To Be Argued By:
CLAUDE M. MILLMAN

New York County Clerk's Index No. 650354/08

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Petitioners-Appellants,

—against—

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, and CONGREGATION SHEARITH ISRAEL, also described as The Trustees of Congregation Shearith Israel,

Respondents-Respondents,

—and—

HON. ANDREW CUOMO, as Attorney General of the State of New York,

Respondent.

BRIEF FOR RESPONDENT-RESPONDENT CONGREGATION SHEARITH ISRAEL

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PRELIMINARY STATEMENT

Respondent Congregation Shearith Israel (the "Congregation") respectfully submits this brief in opposition to the appeal of petitioners Landmark West! Inc., 91 Central Park West Corp., and Thomas Hansen (the "Petitioners"). In a verified, second amended petition filed under Article 78 of the CPLR (the "Petition"), Petitioners sought to block the Congregation's plan to preserve itself by constructing a new community house, topped by a few residential floors, at 8 West 70th Street in Manhattan, next to the Congregation's historic Spanish and Portuguese Synagogue. As found by Supreme Court, New York County (Lobis, J.), below, the unanimous decision of respondent Board of Standards and Appeals of the City of New York (the "BSA") is neither arbitrary nor capricious. This Court should affirm the lower court's decision denying the petition.

This Court has ordered this appeal heard with the appeal in *Kettaneh v. Bd. of Standards and Appeals of the City of New York* (N.Y. Co. Clerk's Index No. 113227/08) ("*Kettaneh*"), another Article 78 challenge to the same BSA resolution. To minimize repetition, this brief contains cross-references to the Congregation's brief in *Kettaneh*. Accordingly, it will facilitate the Court's understanding if our brief in *Kettaneh* is reviewed by the Court before it reviews this brief.

Under Section 72-21 of the Zoning Resolution, respondent Board of Standards and Appeals of the City of New York (the "BSA") can grant a property

owner a variance from zoning restrictions by making five findings of fact (one of which is inapplicable to not-for-profit organizations, such as the Congregation). As is documented in the voluminous administrative record, the BSA held four hearings (on November 27, 2007, February 12, 2008, April 15, 2008, and June 24, 2008; *see* R 1726-1813, 3654-3758, 4462-4515, 4937-4974)[1], studied the issue for fifteen months, credited the testimony of the Congregation's Rabbi (R. 1736-39), education director (R 1739-42), architects (R 1733-36), financial experts (R 3669-79, 4463-83) and counsel, and then explicitly made the factual findings referenced in the statute in its unanimous resolution, dated August 26, 2008, granting the Congregation the zoning variance (the "Resolution").

Petitioners are (i) challenging the BSA's assertion of jurisdiction over the Congregation's application for a zoning variance, and (ii) disputing three of the BSA's five statutory factual findings. Petitioners lack standing to mount these challenges. (*See* Point I.) Moreover, even if they had standing, it would be appropriate to affirm the lower court's decision given that the BSA had a rational basis to (i) assert jurisdiction to issue the variance (*see* Point II(B)(1)), and (ii) make the statutory findings (*see* Point II(B)(2)). The lower court's decision denying the Petition should be affirmed.

[1] References to "R __" are to the administrative record filed by the BSA below. References to "A__" are to Petitioners' appendix. "BSA Res ¶ __" refers to a copy of the BSA Resolution that Petitioners below annotated with paragraph numbering. The copy of the resolution provided by Petitioners in their appendix contains no such numbering. (*See* A275.)

The bulk of Petitioners' brief is devoted to their meritless challenge to the BSA's broad jurisdiction. Petitioners do not (and cannot) deny that the BSA is authorized to issue variances under Section 668 of the New York City Charter regardless of whether there are technical defects in the property owner's application to the Department of Buildings ("DOB") or in the DOB's objections to that application. While Petitioners contend that the only provision that vests the BSA with jurisdiction is Section 666(6) of the New York City Charter, Section 666(5) of the Charter, another jurisdictional provision, explicitly authorizes the BSA to "vary the application of the zoning resolution as may be provided in such resolution and ***pursuant to section six hundred sixty-eight***." N.Y.C. Charter § 666(5) (emphasis added). In any event, even if Petitioners were correct in asserting that the only provision vesting the BSA with jurisdiction were Section 666(5), their jurisdictional challenge would fail, since the BSA had a rational basis for finding that section's requirements satisfied here.

The remainder of Petitioners' brief consists of equally meritless attacks on three of the BSA's factual findings. A BSA finding, however, must "'be sustained if it has a rational basis and is supported by substantial evidence.'" *See Matter of SoHo Alliance v. N.Y. City Bd. of Standards & Appeals*, 95 N.Y.2d 437, 440, 718 N.Y.S.2d 261, 262, 741 N.E.2d 106, 108 (2000). Here, the findings in the BSA's Resolution are supported by an extensive administrative record – almost 6,000

pages in eleven volumes.

The BSA's determination is neither arbitrary nor capricious. The lower court's decision should be affirmed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Do Petitioners have standing to challenge the BSA's zoning variance where the Petition is devoid of any substantive allegation that the variance will affect them in any way?

2. Did the lower court properly find that the BSA's assumption of jurisdiction over the Congregation's application for a variance pursuant to Section 666 of the New York City Charter was rational?

3. Did the lower court properly find that the BSA's grant of a variance was neither arbitrary nor capricious where, in its Resolution, the BSA made each of the five factual findings referenced in Section 72-21 of the New York City Zoning Resolution and each was supported by an extensive administrative record?

COUNTER-STATEMENT OF THE FACTS

Much of the factual and procedural history necessary to understand the BSA's Resolution is set forth in the Congregation's *Kettaneh* brief. We focus here on the lower court's disposition of Petitioners' particular challenges.

As the lower court explained, Petitioners raised two challenges to the BSA's jurisdiction. Petitioners first claimed that the plans that the Congregation

submitted to the BSA were not "'passed on' by the DOB in the [manner] required by [§ 666(6)(a) of] the City Charter" because they were purportedly signed by the wrong civil servant. (A10-11.) Petitioners further claimed that because "the plan submitted to the BSA was not identical to the first plan submitted to the BSA," the BSA lacked jurisdiction to grant the variance. (A12-13.) The lower court rejected these challenges and dismissed the Petition. (A12, A13.)

As a threshold matter, the lower court rejected the Congregation's challenge to Petitioners' standing. It stated that, since "Thomas Hansen, the individual property owner, and 91 [Central Park West] are in close proximity to the Property, they have standing. Accordingly, [P]etitioners collectively have standing. This court need not reach the issue of whether Landmark West!, as an organization, has standing." (A10.)

The lower court then turned to Petitioners' first attack on the BSA's jurisdiction, and upheld the BSA's assertion of jurisdiction as rational. The lower court explained that City Charter § 666 grants the BSA jurisdiction in several ways. Although, as Petitioners asserted, Section 666(6)(a) gives the BSA jurisdiction to decide appeals from the DOB, the lower court agreed with the BSA that Section 666(5)[2] also grants the BSA jurisdiction "[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and

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[2] When it quoted § 666(5), the lower court inadvertently stated that it was quoting § 665.

pursuant to section six hundred sixty-eight." (A11.) The court upheld as rational the BSA's holding that "a review under § 668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner." (A11-12.)

The lower court next rejected Petitioners' assertion that, because the plan submitted to the BSA was slightly different from to the first plan submitted to the DOB, the BSA lacked jurisdiction. (A12-13.) The lower court explained that the Congregation had actually submitted successive applications to the DOB. (A12.) The first was denied, with the DOB citing eight objections. (A12.) After the application was revised, the DOB issued a second denial, which eliminated one of the eight objections. (A12.) It was the second denial, the lower court found, that formed the basis for the variance application. (A12.) Having set forth this procedural history, the lower court had little trouble rejecting Petitioners' claim:

> Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB . . . , the BSA Resolution reflects that the revised plan was reviewed by the DOB. . . . There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the *Kettaneh* decisions, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the *Kettaneh* decision notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur overtime through the BSA's review process in an effort to insure that an applicant is

> meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required showing under [Zoning Resolution] § 72-21.

(A13.)

The lower court also rejected Petitioners' challenges to (i) the BSA's purported consideration of the "landmark status" of the historic Synagogue, (ii) the BSA's finding that the Congregation would be unable to earn a reasonable return from an as-of-right development, and (iii) the BSA's finding that the variances granted were the minimum necessary. (A259, A261-265, A268; *Landmark* Memorandum of Decision on Motion to Reargue at 1-2.) The Congregation's brief in the *Kettaneh* appeal addresses the lower court's conclusions that the BSA's factual findings were rational.

After filing an appeal with this Court, Petitioners also filed a motion to reargue with the lower court. (*Landmark* Memorandum of Decision on Motion to Reargue at 1.) The lower court denied that motion, along with a motion by the *Kettaneh* petitioners to intervene in this case. (*Id.*)

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE BSA RESOLUTION

In an effort to establish standing, the Petition included a few conclusory remarks about the three Petitioners. The Petition alleged that Petitioner Landmark West! Inc. is a not-for-profit organization that protects the "historic architecture

and development patterns of the Upper West Side." (A128 ¶ 8.) It alleged that the two remaining Petitioners are owners of a building (91 Central Park West, on the corner of West 69th Street), around the corner from the West 70th property at issue (but fairly distant from the corner of the property being developed). (A128-29 ¶¶ 11, 12.) The Petition asserted, with no further elaboration, that Petitioners are "within a zone immediately and directly impacted by the New Building" (A131 ¶ 24.) and that they "will experience a reduction of the light, air and convenience of access" as a result of the issuance of the variance (A131 ¶ 25.) Nowhere else in the Petition was there any allegation about "light, air [or] access" or any other information about how Petitioners are in the purportedly impacted "zone." The Petition's "vague, conclusory and unsubstantiated allegations" are insufficient to establish standing. *See All Way East Fourth St. Block Ass'n v. Ryan-NENA Community Health*, 30 A.D.3d 182, 182, 817 N.Y.S.2d 14, 14 (1st Dep't 2006) .

To establish standing, a petitioner must show that the petitioner will suffer injuries of the type that the statute (here, the Zoning Resolution) is designed to protect and that those alleged injuries are "specific to petitioner" and not "general concerns shared by all the residents of the area." *Buerger v. Town of Grafton*, 235 A.D.2d 984-85, 652 N.Y.S.2d 880, 881-82 (3d Dep't 1997). Thus, in *Buerger*, the Court denied standing to a neighbor "within 600 feet" of an affected site who was a member of a property association that owned 400 acres of land contiguous to the

development property since the flood damage, forest habitat degradation, and lake despoliation complained of, while "serious concerns," were "shared by all residents of the area," and thus insufficient to support standing. *Id.*; *see also Soc'y of the Plastics Indus. Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774, 570 N.Y.S.2d 778, 785, 573 N.E.2d 1034, 1041 (1991) ("In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large."); *Matter of City of Plattsburgh v. Mannix*, 77 A.D.2d 114, 116, 432 N.Y.S.2d 910, 912 (3d Dep't 1980) (holding that petitioner lacked the necessary standing to challenge the issuance of a variance because it failed to demonstrate how its personal or property rights would be directly and specifically affected apart from any damage suffered by the public at large).

The standing test for an organization is even higher. *See Soc'y of the Plastics Indus.*, 77 N.Y.2d at 775, 570 N.Y.S.2d at 787, 573 N.E.2d at 1043. As set forth in *Soc'y of the Plastics*, an organization has standing only if three requirements are satisfied. First, as a petitioner, Landmark West! must demonstrate that "one or more of its members [has] standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent." *Id.* Second, Landmark West! "must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate

representative of those interests." *Id.* Lastly, "it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members." *Id.*; *see also Soc'y of the Plastics Indus.*, 77 N.Y. at 775, 570 N.Y.S.2d at 786, 573 N.E.2d at 1042 (no standing found); *see also N.Y. City Coalition for the Preservation of Gardens v. Giuliani*, 666 N.Y.S.2d 918, 246 A.D.2d 399 (1st Dep't 1998) (holding that an organization was without standing to bring action to enjoin construction).

The Petitioners here cannot meet those tests. The Petition is devoid of any substantive allegation that the variance will block Petitioners' windows, affect their views, affect their light, or limit their ability to enter their buildings. Petitioners can make no such claims and, instead, focus on picayune issues about whether the right official signed the DOB objection sheet and whether there are irrelevant distinctions between the plans before the DOB and BSA. Indeed, as-of-right developments would have greater impacts on the supposed "neighbors," Petitioners 91 Central Park West Corporation and Thomas Hansen, than the variance at issue. (*See, e.g.,* R. 4664; A278.)

Furthermore, Landmark West! makes no assertions regarding the impact of the variance on its members. Instead, the Article 78 Petition merely asserted that Landmark West! works with "individuals and grassroots community organizations to protect the historic architecture and development patters of the Upper West Side

and to improve and maintain the community for all of its members." (A128 ¶8.) Indeed, the only allegations that even remotely relate to Landmark West's organizational standing were contained in an affidavit from Kate Wood, Landmark West's executive director. Specifically, Wood claimed that several of Landmark West's "contributing supporters" "reside and own property (or shares in a cooperative apartment corporation which owns property) in buildings immediately adjacent to the development site." (A237-238 ¶2.) Wood further claimed that a sizable number of "contributing supporters" live on the same block as the development site. (A238 ¶3.) Conspicuously absent from this affidavit was any statement regarding Landmark West's legal members, as opposed to "contributors" and "supporters." Indeed, if Landmark West! had any members that purportedly were affected by this variance, it stands to reason that Wood would have referred to them instead of "contributing supporters." Accordingly, these allegations are wholly insufficient to establish Landmark West's standing.

Furthermore, Petitioners' claims, which focus on purported defects in the BSA's jurisdiction, the BSA's purportedly excessive concern for landmarks and the BSA's analysis of finances, are not germane to the organizational purposes of Landmark West! While Landmark West! purportedly has an interest in all Upper West Side landmarks, it can claim no unique interest in this variance, as it will

protect, not undermine, a significant, landmarked Synagogue. Petitioners clearly lack standing to challenge the BSA Resolution.

II. PETITIONERS' CHALLENGES ARE MERITLESS IN ANY EVENT

A. <u>This Court's Standard of Review is Exceedingly Deferential</u>

The New York Court of Appeals has explained that, in general, under the New York City Zoning Resolution, the BSA may grant a variance if it makes five factual findings: "(a) because of 'unique physical conditions' of the property, conforming uses would impose 'practical difficulties or unnecessary hardship;' (b) also due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property; (c) the proposed variances would 'not alter the essential character of the neighborhood or district;' (d) the owner did not create the practical difficulties or unnecessary hardship; and (e) only the 'minimum variance necessary to afford relief' is sought." *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (quoting N.Y. City Zoning Resolution § 72-21).

Once the BSA makes these five findings, the judiciary's role is extraordinarily limited. The New York Court of Appeals has held that a court's "review of the BSA's determination to grant the variances sought is limited by the well-established principle that a municipal zoning board has wide discretion in considering applications for variances." *SoHo Alliance*, 95 N.Y.2d at 440, 718

N.Y.S.2d at 262, 741 N.E.2d at 108.

Petitioners contend that the lower court should not have deferred to the BSA's conclusions as to whether it had jurisdiction over the Congregation's request for a variance. Yet, there is no "jurisdiction" exception to the administrative law principle that agencies are entitled to deference. *See Matter of Korn v. Batista*, 131 Misc. 2d 196, 199, 499 N.Y.S.2d 325, 327 (Sup. Ct. N.Y. Co.) (deferring to agency conclusion that particular types of applications fall within its jurisdiction), *aff'd*, 123 A.D.2d 526, 506 N.Y.S.2d 656 (1st Dep't 1986); *Park Towers South Co. v. A-Lalan Imports, Inc.*, 103 Misc. 2d 565, 566, 430 N.Y.S.2d 188, 189 (App. Term 1st Dep't 1980) (deferring to agency interpretation of extent of its jurisdiction) (*per curiam*); *see also NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830, n.7, 104 S. Ct. 1505, 1510, n.7, 79 L. Ed. 2d 839, 848, n.7 (1984) ("Respondent argues that because 'the scope of the "concerted activities" clause in Section 7 is essentially a jurisdictional or legal question concerning the coverage of the Act,' we need not defer to the expertise of the Board. . . . We have never, however, held that such an exception [for issues of statutory jurisdiction] exists to the normal standard of review of Board interpretations of the Act; indeed, we have not hesitated to defer."). Petitioners cite cases holding that deference – as to jurisdictional or non-jurisdictional issues – is not appropriate where the statute in question is not a complex scheme with which the agency has developed great

expertise. (Petitioners' Br. at 17-18). Those cases focus on the clarity of the statute, *Teachers Ins. and Annuity Ass'n of America v. City of New York*, 82 N.Y.2d 35, 41-42, 603 N.Y.S.2d 399, 401-02, 623 N.E.2d 526, 528-29, or the absence of technical language or practices unique to the agency involved, *Matter of Raganella v. N.Y. City Civ. Serv. Comm'n,* 66 A.D.3d 441, 445-46, 886 N.Y.S.2d 681, 684-85 (1st Dep't 2009), not on jurisdiction. Moreover, the Court of Appeals has held that "the BSA's interpretation of the statute's terms must be 'given great weight and judicial deference' because the BSA is "'comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution,'" an obviously complex, if not Byzantine, statutory scheme. *Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418, 654 N.Y.S.2d 100, 104, 676 N.E.2d 862, 866 (1996); *Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599, 394 N.Y.S.2d 579, 584, 363 N.E.2d 305, 310 (1977) ("[R]esponsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. . . . It matters not whether, in close cases, a court would have, or should have, decided the matter differently."). Such deference is particularly important in this case since the BSA is familiar with what is "common practice"

and what is seen "all the time." (A632-33.)

B. The BSA's Decision Was Not Arbitrary or Capricious

1. The BSA's Assertion of Jurisdiction Was Rational

Petitioners claim that some sort of technical defect in the DOB's signing of its objections to the Congregation's application for a building permit and an irrelevant change in the Congregation's building plans divested the BSA of jurisdiction to issue a variance to the Congregation. (*See* Petitioners' Br. at 13.) This is nonsense. The BSA considered this issue and concluded that its broad jurisdiction over zoning matters was unfettered by the purported defects. This Court should defer to the BSA's construction of the Zoning Resolution in this regard. The BSA's finding that it had jurisdiction is plainly rational.

The BSA explicitly addressed the jurisdiction issue in footnote two of its Resolution, which states in full:

> A letter dated January 28, 2008 to Chair Srinivasan from David Rosenberg, an attorney representing local residents, claims that a purported failure by the Department of Buildings ("DOB") Commissioner or the Manhattan Borough Commissioner to sign the above-referenced August 28, 2007 objections, as allegedly required by Section 666 of the New York City Charter (the "Charter"), divests the Board of jurisdiction to hear the instant application. However, the jurisdiction of the Board to hear an application for variances from zoning regulations, such as the instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner.

(A275 n.2; *see also* A275-277 (discussing plans).)

Even if Petitioners are correct that no deference should be accorded to the BSA's interpretation of Section 666 of the New York City Charter , their argument that Section 668 of the Charter (cited by the BSA in the paragraph quoted above) has no bearing on the BSA's jurisdiction misses the BSA's point. (Petitioners' Br. at 18-21.) The BSA did not assert jurisdiction solely pursuant to Section 668 – instead, the BSA had jurisdiction pursuant to Sections 666(5) *and* 668. That section provides, in pertinent part: "*Jurisdiction.* The Board shall have power . . . . 5. To determine and vary the application of the zoning resolution as may be provided in such resolution and *pursuant to section six hundred sixty-eight.*" N.Y.C. Charter § 666(5) (emphasis added). It plainly is apparent that that Section 666(5) provides a grant of jurisdiction to the BSA to vary the application of the zoning resolution independent of Section 666(6).[3] Accordingly, the BSA's conclusions that (1) Section 668 (through Section 666) empowers the BSA to grant variances and (2) Section 668 "does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner,"[4] are rational constructions of the Zoning Resolution. Indeed,

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[3] Section 666(6) gives the BSA jurisdiction to hear and decide appeals from, *inter alia*, any decision of the commissioner of buildings or any bureau superintendent of buildings acting under a written delegation of power from the commissioner of buildings.

[4] Petitioners do not challenge this conclusion.

several courts have reached the same conclusion. *See, e.g., Highpoint Enters., Inc. v. Bd. of Estimate*, 67 A.D.2d 914, 916 (2d Dept. 1979) (noting that Section 666 (6)[5] gives BSA jurisdiction to "vary the application of the zoning resolution"); *Matter of William Israel's Farm Cooperative v. Board of Standards and Appeals*, 22 Misc. 3d 1105(A), *1 (Sup. Ct. N.Y. County Nov. 15, 2004) (unpublished opinion) (although the respondent apparently filed an application for a variance with the BSA without any review by either of the City officials listed in Section 666(6), the court stated: "The BSA has jurisdiction over applications for variances to the zoning resolution."); *Caprice Homes, Ltd., v. Bennett*, 148 Misc. 2d 503, 505-06 (Sup. Ct. N.Y. County 1989) (distinguishing between claims brought pursuant to Section 666(6) and claims pursuant to Section 666(7)[6]).

Petitioners, however, place great weight on Section 81-a(4) of Article 5-A of the General City Law, which provides:

> Hearing appeals. *Unless otherwise provided by local law or ordinance*, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination, made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the city.

[5] At the time the *Highpoint Enterprises* decision was rendered, present day § 666(5) was codified at § 666(6).

[6] At the time the *Caprice Homes* decision was rendered, present day § 666(5) was codified at § 666(6) and present day § 666(6) was codified at § 666(7).

General City Law, Art. 5-A, § 81-a(4) (emphasis added). Yet, the New York City Charter *is* a "local law or ordinance" that "otherwise provide[s]." *See id.* Indeed, City Charter § 666(5) clearly vests the BSA with original jurisdiction to handle applications for variances.[7]

Petitioners also argue that, according to the BSA website, the BSA will not grant a variance to a property owner "who has not first sought a proper permit or approval from an enforcement agency." (Petitioners' Br. at 27.) Yet, even if an agency's website could constrict an agency's statutory jurisdiction (which it cannot), Petitioners jurisdictional attack would fail. Petitioners are not alleging that the Congregation failed to seek a permit from the Department of Buildings; they are claiming that the Congregation failed to submit the final plans and that DOB failed to select the correct signatory for its objections. (Petitioners' Br. at 13, 21.) Even assuming, *arguendo*, that the BSA website summary is binding, nothing

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[7] By contrast, the cases cited on page 28 of the Petitioners' brief are inapposite the local zoning statutes in those cases, unlike New York City's Charter, expressly limited the jurisdiction of the agencies in question to appeals only. *See, e.g., Gaylord Disposal Service, Inc. v. Zoning Bd. of Appeals of Town of Kinderhook*, 175 A.D.2d 543, 544, 572 N.Y.S.2d 803, 804 (3d Dept. 1991) (jurisdiction of zoning board of appeals is "limited to the appellate jurisdiction specifically given to it by Town Law § 267 (2)."); *Barron v. Getnick*, 107 A.D.2d 1017, 1018, 486 N.Y.S.2d 528, 529 (4th Dep't 1985) (Town of Kirkland "statute clearly gives the Board of Appeals only appellate jurisdiction"); *Kaufman v. City of Glen Cove*, 180 Misc. 349, 356, 45 N.Y.S.2d 53, 58 (Sup. Ct. Nassau Co. 1943) (Glen Cove "Board of Appeals has been vested only with the appellate power of review"); *cf. Klingaman v. Miller*, 168 A.D.2d 856, 857, 564 N.Y.S.2d 526, 528 (3d Dep't 1990) (City of Troy Board of Appeals does not have solely appellate jurisdiction and "is expressly authorized to hear and decide requests for interpretations of the zoning ordinance").

in that website summary bars the BSA from issuing a variance in the alleged circumstances.

a. <u>Petitioners' Complaint Regarding The Signatory To The DOB Objections Is Meritless</u>

In any event, even if the BSA's jurisdiction is limited to claims brought pursuant to Section 666(6)(a) (which it is not), Petitioners' claim that the Notice of Objections was signed by the wrong official still fails. (Petitioners' Br. at14-15) Indeed, there are several independent flaws in Petitioners' logic.

First, the assertions contained in Petitioners' own brief are sufficient to vest the BSA with jurisdiction. Petitioners themselves assert that the DOB Notice of Objections was issued by "Kenneth Fladen, a 'provisional Administrative *Borough Superintendent.*'" (Petitioners Br. at pp. 14-15) (emphasis added) Because (1) Fladen was a Borough Superintendent and (2) Section 666(6)(a) permits the review of any decision or determination "of *any borough superintendent* of buildings acting under a written delegation of power from the commissioner of buildings," the BSA clearly had the authority to "hear and decide appeals" from his determination. (Emphasis added.) Indeed, the BSA's resolution itself states: "the decision of the Manhattan Borough Commissioner, dated August 28, 2007, acting on Department of Buildings Application No. 104250481, reads, in pertinent part . . . ." (A275) Thus, if, as Petitioners assert, Fladen signed the notices of objections, and if, as Petitioners assert, Fladen was a "borough superintendent," the

BSA clearly had the authority to "hear and decide appeals" from his determination. In light of this language, it was not unreasonable for the BSA to conclude that Fladen was acting under written authority from the Commissioner. Petitioners have pointed to no evidence to the contrary.

Second, Petitioners' factual assertions about the process before the DOB are not supported by the record. For example, the March 27, 2007 and August 28, 2007 DOB permit denials are both stamped "Boro Commissioner . . . denied." (A292, A507.) The BSA reasonably could have inferred that these permit denials were either signed by the Borough Commissioner or another authorized employee.

Third, at most, Petitioners' complaints about the DOB process bear on the DOB's decision to *deny* the Congregation a building permit. Petitioners did not file an Article 78 challenge to overturn the DOB denial nor did they name the DOB in this suit. Petitioners cannot challenge the DOB permit denials in this action.

Lastly, Petitioners do not claim that the DOB permit denials were erroneous. Indeed, Petitioners' position is that the DOB – regardless of the official or architectural plans involved – *correctly* concluded that the Congregation's plan would require a variance. It would make absolutely no sense to deprive the BSA of jurisdiction to grant a variance in such circumstances.

b. Petitioners' Complaint Regarding the Trivial Change in the Congregation's Plans is Meritless

Petitioners' contention that the BSA reviewed the wrong plans is equally meritless. (Petitioners' Br. at 26) Relying on their contention that the BSA only has appellate jurisdiction, Petitioners maintain that the BSA improperly reviewed plans that differed (in an irrelevant respect) from those submitted to the DOB. (Petitioners' Br. at 26) Even assuming that, the BSA's jurisdiction is purely appellate (and, as explained *supra*, it is not), the fact that the Congregation's plans naturally evolved over time does not divest the BSA of jurisdiction.

The BSA rationally concluded that the trivial change in plans did not divest it of jurisdiction. The record reflects that while the DOB's initial building permit denial included an eighth objection (based on the inclusion of space between buildings), the Congregation mooted the objection by removing the space from the design. Accordingly, the Borough Commissioner dropped the eighth objection and issued a new building permit denial (with seven objections). (R 348.) The record also reflects that the Congregation provided the BSA with "evidence that the DOB issued their current objections based on the current proposal before the BSA" (R. 308, 310) by submitting, among other things, (i) the revised plans (*i.e.*, without the space between the buildings), dated August 28, 2007, that the Congregation had submitted to the DOB (R. 402-19), and (ii) the Borough Commissioner's revised building-permit denial (with just seven objections), dated that same day (R. 348).

Petitioners filed an untimely administrative appeal of the Borough Commissioner's August 28, 2007 decision (R. 2511-12) but never followed-up with an Article 78 proceeding. The BSA, reasonably, accepted the Congregation's documentation and proceeded to consider the merits of the Congregation's application for a variance.[8] (*See* R. 512).

Even if the plans differed slightly, Petitioners have cited to no authority supporting its assertion that the BSA's jurisdiction was destroyed because the plans it considered slightly differed from those considered by the DOB. Indeed, none of the cases Petitioners cite on page 28 of their brief involved an applicant that submitted plans to a zoning board that differed from those submitted to a building-permit authority, let alone that involved plans that were revised to moot the objections of the permitting authority.[9] Nothing in Charter Section 666(6)(a) divests the BSA of jurisdiction where architectural plans submitted to the DOB are

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[8] Furthermore, contrary to Petitioners assertions on page 26 of their brief, it is clear that Community Board 7 did, in fact, review this application. BSA Res. ¶6.

[9] *See, e.g., McDonald's Corp. v. Kern*, 260 A.D.2d 578, 578, 688 N.Y.S.2d 613, 614 (2d Dep't 1999) (Board of Zoning Appeals improperly raised issue of zoning district boundary lines *sua sponte* and "upon its own inquiry" determined that issue de novo); *Gaylord Disposal Serv., Inc. v. Zoning Bd. of Appeals*, 175 A.D.2d 543, 545, 572 N.Y.S.2d 803, 804-05 (3d Dep't 1991) (Building Inspector sought advisory opinion from Zoning Board of Appeals); *Barron v. Getnick*, 107 A.D.2d 1017, 1017-1018, 486 N.Y.S.2d 528, 529 (4th Dep't 1985) (Zoning Board of Appeals, which only had jurisdiction to hear appeals from determination of Building Inspector, improperly considered application where petitioner filed no application with Building Inspector); *Kaufman v. Glen Cove*, 180 Misc. 349, 357-58, 45 N.Y.S.2d 53, 59-60 (Sup. Ct. Nassau County 1943) (Board of Appeals, which had appellate jurisdiction only, lacked jurisdiction where no application was filed with Building Inspector).

amended upon appeal to the BSA. Indeed, to the extent that the plans differed, they were modified to address one of the DOB's objections – a practice which, as the BSA explained, is common. (*See* A632-33 (Vice-Chair explaining that "that objection is not before us anymore because revised plans were filed and a new objection sheet was filed. It's a common practice. We see it all the time. I think you're seeing demons where none exist."). As the BSA Chair explained, the Congregation was only "requesting a waiver" with respect to the seven objections, and could ultimately be barred from building if the withdrawal of the eighth objection was erroneous: "If there's another objection that they did not identify for the Board, there's no waiver to that." (A631.) It is thus apparent that, as the BSA Vice Chair explained, this claim is "bogus" and lacking "any legal basis." (A632.) Because, as the BSA explained, such modifications are a common part of its unique practice, this Court should not second guess the BSA's conclusion that such modifications are not only permissible, but also preferable. *See Toys "R" Us*, 89 N.Y.2d at 418-19, 654 N.Y.S.2d at 104, 676 N.E.2d at 866 ("The BSA, comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution . . . . Consequently, *in questions relating to its expertise*, the BSA's interpretation of the statute's terms must be 'given great weight and judicial deference, so long as the interpretation is neither

irrational, unreasonable nor inconsistent with the governing statute.'") (emphasis added).

In sum, as the lower court explained, the BSA's conclusion was rational:

> Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB, the footnote in the BSA Resolution reflects that the revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight objections. There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the *Kettaneh* decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the *Kettaneh* decision notes that the BSA often has pre-application meetings with applications for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required finding under Z.R. § 72-21.

(A13.) Petitioners have failed to demonstrate any flaws with this analysis.

2. <u>The BSA's "Five Findings" Were Rational</u>

The BSA made each of the factual findings referenced in Section 72-21 of the New York City Zoning Resolution, referenced in *SoHo Alliance* (*See* BSA Res. ¶¶ 37-215). Each of the five findings is supported by evidence in the record:

- ***"Unique Physical Conditions," ZR § 72-21(a).*** Eighty-five paragraphs of the BSA's Resolution were devoted to the BSA's conclusion that "the unique physical conditions" of the site "create practical difficulties and unnecessary hardship in developing the site in strict compliance with the

applicable zoning regulations" the "required finding under ZR § 72-21(a)." (BSA Res. ¶ 122; *see id.* ¶¶ 37-122.) This finding is supported in the record. (*See, e.g.,* R. 39-43; 139; 319-320; 337-342; 1733-1735; 1739-1740; 1744-1745; 1751; 4565-4576; 4859-4861; 5147-5157; 5763.)

- ***No "Reasonable Return," ZR § 72-21(b).*** Twenty-five paragraphs of the BSA's Resolution addressed the BSA's finding that "because of the subject site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return." (BSA Res. ¶ 148; *see id.* ¶¶ 123-48.) The BSA's reasonable return finding is supported by the record. (*See, e.g.,* R. 133-161; 342-343; 567-568; 4576-4577; 5157-5159.) (As explained below, this finding, which should be viewed as an alternate ground for affirmance, was unnecessary because the Congregation is a not-for-profit organization. *See* Point II(B)(2)(b), below. The record supports the undisputed fact that the Congregation is a not-for-profit corporation. (*See, e.g.*, R. 43-44; 342; 567; 1729-1733; 4576; 4861-4862; 5763-5764.).)
- ***Neighborhood Character, ZR § 72-21(c).*** The BSA devoted fifty paragraphs of its Resolution to explaining its conclusion that "neither the proposed community facility use, nor the proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare." (BSA Res. ¶ 201; *see id.* ¶¶ 149-201.) This finding is fully supported by the record. (*See, e.g.,* R. 44-45; 121-130; 343-344; 3845-3846; 4577-4582; 4597-4635; 4917-4920; 5159-5164; 5764; 5767-5771.)
- ***No "Self-Created Hardship," ZR § 72-21(d).*** The BSA also explicitly found, in a four-paragraph discussion, that "the hardship herein was not created by the owner or by a predecessor in title." (BSA Res. ¶ 205; *see id.*

¶¶ 202-05.) This finding is supported by the record. (*See, e.g.*, R. 45-46; 344-345; 4582; 5764.)

- ***"Minimum Variance," ZR § 72-21(e).*** Finally, the BSA, in a ten-paragraph review of alternate scenarios – including modifications to the Congregation's proposal that the Congregation had already adopted at the BSA's request – concluded that "none" of the additional "lesser variance scenarios" would be appropriate, such that the variance granted was the "minimum" necessary. (BSA Res. ¶¶ 210-211; *see id.* ¶¶ 206-215.) This finding is supported by the record. (*See, e.g.*, R. 4582-4586; 5164-5167; 5765-5766; 5785.)

Petitioners challenge three of these five findings. Their challenges, which are addressed below, are meritless.

a. The BSA's Finding of "Unique Physical Conditions" Was Rational

Petitioners contend that the BSA based its finding, that the Congregation's property is burdened by unique physical conditions, on only two conditions (the obsolescence of existing structures and the landmarked status of the Synagogue), and that these conditions are not "physical conditions" within the meaning of the Zoning Resolution. (Petitioners' Br. at 29-30 & n.6.) In fact, the BSA based its finding on several conditions ignored by Petitioners, each of which independently warrants affirmance, In any event, the BSA rationally concluded that the presence of obsolescent structures and a historically and culturally important Synagogue are "physical conditions" that can be considered in granting a variance.

First, as a threshold matter, the BSA's "physical conditions" finding does not depend on the existence of obsolescent structures or on the landmarked status of the Synagogue. While Petitioners assert that the fact that the development site is located on a zoning lot that is divided by a zoning district boundary and is further constrained by the "sliver" law "were not the basis of the Resolution" (Petitioners' Br. at 30 n.6), the BSA, in fact, devoted more than 20 paragraphs of its Resolution to those conditions. (*See*, *e.g.*, BSA Res. ¶¶ 86-106, 122). Since Petitioners have not raised any challenges to the BSA's finding that these conditions were "unique physical conditions" justifying the variance, the lower court's decision may be affirmed on that basis alone. *Matter of Boland v. Town of Northampton*, 25 A.D.3d 848, 850, 807 N.Y.S.2d 205, 207 (3d Dep't 2006) ("As petitioner does not pursue his substantive challenges to the special use permit on appeal, these arguments are deemed abandoned.").

Second, the lack of merit in Petitioners' unsupported one-liner that the obsolescence of the physical structures on the Congregation's property cannot be "physical conditions" within the meaning of the Zoning Resolution (Petitioners' Br. at 30 n.6) offers a second, independent basis for affirming the lower court. The BSA, employing its expertise in applying New York City's complex Zoning Resolution and citing four court decisions, concluded that unique physical conditions "can refer to buildings" and that the "obsolescence of a building is well

established as a basis for a finding of uniqueness." (BSA Res. ¶ 76). Petitioners point to nothing irrational regarding this conclusion. Indeed, it is established that "unique physical conditions" refers to both land and buildings. *See UOB Realty (USA) Ltd. v. Chin*, 291 A.D.2d 248, 249, 736 N.Y.S.2d 874, 875 (1st Dep't 2002).

Third, contrary to Petitioners assertions, the Congregation did not assert, nor did the BSA find, that the landmarked *status* of the Synagogue constituted a "unique physical condition." It is the historical and cultural significance of the Synagogue, not the mere fact that the LPC has designated it as a landmark, that renders the dominating presence of the Synagogue on the property a "unique physical condition." Because the Congregation demonstrated that the vital importance of the Synagogue to the Congregation's mission renders it impossible to modify, the Congregation clearly satisfied the "unique physical conditions" finding. (*See, e.g.,* BSA Res. ¶108 ("because so much of the Zoning lot is occupied by a building that cannot be disturbed, only a relatively small portion of the site is available for development"); R. 4566 ("unique physical conditions" include "the presence of a unique, noncomplying, specialized building of significant cultural and religious importance occupying two-thirds of the Zoning Lot").)

Indeed, in light of the fact that the Congregation did not seek to alter the Synagogue, Petitioners' claim that the BSA's recognition of the Synagogue's

cultural and religious significance "usurped" the jurisdiction of the City Planning Commission ("CPC") and the LPC is meritless. The record belies that claim because it is undisputed that the Congregation never sought a variance to change the landmarked Synagogue and the BSA never authorized the Congregation to alter the landmark. Tellingly, Petitioners do not contend that the BSA lacks authority to grant a variance for a property *containing* a landmarked structure. Yet, that is all that occurred here: the BSA granted a variance for the part of the lot *not containing the Synagogue* because, *inter alia*, the remainder of the lot contains a Synagogue that may not be altered without impairing the Congregation's mission.

Lastly, Petitioners' arguments regarding Section 74-711 of the Zoning Resolution are meritless in any event. That section merely provides: "In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by the Landmarks Preservation Commission, the City Planning Commission may permit modification of the use and bulk regulations." Interpreting this section, both the BSA and the lower court found that an entity, whose property contains a landmarked building, may seek either a special permit from the LPC pursuant to Section 74-711 or a variance from the BSA pursuant to Section 72-21 of the Zoning Resolution. (A42.) This finding is consistent with the

BSA's other administrative decisions.[10] *See, e.g., Matter of 330 W. 86th St.* (BSA No. 280-09-A, July 13, 2010) (available at http://archive.citylaw.org/bsa/ 2010/07.13.10/280-09-A.doc) (noting that "a form of concurrent jurisdiction is evident" with "landmarks" and DOB); *see also Matter of 67 Vestry Tenants Ass'n v. Raab*, 172 Misc. 2d 214, 223-224, 658 N.Y.S. 2d 804, 811 (Sup. Ct. N.Y. Co. 1997) , ("LPC is not authorized to regulate matters ordinarily considered in the zoning process such as 'the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses'"). Because, as the lower court found, the BSA's construction of the Zoning Resolution was rational, it must be accorded substantial deference. *Toys "R" Us*, 89 N.Y.2d at 418-19, 654 N.Y.S.2d at 104, 676 N.E.2d at 866.

Even if no deference were warranted, no reading of Section 74-711 can support Petitioners' contention that the section vests the LPC or the CPC with

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[10] *Matter of 745 Fox St.* (BSA Res. No. 19-06-BZ May 2, 2006) (noting "existence of . . . historic structure on the site hinders as of right development . . . because of its landmark status") (available at http://archive.citylaw.org/bsa/2006/May%202,%202006/19-06-BZ.doc); *Matter of 135-35 Northern Blvd.* (BSA Res. No. 156-03-BZ Dec. 13, 2005) (considering costs "as a result of the need to protect the interior landmark") (available at http://archive.citylaw.org/bsa/2005/ December%2023,%202005/156-03-BZ.doc); *Matter of 543/45 W. 110th St.* (BSA Res. No. 307-03-BZ July 13, 2004) ("lot's close proximity to a landmarked subway station" not common condition in area) (available at http://archive.citylaw.org/bsa/2004/July%2013,%202004/307-03-BZ.doc); *Matter of 400 Lennox Ave.* (BSA Res. No. 73-03-BZ Jan. 13, 2004) (finding site's "proximity to a designated landmark" a "unique physical condition") (available at http://archive.citylaw.org/bsa/2004/January%2013,%202004/73-03-BZ.doc); *Matter of 245 E. 17th St.* (BSA Res. No. 84-02-BZ June 11, 2002) (LPC's requirements "create[] a practical difficulty and unnecessary hardship for the Congregation" in meeting programmatic needs) (available at http://archive.citylaw.org/bsa/2002/84-02-BZ.doc).

exclusive jurisdiction to consider the impact of a landmarking designation on a property owner. At the very least, nothing in that section purports to divest the BSA of its authority under Section 72-21 of the Zoning Resolution to designate aspects of zoning lots as "unique physical conditions" under the Zoning Resolution. Nowhere does that statute suggest that once the LPC designates a structure as a landmark the BSA is divested of authority to grant a variance application that considers the presence and impact of that structure. *See e.g. E. 91st St. Neighbors to Pres. Landmarks, Inc. v. N.Y. City Bd. of Standards and Appeals*, 294 A.D.2d 126 (1st Dep't 2002) (upholding amendment of variance BSA granted for construction on lots containing landmarked buildings); Brief for Petitioner at 3, *E. 91st St. Neighbors to Pres. Landmarks, Inc. v. N.Y. City Bd. of Standards and Appeals*, 294 A.D.2d 126 (1st Dep't 2002) (No. 984), 2001 WL 36097225 (challenging amendment to variance BSA granted for construction on lots containing landmarked buildings); *Matter of 745 Fox St.* (BSA Res. No. 19-06-BZ May 2, 2006) (noting "existence of . . . historic structure on the site hinders as of right development . . . because of its landmark status") (available at http://archive.citylaw.org/bsa/2006/May%202,%202006/19-06-BZ.doc). Indeed, the contrary is the case: If the BSA considered a variance application for a lot containing a landmarked building and blinded itself to that building's presence,

then the BSA clearly would have abused its discretion. The BSA's decision was plainly rational.[11]

b. **The BSA's Finding of "No Reasonable Return" Was Rational**

Petitioners' challenge to the BSA's "no reasonable return" finding (BSA Res. ¶ 148) is also meritless. Petitioners contend that, in conducting its financial analysis, the BSA disregarded its own precedent by not forcing the Congregation to demonstrate a reasonable return with regard to the community facility. (Petitioners' Br. at 33-36.) Petitioners further claim that non-profit entities are not allowed to earn a reasonable return and thus must, instead, show a nexus between any variance application and its programmatic needs (even though the statute requires nothing of the kind). (*See* Petitioners' Br. at 37-38.) These challenges are

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[11] Petitioners argue that "a court should not find that the Legislature intended two separate agencies to exercise concurrent jurisdiction unless no other reading of the statute is possible." (Petitioners' Br. at 31, *citing Ardizzone v. Elliott*, 75 N.Y.2d 150, 157, 551 N.Y.S.2d 457, 461, 550 N.E.2d 906, 910 (1989)). This is inapposite. First, the BSA did not claim it had "concurrent jurisdiction" of the sort referenced in *Ardizzone*. The BSA did not claim it could issue a Section 74-711 "special permit"; at most, it suggested that it could account for the impact of the landmarked structure on the property. Moreover, Section 74-711 merely provides that the CPC "may permit modification of the use and bulk regulations" affecting landmarked buildings. If its drafters had wished to oust the BSA of its variance power where a Section 74-711 permit may be granted, it could have done so explicitly. *See N.Y. Pub. Interest Research Grp. Straphangers Campaign v. Reuter*, 293 A.D.2d 160, 164-165, 739 N.Y.S.2d 127, 130 (N.Y. App. Div. 1st Dep't 2002) (court must give effect to statute as written) . The BSA rationally concluded that its authority to address areas beyond the landmarked structure is not diminished by the LPC's designation of a landmark. *See Matter of 330 West 86th Street* (BSA No. 280-09-A, July 13, 2010) ("WHEREAS, the Board notes that *concurrent authority* may manifest as multiple agencies, whose approval is required for a single application, review different elements of the same application; this includes instances when, in the process of reviewing plans, DOB may be alerted to another agency's jurisdiction, as it is with *landmarks*, wetland, and flood hazard regulations *and thus a form of concurrent jurisdiction is evident*.") (emphasis added) (available at http://archive.citylaw.org/bsa/2010/ 07.13.10/280-09-A.doc).

nonsense and do not undermine the rationality of the BSA's finding.

As a threshold matter, as explained in Part II(B)(1) of the Congregation's *Kettaneh* brief, the Zoning Resolution explicitly exempts not-for-profit organizations, such as the Congregation, from the "no reasonable return" showing that would otherwise be needed to secure a variance. The lower court's dismissal of the Petition can be affirmed on this basis without considering Petitioners' contentions regarding the BSA's "no reasonable return" finding. In any event, as shown below, Petitioners' assertions are meritless.

Petitioners claim that the BSA's analysis in this case "created a new test for determining mixed purpose variance applications" and, thereby, departed from its prior decision in *Matter of Yeshiva Imrei Chaim Viznitz* (BSA Res. No. 290-05-BZ Jan. 9, 2007) (available at http://archive.citylaw.org/bsa/2007/ January%209,%202007/290-05-BZ.doc). (*See* Petitioners' Br. at 33-36.) The BSA faithfully applied its precedent.

Petitioners' misreading of *Yeshiva Imrei* turns on a fundamental misapprehension of Sections 72-21(a) and (b) of the Zoning Resolution. Section 72-21(a) of the Zoning Resolution requires proof that "that there are unique physical conditions . . . peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of

the Resolution." A non-profit entity is not required to satisfy this requirement if it can demonstrate that accommodation of its programmatic needs requires the variance. (A277-79.) In turn, Section 72-21(b) requires proof that "that because of such physical conditions there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of this Resolution will bring a reasonable return" and states that "this finding shall not be required for the granting of a variance to a non-profit organization."

In *Yeshiva Imrei*, the applicant sought a variance to allow it to create a catering establishment. While the applicant was unable to satisfy the "unique physical conditions" prong, it claimed that it did not need to do so because the catering business was needed to fund its programmatic needs. The BSA disagreed, reasoning that raising funds is not "the type of programmatic need that can be properly considered sufficient justification for the requested use variance." *Yeshiva Imrei* merely concerns the "programmatic need" alternative under Section 72-21(a). The decision has nothing to do with the "no reasonable return" prong of Section 72-21(b). Indeed, *Yeshiva Imrei* stated that not-for-profit entities may proceed as for-profit applicants if they are unable to demonstrate a programmatic need.

Petitioners' second challenge to the BSA's "no reasonable return" finding is also meritless. Petitioners' claim that "[t]he proper inquiry for a not-for-profit

applicant is whether 'unique physical conditions' create a hardship impairing its ability to meet its programmatic needs," and therefore, a non-profit applicant may not seek a variance if it is not related to its programmatic needs. (Petitioners' Br. at 38.) This claim, however, turns Sections 72-21(a) and (b) of the Zoning Resolution on their head. Petitioners essentially reason that because a non-profit entity (1) is *not required* to satisfy the "unique physical conditions" prong of the analysis if it can demonstrate programmatic needs and (2) is *not required* to satisfy the "reasonable return" finding, then the BSA abuses its discretion if it grants a variance to a non-profit entity that, nevertheless, satisfies both subsections. Of course, such a claim is belied by the plain language of the Zoning Resolution and the BSA's prior precedent – nothing in the resolution precludes a not-for-profit entity from satisfying the higher test imposed on for-profit applicants.[12]

c. The BSA's "Minimum Variance" Finding Was Rational

Petitioners' challenge to the BSA's "minimum variance" finding, based on their assertion that the residential floors of the Congregation's planned development are "not necessary" for the Congregation's programmatic needs

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[12] Petitioners cases (Petitioners' Br. at 38) are distinguishable because neither involved applications for variances by not-for-profit entities. *See Concerned Residents of New Lebanon v. Zoning Board of Appeals of Town of New Lebanon*, 222 A.D.2d 773, 774, 634 N.Y.S.2d 825, 826 (3d Dep't 1995) (challenging variance application granted to "Lebanon Valley Auto Racing, Inc."); *Citizens for Ghent, Inc. v. Zoning Board of Appeals of Town of Ghent*, 175 A.D.2d 528, 528, 572 N.Y.S.2d 957, 958 (3d Dep't 1991) (challenging variance granted to company that "sells and installs truck-mounted cranes and related equipment").

(Petitioners' Br. at 39-40), is baseless. The BSA found that the few residential floors proposed by the Congregation were necessary, in that without them the Congregation would not be able to meet "its programmatic need" and fulfill "its religious mission." (BSA Res. ¶ 213.) This finding is well supported in the record. (*See, e.g.*, R. 4223-30, 5157-59.)

The BSA listed, in detail, efforts that it undertook to ensure that the "variance sought" was the "minimum necessary to afford relief" under Section 72-21(e) of the Zoning Resolution. (A287 ("Whereas, the Board finds that the requested lot coverage and rear yard waivers are the minimum necessary to allow the applicant to fulfill its programmatic needs and that the front setback, rear setback, base height and building height waivers are the minimum necessary to allow it to achieve a reasonable financial return[.]").) The BSA required the Congregation to scale back its proposal (*see* BSA Res. ¶¶ 207-209) and also considered numerous alternatives to the Congregation's proposal to determine whether an alternative approach would accommodate its needs (*see id.* ¶¶ 210-211). The record is replete with analyses of alternatives, including as-of-right approaches. (*See*, *e.g.*, *id.* ¶¶ 128, 129, 132, 133, 147, 211). The BSA found, based on the evidence in the record, that the Congregation had "fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission." (*Id.* ¶ 213.)

Based on this record, the BSA rationally determined that the Congregation's final proposal would involve the minimum variance. (*Id.* ¶ 212-15). This Court should not upset the BSA's "minimum variance" finding.

CONCLUSION

For the foregoing reasons, the order of the lower court dismissing the Petition should be affirmed.

Dated: January 14, 2011
New York, New York

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Daniel Vinci being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

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BRIEF FOR RESPONDENT-RESPONDENT CONGREGATION SHEARITH ISRAEL

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