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-	:	REPLY 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.	:	

REPLY 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 or in the alternative for leave to appeal to the Court of Appeals and in reply to the responses of Respondents, dated August 8, 2011, and served by e–mail on August 8 or 9, 2011.

2. The City makes no substantive response, merely repeating the wholly false canard that these issues had been considered by the BSA and discussed and rejected by "both courts,"

but without indicating where in those decisions were the issues addressed. With all due respect, a sweeping statement by an adjudicator asserting that issues not addressed by the adjudicator had no merit without any further explanation is not a "discussion" by the courts. The Congregation states that "The Kettaneh petitioners raise no less than 13 issues in their motion", but then the Congregation was unable to identify where any of these issues were addressed by the BSA, the court below, or in the Appellate Division. Respondents could have simply listed each point, and then provided the citation as to where the issue was addressed. They have not done so, and cannot do so.

3. The Congregation's main substantive point is that "This Court also correctly held that BSA's "reasonable return" finding was rational given BSA's reliance on expert analysis in the record." The Congregation posits an extremely low bar for a variance applicant. According to the Congregation, all an applicant needs to do is retain a financial "expert" for hire who specializes in concocting reasonable return analyses and the job of the BSA is done, according to the Congregation.[1]

4. To the Respondents, the size of the record and the length of the BSA proceeding are sufficient, and there is no need to adduce the facts alleged to constitute substantial evidence. Justice Cardozo, who happened to have been a member of the Congregation, observed that if requirements that hardships supporting variances be fully exhibited were relaxed, then "judicial review would be reduced to an empty form." *Fordham Manor Reformed Church v Walsh*, 244 NY 280, 290 (1927) cited with approval in *Village Bd. of Fayetteville v. Jarrold*, 53 N.Y.2d 254, 259 (1981). The Congregation simply wishes to have judicial review be an "empty form."

5. The Congregation, rather than address the legal insufficiency and irrationality of the reasonable return analysis, simplistically asserts: "This Court also correctly held that BSA's

[1] The Congregation's hired expert has no professional appraisal certifications with accompanying ethical codes and is subject to no professional discipline, as contrasted to the expert submitting detailed critiques in opposition.

"reasonable return" finding was rational given BSA's reliance on expert analysis in the record." Thus, under the Congregation's view of judicial review, a court is foreclosed from examining an expert analysis in conflict with the applicable standards or is on its face irrational.

6. The paid expert's bifurcated analysis presented to and relied upon by the BSA did not meet the standards applied by New York courts. It is a stretch of the imagination to suggest that this Court cannot question the propriety of the assumptions of an expert opinion merely because the BSA accepted the opinion.

(1) The Congregation expert–for–hire used of a bifurcated standard that conflicts with applicable law.

7. The Congregation's paid–expert opinion was incorrect in using a bifurcated approach not approved by the New York Court, and, then, in that bifurcated analysis, made a further error by not using as his starting point the value of the number of square feet in the two floors available for development as–of–right.

As stated in *Concerned Residents v. Zoning Bd. of Appeals*, 222 A.D.2d 773, 774–775 (3d Dep't 1995):

> Our review of the record discloses that KRM's proof of unnecessary hardship was deficient. The primary deficiency is that *its analysis of the rate of return of the property as currently zoned is limited to its 8.2-acre leasehold rather than the 96.4 acres* owned by Lebanon Valley (see, Matter of Citizens for Ghent v Zoning Bd. of Appeals, 175 A.D.2d 528, 529, 572 N.Y.S.2d 957). This deficiency was not cured by the conjectural opinion of KRM's expert that expanding the site would not increase the rate of return (see, Matter of Wheeler v City of Elmira, 101 A.D.2d 647, 649, 475 N.Y.S.2d 163, affd 63 N.Y.2d 721, 480 N.Y.S.2d 194, 469 N.E.2d 515). Another significant deficiency is that *KRM did not submit any evidence regarding the price Lebanon Valley paid* for the 96.4-acre parcel, the present value of the parcel, the real estate taxes and other carrying charges, the amount of any mortgages or liens or the income Lebanon Valley is presently deriving from the property, all factors relevant to the determination of whether the property is yielding a reasonable return (see, Matter of Miltope Corp. v Zoning Bd. of Appeals, 184 A.D.2d 565, 566, 584 N.Y.S.2d 865, lv denied 80 N.Y.2d 760; see also, 2 Anderson, New York Zoning Law and Practice § 23.13, at 179-180 [3d ed]).

> Thus, given these deficiencies, we concur with Supreme Court's finding that the evidence before the ZBA did not support the granting of a use variance to KRM. (emphasis supplied).

8. One commentator in explaining *Concerned Residents* stated:

> The evidence of proof of an inability to realize a reasonable return also may not be segmented to examine less all of an owner's property interest. In Concerned Residents v. Zoning Board of Appeals, a use variance to permit an asphalt plant was annulled because the applicant's proof of hardship related only to the eight acre portion of the site on which the plant was to be located, rather than the entire ninety-six acre parcel. An applicant generally must provide financial proof with respect to all portions of his original related holdings and may not segment his proof so as to ignore profitable portions of a parcel in order to obtain relief as to a less profitable part of the property.

Terry Rice, *Zoning and Land Use*, 47 Syracuse L. Rev. 883, 918 (1997).

9. Similarly, the Court of Appeals stated in *Northern Westchester Professional Park Associates v. Bedford*, 60 N.Y.2d 492, 503–504 (1983):

> An owner will not have sufficiently established his confiscation claim, therefore, if the adverse factors demonstrated affect but a part of the property but do not prevent a reasonable return from the tract as a whole.

10. And, again the Court of Appeals stated in *Koff v. Flower Hill*, 28 N.Y.2d 694 (1971) stated:

> In its reversal, the Appellate Division found that, although plaintiff was permitted, without objection, to amend his complaint so as to encompass therein only that portion of the property comprising the sites fronting on Northern Boulevard, defendant did not consent to removal from the court's consideration the fact that the entire parcel was owned by plaintiff and that, because there was no proof that financial returns on the whole tract would not permit recovery of the purchase price if the property were developed as permitted by the ordinance, there was no showing of confiscation;

11. Even the United States Supreme Court has adopted the same stance in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130–1 (U.S. 1978):

> Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular

> segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole …

12. Petitioners cited these precedents to the BSA, to the New York Supreme Court, and in Petitioners' briefs in the Appellate Division herein. Neither Respondent ever attempted to distinguish these cases or even refer to the argument. Then, the Appellate Division wholly overlooked this issue. When raised by Petitioners reargument motion, once again the Respondents fall mute, except to falsely state that the Appellate Division, the Supreme Court, and the BSA had addressed the issue. Why are the Respondents mute and why do they misrepresent? It is obvious that they have nothing they can say, and do not wish to bring to the attention of the court the complete impropriety of the BSA action. The Respondents' ploy is clever advocacy — hoping that by ignoring an argument, the court will be deceived into ignoring it as well.

(2) Even if a bifurcated analysis was a proper approach, the expert's approach was irrational and did not use value of property as currently zoned, which limits the two floors to 7,494 square feet.

13. The Congregation's simplistic response is that because the Congregation's analysis was prepared by a hired–gun expert, then the BSA's reliance upon the expert is rational. But, the record is clear, as pointed out in Petitioners' moving affirmation, that the very essence of the expert's bifurcated analysis was irrational because he did not use a rational site value and did not use the as–of–right site area. As I stated in ¶ 22 of my moving affidavit:

> 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 a as the starting value, and, the expert clearly did not do this.

14. Not only is the "expert's" approach irrational, but his approach conflicts with the requirement that the value of the site be based upon the "value of the property as presently zoned" and that the original cost should be used as well. *Douglaston Civic Assoc. v. Galvin*, 36 N.Y.2d 1, 9 (1974) (cited in Petitioners brief on appeal.) The two floors of development site permit as–of–right only the construction of 7,594 square feet, for the sliver law restrictions (as well as the building separation requirement) prevent a tower sliver. So, it was irrational as well as not in accord with law that the "expert" used a different site and a different size of the site. In *Douglaston*, the Court of Appeals stated:

> We would merely add that in affirming the decision below we do not intend to imply our approval of the Appellate Division's statement that the board acted correctly "in apparently concluding that a projected return of income, for a parcel for which a variance is sought, may be based on present value, rather than its original cost." (43 A.D.2d 739, 740.) While present value most often will be the relevant basis from which the rate of return is to be calculated, *it is important that the "present value" used be the value of parcel as presently zoned, and not the value that the parcel would have if the variance were granted.* While the record does not speak to this point, we suspect that the $ 121,000 figure here represents the value the parcel would have if granted the variance. Neither do we think that Matter of Crossroads Recreation v. Broz (4 N Y 2d 39, 172 N.Y.S.2d 129, 149 N.E.2d 65) fairly supports that statement as suggested by the Appellate Division. Our intention in Crossroads was simply to reaffirm the rule that the proper inquiry is whether the presently permitted use can yield a

> reasonable return, even if not the most profitable return. (4 N Y 2d at p. 46.) *We would note further that the original cost becomes relevant where, despite the prohibition upon converting the land to another use, the land has nevertheless appreciated significantly to the extent that the owner may have suffered little or no hardship.* (See Matter of Jayne Estates v. Raynor, 22 N Y 2d 417, 421-422, 293 N.Y.S.2d 75, 239 N.E.2d 713) (emphasis supplied*)*.

See also, supra, Concerned Residents v. Zoning Bd. of Appeals, 222 A.D.2d 773, 774–775 (3d Dep't 1995) requiring analysis of the property "as curently zoned."

15. The Congregation does not in any way refute or attempt to justify or explain or rationalize the pure irrationality of the expert's approach or why the site area as currently zoned was not used in the analysis. The BSA accepted the improper and flawed analysis despite Petitioners' objections. Although explicitly addressed in Petitioners' moving papers, the BSA and the Supreme Court ignored these objections, and the Appellate Division overlooked them completely as well.

(3) The Congregation does not deny that an analysis of the entire development site was not submitted to the BSA.

16. There is no dispute that the Congregation never submitted and the BSA never considered whether the entire 64–foot x 100-foot perfectly rectangular prime development site could provide a reasonable return to the Congregation. In its motion, Petitioners once again challenged the BSA and the Congregation to point to such an analysis. They have both failed to do so.

17. The closest thing to an analysis of the entire site that can be found in the record is the December 2007 analysis. Not only does the Congregation's expert readily admit that his mislabeled analysis was not an analysis of an all residential/income–producing building, but the City in its answer admitted that even this flawed analysis understated the rate of return, and that the return when corrected using the facts in the administrative record, yielded a return that exceed the return this "expert" had opined was an adequate and reasonable return. Once again,

Respondents make no effort to explain this opinion — and the admission of the City in its answer is sufficient.

18. The only weak argument that the Congregation could offer in its response to the motion is:

> 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.

19. It is perfectly appropriate for the court to consider the admissions and computations by the City based upon the facts in the record. *215 East 72nd St. Corp. v. Klein*, 58 AD 2d 751 (1st Dept. 1977); *Community Synagogue v. Bates,* 1 N.Y.2d 445 (1956); *Forrest v. Evershed*, 7 N.Y.2d 256 (1959). Even accepting the Congregation's argument, the Congregation here acknowledges that the analysis was flawed and incomplete, and cannot be relied upon by the BSA in its decision. At the very least, this would require remand, except for the fact that the Congregation deliberately refused to update or complete the analysis during the proceeding - with the collusion of the BSA, which refused to require the updating. Still "[a] remand for the sole purpose of transposing the material in the return to a new formal decision would serve no useful purpose." *NYC Hous. Bd. v. Foley*, 23 A.D.2d 84 (1st Dep.t 1965)

> *(4) The Court was mistaken in stating that the BSA had found " the Congregation's need to preserve its existing synagogue" was a physical condition, and in any event, such need is unrelated to the condominium variances and is not a physical condition under § 72–21(a).*

20. As to the unique physical condition, the Congregation makes no effort to identify a condition such as one "including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions." Instead, the Congregation merely restates the mistaken assertion of the Appellate Division that:

> 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.

21. Yet, Petitioners were explicit in their reargument motion that there was no finding in the BSA decision that "the Congregation's need to preserve its existing synagogue" was a physical condition or was the basis of the BSA's physical condition finding. Nor does the Congregation identify any relationship at all between its claimed programmatic "need" and the variances for condominiums that do not touch the synagogue, but tower over it. Nor would such a need constitute a physical condition under §72–21(a). The BSA "finding" refers to other "conditions," which in the context of the decision would appear to relate to the use of landmarking as a hardship, another issue ignored by the Appellate Division and the Congregation, and shamefully ignored by the City response, which should act to uphold the landmarking relief provisions of the law, not destroy them.

> *(5) If § 72–21(b) does not apply to non–profits, then the Congregation is only allowed variances to meet its programmatic needs, and the condominium variances are unrelated to programmatic needs.*

22. The Congregation wholly undercuts its own position when arguing that as a non–profit, it is not required to show the inability to earn a reasonable return when constructing a luxury condominium project.

23. The Congregation states:

> 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.

24. Of course, the Congregation’s statement is incorrect as well as being incomplete, because it evades the question as to what standards should apply when a non–profit is requesting

a variance for a profit–making project. The Congregation seems to suggest that no standards should apply, and that it should be allowed any variances it requests with no limitations. This is plainly wrong — for, clearly the statute would require that the standard is whether the non–profit is unable to meet its reasonable programmatic mission without receiving a variance. But, here, to satisfy its programmatic needs, the Congregation argued that it only needed variances for the lower floor community house. The Petitioners' do not appeal those community house variances. But, there is nothing in the record to provide any basis for the Respondents' claim for variances for the luxury condominiums — and thus this Court should invalidate the condominium variances, even assuming the correctness of the Congregation's argument.

25. The application of the height and set–back zoning regulations to the upper floor condominiums in no way restricts the religious or other ancillary uses of the property by the Congregation. *Community Synagogue v. Bates*, 1. N.Y. 23 445, 453 (1956); *Diocese of Rochester v Planning Bd.*, 1 N.Y.2d 508, 526 (1956); *Islamic Society, Inc. v. Foley*, 96 A.D. 2d 536 (2nd Dep't 1983):

> There are undoubtedly feasible alternatives for locating the most intensive uses of the facility further from the neighboring lot lines, in order to minimize the interference with the privacy and enjoyment of the neighboring properties and to reduce the extent of the variance required (Matter of Mikveh of South Shore Congregation v Granito, 78 AD2d 855, supra). Therefore, the court properly annulled the determination under review and remitted the matter to the zoning board with the direction to grant the variance under such reasonable conditions as will permit petitioner to establish its house of worship and part-time religious school, while mitigating the detrimental or adverse effects upon the surrounding community.

26. In the Congregation's case, all of the religious and programmatic needs of the Congregation can be met within the upper–floor as–of–right envelope. See *Pine Knolls v. Zoning Bd.*, 5 N.Y.3d 407 (2005) (holding that a zoning board may impose legitimate zoning requirements even upon religious organizations) (concurring, Chief Judge Kaye, a member of the

Respondent Congregation herein.)

27. In an important case involving hardships caused by landmarking, *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449 (1980) the Court of Appeals in the landmarking context rejected the very same arguments being made by the Congregation herein.

> Instead, petitioners' arguments seem to emphasize aggrievement with respect to the prohibition against high-rise development. There is no genuine complaint that eleemosynary activities within the landmark are wrongfully disrupted, but rather the complaint is instead that the landmark stands as an effective bar against putting the property to its most lucrative use.
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> * * *
>
> The Society also contends that the existence of the designation interferes with the free exercise of its religious activities; however, rather than argue its desire to modify the structure to accommodate these religious activities, the Society has suggested that it is improper to restrict its ability to develop the property to permit rental to nonreligious tenants. For this reason the Society's reliance on our decision Matter of Westchester Reform Temple v Brown (22 N.Y.2d 488), which dealt with restrictions actually impairing religious activities, is clearly misplaced. Although the Society is concededly entitled to First Amendment protection as a religious organization, this does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters (cf. Wisconsin v Yoder, 406 US 205, 215).

Clearly, *Spatt* would wholly reject the use by the BSA of the landmarking hardship to justify variances completely unrelated to the landmarking hardship.

28. Variances to brick–up windows in the adjoining building are unrelated to any programmatic needs of the Congregation and have nothing to do with any needs by the Congregation to preserve its synagogue. Again, this is purely about money, transferring value from the adjoining building to the membership of the Congregation in the form of reduced support requirements.

29. When construing a statute, a court is to seek to discern and give effect to the legislative intent. *Roberts v Tishman Speyer*, 13 N.Y.3d 270, 285–6 (2009). There is no indication of a legislative intent to absolve non–profits from complying with zoning regulations.

It is not enough for the Congregation to merely assert that it need not provide a reasonable return analysis for luxury condominium project sponsored by a non–profit — it needs to enunciate the standard that consequentially would apply to non–profits in such a situation.

30. The City's silence on the issue is shameful. The BSA explicitly found that § 72–21(b) requires even a non–profit to show that a reasonable return cannot be earned in these circumstances and clearly the City must have read the Congregation's brief herein and the statements of the Congregation's counsel at oral argument. But, the City, so intent in serving the interests of this wealthy and influential congregation, is willing to sit by silently while the zoning regime is being perverted and the door swung wide open for any non–profit to evade zoning regulation.

(6) The Congregation did not meet its burden of showing a hardship to support the condominium variance.

31. The Congregation shows nothing in the record that demonstrates that, without variances for the luxury condominiums, it will suffer a hardship preventing it from either using the property to meet its programmatic needs or earning a reasonable return. The Court of Appeals aptly described the standards to be applied in *Spears v. Berle*, 48 N.Y.2d 254, 263 (1979):

> Nonetheless, there has evolved from our decisions a standard which, while retaining an element of flexibility, is capable of practical application. Under this test, a land use regulation -- be it a universally applicable local zoning ordinance or a more circumscribed measure governing only certain designated properties -- is deemed too onerous when it "renders the property unsuitable for any reasonable income[,] productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value" ... A petitioner who challenges land regulations must sustain a heavy burden of proof, demonstrating that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use (see Penn Cent. Transp. Co. v New York City, 438 U.S. 104, 130-131, supra; McGowan v Cohalan, supra, at pp 436-438; Williams v Town of Oyster Bay, supra, at p 82). To carry this burden, the landowner should produce "dollars

> and cents" evidence as to the economic return that could be realized under each permitted use ... Only when the evidence shows that the economic value, or all but a bare residue of the value, of the parcel has been destroyed has a "taking" been established ...

Conclusion

32. During the BSA proceeding, the Congregation had every opportunity to cure the many deficiencies in its application and was represented by sophisticated counsel. The Congregation deliberately decided not to provide a complete and proper submission over the 18 months of the proceeding. There is no need for a remand. The variances for the condominiums simply should be vacated and the BSA directed to deny those variances.

Dated: August 12, 2011
New York, New York

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