

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

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LANDMARK WEST! INC., 91 CENTRAL PARK : Calendar No. 4887  
WEST CORPORATION AND THOMAS HANSEN, :

*Petitioners-Appellants,* : New York County  
Index No.  
650354/08

- against -

CITY OF NEW YORK BOARD OF STANDARDS :  
AND APPEALS, NEW YORK CITY PLANNING :  
COMMISSION, HON. ANDREW CUOMO, as :  
Attorney General of the State of New York, and :  
CONGREGATION SHEARITH ISRAEL, also :  
Described as the Trustees of Congregation Shearith :  
Israel, :

REPLY  
AFFIRMATION

*Respondents-Appellees.*

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DAVID ROSENBERG, an attorney admitted to practice in the  
New York courts, under penalty of perjury, affirms:

1. I am a member of Marcus Rosenberg & Diamond LLP, attorneys  
for Appellants Landmark West! Inc., 91 Central Park West Corporation and Thomas  
Hansen (“Appellants”), and am personally familiar with all matters stated in this  
affirmation submitted in:

a. Response to Respondents’ opposing affirmations;

and

b. Further support of Appellants' motion for leave to reargue or for leave to appeal to the Court of Appeals.

2. Unfortunately, as I will explain, Respondents' affirmations appear to be intended to obfuscate, rather than to clarify, the issues.

Respondent Congregation Shearith Israel ("CSI")

3. In paragraph 3 of his August 8, 2011 affirmation, CSI's attorney, Claude Millman, claims that Appellants argued that BSA "lacked the authority to grant the requested zoning variance because:

. . . the wrong official of . . . DOB acted on [CSI's] submission; and

BSA . . . lacked "original" jurisdiction it would have needed to overlook that purported defect.

4. Mr. Millman is far too clever and experienced to have so misinterpreted Appellants' argument. Rather, it is clear that he hopes to confuse this Court as to Appellants' argument, which is simple and straightforward.

5. Charter Sections 666(6)(a), 645(c) and 648 provide:

§ 666. **Jurisdiction.** The board shall have power:

\* \* \*

6. To hear and decide appeals from and review,

(a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or of a deputy commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed\* in accordance with the provisions of section six hundred forty-two or section six hundred forty-five of this charter. . . .

\* \* \*

§ 645 **Offices of the department; powers and duties.**

(c) The commissioner may, by instrument in writing filed in the department, designate a borough superintendent of the department to possess within a borough any of the powers granted to the commissioner by subdivision (b) of this section and to exercise the same within such borough in the name of the commissioner for such times and under such conditions as he may specify. . . .

\* \* \*

§ 648. **Appeals.** Appeals may be taken from decisions of the commissioner and of a deputy commissioner or the borough superintendent acting under a written delegation of power filed in accordance with the provisions of section six hundred forty-two or subdivision (c) of section six hundred forty-five of this chapter, to the board of standards and appeals as provided by law.

6. These provisions expressly limit BSA's jurisdiction to review of a DOB determination issued by: the Commissioner of Buildings; or a Deputy

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\* Unless otherwise indicated, all emphasis herein is added.

Commissioner or Borough Superintendent designated under a written and filed delegation of power.

7. Neither the City nor CSI claim that the signatory on the March 27, 2007 DOB Objections was either the Commissioner of Buildings or a duly designated Deputy Commissioner or Borough Superintendent.

8. Thus, the issue was not, as claimed by CSI, that the “wrong official . . . acted on [CSI’s] submission”. Certainly, any of DOB’s many Plan Examiners could have reviewed CSI’s proposed plans and approved them for construction or raised objections.

9. However, in order to appeal DOB’s determination to BSA, CSI was required to submit the proposed plans (with the Plan Examiner’s objections) to the Building Commissioner or a duly designated Deputy Commissioner or Borough Superintendent and to obtain a final objection sheet from one of these statutorily required officials.

10. The statutory procedures required by the Charter serve an obvious and understandable purpose, *i.e.*, before an appeal may be taken to BSA from a determination of a DOB Plan Examiner or other staff employee, the application

must first be presented to, and reviewed by, the Commissioner of Buildings or a duly delegated Deputy Commissioner or Borough Superintendent, the highest level DOB officials, who may:

a. overrule the Plan Examiner's objections, thereby avoiding the need for a BSA appeal; or

b. modify the Plan Examiner's objections, thereby limiting the conditions for which a variance may be required.

11. Having failed to obtain such a determination – the exhaustion of administrative remedies within DOB – there was no jurisdiction for BSA to entertain the appeal.

12. Contrary to CSI's argument, Appellants never suggested that BSA "lacked the 'original' jurisdiction . . . to overlook that purported defect."

13. Appellants' point is far simpler:

a. BSA has no "original" jurisdiction to issue a variance; and

b. since CSI failed to obtain a final DOB review and determination, BSA lacked appellate jurisdiction.

14. As BSA's own rules expressly state:

#### **§ 1-06 The Zoning (BZ) Calendar**

(a) Subject Matter

No application for a variance or special permit shall be entertained by the Board except from an order, requirement, decision, or determination made in a specific case by the Commissioner of Buildings, any Borough Superintendent of the Department of Buildings or their authorized representative, or the Commissioner of the Department of Business Services pursuant to the Board's jurisdiction as set forth in the New York City Charter.

15. Similarly, BSA's website expressly states [A 132 - 133]:

The majority of the Board's activity involves reviewing and deciding applications for variances and special permits, as empowered by the Zoning Resolution, and applications for appeals from property owners whose proposals have been denied by the City's Department of Buildings. . . .

The Board can only act upon specific applications brought by landowners or interested parties who have received prior determinations from one of the enforcement agencies noted above. The Board cannot offer opinions or interpretations generally and it cannot grant a variance or a special permit to any property owner who has not first sought a proper permit or approval from an enforcement agency. . . .

16. Finally, BSA's answer to Appellant's petition in the Supreme Court [A 183] affirmatively pleaded:

115. In order to develop a property with a non-conforming use or a non-complying bulk, an applicant is first required to apply to New York City Department of Buildings ("DOB"). After DOB issues its denial of the non-conforming or non-complying proposal, a property owner may apply to the BSA for a variance.

17. BSA's failure to adhere to its own express rules, by itself, would warrant reversal. *See, e.g., Matter of Field Delivery Serv.*, 66 N.Y.2d 516, 517 (1985).

Respondent City of New York (the "City")

18. The City's attorney, Ronald E. Sternberg, in his August 8, 2011 affirmation (paragraph 6), misstates my oral argument before this Court:

Instead, 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 [Section 666(5)] out of the Charter.

19. Mr. Sternberg had admitted on page 4 of his brief to this Court:

It may well be, as [Appellants] argue, that the BSA's appellate jurisdiction may not be invoked without a determination

issued by the DOB Commissioner or a borough superintendent acting under appropriate delegation.

20. To avoid this glaring jurisdictional defect, CSI, BSA and the City asserted a claim never asserted before this case and contradicted by BSA's own rules, *i.e.*, that BSA allegedly possessed original jurisdiction to issue a variance, without prior DOB review, citing Charter Section 666(5), which states:

[BSA] shall have the power:

\* \* \*

5. To determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to section six hundred sixty-eight.

21. Section 668, to which reference is made in Section 666(5), is merely a procedural provision. The other provision mentioned in Section 666(5), the Zoning Resolution, does not grant original jurisdiction to BSA to grant a variance.

22. To the contrary, it states [§ 72-21]:

When in the course of enforcement of this Resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this Resolution . . . the Board of Standards and Appeals may, in accordance with the requirements set forth in this Section, vary or modify the provision. . . .



23. When I discussed this at oral argument, Justice Leland DeGrasse pointedly asked me whether this would not render meaningless Charter Section 666(5), which never would come into play.

24. My response, which I clearly recall, was that, under the current provisions of the Zoning Resolution, there would be no basis for jurisdiction under Charter Section 666(5).

25. As I then explained, the Charter is a relatively permanent document, requiring amendment by a Local Law at the least. The Zoning Resolution, on the other hand, may be amended by the City Planning Commission, and has been the subject of frequent revisions.

26. Thus, as I responded to Justice DeGrasse, and reiterate today, Charter Section 666(5) is not meaningless. It is a provision intentionally crafted to permit BSA to respond to future potential amendments of the Zoning Resolution.

27. Moreover, this Court's determination that BSA possesses original jurisdiction pursuant to Charter Section 666(5), effectively would nullify Charter Section 643, which grants to DOB, not BSA, the primary authority for interpreting and enforcing the Zoning Resolution.

28. What is clear today, and beyond any legitimate dispute, is the fact that Charter Section 666(5) does not expressly or impliedly grant original jurisdiction to BSA to vary the Zoning Resolution, where the DOB Commissioner or a duly designated Deputy Commissioner or Borough Superintendent has not issued final objections.

### Conclusion

29. Appellants recognize that they bear a heavy burden on reargument, as they did in their initial challenge to the City Respondents.

30. As I hope that I now have established, Respondents' misstatements of the facts and the law – and my failure to have clearly explained them – led this Court to err in its original decision and order.

31. The issues raised with respect to CSI's application for a variance to construct and sell five floors of luxury condominiums, a project totally unrelated to CSI "mission", as acknowledged by BSA's Resolution [A 277], certainly are important to the community represented by Appellants.

32. However, two issues transcend such concerns, *i.e.*:

a. If a non-profit entity is permitted to obtain a variance solely to engage in the unrelated business of real estate development and the sale of five floors of luxury condominium apartments, what is to prevent any other non-profit entity from obtaining a variance to construct a 50-floor high-rise condominium tower – in violation of the City’s carefully prepared Zoning Resolution - simply to generate millions of dollars in windfall cash; and

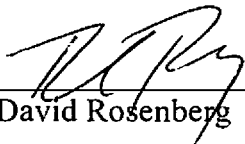
b. If this Court adheres to its determination that BSA possesses original jurisdiction to grant variances, what is to become of the carefully constructed, and statutorily required, process of initial DOB enforcement and interpretation of the Zoning Resolution?

33. Appellants do not ask this Court to “baby sit” or review, *ab initio*, BSA’s determination of CSI’s variance application.

34. Appellants merely request that this Court grant reargument to the extent of vacating CSI’s variance and remanding the matter for CSI to comply with the statutory procedures dictated by the Charter before seeking review by BSA.

35. Should this Court decline to do so, it is respectfully submitted that these issues are of significant and far-reaching importance warranting review by the Court of Appeals.

Dated: New York, New York  
August 16, 2011

  
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David Rosenberg

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N.Y. County Index No. 650354/08

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and THOMAS HANSEN,

*Petitioners-Appellants,*

-against-

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS,  
NEW YORK CITY PLANNING COMMISSION, HON. ANDREW  
CUOMO, as Attorney General of the State of New York, and CONGREGATION  
SHEARITH ISRAEL, also described as the Trustees of Congregation  
Shearith Israel,

*Respondents-Appellees.*

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REPLY AFFIRMATION

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Certified pursuant to § 130-1.1(a)  
Of the Rules of the Chief Administrator

By:   
David Rosenberg

Date: August 16, 2011