*To Be Argued By:*
Alan D. Sugarman

*New York County Clerk's Index No. 113227/08*

# New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

NIZAM PETER KETTANEH and HOWARD LEPOW,

*Petitioners-Appellants,*

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

*against*

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair of said Board, CHRISTOPHER COLLINS, Vice Chair of said Board and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

*Respondents-Respondents.*

## REPLY FOR PETITIONERS-APPELLANTS NIZAM PETER KETTANEH AND HOWARD LEPOW

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## Preliminary Statement[1]

Respondents finally have been pressed to identity the precise evidence upon which the BSA relied for its (b) and (e) findings.[2] For the crucial showing that "no permissible use will yield a reasonable return for the entire property,"[3] the City Brief has identified only two documents from the 6000 pages in the BSA record.[4] *These documents, the December 2007 and the July 2008 Freeman submissions, refute, rather than support, the findings*.

A *"complying, fully residential development"* analysis was never supplied by the Congregation as requested by the BSA in June 2007.[5] Respondents avoid addressing, but do not dispute, that the December 2007 analysis cited by the City was not fully–residential, although still yielding a rate of return exceeding that which the Congregation's sole economic consultant opined was acceptable.[6]

The City also relies upon Freeman's July 2008 submission, a so–called bifurcated analysis, analyzing the profitability of only the two upper floors remaining after the Congregation satisfied its programmatic needs with the community house floors below. Respondents, significantly, do not deny that the

[1] Petitioners' Brief contained the following typographical errors, as to which Respondents were informed: Pet. Br. at 46, n. 119: [A–5115] rather than [A–4115]; Pet. Br. at 61, [A–1010] rather than [A–1011]; Pet. Br. at 45, [A–5115] rather than [A–4115]; Pet. Br. at 29, [A–2972] and [A–2974] rather than [A–2792] and [A–2794].
[2] Respondents' briefs in the related Landmark West appeal, incorporated by reference their briefs herein and responded to some issues raised by Petitioners. Cong. LW–Brief and City LW–Br.
[3] *Fayetteville v. Jarrold*, 53 N.Y. 2d 254, 258 (1981).
[4] [A–2769] cited as R–1969 at City Br. 16 and [A–4223] cited as R–5171 at City Br. 18. Rather than cite to Petitioners' complete Appendix as to which multiple copies are filed with this Court, Respondents provided many citations to the BSA administrative file below [A–249], needlessly inconveniencing this Court.
[5] [A–1496].
[6] [A-1294].

site value used was not the market value of the right to develop two floors of condominiums, but the value of undeveloped space above the adjoining Parsonage that inflated the site value by 300%. Moreover, Respondents do not deny that overstating this two-floor site value understates the return for the condominium part of the approved building, as well as for the approved scheme.[7]

## Argument

### A. Programmatic needs and deference to religious organization are not part of this appeal.

To narrow the issues Petitioners did not appeal the community house variances extending the lower floors rearward, allowing only 1,500 additional square feet.[8] Petitioners sought to remove from discussion diversionary issues unrelated to the condominium variances, such as deference to religious organization and access and circulation for toddlers and elderly congregants.[9]

Petitioners reasoned that the Congregation's request for these small variances was a ploy to divert attention from its primary goal: earning revenue from condominiums, which account for 90% of the additional floor area allowed by the variances.[10] Petitioners observed that the Congregation is not seeking to use for its religious/community programmatic needs all the space that is available in an

[7] *See* Pet. Br. at 33–37 and 56–57.
[8] ¶ 46 [A–55]. The Congregation diverts *more than* 1500 square feet of space on the lower floors for condominium lobbies, elevators, and stairs, at the same time that the Congregation asserted programmatic need variances to provide only 1500 square feet of space *on the same floors*.
[9] Because the non–leveraged return on investment approach still yields a reasonable return, Petitioners' did not appeal its claim that the leveraged return on equity approach as required by the BSA Instructions was not utilized. The court below, though, was i*ncorrect* that this was Petitioners' "biggest complaint." [A–35]. *See* [A–769].
[10] Pet. Br. n. 16 at 7.

as–of–right building, and chose to rent its adjoining Parsonage rather than use it for programmatic needs.[11] Notwithstanding, the Congregation still peppers its response with its favored red herrings: discussion of deference to religious organizations and programmatic needs that have nothing to do with the issues on this appeal.[12]

## B. No evidence shows the Congregation's financial need or that the variances are required for its survival.

The Congregation brief on page 1 accuses opponents of seeking to "block the Congregation's plan to *preserve itself*." This provocative assertion is false. The Congregation contended to the LPC that because of financial hardship, ZR §74–711 relief was required. When the LPC asked for proof, the Congregation withdrew the ZR §74–711 application.[13] The Board rejected the Congregation's "economic engine" argument and asked the Congregation to "forgo such a justification in its submissions."[14] The Congregation ignored the Board's request.[15] In response, opponents pointed out the indications of substantial financial resources of Congregation members.[16]

## C. The Court below did not apply a substantial evidence standard.

[11] Pet. Br. n 17 at 8. The Congregation *falsely asserts* that the Board had found that an as–of–right building would not viably resolve circulation and access issues, *when in truth* the Board had referred only to the Parsonage. Cong. Br. at 29. The Congregation *falsely implies* that the Board considered circulation and access as physical conditions in relation to the condominium variances. Cong. Br. at 27. *See* Pet. Br. n. 54 at 17.
[12] *See e.g.* Cong. Br. at 7, 12, 13, 18, 19, 23, 28, 29, 32, 39, and 45. The Congregation *falsely* states the Board found that condominiums were required to meet programmatic needs. Cong. LW–Br. at 36.
[13] Pet. Br. at 11.
[14] ¶ 79–80 [A–57].
[15] *See* Fifth Attorney Statement. [A–4197] and [A–4221].
[16] Pet. Br. at 11. The court below at A–30 *incorrectly* stated "The BSA rejected petitioners' contentions that the Congregation should have sought to raise funds from its members instead of seeking the requested variances…" Petitioners never took this position.

Respondents concede the proper standard for review is the substantial evidence standard as required by ZR §72–21, citing *Soho Alliance* that *each* finding *must have a rational basis and be supported by substantial evidence*.[17] Substantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.[18]

Clearly, the court below applied an arbitrary and capricious standard.[19] To make it appear as if the court below applied a substantial evidence standard, the City brief *improperly and misleadingly* refers to *Soho Alliance* in a way to make it appear as if the court below "correctly determined" there was an absence of substantial evidence.[20] Yet the court below *did not* "determine" that "it cannot be said that there was an absence of substantial evidence." The City *misleadingly* inserts the quoted phrase *"it cannot be said …"* to make it sound as if these words were stated by the court below, when in fact the phrase is an excerpt from *SoHo Alliance*.

*(1) Respondents did not show the substantial evidence supporting each of the Board findings.*

Respondents rely primarily on the size of the record and the decisions of the Board and the court below as "evidence," but they are not evidence of what is in

[17] *SoHo Alliance v. New York City Bd. of Standards and Appeals*, 95 N.Y.2d 437 (2000). *See* Cong. Br. at 3, 16 ,17, 19, 21, 26, 32. *See* City Br. at 2, 8, 9, 10, 14, 19 and 24.
[18] *Soho Alliance v. New York City Bd. of Standards and Appeals*, 264 A.D. 2d 59, 63, (1st Dep't 2000), *aff'd* 95 N.Y. 2d 437 (2000).
[19] *See* decision below at [A–28], [A–29], [A–36], [A–38], [A–39], [A–41], [A–42], and [A–44].
[20] City Br. at 10.

the record.[21] These decisions make factual assertions not in the record.[22]

Over 50% of the Congregation's and 70% of the City's citations are to these two non–evidentiary decisions. Many of the remaining Congregation references (over 37) are to rhetorical attorney statements.

Other citations are irrelevant, pertaining for example only to the community house variances, such as the testimony of the Rabbi and education director of the Congregation.[23]

More significant than the size of the record is what was *not* provided by the Congregation such as (i) an all–residential as–of–right analysis, (ii) the market value of the two–floor condominium development rights, (iii) an analysis of a building with a front courtyard not obstructing windows, (iv) complete construction estimates for the as–of–right schemes, and (v) a description by the Congregation's architect of the exact changes to the building drawings obviating the need for the 40–foot separation eighth variance.[24]

## D. Respondents did not show any evidence that the development site as now zoned is incapable of yielding a reasonable rate of return.

Respondents are unable to show evidence that the development site as

[21] The Congregation padded the record with five versions of its single–spaced 50–page attorneys' statements, 470 pages of LPC transcripts [A–2810] and 500 pages of irrelevant and duplicative "consent" forms from Congregation members living far outside the 400–foot zone. R–2030 to R–2500, 2 RCNY 1–06(g). [A–805].[A–1257], [A–823], [A–232–34].

[22] The Congregation below asked to supplement its response with citations to the record; the court said that it did not need those citations. [A–773] at line 4. *See also* [A–768–69].

[23] Cong. Br. at 3–4 citing R–1736–39 ([A–2487]) and R 1739–42 ([A–2490]).

[24] The Congregation ludicrously claims that the Congregation witnesses had "bested" cross–examination by opponents in the BSA proceeding. Cong. Br. at 26. The Board does not permit cross–examination of an applicant by opponents. Had opponents been able to cross–examine the Congregation witnesses, the answers would have prevented the Board from allowing the variances.

currently zoned is incapable of yielding a reasonable return.

Significantly, Respondents and the court below do not address the merits of the issue — briefed extensively by Petitioners — that the City's own updated computation of the December 2007 "all–residential" scheme would yield an annualized return on investment of 6.7%,[25] exceeding the 6.55% return on investment which the Congregation's expert Freeman had opined was an "acceptable" return.[26] Respondents make no attempt to distinguish, diminish, explain, or refute Freeman's opinion that 6.55% was an "acceptable "return.[27]

*Without any explanation*, the City now claims: "There is no merit to petitioners' argument that the Board should have required the Congregation to recalculate its December 2007 estimated financial return for an all residential scheme."[28] The City is wrong: the per square foot value used in December 2007 was subsequently reduced from $750 to $625 therefore recomputation is required.[29]

Since Respondents do not dispute that the December 2007 analysis was not really an all–residential analysis,[30] even the 6.7% return computed in the City's Article 78 answer is understated. Respondents do not explain the Board's failure to insist that Freeman provide an all–residential analysis.

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[25] Pet. Br. at 41. The City in its brief at 21 asserts *incorrectly* that the 6.7% figure is "Petitioners' number"; the truth is that the 6.7% computation was performed *by the City* in ¶292 of its answer to the Article 78 Petition. [A–335].
[26] [A–1294]. *See* Pet. Br. at 37–38.
[27] *See e.g.*, City Br. at 21, avoiding mentioning Freeman's 6.55% opinion.
[28] City Br. at 20.
[29] *See* I.E(3) at 10 below.
[30] *See* Pet. Br. at 39–40.

As to what is a minimum reasonable return, the City asserts *falsely* that "The Congregation's experts established that 11% was a reasonable return." *Nothing* in the cited documents supports the City's assertion. The Board decision makes no reference to a 10.93% or 11% return figure; the only reference is in Freeman's Schedule A as the Annualized Rate of Return.[31] Except for Freeman's opinion as to the 6.55%, the record is silent as to what is the minimum reasonable return.[32]

## E. Respondents do not show substantial or indeed any rational evidence to support the (b) and (e) findings.

The City attempts to show the factual basis of the (b) and (e) findings in a narrative at page 16.[33] The City describes Freeman's initial submission of April 2007, *incorrectly* stating that Freeman had initially submitted an as–of–right residential analysis.[34]

### *(1) The November 27, 2007 BSA Hearing — the Congregation is asked to use a site value for the two floors representing what a developer would use and pay for.*

The City then moves to the November 27, 2007 hearing where it instructed Freeman to remove the non–residential value from the site value for the development rights for the two floors of condominiums. The Board "asked the Congregation to revise the analysis to exclude it [sic] from the site value and to

[31] City Br. at 21.
[32] [A–1294] cited at Pet. Br. 37–38. In Freeman's March 11, 2008 submission, he seems to imply that 8.56% is a "minimum reasonable return" [A–3340–41], but did not explain the change in his opinion as to the necessary return. *See* n. 46 below.
[33] City Br. at 16–17.
[34] [A–1287] (R–133–61). The City cites to ¶127 (A–59–60]. The Board's decision is *incorrect*. Pet. Br. n. 48 at 16. Thereafter, BSA staff in June 2007 requested a *"complying, fully residential development"* analysis [A–1496], an analysis never provided.

evaluate an as–of–right development."[35] The transcript shows the Board was clear the valuation should not include that area which *"is not going to be used by the developer"* and asked Freeman to take out the space "being used by the synagogue,"[36] clearly intending that the site value in any bifurcated analysis be the market value of the development rights to build the two floors of condominiums useable by a developer.[37]

> *(2) The December 2007 submission did not respond to the Board's request to revise the site value for the right to develop two floors of condominiums.*

The City brief then discusses Freeman's December 2007 submission, implying that Freeman's responded therein to the Board request to revise the site value to include only the market value of the development rights for two floors.[38] Freeman never did so.[39] The Congregation's assertion that Freeman submitted a "revised" analysis is not evidence that the site value was in fact adjusted downward to the value of two floors of development rights.[40]

The City also asserts that Freeman submitted an analysis of an "as–of–right residential building with 4.0 F.A.R."[41] Freeman still had not submitted the *"complying, fully residential development"* analysis requested by the staff in June [A–1496]; instead, he just falsely claimed to have done so by mislabeling the

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[35] City Br. at 16 then cites the transcript of the November 27, 2007 BSA hearing. R–1753 [A–2504].
[36] Pet. Br. at 21–22.
[37] *See* discussion at Pet. Br. 21–22 and 33.
[38] City Br. at 16 citing R–1969 [A–2769].
[39] See pages 16 to 18 below.
[40] The City implies *incorrectly* that the Congregation responded "to questions raised by the Board." City Br. at 16.
[41] City Br. at 16.

F.A.R. 4.0 analysis as "all–residential" in his Schedule A.[42]

Freeman's Schedule A provides a side–by–side display that reveals Freeman did not adjust the site value for the two–floor scheme as the Board requested. Freeman uses the *very same site value*[43] of $14,816,000 for both the 28,724 square foot seven–floor Scheme C and the 7,594 square foot two–floor Scheme A.[44] The following excerpted rows from the Schedule [45] reveal this:

| | [Scheme A] Revised As Of Right CF/Residential Development | Revised Proposed Development – Residential Only | [Scheme C] All Residential F.A.R. 4.0 |
|---|---|---|---|
| Built Residential Area | 7,594 | 22,352 | 28,724 |
| Sellable Area | 5,316 | 15,243 | 17,730 |
| Acquisition Cost | $14,816,000 | $14,816,000 | $14,816,000 |

This is conclusive evidence that the site value for the two floors was not reduced in the December 2007 submission as required by the Board at the November hearing and that Freeman applied the same site value both to a two–floor site and a seven–floor site.

Freeman also applies the overstated $14,816,000 figure as the site value for the Proposed Scheme; consequently, the rate of return for the Proposed Scheme must be far higher than 10.93%.

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[42] Freeman's December 2008 Schedule A. [A–2780](R–1980). A clearer version may be found at P–02557, Volume 8 of Petitioners' Appendix A filed below. [A–157].

[43] Freeman incorrectly uses the phrase "acquisition cost" rather than the accurate phrases "site value" or "market value."

[44] Exhibits A [A–2792] and C [A–2794] to Freeman's same December 2007 submission clearly identifies the schemes as Schemes A and C.

[45] [A–2780]. For clarity, only selected rows from Schedule A are shown.

*(3) The February 21, 2008 BSA Hearing — the Board ignores the Congregation's failure to reduce the two–floor site value and to provide a fully–residential analysis.*

The BSA narrative continues to the next Board hearing of February 21, 2008, following Freeman's December submission. The narrative does not reveal that the Board at the hearing ignored the Congregation's continuing failure to reduce the two–floor site value and to provide a fully residential development analysis. [A–1496].[46]

Instead the narrative merely states that the Board at the February hearing "requested a recalculation of the site value."[47] The transcript shows the Board believed Freeman's per square foot comparable value of $750 was too high.[48] Yet, *the Board ignored the even larger error of Freeman multiplying that figure, not by the area of two floors of condominiums, but apparently by the floor area of the entire building*.[49]

Between November 2007 and February 2008 something happened to the Board: inexplicably, it was now ignoring the crucial issues and focusing on less significant ones.

*(4) Freeman's July 2008 final summary analysis uses the overstated site value and conceals its impropriety by not including the all–residential analysis in the summary.*

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[46] Freeman may have prepared an all–residential analysis that he did not reveal. [A–3340–41]. Freeman seems to admit that an all–residential scheme would provide a reasonable return. *Id.*

[47] City Br. at 17 citing entire BSA transcripts of February 12, 2008, R–3653–3758 [A–3152–3257] and of April 15, 2008, R–4462–515 [A–3630–83].

[48] *See* [A–3174] *et seq.* Opposition Expert Levine stated the proper value was $500 per square foot. [A–3123], [A–3384] and [A–3622]. In his May 2008 submission, Freeman reduced the value to $625. *See* [A–3819].

[49] The City Brief skips over several Freeman submissions [A–3301], [A–3330], [A–3607], [A–3815], and [A–4028].

The City narrative continues with Freeman's July 2008 submission.[50] This was the Congregation's final reasonable return submission. The City states:[51]

> The Congregation's revised analysis of the as–of–right building using the revised estimated value of the property "showed that the revised as–of–right alternative would result in substantial loss" (A60[¶138]; see, R. 5171–81).

The Board in ¶138 refers to but *one* as–of–right alternative, not the two included in the December 2007 submission. Freeman includes only the two–floor Scheme A alternative in this July 2008 summary Schedule A, omitting the "all–residential" Scheme C analysis. Freeman precludes comparison between the (i) "all–residential" Scheme C site value and (i) the two–floor Scheme A site value. He thereby conceals his fabrication.[52]

Extract From Schedule A – July 2008 Freeman Submission[53]

| | [Scheme A] Revised As Of Right CF/Residential Development | Revised Proposed Development |
|---|---|---|
| Built Residential Area | 7,594 | 22,352 |
| Sellable Area | 5,316 | 15,243 |
| Acquisition Cost | $12,347,000 | $12,347,000 |
| Est. Total Investment | $20,465,000 | $26,731,000 |
| Sale Of Units | $12,347,000 | $36,394,000 |
| Est. Profit (Loss) | ($8,757,000) | $6,815,000 |
| Return On Total Investment | | 25.49% |
| Annualized Return On Investment | 00.0% | 10.93% |

[50] City Br. at 18 citing R–5171–81 [A–4223–33], Eleventh Freeman Submission July 8, 2008.
[51] *Id.*
[52] [A–4230].
[53] [A–4230].

Freeman's new site value for just two floors of development rights is $12,347,000 — not the market value of the 7,594 square feet of development rights but the value of 19,755 square feet of undeveloped space above the adjoining parsonage.

*(5) Freeman's July 2008 submission uses an entirely new methodology to value the two–floors of development rights, continuing to overstate the site value.*

Freeman's May 8, 2008 submission shows that he devised the number $12,347,000 by multiplying the site value per square foot of $625 times 19,755 square feet, representing the supposedly unused developable space over the adjoining Parsonage.[54]

*The resulting site value is hardly the market value of the development rights for which a developer of a two–floor condominium would pay*, which the Board had requested at its November 2007 hearing.

Had Freeman multiplied $625 times 7,594, the site value would be $3,322,500, not $12,347,000.

Conveniently, Freeman contrived a figure $12,347,000 not very different from the figure used in the December 2007 submission — to avoid revealing the valuation of the two floors had nothing to do with the actual market value of the two floors.

Any true market valuation of the development rights for the two floors based

[54] [A–3818–19]. Pet. Br. at 33–37.

upon area times value per square foot would yield a value too low for Freeman's purposes, as opponents were demonstrating.[55] Respondents cannot explain the relationship between the Parsonage developable space and the two–floors of condominium development rights. Freeman's approach is wholly irrational. Freeman and the Board evidently wished to conceal what was going on, and for good reason.

*(6) Freeman uses ordinary arithmetic to compute the annualized return on investment of 10.93% but does not apply that arithmetic using the proper site value.*

Freeman uses an ordinary arithmetic formula to compute the 10.93% return in Schedule A of his July 2008 submission:

> (Profit ÷ Development Period in Months) x 12) ÷ Total Investment = Annualized Return on Investment

Using this formula and Freeman's own figures in his Schedule A, Freeman's annualized rate of return of 10.93% is obtained as follows:

> (($6,815,000 ÷ 28) x 12) ÷ $26,731,000 =10.93%

The variables in this formula are (i) Total Investment — the sum of costs including the site value and (ii) Profit.[56] When site value is decreased, Profit increases and Total Investment decreases, both by the same amount.

Multiplying the sellable–area of 5316 square feet times $625, yields a site

[55] *See e.g.* Levine at [A–3123].

[56] Another variable, and one subject to manipulation, it the number of months of development, used to annualize the return. The Board's Instructions for Form BZ contemplate use of the higher non–annualized return. [A–502–03]. *See* note 57 at p. 20 below.

value of $3,322,500 and an annualized return on investment of 38.2%. Multiplying the built–residential–area of 7594 square feet yields a site value of $4,746,250 and an annualized return on investment of 32.30%.

While the Congregation calls this "quibbling," challenging *a single error that more than triples the annualized rate of return of the proposed building* is hardly "quibbling."[57]

> *(7) The court failed to address the fallacious calculation of the site value and the use of the undeveloped space above the parsonage to value the two–floors of development rights.*

Respondents and the decisions below do not address: (i) the improper use of the bifurcated approach; (ii) the *fallacious* methodology to arrive at the two–floor site value; and, (iii) the use of landmarking hardship as the rationale for using the Parsonage undeveloped space to calculate site value.

At most, the Congregation Brief at 9 *falsely* states:[58]

> The lower court rejected Petitioners' assertion that the BSA "never explicitly addressed" the proper reasonable return analysis for "mixed–use profit and non–profit" developments. (A34.)

The decision below at A-34 merely observed that Petitioners objected to the bifurcated approach but did not address Petitioners' legal arguments.

> *(8) Respondents do not justify the BSA's failure to consider actual acquisition cost.*

[57] Cong. Br. at 37. Opposition expert Martin Levine described other discrepancies in the Freeman analysis. *See* Levine report at [A–4363].
[58] Cong. Br. at 9.

Respondents and the court below failed to distinguish the many cases requiring a zoning board to consider the actual acquisition cost.[59] The policy requiring consideration of the actual acquisition cost was stated by the Court of Appeals in *Matter of Douglaston Civic Assn*:[60]

> While present value *most often* will be the relevant basis from which the rate of return is to be calculated, it is important that the "present value" used be the value of parcel as presently zoned, and not the value that the parcel would have if the variance were granted.
>
> * * *
>
> We would note further that the *original cost becomes relevant where, despite the prohibition upon converting the land to another use, the land has nevertheless appreciated significantly to the extent that the owner may have suffered little or no hardship* (emphasis supplied).

The BSA Instructions required submission of actual acquisition costs and dates.[61]

The Congregation *incorrectly* asserts the court below found that an applicant need not provide the purchase price.[62] The court attempted to avoid addressing the ample precedent requiring consideration of actual acquisition cost by making a factual distinction: that the Congregation had provided the deeds that included the purchase price, implying the Board had considered the acquisition cost.

But, the Board did not consider this information by requiring Freeman to

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[59] *See* Pet. Br. at 58, n. 141.
[60] *Douglaston Civic Ass'n v Galvin,* 36 N.Y.2d 1, 9 (1974).
[61] *See* Detailed Instructions for Completing BZ Applications. [A–821]. After Petitioners' filed their brief, the BSA released new instructions omitting the requirement to submit acquisition costs and requiring the return on investment approach for both condominiums and rental projects. [A–36–38]. http://www.nyc.gov/html/bsa/downloads/pdf/forms/bz_instructions_september_2010.pdf.
[62] Cong. Br. at 9.

compute the return on investment using the actual purchase price. It did not even state the actual purchase price in its decision. Accepting Respondents' contention that the acquisition costs are shown in the deeds for the three brownstone lots constituting the development site, the actual acquisition price is $11,762,[63] versus the "acquisition cost" of $12,347,000 used by Freeman in his July 2008 Schedule.

Using Freeman's simple arithmetic, and applying the $11,762 acquisition price to the July 2008 Schedule A, produces an annualized return of not 10.93%, but of 57% and a total return of 133%.[64]

Absent consideration of the acquisition price, there is no predicate to support a finding of economic hardship.[65]

*(9) The Congregation deliberately submitted incomplete, spoliated construction estimates.*

The City's response to the Petitioners' objections respecting the spoliated construction comments is to state without explanation that "There is no merit to petitioners' argument."[66] Respondents do not deny that Freeman did not provide complete reports for the key as–of–right scenarios. The City's rationalization is that the Board *could* have reviewed base unit price.[67] The City's cited pages show no computation of base unit price and are wholly irrelevant.[68] The City does not

[63] *See* Pet. Br. at 25, n. 70.
[64] *See* Section 0 at 17 above.
[65] *Cowan v. Kern*, 41 N.Y.2d 591, 597 (1977). *Loujean Properties, Inc., v. Town of Oyster Bay*, 160 A.D.2d 797 (2d Dep't 1990).
[66] City Br. at 20.
[67] *Id.*
[68] The City cited R.–1997 [A–2797] (incomplete estimate), and R–5178–79 [A–4230]. Pet. Br. at 26.

claim the Board actually analyzed the base unit price – only that it *could have* done so. That the Board did not do so is clear from the following figures from Freeman's July 2008 Schedule A:[69]

| | Revised As Of Right CF/Residential Development [Scheme A] | Revised Proposed Development [Scheme C] |
|---|---|---|
| Built Residential Area | 7,594 | 22,352 |
| Sellable Area | 5,316 | 15,243 |
| Base Construction Costs | $3,722,000 | $7,398,000 |
| Soft Construction | $3,977,000 | $6,322,000 |

Performing the simple division described by the City, the unit cost for the two–floor condominium Scheme A is $490 per square foot, while for the proposed five–floor condominium the base unit price is $331 per square foot – an unexplained substantial difference showing that the as–of–right costs were inflated.

Whether the Board *could have* analyzed the unit cost does not change the fact that Freeman failed to provide the complete documents,[70] and the Board was aware that they had not been provided but deliberately did not ask for them. Not only does this establish bad faith by the Board, the spoliation destroys the value of the construction costs as evidence to support the Board findings.

The only explanation for the Board's failure to require the submission of the complete construction cost documents, which undoubtedly were in Freeman's

[69] [A–4230].
[70] Certainly Freeman had the complete documents; he just would not produce them.

possession, is deliberate blindness.[71]

## F. The Board refused to consider the financial return for a scheme with a courtyard such that the front windows in the adjoining building would not be obstructed.

The Congregation asserts: "As discussed throughout this brief, the BSA required a litany of alternative proposals and concluded that the variance granted was the minimum needed to afford relief."[72] What the Congregation does not reveal is that the "litany of alternative proposals" did not include a feasibility analysis of a building with courtyard that would not obstruct the front windows of the adjoining building, the one scenario requested by opponents whose requests the Board deliberately and capriciously ignored.

The Board deliberately failed to request an analysis of a small front courtyard eliminating only 771 square feet of condominium space.[73] Instead, as the Congregation boasts, it submitted and the Board accepted six irrelevant lesser variance scenarios: a) without penthouses and terrace; b) without penthouse but with terrace; c) without 8th floor and without terraces; d) without eighth floor and with terraces; e) without penthouse; and f) without eighth floor.[74]

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[71] *See* Cong. Br. 33, n. 5. There is ample evidence of the deliberate blindness shown by the Board as to core issues; deliberate blindness is evidence of bad faith. A zoning board's determination may be set aside if there are indications of bad faith on the part of the board. *Cowan v. Kern*, 41 N.Y.2d 591, 599 (1977).

[72] Cong. Br. at 43.

[73] The drawings show that the size of the rear courtyard is 15.75 feet x 15 feet, or 237 square feet. [A–3853–54]. The courtyard reduces space on each of floors six, seven, and eight by 237 square feet and on the penthouse floor by 60 square feet. [A–3855].

[74] To support this "litany," the Congregation cites Freeman's last gasp, August 12, 2008 submission summarizing six previously submitted alternatives. [A–4440–441]. Cong. Br. at 24–25.

## G. Respondents do not show physical conditions such as irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions.

There is no evidence showing "physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions" creating a hardship that may only be remedied by variances for the condominiums.[75]

Respondents' first raise a straw man – focusing on the word "unique" in the phrase "unique physical condition," an issue never raised in either Petitioners' Article 78 petition or in its Appellate Brief.[76]

Next, the Congregation *falsely claims without citation* that the Board *found* the development site was an irregular "L–shaped" site:[77]

> Petitioners have failed to demonstrate that the BSA irrationally found that a "unique physical condition" arises from the fact that the Congregation, faced with an inability to develop the underdeveloped land occupied by the Synagogue, can only use *the remaining "L" shaped portion of the lot*. (A4199–4209.)

The *critical* fact is that the Board never made such a finding as to an "L" shaped lot. Desperate, the Congregation cites to [A–4199] , which relates only to the community house related hardships and provides *no* support for the Congregation's claim.[78]

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[75] ZR §72–21 (a).
[76] Cong. Br. states *incorrectly* at 8: "The lower court rejected Petitioners' assertion that the division of the lot by a zoning district boundary is not 'unique'" citing [A–31–32]. The court did not state this at all. *See also* Cong. Br. at 28.
[77] Cong. Br. at 32.
[78] The Congregation does not assert that obsolescence was found to constitute a physical condition. Still, any

*(1) The Board may not use landmarking as a factor in granting for–profit variances under ZR §72–21.*

While the City properly admits that the Board took the landmarking hardship into account under its (a) finding,[79] the Congregation confusingly asserts that the Board did not,[80] and then seems to change its mind and argue the BSA had jurisdiction to do so.[81] Yet on this issue, the City brief does not attempt to respond to Petitioner's brief,[82] effectively conceding that the Board has no jurisdiction to provide relief for landmarking hardships. Evidently, the City did not wish to take a position on this sensitive issue in a formal appellate brief. Neither Respondent addressed the use of landmarking hardship in the artifice of transferring the Parsonage value to the two as–of–right floors.[83]

Respondents do not address the comprehensive legislative scheme described by Petitioners in footnote 157 of their brief at page 64, listing eighteen different zoning resolution provisions addressing procedures to obtain relief from landmarking hardships, *none of which provide any role for the BSA*. A legislature's desire to provide exclusive jurisdiction "may be inferred from … the legislative enactment of a comprehensive and detailed regulatory scheme."[84] Accordingly, "[a] court should not find that the Legislature intended two separate agencies to

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obsolescence (see Cong. LW–Br. at 27) is unrelated to the condominium variances. Pet. Br. at 43 and 61–62.

[79] City Br. at 10: "The BSA determined 'that there are unique physical conditions' (ZR §72–21(a) in three particular respects …"

[80] Cong. Br. at 32.

[81] Cong. Br. at 31.

[82] Pet. Br. at 62–64. Petitioners argued below the lack of BSA jurisdiction to consider landmarking. *See* Pet. Reply below at [A–417–18].

[83] The court below did not provide legal reasoning to support its conclusion of concurrent jurisdiction. [A–42].

[84] *New York State Club Ass'n v. City of New York*, 69 NY 2d 211, 217 (1987).

exercise concurrent jurisdiction unless no other reading of the statute is possible."[85]

Respondents do not dispute that the Congregation applied for, but then withdrew, its application for ZR §74–711 relief[86] and that Board failed to restrict future development of the Parsonage and Synagogue, while using a novel transfer of development value over the Parsonage to the development site.[87]

*(2) The Board may not grant a variance under ZR §72–21 merely because a lot is located in two zoning districts.*

The Congregation mistakenly claims that *Elliott v. Galvin* holds that "location of zoning lot within two different zoning districts constituted 'unique physical conditions' within the meaning of the zoning resolution."[88] The Court of Appeals[89] relied upon an actual physical condition: "the irregular shape and small size of the C1–9 portion of the zoning lot", stating only that the split zoning could "contribute" to unique *physical conditions*.[90]

The City's brief at 11 *misrepresents* the substance of ZR §73–52 and ZR §77–00 as authorizing the Board's use of a split–lot as a "physical condition." Rather, *these provisions prohibit the action taken by the Board.* The proposed variances are *bulk* variances not *use* variances to which ZR §73–52 applies. The "finding" referred to as well is a finding is a special, not a variance proceeding.

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[85] *Ardizzone v. Elliott*, 75 N.Y. 2d 150 (1989).
[86] Pet. Br. at 11 and 63–64.
[87] *See* Section I.E(5) at page 16 above.
[88] Cong. Br. at 27. The Congregation's citation to BSA decisions at Cong. LW–Br. at 30, are properly distinguishable as involving either a true physical condition or a non–profit where programmatic need was a factor.
[89] *Elliott v. Galvin*, 33 N.Y.2d 594 (1973).
[90] Neither the Court of Appeals in *Elliot v. Galvin*, nor the Appellate Division below, considered ZR §73–52 and ZR §77–211. *Elliott v. Galvin*, 40 A.D.2d 317 (1st Dep't 1973).

Finally, ZR §73–52 limits extension of the zoning to a maximum for 25 feet from the zoning boundary, not the *entire* lot the Board approved.

ZR 77–00 cited by the City refers to the entire Article 7, Chapter 7 of the Zoning Resolution. In that chapter only ZR §77–211 appears to be remotely related to the bulk variance relief sought by the Congregation. ZR §77–211 is expressly limited to situations involving single or two–family residences zoned sites or commercial or manufacturing zoned sites — inapplicable here. Further, ZR §77–03 makes clear that ZR §77–211 is the exclusive means under the zoning resolution to provide bulk relief from a split lot in two zoning districts.

So, the two provisions cited by the City demonstrate that the Board acted beyond its authority. These two provisions apparently were enacted in the zoning resolution because the Board lacked authority to provide similar relief in a variance proceeding based solely on split-zoning.

*(3) Respondents fail to explain why ZR §23–711 and the eighth DOB objection are inapplicable and how the BSA could approve a building with known violations of the zoning resolution.*

The Congregation's architects, the BSA staff, and the initial DOB objection letter all put the Board on notice that the proposed building would violate ZR §23–711.[91]

The Congregation asserts that there had been a "space between the buildings" and that "trivial changes in plans" obviated the need for the eighth

[91] Pet. Br. at 16–17. *See* Transcript of BSA Hearing held February 12, 2008 [A–3227], line 1668 where Respondents Collins states that it does not matter what changes were made.

objection but fails to cite anything in the record supporting this assertion.[92] The Congregation's architects Platt Byard Dovell White, who represented the Congregation before the DOB and testified at the BSA hearings, *never* supported these assertions.[93]

Given the Congregation's stated primary programmatic need for better access and circulation, there could be no space between Synagogue and community house buildings, which must be joined to meet the "requirements to align its ...east elevation with the existing Synagogue building" to allow elevators and corridors to provide access to the Synagogue from the community house.[94]

Respondents conjure up "evidence" because it is improper for the Board to approve a building that it knew would violate the zoning resolution: ZR §23–711.

## H. The Board's ex–parte meeting was wholly improper and, together with the Board's refusal to disclose what occurred, is further evidence of bad faith by the Board.

Respondents rely upon the BSA's "Procedure for Pre–Application Meetings and Draft Applications" (Procedures) as allowing these improper *ex parte* meetings,[95] while simultaneously stating other BSA Instructions are inapplicable to the feasibility studies.

The Procedures do not support the Congregation's view. Nothing in these Procedures can be read to authorize the Chair and Vice Chair to hold formal,

[92] Cong. LW–Br. at 21.
[93] *See* DOB objection [A–1656] and BSA hearing transcript. [A–3157]. After the last hearing, the architects in August 2008 submitted a letter to the BSA, without explaining why the eighth objection was removed. [A–4447].
[94] Cong. Br. at 32.
[95] Cong. Br. at 13–14.

secret, *ex parte* meetings with an applicant team, and then refuse to disclose what occurred. The Board's General Counsel states that: *"the Board has a strict policy prohibiting commissioners from communicating with applicants or the general public* — outside of the public hearing process — on pending/filed cases."[96]

Sanctioning this *ex parte* meeting would be no different from this Court allowing parties to discuss their upcoming appeals privately with members of this Court, but only if discussion took place prior to filing the appeal.[97]

## I. The City has no response to the Board's defective (c) finding.

The City Brief does not respond to the Board's having made a finding under the standards of CEQR for its finding (c), rather than under the standards of ZR §72–21(c).[98] The fundamental purpose of zoning regulations in New York is to provide "adequate light, air [and] convenience of access" for the City's residents.[99] The purposes of the height and setback zoning requirements is to protect light and air in the narrow side streets, not just protect public areas like Central Park to which the CEQR standards relate. A tall building with no setbacks on a narrow residential street would have just the negative shadow impact against which contextual zoning was intended to protect, yet this did not concern the Board.

## J. Non–profits proposing income–producing buildings must show that the entire site will not yield a reasonable return.

[96] *See* Board's General Counsel stating that the *ex parte* meeting was proper because it took place prior to the filing of the application. [A–2239].
[97] *Id.*
[98] Pet. Br. at 65–67.
[99] General City Law §20.

Because §72–21(b) provides that "this finding shall not be required for the granting of a variance to a non–profit organization," the Congregation asserts that (b) findings "are not required 'for the granting of a variance to a non–profit organization' and thus applies without regard to whether the non–profit is seeking a variance that may facilitate the construction of residential homes."[100]

The Congregation then asserts "the Congregation, ha[s] the same right to generate a reasonable return from their property as any private owner."[101] We agree —– the Congregation has the same rights, but subject to the same limitations, applicable to any other private owner, including showing that the entire development site is unable to generate a reasonable return.[102]

## Conclusion

The condominium variances should be vacated. There is no need for remand to the BSA, for the Congregation had ample opportunity to make its case, and chose not to do so.

Dated: March 10, 2011
New York, New York

Respectfully submitted,

[100] Cong. Br. at 36. The Congregation cites *Fisher v. New York City Bd. of Standards and Appeals*, 21 Misc. 3d 1134(A), (Sup. Ct. N.Y. County 2008), failing to note the First Department decision in *Fisher v. New York City Bd. of Standards And Appeals*, 71 A.D.3d 487 (1st Dep't 2010) upholding the variances on the express grounds that the variance sought only minor modifications.
[101] Cong. Br. at 39.
[102] There is no merit to the Congregation's attempt at Cong. Br. at 39 to distinguish the cases cited at Pet. Br. 54–55.

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AFFIRMATION OF SERVICE

I, Alan D. Sugarman, Attorney for Petitioners-Appellants, hereby affirm that I served the **Petitioners-Appellants Reply dated March 10, 2011,** upon counsel for Respondents to the physical and e-mail addresses below as follows:

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