NEW YORK SUPREME
APPELLATE DIVISION : FIRST DEPARTMENT

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NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners-Appellants,

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

-against-

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

Respondents-Respondents.

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AFFIRMATION IN OPPOSITION

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

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

Petitioners-Appellants,

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

-against-

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION,

Respondents-Respondents,

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

Respondent,

and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Respondent-Respondent.

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

RONALD E. STERNBERG, an attorney duly admitted to practice in the State of New York, and of counsel to JEFFREY D. FRIEDLANDER, First Assistant Corporation Counsel of the City of New York, the attorney of record for municipal respondents-respondents in the captioned proceedings, consolidated on appeal, hereby affirms that the following statements are true, under penalty of perjury:

1. I am an Assistant Corporation Counsel in the Appeals Division of the Office of the Corporation Counsel. I am fully familiar with the facts and the proceedings had herein on the basis of the information contained in the files maintained by my office with regard to this matter.

2. This affirmation is submitted in opposition to the motions of the respective petitioners-appellants, both returnable August 15, 2011, for reargument of, or leave to appeal to the Court of Appeals from, an order of this Court, entered June 23, 2011. This Court unanimously affirmed an order and judgment (one paper) of the Supreme Court, New York County (Lobis, J.), entered July 24, 2009, that confirmed the challenged determination of respondent Board of Standards and Appeals ("BSA") "in all respects," denied the applications, and dismissed the petitions. In these article 78 proceedings, petitioners, as reviewed by this Court, "challenge a zoning variance granted by BSA to respondent Congregation Shearith Israel (the Congregation), a not-for-profit religious institution."

3. The motions should be denied.

Reargument

4. Petitioners' papers do not demonstrate that in considering these appeals, argued on April 5, 2011, and decided on June 23, 2011, this Court overlooked or misapprehended any relevant facts or law. Rather, petitioners merely advance arguments that

they previously raised and that were rejected by the BSA and, upon extensive briefing, by both the Court below and this Court. As noted by this Court, "BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." "A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Foley v. Roche*, 68 AD2d 558, 567 (1st Dept. 1979).

5. Upon the extensive record in these proceedings, including the comprehensive evidence before the BSA, bound into 12 volumes and filed in the Court below along with the BSA's answer to the petition, this Court, echoing the Court below and explicitly rejecting each of petitioners' arguments, reasonably concluded "that BSA's finding that the proposed building satisfies each of the five criteria for a variance set forth in [City Zoning Resolution] § 72-21 has a rational basis and is supported by substantial evidence." Petitioners provide no basis for revisiting that determination.

6. In particular, the Landmark petitioners reiterate, and seek to "make clear," their argument that the BSA lacked jurisdiction to consider the Congregation's application and to grant the requested variance. As fully reviewed in municipal respondents' brief on the appeal, petitioners' argument that the BSA has only appellate jurisdiction ignores section 666(5) of the Charter, that explicitly provides that the BSA "shall have the power ... [t]o determine and vary the application of the zoning resolution." Indeed, in response to a question from the bench during oral argument, petitioners' counsel acknowledged that acceptance of petitioners' argument would require the Court to read that section out of the Charter. Petitioners' papers

provide no basis for concluding that this Court should revisit its appropriate rejection of their contention.

7. Petitioners' request for reargument of this Court's inclusive decision should be denied.

Leave to appeal

8. Leave to appeal should be denied because, contrary to petitioners' contentions, the issues involved are not of such novelty or public importance as to warrant further review by the Court of Appeals. Relying on well-established law, and applying it to the facts, this Court appropriately affirmed the dismissal of the petitions, concluding that the BSA's determination "has a rational basis and is supported by substantial evidence."

Conclusion

9. For a complete discussion of the issues, this Court is respectfully referred to the briefs of the respective respondents filed on petitioners' appeals.

WHEREFORE, petitioners' motions for reargument or leave to appeal should be denied in all respects, with costs of the motions.

Dated: New York, New York
August 8, 2011

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RONALD E. STERNBERG
Assistant Corporation Counsel