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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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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AFFIRMATION IN OPPOSITION

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

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

CLAUDE M. MILLMAN, an attorney duly admitted to practice in the State of New York, the attorney of record for respondent-respondent Congregation Shearith Israel (the "Congregation") in the captioned proceedings, consolidated on appeal, hereby affirms that the following statements are true, under penalty of perjury:

1. I am a partner at Kostelanetz and Fink, LLP, counsel of record to the Congregation. I am familiar with the facts and proceedings in this matter.

2. I submit this affirmation in opposition to the motions (returnable August 15, 2011) of petitioners-appellants for reargument of, or leave to appeal to the Court of Appeals from, this Court's June 23, 2011 decision. Petitioners present no new information to the Court and no issues of importance. The motions should be denied.

Reargument

3. The Landmark petitioners repeat their argument that the respondent Board of Standards and Appeals ("BSA") lacked the authority to grant the requested zoning variance because (i) according to the Landmark petitioners, the wrong official of the Department of Buildings ("DOB") acted on the Congregation's submission, and (ii) BSA allegedly lacked the "original" jurisdiction it would have needed to overlook that purported defect. In its decision, this Court rejected this argument because, even if the Landmark petitioners were correct as to "(i)," it would be of "no consequence" because BSA plainly has "original" jurisdiction and is not limited to "appellate" jurisdiction.

4. While the Congregation certainly agrees with the Court in this regard, the Landmark petitioners' motion is ***also*** lacking for a reason that this Court did not need to reach: The Landmark petitioners failed to establish "(i)," a technical deficiency in DOB's action. The record, in fact, established, among other things, that DOB reviewed plans submitted by the

Congregation and that the DOB objections before the BSA were issued by a provisional administrative "borough superintendent" using the official stamp of the "Boro Commissioner," which was sufficient to justify "appellate" BSA jurisdiction even under the Landmark petitioners' erroneous theory. *See* Congregation's Brief on Appeal at 19-20. (The Landmark petitioners argue in their motion that BSA somehow conceded a defect in the DOB's process. In fact, BSA merely argued that any alleged defect was of no consequence. There was no concession.) In any event, the Landmark petitioners have never claimed that the DOB objections were wrong; all parties agreed that the objections issued by DOB and considered by BSA were correct. The Landmark petitioners merely argued that the wrong DOB employee issued the DOB's matter-of-fact objections. The Landmark petitioners were wrong about that, and, as this Court correctly found, the alleged clerical defect in the DOB's process did not prevent BSA from granting the Congregation a variance in any event.

5. The Kettaneh petitioners raise no less than 13 issues in their motion. Their contentions are also meritless. As this Court correctly determined, BSA had a rational basis to find "unique physical conditions" in light of the location of the zoning district boundary and other factors, including the Congregation's need to preserve its existing synagogue. This Court also correctly held that BSA's "reasonable return" finding was rational given BSA's reliance on expert analysis in the record. The Kettenah petitioners' efforts to argue from post-administrative-decision statements in the municipal respondents' answer and trial court brief in this action are unavailing because those statements (which do not support petitioners in any event) were obviously not in the administrative record that this Court was asked to review. Finally, while the Court appropriately declined to reach the Congregation's contention that the "reasonable return" requirement does not apply the Congregation, the Court could not reverse

and find for the Kettaneh petitioners on that issue without considering and rejecting the Congregation's contention, which the Congregation respectfully submits is squarely supported by the statutory language exempting not-for-profit entities from the no-reasonable-return requirement.

Leave to appeal

6. Leave to appeal should also be denied. The issues presented by petitioners are not of such novelty or public importance as to justify review by the Court of Appeals.

Conclusion

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

CLAUDE M. MILLMAN