SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
Petitioners-Appellants,	:	New York County Index No. 113227/08 (LOBIS)
-against-	:	NOTICE OF MOTION TO REARGUE AND ALTERNATIVELY FOR LEAVE TO APPEAL
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-Appellees.	:	

PLEASE TAKE NOTICE, that upon the annexed affirmation of Alan D. Sugarman, dated July 22, 2011, to which is appended the order and decision of this court dated June 23, 2011, and upon all proceedings heretofore had herein, the undersigned will move this Court at a Term thereof to be held at the Appellate Division Courthouse located at 27 Madison Avenue, New York, NY 10010 , on August 15, 2011, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order:

(a) pursuant to CPLR 2221 granting reargument;

(a) alternatively, pursuant to CPLR 5602(b) granting leave to Petitioners to appeal the order of this court to the Court of Appeals; and,

(c) for such other and further relief as to the court may seem just and proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b), answering papers, if any, should be served upon the undersigned so as to be received no later than seven (7) days prior to the return date of this motion.

Dated: July 22, 2011
New York, New York

Alan D. Sugarman

Attorney for Petitioners-Appellants

Law Offices of Alan D. Sugarman
Suite 4
17 West 70th Street
New York, NY 10023
212-873-1371
sugarman@sugarlaw.com

Of Counsel:
James A. Greer, II

To:

Jeffrey Friedlander
First Assistant Corporation Counsel of the
City of New York
Ronald E. Sternberg
New York City Department of Law
Senior Assistant Corporation Counsel
100 Church Street, Rm. 6-186
New York NY 10007
Tel: (212) 788-1070
Fax: (212) 788-1054

RSternbe@law.nyc.gov
Attorneys for Respondents-Appellee
Board of Standards and Appeals and Chair and Vice-Chair

Claude M. Millman
Kostelanetz & Fink, LLP
7 World Trade Center, 34th Floor
New York, NY 10007
212-808-8100 (main)
212-840-7031 (direct)
212-808-8108 (fax)
cmillman@kflaw.com

Attorneys for Respondent-Appellee Congregation Shearith Israel aka Trustees of Congregation Shearith Israel in the City of New York

Courtesy copy to:
David Rosenberg, Esq.
Marcus Rosenberg & Diamond LLP
488 Madison Avenue
New York, New York 10022
(212) 755-7500
Attorneys for Petitioners Landmark West et al
In Related Matter:
Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
Petitioners-Appellants,	:	New York County Index No. 113227/08 (LOBIS)
-against-	:	AFFIRMATION IN SUPPORT OF MOTION TO REARGUE AND ALTERNATIVELY FOR LEAVE TO APPEAL
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-Appellees.	:	

AFFIRMATION OF ALAN D. SUGARMAN

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

Alan D. Sugarman, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms under the penalties of law:

1. I am the attorney for the Petitioners Kettaneh and Lepow herein and submit this affirmation on personal knowledge in support of the motion of these Petitioners for reargument of this Court's order and decision of June 23, 2011, or in the alternative for leave to appeal to the Court of Appeals. No previous application has been made for this relief.

2. On June 23, 2011, by unanimous decision,[1] the Appellate Division First Department affirmed the July 10, 2009 decision and order of the Supreme Court, New York County[2] upholding the August 26, 2008 decision of the New York City Board of Standards and Appeals (BSA) granting seven variances to the politically influential and affluent Congregation Shearith Israel to construct luxury condominiums on a highly desirable development site on Manhattan's West Side adjacent to the Congregation's landmarked Synagogue. As to almost all of the issues raised on appeal by Petitioners, the Appellate Division's consideration was summary in nature, the decision simply stating: "We have considered petitioners' remaining arguments and find them without merit." The Appellate Division further erroneously asserted that the "BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." On the contrary, the BSA — engaging in deliberate blindness — ignored the arguments raised by Petitioners before the BSA, and then later in this appeal. Thus, for the Appellate Division to assert that the issues were expressly acknowledged and considered by the BSA, when the reverse it true, shows that the Appellate Division misapprehended or overlooked the points raised by Petitioners and then summarily dismissed as lacking merit by the Appellate Division.

3. This affirmation will not repeat the arguments made in Petitioners' Appeal Brief

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[1] Justices Angela M. Mazzarelli, Dianne T. Renwick, Leland G. DeGrasse, Helen E. Freedman and Rosalyn H. Richter.

[2] Justice Joan B. Lobis. Justice Lobis, clearly uncomfortable with the action of the BSA unfortunately applied an incorrect standard of review **(**Reply at 4), and did not apply the substantial evidence standard. Justice Lobis further stated:

> If this court were empowered to conduct a de novo review of the BSA's determination, and were not limited to the Article 78 standard of review of a reasonable basis for the determination, the result here might well be different. The facts are undisputed that the Congregation receives substantial rental income from the Beit Rabban Day School and the rental of the Parsonage; the Congregation may have additional earnings from renting the banquet space. There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage. It is also undisputed that the windows of some apartments in the building adjacent to the Project will now be blocked, whereas the windows would not be blocked by an as-of-right structure, which could have been built with two floors of condominiums.

and Reply – but will note the failure of the Appellate Division to address the issues clearly raised by Petitioner and mostly ignored by the BSA. The Appellate Division has ignored long-standing law and, by eviscerating the Zoning Resolution, has also disturbed in a material way land use regulation in New York City,. The Decision and Order is of enormous practical significance to the regulation of land use in the City of New York. Of greater concern is that the Decision and Order conflicts with the decisions of the Court of Appeals and of this and other Departments of the Appellate Division in the following ways:

4. The questions of law to be considered by the Court of Appeals include:

- In a variance application by a religious non-profit for a mixed–use project with (i) religious programmatic and (ii) luxury condominium components, may the analysis of reasonable return ignore the reasonable return that could be obtained if the entire development site were used solely for condominium and other income production?
- In a variance application by a religious non-profit for a mixed–use project with (i) religious programmatic and (ii) luxury condominium components, may the analysis of reasonable return be based upon only the return that could be obtained from the luxury condominium component?
- In a reasonable return "dollar and cents" analysis supporting a variance for a building, may the analysis use as the starting point site value an arbitrary site value of a site other than the site where the building is located?
- In a reasonable return "dollar and cents" analysis supporting a variance for a building, may the analysis use as the starting point a site value other than the site value of the as-of-right site area?
- In a reasonable return "dollar and cents" analysis supporting a variance for a building, may the analysis ignore the acquisition cost of the property?

- Under the New York City zoning laws, is a hardship arising out of landmarking a physical condition creating a hardship that may be resolved by granting variances for the construction of luxury condominiums?
- Under New York City law, does the BSA have statutory jurisdiction to consider landmarking hardships to support a variance, or does New York City law assign that power solely to the New York City Planning Commission?
- Under New York City law, may the BSA engage in the transfer of landmarked development rights without restricting future use of the rights transferred from the landmarked site?
- Under New York City law, may a condition that is not "physical" be the basis of a hardship justifying the variance?
- May the Chair and the Vice Chair of a zoning board hold private meetings with a variance applicant to consider the exact application to be submitted to the zoning board and then refuse to disclose what occurred at the meeting, and, is such a meeting and refusal to disclose not evidence of bad faith by the zoning board?
- Is a zoning board not required to take as hard look at alternatives suggested to the board by knowledgeable experts if such alternatives would prevent the blocking of windows in an adjacent property where the variances are solely for the production of profit to the applicant and the rate of return for the project is the largest return ever granted by such board and is nearly twice the rate of return that the sole expert for the applicant opined was reasonable and adequate return?
- Where a zoning board engages in multiple acts of deliberate blindness, refuses to take a hard look at alternatives, engages in private meetings with the applicant without disclosing what transpired, and conceals key considerations in its written decision, should a court defer to vague and conclusory findings by that board, or

should the court carefully require specific factual support for each finding for each variance, or dismiss or remand the case?

- May the BSA rely on a reasonable return analysis using allocations of construction costs in a mixed use building, where the applicant deliberately conceals the allocations of costs by submitting spoliated documents, and the BSA deliberately refuses to take a hard look at the facts by not requiring the submission of complete documents after repeatedly being informed of the spoliated documents? [Pet. Br. at 250].

5. The variances challenged by Petitioners on appeal provide only one benefit to the Congregation: money. Without these variances, the only hardship suffered by the Congregation is loss of funding to subsidize its wealthy members in order to construct a community center for use by these same members. To emphasize again, these variances are only about money, and money, not for the disadvantaged, but for the most advantaged. The Congregation is most influential and prestigious with wealthy members. Prominent real estate developers and allies of Mayor Bloomberg such as Jack Rudin are members, and even the members of the family of the current Corporation counsel are past and/or current members.

6. In order to justify the variances the BSA needed to make the incredible finding that a conforming building on this perfect development site would be unable to yield a reasonable return. Because this perfectly rectangular, 6400 square foot site just 100 feet from Central Park has no physical impairments of any type whatsoever, the lesson here is that no site subject to contextual zoning would be able to earn a reasonable return, thus consigning contextual zoning to the dustbin. The BSA could only find that a reasonable return could not be obtained by not considering an as-of-right development on the entire site, in direct conflict with precedent as well as common sense, and then by engaging in the most irrational act of using a site value - not of the development site but of another site - and then to conceal what the BSA

was accepting in its decision. This behavior of the BSA is not credible but irrational and shocking.

7. Furthermore, since the BSA and Supreme Court decisions are lengthy, the summary affirmation by the Appellate Division of the error-filled BSA and Supreme Court decisions wreaks havoc upon the New York City scheme of zoning and landmark regulation as discussed below. As just one error, the BSA was clear that its decision — with the affirmation of the Supreme Court — was in essence a transfer of air rights from the landmarked Parsonage to the 6400 square foot development site. Amazingly, the summary affirmation by the Appellate Division — without discussion — has now authorized the BSA to consider landmarking as a physical condition hardship where no such statutory authority is accorded the BSA to do so.

The BSA decision states at paragraph 120:

> WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of available development rights from a landmark building within the lot on which it is located or to an adjacent lot.

Because the BSA decision at paragraph 120 is so explicit that the BSA was transferring landmarked air rights in the section of the BSA decision devoted to the condominium physical condition finding, the Appellate Division by its summary decision has conferred on the BSA jurisdiction where none exists. Clearly, the Appellate Division decision in the future will be read together with the BSA decision it affirmed.

8. The Appellate Division was also notably incorrect in asserting that the "BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." The BSA deliberately avoided most of the issues raised again by Petitioners in the appeal. There is no discussion in the BSA decision, for example, of the erroneous use by the Congregation's consultant of the site value of 21,000 square feet of undeveloped air rights over the parsonage in calculating the site value of the 6700 square feet of the two as-of-right

condominium floors. Critically, the BSA did not even acknowledge in its decision it reliance upon a bifurcated analysis. With respect, the Appellate Division should again compare the Brief and Reply against the BSA decision and revise its decision accordingly.

9. Similarly, the Appellate Division decision, by allowing the BSA to analyze the feasibility of only a part of the development site, and not the entire site, — the so-called bifurcated approach — is in direct conflict with extensive precedent. Pet. Br. at 54-5.

10. In affirming the Supreme Court decision sanctioning the bifurcated approach, the Appellate Division has reversed precedent. If the Appellate Division supports the bifurcated analysis of mixed-use project proposed by non-profits without an analysis of the full income potential of the development site, then the Court should state so clearly, and indicate why the precedent cited by Petitioners is inapplicable or distinguishable.

11. The Appellate Division also misapprehends the facts — it states incorrectly that the "BSA concluded that the Congregation had shown its entitlement to the requested *variance*." This is significantly inaccurate for the BSA granted not one, but seven variances; on appeal only four variances relating only to the luxury condominium were challenged by Petitioners. Significantly, § 72-21 requires that the five conditions be met for each variance - this requires not a conflated analysis of all the variances, but a discrete analysis of each variance and application of each of the five conditions to each variance. As to each one of the condominium variances, the BSA needed to specifically find that, because of the "physical conditions" the BSA asserts to exist, 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." § 72–21(b). The statute provides that this finding is to be made as to each of the variances granted — a global finding is not sufficient.

A. The Analysis of Reasonable Return for an As-Of-Right Building

12. The Appellate Division overlooked the BSA's failure to identify the specific

reasonable return analysis upon which the BSA's reasonable return finding was based, and also the Appellate Division itself did not clarify which reasonable return analysis it believed constituted the substantial evidence claimed to support the finding. The Appellate Division states that "[the] BSA rationally concluded that due to the unique physical conditions, the Congregation could not realize a reasonable return from an as-of-right building." While the record contains a dizzying array of analyses submitted by the Congregation's expert, the Appellate Division does not indicate which as-of right building analysis it is relying upon. If the Appellate Division cannot identify the exact analysis upon which the BSA relief is based, then it would seem that the Appellate Division cannot rationally conclude that substantial evidence supports the § 72–21(b) finding.

13. The responsive papers of the City narrowed down the possible analyses upon which the City relied to these two analyses: (i) the December 2007 seven-floor building (the Scheme C), which was not updated and was not all-residential, and (ii) the July 2008 so-called bifurcated approach analyzing only two of the potential seven floors of space (the Scheme A.) The Appellate Division overlooked the fact that neither of these analyses meets the standards of law and precedent. *See* cases cited at Pet. Br. at 54–5.

(1) The BSA Did not Consider an All Income Producing As-Of-Right Building

14. If the Appellate Division believed that the BSA relied upon the December 2007 analysis, then the Appellate Division overlooked the fact that the Congregation's expert admitted that the December, 2007 example was not an all-income producing building and did not follow the precedent requiring that in a variance proceeding, the dollars and cents analysis must be of the entire site. Thus, the Appellate Division decision would conflict with settled law. Moreover, the Appellate Division overlooked the fact that even this analysis yielded a rate of return that exceeded that the return the Congregation's expert opined was reasonable. At the

same time, the Appellate Division was holding that it was appropriate for the BSA to rely upon the opinion of the same expert. Thus, this analysis cannot be the analysis that is the substantial evidence supporting the § 72–21(b) finding.

15. Respondents do not dispute that the Congregation did not present an all–income-producing analysis. See Pet. Br. at 39. Perhaps the Appellate Division overlooked the unequivocal statement by the Congregation's expert accompanying his December, 2007 report cited at Pet. Br. at 39:

> "The new development consists of a ground floor residential and synagogue lobby and core, and floors 2-7 would be for sale condominium units."[A-2794].

An all-residential development of the nature typical in the neighborhood would have had condominiums and professional offices on floors 1–7 and would have utilized the value of the two basements for professional offices and other permitted uses.

16. Thus, the Appellate Division should not have relied upon the December 2007 analysis; moreover, because the BSA did not require the updating of this analysis in July 2008, it seems that the BSA was not relying upon it but only upon the analysis of the two floors. This failure to present an analysis of an as-of-right building occupying the entire development site was admitted by the Congregation's consultant; further, at oral argument Respondents did not dispute the fact of this failure to present such an analysis.

17. Petitioners cited the extensive precedent requiring analysis of the entire site. The Supreme Court ignored the cited precedent. Respondents did not even attempt to distinguish the precedent, ignoring the issue altogether. Then, the Appellate Division summarily dismissed the issue as having no merit without discussing the precedent to the contrary.

18. Even more important, the as-of-right analyses were addressed on page 1 of Petitioners' Reply and were the only issues argued by Petitioners during oral argument, yet the Appellate Division overlooked the issue in its decision.

19. And, if the Appellate Division was relying upon the December 2007 analysis, it overlooked the undisputed fact the return for this scheme was 6.77% return yet the Congregation's expert opined specifically that 6.55% was an adequate return. Oddly, the Appellate Division stated that the BSA was relying upon the expert opinion, but apparently, the BSA was not, for it then ignored this specific opinion of the Congregation's expert.

(2) The Bifurcated Analysis of Two Floor As-Of-Right Building Was Not Considered and the BSA Did Not Use the Site Value for the Two Floors

20. The second possible analysis which the Appellate Division may have relied up as the substantial evidence is the so-called bifurcated analysis of the two floors of development rights consisting of 7,494 square feet in total, atop the community space. The applicant was required to provided a dollars and cents analysis of the development site - the upper two floors of 7494 square feet. The Congregation did not do this — rather, as admitted by the Congregation's expert, that expert used as a starting point in the financial analysis the value of 19,755 square feet of undeveloped space over the adjoining parsonage, not the value of the two floors of the development site. The Appellate Division apparently overlooked the fact that the expert and the BSA did not use the value of the as-of-right site being considered in the analysis, but a wholly irrational and arbitrarily different site. It is undisputed that a conforming two floors of condominiums would only contain 7,494 square feet, not 19,755. If the Appellate Division did not overlook this fact, then the Appellate Division overlooked the fact that there was no rational explanation provided by the BSA or the expert or by the Respondents' papers or oral argument as to why a different site was used for valuation or why 7,494 was not used as the size of the site.

21. It is clear that there was never an analysis conducted of the two-floor development site using the value of the site under consideration, since the value used was of a separate site nearly three times larger. These facts are completely undisputed; it is apparent that

the BSA was too embarrassed to include these facts in its decision - as it should have been. Had the BSA done so, every zoning practitioner and economist would have ridiculed them. So, the BSA just hid what they did so as not to be ridiculed and perhaps to hope that future variance applicants may not attempt the same trick. Yet the record is clear and the BSA has opened the door to irrationality.

22. The Appellate Division may have overlooked pages 3 and 4 of the Congregation's expert's report of May 13, 2008 [A-3818-9], quoted at page 35 of Petitioners brief. Here the expert readily admitted the use of the undeveloped area over the parsonage as a basis to determined the value of the 7,494 square feet of the two-floor site being developed:

> The available floor area on the Parsonage portion of the site (19,094 sq. ft.) exceeds the area needed (10,321 sq. ft.) to replace the non-complying area on the 70th Street lot. Therefore, in the current consideration, we have assumed that the 19,755 sq. ft. could be achieved by utilizing the as of right buildable floor area from the parsonage portion of the site. Utilizing the comparable sales value of $625/sq. ft. determined by the comparable sales analysis described above, the acquisition cost is 19,755 sq. X $625/sq. ft., equal to the amount of $12,347,000.

Without question, rather than value the 7,594 square feet available on the two as-of-right floors, the expert contrived to inflate this value to 19,755 square feet - by using space from above the parsonage. But the only reasonable return computation is to use the value of the space as-of-right as the starting value, and, the expert clearly did not do this.

23. That the value of the two floors of development rights was not used in the analysis was not disputed by respondents in their responsive papers or at oral argument (the Petitioners having devoted all of their argument time to the issues of the as-of-right analyses) and the Appellate Division lumped this issue into a summary dismissal. It is thus undisputed that the BSA did not consider a dollar and cents analysis of the development site but of something different. Under any rational world-view, the reliance upon this analysis by the BSA was wholly irrational.

24. Thus the Appellate Division was incorrect in its assumption that there was any rational conclusion by the BSA that the Congregation could not realize a reasonable return from the development site. This issue was fully briefed as Petitioners' primary issue and fully discussed at oral argument; it was ignored by Respondents in their responsive papers and not refuted at oral argument. Despite the assertion of the Appellate Division, the BSA in its decision did not discuss it. The Appellate Division itself ignored the issue except for its omnibus statement that "We have considered petitioners' remaining arguments and find them without merit."

25. Even if the bifurcated analysis had been conducted using rational starting facts, it still remains clear, as discussed above, that New York law would not accept a valuation of only part of the as-of-right space available for construction.

(3) The Actual Acquisition Price of the Site Was Not Considered

26. The Appellate Division also apparently overlooked the fact that in neither analysis did the BSA consider the actual acquisition price of the site — there are no analyses at all of the return on investment using the actual acquisition price of the site. (*See* cases cited Pet. Br. at 58, Pet. Reply at 15). No one can show such an analysis using the actual acquisition price — the Respondents refer to no analysis using the original acquisition price. The Respondents cannot even provide a dollars and cents value of the original acquisition price. Indeed, the BSA ignored the issue, and thus the Appellate Division incorrectly asserts that " BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." The Supreme Court asserted falsely that the actual acquisition price was submitted, but neither that Court, nor the Respondents, nor the Appellate Division have been able to state what that figure is — and, again, it is undisputed that no analysis was done using the actual number. Indeed, the Appellate Division omnibus "no–merit" denial avoids addressing the New York precedent to the contrary.

(4) No Substantial Evidence of a Relevant Reasonable Return Analysis to Support the §72–21(b) Finding

27. The Appellate Division asserts that there was substantial evidence in the record to support the finding that a reasonable return could not be earned. It is respectfully requested that on rehearing, the Appellate Division identify with specificity the exact analysis that it asserts constitutes the substantial evidence of an analysis of an as–of–right building. If the Appellate Division relies upon the July 2008 bifurcated analysis, then it needs to explain why it is rational to use a site value of a different site and to explain how an analysis of only a portion of the site is consistent with the extensive jurisprudence stating that the entire property is to be analyzed.

B. No Physical Condition as Defined in 72–21(a).

28. The Appellate Division decision overlooks the exact language of § 72–21(a) of the Zoning Resolution as to the nature of the required physical condition: "physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions." *See* cases cited at Pet. Br. at 59.

29. The Appellate Division, citing *Galvin*, asserted that:

> "The location of the zoning district boundary, along with other factors, including the Congregation's need to preserve the existing synagogue, provides a rational basis for BSA's finding of unique physical conditions." and then cites Galvin."

In so stating, the Appellate Division cites no physical conditions of the type enumerated in the statute, and gives no hint of what are the "other factors" upon which the Appellate Division relies. The record is silent as to why variances for construction by the Congregation of the extra floors of the condominiums and the elimination of setback are required to "preserve the existing synagogue." Perhaps the Congregation could argue that somehow variances were required for the lower floors to somehow preserve the Synagogue adjoining the lower floors, but there is no relationship between the condominium floors and the Synagogue. So this would have been a nonsensical finding not supported by any evidence had the BSA indeed made such a

finding, which it did not do.

30. *Galvin* follows the explicit requirement of 72–21(a) that there be a unique physical condition referring to the "irregular" shape:

> "The record supports the finding that the location of the zoning lot within two different zoning districts, as well as the irregular shape and small size of the C1–9 portion of the zoning lot constitute such "unique physical conditions" which allow the granting of a variance."

31. The Appellate Division overlooked not only the clear language of the statute but the consistent interpretation of the very case it cites which refers to the irregular shaped physical condition. Nothing of that sort of physical condition exists here, and the Appellate Division — without explanation — does not follow the direction of *Galvin* or the statute.

(1) The Other "Conditions" Relied Upon by the BSA

32. Moreover, the Appellate Division misstates the findings of the BSA by alleging that the BSA made a finding based upon "the need to preserve the existing synagogue." The Appellate Division cannot put words into the mouth of the BSA — the BSA in its paragraph 122 specifies no physical conditions and does not refer to "the need to preserve the existing synagogue" as a physical condition. Instead the BSA relies upon programmatic needs as a physical condition, and also expressly relies upon its self-created powers to transfer air rights of a landmarked building to another part of the zoning site.

33. The statute does not just state that there must be a physical condition, but that the variance must somehow be related to the specific hardship.

34. Upon reargument, it is respectfully requested that the Appellate Division identify any finding by the BSA allegedly stating that the "need to preserve the existing synagogue" was a physical condition and moreover any explanation of how in any way this "need" was related to the construction of the luxury condominiums on the upper floors which had no physical connection or relationship to the Synagogue.

(2) Programmatic Needs Are Not a Physical Condition and Not Related to the Condominium Variances.

35. As to the four variances for the luxury condominiums, the BSA does not even make the effort to draw the connection between the Congregation's claimed programmatic needs and the variances requested. The four condominium variances do not resolve or affect the Congregation's programmatic needs in any way whatsoever. The BSA's decision does not even attempt to rationalize the use of programmatic need as a basis for the physical condition. The only relationship between programmatic needs and the condominium variances is that the money provided by the condominium variances makes it easier on the pocketbooks of the well–off Congregation to fund the community house. This indeed was the express argument of the Congregation, which the BSA had rejected.

(3) The BSA's Improper Reliance upon Landmarking as a Physical Condition Hardship

36. The second issue is the express reliance by the BSA on the landmarked status of the Synagogue, at paragraph 120:

> WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of available development rights from a landmark building within the lot on which it is located or to an adjacent lot ..

37. Unmistakably the Board here and elsewhere uses landmarking as a hardship and a factor justifying the condominium variances. The City admits that the Board took the landmarking hardship into account under its (a) finding.[3] But, the Appellate Division seems to disagree with the City Respondents, and ignores the BSA's express reliance upon the landmarking hardship.

38. As demonstrated clearly the BSA has no power to afford relief from landmarking

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

hardships, for that power resides solely in the hands of the City Planning Department, with some assistance from the Landmarks Preservation Commission. What the BSA should have added to this paragraph is the following "but all such provisions of the Zoning Resolution require action by the Department of City Planning, and the BSA is provided no authority under the Zoning Resolution to consider landmarking hardships in a variance proceeding for that would trample the powers expressly delegated to the Department of City Planning." This issue was clearly raised by Petitioners, but, despite the assertion of the Appellate Division, it was ignored by the BSA, and equally ignored by the Appellate Division in its omnibus dismissive statement.

39. Moreover, the BSA, in effectively transferring air rights from the Parsonage to the development site, completely ignored the requirements of the Zoning Resolution to restrict development of the air rights being transferred. Justice Lobis agreed, stating that: "There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage." The Supreme Court did not appreciate that the BSA had completely subverted the landmarking hardship relief provisions in its evident desire to satisfy the Congregation. What the BSA did is absolutely outrageous; the Appellate Division's sanctioning this subversion of the Zoning Resolution is unfortunate as well.

(4) The assertion that the split zoning lot is a physical condition hardship is irrelevant because ZR § 23–711 prevents the Congregation from building a tower on the R10A sliver portion of the lot.

40. The Appellate Division erroneously assumed that the Congregation is unable to construct a building exceeding 75 feet in height on the R10A 17–foot wide sliver portion of the development site. This section of the lot is too narrow to allow the Congregation to construct a sliver tower in that section up to the 185 feet allowed by R10A zoning. So, apparently the Appellate Division reasoned that the Congregation suffered a hardship as to the entire development site because a tall building could not be built on the sliver, and that this hardship

was not a merely just a hardship relating to the zoning, but a physical condition. (Of course, even without a tower on the sliver, the Congregation could build a completely useful and profitable building on this highly desirable perfect site.)

41. But, the Appellate Division overlooked the fact that ZR § 23–711, is the overriding factor in limiting a tall building on the R10A sliver. Pet. Br. at 16, 19, and 44. Pet. Reply at 5 and 22-3. That provision requires a 40–foot separation between the Synagogue structure and the upper floors of any residential tower on both the R10A and the R8B portion of the development site. The Appellate Division overlooked the fact that all parties, the Congregation's expert architect, the BSA, and the DOB agreed that the 40–foot separation was required. Thus the split zoning lot is wholly irrelevant - the limiting factor is ZR § 23–711.

42. Then mysteriously, the Congregation "persuaded" the DOB under a shroud of secrecy not to object to the Congregation's clear failure to comply with ZR § 23–711 — the Eighth Objection. The BSA refused to discuss this requirement of ZR § 23–711, merely stating — completely untruthfully — that there was a change in the plans submitted to the DOB and because of that the Eighth Objection no longer applied. However, this is completely untrue for, among other things, the Congregation was merely applying for variances for the same building with the same envelope for which the LPC issued a Certificate of Appropriateness. The BSA statement at footnote 1 to its decision that modifications to the plans were made by the Congregation and resulted in the elimination of the eighth objection is completely untrue and the BSA statement was known by the BSA to be untrue when made. Further, despite the belief of the Appellate Division that the BSA had addressed the issue of ZR § 23–711, it did not, avoided the issue, and indeed made a materially untrue statement to cover up its refusal to take a hard look.

43. There is no evidence, let alone substantial evidence, to support that material statement, and the BSA and the Congregation in three years of litigation have yet to identify the

modifications that justified removal of the 40-foot separation Eighth Objection. The BSA then approved a building knowing that it violated the zoning regulation so that is could use the weak argument that the split zoning lot was a physical condition. For this reason, the split zoning lot cannot be considered the hardship causing problems for the Congregation.

C. Application of § 72–21(b) to Non–Profits Engaged in Income Production Activities

44. The most grievous damage done by the Appellate Division's decision is to suggest that the § 72–21(b) may not be applicable to non–profits engaged in the construction of luxury condominiums and would not be required to show that the non–profit could not earn a reasonable return, challenging the explicit decision of the BSA to the contrary in paragraphs 124–126 of its decision. This issue was not properly before the Court, as admitted by counsel for the Respondent Congregation at oral argument for the simple reason that the Congregation did not cross–appeal, and, having only raised the argument in its responsive papers, prevented the Corporation Counsel from defending the position of the BSA.

45. The Appellate Division's recognition of this argument is simply toxic to zoning regulation in New York City, particularly because of the extensive ownership of land in New York City by all sorts of non–profits, from churches to private schools. Indeed, many non–profits are not even 501(c)(3) organizations or charitable organizations registered with the state, but merely entities that have decided not to have shareholders and simply pay their profits out as salaries.

46. The suggestion by the Appellate Division invites real estate developers, such as Congregation member Jack Rudin, to find any one of the innumerable "non–profits" in New York City to partner with and then circumvent zoning regulation. Many of the creative interpretations of the zoning resolution adopted by the BSA and seemingly approved here by the Appellate Division are at odds with the policies supporting zoning. Yet, clearly the entire policy

of New York state law requiring reasonable return computations in variance proceedings is completely ignored.

D. The Minimum Variance Condition

47. The BSA did not taken a "hard look" at the whether the minimum variance condition would be satisfied by a building with a front courtyard which would not block the legal windows in the adjoining building, including windows in the apartments owned by Petitioner Lepow. (Reply, p. 18). *Kahn v. Pasknik*, 90 N.Y.2d 569 (1997). The BSA did not make a reasoned elaboration of the basis for its determination, but avoided reasoned determination by not even attempting to analyze the impact on return of such a small front courtyard, despite specific insistent requests of opponents. *Gernatt Asphalt v. Sardinia*, 86 N.Y. 2d 668 (1996). Instead, the BSA, acting with intentional blindness, took no look at all in making the minimum variance finding.

48. As shown in Petitioners' appeal papers [Reply at 18], a courtyard would have only minimally diminished the 10.93% return and the coffers of the Congregation, which 10.93% return would have still been far higher than the 6.55% return which the Congregation's expert opined was sufficient. A front courtyard would have diminished the condominium space by a mere 771 square feet, barely affecting the profitability of the condominiums. In the litany of its proposals the Congregation would not provide this alternative, and the BSA deliberately refused to request that the alternative be provided. [Pet. Reply at 18; Pet. Br. at 65]. The summary affirmation on this point by the Appellate Division merely ratified the intentional blindness displayed by the BSA. Moreover, the Appellate Division was incorrect in stating that "The BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." To the contrary, the BSA coyly avoided reference to the blocked front windows and was completely silent as to the possibility of a front courtyard. Thus, the BSA put on blinders and deliberately refused to take a hard look at the claim of the Congregation that the variances

requested were the minimum required.

49. The deliberate blindness by the BSA is evidence of bad faith. (Reply at p. 18, n. 71.)

E. The Appellate Division Sanctions Improper Behavior

50. The Appellate Division seemed to be completely oblivious to the improper behavior of Respondents and in it "no merits" ruling, has now approved the following behavior:

- The Appellate Division has approved a wholly improper *ex parte* meeting between the BSA members and applicant discussing the exact application to be submitted and reviewed by the BSA and then refusing to disclose what transpired at the meeting. (Pet. Brief at 14, Pet. Reply at 23). Because this private meeting considered the same project and design to be submitted to the BSA a few weeks later (a requirement since the Congregation was required to submit the project as approved by the LPC), the precedent set by the Court is that the Chair and the Vice Chair of the BSA may have meetings with an applicant, exclude the public, not keep a record of the meeting, or if they do, conceal that record from the public.
- The Appellate Division has approved the submission of false spoliated material financial data by the applicant's expert, and the BSA turning a blind eye toward such falsity. (Reply, Page 16.)

F. Conclusion

51. Not only does the Appellate Division decision wreak havoc on land use regulation and question long–standing jurisprudence, but also its unquestioning affirmance of the ambiguous and unsupportable BSA decision merely provides fodder for political and other corruption at this much–criticized agency. We do not suggest that there were any payoffs

involved in this particular matter, but the unhappy history of this agency is part of the public record. This unqualified rubber–stamping of whatever the BSA does is problematic — the record of this matter contains far too many suggestions of bad faith, failure to adhere to BSA regulations, vague findings and deliberate blindness to just automatically affirm the BSA's actions herein. Rehearing is in order, as well as appeal to the Court of Appeals.

Attachments:

Appellate Division Decision
Supreme Court Decision
BSA Decision

Dated: July 22, 2011
New York, New York

ALAN D. SUGARMAN
Law Offices of Alan D. Sugarman
Attorneys for Petitioners–Appellants
Kettaneh & Lepow
17 West 70th Street Suite 4
New York, NY 10023
212–873–1371
sugarman@sugarlaw.com

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

New York Supreme Court
APPELLATE DIVISION : FIRST DEPARTMENT

Nizam Peter Kettaneh, et al.,

Petitioners-Appellants,

-against-

Board of Standards and Appeals of the City of New York, et al.,

Respondents-Respondents.

- - - - - - - -

Landmark West! Inc., et al.,

Petitioners-Appellants,

-against-

Board of Standards and Appeals of the City of New York, et al.,

Respondents-Respondents,

Hon. Andrew Cuomo, etc.,

Respondent.

Appellate Division Order and Notice of Entry

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Respondents-Appellees
100 Church Street
New York, N.Y. 10007

Due and timely service of a copy of the within Order and Notice of Entry is hereby admitted.

New York, N.Y. ....., *2011* .

..... *Esq.*

Attorney for.....

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on the 23rd day of June, 2011.

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Respondents-Appellees
100 Church Street
New York, New York 10007
Tel: (212) 788-1070

By: _____
Ronald E. Sternberg
Assistant Corporation Counsel

To: Law Offices of Alan D. Sugarman
Attorney for Petitioners-Appellants
17 West 70th Street, Suite 4
New York, NY 10023
(212) 873-1371

Marcus Rosenberg & Diamond LLP
Attorneys for Petitioners-Appellants
488 Madison Avenue, 17th floor
New York, NY 10022
(212) 755-7500

Dated: June 30, 2011

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Richter, JJ.

4886-
4887 Index 113227/08

Nizam Peter Kettaneh, et al.,
Petitioners-Appellants,

-against-

Board of Standards and Appeals of
the City of New York, et al.,
Respondents-Respondents.

- - - - -

Landmark West! Inc., et al.,
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Board of Standards and Appeals of
the City of New York, et al.,
Respondents-Respondents,

Hon. Andrew Cuomo, etc.,
Respondent.

Law Offices of Alan D. Sugarman, New York (Alan D. Sugarman of counsel), for Nizam Peter Kettaneh and Howard Lepow, appellants.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for Landmark West! Inc., 91 Central Park West Corporation and Thomas Hansen, appellants.

Jeffrey D. Friedlander, Assistant Corporation Counsel, New York (Ronald E. Sternberg of counsel), for municipal respondents.

Proskauer Rose LLP, New York (Claude M. Millman of counsel), for Congregation Shearith Israel, respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan Lobis, J.), entered July 24, 2009, denying and

dismissing the petition by Kettaneh and Lepow (the Kettaneh petitioners) to annul the determination of respondent Board of Standards and Appeals of the City of New York (BSA), dated August 26, 2008, and confirming the determination, unanimously affirmed, without costs. Order and judgment (one paper), same court and Justice, entered October 6, 2009, denying and dismissing the petition by Landmark West! Inc., 91 Central Park West Corporation and Thomas Hansen (the Landmark petitioners) to annul the aforesaid determination, and confirming the determination, unanimously affirmed, without costs.

In these article 78 proceedings, consolidated on appeal, petitioners challenge a zoning variance granted by BSA to respondent Congregation Shearith Israel (the Congregation), a not-for-profit religious institution. The subject zoning lot is located on Manhattan's Upper West Side and is currently occupied by the Congregation's landmarked synagogue, a connected parsonage house and a community house. The Congregation plans to demolish the community house and replace it with a nine-story community facility/residential building. The bottom four floors of the new building would be utilized for community purposes including a lobby/reception space for the synagogue, a toddler program, adult education and Hebrew school classes, a caretaker's unit and a

Jewish day school; the upper five stories would be occupied by residential market-rate condominium units.

Because the proposed building does not comply with zoning requirements, the Congregation sought a variance from BSA. The Congregation asserted that it needed a new facility so it could better accommodate religious and educational programs for its growing membership. BSA held a series of public hearings at which both proponents and opponents of the variance application testified and made written submissions. In a resolution adopted August 26, 2008, BSA concluded that the Congregation had shown its entitlement to the requested variance. BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing. Petitioners then brought the instant proceedings challenging BSA's resolution. In decisions rendered July 24, 2009 and October 6, 2009, Supreme Court confirmed BSA's determination, finding that it was rationally based. We now affirm.

It is well settled that municipal zoning boards have wide discretion in considering applications for variances, and judicial review is limited to determining whether the board's action was illegal, arbitrary or an abuse of discretion (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]; *Matter of SoHo*

Alliance v New York City Bd. of Stds. & Appeals, 95 NY2d 437 [2000]). Thus, a determination by a zoning board should be upheld if it has a rational basis and is supported by substantial evidence (*Matter of Ifrah* at 308). In reviewing such determinations, "courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (*Matter of Sasso v Osgood*, 86 NY2d 374, 385 n 2 [1995]).

"In order to issue the variances here, the BSA was required [under § 72-21 of the New York City Zoning Resolution] to find that the proposed development met five specific requirements: that (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" (*Matter of SoHo Alliance*, 95 NY2d at 440; *see* New York City Zoning Resolution § 72-21). "[I]n questions relating to its expertise,

the BSA's interpretation of the [Zoning Resolution'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" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419 [1996] [citation and internal quotation marks omitted]).

We conclude that BSA's finding that the proposed building satisfies each of the five criteria for a variance set forth in § 72-21 has a rational basis and is supported by substantial evidence (*see Matter of SoHo Alliance*, 95 NY2d at 440). BSA rationally found that there are "unique physical conditions" peculiar to and inherent in the zoning lot such that strict compliance with the zoning requirements would impose "practical difficulties or unnecessary hardship" (Zoning Resolution § 72-21[a]). Among the physical conditions BSA considered unique was that the zoning lot in question straddles two zoning districts: part of the lot is in the R10A zoning district and the remainder is in zoning district R8B, which has much stricter zoning requirements. BSA rationally concluded that the location of the zoning district boundary in the middle of the development site constrained an as-of-right development by imposing different

height and setback limitations on the two portions of the single zoning lot.

The location of the zoning district boundary, along with other factors, including the Congregation's need to preserve the existing synagogue, provides a rational basis for BSA's finding of unique physical conditions (see *Matter of Elliott v Galvin*, 33 NY2d 594, 596 [1973]). Although four nearby lots are also intersected by a zoning district boundary, it cannot be said that this condition is "common to the whole neighborhood" (*Matter of Vomero v City of New York*, 13 NY3d 840, 841 [2009] [citation and internal quotation marks omitted]; see also *Matter of Douglaston Civic Assn. v Klein*, 51 NY2d 963, 965 [1980] ["Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship"]). There is no merit to the contention that the requirement of unique physical conditions refers only to land and not buildings (*Matter of UOB Realty (USA) Ltd. v. Chin*, 291 AD2d 248 [2002], *lv denied* 98 NY2d 607 [2002]).

Section 72-21(b) of the Zoning Resolution requires a finding that due to the unique physical conditions, conforming uses would not "enable the owner to realize a reasonable return" from the

zoned property. This finding, however, is not required for the granting of a variance to a nonprofit organization (Zoning Resolution § 72-21[b]). Nevertheless, BSA determined that because the planned condominiums were unrelated to the Congregation's mission, the Congregation was required to establish its inability to obtain a reasonable return from the residential portion of the proposed building. BSA then found, based on expert submissions and its own analysis, that the Congregation made the requisite showing.

On appeal, the Congregation contends that as a nonprofit entity, it is exempt from the § 72-21(b) showing despite the fact that residential condominiums are a major part of its planned development. We need not reach this issue because BSA rationally concluded that due to the unique physical conditions, the Congregation could not realize a reasonable return from an as-of-right building. In making that finding, BSA reasonably relied upon "expert testimony submitted by the owners based upon significant documentation, including detailed economic analysis" (*Matter of SoHo Alliance*, 95 NY2d at 441). There was substantial evidence to support the remaining § 72-21 findings.

There is no merit to the Landmark petitioners' contention that BSA lacked jurisdiction to grant the variance here. Section 666(6)(a) of the New York City Charter gives BSA the power to hear and decide appeals from determinations made by the commissioner of buildings, or, if properly designated, a deputy commissioner or a borough superintendent of buildings. Here, the Landmark petitioners contend that the objections issued by the Department of Buildings (DOB) after review of the plans were not signed by any of these officials. However, any such failure is of no consequence because § 666(5) of the City Charter provides an independent basis for BSA's jurisdiction. Under that subdivision, BSA has the power to "determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to [§ 668 of the Charter]" (*see Matter of Highpoint Enters. v Board of Estimate of City of N.Y.*, 67 AD2d 914, 916 [1979], *affd* 47 NY2d 935 [1979]; *William Israel's Farm Coop. v Board of Stds. & Appeals of City of N.Y.*, 22 Misc 3d 1105[A] [2004], *appeal dismissed* 25 AD3d 517 [2006]). Since § 668 does not require a final determination executed by one of the designated officials, BSA properly entertained the instant

variance application.

We have considered petitioners' remaining arguments and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 23, 2011

CLERK

Order and Judgment Appealed From: Decision, Justice Joan B. Lobis, July 10, 2009, entered July 24, 2009, 2009 NY Slip Op 31548(U) (1 of 38)

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis PART 6

Index Number : 113227/2008
KETTANEH, NIZAM PETER
VS.
BOARD OF STANDARDS AND APPEALS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.
MOTION DATE 3/31/09
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of ~~Motion~~/ Order to Show Cause — Affidavits — Exhibits ...	1-27
Answering Affidavits — Exhibits	28-71; 72
Replying Affidavits	73-103

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/10/09

J.S.C.

FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

Index No. 113227/08

-against-

Decision, Order and Judgment

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

Respondents.

----------X

JOAN B. LOBIS, J.S.C.:

Nizam Peter Kettaneh and Howard Lepow bring this petition, pursuant to Article 78 of the C.P.L.R., seeking to annul and reverse the August 26, 2008 determination of the Board of Standards and Appeals of the City of New York and its chair and vice-chair, Meenakshi Srinivasan and Christopher Collins, respectively (collectively referred to as the "BSA" or the "Board"). The determination is set forth in Resolution 74-07-BZ (the "BSA Resolution"). The BSA Resolution approved the application of respondent Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel (the "Congregation"), a not-for-profit religious institution, for a variance for the property located at 8-10 West 70th Street in Manhattan (the "Property"), which is adjacent to the Congregation's sanctuary, located at 6 West 70th Street. The Congregation seeks to build a structure containing four floors of community space and five floors of luxury condominiums (the "proposed building" or the "Project"). The Board found that the Congregation had satisfied the criteria set forth in New York City Zoning Resolution § 72-21 for a variance. Respondents BSA and the Congregation oppose the petition.

The Property is located within the Upper West Side/Central Park West Historic District and is in a residential zoning district. Petitioner Kettaneh owns and resides in a townhouse located at 15 West 70th Street, which is opposite the Congregation's sanctuary. Petitioner Lepow resides at 6 East 79th Street. Mr. Lepow owns ten (10) cooperative apartments in a building located at 18 West 70th Street (the "West 70th Building"), which is the building adjoining the Property.

The Property is comprised of two tax lots—Block 1122, Lots 36 and 37—with a total lot area of 17,286 square feet. The lots constitute a single zoning lot because the tax lots have been in common ownership since 1984, which is the date of the adoption of the existing zoning district boundaries. The bulk of the site is in the R8B zoning district, known as contextual mid-block zoning, with height and setback limitations. The remainder of the Property is in the R10A zoning district, which has less restrictive zoning requirements. The zoning lot has 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage on Central Park West. Lot 36 consists of the synagogue building, an historic landmark, which was constructed in 1896. Adjacent to the south side of the synagogue, on Central Park West, is a townhouse known as the Parsonage, which was also constructed in 1896. The Parsonage is 75 feet tall and holds 27,760 square feet. Lot 37, which is on West 70th Street, just off Central Park West, is 64 feet by 100 feet. This lot is the combination of three residential house lots, once owned by the Congregation, but sold in 1896 to private owners for the construction of private residences, with the restriction that no structure would exceed the height of the Synagogue building itself. In 1949, two of these lots were conveyed back to the Congregation and in 1954, row houses were constructed on this portion of the Property, creating the Community House. The third lot was conveyed back to the Congregation in 1965. While there were three structures originally, in 1970, the building on the lot acquired in 1965 was

demolished, leaving a vacant lot. Presently, this vacant part of Lot 37 contains a trailer that is used for classrooms. The other part of the lot contains the four-story Community House, which totals 11,079 square feet, and occupies approximately 40% of the tax lot area; the remaining 60% is vacant. The Beit Rabban Day School, a private, nonsectarian Jewish day school that is not affiliated with the Congregation, is the primary user of the Community House, and pays rent to the Congregation.

The Application Process

In order to develop a property that has a non-conforming use or non-complying bulk, the applicant must submit an application to the Department of Buildings ("DOB"). After the DOB issues its denial of the non-conforming or non-complying proposal, the property owner may then apply to the BSA[1] for a variance. The BSA is required to hold hearings and comply with other statutory procedures. Specific findings must be made in the BSA determination to grant or deny a variance. (See below.) Each of the five criteria must be satisfied before a variance may be granted. If the BSA does not grant a variance, the property owner may only develop the property in conformance with the use and bulk regulations for the particular zoning district.

The Zoning Regulations as to the Granting or Denial of a Variance

In determining whether or not to grant a variance, Z.R. § 72-21 requires the BSA to make "each and every one" of five specific findings of fact, as follows: (1) that the subject property

[1] The BSA is empowered to hear, decide and determine whether to grant or deny requests to vary the zoning laws. New York City Charter (the "Charter") §§ 666(5), 668; Z.R. §§ 72-01(b) and 72-20 et seq. The BSA is comprised of five commissioners, who are appointed by the Mayor of the City of New York, each for a term of six years. Pursuant to § 659 of the Charter, at least one member must be a planner with professional qualifications; another member is required to be a licensed professional engineer; and, another member is required to be a registered architect. All three of these professionals must have at least ten years' experience.

has "unique physical conditions" which create "practical difficulties or unnecessary hardship in complying strictly" with the permissible zoning uses and that such practical difficulties are not due to the general conditions of the neighborhood; (2) that the physical conditions of the property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a reasonable return" from the property; (3) that the variance "will not alter the essential character of the neighborhood" or "substantially impair the appropriate use or development of adjacent property" and "will not be detrimental to the public welfare"; (4) that the "practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner"; and, (5) that the variance be "the minimum variance necessary to afford relief." The BSA is further required to set forth in its determination

> each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be supported by substantial evidence of other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board.

The Congregation's Application to the BSA

On or about March 27, 2007, the Manhattan Borough Commissioner of the DOB denied the application, citing eight objections.[2] After the application was revised, the DOB issued a second determination, which eliminated one of the prior objections. The DOB's second determination, issued on or about August 27, 2007, was the basis for the variance application.

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[2] Prior to this application, the Congregation submitted an application to the Landmarks Preservation Commission ("LPC"). As set forth at p. 29, infra, the LPC issued a Certificate of Appropriateness in March 2006.

On April 1, 2007, the Congregation submitted its variance application to the BSA. As a result of its growth in membership from 300 families when the synagogue first opened, to its present membership of 550 families, the Congregation asserted that it needed a new facility to accommodate its religious mission. In addition, the Congregation claimed that it needed to update the 110-year-old building to make it more easily handicapped accessible.

To this end, the plan seeks to demolish the existing Community House occupying tax lot 37, and replace it with a nine-story (including penthouse and cellar) mixed-use community facility/residential building. The use of the Property conforms with the zoning regulations (i.e., as-of-right), so no use waivers were requested; the variance request was with respect to non-complying bulk. The Congregation sought a waiver of certain regulations, since the proposed building does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear setback for the zoning district.[3] The proposed building will have a total floor area of 42,406 square feet, which is comprised of 20,054 square feet of community facility floor area and 22,352 square feet of residential floor area. The base height along West 70th Street is 95 feet, 1 inch, which is just over 35 feet higher than the maximum permitted height of 60 feet; the front setback is 12 feet, which is 3 feet short of the minimum permitted distance of 15 feet; the total height is 105 feet, 10 inches, which is just over 30 feet higher than the maximum permitted height; the rear yard is 20 feet for the second through fourth floors, which is equal to the required minimum; the rear

[3] "Lot coverage" is that portion of a zoning lot which, when viewed from above, is covered by a building."Rear yard" is that portion of the zoning lot which extends across the full width of the rear lot line and is required to be maintained as an open space. "Base height" is the maximum permitted height of the front wall of a building before any required setback. "Building height" is the total height of the building, measured from the curb level or base plane to the roof. A "setback" is the portion of a building that is set back above the base height before the total height of the building is achieved.

setback is 6 feet, 8 inches, which is more than 3 feet short of the minimum required distance of 10 feet; and, the interior lot coverage is 80%, which is 10% greater than the maximum permitted lot coverage of 70%.

In support of the application, the Congregation submitted a zoning analysis, a statement in support, an economic analysis, drawings, and photographs. The Congregation also submitted an Environmental Assessment Statement. An Economic Analysis Report, dated March 28, 2007 (the "March 2007 Report"), was submitted by the Congregation's consultant, Freeman/Frazier & Associates, Inc. ("Freeman/Frazier"). The March 2007 Report analyzed the feasibility of two alternatives for the development of the site— an as-of-right residential/community facility consisting of a six-story building, with condominium units on the fifth and sixth floors, and a proposed residential/community facility. The latter proposal would require a variance from the BSA, since the proposal called for an eight-story plus penthouse mixed-use building, with condominiums on floors five through eight, plus the penthouse.[4]

On or about June 15, 2007, the BSA issued a Notice of Objections to the variance application, to which Freeman/Frazier responded; the BSA issued a second set of objections on October 12, 2007, comprising twenty-two (22) objections, to which Freeman/Frazier also responded. The crux of the response related to the second prong of the required finding of fact, i.e., the

[4] Freeman/Frazier subsequently made revisions to the March 2007 Report, and submitted letters and/or reports dated September 6, 2007; October 24, 2007; December 21, 2007; January 30, 2008; March 11, 2008; April 1, 2008; May 13, 2008; June 17, 2008; and, July 8, 2008.

reasonable return analysis. Freeman/Frazier also provided a revised as-of-right development, since the prior as-of-right proposal actually violated the rear yard limitations and was not as-of-right. The revised proposal also reduced the floor-to-ceiling heights, which resulted in a seven-story building with a total of six residential units. Freeman/Frazier concluded that an as-of-right building would result in an annualized capital loss in the amount of $23,000, while the revised proposed development would yield an annualized return on total investment of 8.16%.

The Community Board 7 Land Use Committee ("CB7") held hearings on October 17 and November 19, 2007. A number of community residents and elected officials spoke in opposition. The Congregation pointed out that the design had changed slightly after the Congregation appeared before the Landmarks Preservation Commission ("LPC"), with respect to the decrease in size of the proposed building and certain elements of the façade.[5] CB7 expressed concern as to whether all of the residential space in the proposed building was really necessary to finance the Project and the Congregation's programmatic needs. The opposition raised this as a concern, and also questioned the Congregation's use of the Parsonage as rental property rather than as space for its programmatic needs; the excessive garbage that would pile up after events; excessive traffic from the school; and, the shadows that will result from the height of the new building. CB7 questioned the need for five condominiums; whether five condominiums was truly the minimum number necessary for a reasonable return; and, why a Congregation with a large number of wealthy members needed this manner of financing for its programmatic needs.

[5] At the time of the presentation to the LPC, the Congregation sought to construct a fourteen-story building.

The Congregation asserted that it was not required to satisfy the finding of a reasonable rate of return, and that it was optional for the BSA to make that finding. The Congregation stated that the Parsonage was not suitable for community facility use, in that there were too many building code violations for multi-purpose use, so that it is only suitable as a residence. CB7 rejected the variances for the condominiums, but approved the smaller, lower floor variances, essentially approving the horizontal variances but not the vertical variances. On December 4, 2007, the entire Community Board rejected all seven of the variances.

After notice by publication and mailing, the BSA held its first hearing on November 27, 2007. Representatives from the Congregation addressed the reasons for the proposed building, which included the need to accommodate the growth in membership and the need to make the building more handicapped accessible. The BSA asked the Congregation to consider only the value of the residential portion of the site in calculating the reasonable return, and eliminate the community facility from the site value.[6] By letter dated December 21, 2007, Freeman/Frazier submitted its revisions. Five development alternatives were set forth: (1) a revised as-of-right community facility/residential development, which is a revision to the proposal submitted in the March 2007 Report; (2) a lesser variance alternative as-of-right community facility/residential development, which is based on the proposal that was submitted in response to the Board's June 15, 2007 Notice of Objections; (3) a claimed as-of-right structure with tower development, which would consist of a tower with floors five through sixteen comprising thirteen residential units, but would have a smaller zoning floor area than the proposed development; (4) the proposed development, which

[6] The term "site value" is used interchangeably with the terms "acquisition cost" and "market value" of the Property.

consists of new construction of an eight-story building, plus penthouse; and, (5) an as-of-right residential development. Also, pursuant to the Board's request, the economic feasibility analysis was performed considering only the value of the residential portion of the site. The first three alternatives all resulted in annualized losses. The fourth proposal of the mixed use building with five condominiums provided an annualized return on total investment in the amount of 12.19%, while the fifth proposal provided an annualized return on total investment in the amount of 3.63%. Freeman/Frazier acknowledged its failure to respond to the opposition's concerns, including not valuing income from the school, Parsonage and basement/banquet space.

The public hearing continued on February 12, April 15, and June 24, 2008. Each date, testimony was presented by opponents to the Project and written submissions were prepared by both the Congregation and the opponents to the Project after each hearing. Freeman/Frazier's March 11, 2008 letter and report responds specifically to concerns raised at the February 12, 2008 hearing, and to the report of Martin Levine, of Metropolitan Valuation Services ("MVS"), the expert for the opposition. The BSA asked Freeman/Frazier to review the estimated property value of the residential development portion of the site, using the as-of-right zoning floor area determined by assuming the building lot to be a single split zoning lot, and to consider the financial feasibility of several new alternatives. Freeman/Frazier re-examined comparable sites for land prices, and examined alternatives such as increasing the courtyard space (which would decrease the sellable area on each floor), and reducing the height of the proposed building by one story. The revised proposals would provide an annualized return on total investment of 8.58% and 1.94%, respectively.

MVS submitted a report in which the principal complaint was with respect to the economic feasibility of the Project. MVS questioned Freeman/Frazier's land value of $750 per square foot of buildable area, claiming that this number was arrived at using "cherry picked" data. Rather, MVS argued that a land value of $500 per buildable square foot was a more probable indicator of the Property's market value. MVS also questioned the construction costs. At the April 15 hearing, the Board focused on the price per foot for development, the comparables that were used, and the programmatic needs of the Congregation. The Chair questioned the credibility of the site value, and questioned whether the current proposal before the Board really was the minimum variance required, which is the fifth required finding. The opposition questioned why the BSA was not scrutinizing the Congregation's financial statements to see what available resources it has, other than potential income from the sale of the condominiums. The BSA concluded the hearing by requesting that the Congregation address the issue of shadows and the implication of a larger building on the surrounding buildings. The BSA also requested clarification to demonstrate that the additional ten-foot encroachment is driven by the Congregation's programmatic needs.

Freeman/Frazier's May 13, 2008 response contained a revised proposal consisting of a building with eight floors and a penthouse, with a complying courtyard in the rear in order to continue providing light and air to three lot line windows in the West 70th Building. The courtyard would start at the sixth floor, which would reduce the size of floors six through eight, and the penthouse. A second revised proposal was the same as above, but eliminated the penthouse. A third alternative eliminated the eighth floor, but retained the penthouse, because the LPC believed the architectural character of the penthouse was an important design feature. The three proposals yielded an annualized return on total investment of 10.66%, 3.82%, and 0.93%, respectively. Although the

BSA specifically requested that the Congregation address the impact of shadows and the programmatic needs of the Congregation, these issues were not addressed.

MVS raised additional objections, to which Freeman/Frazier responded by noting that the same objections were set forth previously. A member of the opposition (petitioners' counsel herein) expressed concern about the practice of measuring return on investment, rather than a return based on equity. Freeman/Frazier responded that it is customary in a condominium development project to use return on investment (see pp. 23-24, infra), and also addressed other concerns raised by opponents to the Project.

At the June 24 hearing, a question arose concerning the failure to account for the terraces in the proposed pricing of the condominiums. The BSA also questioned how the efficiency ratio was calculated, the comparables that were used, and whether the comparables calculated square footage solely based on the interior of an apartment or whether the square footage also included common areas. Freeman/Frazier responded to issues raised at the June 24 hearing, MVS' June 23, 2008 report, and a letter from Mr. Sugarman. Freeman/Frazier's July 8 submission updated the prices for the condominium units, since they now had terraces on the fifth and sixth floors; the proposed apartment prices were still lower than in the March 2007 Report, since there is now less sellable square footage per floor than in the original plan. The additional value as a result of the terrace areas increased the annualized return on investment from 10.66% to 10.93%. The revisions to the as-of-right development resulted in an annualized capital loss of $4,569,000. Freeman/Frazier also responded to the question concerning the efficiency ratio, noting that the variations occurred as the sellable areas change, while the common areas remain the same size. The opponents continued

to question the methodology to determine the acquisition costs, and the decision to utilize a return on investment analysis, rather than a return based on equity. Freeman/Frazier responded by noting that the concerns were repetitive, or rejected the comments outright.

In a decision dated August 26, 2008, the BSA adopted unanimously, by a vote of 5-0, the Resolution granting the variance. The BSA Resolution approved the construction of a new building which will contain both community space and five luxury condominium apartments. The relevant portion of the Resolution provides that the BSA

> permit[s], on a site partially within an R8B district and partially within an R10A district within the Upper West Side/Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to Z.R. §§ 24-11, 77-24, 24-36, 23-66, and 23-633; on condition that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received May 13, 2008" - nineteen (19) sheets and "Received July 8, 2008" - one (1) sheet; and on further condition:
>
> **THAT** the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80. . .

Other conditions include, inter alia, that the Congregation obtain an updated Certificate of Appropriateness from the LPC prior to any building permit being issued by the DOB; that substantial construction be completed in accordance with Z.R. § 72-23; and, that the DOB ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction. The Resolution was filed on August 29, 2008. This Article 78 proceeding was commenced on September 29, 2008.

As approved, the proposed building includes mechanical space and a multi-function room on the sub-cellar level, with 360-person capacity[7] for a banquet hall for various life cycle events; a cellar level with separate dairy and meat kitchens and childcare space. The first floor consists of the synagogue lobby, small synagogue, rabbi's office, and library and archive space; the second floor contains toddler classrooms; the third floor contains Hebrew School classrooms and the Beit Rabban Day School; and, the fourth floor consists of a caretaker's apartment and adult education classrooms. The residential condominiums are on the fifth through eight and ninth (penthouse) floors. Portions of the ground through fourth floor contain elevators for the synagogue.

Petitioners' Allegations

Petitioners raise numerous objections to the BSA's determination. The primary claim is that there was no need for the zoning variance at all. Petitioners assert that the Congregation stated repeatedly during the course of the proceedings before the BSA that the purpose of the variances was to fund the Congregation's programmatic needs, through income from the condominiums. Petitioners argue that the Congregation failed to demonstrate financial need; indeed, petitioners assert that the historic Congregation can raise the necessary funds from its members. They also object to the BSA's failure to inquire of the Congregation as to the rent being paid by the Beit Rabban Day School; the rent being paid by the residential tenant of the six-bedroom luxury Parsonage residence, which is apparently rented to Lorin Maazel, the Musical Director of Lincoln Center, at a monthly rent of $19,000; and, income from the banquet facilities.

[7] During the November 19, 2007 CB7 public meeting, a representative of the Congregation stated that the capacity was 440 persons.

Petitioners further allege that a conforming as-of-right mixed-use building could be built, with two floors of luxury condominiums, with setbacks and height limitations of 75 feet, consistent with the brownstones on the block, or, a conforming all-residential building could be built that would allow for seven floors of condominiums, with two sub-basements. The proposed building will adversely affect the light and air in the courtyard that these apartments face. Two of the apartments owned by Mr. Lepow—apartments 7B and 8B—will be "bricked up" by the proposed building as a result of the variances. In a conforming, as-of-right structure, however, his apartments would not be bricked up. Similarly, the other units face a courtyard; in an as-of-right structure, there would be little, if any, adverse impact.

Petitioners allege that on November 8, 2006, before the application was filed, respondents Srinivasan and Collins held what petitioners describe as an "ex parte" meeting with the Congregation's lawyers and consultants at BSA headquarters without notifying the opponents of the project, and refused to provide information concerning what occurred at the meeting.

Finally, petitioners allege that because the Congregation did not exhaust its administrative remedies provided by §74-711, claiming that the Congregation failed to complete the review process before the LPC. Petitioners contend that the BSA should not have entertained the application, since the Congregation is asserting the same landmark hardships and economic need inherent in a § 74-711 application.

Article 78 Standard of Review

"'It is not the function of judicial review in an article 78 proceeding to weigh the facts and merits *de novo* and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis.'" Clancy-Cullen Storage Co., Inc. v. Board of the Elections in City of New York, 98 A.D.2d 635, 636 (1st Dep't 1983) (emphasis in original), quoting Kayfield Const. v. Morris, 15 A.D.2d 373, 378 (1st Dep't 1962). "[A]n agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable." In re Smith v. Donovan, 61 A.D.3d 505 (1st Dep't 2009), citing Seitttelman v. Sabol, 91 N.Y.2d 618, 625 (1998).

Moreover, there is a special deference given to determinations of zoning boards and other bodies. Khan v. Zoning Bd. of Appeals of Village of Irvington, 87 N.Y.2d 344, 351 (1996); Parsons v. Zoning Bd. Of Appeals, 4 A.D.3d 673, 674 (3d Dep't 2004). "Local zoning boards have broad discretion in considering applications for variances and interpretations of local zoning codes, and the scope of judicial review is limited to whether their action was arbitrary, capricious, illegal, or an abuse of discretion." Matter of Marino v. Town of Smithtown, 61 A.D.3d 761 (2d Dep't 2009), citing Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613 (2004); Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 62-63 (1st Dep't 2000). A determination is considered to be rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." Halperin v. City of New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005), lv. dismissed, 6 N.Y.3d 890, lv. denied, 7 N.Y.3d 708 (2006). Furthermore, "[w]hile religious institutions are not exempt from local zoning laws, 'greater flexibility is required in evaluating an application for a religious use than an

application for another use and every effort to accommodate the religious use must be made.'" Halperin, supra, at 773, citations omitted.[8] In challenging any zoning determination as arbitrary, "the burden of establishing such arbitrariness is imposed upon him who asserts it." Robert E. Kurzius, Inc. v. Incorporated Vil. of Upper Brookville, 51 N.Y.2d 338, 344 (1980), cert. denied, 450 U.S. 1042 (1981), quoting Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121 (1951).

The Five Factors

As set forth at pp. 3-4, supra, pursuant to Z.R. § 72-21, the BSA is required to examine five factors before granting a variance. Each of these findings is addressed below.

The First Finding - Unique Physical Conditions

Under § 72-21(a), there must be a finding that the property at issue has "unique physical conditions" which create practical difficulties or unnecessary hardship in complying strictly with the permissible zoning provisions, and that such practical difficulties are not the result of the general conditions of the neighborhood. The unique physical conditions must be "peculiar to and inherent in the particular zoning lot." The Congregation argued that the site's physical conditions created an unnecessary hardship in developing the site in compliance with the zoning regulations

[8] Of course, where the proposed use is solely or primarily for religious purposes, flexibility and greater deference must be accorded. Here, the variance is sought for a mixed use building. "Affiliation with or supervision by religious organizations does not, *per se*, transform institutions into religious ones. 'It is the proposed use of the land, not the religious nature of the organization, which must control.'" Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710, 711 (2d Dep't 1988), quoting Bright Horizon House v. Zoning Bd. of Appeals of Town of Henrietta, 121 Misc. 2d 703, 709 (Sup. Ct. Monroe Co. 1983). The record reflects that the BSA gave the Congregation deference with respect to the variance request for the community facility, but did not accord the Congregation deference to the extent that it was seeking a variance for the revenue-generating, residential portion of the Project.

with respect to lot coverage and yards. Were the Congregation required to comply with the 30 foot rear yard and lot coverage, it argued, the floor area of the community facility would be reduced by approximately 1,500 square feet, which would severely restrict the Congregation's programmatic needs. The Congregation argued that it needed to expand the lobby ancillary space; expand the toddler program; develop classroom space for the Hebrew school and adult education program; provide a residence for an onsite caretaker; and, provide classrooms for the Beit Rabban Day School.

The BSA separated its analysis of the first finding into two parts: the community facility portion of the Project and the residential portion of the Project. This separation was necessitated by the fact that the Congregation is not accorded the deference as a non-profit for the residential portion of the Project. With respect to the community facility portion of the Project, the BSA rejected the opposition's claim that the Congregation was required to establish a financial need for the project as a whole, since nothing in the zoning law requires a showing of financial need as a prerequisite for the granting of a variance. Rather, all that is required is that the existing zoning regulations impair its ability to meet its programmatic needs The BSA rejected petitioners' contentions that the Congregation should have sought to raise funds from its members instead of seeking the requested variances, stating that the wealth of the property owner is irrelevant to the hardship finding.

The BSA determined that, when considering the physical conditions together with the programmatic needs of the Congregation, denying the variance would constitute an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations." The BSA rejected petitioners' contention that the programmatic needs were too

speculative; that both the Beit Rabban Day School and the toddler program were not reasonably associated with the overall religious purpose of the Congregation; and, that the Congregation's programmatic needs could be satisfied within an as-of-right building. In response to the BSA's request, the Congregation submitted a detailed analysis of the programmatic needs on a space- and time-allocated basis, which demonstrated that daily simultaneous use of the majority of the space required waivers of the zoning regulations with respect to floor area. Because of the areas needed for an elevator and stairs, and the height limit of an as-of-right building due to the width of the Parsonage, an as-of-right building would gain little additional floor area. The BSA Resolution cites Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that it is inappropriate for a zoning board to second guess a non-profit organization with respect to the location in which to place its programs.

Turning to the residential portion of the Project, among the unique physical conditions of the site include the fact that the lot is divided by a zoning district boundary, with 73% of the lot in R10A and 27% of the lot in R8B. The total height limitation for R10A is 185 feet, with a maximum base height of 125 feet, while the R8B portion has a total height limit of 75 feet and a maximum base height of 60 feet. Applying the R8B restrictions, less than two full stories of residential floor area would be permitted above the four-story community use facility.

Petitioners argued that the lot was not unique, solely because of the presence of a zoning district boundary within the lot, pointing out that other properties owned by religious institutions and the Museum of Natural History in the areas bounded by Central Park West and Columbus Avenue, and by 59th Street and 110th Street, had the same zoning district boundaries.

The BSA noted that the presence of other lots with the same zoning district boundaries does not defeat the claim of "uniqueness;" rather, the parcel's conditions must be such that they are not generally applicable to other lots in the vicinity.

An applicant's claim of uniqueness necessarily requires a comparison between similarly situated lots in the neighborhood with those of the applicant's lot. Soho Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441 (2000). "Unique physical conditions" may include the idiosyncratic configuration of the lot (Soho Alliance, supra) or unique characteristics of the building itself. UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248, 249 (1st Dep't 2002). A unique consideration here is that a large portion of the lot is occupied by the landmark Synagogue; the BSA noted that the limitations on development on the Synagogue portion of the lot result in that portion being underdeveloped. Because of the landmark status, the Synagogue is permitted to use only 28,274 square feet for an as-of-right development, although it has approximately 116,752 square feet in developable floor area. The unique physical conditions, the BSA concluded, "when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations," which satisfied the requirement of subdivision (a) of the zoning regulations. This finding is sufficient to support the BSA's determination that the Property is unique.

The Second Finding - Inability to Earn a Reasonable Return

Second, the BSA must find that the physical conditions of the Property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a

reasonable return" from the property.[9] Failure to meet the burden of proof that an as-of-right building in conformity with the zoning requirements will not bring a reasonable return requires denial of the variance. Petitioners assert that the BSA failed to properly analyze the reasonable return of a conforming as-of-right building.

The Congregation argued initially that it did not even need to show a reasonable return, since the Congregation is a not-for-profit corporation. Section 72-21(b) sets forth that "this finding shall not be required for the granting of a variance to a non-profit organization." But, the BSA specifically requested that the Congregation submit reasonable return analysis, concluding that the exemption from this requirement did not apply when a non-profit was seeking variances for a total or partial for-profit building. Alternatively, the Congregation argued that even if the Congregation had to satisfy the requirement of the reasonable return analysis, the Congregation demonstrated that a conforming as-of-right structure would not result in a reasonable rate of return.

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[9] The term "reasonable return" is not defined. In its memorandum of law, the Board suggests that "reasonable return" does not mean "any sort of profit whatsoever," but rather a profit margin "substantial enough to actually spurt development." The rate of return for the proposed development, as approved by the BSA, is 10.93%. In SoHo Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441, a reasonable rate of return was found to be 9.9%. In Mt. Lyell Enterprises, Inc. v. DeRooy, 159 A.D.2d 1015, 1016 (4th Dep't 1990), an 11.76% rate of return after three years was found to be "not unreasonably low." But, in Ryan v. Miller, 164 A.D.2d 968 (4th Dep't 1990), a use variance was denied when a conforming use would still earn 5.7%, even though other conservative investments were earning 10-11% return at that time. The Appellate Division decision in SoHo Alliance flatly rejected any effort to determine that a specific percentage is reasonable as a matter of law: "[w]e are unaware of any hard and fast rule as to what constitutes a reasonable rate of return. Each case turns on facts that are dependent upon individualized circumstances." Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 69 (1st Dep't), aff'd, 95 N.Y.2d 437, 441 (2000).

Petitioners assert that although the BSA required the analysis to be performed, the BSA never explicitly addressed how the reasonable return analysis should be conducted, since there is no language in the statute as to how to consider a mixed-use profit and non-profit structure. Freeman/Frazier's March 2007 Report concluded that there is no return on investment provided by the as-of-right development. The first proposed development provided a 6.55% annualized return on total investment. Freeman/Frazier notes that this is at the low end of the range that typical investors would consider for an investment opportunity. The Congregation then submitted a study that analyzed an as-of-right community facility/residential building within an R8B envelope; an as-of-right building with a floor area ratio ("FAR") of 4.0;[10] a proposed building requiring a variance; and, a community facility and residential building that is smaller than the third proposal. In November 2007, the BSA asked the Congregation to revise the evaluation, which it did, by including an as-of-right community facility and residential tower using a modified site value. None of these analyses, other than the original proposed structure, resulted in a reasonable return.

The BSA asked the Congregation to submit additional revisions, after it was determined that the proposed tower on the R10A portion of the lot was contrary to Z.R. § 73-692, the "Sliver Law."[11] At the February 12, 2008 and April 15, 2008 hearings, the BSA questioned the Congregation's basis for the valuation of its development rights, and asked for a recalculation of the value of the site, together with a revised plan with a court to the rear of the building, above the fifth floor. Another revised plan was submitted, which assessed the financial feasibility of: the original proposed building, but with a complying court; an eight-story building with a complying court; and,

[10] The FAR permitted for district R8B is 4.0; the FAR for district R10A is 10.0.

[11] The Sliver Law applies to lots under 45 feet and limits the height of a building on such a lot to a height of 60 feet.

a seven-story building with a penthouse and complying court, using revised site values. Once again, only the original proposed building was shown to be financially feasible. The Board asked for further clarifications; in a July 8, 2008 response, Freeman/Frazier recalculated the value of the apartments with the addition of rear outdoor terraces, and revised the sale prices of two units. Again, the revised analysis that was submitted failed to demonstrate a reasonable return.

Petitioners assert that the BSA failed to adhere to its own guidelines because it did not require the Congregation to provide the original acquisition price of the Property. But, the BSA points out that this is not required, since it is contained in the general guidelines. In any event, the Congregation did submit the acquisition costs, which were provided in the deeds to the Property. Petitioners also assert that the Congregation never complied with the request to provide an analysis of an all-residential building, and instead, provided an analysis for a partially residential building, without including basement and sub-basement space. The methodology utilized by the Congregation's expert, petitioners contend, inflated the largest single cost component—the site value—in concluding that the Congregation could not obtain a reasonable return. Petitioners questioned the use of comparable sales prices based on property values from the period of mid-2006 to 2007, rather than more current sales prices, and questioned the methodology of calculating the financial return based on profits, rather than by calculating the projected return on equity. They also questioned the omission of income from the Beit Rabban Day School from the feasibility study. Finally, petitioners' biggest complaint was that the Congregation's expert did not utilize the return on equity analysis in determining the Project's rate of return.

Freeman/Frazier responded that it was more appropriate to use a return on profit model, which evaluated profit or loss on an unleveraged basis, to evaluate the feasability of the Project, rather than to evaluate the Project's return on equity on a leveraged basis. Freeman/Frazier argued that the methodology it used is typically used for condominium or home sale analyses, and is more appropriate for this Project, while the methodology petitioners wanted to use is typically used for income producing residential or commercial rental projects. Petitioners assert, in contrast, that not only do the BSA guidelines ask for an analysis on a leveraged basis, but that many reported decisions show that return on equity is the factor commonly used. Petitioners point out that Freeman/Frazier used the return on equity analysis in the project that was the subject of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 2006 WL 1547635, 1 (Sup. Ct. Kings Co. 2006), rev'd, 49 A.D.3d 749 (2d Dep't 2008). Petitioners contend that both the BSA and Freeman/Frazier were unable and unwilling to explain why a leveraged return on equity analysis was appropriate in the Red Hook project, but not for the Congregation's Project. What neither side points out is that the Red Hook project consisted of both condominiums and retail space; according to one decision, four of the six floors were condominiums, while the other two floors were retail space.[12] See, Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 11 Misc. 3d 1081(A), 2006 WL 1023901, 1 (Sup. Ct. Kings Co. 2006). This mixed-use of commercial rental and residential areas explains why Freeman/Frazier employed the return on equity analysis in the Red Hook case, while here, it used a return on profit model. It cannot be found to be arbitrary and capricious to use a return on profit model for that portion of the Project that consists solely of residential condominiums.

[12] The Board incorrectly refers to the Red Hook project as a conversion from a warehouse to luxury rental apartments. Petitioners simply refer to the Red Hook project as a residential building.

The other cases cited by petitioners that employed a return on equity analysis were requests for variances for conversions for commercial use. Kingsley v. Bennett, 185 A.D.2d 814 (2d Dep't 1992) (real estate office in a one- and two-family residential zoning district); Morrone v. Bennett, 164 A.D.2d 887 (2d Dep't 1990) (restaurant/bar with cabaret sought to expand its facility in a commercial district mapped within a residential district); Lo Guidice v. Wallace, 118 A.D.2d 913, 915 (3d Dep't 1986) (request to open an Italian restaurant in an area zoned as two-family residential). In contrast, a return on profit analysis was utilized in Cook v. Haynes, 63 A.D.2d 817 (4th Dep't 1978), which concerned a request by a landowner for a variance to build a residence on a lot that was zoned for both residential and agricultural purposes.

Here, the BSA agreed that the return on profit model, which evaluates profit or loss on an unleveraged basis, is the customary model for evaluating market-rate residential condominium development. Using the return on profit model, Freeman/Frazier concluded that the Congregation could not obtain a reasonable return from a conforming, as-of-right structure. Petitioners contend that Freeman/Frazier's reports used inconsistent terms, provided incomplete and unsigned reports by the estimator of construction costs, and used different values for the total square footage. In the petition, petitioners accuse Freeman/Frazier of "transparently manipulating the numbers," by decreasing the number of square feet in each report as the value per square foot increases, thereby allowing the Project to show a loss. The expert retained by the opposition, Martin Levine, of MVS, pointed out the Congregation's faulty approach, which the Congregation never corrected, based on its contention that the BSA did not ask for any additional information concerning the reasonable return for an all-residential building and the Congregation's failure to include the sub-sub-basement. Mr. Levine questioned Freeman/Frazier's non-compliance with BSA guidelines; construction cost

estimate fallacies; incomplete documents; and, exaggerated soft costs. Petitioners contend that the BSA ignored every issue raised by Mr. Levine, except his criticism of the return on equity, which the BSA considered but rejected.

These are but some of the challenges petitioners raise in their attempt to challenge the subdivision (b) finding. This court has considered all of their objections and finds them to be unavailing. The record reflects that the BSA responded to the concerns raised by petitioners during the underlying proceedings, particularly in that the BSA required numerous revisions to the Freeman/Frazier submissions. Contrary to petitioners' contentions, the BSA Resolution does more than merely "indicate" that there would be no reasonable return; the BSA makes the requisite finding. Based on the foregoing, and the deference that must be accorded the BSA's determination that the proposed building is necessary to enable the Congregation to realize a reasonable return from the Property, this court determines that the finding is not arbitrary and capricious.[13]

The Third Finding — Not Altering the Essential Character of the Neighborhood and Not Impairing the Use of Adjacent Property

Petitioners challenge the BSA finding that the granting of a variance will not alter the essential character of the neighborhood; will not "substantially impair the appropriate use or development of adjacent property;" and, "will not be detrimental to the public welfare." Rather, they argue that (1) the variance results in the bricking up of windows in the West 70th Building and (2) the shadows cast on other buildings on the block will have a negative effect on the public welfare and the environment.

[13] Given the current economic climate, it is uncertain whether the reasonable return as calculated by Freeman/Frazier remains a viable figure.

The initial proposal would have resulted in the closure of seven windows in six cooperative apartment units in the West 70th Building. The BSA required the Congregation to reduce the size of the condominiums in the rear of the building and create a courtyard to prevent the rear windows in the West 70th Building from being bricked up. But, petitioners assert that the BSA and the Congregation "collaborated" to create a record that would obscure the facts as to the number of windows that would be bricked up. Petitioners argue that it was arbitrary and capricious and an abuse of discretion for the BSA to require courtyards in the rear of the building but not to require a courtyard for the identically situated apartments in the front part of the eastern face of the building. As approved, the proposed building results in windows on the eastern face of the West 70th Building losing light and air, together with views of Central Park, while a conforming, as-of-right building would not block any windows in the West 70th Building.

The BSA points out that a property owner has no protected right to a view, and that lot line windows cannot be used to satisfy light and air requirements. Nevertheless, the BSA required the Congregation to provide a fully compliant outer courtyard to the sixth through eighth floors of the Project, which would retain three more lot line windows than had been proposed originally, notwithstanding the fact that there was no requirement to do so. The fact that four lot line windows in the front of the West 70th Building adjacent to the Project will be blocked is not grounds to reject the Project.

As part of the variance application, an environmental review was conducted in accordance with the State Environmental Quality Review Act, Article 8 of the State Environmental Conservation Law ("SEQRA") and the City Environmental Quality Review, Title 62, Chapter 5 of

the Rules of the City of New York ("CEQR"), which found that the Project would not have a significant adverse impact on the environment. Once the BSA made this finding, there was no need for the BSA to prepare an Environmental Impact Statement, pursuant to 43 RCNY § 6-07(b). Petitioners criticize the BSA's reliance on CEQR regulations, which provide that shadows on streets and sidewalks or on other buildings generally are not considered significant.[14] Petitioners contend that there is a conflict between CEQR, and the mid-block zoning resolution and subdivision (c). Petitioners further assert that there was no proper analysis of the street shadows and no comparison of the difference in shadows between an as-of-right building and the Project.

The BSA notes that while petitioners argued that the proposed height of the Project was incompatible with the neighborhood character, the West 70th Building has approximately the same base height as the proposed Project and no setback. The West 70th Building also has a FAR of 7.23, while the Project has a FAR of 4.36. Other buildings directly to the north and south on Central Park West have a greater height than the proposed building. Finally, since no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street, any incremental shadows would not constitute a significant impact on the surrounding community.

The Fourth Finding — Practical Difficulties or Unnecessary Hardship Have Not Been Created by the Owner

Subdivision (d) requires that the evidence support a finding that the claimed hardship was not created by the owner of the premises or a predecessor in title. The BSA found that the

[14] An adverse shadow impact occurs when the shadow from a proposed project falls upon a publicly accessible open space, an historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation.

hardship was not self-created, but originated from the fact that the Synagogue building is landmarked. The hardship is a further result of the 1984 rezoning of the site, the site's unique physical conditions, and the site's location on a zoning lot that is divided by a district boundary. This finding has ample support in the record, and is not specifically challenged by petitioners.

The Fifth Finding — Variance is the Minimum Variance Necessary to Afford Relief

Petitioners argued that the minimum variance necessary would actually be no variance at all, claiming that the Congregation could have built an as-of-right structure to meet its programmatic needs. After changes were made to the Project's design, the BSA determined that the Congregation had "fully established its programmatic needs for the proposed building and the nexus of the proposed uses within its religious mission." As to the community use portion of the Project, the BSA again cited to the line of cases, including Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, supra, 38 N.Y.2d 283; Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968); and, Jewish Recons. Synagogue of North Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that a zoning board must accommodate a proposal by religious and educational institutions for projects in furtherance of their mission, unless the proposed project is shown to have "significant and measurable detrimental impacts on surrounding residents." The BSA found that no such showing had been made.

As to the condominium portion of the Project, the BSA found that the modifications to the proposal, which included adding an outer court and reducing the floor plates of the upper floors, thereby reducing the variance for the rear yard setback, when considered in conjunction with the reasonable return analysis, led to the determination that the variance is the minimum required to afford relief. This finding is supported in the record and is not arbitrary and capricious.

Other Arguments Raised By Petitioners

In addition to their contentions that the Congregation's proposed building did not satisfy the need for a variance, and that the Board's findings under §72-21 were arbitrary and capricious, petitioners raise other challenges to the Board's determination, and contend that the process was flawed. All of these allegations are addressed below.

First, petitioners contend that prior to seeking a variance from the BSA, the Congregation was required to submit an application to the LPC for a special permit under Zoning Resolution § 74-711, and that its failure to do so precludes its application to the BSA for a variance. In 2001, the Congregation applied to the LPC for a special permit under Zoning Resolution § 74-711. A hearing was held on November 26, 2002. The Congregation subsequently withdrew the application and requested a Certificate of Appropriateness, which was considered at a public hearing on February 11, 2003. Following comments at that hearing, the proposal was revised, and a hearing was held on July 1, 2003; additional changes were made, and two additional hearings were held on January 17 and March 14, 2006. At the conclusion of the March 14 hearing, the LPC indicated that it was approving the proposed building, and issued a Certificate of Appropriateness, dated March 21, 2006, solely as to whether the structure would be appropriate for a landmark district. As the BSA points out in its papers, there is no legal requirement that a party seek a special permit from the LPC. A party may elect to seek either a special permit or a variance. The only requirement that the Congregation had to fulfill was to apply for a Certificate of Appropriateness, which the Congregation did. Therefore, the Congregation fulfilled the prerequisite before applying to the BSA for a variance.

Another argument raised by petitioners is that it was improper for the BSA to meet with representatives of the Congregation on November 8, 2006, months before the application was even brought before the BSA. Petitioners assert that the Board had already determined to grant the variances before the hearings had even begun. In response to this claim, the BSA asserts that pre-application meetings are a routine part of practice before the Board. Indeed, annexed as Exhibit E to the Board's answer is a document entitled "Procedure for Pre-Application Meetings and Draft Applications." The document sets forth that "[t]he BSA historically has offered some form of pre-application meeting process to potential applicants." Pre-application meetings are strongly encouraged, so that the application process proceeds more smoothly. After petitioners' counsel complained about the pre-application meeting, the BSA offered counsel the opportunity for his own pre-application meeting, but counsel refused.

At the start of the public hearing in this matter, the Chair of the BSA addressed the concerns of the community that an "ex parte" meeting had been held some months before, and the opposition's request that the BSA members who met with representatives from the Congregation should recuse themselves. The Chair of the BSA explained that pre-application meetings are routine, and that the meeting is not barred under section 1046 of the Charter, Administrative Procedure Act ("APA"), since APA does not apply to proceedings before the BSA.[15] See, Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25

[15] Section 1046 pertains to rules for adjudication when an agency is authorized to conduct an adjudication. The term "adjudication" is defined in § 1041 as "a proceeding in which the legal rights, duties or privileges of named parties are required to be determined by an agency on a record and after an opportunity for a hearing." This section applies to hearings before an administrative law judge or hearing officer, not an agency such as the LPC or BSA. Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25 A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y. 3d 710 (2006).

A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y.3d 710 (2006); but see, Carroll v. Srinivasan, Index No. 110199/07 (Sup. Ct. N.Y. Co. Jan. 30, 2008) (holding that BSA hearings are subject to § 1046 of the City Charter). Since nothing in the law prohibits the BSA from holding pre-application meetings, petitioners' claim that the meeting was improper is without merit.

Finally, petitioners challenge the manner in which the hearing was conducted and the entire proceeding as arbitrary and capricious. Petitioners challenge the time limits on their presentations at the hearing; the BSA's failure to question some of the opposition's expert witnesses; the refusal to allow the opposition architect to inspect the premises; and, the BSA's refusal to subpoena witnesses. In response to these allegations, the BSA notes that since the applicant has the burden to support its case for each of the five required findings under Z.R. § 72-21, applicants must be given the opportunity to do so. But, the BSA maintains that the opponents were in no way strictly limited to a three minute time limit during the four hearings dates.

First, nothing requires sworn testimony, cross-examination of witnesses, or the subpoenaing of witnesses at a BSA hearing. Under section 663 of the Charter, it is wholly discretionary for the chair or vice-chair to administer oaths or compel the attendance of witnesses. Similarly, § 1-01.1(j) and (k) of the Rules of the City of New York provides that the Chair controls the admission of evidence and order of the speakers, and allows the Chair to limit testimony.

The administrative record that was submitted in this case belies petitioners' contention that they did not have an adequate opportunity to be heard. The transcripts of the BSA hearings reflect that at every hearing date, community members who opposed the project—including

petitioners, petitioners' counsel, elected officials and other members of the community—were permitted to speak.[16] In addition, opponents to the Project, including petitioners' counsel, submitted numerous letters, documents and reports to the BSA in opposition to the Project.

Petitioners' contentions as to the conduct of the hearing are wholly devoid of merit. The public hearing is not a judicial or quasi-judicial proceeding. Opponents to an application have no due process right to cross-examine applicants for a variance. See note 15, supra. For all of these reasons, petitioners' claim that the procedures employed by the BSA were improper is rejected.

Conclusion

If this court were empowered to conduct a *de novo* review of the BSA's determination, and were not limited to the Article 78 standard of review of a reasonable basis for the determination, the result here might well be different. The facts are undisputed that the Congregation receives substantial rental income from the Beit Rabban Day School and the rental of the Parsonage; the Congregation may have additional earnings from renting the banquet space. There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage. It is also undisputed that the windows of some apartments in the building adjacent to the Project will now be blocked, whereas the windows would not be blocked by an as-of-right structure, which could have been built with two floors of condominiums.

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[16]For example, at the November 27, 2007 hearing, representatives from the offices of State Senator Tom Duane and Assembly Member Richard N. Gottfried spoke in opposition to the Project, as did Mark Lebow, Esq. an attorney for another group of opponents to the application; Norman Marcus, a retired attorney who previously served as general counsel to the Planning Commission; Alan Sugarman, Esq., counsel for petitioners herein; and, many other community residents. Indeed, of the 88-page transcript for that day's hearing, 43 pages contain opposition testimony.

Community residents expressed concern that approval of the variances at issue here opens the door for future anticipated applications by other not-for-profits in the Upper West Side historic district. The concern for precedential effect may well have merit. But, "in reviewing administrative determinations, a court may not overturn an agency's decision merely because it would have reached a contrary conclusion." Matter of Sullivan County Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 278 (1972). This court cannot substitute its judgment for that of the BSA. When viewing the record as a whole, and giving the BSA's determination the due deference that it must be afforded, it cannot be said that the BSA's determination that the Congregation's application satisfied each of the five specific findings of fact lacked a rational basis. Matter of Sullivan County Harness Racing Ass'n, supra, at 277-78 (1972) ("if the acts of the administrative agency find support in the record, its determination is conclusive."). The record reflects that the BSA "balanced and weighed the statutory facts, and its findings were based on objective facts appearing in the record." Halperin, supra, 24 A.D.3d 773. Accordingly, the decision must be confirmed. Id.

Based on the foregoing, the [illegible] is denied, and the petition is dismissed. The decision of the BSA is confirmed in all respects. This constitutes the decision, order and judgment of the court.

Dated: July 10, 2009

JOAN B. LOBIS, J.S.C.

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Norman Cousins
Clerk

Order and Judgment Appealed From: Decision, Justice Joan B. Lobis, July 10, 2009, entered July 24, 2009, 2009 NY Slip Op 31548(U) (35 of 38)

113427

Index No. 401074/2008

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

- against -

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair and CONGREGATION SHEARITH ISRAEL aka THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents.

DECISION, ORDER, AND JUDGMENT

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Respondents
100 Church Street, Room 5-153
New York, N.Y. 10007

Of Counsel: Louis Lupin
Tel: (212) 788-0581

Due and timely service is hereby admitted

New York, N.Y. ..... 200..

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Attorney for.....

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
N.Y.
AT

Order and Judgment Appealed From: Decision, Justice Joan B. Lobis, July 10, 2009, entered July 24, 2009, 2009 NY Slip Op 31548(U) (36 of 38)

Order and Judgment Appealed From: Decision, Justice Joan B. Lobis, July 10, 2009, entered July 24, 2009, 2009 NY Slip Op 31548(U) (37 of 38)

Index No.104077/2008

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NIZAM PETER KETTANEH and
HOWARD LEPOW,

Petitioners,

- against -

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

Respondents.

NOTICE OF ENTRY OF DECISION, ORDER AND JUDGMENT

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Respondents
100 Church Street, Room 5-154
New York, N.Y. 10007

Of Counsel: Christina L.Hoggan
Tel: (212) 788-0461

Due and timely service is hereby admitted.

New York, N.Y. ....., *200* . . .

..... *Esq.*

Attorney for.....

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation Shearith Israel, filed August 25, 2008 (1 of 14)

74-07-BZ
CEQR #07-BSA-071M

APPLICANT – Friedman & Gotbaum, LLP, by Shelly S. Friedman, Esq., for Congregation Shearith Israel a/k/a Trustees of the Congregation Shearith Israel in the City of N.Y. a/k/a the Spanish and Portuguese Synagogue.

SUBJECT – Application April 2, 2007 – Variance (§72-21) to allow a nine (9) story residential/community facility building; the proposal is contrary to regulations for lot coverage (§24-11), rear yard (§24-36), base height, building height and setback (§23-633) and rear setback (§23-663). R8B and R10A districts.

PREMISES AFFECTED – 6-10 West 70th Street, south side of West 70th Street, west of the corner formed by the intersection of Central Park West and West 70th Street, Block 1122, Lots 36 & 37, Borough of Manhattan.

COMMUNITY BOARD #7M

APPEARANCES –
For Applicant: Lori Cuisinier.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

THE RESOLUTION:

¶1 WHEREAS, the decision of the Manhattan Borough Commissioner, dated August 28, 2007,[1] acting on Department of Buildings Application No. 104250481, reads, in pertinent part:

1. "Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to Section 24-11/77-24. Proposed interior portion lot coverage is 0.80;
2. Proposed rear yard in R8B does not comply. 20'.00 provided instead of 30.00' contrary to Section 24-36;
3. Proposed rear yard in R10A interior portion does not comply. 20.—' provided instead of 30.00' contrary to Section 24-36;
4. Proposed initial setback in R8B does not comply. 12.00' provided instead of 15.00' contrary to Section 24-36;
5. Proposed base height in R8B does not comply. . . contrary to Section 23-633;
6. Proposed maximum building height in R8B does not comply. . . contrary to 23-66;
7. Proposed rear setback in an R8B does not comply. 6.67' provided instead of 10.00' contrary to Section 23-633;"[2] and

¶2 WHEREAS, this is an application under ZR § 72-21, to permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility / residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear yard setback contrary to ZR §§ 24-11, 77-24, 24-36, 23-66, and 23-633; and

¶3 WHEREAS, this application is brought on behalf of Congregation Shearith Israel, a not-for-profit religious institution (the "Synagogue"); and

¶4 WHEREAS, a public hearing was held on this application on November 27, 2007, after due notice by publication in the *City Record*, with continued hearings on February 12, 2008, April 15, 2008 and June 24, 2008, and then to decision on August 26, 2008; and

¶5 WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

¶6 WHEREAS, Community Board 7, Manhattan, recommends disapproval of this application; and

¶7 WHEREAS, a number of members of the Synagogue testified in support of the application; and

¶8 WHEREAS, a representative of New York State Senator Thomas K. Duane testified at hearing in opposition to the application; and

¶9 WHEREAS, a representative of New York State Assembly Member Richard N. Gottfried testified at hearing in opposition to the application; and

¶10 WHEREAS, a number of area residents testified in opposition to the application; and

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1 The referenced August 28, 2007 decision supersedes a March 27, 2007 decision by the Department of Buildings which included eight objections, one of which was eliminated after the applicant modified the plans.

2 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.

By Stipulation, the parties stipulated to cite to the BSA decision by the paragraph number, here inserted in the decision included in the BSA Administrative Record.

74-07-BZ
CEQR #07-BSA-071M

¶11 WHEREAS, additionally, Landmark West! and a group of neighbors represented by counsel testified at hearing and made submissions into the record in opposition to the application (the "Opposition"); the arguments made by the Opposition related to the required findings for a variance, and are addressed below; and

¶12 WHEREAS, the subject zoning lot on which the Synagogue is located consists of Lots 36 and 37 within Block 1122 (the "site"); and

¶13 WHEREAS, the site has a total lot area of 17,286 square feet, with 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage on Central Park West; and

¶14 WHEREAS, the portion of the site that extends 125 feet west of Central Park West is located in an R10A zoning district; the remainder of the site is located within an R8B district; and

¶15 WHEREAS, the site is also located within the Upper West Side/ Central Park West Historic District; and

¶16 WHEREAS, Tax Lot 36 is occupied by the Synagogue, with a height of 75'-0", and a connected four-story parsonage house located at 99-100 Central Park West, with a total floor area of 27,760 sq. ft.; and

¶17 WHEREAS, Tax Lot 37 is occupied in part by a four-story Synagogue community house with 11,079 sq. ft. of floor area located at 6-10 West 70th Street (comprising approximately 40 percent of the tax lot area); the remainder of Lot 37 is vacant (comprising approximately 60 percent of the tax lot area) (the "Community House"); and

¶18 WHEREAS, the Community House is proposed to be demolished; and

¶19 WHEREAS, the applicant represents that Tax Lot 36 and Tax Lot 37 together constitute a single zoning lot under ZR § 12-10, as they have been in common ownership since 1965 (the "Zoning Lot"); and

¶20 WHEREAS, Tax Lot 37 is divided by a zoning district boundary, pursuant to 1984 zoning map and text amendments to the Zoning Resolution that relocated the former R8/R10 district boundary line to a depth of 47 feet within the lot; and

¶21 WHEREAS, the applicant further represents that the formation of the Zoning Lot predates the relocation of the zoning district boundary, and that development on the site is therefore entitled to utilize the zoning floor area averaging methodology provided for in ZR § 77-211, thereby allowing the zoning floor area to be distributed over the entire Zoning Lot; and

¶22 WHEREAS, the applicant states that as 73 percent of the site is within an R10A zoning district, which permits an FAR of 10.0, and 27 percent of the site is within an R8B zoning district, which permits an FAR of 4.0, the averaging methodology allows for an overall site FAR of 8.36 and a maximum permitted zoning floor area of 144,511 sq. ft.; and

¶23 WHEREAS, the applicant states that the site is currently built to an FAR of 2.25 and a floor area of 38,838 sq. ft.; and

¶24 WHEREAS, the applicant proposes a nine-story and cellar mixed-use building with community facility (Use Group 3) uses on two cellar levels and the lower four stories, and residential (Use Group 2) uses on five stories including a penthouse (the "proposed building"), which will be built on Tax Lot 37; and

¶25 WHEREAS, the applicant states that the community facility uses include: Synagogue lobby and reception space, a toddler program, adult education and Hebrew school classes, a caretaker's unit, and a Jewish day school; the upper five stories are proposed to be occupied by five market-rate residential condominium units; and

¶26 WHEREAS, the proposed building will have a total floor area of 42,406 sq. ft., comprising 20,054 sq. ft. of community facility floor area and 22,352 sq. ft. of residential floor area; and

¶27 WHEREAS, the proposed building will have a base height along West 70th Street of 95'-1" (60 feet is the maximum permitted in an R8B zoning district); with a front setback of 12'-0" (a 15'-0" setback is the minimum required in an R8B zoning district); a total height of 105'-10" (75'-0" is the maximum permitted in an R8B zone), a rear yard of 20'-0" for the second through fourth floors (30"-0" is the minimum required); a rear setback of 6'-8" (10'-0" is required in an R8B zone), and an interior lot coverage of 80 percent (70 percent is the maximum permitted lot coverage); and

¶28 WHEREAS, the Synagogue initially proposed a nine-story building with a total floor area of 42,961 sq. ft., a residential floor area of 22,966 sq. ft., and no court above the fifth floor (the "original proposed building"), and

¶29 WHEREAS, the Synagogue modified the proposal to provide a complying court at the north rear above the fifth floor, thereby reducing the floor plates of the sixth, seventh and eighth floors of the building by approximately 556 sq. ft. and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in the variance of the rear yard setback by 25 percent and a reduction in the residential floor area to 22,352 sq. ft.; and

¶30 WHEREAS, the Synagogue is seeking waivers of zoning regulations for lot coverage and rear yard to develop a community facility that can accommodate its religious mission, and is seeking waivers of zoning regulations pertaining to base height, total height, front setback, and rear setback to accommodate a market rate residential development that can generate a reasonable financial return; and

¶31 WHEREAS, as a religious and educational institution, the Synagogue is entitled to significant

74-07-BZ
CEQR #07-BSA-071M

deference under the laws of the State of New York pertaining to proposed changes in zoning and is able to rely upon programmatic needs in support of the subject variance application (see Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968)); and

¶32 WHEREAS, under ZR § 72-21(b), a not-for-profit institution is generally exempted from having to establish that the property for which a variance is sought could not otherwise achieve a reasonable financial return; and

¶33 WHEREAS, however, the instant application is for a mixed-use project in which approximately 50 percent of the proposed floor area will be devoted to a revenue-generating residential use which is not connected to the mission and program of the Synagogue; and

¶34 WHEREAS, under New York State law, a not-for-profit organization which seeks land use approvals for a commercial or revenue-generating use is not entitled to the deference that must be accorded to such an organization when it seeks to develop a project that is in furtherance of its mission (see Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) and Roman Cath. Dioc. of Rockville Ctr v. Vill. Of Old Westbury, 170 Misc.2d 314 (1996); and

¶35 WHEREAS, consequently, prior Board decisions regarding applications for projects sponsored by not-for-profit religious or educational institutions which have included commercial or revenue-generating uses have included analysis of the hardship, financial return, and minimum variance findings under ZR § 72-21 (see BSA Cal. No. 315-02-BZ, applicant Touro College; BSA Cal. No. 179-03-BZ, applicant Torah Studies, Inc.; BSA Cal. No. 349-05-BZ, Church of the Resurrection; and BSA Cal. No. 194-03-BZ, applicant B'nos Menachem School); and

¶36 WHEREAS, therefore, as discussed in greater detail below, the Board subjected this application to the standard of review required under ZR § 72-21 for the discrete community facility and residential development uses, respectively, and evaluated whether the proposed residential development met all the findings required by ZR § 72-21, notwithstanding its sponsorship by a religious institution; and

ZR § 72-21 (a) – Unique Physical Conditions Finding

¶37 WHEREAS, under § 72-21 (a) of the Zoning Resolution, the Board must find that there are unique physical conditions inherent to the Zoning Lot which create practical difficulties or unnecessary hardship in strictly complying with the zoning requirements (the "(a) finding"); and

Community Facility Use

¶38 WHEREAS, the zoning district regulations limit lot coverage to 80 percent and require a rear yard of 30'-0"; and

¶39 WHEREAS, the proposed building will have the following program: (1) a multi-function room on the sub-cellar level with a capacity of 360 persons for the hosting of life cycle events and weddings and mechanical space; (2) dairy and meat kitchens, babysitting and storage space on the cellar level; (3) a synagogue lobby, rabbi's office and archive space on the first floor; (4) toddler classrooms on the second floor; (5) classrooms for the Synagogue's Hebrew School and Beit Rabban day school on the third floor; and (6) a caretaker's apartment and classrooms for adult education on the fourth floor; and

¶40 WHEREAS, the first floor will have 5,624 sq. ft. of community facility floor area, the second and third floor will each have 4,826.5 sq. ft. of community facility floor area, and the fourth floor will have 4,777 sq. ft. of community facility floor area, for a total of 20,054 sq. ft. of community facility floor area; and

¶41 WHEREAS, the applicant represents that the variance request is necessitated by the programmatic needs of the Synagogue, and by the physical obsolescence and poorly configured floor plates of the existing Community House which constrain circulation and interfere with its religious programming; and

¶42 WHEREAS, the applicant represents that the programmatic needs and mission of the Synagogue include an expansion of its lobby and ancillary space, an expanded toddler program expected to serve approximately 60 children, classroom space for 35 to 50 afternoon and weekend students in the Synagogue's Hebrew school and a projected 40 to 50 students in the Synagogue's adult education program, a residence for an onsite caretaker to ensure that the Synagogue's extensive collection of antiquities is protected against electrical, plumbing or heating malfunctions, and shared classrooms that will also accommodate the Beit Rabban day school; and

¶43 WHEREAS, the applicant states that the proposed building will also permit the growth of new religious, pastoral and educational programs to accommodate a congregation which has grown from 300 families to 550 families; and

¶44 WHEREAS, to accommodate these programmatic needs, the Synagogue is seeking lot coverage and rear yard waivers to provide four floors of community facility use in the proposed building; and

¶45 WHEREAS, the Board acknowledges that the Synagogue, as a religious institution, is entitled to substantial deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs in support of the subject variance application (see Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986)); and

74-07-BZ
CEQR #07-BSA-071M

¶46 WHEREAS, however, in addition to its programmatic needs, the applicant also represents that the following site conditions create an unnecessary hardship in developing the site in compliance with applicable regulations as to lot coverage and yards: if the required 30'-0" rear yard and lot coverage were provided, the floor area of the community facility would be reduced by approximately 1,500 sq. ft.; and

¶47 WHEREAS, the applicant states that the required floor area cannot be accommodated within the as-of-right lot coverage and yard parameters and allow for efficient floor plates that will accommodate the Synagogue's programmatic needs, thus necessitating the requested waivers of these provisions; and

¶48 WHEREAS, the applicant represents that a complying building would necessitate a reduction in the size of three classrooms per floor, affecting nine proposed classrooms which would consequently be too narrow to accommodate the proposed students; the resultant floor plates would be small and inefficient with a significant portion of both space and floor area allocated toward circulation space, egress, and exits; and

¶49 WHEREAS, the applicant further states that the reduction in classroom floor area would consequently reduce the toddler program by approximately 14 children and reduce the size of the Synagogue's Hebrew School, Adult Education program and other programs and activities; and

¶50 WHEREAS, the applicant represents that the requested yard and lot coverage waivers would enable the Synagogue to develop the site with a building with viable floor plates and adequate space for its needs; and

¶51 WHEREAS, the Opposition has argued that the Synagogue cannot satisfy the (a) finding based solely on its programmatic need and must still demonstrate that the site is burdened by a unique physical hardship in order to qualify for a variance; and

¶52 WHEREAS, notwithstanding that the applicant has asserted that the site is also burdened with a physical hardship that constrains an as-of-right development, discussed below, the Board notes that the Opposition ignores 50 years of unwavering New York jurisprudence holding that zoning boards must accord religious institutions a presumption of moral, spiritual and educational benefit in evaluations of applications for zoning variances (see e.g.; Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508 (1956) (zoning board cannot wholly deny permit to build church in residential district; because such institutions further the morals and welfare of the community, zoning board must instead seek to accommodate their needs); see also Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968); and Islamic Soc. of Westchester v. Foley, 96 A.D. 2d 536 (2d Dep't 1983)), and therefore need not demonstrate that the site is also encumbered by a physical hardship; and

¶53 WHEREAS, in support of its proposition that a religious institution must establish a physical hardship, the Opposition cites to decisions in Yeshiva & Mesivta Toras Chaim v. Rose (137 A.D.2d 710 (2d Dep't 1988)) and Bright Horizon House, Inc. v Zng. Bd. of Appeals of Henrietta (121 Misc.2d 703 (Sup. Ct. 1983)); and

¶54 WHEREAS, both decisions uphold the denial of variance applications based on findings that the contested proposals constituted neither religious uses, nor were they ancillary or accessory uses to a religious institution in which the principal use was as a house of worship, and are therefore irrelevant to the instant case; and

¶55 WHEREAS, the Board finds that the proposed Synagogue lobby space, expanded toddler program, Hebrew school and adult education program, caretaker's apartment, and accommodation of Beit Rabban day school constitute religious uses in furtherance of the Synagogue's program and mission; and

¶56 WHEREAS, the Opposition contends that the Synagogue's programmatic needs are too speculative to serve as the basis for an (a) finding; and

¶57 WHEREAS, in response to a request by the Board to document demand for the proposed programmatic floor area, the applicant submitted a detailed analysis of the program needs of the Synagogue on a space-by-space and time-allocated basis which confirms that the daily simultaneous use of the overwhelming majority of the spaces requires the proposed floor area and layout and associated waivers; and

¶58 WHEREAS, the Opposition argues, nonetheless, that the Synagogue's programmatic needs could be accommodated within an as-of-right building, or within existing buildings on the Synagogue's campus and that the proposed variances for the community facility use are unmerited and should consequently be denied; and

¶59 WHEREAS, specifically, the Opposition has contended that the Synagogue's programmatic needs could be accommodated within the existing parsonage house; and

¶60 WHEREAS, the applicant represents that the narrow width of the parsonage house, at approximately 24'-0", would make it subject to the "sliver" limitations of ZR § 23-692 which limit the height of its development and, after deducting for the share of the footprint that would be dedicated to elevator and stairs, would generate little floor area; and

¶61 WHEREAS, the applicant further represents that development of the parsonage house would not address the circulation deficiencies of the synagogue and would block several dozen windows on the north elevation of 91 Central Park West; and

¶62 WHEREAS, the Board notes that where a

74-07-BZ
CEQR #07-BSA-071M

nonprofit organization has established the need to place its program in a particular location, it is not appropriate for a zoning board to second-guess that decision (see Guggenheim Neighbors v. Bd. of Estimate, June 10, 1988, N.Y. Sup. Ct., Index No. 29290/87), see also Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

¶63 WHEREAS, furthermore, a zoning board may not wholly reject a request by a religious institution, but must instead seek to accommodate the planned religious use without causing the institution to incur excessive additional costs (see Islamic Soc. of Westchester v. Foley, 96 A.D.2d 536 (2d Dep't 1983); and

¶64 WHEREAS, religious institutions are entitled to locate on their property facilities for other uses that are reasonably associated with their overall purposes and a day care center/ preschool has been found to constitute such a use (see Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)); and

¶65 WHEREAS, in submissions to the Board, the Opposition argues that the Beit Rabban school does not constitute a programmatic need entitled to deference as a religious use because it is not operated for or by the Synagogue; and

¶66 WHEREAS, however, it is well-established under New York law that religious use is not limited to houses of worship, but is defined as conduct with a 'religious purpose;' the operation of an educational facility on the property of a religious institution is construed to be a religious activity and a valid extension of the religious institution for zoning purposes, even if the school is operated by a separate corporate entity (see Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971); and

¶67 WHEREAS, the applicant further states that the siting of the Beit Rabban school on the premises helps the Synagogue to attract congregants and thereby enlarge its congregation, which the courts have also found to constitute a religious activity (see Community Synagogue v. Bates, 1 N.Y.2d 445, 448 (1958)), in which the Court of Appeals stated, "[t]o limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation"); and

¶68 WHEREAS, the Board notes that the applicant has provided supportive evidence showing that, even without the Beit Rabban school, the floor area as well as the waivers to lot coverage and rear yard would be necessary to accommodate the Synagogue's programmatic needs; and

¶69 WHEREAS, the applicant represents that the variance request is necessitated not only by its programmatic needs, but also by physical conditions on the subject site – namely – the need to retain and preserve the existing landmarked Synagogue and by the obsolescence of the existing Community House; and

¶70 WHEREAS, the applicant states that as-of-right development of the site is constrained by the existence of the landmarked Synagogue building which occupies 63 percent of the Zoning Lot footprint; and

¶71 WHEREAS, the applicant represents that because so much of its property is occupied by a building that cannot be disturbed, a relatively small portion of the site is available for development – largely limited to the westernmost portion of the Zoning Lot; and

¶72 WHEREAS, the applicant further represents that the physical obsolescence and poorly configured floorplates of the existing Community House constrain circulation and interfere with its religious programming and compromise the Synagogue's religious and educational mission, and that these limitations cannot be addressed through interior alterations; and

¶73 WHEREAS, the applicant states that the proposed building will provide new horizontal and vertical circulation systems to provide barrier-free access to its sanctuaries and ancillary facilities; and

¶74 WHEREAS, based upon the above, the Board finds that the aforementioned physical conditions, when considered in conjunction with the programmatic needs of Synagogue, create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations; and

¶75 WHEREAS, the Opposition argues that uniqueness is limited to the physical conditions of the Zoning Lot and that the obsolescence of an existing building or other building constraints therefore cannot fulfill the requirements of the (a) finding, while citing no support for such a proposition; and

¶76 WHEREAS, to the contrary, New York courts have found that unique physical conditions under Section 72-21(a) of the Zoning Resolution can refer to buildings as well as land (see Guggenheim Neighbors v. Board of Estimate, June 10, 1988, N.Y. Sup. Ct. Index No. 29290/87; see also, Homes for the Homeless v. BSA, 7/23/2004, N.Y.L.J. citing UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248 (1st Dep't 2002;); and, further, obsolescence of a building is well-established as a basis for a finding of uniqueness (see Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dep't 1985), and Polsinello v. Dwyer, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (condition creating hardship was land improved with a now-obsolete structure)); and

¶77 WHEREAS, in submissions to the Board, the Opposition has also contended that the Synagogue had failed to establish a financial need for the project as a whole; and

¶78 WHEREAS, the Board notes that to be entitled to a variance, a religious or educational institution must establish that existing zoning requirements impair its ability to meet its programmatic needs; neither New

74-07-BZ
CEQR #07-BSA-071M

York State law, nor ZR § 72-21, require a showing of financial need as a precondition to the granting of a variance to such an organization; and

¶79 WHEREAS, the applicant proposed the need to generate revenue for its mission as a programmatic need, New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization, notwithstanding an intent to use the revenue to support a school or worship space; and

¶80 WHEREAS, further, in previous decisions, the Board has rejected the notion that revenue generation could satisfy the (a) finding for a variance application by a not-for-profit organization (see BSA Cal. No. 72-05-BZ, denial of use variance permitting operation by a religious institution of a catering facility in a residential district) and, therefore, requested that the applicant forgo such a justification in its submissions; and

¶81 WHEREAS, however, in numerous prior instances the Board has found that unique physical conditions, when considered in the aggregate and in conjunction with the programmatic needs of a not-for-profit organization, can create practical difficulties and unnecessary hardship in developing a site in strict conformity with the current zoning (see, e.g., BSA Cal. No, 145-07-BZ, approving variance of lot coverage requirements to permit development of a medical facility; BSA Cal. No. 209-07-BZ, approving bulk variance to permit enlargement of a school for disabled children; and 215-07-BZ, approving bulk variance to permit enlargement of a YMCA); and

Residential Use

¶82 WHEREAS, the building is proposed for a portion of the Zoning Lot comprised of Lot 37, with a lot area of approximately 6,400 sq. ft. (the "development site"); and

¶83 WHEREAS, proposed residential portion of the building is configured as follows: (1) mechanical space and accessory storage on the cellar level; (2) elevators and a small lobby on the first floor; (2) core building space on the second, third and fourth floors; and (3) a condominium unit on each of the fifth through eighth, and ninth (penthouse) floors, for a total of five units; and

¶84 WHEREAS, the first floor is proposed to have approximately 1,018 sq. ft. of residential floor area, the second through fourth floors will each have 325 sq. ft. of residential floor area, the fifth floor will have 4,512 sq. ft. of residential floor area, the sixth through eighth floors will each have approximately 4,347 sq. ft. of residential floor area and the ninth (penthouse) floor will have approximately 2,756 sq. ft., for a total residential floor area of approximately 22,352 sq. ft.; and

¶85 WHEREAS, the applicant represents that compliance with the zoning requirements for base height, building height, and front and rear setback would allow a residential floor area of approximately 9,638 sq. ft.; and

¶86 WHEREAS, the applicant states that the following unique physical conditions create practical difficulties and unnecessary hardship in developing the subject site in compliance with underlying district regulations: (1) the development site's location on a Zoning Lot that is divided by a zoning district boundary; (2) the existence and dominance of a landmarked synagogue on the footprint of the Zoning Lot; and (3) the limitations on development imposed by the site's contextual zoning district regulations; and

¶87 WHEREAS, as to the development site's location on a zoning lot that is divided by a zoning district boundary, the applicant states that the development site is split between an eastern portion, comprising approximately 73 percent of the Zoning Lot, which is located within an R10A zoning district, and a western portion, comprising approximately 27 percent of the Zoning Lot, which is located in an R8B zoning district; and

¶88 WHEREAS, applicant represents that the division of the development site by a zoning district boundary constrains an as-of-right development by imposing different height limitations on the two respective portions of the lot; and

¶89 WHEREAS, in the R10A portion of the Zoning Lot, a total height of 185'-0" and maximum base height of 125'-0" are permitted; and

¶90 WHEREAS, in the R8B portion of the development site, a building is limited to a total height of 75'-0" and a maximum base height of 60'-0" with a setback of 15'-0"; and

¶91 WHEREAS, the applicant further represents that the requirements of the R8B district also limit the size of floor plates of a residential development; and

¶92 WHEREAS, in the R8B portion of the development site, a setback of 15'-0" is required at the 60 ft. maximum base height, and a 10'-0" rear setback is required; the applicant represents that a complying development would therefore be forced to set back from the street line at the mid-point between the fifth and sixth floors; and

¶93 WHEREAS, in the R10A portion of the development site, a 15'-0" setback is not required below the maximum base height of 125'-0", and a total height of 185'-0" is permitted, which would otherwise permit construction of a 16-story residential tower on the development site; and

¶94 WHEREAS, the applicant is constrained from building to the height that would otherwise be permitted as-of-right on the development site by the "sliver law" provisions of ZR § 23-692, which operate to limit the maximum base height of the building to 60'-0" because

74-07-BZ
CEQR #07-BSA-071M

the frontage of the site within the R10A zoning district is less than 45 feet; and

¶95 WHEREAS, a diagram provided by the applicant indicates that less than two full stories of residential floor area would be permitted above a four-story community facility, if the R8B zoning district front and rear setbacks and height limitations were applied to the development site; and

¶96 WHEREAS, the Board notes that several Zoning Resolution provisions recognize the constraints created by zoning district boundaries where different regulations apply to portions of the same zoning lot; and

¶97 WHEREAS, specifically, the Board notes that the provisions of ZR § 77-00, permitting the transfer of zoning lot floor area over a zoning district boundary for zoning lots created prior to their division by a zoning district boundary, recognize that there is a hardship to a property owner whose property becomes burdened by a district boundary which imposes differing requirements to portions of the same zoning lot; and

¶98 WHEREAS, the Board further notes that that the special permit provisions of ZR § 73-52 allow the extension of a district boundary line after a finding by the Board that relief is required from hardship created by the location of the district boundary line; and

¶99 WHEREAS, the applicant represents, however, that because of the constraints imposed by the contextual zoning requirements and the sliver law, the Synagogue can transfer only a small share of its zoning lot area across the R8B district boundary; and

¶100 WHEREAS, the applicant further represents that the site is unique in being the only underdeveloped site overlapping the R10A/R8B district boundary line within a 20-block area to the north and south of the subject site; and

¶101 WHEREAS, the applicant further represents that 17 other residential zoning lots overlap the R10A/ R8B district boundary line between West 65th Street and West 86th Street, but that none were characterized by a similar amount of surplus development rights; and

¶102 WHEREAS, the applicant states that all the properties within the 22-block study area bisected by the district boundary line are developed to an FAR exceeding 10.0, while the subject Zoning Lot is developed to an FAR of 2.25; and

¶103 WHEREAS, the Opposition argues that the presence of a zoning district boundary within a lot is not a "unique physical condition" under the language of ZR § 72-21 and represents that four other properties are characterized by the same R10A/ R8B zoning district boundary division within the area bounded by Central Park West and Columbus Avenue and 59th Street and 110th Street owned by religious or nonprofit institutions, identified as: (i) First Church of Christ Scientist, located at Central Park West at West 68th Street; (ii) Universalist Church of New York, located at Central Park West at West 76th Street; (iii) New-York Historical Society, located at Central Park West at West 77th Street; and (iv) American Museum of Natural History, located at Central Park West at West 77th Street to West 81st Street; and

¶104 WHEREAS, the Board notes that it has recognized that the location of zoning district boundary, in combination with other factors such as the size and shape of a lot and the presence of buildings on the site, may create an unnecessary hardship in realizing the development potential otherwise permitted by the zoning regulations (see BSA Cal. No. 358-05-BZ, applicant WR Group 434 Port Richmond Avenue, LLC; BSA Cal. No. 388-04-BZ, applicant DRD Development, Inc.; BSA Cal. No. 291-03-BZ, applicant 6202 & 6217 Realty Company; and 208-03-BZ, applicant Shell Road, LLC); and

¶105 WHEREAS, the Board further notes that the incidence of four sites within a 51-block area sharing the same "unique conditions" as the subject site would not, in and of itself, be sufficient to defeat a finding of uniqueness; and

¶106 WHEREAS, under New York law, a finding of uniqueness does not require that a given parcel be the only property so burdened by the condition(s) giving rise to the hardship, only that the condition is not so generally applicable as to dictate that the grant of a variance to all similarly situated properties would effect a material change in the district's zoning (see Douglaston Civ. Assn. v. Klein, 51 N.Y.2d 963, 965 (1980)); and

¶107 WHEREAS, as to the impact of the landmarked Congregation Shearith Israel synagogue building on the ability to develop an as-of-right development on the same zoning lot, the applicant states that the landmarked synagogue occupies nearly 63 percent of the Zoning Lot footprint; and

¶108 WHEREAS, the applicant further states that 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; and

¶109 WHEREAS, the applicant represents that only the area occupied by the parsonage house, located directly to the south of the Synagogue on Tax Lot 36, and the development site are available for development; and

¶110 WHEREAS, the applicant represents that the narrow width of the parsonage house makes its development infeasible; and

¶111 WHEREAS, the applicant states that the area of development site, at approximately 6,400 sq. ft., constitutes only 37 percent of Zoning Lot area of the site; and

¶112 WHEREAS, the Board notes that the site is significantly underdeveloped and that the location of

74-07-BZ
CEQR #07-BSA-071M

the landmark Synagogue limits the developable portion of the site to the development site; and

¶113 WHEREAS, as to the limitations on development imposed by the site's location within the R8B contextual zoning district, the applicant represents the district's height limits and setback requirements, and the limitations imposed by ZR § 23-692, result in an inability to use the Synagogue's substantial surplus development rights; and

¶114 WHEREAS, the applicant represents that, as a result of these constraints, the Synagogue would be permitted to use a total of 28,274 sq. ft. for an as-of-right development, although it has approximately 116,752 sq. ft. in developable floor area; and

¶115 WHEREAS, the Synagogue further represents that, after development of the proposed building the Zoning Lot would be built to a floor area of 70,166 sq. ft. and an FAR of 4.36, although development of 144,511 sq. ft. of floor area and an FAR of 8.36 would be permitted as-of-right, and that approximately 74,345 sq. ft. of floor area will remain unused; and

¶116 WHEREAS, the Opposition contends that the inability of the Synagogue to use its development rights is not a hardship under ZR § 72-21 because a religious institution lacks the protected property interest in the monetization of its air rights that a private owner might have, citing Matter of Soc. for Ethical Cult. v. Spatt, 51 N.Y.2d 449 (1980); and

¶117 WHEREAS, the Opposition further contends that the inability of the Synagogue to use its development rights is not a hardship because there is no fixed entitlement to use air rights contrary to the bulk limitations of a zoning district; and

¶118 WHEREAS, the Board notes that Spatt concerns whether the landmark designation of a religious property imposes an unconstitutional taking or an interference with the free exercise of religion, and is inapplicable to a case in which a religious institution merely seeks the same entitlement to develop its property possessed by any other private owner; and

¶119 WHEREAS, furthermore, Spatt does not stand for the proposition that government land use regulation may impose a greater burden on a religious institution than on a private owner; indeed, the court noted that the Ethical Culture Society, like any similarly situated owner, retained the right to generate a reasonable return from its property by the transfer of its excess development rights (see 51 N.Y.2d at 455, FN1); and

¶120 WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of available development rights from a landmark building within the lot on which it is located or to an adjacent lot, and

¶121 WHEREAS, the Board further notes that while a nonprofit organization is entitled to no special deference for a development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to develop its property than would be imposed on a private owner; and

¶122 WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a); and

ZR § 72-21 (b) – Financial Return Finding

¶123 WHEREAS, under ZR § 72-21 (b), the Board must establish that the physical conditions of the site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return, and that the grant of a variance is therefore necessary to realize a reasonable return (the "(b) finding"), unless the applicant is a nonprofit organization, in which case the (b) finding is not required for the granting of a variance; and

Community Facility Use

¶124 WHEREAS, the applicant represents that it need not address the (b) finding since it is a not-for-profit religious institution and the community facility use will be in furtherance of its not-for-profit mission; and

Residential Development

¶125 WHEREAS, under New York State law, a not-for-profit organization which seeks land use approvals for a commercial or revenue-generating use is not entitled to the deference that must be accorded to such an organization when it seeks to develop a project that is in furtherance of its mission (see Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); (municipal agency was required to make the variance findings because proposed use would be operated solely by and for the benefit of a private entrepreneur); Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) (variance upheld permitting office and limited industrial use of former school building after district established inability to develop for a conforming use or otherwise realize a financial return on the property as zoned); and Roman Cath. Dioc. of Rockville Ctr v. Vill. Of Old Westbury, 170 Misc.2d 314 (1996) (cemetery to be operated by church was found to constitute a commercial use)); and

¶126 WHEREAS, the residential development was not proposed to meet its programmatic needs, the Board therefore directed the applicant to perform a financial feasibility study evaluating the ability of the Synagogue to realize a reasonable financial return from as-of-right residential development of the site, despite the fact that it is a not-for-profit religious institution; and

¶127 WHEREAS, the applicant initially submitted a feasibility study that analyzed: (1) an as-of-right community facility/residential building within an R8B envelope (the "as-of-right building"); (2) an as-of-right

74-07-BZ
CEQR #07-BSA-071M

residential building with 4.0 FAR; (3) the original proposed building; and (4) a lesser variance community facility/residential building; and

¶128 WHEREAS, at hearing, the Board questioned why the analysis included the community facility floor area and asked the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of-right development; and

¶129 WHEREAS, in response, the applicant revised the financial analysis to analyze: (1) the as-of-right building; (2) the as-of-right residential building with 4.0 FAR; (3) the original proposed building; (4) the lesser variance community facility/residential building; and (5) an as-of-right community facility/residential tower building, using the modified the site value; and

¶130 WHEREAS, the feasibility study indicated that the as-of-right scenarios and lesser variance community facility/residential building, would not result in a reasonable financial return and that, of the five scenarios only the original proposed building would result in a reasonable return; and

¶131 WHEREAS, it was subsequently determined that a tower configuration in the R10A portion of the Zoning Lot was contrary to ZR § 73-692 (the "sliver law") and therefore that the as-of-right community facility/residential tower building could not represent an as-of-right development; the Board then questioned the basis for the previous valuation of the development rights and requested that the applicant recalculate the site value using only R8 and R8B sales; and

¶132 WHEREAS, the Board also requested the applicant to evaluate the feasibility of providing a complying court to the rear above the fifth floor of the original proposed building; and

¶133 WHEREAS, applicant subsequently analyzed the financial feasibility of: (i) the proposed building (the original proposed building with a complying court); (ii) an eight-story building with a complying court (the "eight-story building"); and (iii) a seven-story building with penthouse and complying court (the "seven-story building"), using the revised site value; the modified analysis concluded that of the three scenarios, only the proposed building was feasible; and

¶134 WHEREAS, at hearing, the Board raised questions as to the how the space attributable to the building's rear terraces had been treated in the financial feasibility analysis; and

¶135 WHEREAS, in a written response, the applicant stated that the rear terraces on the fifth and sixth floors had not originally been considered as accessible open spaces and were therefore not included in the sales price as sellable terrace areas of the appertaining units; the applicant provided an alternative analysis considering the rear terraces as sellable outdoor terrace area and revised the sales prices of the two units accordingly; and

¶136 WHEREAS, at hearing, the Board also asked the applicant to explain the calculation of the ratio of sellable floor area gross square footage (the "efficiency ratio") for each of the following scenarios: the proposed building, the eight-story building, the seven-story building, and the as-of-right building; and

¶137 WHEREAS, in a subsequent submission, the applicant provided a chart identifying the efficiency ratios for each respective scenario, and explained that the architects had calculated the sellable area for each by determining the overall area of the building and then subtracting the exterior walls, the lobby, the elevator core and stairs, hallways, elevator overrun and terraces from each respective scenario; and

¶138 WHEREAS, the applicant also submitted a revised analysis of the as-of-right building using the revised estimated value of the property; this analysis showed that the revised as-of-right alternative would result in substantial loss; and

¶139 WHEREAS, in a submission, the Opposition questioned the use of comparable sales prices based on property values established for the period of mid-2006 to mid-2007, rather than using more recent comparable sales prices, and questioned the adjustments made by the applicant to those sales prices; and

¶140 WHEREAS, in a written response, the applicant pointed out that, to allow for comparison of earlier to later analyses, it is BSA practice to establish sales comparables from the initial feasibility analysis to serve as the baseline, and then to adjust those sales prices in subsequent revisions to reflect intervening changes in the market; the applicant also stated that sales prices indicated for units on higher floors reflected the premium price units generated by such units compared to the average sales price for comparable units on lower floors; and

¶141 WHEREAS, the Opposition also questioned the choice of methodology used by the applicant, which calculated the financial return based on profits, contending that it should have been based instead on the projected return on equity, and further contended that the applicant's treatment of the property acquisition costs distorted the analysis; and

¶142 WHEREAS, in response to the questions raised by the Opposition concerning the methodology used to calculate the rate of return, the applicant states that it used a return on profit model which considered the profit or loss from net sales proceeds less the total project development cost on an unleveraged basis, rather than evaluating the project's return on equity on a leveraged basis; and

¶143 WHEREAS, the applicant further stated that a return on equity methodology is characteristically used for income producing residential or commercial rental projects, whereas the calculation of a rate of return based

74-07-BZ
CEQR #07-BSA-071M

on profits is typically used on an unleveraged basis for condominium or home sale analyses and would therefore be more appropriate for a residential project, such as that proposed by the subject application; and

¶144 WHEREAS, the Board notes that a return on profit model which evaluates profit or loss on an unleveraged basis is the customary model used to evaluate the feasibility of market-rate residential condominium developments; and

¶145 WHEREAS, the Opposition also raised concerns as to the omission of the income from the Beit Rabban school from the feasibility study; and

¶146 WHEREAS, in response to concerns raised by the Opposition as to why the feasibility study omitted the income from the Beit Rabban school, a submission by the applicant states that the projected market rent for community facility use was provided to the Board in an earlier submission and that the cost of development far exceeded the potential rental income from the community facility portion of the development; and

¶147 WHEREAS, further, the Board notes that it requested that costs, value and revenue attributable to the community facility be eliminated from the financial feasibility analysis to allow a clearer depiction of the feasibility of the proposed residential development and of lesser variance and as-of-right alternatives; and

¶148 WHEREAS, based upon its review of the applicant's submissions, the Board has determined 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; and

ZR § 72-21 (c) – Neighborhood Character Finding

¶149 WHEREAS, as pertains to the (c) finding under ZR § 72-21, the Board is required to find that the grant of the variance will not alter the essential neighborhood character, impair the use or development of adjacent property, or be detrimental to the public welfare; and

¶150 WHEREAS, because the variances sought to permit the community facility use differ from the variances sought to permit the proposed residential use, the potential affects on neighborhood character of each respective set of proposed variances are discussed separately below; and

Community Facility Use

¶151 WHEREAS, the applicant represents that the proposed rear yard and lot coverage variances permitting the community facility use will not negatively affect the character of the neighborhood, nor affect adjacent uses; and

¶152 WHEREAS, the applicant states that the proposed waivers would allow the community facility to encroach into the rear yard by ten feet, to a height of approximately 49 feet; and

¶153 WHEREAS, the applicant states that, as a community facility, the Synagogue would be permitted to build to the rear lot line up to a height of 23 feet; and

¶154 WHEREAS, the applicant represents that the affect of the encroachment into the rear yard is partly offset by the depths of the yards of the adjacent buildings to its rear; and

¶155 WHEREAS, the Board conducted an environmental review of the proposed action and found that it would not have significant adverse impacts on the surrounding neighborhood; and

¶156 WHEREAS, the Opposition disputes the findings of the Environmental Assessment Statement ("EAS") and contends that the expanded toddler program, and the life cycle events and weddings held in the multi-purpose room of the lower cellar level of the proposed community facility would produce significant adverse traffic, solid waste, and noise impacts; and

¶157 WHEREAS, the Board notes that the additional traffic and noise created by the expanded toddler program – which is projected to grow from 20 children to 60 children daily – falls below the CEQR threshold for potential environmental impacts; and

¶158 WHEREAS, the Board further notes that the waivers of lot coverage and rear yard requirements are requested to meet the Synagogue's need for additional classroom space and that the sub-cellar multi-purpose room represents an as-of-right use; and

¶159 WHEREAS, the applicant states that the proposed multi-function room would result in an estimated 22 to 30 life cycle events and weddings over and above those currently held; and

¶160 WHEREAS, with respect to traffic, the applicant states that life cycle events would generate no additional traffic impacts because they are held on the Sabbath and, as Congregation Shearith Israel is an Orthodox synagogue, members and guests would not drive or ride to these events in motor vehicles; and

¶161 WHEREAS, the applicant further states that significant traffic impacts are not expected from the increased number of weddings, because they are generally held on weekends during off-peak periods when traffic is typically lighter, or from the expanded toddler program, which is not expected to result in a substantial number of new vehicle trips during the peak hours; and

¶162 WHEREAS, with respect to solid waste, the EAS estimated the solid waste attributable to the entirety of the proposed building, including the occupants of the residential portion and the students in the school, and conservatively assumed full occupancy of the multi-function room (at 360 persons); and

¶163 WHEREAS, the estimates of solid waste generation found that the amount of projected additional waste represented a small amount, relative to the amount of solid waste collected weekly on a given route by the Department of Sanitation, and would not

74-07-BZ
CEQR #07-BSA-071M

affect the City's ability to provide trash collection services; and

¶164 WHEREAS, the Synagogue states that trash from multi-purpose room events will be stored within a refrigerated area within the proposed building and, if necessary, will be removed by a private carter on the morning following each event; and

¶165 WHEREAS, at the Board's direction, the applicant submitted revised plans showing the cellar location of the refrigerated trash storage area; and

¶166 WHEREAS, with respect to noise, as the multi-purpose room is proposed for the sub-cellar of the proposed building, even at maximum capacity it is not expected to cause significant noise impacts; and

¶167 WHEREAS, as held in Westchester Reform Temple v. Brown (22 N.Y.2d 488 (1968)), a religious institution's application is entitled to deference unless significant adverse effects upon the health, safety, or welfare of the community are documented (see also Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

¶168 WHEREAS, the Opposition has raised general concerns about disruption to the character of the surrounding neighborhood, but has presented no evidence to the Board supporting the alleged traffic, solid waste and noise impacts of the proposed community facility; and

¶169 WHEREAS, the detrimental effects alleged by the Opposition largely concern the purported impact of events held in the multi-purpose room which, as noted above, is permitted as-of-right; and

Residential Use

¶170 WHEREAS, the applicant represents that the proposed variances to height and setback permitting the residential use will not negatively affect the character of the neighborhood, nor affect adjacent uses; and

¶171 WHEREAS, the applicant states that the proposed base height waiver and front setback waivers of the R8B zoning requirements allow the building to rise to a height of approximately 94'-10" along the West 70th Street street-line, before setting back by 12'-0"; and

¶172 WHEREAS, the applicant further states that the R8B zoning regulations limit the base height to 60 feet, at which point the building must set back by a minimum of 15'-0"; and

¶173 WHEREAS, the applicant states that the proposed waiver of maximum building height will allow a total height of approximately 105'-10", instead of the maximum building height of 75'-0" permitted in an R8B district; and

¶174 WHEREAS, the applicant also seeks a rear setback of 6'-8", instead of the 10'-0" rear setback required in an R8B district; and

¶175 WHEREAS, the applicant represents that the front and rear setbacks are required because the enlargement would rise upward and extend from the existing front and rear walls; and

¶176 WHEREAS, the applicant represents that the proposed base height, wall height and front and rear setbacks are compatible with neighborhood character; and

¶177 WHEREAS, the applicant states that a Certificate of Appropriateness approving the design for the proposed building was issued by the Landmarks Preservation Commission on March 14, 2006; and

¶178 WHEREAS, the Opposition raised issues at hearing concerning the scale of the proposed building and its compatibility to the neighborhood context; and

¶179 WHEREAS, the applicant represents that the proposed bulk and height of the building is consistent with the height and bulk of neighboring buildings, and that the subject site is flanked by a nine-story building at 18 West 70th Street which has a base height of approximately 95 ft. with no setback, and an FAR of 7.23; and

¶180 WHEREAS, the applicant further represents that the building located at 101 Central Park West, directly to its north, has a height of 15 stories and an FAR of 13.92; and that the building located directly to its south, at 91 Central Park West, has a height of 13 stories and an FAR of 13.03; and

¶181 WHEREAS, the Board notes that, at nine stories in height, the building would be comparable in size to the adjacent nine-story building located at 18 West 70th Street, while remaining shorter than the 15-story and 13-story buildings located within 60 feet of the site; and

¶182 WHEREAS, the Opposition also contends that the proposed nine-story building disrupts the mid-block character of West 70th Street and thereby diminishes the visual distinction between the low-rise mid-block area and the higher scale along Central Park West; and

¶183 WHEREAS, the applicant submitted a streetscape of West 70th Street indicating that the street wall of the subject building matches that of the adjacent building at 18 West 70th Street and that no disruption to the midblock character is created by the proposed building; and

¶184 WHEREAS, the Opposition also contends that approval of the proposed height waiver will create a precedent for the construction of more mid-block high-rise buildings; and

¶185 WHEREAS, as discussed above, the Opposition has identified four sites within a 51-block area bounded by Central Park West and Columbus Avenue, and 59th Street and 110th Street that purportedly could seek variances permitting midblock buildings which do not comply with the requirements of the R8B zoning district; and

¶186 WHEREAS, an analysis submitted by the applicant in response found that none of the four sites identified by the Opposition shared the same potential for mid-block development as the subject site; and

¶187 WHEREAS, the Opposition argues that the

74-07-BZ
CEQR #07-BSA-071M

proposed building will significantly diminish the accessibility to light and air of its adjacent buildings; and

¶188 WHEREAS, the Opposition contended specifically that the proposed building abuts the easterly wall and court of the building located at 18 West 70th Street, thereby eliminating natural light and views from seven eastern facing apartments which would not be blocked by an as-of-right building; and

¶189 WHEREAS, the Opposition further argues that the proposed building will cut off natural lighting to apartments in the building located at 91 Central Park West and diminish light to apartments in the rear of the building located at 9 West 69th Street, and that the consequentially diminished light and views will reduce the market values of the affected apartments; and

¶190 WHEREAS, in response the applicant noted that lot line windows cannot be used to satisfy light and air requirements and, therefore, rooms which depend solely on lot line windows for light and air were necessarily created illegally and the occupants lack a legally protected right to their maintenance; and

¶191 WHEREAS, the applicant further notes that an owner of real property also has no protected right in a view; and

¶192 WHEREAS, nonetheless, the Board directed the applicant to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows than originally proposed; and

¶193 WHEREAS, the applicant submitted revised plans in response showing a compliant outer court; and

¶194 WHEREAS, the Opposition asserts that the proposed building would cast shadows on the midblock of West 70th Street; and

¶195 WHEREAS, CEQR regulations provide that an adverse shadow impact is considered to occur when the shadow from a proposed project falls upon a publicly accessible open space, a historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation, and that shadows on streets and sidewalks or on other buildings are not considered significant under CEQR; and

¶196 WHEREAS, a submission by the applicant states that that no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street; thus any incremental shadows in this area would not constitute a significant impact on the surrounding community; and

¶197 WHEREAS, a shadow study submitted by the applicant compared the shadows cast by the existing building to those cast by the proposed new building to identify incremental shadows that would be cast by the new building that are not cast presently; and

¶198 WHEREAS, the EAS analyzed the potential shadow impacts on publicly accessible open space and historic resources and found that no significant impacts would occur; and

¶199 WHEREAS, the applicant evaluated shadows cast over the course of a full year, with particular attention to December 21, when shadows are longest, March 21 and September 21 (vernal and autumnal equinoxes) and June 21, when shadows are shortest, disregarding the shadows cast by existing buildings, and found that the proposed building casts few incremental shadows, and those that are cast are insignificant in size; and

¶200 WHEREAS, specifically, the shadow study of the EAS found that the building would cast a small incremental shadow on Central Park in the late afternoon in the spring and summer that would fall onto a grassy area and path where no benches or other recreational equipment are present; and

¶201 WHEREAS, based upon the above, the Board finds 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; and

ZR § 72-21 (d) - Self Created Hardship Finding

¶202 WHEREAS, as pertains to the (d) finding under ZR § 72-21, the Board is required to find that the practical difficulties or unnecessary hardship burdening the site have not been created by the owner or by a predecessor in title; and

¶203 WHEREAS, the applicant states that the unnecessary hardship encountered by compliance with the zoning regulations is inherent to the site's unique physical conditions: (1) the existence and dominance of a landmarked synagogue on the footprint of the Zoning Lot, (2) the site's location on a zoning lot that is divided by a zoning district boundary; and (3) the limitations on development imposed by the site's contextual zoning district; and

¶204 WHEREAS, the applicant further states that these conditions originate with the landmarking of its Synagogue building and with the 1984 rezoning of the site; and

¶205 WHEREAS, based on the above, the Board therefore finds that the hardship herein was not created by the owner or by a predecessor in title; and

ZR § 72-21 (e) – Minimum Variance Finding

¶206 WHEREAS, as pertains to the (e) finding under ZR § 72-21, the Board is required to find that the variance sought is the minimum necessary to afford relief; and

¶207 WHEREAS, the original proposed building of the Synagogue had no rear court above the fifth floor, and

¶208 WHEREAS, in response to concerns raised by the residents of the adjacent building, the Board directed the applicant to provide a fully compliant outer court to the

74-07-BZ
CEQR #07-BSA-071M

sixth through eighth floors of the building, thereby retaining access to light and air of three additional lot line windows; and

¶209 WHEREAS, the applicant modified the proposal to provide a complying court at the north rear above the fifth floor, thereby reducing the floor plates of the sixth, seventh and eighth floors of the building by approximately 556 sq. ft. and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in the variance of the rear yard setback of 25 percent; and

¶210 WHEREAS, during the hearing process, the Board also directed the applicant to assess the feasibility of several lesser variance scenarios; and

¶211 WHEREAS, financial analyses submitted by the applicant established that none of these alternatives yielded a reasonable financial return; and

¶212 WHEREAS, however, the Opposition argues that the minimum variance finding is no variance because the building could be developed as a smaller as-of-right mixed-use community facility/ residential building that achieved its programmatic mission, improved the circulation of its worship space and produced some residential units; and

¶213 WHEREAS, the Synagogue has fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission; and

¶214 WHEREAS, the Board notes again that a zoning board must accommodate a proposal by a religious or educational institution for a project in furtherance of its mission, unless the proposed project is shown to have significant and measurable detrimental impacts on surrounding residents (See Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968); Islamic Soc. of Westchester v. Foley, 96 A.D. 2d 536 (2d Dep't 1983); and Jewish Recons. Synagogue of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

¶215 WHEREAS, the Opposition has not established such impacts; and

¶216 WHEREAS, the Opposition may have raised other issues that are not specifically addressed herein, the Board has determined that all cognizable issues with respect to the required variance findings or CEQR review are addressed by the record; and

¶217 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; and

¶218 WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made under ZR § 72-21; and

¶219 WHEREAS, the project is classified as a Type 1 action pursuant to 6NYCRR, Part 617; and

¶220 WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 07BSA071M dated May 13, 2008; and

¶221 WHEREAS, the EAS documents that the project as proposed would not have significant adverse impacts on Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Waterfront Revitalization Program; Infrastructure; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; and Public Health; and

¶222 WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

¶223 *Therefore it is Resolved* that the Board of Standards and Appeals issues a Negative Declaration with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes the required findings under ZR § 72-21, to permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/ residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to ZR §§ 24-11, 77-24, 24-36, 23-66, and 23-633; *on condition* that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received May 13, 2008"– nineteen (19) sheets and "Received July 8, 2008"– one (1) sheet; and *on further condition*:

¶224 THAT the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80; and

¶225 THAT the applicant shall obtain an updated Certificate of Appropriateness from the Landmarks Preservation Commission prior to any building permit being issued by the Department of Buildings;

¶226 THAT refuse generated by the Synagogue shall be stored in a refrigerated vault within the building, as shown on the BSA-approved plans;

74-07-BZ
CEQR #07-BSA-071M

¶227 THAT this approval is limited to the relief granted by the Board, in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

¶228 THAT the approved plans shall be considered approved only for the portions related to the specific relief granted;

¶229 THAT substantial construction be completed in accordance with ZR § 72-23;

¶230 THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, August 26, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, August 26, 2008.
Printed in Bulletin No. 35, Vol. 93.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

CERTIFIED RESOLUTION

Chair/Commissioner of the Board

AFFIRMATION OF SERVICE

I, Alan D. Sugarman, Attorney for Petitioners-Appellants, hereby affirm that I served the **Petitioners-Appellants Motion for Reargument or in the Alternative Leave to Appeal dated July 22, 2011,** upon counsel for Respondents to the physical and e-mail addresses below as follows:

An Acrobat PDF file by electronic mail to the e-mail addresses below on July 25, 2011.

Two paper copies by Federal Express for delivery on July 25, 2011.

Ronald E. Sternberg
New York City Department of Law
Senior Assistant Corporation Counsel
100 Church Street Rm. 6-186
New York NY 10007
Tel: (212) 788-1070
Fax: (212) 788-1054
RSternbe@law.nyc.gov

Attorneys for Respondents-Appellees Board of Standards and Appeals and Chair and Vice-Chair

Claude M. Millman
Kostelanetz & Fink, LLP
7 World Trade Center, 34th Floor
New York, NY 10007
212-808-8100 (main)
212-840-7031 (direct)
212-808-8108 (fax)
cmillman@kflaw.com

Attorneys for Respondent-Appellee Congregation Shearith Israel aka Trustees of Congregation Shearith Israel in the City of New York

Dated: July ___, 2011
New York, New York

_____
Alan D. Sugarman
Attorney for Petitioners-Appellants

SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

INDEX No 113227/08
APPEAL FROM SUPREME COURT
NEW YORK COUNTY (LOBIS)

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners-Appellants

Against

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

Respondents-Appellees

NOTICE OF MOTION TO REARGUE AND ALTERNATIVELY FOR LEAVE TO APPEAL WITH AFFIRMATION of ALAN D. SUGARMAN

Law Offices Of
ALAN D. SUGARMAN
17 West 70th Street
Suite 4
New York, NY 10023
212-873-1371

Attorneys for Petitioners-Appellants

To:
Jeffrey Friedlander
First Assistant Corporation Counsel of the
City of New York
Ronald E. Sternberg
New York City Department of Law
Senior Assistant Corporation Counsel
100 Church Street, Rm. 6-186
New York NY 10007
Tel: (212) 788-1070
Fax: (212) 788-1054
RSternbe@law.nyc.gov
Attorneys for Respondents-Appellee
Board of Standards and Appeals and Chair and Vice-Chair

Claude M. Millman
Kostelanetz & Fink, LLP
7 World Trade Center, 34th Floor
New York, NY 10007
212-808-8100 (main)
212-840-7031 (direct)
212-808-8108 (fax)
cmillman@kflaw.com
Attorneys for Respondent-Appellee Congregation
Shearith Israel aka Trustees of Congregation Shearith Israel in the
City of New York

I affirm that I am counsel for Petitioners-Appellants and the within was served by Federal Express and e-mail, upon counsel for Respondents-Appellees and upon counsel for Landmark West, on July 25, 2011.

_____
Alan D. Sugarman
July 25, 2011

David Rosenberg, Esq.
Marcus Rosenberg & Diamond LLP
488 Madison Avenue
New York, New York 10022
(212) 755-7500
Attorneys for Landmark West et all - Related Appeal