COURT OF APPEALS
STATE OF NEW YORK

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
Petitioners-Appellants,	:	New York County Clerk's Index No. 113227/08
-against-	:	PETITIONERS' MOTION 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.	:	

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December 8, 2011

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COURT OF APPEALS
STATE OF NEW YORK

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
Petitioners-Appellants,	:	New York County Clerk's Index No. 113227/08
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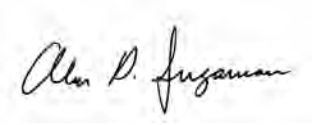
BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair of said Board, CHRISTOPHER COLLINS, Vice Chair of said Board, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,	:	
Respondents-Appellees.	:	

PLEASE TAKE NOTICE, that for the reasons set forth in the accompanying Petitioners' Brief in Support of Motion for Leave to Appeal to the Court of Appeals, dated December 9, 2011, and the exhibits thereto; and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a term to be held at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 19th day of December, 2011, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an Order pursuant to CPLR §§ 5513(b), 5514 and 5602 and §§ 500.21 and 500.22 of this Court’s Rules of Practice, granting leave to appeal from the final Order of the Appellate Division, First Department, dated June 23, 2011, and the Order denying reargument thereof dated October 20, 2011 and entered November 4, 2011, on the

grounds that the questions presented are of great public importance, and that permission to appeal should be granted in the interests of substantial justice, and for such other and further relief as to the Court seems just and proper.

Answering papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the return date of the motion.

Dated: December 8, 2011
New York, New York



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Index No. 650354/08

COURT OF APPEALS
STATE OF NEW YORK

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
	:	New York
Petitioners–Appellants,	:	County Clerk's
	:	Index No.
	:	113227/08
–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–Appellees.	:	

PETITIONERS-APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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December 8, 2011

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Statement of Procedural History of Case

Petitioners–Appellants Nizam Peter Kettaneh and Howard Lepow make this timely motion for leave to appeal pursuant to CPLR §§ 5513(b) and (d) and 5602(a)(1)(i) and § 500.11 of the Court's Rules of Practice. On October 20, 2011 the Appellate Division denied Petitioners–Appellants ' motion for reargument/leave to appeal.[1] The within motion is being served on or before December 9, 2011, within 35 days after the November 4, 2011 service–by–mail of the notice of entry.[2]

The case was initiated on September 7, 2008 by an Article 78 appeal to the Supreme Court, New York County from the August 26, 2008 resolution and decision of the Respondent-Appellee Board Of Standards And Appeals Of The City of New York ("BSA".)[3] On July 10, 2009, the Supreme Court dismissed the Article 78 proceeding.[4] Petitioners–Appellants then appealed to the Appellate Division First Department,[5] which on June 23, 2011 affirmed the Supreme Court

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[1] Appellate Division denial of motion to reargue/appeal with notice of entry. Ex. E.
The within motion includes:
(1) extracts from the Appendix on Appeal (citations thereto include an "*" asterisk);
(2) the opinions below at Ex. A–E; and
(3) the briefs below at Ex. F–V.
Filed separately is Petitioners–Appellants' seven volume Appendix on Appeal as filed by the Petitioners–Appellants in the Appellate Division; citations therein are to A–1 to A–4450. The Appendix contains a least one copy of *every* relevant document filed by the City in the BSA's duplicative and massive "administrative record." The Appendix contents was provided to Respondents months in advance of filing with the Appellate Division, with the Respondents making no objection as to completeness.

[2] Ex. E.

[3] BSA Decision aks BSA Resolution. Ex. A.

[4] Ex. Supreme Court Decision below. Ex. C.

[5] Notice of Appeal to Appellate Division. Ex. N.

by unanimous decision.[6]

Jurisdictional Basis for Leave to Appeal

This Court has jurisdiction of the motion and appeal requested pursuant to Article VI, § 3(a) of the New York State Constitution and CPLR § 5602(a)(1)(i). The orders of the Appellate Division are final determinations since they completely dispose of the case. Because there were no dissents, Petitioners have no right to appeal, but herein seek leave of this Court to appeal. This case presents questions of law and thus meets all the requirements set out in CPLR § 5602(a)(1)(i) as to this Court's jurisdiction over motions for leave to appeal.

Statement of Questions Presented for Review

These issues were raised at all three levels below including (when not premature for one could not predict the basis of the BSA rulings) at the BSA administrative level, and thus are appropriately reviewable by the Court. Petitioners-Respondents were not parties at the BSA administrative level.

(1) Question 1 — Reasonable Return Analysis of Only Portion the Site.

May a zoning board, in considering whether an owner is able to earn a reasonable return under Section § 72-21 of the New York City Zoning Resolution,[7] *consider only a portion of the development site, rather than the entire site?* [8]

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[6] Appellate Division Decision below. Ex. D.

[7] The New York City Zoning Resolution is hereafter cited as Z.R. Z.R. § 72-21 is included herein as A-787*.

[8] The issue was preserved below at G–14, 53, and 70; J–14–16; O–45, O–48, O–63; R–8, S–5, S–8, V–3, V–7. The Supreme Court mentioned this issue at 23, Ex. C–24. At the BSA, the issue was raised repeatedly. A–4345, A–4355, A–4359, A–4360, A–4383, A–4402.

Answer. No. Established precedent of the New York State courts requires that the site as a whole be evaluated as to the ability to earn a reasonable return. The BSA record is clear that the BSA relied upon a "bifurcated" analysis of a portion of the site where two upper floors of the proposed as–of–right building was analyzed — there is no complete analysis of an all–income producing proposal of the entire development site in the record, and the analysis that is in the record establishes that a reasonable return may be earned. The Supreme Court erred in ignoring established precedent and allowing an analysis of only a portion of the site.[9] The decision conflicts with prior decisions of the Court and other courts. The Appellate Division erred in completely ignoring the question and affirming the Supreme Court.

(2) Question 2 — Improper Use of Site Value of Different Site.

May a zoning board in considering whether an owner is able to earn a reasonable return, consider a dollars and cents analysis that uses as the starting site value the value of a different piece of property, and one larger than the development site. [10]

Answer: No. Precedent requires that the financial analysis consider the value of the site under development assuming the applicability of the zoning regulation, and not the value of a separate site larger in size and greater in value.

[9] Supreme Court Decision at 23. Ex. C-24*.
[10] The issue was preserved below at G–58–66, J–18–23, O–27, O–37. O–39–O–43; S–10–11; V–5. At the BSA, the issue was raised at A–4384*; A–4430*, A–4436*, A–4437*.

The two–floor of as–of–right condominium space contained only 5,316 square feet. Over Petitioners' repeated objections, the BSA allowed the Congregation to assign to this two floors the value of 19,755 square feet over an adjoining structure. The Supreme Court ignored the issue, as did the Appellate Division – in both cases again over Petitioners' objections. As presented to the court, this is a novel issue, since it seems no variance applicant has ever dared to use a site value of a different site in a reasonable return analysis under Z.R. § 72-21.

(3) Question 3 — The BSA Has No Power to Transfer Development Rights from a Landmark From One Part of a Zoning Lot to Another

In granting a variance under § 72–21 of the New York City Zoning Resolution, may the BSA assume the power of other agencies by transferring air right value from a landmarked property to the site for which a variance is sought [11]

Answer: No. The BSA was acting *ultra vires by* assuming powers expressly granted to the New York City Planning Department and allowing the transfer of the value of unused air rights over a landmarked property. The Supreme Court acknowledged that no restrictions from future development were imposed upon the property from which the value was "transferred", but together with the Appellate Division ignored the question. The BSA also improperly considered a landmarking hardship as a physical condition.

[11] The issue was preserved below at J–141, O–62–71, R–23, S–15–16.

(4) Question 4 — Programmatic Need, Landmarking, and Split-Lots Are Not "Physical Conditions."

Under the New York City Zoning Resolution Z.R. *§ 72–21(a) requirement of a physical condition hardship with a nexus to the variance, may the BSA consider landmarking hardships, split-zoning lots and programmatic needs to be physical condition hardships?*[12]

Answer: No. Neither landmarking hardships, split zoning lots, or programmatic needs are physical conditions of the type described in Z.R. § 72–21(a). Moreover, the Supreme Court erred in suggesting that the BSA may consider landmarking as a physical condition. [13] The Appellate Division ignored the question. There are no reported decisions that allow Z.R. § 72–21(a) to be satisfied without a true physical condition for revenue-producing variances.

(5) Question 5 — An Inflated Site Value May Not Be Used As Basis to Support Minimum-Variance Finding.

May a zoning board in evaluating whether the variances are the minimum needed to yield a reasonable return under Z.R. § 72–21(e)*, approve a reasonable return analysis using an inflated site value, of a different piece of property, and one larger than the development site?*[14]

Answer: No. The BSA as a zoning board may only grant the minimum variance required to remedy a hardship, as is articulated in Z.R. § 72–21(e). The standard methodology of reasonable return analysis is to use the same site value as

[12] The issue was preserved below at A–4332; A–4392–3, G–29–47, 0–59–61; R–22–6.
[13] Supreme Court Decision at 19. Ex. C–20.
[14] The issue was preserved below at J–12; G–58–64; O–37–43, O–61–3; R–10–16; S–10–12; V–5.

is used in the Z.R. § 72–21(b), which here was grossly inflated, as shown in Question 2. Because the site value is inflated, the analysis of the Z.R. § 72–21(e) minimum return is fatally flawed and can be no basis for the Z.R. § 72–21(e) finding, and the variances must be vacated. Moreover, the site value is a transparent transfer of value of undeveloped space over a landmark property, a transfer that the BSA may not approve under Z.R. § 72–21.

(6) Question 6 — Are Non–Profits Exempt from Showing That A Reasonable Return Cannot Be Earned Concerning a For–Profit Project.[15]

Where a non–profit owner is engaged in the development of a for–profit project such as luxury condominiums, is the non–profit exempt from making a no–reasonable–return showing for the project?

Answer. No. This is a question not directly answered by the language of the statute. The applicable Zoning Resolution of New York City, although not explicit, should be read to require such a financial analysis. The BSA so ruled.[16] The Appellate Division decision has introduced an element of chaos by questioning the BSA's position that non–profits in New York City need to make such a showing[17], and ignoring the result that the non-profits should then be limited to reasonable satisfaction of mission related need. Clarification of this issue alone merits review.

[15] The issue was preserved below at J–27–30; R–3; S–18; V–19.
[16] BSA Decision, Ex. A–8–9, ¶ 125–6.
[17] Appellate Division Decision, Ex. D–7.

Overview

On August 26, 2008 the Respondent–Appellee New York City Board of Standards and Appeals (the "BSA" or the "City") granted variances to the Respondent–Appellee Congregation Shearith Israel (the "Congregation") for the construction of a high–rise, luxury building located on West 70th Street in New York City.[18] The BSA–approved building is a mixed–use project with a community house building on the lower floors, five upper floors of luxury condominiums, and a basement banquet hall. So as to establish that existing zoning regulations impaired the Congregation's use and value of the property as required by Z.R. § 72-21 of the New York Zoning Resolution, the Congregation presented to the BSA an economic analysis of the conforming seven–floor building with a community house, and only two condominiums on the upper floors. The Congregation claimed that it was unable to earn a reasonable return from the portion of the building consisting of the two–condominium floors, claiming that it required additional condominium floors to make the building economical. The BSA erroneously accepted the reasonable return analysis of just this two-floor portion of the site, and did not address whether the entire site could provide a reasonable return. The BSA also erroneously allowed the analysis to use as a starting point the value of air rights over an adjoining building, rather than the value of the two floors of air rights on the site of the proposed building, ignoring

[18] BSA Decision. Ex. A.

applicable precedent and also acting *ultra vires*.

The development site is adjacent to the Congregation's historic 1897 synagogue and consists of three former brownstone sites, located 100 feet from Central Park West. The site is a 64–by–100–foot rectangular lot with no physical irregularities.[19] The site is across the street from a historic brownstone owned by Petitioner–Appellant Kettaneh and is adjacent to cooperative apartments owned by Petitioner–Appellant Lepow. The approved building scheme would block Petitioner–Appellant Lepow's otherwise legal lot–line windows, which have views of Central Park, although an as–of–right building would not.

The variances challenged by Petitioner–Appellants on its appeal are not required to meet programmatic needs of the Congregation; Petitioners–Appellants do not challenge the less–substantial variances for the lower floor Community House. The upper–floor condominium variances account for over 90% of the variance floor area.[20] Accordingly, the challenged variances have nothing to do with the programmatic needs of the Congregation. The minor community house variance were only a distraction, serving to divert attention from the revenue-producing condominiums.[21]

The site is subject to West Side "contextual zoning," the zoning applicable to residential neighborhoods with narrow side streets. Contextual zoning limits

[19] Supreme Court Decision below at 13, Ex. C–14.
[20] *See* As–of–Right Zoning Calculations. A–1208*.
[21] Revenue generation is not a basis for a variance to a non–profit. BSA Decision, ¶ 79–80, Ex. A–6.

maximum building height to 75 feet and requires upper–floor setbacks on a building's street side, so as to protect the light and air on the street and the character of the community. A conforming as–of–right building on the development site would thus be limited to 75 feet in height.[22]

The Congregation had obtained a Certificate of Appropriateness from the Landmark Preservation Commission (LPC), but no recommendation as to landmark hardship relief under Z.R. 74-711, the Congregation having withdrawn its application for such. A-1076.

Economic Analysis Submitted by Congregation's Expert Freeman

The BSA as the local zoning board must adhere to the substantial precedent of the New York courts, as well as adhere to Z.R. § 72–21 of the New York City Zoning Resolution that codifies common law and articulates somewhat more stringent standards than exist under statutes applicable outside of New York City.[23] Under Z.R. § 72–21, the BSA is required to make five findings for each variance in order to issue a variance, of which only three are addressed in this motion for leave to appeal, Z.R. § 72–21(a), Z.R. § 72–21(b), and Z.R. § 72–21(e). [24]

Zoning Resolution § 72–21 requires that findings be supported by "substantial evidence." A factual or conclusory finding by the BSA is not substantial evidence for the same findings. Yet, in the briefs below, Respondents–

[22] *See* Petitioners–Appellants' Brief on Appeal, Ex. O–15. The BSA in paragraph 126 of its decision a (Ex. ¶ 126, Ex. A–8): "WHEREAS, the residential development was not proposed to meet its programmatic needs ..."
[23] Town Law § 267–b, for example, does not require that there be a physical condition creating a hardship, in contrast to Z.R. § 72–21(a). Thus, non-New York City decisions are not precedent as to this issue.
[24] *See* Z.R. § 72–21 reproduced at A–789*.

Appellants when attempting to identify substantial evidence supporting important findings cited principally to the BSA resolution.[25] Even the BSA resolution was oblique. For example, given the confusing and numerous economic studies presented, and the mistakes in the BSA decision,[26] it is not difficult if possible at all to identify with certainty the exact study upon which a particular BSA finding is based.

April 1, 2007. The Congregation filed its initial application accompanied by the economic "reasonable return" analysis required to establish (i) under Z.R. § 72–21(b) that the Congregation could not earn a reasonable return for the condominium project unless variances were granted and (ii) the economic analysis under Z.R. § 72–21(e) that the requested variances were the minimum variance required to resolve hardships to the Congregation.

For the Z.R. § 72–21(b) finding, the Congregation's economic expert Freeman/Frazier (hereafter Freeman) provided an analysis of a conforming as–of–right mixed–use scheme with two floors of condominiums, concluding that such a scheme would not yield any return (the so–called "bifurcated" analysis.)

For the Z.R. § 72–21(e) finding, Freeman provided an analysis of a proposed scheme for which a variances were sought consisting of community spaces with five floors of condominiums above them, which yielded a return on investment of

[25] *See* City Appeal Brief at 9, Ex. P–13. For example, at P–20, the City relies principally upon conclusory statements in the BSA record as proof of substantial evidence.
[26] *See* footnote 27 at 11 below. By conveniently omitting dates of various analyses and specific page number references, the BSA obscures its decisions and thwarts meaningful review.

6.55%. For the latter scheme, Freeman provided his expert professional opinion that the return would "be considered acceptable for the project." A–1294*.

The initial submission did not include an analysis of the economic return for a building on the entire development site, as required by precedent.[27] This was quickly pointed out by the BSA, which on June 15, 2007 required the Congregation to provide an economic analysis of "a *complying, fully·residential* development … for the purposes of gauging what the economic potential of the development site would be without the hardship." A–1496*.

September 10, 2007. Five months after the initial application, the Congregation filed a revised application with new economic analysis. A–1655*. The revised proposed mixed–use scheme (the partial analysis) showed a return of 6.59%, and once again Freeman opined that "The return provided by the Revised Proposed Development, in this case, therefore, would be acceptable." A–1653*. This was the last discussion in the record as to what constituted a minimum reasonable return; there was never any discussion at the hearings or any other submissions, or in the BSA decision, of the rationale for determining what would be a reasonable return.[28]

[27] The BSA decision was incorrect in stating that the Congregation initially submitted an all–residential analysis. BSA Decision at ¶ 127. BSA Decision at Ex. A–8. Clearly, the BSA's mistaken decision cannot be "substantial evidence" of anything when such a basic error is made.

[28] The City falsely states in its Article 78 Answer (A–335*): "As established by the Congregation's experts, a reasonable rate of return for the subject premises was approximately 11%." This is patently false, and the citations in no way support this improper assertion. Not doubt the City will again attempt to make this false claim by citing not to the Appendix available to the Court of Appeals, but to the administrative record. R-4652 may be found at A-004652; R-4868 at A-4033, R-5172 at A-4224, and R - 5178 at A-4230.

Freeman also included on September 10, 2007 a so–called all– residential as–of–right scheme. Although described by Freeman as an "all–residential" analysis, it was not, as revealed by Freeman's own words. A–1655*. On October 12, 2007, the BSA again responded quickly objecting to this so–called all–residential analysis:

> 15. Scheme C (Residential Scheme): This as–of–right scenario does not maximize floor area that can be accommodated within the R8B zoning envelope. Instead of showing a six–story building with five stories below the 60' maximum base height, please reduce the floor–to–ceiling heights and show a seven–story building with five stories up to the 55' minimum base height and two floors above.

What Freeman was attempting to do was to reduce the potential income by reducing the number of square feet devoted to income production, but he had been caught by the BSA.

October 25, 2007. Freeman submitted another analysis, which included a "Revised As of right Residential FAR 4.0" scheme. A–2107*, still incorrectly captioning the scheme as "all–residential", when it was not. In the analysis for the two–floor, mixed–use, partial scheme, Freeman used as the value of the two–floors $17,050,000, and, used this same value as the site value for the proposed scheme. A–2107*. It is apparent that the site value was the largest single cost; it is also apparent that any inflation of the site value greatly diminishes the return on investment, not only for the as–of–right analysis, but also for the proposed scheme.

November 27, 2007. The BSA held its first hearing. The BSA chair emphatically criticized Freeman's methodology in valuing the 5,316 square feet of

sellable areas for the two floors of condominiums at a value of $17,050.000; thus Freeman showed that the "land" value exceeded the $12,623,000 sales price of the resulting condominiums by $4.5 million.

> CHAIR SRINIVASAN
> Freeman needs to explain to us what he's done on his financials. We've seen it. I think we have some concerns which we raised yesterday and either he can go back and look at that or we can state them for the record, but I think some of the issues have to do with how the site is valued and *how a good portion of what is anticipated as the developer paying for that site is not going to be used by the developer because it's being used by the synagogue*. So, it's almost like you should take that out of the equation and then you have this value on this property without that 20,000 square feet that's being used for the synagogue. (emphasis supplied)[29]

In other words, the Chair was pointing out that no developer would pay $17,050.000 for the air–rights to build two condominiums, which could only sell for $12,623,000, according to Freeman's own figures. Alas, Freeman never corrected the inflated valuation of the two–floors and for some unexplained reason, the BSA gave up the good fight and never again insisted on such a correction.

December 27, 2007. Freeman then filed yet another attempt at an economic analysis. In this new version, Freeman reduced the site value for the air rights for the two floors only from $17,050,000 to $14,816,000, which still exceeded the sales price of $12,423,000 for the two condominiums that could be built. A–2780*. Clearly, no one could claim with a straight face that the market value of the two

[29] BSA Hearing November 27, 2007, page 27, line 592. A–2504*.

floors of air–rights was greater than the selling price of a completed condominium together with the air rights. Freeman acknowledges that the valuation applies to only 5,316 square feet of sellable area. A–2780*. A–2792*.

Freeman also on December 27 also filed yet another version of the incorrectly labeled, all–residential scheme showing that this version was profitable, though yielding a return of 3.62%. *Id.* This new return was now dangerously close to the return of 6.55% that Freeman has opined professionally was sufficient. Freeman never again revised this analysis, and the BSA never again referred to this all residential scheme. By Freeman's own words, this so–called all–residential scheme was not all residential.

> The Revised As of Right Residential FAR. 4.0 Development alternative (Plans set titled: As of Right – Scheme C Residential Scheme, dated 10–22–2007) consists of new construction of a seven–story residential building on lot 37 with the synagogue remaining untouched. The new development consists of a ground floor residential and synagogue lobby and core, and floors 2-7 would be for sale condominium units. There will be a total of six residential units. The total gross residential area, not including the cellar would be 28,724 sq., which includes residential lobby and core.

This analysis failed to include the value not only of the first floor of the structure, but of the very valuable 6400 square feet of basement space. This basement space was usable not only for a banquet hall, but for many other purposes including medical offices, gyms, and schools. But, Freeman excluded this value, thereby depressing the return on investment. Moreover, this analysis assumed a value per square foot of $750, although the BSA later pressed Freeman to reduce this to $625. A–4330* (*See* Freeman quote from his May 13, 2007

analysis cited immediately below.)

May 13, 2008. On this date Freeman began to use a new basis for the site value of the two–condominiums: Freeman, rather than use the value for the actual 5,366 square feet of air rights in the development site, began to use 19,094 square feet of what he considered developable space over the adjoining parsonage. A–3818–9*:

> The existing Parsonage building contains approximately 5,366 sq. ft. The remaining floor area available from the Parsonage portion of the site would be 19,094 sq., not including the floor area within the existing Parsonage building.
>
> 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.
>
> Utilizing the comparable sales value of $625/sq. determined by the comparable sales analysis described above, the acquisition cost is 19,755 sq. X $625/sq., equal to the amount of $12,347,000.

Not only did this new analysis conflict with the precedents requiring that the entire site by analyzed to ascertain the return, and not just the two floors, but the new analysis departed from precedent which would require that the site value be the value of the actual site under development. *See* A–3831* and A–490*. Furthermore, to the extent that this was a back–door effort to transfer air rights from landmarked property, this was a *ultra vires* effort not authorized by the NYC Zoning Resolution.

Freeman's failure even to include the value of the two floors of

condominium space in his analysis shows the contrived nature of this valuation.

Although Freeman states that his approach was "utilizing the as of right buildable floor area from the parsonage portion of the site," Freeman did not propose that the BSA require a restrictive covenant against future development using the same square feet. Not only did the BSA not impose such a restriction, but also it did not disclose what it and Freeman were doing in its subsequent decision.

July 8, 2008. Freeman filed his last economic analysis of the bifurcated as–of–right scheme and the proposed scheme. A–4230. He used as the site value for the 5,316 square feet, the same $12,347,000 figure he had concocted in May, and then, as he invariably did , used the same amount in the proposed building scheme that was to be approved by the BSA. Assuming that the site value of $12,357,000 was correct, it would have been proper and customary to use that value as the starting point in the analysis of the proposed scheme.

This proposed scheme showed a return of 10.93% – a return not mentioned in the BSA final decision and not justified or discussed anywhere in the record, that far exceeded the 6.55% figure which Freeman had opined, as an expert, was sufficient.

When Petitioners-Appellants and other opponents pointed out that Freeman's site valuation resulted in a valuation per square foot of $2,323, Freeman (FFA) responded on August 12, 2008 A–4330*:

> At no time did FFA state or imply that the value of this site is $2,323 per square foot of building area. As stated repeatedly, the value of the site is based on the available residential floor area. Based on the BSA's direction as to floor area to be considered, the maximum value utilized in any FF A submission was $750/sq.. At the request of the BSA, the July 8, 2008 FF A submission utilizing only R8 and R8B comparable was $625/sq. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

Freeman of course was not addressing the assertion: Freeman's valuation of $12,347,000 for the two condominium floors of 5,316 square feet is indeed $2,323 per square foot. That is a correct assertion. But, here, Freeman admits again that his site value was not the value of the site being developed, but of another site. Also, importantly, Freeman clarified for the record the reduction in valuation from $750 a foot to $625 a foot.

Nor did Freeman revise the so–called all–residential scheme last submitted in December, 2007, which, among other things, was not all–residential. But, as Freeman admits in the just quoted section, he was pressed by the BSA to reduce the value per square foot from $750/sq. ft. used in December, 2007 to $625. Yet he did not submit a updated version of the December, 2007 so–called, all–residential analysis. When pressed by opponents, Freeman responded A–4229*:

> As noted on page 7 of the July 8, 2008 Response, the BSA did not request a submission of an analysis of a revised Scheme C. Subsequent to its receipt of this material into the record, the BSA did not ask for *any* additional information regarding this matter. *(emphasis supplied)*

Subsequently, in the Article 78 proceeding, the BSA revised the December, 2007 analysis to use the reduced site value per square foot of $625, as compared to $750. The resulting return on investment was 6.7% A–335*, which again exceeded the return of 6.55% that the Congregation's economic expert opined was a sufficient

return. Freeman's two opinions as to what was a sufficient return are the *only evidence* in the record as to what constituted a reasonable return.

August 26, 2008 BSA Decision. The BSA issued its resolution and decision approving the variance for the July 8, 2008 proposed building.

The BSA, which had previously acknowledged that the influential Congregation (with one Trustee who is an well-known real estate developer and ally of the Mayor who testified at hearings in support of the project[30]) had placed the BSA in a "hard place," apparently set aside its misgivings, held its institutional nose, and approved the variances, attempting to cover its tracks by writing a decision full of obfuscation.

Despite explicit and repeated objections from opponents, the BSA's 230 paragraph decision ignored the objections: 1) to the partial bifurcated analysis, 2) to the improper site value methodology used by the Congregation, and 3) to the BSA's not having jurisdiction to provide landmarking hardship relief.

The City in its briefs below does not dispute that the Congregation never submitted an economic analysis of an all–income producing building, and, further admits that the BSA did not require the submission of the so–called all–residential analysis of December, 2007 by using a per square foot valuation of $625 rather than the $750 per square foot.

[30] At the LPC hearings, Congregation members testifying included Jack Rudin, real estate developer, Jack Stanton, respected philanthropist, and Louis Solomon, former law partner of Corporation Counsel Cardozo. A-926, A-993, , A-4380 and A-4389. *See,* A-2966 (Stanton Announces $100 Million Gift to Yeshiva University.) The Congregation never attempted to establish any financial need, for there is none.

Argument

I. The "Reasonable Return" Test Requires Consideration of the Return Which Could Be Obtained from the Entire Property, Not Just A Portion.

Under Z.R. § 72–21 (b), the Congregation in seeking a variance for a revenue earning project was required to provide dollars and cents evidence that it would be unable to earn a reasonable return from an all–income producing conforming building. This it did not do.

A. The BSA in making the "reasonable return" finding, relied upon a profit analysis of only two floors of a conforming seven–floor structure.

Despite the obfuscation in the BSA decision, the City in its briefs below does not dispute that the BSA relied only upon the flawed July 8, 2008 economic analysis with the partial site analysis as a basis for both the (b) findings.

It is undisputed that the as–of–right alternative analysis referred to by the BSA in its decision at ¶ 183[31] is an analysis of only a part of the development site, i.e., only two floors of a seven–floor building (with basement banquet hall) that could have been built under the zoning law without any variances at all.[32]

B. The Courts Have Held that the Return from the Entire Property Must Be Considered

This is the reasoning followed by numerous courts when owners have tried to claim that a reasonable return could not be earned from only a part of the property. The Supreme Court erred in holding that an analysis of only a portion of

[31] § 183 "WHEREAS, the applicant also submitted a revised an 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." BSA Decision at Ex. A-8.

[32] Opposition real estate valuation expert Levine estimates a minimum of 11,000 square feet of valuable, income–generating real estate was omitted by Freeman. A–4355.

the property was proper.[33]

The Court of Appeals held 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.

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;

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). ... 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).

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

[33] *See* text at n. 34 below.

> 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).

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 …

The Supreme Court below erroneously concluded, without discussing any of the cited precedents that "It cannot be found to be arbitrary and capricious to use a return on profit model for that portion the Project that consists solely of residential condominiums."[34] Whether arbitrary or capricious is beside the point; the use of an analysis for " [a] portion [of] the Project that consists solely of residential condominiums" conflicts with directly relevant precedent. A BSA decision may be set-aside not only if it is arbitrary and capricious, but also if it has no rational basis, lacks substantial evidence, and is illegal. *SoHo Alliance v. New York City Bd. of Stds. & Appeals*, 95 N.Y.2d 437, 440 (2000). Here, what the BSA did fails on all grounds, but, for this motion for leave to appeal, it must be emphasized that

[34] Supreme Court Decision at 23. Ex. C–24*. The Court should have said "return on investment" here and elsewhere in its decision. The source of the term "return on profit" evidently was ¶ 142 and 144 of the BSA Decision, which is illustrative of the financial illiteracy of the BSA, since, the phrase is not used in financial anlaysis. The presumption of financial expertise on the part of the BSA should be rebuttable.

their action was illegal as well.

C. The December, 2007 Analysis Cannot Be Relied Upon by the BSA for its § 72–21 (b) finding.

The City may not claim that the BSA relied upon the so–called "all–residential" as–of–right analysis submitted in December, 2007.

First, it is clear from the record that the BSA (b) finding was not based upon the so–called all–residential December, 2007 scheme, but upon an analysis of a "portion [of] the Project that consists solely of residential condominiums" as noted by the Supreme Court.

Second, had the BSA relied upon the so–called all–residential analysis, the BSA could not assert that this was an analysis of the entire property, for the Congregation's expert himself describes a scheme that is not all–residential.

Third, the City admitted in its Article 78 answer that the December, 2007 analysis had not been updated to use the new $625 per square foot value, and not the $750 per square foot value. The City then in its answer performed a recomputation and arrived at a rate of return that exceeded what the Congregation's economic expert had stated was sufficient.[35]

The December, 2007 analysis of a less-than-all- residential scheme shows that such a scheme would yield a reasonable rate of return to the Congregation. Should there be any doubt, the matter should be remanded back to the BSA with

[35] The Congregation below argued that it did not "understand" the BSA's simple recomputation and the recomputation in the Supreme Court filing could not be considered by the Supreme Court. Were the Congregation correct (and it is not), still the Congregation is acknowledging that the matter should be sent back to the BSA for hearing and recomputation.

instructions to consider seven–floor all residential scheme including optimal use of the basement 6400 square feet.

II. Even For An Analysis of a Part of the Site, The Starting Point of a "Reasonable Return" Analysis is the Value of the Development Site As Presently Zoned, not the Value of a Different Site.

Even were it to be held that the BSA could rely upon an analysis of only a portion of the site, the specific analysis of July 8, 2008 upon which the BSA relied is wholly defective and not conducted in accordance with precedent. The most significant single "cost" in the two–floor as–of–right analysis of July 8, 2008 is the what Freeman labeled the "acquisition cost" of the site, which he concluded was $12,347,000 for the 5,316 of sellable area contained in the two condominium floors. A–4230*. Freeman admits that he was not valuing the 5,316 of square feet on this portion of the site, but a completely different area, which was 19,094 square feet of development rights over the adjoining Parsonage Building. A–3818–9*. A–4330*.[36]

The courts have consistently held that the rate of return is to be computed based upon "value of *the property* as presently zoned." *Douglaston Civic Assoc. v. Galvin*, 36 N.Y.2d 1, 9 (1974); *Concerned Residents v. Zoning Bd. of Appeals*, 222

[36] This is not the only error in Freeman's so–called analyses. The analyses was ripped apart by professional witness after professional witness and rejected by Community Board 7. Errors include the BSA's ignoring the actual cost of acquisition of the development site in 1949 and later (the deeds submitted were for one dollar and other valuable consideration), using a return on investment analysis when the explicit rules of the BSA required a return on equity analysis, using an annualized return when the BSA rules specifically require total return, submitting spoliated incomplete construction estimates omitting cost allocation information, and applying construction interest from day one instead of as an increasing amount during the term of construction. It would seem that the BSA should evidence at least some knowledge of basic Real Estate Financial Analysis 101.

A.D.2d 773, 774–775 (3d Dep't 1995). Admittedly, there was no case found where a court held that it was improper for a rate of return to be based upon a property other than one under consideration, for the simple reason that no owner has been audacious enough to attempt to do what the Congregation is attempting. This is thus a novel question for that reason.

To the extent that this "transfer" of value from the parsonage to the development site is an attempt at a transfer of development rights based upon a landmarking hardship, that is beyond the authority of the BSA as discussed below at III below.

The reasonable return analysis of the two floors of condominiums in the bifurcated analysis is thus grossly understated for inflating the site value obviously decreases the return on investment, and, for that reason, the BSA has no basis for its (b) findings for the condominiums.

The inflated site value of the two floors not only distorts the analysis of the as–of–right scheme, but also the proposed development schemes. This is because, in computing the rate of return in the proposed building, the starting site value is the site value under the as–of–right analysis, as is discussed in the analysis of the (e) finding below at V below.

III. The BSA Is Not Empowered to Provide Relief from Landmarking Hardships, for that Power Resides With the New York City Planning Commission

The BSA considered alleged hardships resulting from landmarking in two

different ways, only the first of which is disclosed in the BSA decision.

First, the BSA found the hardship created by landmarking to be considered a "physical condition" under Z.R. § 72–21(a). In support of that finding, the BSA in the section of its decision, ¶¶ 107–127 (Ex. A-7-8), devoted to that landmark justification for the (a) finding, stated:

> ¶ 120 WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of development rights from a landmark building within the lot on which is it located or to an adjacent lot.[37] (Ex. A–8.)

The next section IV addresses whether the such a hardship may be considered a "physical condition", but it should be noted that the BSA failed to discuss this issue where it belonged under the (b) finding, thereby concealing the transfer of air rights inherent in the site valuation.

Second, the BSA, as noted in the section above, effectively transferred air rights over the adjoining Parsonage to the development site by allowing the site value of the air rights to be assigned to the development site. Oddly, the BSA concealed the fact that this transfer of value was the basis of the economic analysis that was the foundation of the conclusions that no reasonable return could be obtained under Z.R. § 72–21(b). There is no reference in the discussion of the residential development (b) finding at ¶¶ 125–148 (Ex. A-8-10) that this transfer of land value would reduced reasonable return or that the site value was being

[37] Despite the BSA's statement here and in the surrounding paragraphs, the Congregation attempted to mislead the Appellate Division by a quibble "In any event. the Resolution does not suggest that the BSA, here, treated the landmarked **status** of the Synagogue as a hardship." (*emphasis in original)*.

computed using this artifice. Nor of course did the BSA disclose that this same contrivance artificially reduced the return for the Z.R. § 72–21(e) analysis.

The BSA acts ultra vires in arrogating to itself the right to ameliorate landmark hardships, both in the transfer of development right value over the parsonage and in the consideration of a landmarking hardship as a physical condition.

The power to provide relief from hardships arising out of landmarks is the City Planning Commission. The Zoning Resolution has an elaborate structure for providing such relief, incorporate in the following provisions: Z.R. §42–142; Z.R. §74–711; Z.R. §74–712; Z.R. §74–721; Z.R. §74–79; Z.R. §74–791; Z.R. §74–792; Z.R. §74–793; Z.R. §81–254; Z.R. §81–266; Z.R. §81–277; Z.R. §81–63; Z.R. §81– 631; Z.R. §81–633; Z.R. §81–634; Z.R. §81–635; Z.R. §81–741; and Z.R. §99–08.

The Zoning Resolution assigns absolutely no role to the BSA in providing relief from landmark hardships. Yet, the Supreme Court below expressly acknowledged, incorrectly, use of landmark hardships in granting variances under Z.R. § 72-21 for revenue production.[38]

But, rather than comply with the careful regulatory scheme set out in the Zoning Resolution, the BSA simply ignored the provisions that it noted in ¶ 120 (Ex. A-8), and then arrogated to itself powers under Z.R. § 72–21 that plainly do

[38] Supreme Court Decsion at 19, Ex. C-20.

not exist.

As to the landmarking hardship, the principal relevant provision is Z.R. § 74–711, which the Congregation initially applied for, but then withdrew for the simple reason that it could not comply with the provisions and further did not wish to have restrictive covenants against development on the landmark site.[39] When development rights are transferred from a landmark location, such a restrictive covenant is normally placed on the landmark location.[40] Here, the BSA in exercising powers it did not have and allow improper transfer of air rights from the Parsonage air rights to the development site air rights, did not impose a restrictive covenant against further development over the parsonage, a standard feature in the transfer of air rights. [41]

The Chair at the first hearing stated that the Congregation had placed it in a "hard spot":

> So, we're put in this *hard place*. Typically, when you have a situation that goes through Landmarks where you're asking for height and setback waivers and they're

[39] The Congregation *falsely* suggested below that LPC denied the § 74–711 application to the LPC. Letter from Congregation's Counsel to BSA June 17, 2008 A–4025 ("The Congregation's request for Landmarks cooperation on a Z.R.CNY Sec. 74–711 special permit was denied,") To the contrary, Shelly Friedman (counsel for the Congregation) advised the LPC at a hearing that the Congregation was withdrawing its § 74–711 application. LPC Hearing, November 15, 2005. A–1027–28. ("We have withdrawn that aspect of the litigation," p.9, l. 19–20). *See also* Applicant's Fifth Statement in Support of July 8, 2008. A–4182.

[40] *See* Transcript of Community Board 7 (CB7) Proceeding, October 17, 2007, page 135. A–2006.

> MS. NORMAN: Would it be possible then the synagogue would come back at a later date and suggest that they need to use those air rights to build above the parsonage.
> MR. FRIEDMAN [counsel for the Congregation]: Anything is possible. … That's what the 74–711 was all about. It just didn't happen.

[41] Community Board 7 (CB7) Proceeding, October 17, 2007, p. 135. A–2006.

MS. NORMAN: Would it be possible then the synagogue would come back at a later date and suggest that they need to use those air rights to build above the parsonage.
MR. FRIEDMAN: Anything is possible. … That's what the 74–711 was all about. It just didn't happen.

> not driven by hardship, there's another venue and I know that you just mentioned 74–711. It – – maybe it was foreclosed to you. That's unfortunate, but we're here looking at this case and it's just – – it's been very hard for us to get our hands around this (emphasis supplied). [42]

The BSA failed to acknowledge that *nothing* in the Zoning Resolution provided any authority to the BSA to permit the utilization or transfer of available development rights from a landmark site — the authority to exercise such discretion falls solely within the purview of the City Planning Commission.

But, the Congregation wanted it both ways – it wanted something tantamount to a development rights transfer without a restrictive covenant, and that is what the BSA did, without any authority at all. As the Supreme Court stated: "There is also some concern that the Congregations could, in the future, seek to use air rights over the Parsonage."[43] But, the BSA had no authority in the first instance to allow such a transfer: that authority resides solely in the City Planning Commission. The BSA can only exercise the powers granted to it, and cannot invent powers.

One could describe the BSA act as an abuse of discretion, but that would presume that the BSA had the authority in the first place to approve a transfer of air rights where development is inhibited by landmarking. The standard of review encompasses not only arbitrary and capricious action by the BSA, but action not in accord with the law.

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[42] November 27, 2007 BSA Hearing, p. 23, line 510. A–2505*.
[43] Supreme Court Decision at 32, Ex. C–33*.

This issue presented here is novel, for there are no cases where the BSA has so baldly attempted an end-run around the Zoning Resolution by transferring development rights without the approval of the City Planning Commission.

IV. Landmarking, Split-Zoning, and Programmatic Needs Are Not Physical Conditions Under Z.R. § 72–21 (a) of the NYC Zoning Resolution.

Although the BSA made a finding that there were unique physical conditions creating difficulties and hardships that could only be satisfied by the condominium variances, a review of the BSA's discussion in support of the findings shows that none of the "conditions" references are physical conditions within the meaning of Z.R. § 72–21. The BSA specifies no qualifying physical condition.

Section 72–21(a) of the New York City Zoning Resolution requires that:

> … there are unique *physical* conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other *physica*l conditions peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the Resolution; (*emphasis supplied*).

The next section, Z.R. § 72–21 (b), emphasizes the need for a "*physical* condition," and not just any condition, to support the hardship.

Paragraphs 82–122 (A–6 to A–8) of the BSA decision are devoted to the physical condition finding, yet nowhere in this extensive discussion is there reference to any physical condition of the nature described in Z.R. § 72–21(a), that is "irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions."

Rather than focus on the requirement for a "physical" condition, the BSA and the Supreme Court focused more on the word "unique". The Supreme Court revealed its lack of focus by stating "This finding is sufficient to support the BSA's determination that the Property is unique."[44]

The BSA for its "finding" for a physical condition having a nexus with the upper floor condominium variances stated at ¶ 122 (Ex. A–8):

> 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);

This bare finding is devoid of facts, for, there are no "physical conditions cited above," and certainly, the programmatic needs of the Congregation are unrelated to the condominium variance and indeed are not physical at all.[45]

Indeed, none of the "conditions cited above" by the BSA are "physical" conditions. The conditions cited outlined in the BSA's decision at ¶ 86 (Ex. A-6): (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. Clearly, these are not physical conditions.

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[44] Supreme Court Decision at C–20*. The Supreme Court was further confused is asserting that the conclusory "finding is sufficient", rather than the proper holding that there was any evidence to support the finding. To accept the Supreme Court's logic, all the BSA needs to do to prevent review is to recite the words of the five findings.

[45] The BSA so stated in its decision. (*See* paragraph 126 of its decision (Ex. ¶ 126, Ex. A–8): "WHEREAS, the residential development was not proposed to meet its programmatic needs ..." also cited at fn 22 at page 3, *supra*.) Thus the BSA contradicts itself.

What the Congregation and the BSA consider to be "physical conditions" is merely the result of land use regulation, either by the landmark laws or zoning regulations. These cannot be considered examples of "irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical" conditions. Were the Court to uphold to allow this interpretation, then, by definition, any zoning regulation would be a 'physical condition,' since the zoning regulations by definition imposed "limitations on development."[46]

As Norman Marcus, the dean of New York City zoning laws and regulations experts, testified at the BSA Hearing opposing the variances: "There is no hardship there. That was police power. That was the City of New York determining what the appropriate zoning was for the area."[47]

As to split zoning lots and landmark hardships, the Zoning Resolution deals with these non–physical hardships with specific provisions controlling how and when relief may be provided to these hardships that do not fall within the purview of Z.R. § 72–21. The provisions relating to landmarking hardships are described in the previous section. For split zoning lots, there are the provisions of Z.R. § 73–52 and Z.R. § 77–00. (*See* discussion at Ex. J–45, O–50).

Rather than follow these specific provisions, the BSA stated:

> ¶ 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. (Ex. A–7.)

[46] The Congregation, aware of the lack of substance in its claim, attempted to mislead the Appellate Division by falsely claiming that BSA found that the development site was an irregularly "L–shaped" cite. *See* Q–a–38, R–22.
[47] February 12, 2008 BSA Hearing at 39. A–4373.

But, rather than comply with the careful regulatory scheme set out in the Zoning Resolution for both landmark hardships and split-zoning lot hardships, the BSA simply ignored the provisions, and then arrogated to itself new powers under Z.R. § 72–21 that plainly do not exist, for the simple reason that the Congregation could not comply with the specific provisions of the Zoning Resolution governing non–physical hardships.

As to the split–zoning–lot "hardship", the BSA did not apply the provisions of the Zoning Resolution concerning that situation, but rewrote the statute to bring this "hardship" under Z.R. § 72–21.

The Congregation will cite *Elliott v. Galvin*, 33 N.Y.2d 594 (1973) as holding that held that a split–zoning lot could be a unique physical condition under Z.R. § 72–21(a).[48] Yet, the Court of Appeals relied upon an actual physical condition: "the irregular shape and small size of the C1–9 portion of the zoning lot", stating only that the split zoning could "contribute" to unique physical conditions.[49]

The cases addressing the physical condition requirement of Z.R. §72–21(a) for revenue generating project are careful to identify the actual physical condition. *Douglaston Civic Assoc. v. Galvin*, 36 N.Y.2d 1 (1974) and *Douglaston Civic*

[48] The BSA was well aware that another provision, Z.R. § 23–711 was the overriding restriction against construction on the R10A portion of the development site, in that a 40–foot separation was required on the upper floors. J–46. *See,* A–1494. So as to try to bring its dubious action under *Elliot,* the BSA decided to ignore Z.R. § 23–711!!!

[49] Neither the Court of Appeals in *Elliot v. Galvin*, nor the Appellate Division below, considered Z.R. §73–52 and Z.R.
§77–211.

Association v. Klein, 51 N.Y.2d 963 (1980) ("swampy nature of property"); *Galin v. Board of Estimate*, 72 A.D.2d 114, 116 (N.Y. App. Div. 1st Dep't 1980), aff'd, 52 N.Y.2d 869, 870 (N.Y. 1981) ("narrowness and depth of the subject lot"); *Albert v. Board of Estimate*, 101 A.D.2d 836 (2d Dep't), appeal denied, 63 N.Y.2d 607 (1984) ("peculiar wedge shape of the subject lot"); and *UOB Realty (USA) Ltd. v. Chin*, 291 A.D.2d 248 (1st Dep't 2002) ("construction of a large portion of the premises on pilings"); *Matter of Elliott v Galvin*, 33 N.Y.2d 594, 596 (1973) (irregular shape and small size — combined with split lot); *SoHo Alliance v. New York City Bd. of Stds. & Appeals*, 95 N.Y.2d 437, 441 (2000) (physical conditions such as "idiosyncratic lot configuration," "L–shaped" and "irregular and unique shape of lots"); and *Vomero v. City of New York*, 13 Misc. 3d 1214(A) (Richmond Cty. Sup. Ct. 2006), rev'd, 54 A.D.3d 1045, 864 N.Y.S.2d 159 (2d Dep't 2008) (irregular shape of the lot.)

Thus, the Supreme Court decision together with the BSA decision conflict with long-standing precedent as well as the precise words of the statute. Certainly there is no precedent for a landmark situation to be considered a hardship under Z.R. § 72-21(a) in a revenue-producing project.

V. There Is No Evidence to Support the BSA's Minimum Return § 72–21(e) Finding Because The Finding Relies Upon A Site Value of a Property Other Than the One Under Development

The BSA's Z.R. § 72–21(e) finding is based upon Freeman's economic analysis of the proposed building as shown in Freeman's July 8, 2008 report, which

showed an annualized return of 10.93%.[50] Implicit in the BSA's finding is that only this proposed building would provide a sufficient return to the Congregation.

Yet, Freeman, the Congregation's expert, had opined that a 6.55% return was acceptable, and the BSA in its answer acknowledged that the partial residential scheme of December 27, 2008 would return a return greater than 6.55%. Other than Freeman's report, there is no other discussion in the record or the decision as to why, without explanation, a 10.93% return was now the minimum return. Thus, the BSA's finding has no evidence in support. Indeed, the evidence of record makes clear that it is beyond dispute that an all=income producing building would yield a reasonable return.

As a second reason, the July 8, 2008 analysis of the proposed building relies upon the improper use of the value of the air rights over the parsonage as the starting point for the analysis. The site value used is $12,347,000, which as discussed above is completely improper. It assumes incorrectly that the BSA has the power to transfer air–right values and then further value a site other than the site under development.

Third, the July 8, 2008 analysis of the proposed building relies upon a transfer of the value of development rights from one part of the zoning site to another part, a transfer that is beyond the power of the BSA.

[50] This schedule shows that the actual return on investments was 25.49%; the annualized return is computed by dividing the number of months to develop into the return, here 28 months. Manipulating the number of months also serves to manipulate and in this case to grossly understate the return.

A proper analysis would have used the value of $3,222,500[51] as a starting point on line 3 of the analysis at A–4230* rather than $12,347,000, a difference of $ 9,025,500. Thus the profit shown on A–4230 as $6,815,000 (fifth line from the bottom) would increase by $ 9,025,500 to $15,839,500.00, and at the same time reduce the Estimated Total Investment, since the site value is a large component of Estimated Total Investment.

No great appreciation of mathematics beyond that taught in high school is needed to comprehend that increasing the profit would then increase the annualized return on investment far above 10.93%. Indeed, the annualized return on investment would increase to as much as 38.2% just by correcting Freeman's site value contrivance.[52] Yet, the Court need not verify the computation, once it concludes that the 10.93% value is wholly fallacious, grossly understated and without any support in the record except for a computational method that is not consistent with precedent.

Clearly, then, Freeman's analysis in support of the minimum variance finding must be disregarded, and accordingly there is no basis for the (e) finding, and the variances should not have been granted.[53]

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[51] 5,316 square feet on the two floor time $625 per square foot, the BSA approved valuation per square feet.

[52] *See* Ex. R–16–17. The simple formula is (Profit ÷ Development Period in Months) x 12) ÷ Total Investment = Annualized Return on Investment. Freeman's computation to obtain 10.93% was: (($6,815,000 ÷ 28) x 12) ÷ $26,731,000 = 10.93%. Substituting the corrected starting site value, the computation would be (($15,839,500 ÷ 28) x 12) ÷ $17,705,500 = 38.2%.

[53] The BSA also did not even address what the return would be were the condominium sizes slightly reduced so as to not block the windows of the adjoining condominiums, including the condominiums owned by Petitioner Lepow. The Supreme Court noted that "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

VI. A Religious Non–Profit Engaged in For–Profit Development Is Not Exempt From The Requirement To Show That A Reasonable Return Cannot Be Earned.

The BSA properly required the Congregation to submit a financial analysis of the return of the commercial and revenue–generating use represented by the luxury condominiums under applicable law and under Z.R. § 72–21 (b). The Congregation disagreed and the Appellate Division suggested that there could be merit to the Congregation's argument.

The BSA found at ¶¶ 34–5 (Ex. A–3):

> ¶ 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 Z.R. § 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).

Petitioners–Appellants agree with the position of the BSA on this point, and to the BSA's citation to *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). The Congregation's position would be particularly destructive of zoning regulation in

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could have been built with two floors of condominiums." Supreme Court decision at 32. Ex. C–33*. Had the Congregation included setbacks and courtyards on the affected floors, the windows would not be blocked either.

New York City, since so much of the City's real estate is owned by religious, educational, health and other non–profits, all of whom could ignore zoning regulation to build income producing properties in conjunction with private developers, not even based upon an entire lot, but based upon the alleged lack of profitability of a slice of air rights owned by the non–profit.[54]

Notably missing from the Congregation's argument is the articulation of the standard then to be applied. Clearly, a non–profit could not obtain a variance where its mission–based programmatic needs were satisfied. It is clear hear that (with the minor non–challenged variances), all of the programmatic needs of the Congregation may be satisfied without resort to the condominium variances. Thus, accepting the Congregation's arguments, it is entitled to no variances for the condominiums.

Conclusion

The Court of Appeals should not take the position of the Respondents–Appellants that there is no role for the courts in reviewing the decisions of zoning boards. Chief Judge Cardozo, 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). (Ironically, Mr. Justice Cardozo happened to have

[54] Oddly enough, the Corporation Counsel has been completely silent in supporting the BSA's position and in opposing the Congregation's argument.

been a member of the Congregation.[55] Indeed in 1896, as a new graduate from Columbia Law School, he appeared at a meeting of the Congregation to considering a motion that the separation of sexes should be ended when the new Synagogue was built.[56] Conceivably, he may have participated in drafting covenants to protect the new Synagogue from adjacent inappropriate buildings.[57])

In this case the BSA has grossly exceeded its authority under the applicable law; to accept the contrary arguments of the Respondents-Appellants would indeed convert judicial review to "an empty form." The decisions below conflict with prior decisions of this Court and the Appellate Divisions, conflict with statutes, and raise novel issues.

The Motion for Leave to Appeal should be granted.

Dated: December 8, 2011
New York, New York

Respectfully submitted,

ALAN D. SUGARMAN, Esq.
Law Offices of Alan D. Sugarman

[55] Corporation Counsel Michael A. Cardozo recused himself from this matter, without explanation. It is not clear whether he did so because he or relatives are or were members of the Congregation, or because he was the law partner of Louis M. Solomon of Proskauer. Mr. Solomon initially represented the Congregation and was an officer of the Congregation. Another prominent jurist and current member of the Congregation is Chief Judge Judith S. Kaye – though nothing suggests her support of or involvement in this matter. Notably, Landmarks Commissioner Roberta Gratz, a former member of the Congregation, voted against the project at the LPC. Transcript of LPC Hearing, March 14, 2006, p. 27, A–1071. *See also* A–3078–84.
[56] ANDREW L. KAUFMAN, CARDOZO 70 (1998 Harvard University Press).
[57] *See* ¶ 19 at A-2918-8. A-3049.

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sugarman@sugarlaw.com

Of Counsel:
James A. Greer, II

COURT OF APPEALS
STATE OF NEW YORK

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
Petitioners-Appellants,	:	New York County Clerk's Index No. 113227/08
-against-	:	PETITIONERS' MOTION
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,	:	**Tab 3 Exhibits to Motion For Leave To Appeal**
Respondents-Appellees.	:	

The Exhibits to Motion For Leave to Appeal consist of 39 pages selected from the Seven Volume Appendix on Appeal filed With the Appellate Division and from the Supreme Court Opinions below.

Portions of interest are indicated by red boxes.

December 8, 2011

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

of #buildings or other structures#, subject to the requirements of this Resolution.

On such an appeal or review, the Board may reverse, affirm, in whole or in part, or modify, such rule, regulation, order, requirement, decision, or determination and may make such rule, regulation, order, requirement, decision, or determination as in its opinion should have been made in the premises in strictly applying and interpreting the provisions of this Resolution, and for such purposes the Board shall have the power of the officer from whose ruling the appeal or review is taken.

However, there shall be no appeal to or review by the Board from an interpretation of this Resolution made by the Board of Environmental Protection of the Department of Environmental Protection, or any other agency for which the New York City Charter establishes a board empowered to adopt rules and regulations for such agency.

12/15/61

72-12
Street Layout Varying from Maps

Where the street layout actually on the ground varies from the street layout as shown on the #zoning maps#, the designation as shown on such maps shall be applied by the Board of Standards and Appeals, after public notice and hearing, in such a way as to carry out the intent and purpose of this Resolution.

12/15/61

72-20
VARIANCES

6/20/68

72-21
Findings Required for Variances

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, and there are practical difficulties or

unnecessary hardship in the way of carrying out the strict letter of such provision, the Board of Standards and Appeals may, in accordance with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.

Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this Resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:

(a) that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular #zoning lot#; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the #use# or #bulk# provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the #zoning lot# is located;

(b) that because of such physical conditions 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, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such #zoning lot#; this finding shall not be required for the granting of a variance to a non-profit organization;

(c) that the variance, if granted, will not alter the essential character of the neighborhood or district in which the #zoning lot# is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare;

(d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however where all other required findings are made, the purchase of a #zoning lot# subject to the restrictions sought to be varied shall not itself constitute a self-created hardship; and

(e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to

afford relief; and to this end, the Board may permit a lesser variance than that applied for.

It shall be a further requirement that the decision or determination of the Board shall set forth 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 or other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board. Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection.

12/15/61

72-22
Conditions or Restrictions

The Board of Standards and Appeals may prescribe such conditions or restrictions applying to the grant of a variance as it may deem necessary in the specific case, in order to minimize the adverse effects of such variance upon other property in the neighborhood. Such conditions or restrictions shall be incorporated in the building permit and certificate of occupancy. Failure to comply with such conditions or restrictions shall constitute a violation of this Resolution, and may constitute the basis for denial or revocation of a building permit or certificate of occupancy and for all other applicable remedies.

7/18/95

72-23
Lapse of Variances

A variance granted under the provisions of this Resolution shall automatically lapse if substantial construction, in accordance with the plans for which such variance was granted, has not been completed within four years from the date of granting such variance by the Board of Standards and Appeals or, if judicial proceedings have been instituted to review the Board's decision to grant any variance, the four-year lapse period shall commence upon the date of entry of the final order in such proceedings, including appeals.

74-711

Landmark preservation in all districts

In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by the Landmarks Preservation Commission, the City Planning Commission may permit modification of the use and bulk regulations, except floor area ratio regulations, provided that:

(a) The following conditions are met:

(1) any application pursuant to this Section shall include a report from the Landmarks Preservation Commission stating that a program has been established for continuing maintenance that will result in the preservation of the subject building or buildings, and that such use or bulk modifications, or restorative work required under the continuing maintenance program, contributes to a preservation purpose;

(2) any application pursuant to this Section shall include a Certificate of Appropriateness, other permit, or report from the Landmarks Preservation Commission stating that such bulk modifications relate harmoniously to the subject landmark building or buildings in the Historic District, as applicable; and

(3) the maximum number of dwelling units shall be as set forth in Section 15-111 (Number of permitted dwelling units).

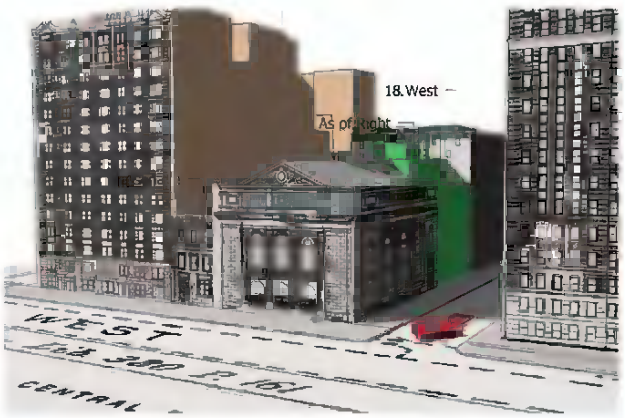
(b) In order to grant a special permit, the City Planning Commission shall find that:

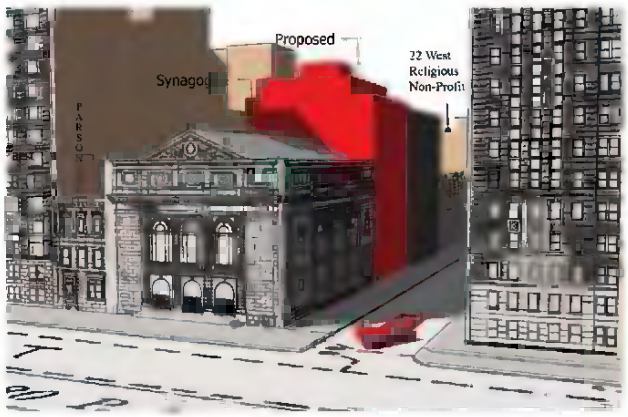
(1) such bulk modifications shall have minimal adverse effects on the structures or open space in the vicinity in terms of scale, location and access to light and air; and

(2) such use modifications shall have minimal adverse

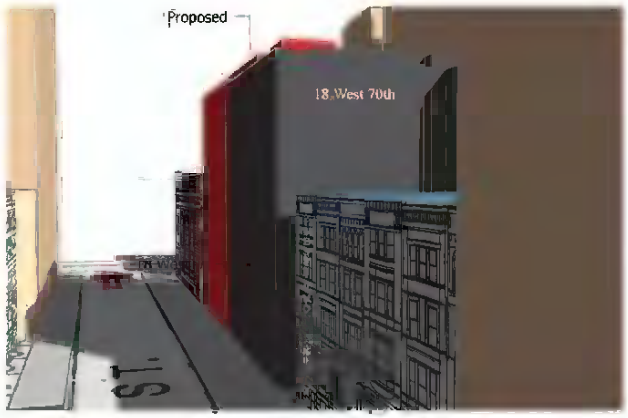
effects on the conforming uses within the building and in the surrounding area.

The City Planning Commission may prescribe appropriate additional conditions and safeguards which will enhance the character of the development of said zoning lot.

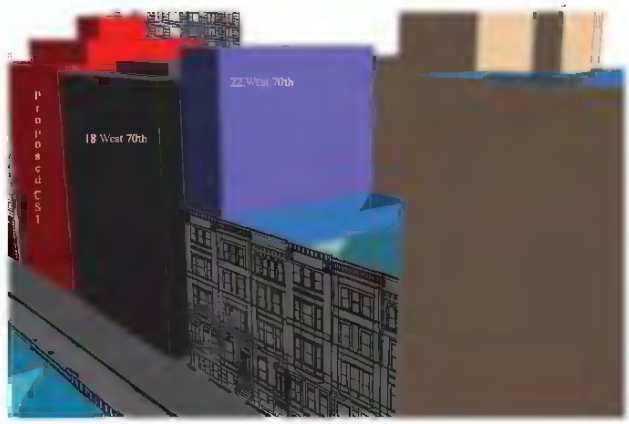

18 West
As of Right
WEST
CENTRAL

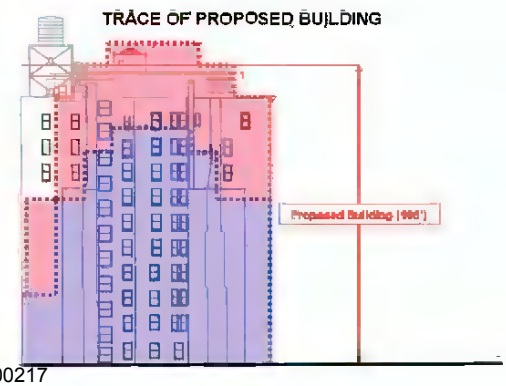

Proposed
Synagog
22 West
Religious
Non-Profit
PARSON


18 West 70th
AS OF RIGHT
ST.


Proposed
18 West 70th
ST.


SCHOOL BUS


Proposed
22 West 70th
18 West 70th

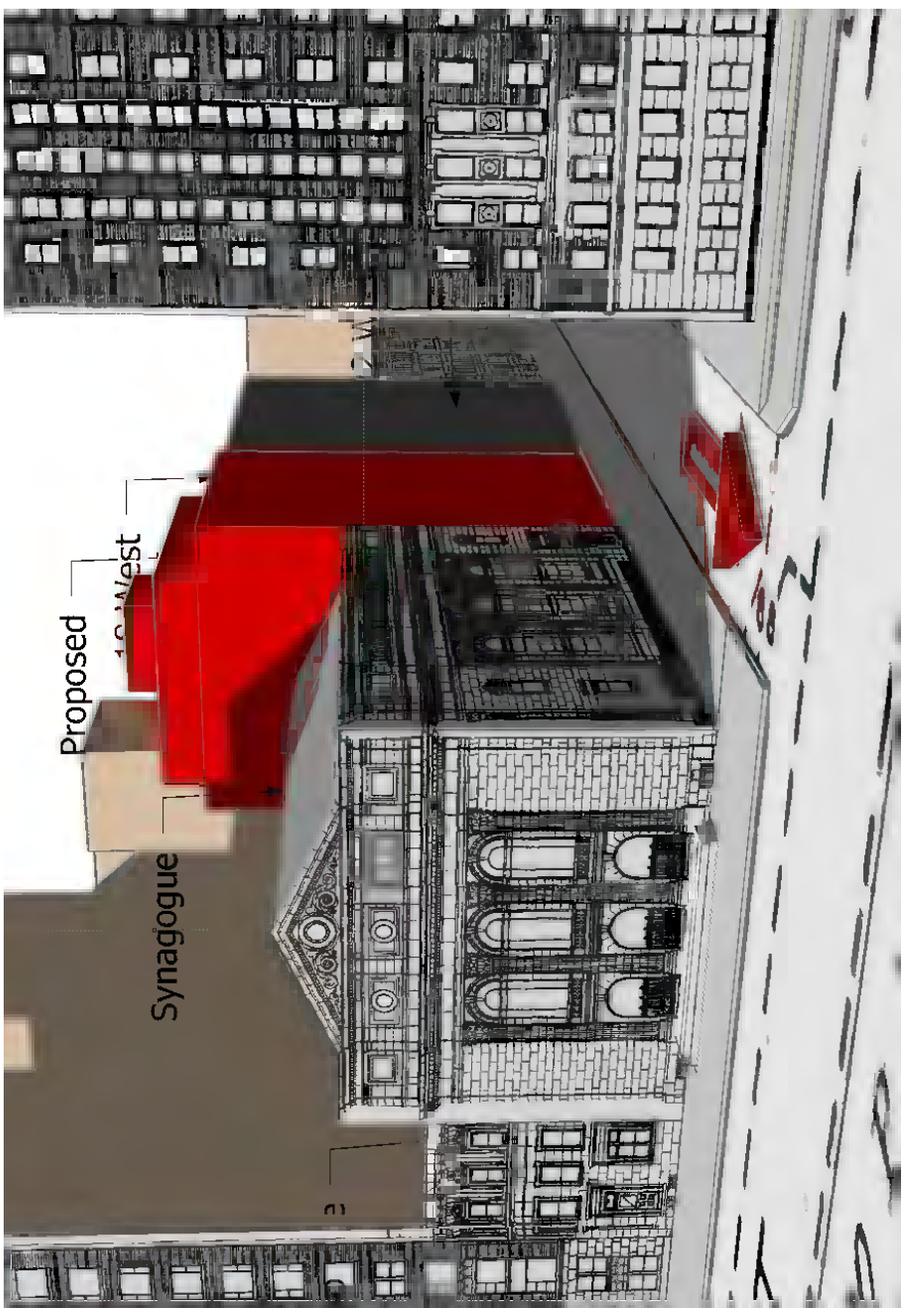

TRACE OF PROPOSED BUILDING
Proposed Building (90')

12

As-of-Right (green)

14

Proposed- No Facade



square footage, BSA had the necessary elements to calculate and review the base unit price [R. 1997, 5178-79]. Accordingly, the additional pages were irrelevant because they were not needed for BSA's review. Moreover, as admitted by petitioners, strict rules of evidence do not apply to an administrative hearing. Petition ¶ 193. Thus, there was no requirement for the alleged additional pages to be submitted.

292. Second, petitioners argue that, prior to adopting the Resolution, BSA should have required the Congregation to revise its December 21, 2007 Scheme C study (all residential scheme). Specifically, petitioners claim that the Congregation should have been required to recalculate its estimated financial return for an all residential scheme utilizing the $12,347,000 acquisition value set forth in the Congregation's final July 2008 report because doing so would have shown a profit of approximately $5 million. Petitioners' argument is flawed. As set forth above, under Z.R. §72-21(b), BSA examines whether an applicant can realize a reasonable return, not merely a profit. While utilizing the revised acquisition value, i.e., $12,347,000, would have resulted in a profit of approximately $5 million, the rate of return would have only been increased to 6.7%. As established by the Congregation's experts, a reasonable rate of return for the subject premises was approximately 11% [R. 4652-3, 4656, 4868-69, 5172, 5178]. Accordingly, since petitioners' proposed calculation would not have resulted in a reasonable return, petitioners' argument fails.[19]

293. Third, petitioners argue that Freeman Frazier and BSA improperly interchanged the phrases "acquisition cost" "'market value' of the land," and "site value." Petition ¶ 132. Petitioners further argue that "[t]he inconsistent use of terms is intended to create complexity and make it difficult for courts to review the assertion of the Congregation or

[19] Notably, the rate of return for the proposed development as approved by BSA is 10.93%.

R-4652 may be found at A-004652; R-4868 at A-4033, R-5172 at A-4224, and R- 5178 at A-4230.

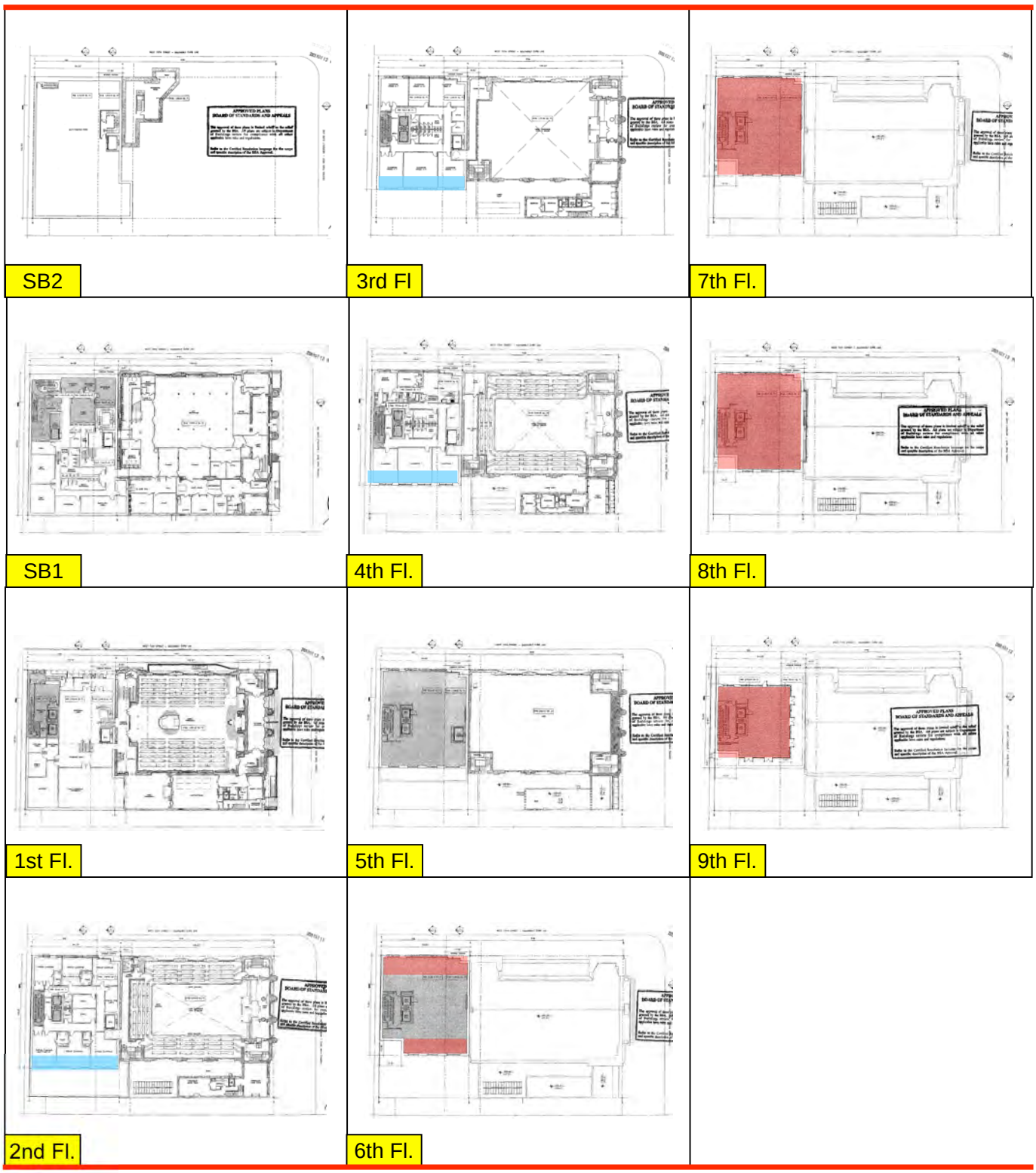
A-476
(A-476 to A-476)

Ket. Reply Ex. M-1 - Approved Variance Locations - 90% Condo, 10% Community House (#1:88) (1 of 1)

Pet. Ex. M-1

Variance Location Approved Bldg.

90% Condo, 10% Community House



Community house variances

Luxury condo variances

Drawings from R-4695, Proposed Drawings Approved by BSA; Variances from R-4702-R-4711

A-490
(A-490 to A-490)

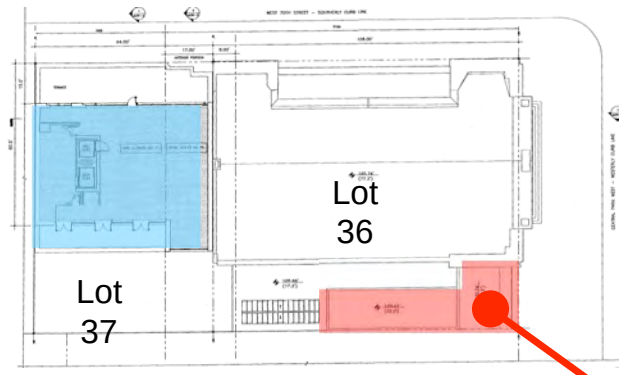
Ket. Reply Ex. N-6 - Location of Parsonage and Two Condominiums in Scheme A Composite, Ket. Ex. N-6 (#1:95) (1 of 1)

Pet. Ex. N-6

Parsonage Air Rights Area

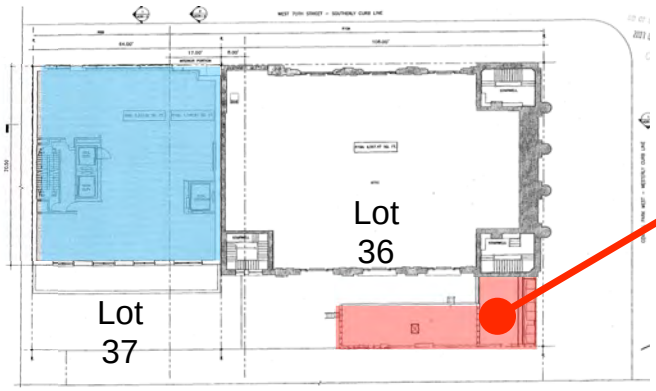
In Lot 36

Parsonage - no relationship to Site Area
of 5th and 6th floor condos in Lot 37



Sixth Floor AOR (R-606) Lot 37
3,082 gross sq.ft. (R-594)

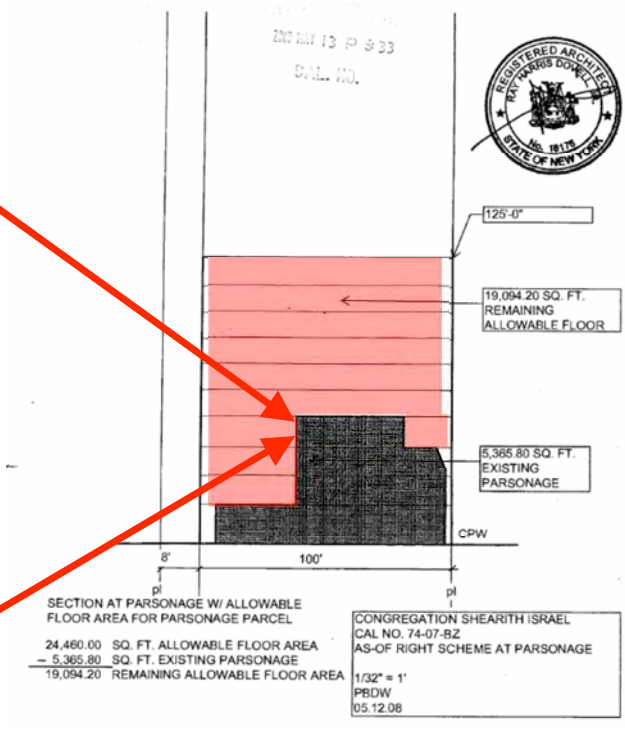
Parsonage



Fifth Floor AOR (R-605) Lot 37
4,512 gross sq.ft. (R-594)

Parsonage

Parsonage Lot 36



Parsonage, Cross Section looking north
(R-4694)

Parsonage “air rights” - 19,775 sq.ft.

5.00 Conclusion

7.4 0.7.- B 7.

The Proposed Development provides a 6.55% Annualized Return on Total Investment. This return is at the low end of the range that typical Investors would consider as an investment opportunity, taking into account the potential risks inherent in this type of development project, and few, if any, investment options. The returns provided by the Proposed Development alternative, in this case would, therefore, be considered acceptable for this project.

There is no Return on Investment provided by the As of Right Development.

6.00 Professional Qualifications

A statement of my professional qualifications is attached. Please note that I am independent of the subject property's owner and have no legal or financial interest in the subject property.

ECONOMIC ANALYSIS
10 WEST 70TH STREET
NEW YORK, NY
MARCH 28, 2007
PAGE 8

Two Floor Scheme

SCHEDULE A1: ANALYSIS SUMMARY - CONDOMINIUM USE

		AS OF RIGHT DEVELOPMENT	PROPOSED DEVELOPMENT
BUILDING AREA (SQ.FT.)			
BUILT RESIDENTIAL AREA		7,596	23,067
SELLABLE AREA		5,022	16,242
CAPITAL INVESTMENT SUMMARY			
ACQUISITION COST		$18,944,000	$18,944,000
HOLDING & PREP. COSTS		$0	$0
BASE CONSTRUCTION COSTS		$3,603,000	$7,488,000
SOFT CONSTRUCTION COSTS		$4,873,000	$6,592,000
		$27,420,000	$33,024,000
PROJECT VALUE			
SALE OF UNITS		$12,313,000	$42,134,000
(less) SALES COMMISSIONS	6%	($739,000)	($2,528,000)
CAPITALIZED VALUE OF COMMERCIAL SPACE		$0	$0
EST. NET PROJECT VALUE		$11,574,000	$39,606,000
PROJECT INVESTMENT			
ACQUISITION COST		$18,944,000	$18,944,000
HOLDING & PREP. COSTS		$0	$0
BASE CONSTRUCTION COSTS		$3,603,000	$7,488,000
SOFT CONSTRUCTION COSTS		$4,873,000	$6,592,000
CARRYING COSTS DURING SALES PERIOD		$550,000	$664,000
EST. TOTAL INVESTMENT		$27,970,000	$33,688,000
RETURN ON INVESTMENT			
ESTIMATED PROJECT VALUE		$11,574,000	$39,606,000
(less)EST.TOTAL INVESTMENT		($27,970,000)	($33,688,000)
(less) EST.TRANSACTION TAXES		($225,000)	($769,000)
EST.PROFIT (loss)		($16,621,000)	$5,149,000
DEVELOPMENT/SALES PERIOD (MONTHS)		23	28
ANNUALIZED PROFIT (loss)		($8,672,000)	$2,207,000
RETURN ON TOTAL INVESTMENT		0.00%	15.28%
ANNUALIZED RETURN ON TOTAL INVESTMENT		0.00%	6.55%

NOTE : ALL $ FIGURES ROUNDED TO NEAREST THOUSAND

19. **Page 23**: Within the second and third sentence of the second paragraph, please change references to both "maximum height" and "maximum building height" to "maximum base height."

20. **Page 24**: Please correct the title of the first full paragraph by replacing "Building Separation" with "Standard Minimum Distance Between Buildings."

21. **Page 24**: Please note that ZR § 23-711 prescribes a required minimum distance between a residential building and any other building on the same zoning lot. Therefore, within the first full paragraph, please clarify that the DOB objection for ZR § 23-711 is due to the lack of distance between the residential portion of the new building and the existing community facility building to remain.

22. **Page 25**: Within the suggested "(c) finding," please note the number of lot-line windows for adjacent residential buildings that would be blocked for both the as-of-right, lesser variance (see BSA Objections # 30-31) and proposed scenarios.

23. **Page 25**: Within the suggested "(c) finding," please discuss the built context along the subject blockfronts of West 70th Street and the alleged appropriateness of the proposed building in terms of neighborhood character. Please reference drawing P-17.

EXISTING CONDITIONS DRAWINGS

24. **EX-3 & EX-4 (Section Drawings)**: Please substantially enlarge each drawing within the 11x17 sheet and show floor-to-ceiling heights. Additionally, please remove the illustrative as-of-right envelope outline from these drawings.

AS-OF RIGHT CONDITIONS DRAWINGS

25. It appears that the "as-of-right" scenario would still require a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings) given that it contains residential use (see Objection # 21). Please clarify.

26. **AOR-3 & AOR-4 (Section Drawings)**: Please substantially enlarge each drawing within the 11x17 sheet and show floor-to-ceiling heights.

27. **Drawing AOR-14**: Please label the proposed (as-of-right) building and existing, adjacent buildings accordingly.

PROPOSED CONDITIONS DRAWINGS

28. **P-3 & P4**: Please correct the title of the drawings by replacing "street wall sections" with "Areas of Non-Compliance."

29. Please provide new **section drawings** which show floor-to-ceiling heights.

"LESSER-VARIANCE" DRAWINGS

30. Please provide a full plan set of lesser-variance drawings that show compliant height and setback (objections for ZR § 23-633 and ZR § 23-663 are removed) that seeks to accommodate CSI's programmatic needs and excludes the proposed tenant school space; the remaining floor area shall be used for residential use.

31. Please provide a full plan set for a complying, 4.0 FAR residential building on Lot 36 that includes a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings).

BSA ZONING ANALYSIS

32. Under "Maximum Permitted" column, please confirm the maximum allowable FAR as "8.38." Provided that the area within the R10A district measures 125' x 100'6" = 12,562.5 sf (72.7% x 10.0 FAR) and that area within the R8B district measures 47' x 100'6" = 4723.5 (27.3% x 4.0 FAR), the maximum allowable FAR, as averaged pursuant to ZR § 77-22, appears to be 8.36. Please verify this analysis and revise all relevant zoning calculations accordingly.

33. Under Applicable ZR Section for "No. Parking Spaces," please change ZR § 13-42 to § 13-12 (for UG 2) and § 13-133 (for UG 4). Pursuant to these sections, residential parking spaces cannot exceed 35% of dwelling units and community facility parking cannot exceed one space per 4000 sq. ft of floor area. Please verify this information and revise the "Maximum Permitted" column accordingly.

DEPARTMENT OF BUILDINGS (DOB) OBJECTIONS

34. Please provide evidence that the DOB issued their current objections based on the current proposal before the BSA.

FEASIBILITY STUDY

35. Although it is recognized that Congregation Shearith Israel has not-for-profit status, for the purpose of this study, please ascribe standard market-rate rents for community facility space based on comparables rents in the vicinity of the subject site for both the as-of-right and proposed scenarios.

36. It is noted that all comparable properties analyzed to determine the subject site's value (Schedule C, Page 10-12) are all downward adjusted for "inferior zoning" (the subject site has split zoning - R8B and R10A - and the comparables are all located in R8 or R8 equivalent districts). Please note that for developments in contextual districts, each portion of the zoning lot shall be regulated by the height and setback applicable to the district in which such portion of the zoning lot is located. Further, it is noted that the subject site is located within an historic district which applies further regulation on the height of any

development of this site. Given this information regarding height and setback controls, it does not appear that additional floor area above 4.0 FAR could be utilized on this site (please note that the as-of-right plans show an FAR of 3.23 or 5,513.60 sq. ft. on the R10A zoned portion of Lot 36). Therefore, it does not appear that the subject site's partial location within a 10.0 FAR district (R10A) should warrant any downward adjustment for comparable properties zoned R8, R8B or C6-2A. Please revise this analysis.

37. Provided that the alleged hardship claim for the development site (Lot 36) is an inability to accommodate CSI's programmatic needs on Lot 37, please analyze a complying, fully residential development on Lot 36 as requested within Objection # 31. This analysis is requested for the purposes of gauging what the economic potential of the development site would be without the alleged hardship.

38. Please analyze the "lesser variance scenarios" as described in BSA Objections # 30 and # 31.

CEQR REVIEW / EAS

39. **Methodology for Project Site**: It is inappropriate to analyze only the proposed new building on the subject zoning lot. Please revise the EAS to reflect the entire zoning lot (existing synagogue and proposed new building).

40. **Methodology for "No-Build" / "Build" Scenarios**: Provided that the feasibility study, submitted as part of this application, asserts that an as-of-right development is not economically feasible, it does not appear to be a reasonable assumption to project new, complying development on Lot 37 by the Build Year of 2009. Please either provide a thorough and rational justification for this approach or revise this EAS's methodology by analyzing existing conditions on the entire *zoning lot* for the "no-build" scenario.

EAS Form

41. **Part I, No. 8**: Please update this section to reflect the Certificate of Appropriateness granted by the Landmarks Preservation Commission for the subject proposal.

42. **Part I, No.13b**: Please verify the gross square footage sums listed for "Project Square Feet To Be Developed" (please be sure to include cellar space) and for "Gross Floor Area of Project" (be sure to include the existing Synagogue building and all cellar space).

43. **Part II, No.3**: Please amend the site data for "Community Facility" by including both existing buildings on the subject zoning lot.

44. **Part II, No.4**: There does not appear to be any existing parking spaces on the subject property. Please revise "Existing Parking" section accordingly.

45. **Part II, No.10**: Under "Proposed Land Use," please verify the gross square footage of each building. Be sure to include the existing Synagogue and all cellar space).

46. **Part II, No.11**: No parking is proposed; please revise this section accordingly.

The Feasibility Analysis estimated the net project value to be $14,820,000. This amount is the sum of residential condominium unit sales, less sales commissions, plus the capitalized value of the community facility space. The total investment required, including estimated Property Value, base construction costs, soft costs and carrying costs during the sales period for the Revised As of Right Development is estimated to be $28,139,000. As shown in Schedule A, the development of the Revised As of Right Development would result in an annualized capital loss of $7,064,000.

c) Revised Proposed Development (*Objection #35*)

The Feasibility Analysis estimated the net project value to be $39,556,000. This amount is the sum of residential condominium unit sales, less sales commissions, plus the capitalized value of the community facility space, which as shown in the attached Schedule A2, space is $4,056,000. The total investment, including estimated Property Value, base construction costs, soft costs and carrying costs during the sales period for the Revised Proposed Development is estimated to be $33,689,000.

As shown in Schedule A, the development of the Revised Proposed Development would provide an Annualized Return on Total Investment of 6.59%. We note that this return is not significantly higher than the previous return of 6.55%. This results from the assumption that the community facility areas will be rented at market rate. In fact, were the project to be undertaken today, as the proforma analysis assumes, the value of the project would be constrained by the fact that the community facility would produce no income and the lower return of 6.55% would be a more accurate reflection of the actual conditions.

d) As of Right Residential F.A.R. 4.0 Development (*Objection #37*)

The Feasibility Analysis estimated the net project value to be $33,018,000. This amount is the sum of total estimated gross sales proceeds, less sales commissions. The total investment, including estimated Property Value, base construction costs, soft costs and carrying costs during the sales period for the As of Right Residential F.A.R 4.0 Development is estimated to be $37,388,000. As shown in Schedule A, the development of the As of Right Residential F.A.R 4.0 Development would result in an annualized capital loss of $2,313,000.

The Revised As of Right Residential Development, Alternative As of Right Residential Development and As of Right Residential F.A.R. 4.0 Development would each result in an annualized loss. The return provided by the Revised Proposed Development would provide 6.59% return on investment. The return provided by the Revised Proposed Development, in this case, therefore, would be considered acceptable.

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SCHEDULE A: ANALYSIS SUMMARY - CONDOMINIUM USE

		ALTERNATIVE AS OF RIGHT CF/RESIDENTIAL DEVELOPMENT	REVISED AS OF RIGHT CF/RESIDENTIAL DEVELOPMENT	REVISED PROPOSED DEVELOPMENT	ALL RESIDENTIAL F.A.R. 4.0
BUILDING AREA (SQ.FT.)					
BUILT RESIDENTIAL AREA		11,936	7,594	20,863	25,842
SELLABLE AREA		8,593	5,316	14,980	18,883
CAPITAL INVESTMENT SUMMARY					
ACQUISITION COST		$18,944,000	$18,944,000	$18,944,000	$18,944,000
HOLDING & PREP. COSTS		$0	$0	$0	$0
BASE CONSTRUCTION COSTS		$4,249,000	$3,722,000	$7,488,000	$10,831,000
SOFT CONSTRUCTION COSTS		$5,080,000	$4,919,000	$6,594,000	$6,873,000
		$28,273,000	$27,585,000	$33,026,000	$36,648,000
PROJECT VALUE					
SALE OF UNITS		$19,671,000	$12,114,000	$37,786,000	$35,126,000
(less) SALES COMMISSIONS	6%	($1,180,000)	($727,000)	($2,266,000)	($2,108,000)
CAPITALIZED VALUE OF COMMUNITY FACILITIES		$2,133,000	$3,433,000	$4,056,000	NA
EST. NET PROJECT VALUE		$20,624,000	$14,820,000	$39,556,000	$33,018,000
PROJECT INVESTMENT					
ACQUISITION COST		$18,944,000	$18,944,000	$18,944,000	$18,944,000
HOLDING & PREP. COSTS		$0	$0	$0	$0
BASE CONSTRUCTION COSTS		$4,249,000	$3,722,000	$7,488,000	$10,831,000
SOFT CONSTRUCTION COSTS		$5,080,000	$4,919,000	$6,594,000	$6,873,000
CARRYING COSTS DURING SALES PERIOD		$574,000	$554,000	$863,000	$740,000
EST. TOTAL INVESTMENT		$28,847,000	$28,139,000	$33,889,000	$37,388,000
RETURN ON INVESTMENT					
ESTIMATED PROJECT VALUE		$20,624,000	$14,820,000	$39,556,000	$33,018,000
(less)EST.TOTAL INVESTMENT		($28,847,000)	($28,139,000)	($33,889,000)	($37,388,000)
(less) EST.TRANSACTION TAXES		($359,000)	($221,000)	($689,000)	($641,000)
EST.PROFIT (loss)		($8,582,000)	($13,540,000)	$5,178,000	($5,011,000)
DEVELOPMENT/SALES PERIOD (MONTHS)		23	23	28	26
ANNUALIZED PROFIT (loss)		($4,476,000)	($7,064,000)	$2,219,000	($2,313,000)
RETURN ON TOTAL INVESTMENT		0.00%	0.00%	15.37%	0.00%
ANNUALIZED RETURN ON TOTAL INVESTMENT		0.00%	0.00%	6.59%	0.00%

NOTE : ALL $ FIGURES ROUNDED TO NEAREST THOUSAND

8. Page 28: Within the final sentence of the "Rear Yard in R10A and R8B" section, please change "...provide a fully compliant rear yard" to "...do not further encroach into the required rear yard."

9. Page 29: Within the first sentence of the "Rear Setback" section, please change "rear lot line" to "rear yard line."

10. Page 29 & 30: Also within the "Rear Setback" section, please change "This 3.5 ft. setback differential resulted in the issuance of DOB objection #7" to "The proposed base height above the permitted 60' and the proposed rear setback at less than the required 10' resulted in the issuance of DOB Objection # 7."

11. Page 30: Please remove the final sentence of the "Rear Setback" section. The discussion of the ground floor level which is allowed to be built full to rear lot line as a permitted obstruction is not germane to this section.

12. Page 31: For the suggested "(c) finding," as previously requested by Objection # 23 of the First Notice, please describe existing built conditions along both West 70th Street block-fronts between Central Park West and Columbus Avenue.

AS-OF-RIGHT CONDITIONS DRAWINGS

13. As-of-right schemes 'A' and 'B' both appear to violate the rear yard and thus are not "as-of-right." The rear portion of the building within the required rear yard appears to exceed one-story and thus does not qualify as a permitted obstruction pursuant to ZR § 24-33. Please revise these drawing sets to show a compliant rear yard.

14. Please re-label all as-of-right drawings so as each drawing set has its own unique identifier (e.g., AOR-A-3, AOR-B-3, and AOR-C-3).

15. Scheme C (Residential Scheme): This as-of-right scenario does not maximize floor area that can be accommodated within the R8B zoning envelope. Instead of showing a six-story building with five stories below the 60' maximum base height, please reduce the floor-to-ceiling heights and show a seven-story building with five stories up to the 55' minimum base height and two floors above.

PROPOSED CONDITIONS DRAWINGS

16. Drawing P-4 ("Proposed Areas of Non-Compliance"): A legend is provided on this sheet for four discrete non-complying elements (building height, base height, and front and rear setback); however the drawing only shows the area of non-compliance for building height. Please revise this drawing by graphically showing all areas of proposed non-compliance.

17. Please provide an illustrative elevation drawing showing a comparison of lot line windows on adjacent building(s) that would be blocked under an as-of-right and the proposed scenario.

"LESSER-VARIANCE" DRAWINGS

18. Objection # 30 has not been complied with. Please provide a full plan set for a lesser-variance scenario that shows compliant building height, base height, front and rear setback but non-complying rear yard and lot coverage.

FEASIBILITY STUDY

19. Please analyze the revised as-of-right scenarios ("Scheme A" and "Scheme B") as described by Objection # 13.

20. Please analyze the revised "Scheme C" (as-of-right residential scenario) as described by Objection # 15 of the Second Notice.

21. Please analyze the "lesser-variance" scheme as described within Objection # 30 of the First Notice.

22. The response given to Objection # 36 of the First Notice is not satisfactory. It does not directly respond to the overall point that because the development site, although partially located within an R10A district, is primarily zoned R8B and located entirely within an historic district, and thus cannot reasonably utilize additional floor area from the R10A district. Therefore, it is not appropriate to adjust upward the vacant land sales comparables for zoning.

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SCHEDULE A1: ANALYSIS SUMMARY - CONDOMINIUM USE

		REVISED AS OF RIGHT C/F/RESIDENTIAL DEVELOPMENT	LESSER VARIANCE C/F/RESIDENTIAL DEVELOPMENT	REVISED PROPOSED DEVELOPMENT	ALL RESIDENTIAL F.A.R. 4.0
BUILDING AREA (SQ.FT.)					
BUILT RESIDENTIAL AREA		7,594	12,575	20,883	28,724
SELLABLE AREA		5,316	8,583	15,799	17,780
CAPITAL INVESTMENT SUMMARY					
ACQUISITION COST		$17,050,000	$17,050,000	$17,050,000	$17,050,000
HOLDING & PREP. COSTS		$0	$0	$0	$0
BASE CONSTRUCTION COSTS		$3,722,000	$4,339,000	$7,488,000	$11,906,000
SOFT CONSTRUCTION COSTS		$4,663,000	$4,851,000	$6,520,000	$7,179,000
		$25,435,000	$26,240,000	$31,058,000	$36,031,000
PROJECT VALUE					
SALE OF UNITS		$12,623,000	$20,191,000	$40,988,000	$39,627,000
(less) SALES COMMISSIONS	6%	($757,000)	($1,211,000)	($2,458,000)	($2,380,000)
CAPITALIZED VALUE OF COMMUNITY FACILITIES		$0	$0	$0	NA
EST. NET PROJECT VALUE		$11,866,000	$18,980,000	$38,510,000	$37,437,000
PROJECT INVESTMENT					
ACQUISITION COST		$17,050,000	$17,050,000	$17,050,000	$17,050,000
HOLDING & PREP. COSTS		$0	$0	$0	$0
BASE CONSTRUCTION COSTS		$3,722,000	$4,339,000	$7,488,000	$11,906,000
SOFT CONSTRUCTION COSTS		$4,663,000	$4,851,000	$6,520,000	$7,179,000
CARRYING COSTS DURING SALES PERIOD		$515,000	$539,000	$664,000	$733,000
EST. TOTAL INVESTMENT		$25,950,000	$26,779,000	$31,722,000	$36,764,000
RETURN ON INVESTMENT					
ESTIMATED PROJECT VALUE		$11,866,000	$18,980,000	$38,510,000	$37,437,000
(less)EST.TOTAL INVESTMENT		($25,950,000)	($26,779,000)	($31,722,000)	($36,764,000)
(less) EST.TRANSACTION TAXES		($230,000)	($368,000)	($748,000)	($727,000)
EST.PROFIT (loss)		($14,314,000)	($8,167,000)	$6,040,000	($54,000)
DEVELOPMENT/SALES PERIOD (MONTHS)		23	23	28	28
ANNUALIZED PROFIT (loss)		($7,468,000)	($4,261,000)	$2,589,000	($23,000)
RETURN ON TOTAL INVESTMENT		0.00%	0.00%	19.04%	0.00%
ANNUALIZED RETURN ON TOTAL INVESTMENT		0.00%	0.00%	5.16%	0.00%

NOTE : ALL $ FIGURES ROUNDED TO NEAREST THOUSAND

We're not taking any floor area from the synagogue. We're simply using the floor area that the zoning permits us on our footprint but we're using it as a mixed use building.

And, I don't see that that locks us out of making the required findings. I simply need to know how you best want to analyze the situation.

CHAIR SRINIVASAN: I think what we've heard today from the speakers, so far, has to do with the program of the synagogue.

Those can be accommodated on that site with maybe as-of-right but, at the most, there's waivers that relate to lot coverage and to the rear yard for the first - - second to fourth floor.

So, when you've made this presentation just as the program needs for the synagogue, well, then we see a proposal which includes another piece of it where you're asking for waivers which don't really relate directly to the program of the synagogue except that it gives you - - you're able to monetize your air rights and use it in a way, which I understand, may fund the congregation but those are not the typical cases that we see before the Board.

So, we're put in this hard place.

Typically, when you have a situation that goes through Landmarks where you're asking for height and setback waivers and they're not driven by hardship, there's another venue and I know that you just mentioned 74-711. It - - maybe it was foreclosed to you. That's unfortunate, but we're here looking at this case and it's just - - it's been very hard for us to get our hands around this.

as an incidental to explain the fact that any residential use would have to start 49 feet up and be contained by your height limitations in that district.

MR. FRIEDMAN: We will take a look at how we can re-present that, re-present that to you.

Would it be helpful to hear from Mr. Freeman on this point since I think his analysis unlocks some of the concerns that you have on these questions?

CHAIR SRINIVASAN: Well, I think we've read through the financials. We may disagree with Mr. Freeman's assumptions, so I don't think Mr. Freeman needs to explain to us what he's done on his financials. We've seen it. I think we have some concerns which we raised yesterday and either he can go back and look at that or we can state them for the record, but I think some of the issues have to do with how the site is valued and how a good portion of what is anticipated as the developer paying for that site is not going to be used by the developer because it's being used by the synagogue.

So, it's almost like you should take that out of the equation and then you have this value on this property without that 20,000 square feet that's being used for the synagogue.

And, then, I think it's about looking at what Commissioner Ottley-Brown said. It's how do you use that on the site?

Because, otherwise, it goes back to the same thing; that $10 million worth is really just paying for the synagogue.

And I think it - - then it still remains a door opener so we've seen a lot of cases before the Board which is based on programmatic needs there; enlargements of existing

Scheme C - Incorrectly labelled "All Residential"

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SCHEDULE A1: ANALYSIS SUMMARY - CONDOMINIUM USE

		REVISED AS OF RIGHT CF/RESIDENTIAL DEVELOPMENT		LESSER VARIANCE CF/RESIDENTIAL DEVELOPMENT		AS OF RIGHT WITH TOWER DEVELOPMENT (Residential Only)		REVISED PROPOSED DEVELOPMENT (Residential Only)		ALL RESIDENTIAL F.A.R. 4.0
BUILDING AREA (SQ.FT.)										
BUILT RESIDENTIAL AREA		7,884		12,575		20,019		20,863		28,724
SELLABLE AREA	70%	5,518	69%	8,693	78%	10,348	82%	16,788	62%	17,780
CAPITAL INVESTMENT SUMMARY										
ACQUISITION COST		$14,816,000		$14,816,000		$14,816,000		$14,816,000		$14,816,000
HOLDING & PREP. COSTS		$0		$0		0		$0		$0
BASE CONSTRUCTION COSTS		$3,722,000		$4,339,800		$8,068,000		$7,466,000		$11,808,000
SOFT CONSTRUCTION COSTS		$4,337,000		$4,525,000		$6,274,000		$6,434,000		$6,847,000
		$22,875,000		$23,680,000		$29,148,000		$29,736,000		$33,471,000
PROJECT VALUE										
SALE OF UNITS		$12,823,000		$20,191,000		$24,595,000		$40,998,000		$40,199,000
(less) SALES COMMISSIONS	6%	($767,000)		($1,211,000)		($1,476,000)		($2,458,000)		($2,412,000)
EST. NET PROJECT VALUE		$11,956,000		$18,980,000		$23,119,000		$38,540,000		$37,787,000
PROJECT INVESTMENT										
ACQUISITION COST		$14,816,000		$14,816,000		$14,816,000		$14,816,000		$14,816,000
HOLDING & PREP. COSTS		$0		$0		$0		$0		$0
BASE CONSTRUCTION COSTS		$3,722,000		$4,339,800		$8,068,000		$7,466,000		$11,808,000
SOFT CONSTRUCTION COSTS		$4,337,000		$4,525,000		$6,274,000		$6,434,000		$6,847,000
CARRYING COSTS DURING SALES PERIOD		$470,000		$493,000		$600,000		$884,000		$888,000
EST. TOTAL INVESTMENT		$23,345,000		$24,173,000		$29,748,000		$29,402,000		$34,159,000
RETURN ON INVESTMENT										
ESTIMATED PROJECT VALUE		$11,956,000		$18,980,000		$23,119,000		$38,540,000		$37,787,000
(less) EST. TOTAL INVESTMENT		($23,345,000)		($24,173,000)		($29,748,000)		($29,402,000)		($34,159,000)
(less) EST. TRANSACTION TAXES		($230,000)		($368,000)		($448,000)		($746,000)		($734,000)
EST. PROFIT (loss)		($11,709,000)		($5,561,000)		($7,076,000)		$9,390,000		$2,894,000
DEVELOPMENT/SALES PERIOD (MONTHS)		23		29		32		28		28
ANNUALIZED PROFIT (loss)		($6,109,000)		($2,801,000)		($2,664,000)		$3,693,000		$1,240,000
RETURN ON TOTAL INVESTMENT		0.00%		0.00%		0.00%		28.43%		8.47%
ANNUALIZED RETURN ON TOTAL INVESTMENT		0.00%		0.00%		0.00%		12.19%		3.63%

Scheme A - Two Floor Analysis

EXHIBIT A

As of Right Scheme A – Revised As of Right Community Facility/Residential Development

As requested by the Board, we have provided an analysis of the Revised As of Right Development (Plans set titled: As of Right - Scheme A (Original), dated 10-22-2007), which would consist of a new synagogue lobby on the ground floor, and community facilities on the second through fourth floors, with a gross floor area of 18,134 sq.ft. On the fifth and sixth floors there would be two condominium units for sale with a gross residential area on the fifth and sixth floors of 7,594 sq.ft. The total gross residential area, not including the cellar would be 9,638 sq.ft., and includes the lobby and core areas of the residential portion of the development.

The gross built area of this alternative would be 27,772 sq.ft. not including the cellar. The zoning floor area for this alternative would be 27,772. The residential sellable area is 5,316 sq.ft.

This development program is referred to as the "Revised As of Right Community Facility/Residential Development".

EXHIBIT C

2007 DEC 28 P 12:04
CAL. NO.

As of Right Residential F.A.R. 4.0 – Scheme C

The Revised As of Right Residential F.A.R. 4.0 Development alternative (Plans set titled: As of Right – Scheme C Residential Scheme, dated 10-22-2007) consists of new construction of a seven-story residential building on lot 37 with the synagogue remaining untouched. The new development consists of a ground floor residential and synagogue lobby and core, and floors 2-7 would be for sale condominium units. There will be a total of six residential units. The total gross residential area, not including the cellar would be 28,724 sq.ft., which includes residential lobby and core.

The gross built area of this alternative would be 28,724 sq.ft., not including the cellar. The zoning floor area for this alternative would be 28,724 sq.ft. The residential sellable area is 17,780 sq.ft.

The gross built residential area would be 18,006 sq.ft., and the sellable area would be 11,835. The estimated sales prices are attached as Schedule D3.

Revised Value of the Property

As requested by the BSA, we have eliminated consideration of the R10 comparables. We have reviewed the previously submitted R8 comparable sales analysis, and revised the analysis to eliminate sales in districts with commercial overlays and provide several additional sales from R8 and R8B districts. The revised comparable sales analysis is attached as Schedule C to this letter. As shown in Schedule C, sales prices for vacant and underutilized land in R8 and R8B districts, adjusted for comparability, ranged from $573.77/sq.ft. of F.A.R. development area to $673.13/sq.ft., with an average of $628.52/sq.ft. For purposes of this analysis, a value of $625/sq.ft., or slightly below the average, was used.

As described in the initial submission of March 28, 2007, lot 37 yielded 37,889 sq.ft. of total development floor area. The Board requested that only the gross residential area be utilized with this methodology. This gross residential area was determined by the As of Right Development Alternative with Tower which contained 18,134 sq.ft. of community facility area, and residential floor area of 19,755 sq.ft.

However, that alternative assumed a non-complying sliver building tower portion. The gross residential area without the non-complying portion would only be 9,434 sq.ft., the difference between the residential area with the non-complying tower portion (19,755 sq.ft.) and the complying residential floor area (9,434 sq.ft.) is 10,321 sq.ft.

To address this issue, further consideration was given to the zoning floor area available, taking into account the portion of the site containing the Parsonage building. As shown in the Exhibit One, prepared by the project architects, Platt Byard Dovell and White, the as of right buildable floor area for that portion of the property is 24,460 sq.ft. The existing Parsonage building contains approximately 5,366 sq.ft. The remaining floor area available from the Parsonage portion of the site would be 19,094 sq.ft., not including the floor area within the existing Parsonage building.

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.ft. X $625/sq.ft., equal to the amount of $12,347,000.

Development Cost Assumptions

For each development alternative, a construction cost estimate has been provided by McQuilkin and Associates. Each estimate can be found in Exhibit 2 to this Report.

The estimated hard construction cost for the total development of Revised Proposed Development is $7,398,000. No construction costs related to development of the community facility have been included.
The estimated hard construction cost for the total development of Revised Proposed Development without Penthouse is $6,547,000. No construction costs related to development of the community facility have been included.

The estimated hard construction cost for the total development of Revised Proposed Development without Eighth Floor is $6,291,000. No construction costs related to development of the community facility have been included.

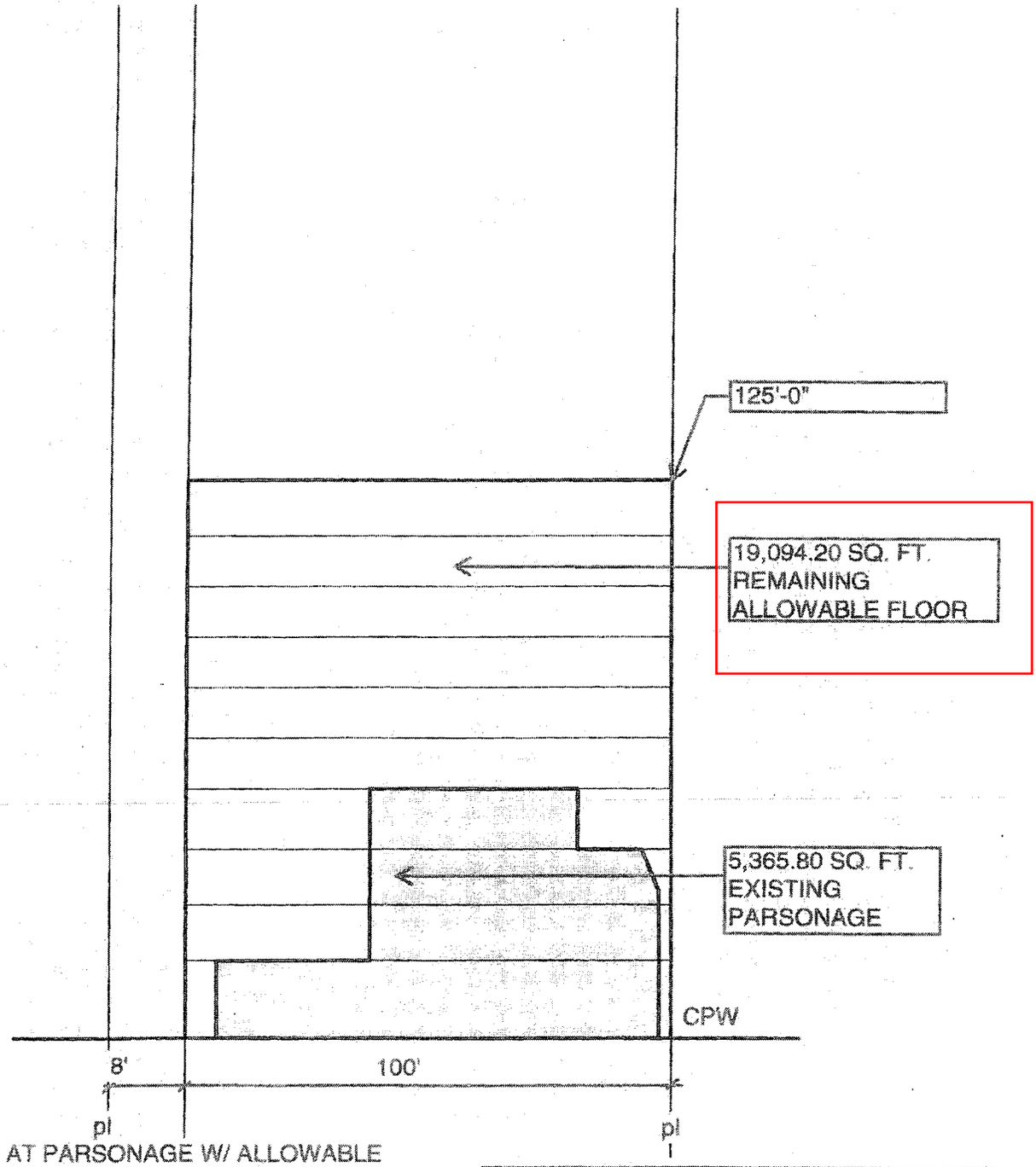
All assumptions are the same as those described in the Economic Analysis Report, dated March 11, 2008.

Economic Analysis

A) Revised Proposed Development

As shown in the attached Schedule A, the Feasibility Analysis estimated the net project value to be $34,039,000. This amount is the sum of residential condominium unit sales, less sales commissions. The total investment, including estimated Property Value, base construction costs, soft costs and carrying costs during the sales period for the Revised Proposed Development is estimated to be $26,731,000.

As shown in Schedule A1, the development of the Revised Proposed Development would provide an Annualized Return on Total Investment of 10.66%.



SECTION AT PARSONAGE W/ ALLOWABLE
FLOOR AREA FOR PARSONAGE PARCEL

24,460.00 SQ. FT. ALLOWABLE FLOOR AREA
– 5,365.80 SQ. FT. EXISTING PARSONAGE
19,094.20 REMAINING ALLOWABLE FLOOR AREA

CONGREGATION SHEARITH ISRAEL
CAL NO. 74-07-BZ
AS-OF RIGHT SCHEME AT PARSONAGE

1/32" = 1'
PBDW
05.12.08

Mr. Sugarman, as did the previously discussed MVS Report, suggests that there have been improprieties in estimating and allocating construction costs – that the costs for the "two bedroom care takers apartment on the fourth floor" have been erroneously included in the residential cost estimate.

By this we can only assume that the only portion of the estimate Mr. Sugarman has read is the last page of the McQuilkin & Associates estimate – the "Proposed Apartment Matrix".

It appears from these comments that Mr. Sugarman has neither the knowledge or experience necessary to understand the details contained in the construction cost estimates provided or is trying to mislead the BSA. As described in response to the the MVS Report, above, the cost of the caretaker's apartment, which is accessory to the community facility space, is appropriately allocated to the community facility construction costs.

Scheme A Acquisiton Cost

Mr. Sugarman states that, "Scheme A analysis continues to ascribe land cost for the entire building to just the two floor condominium."

As noted in the above response to the MVS Report, and mentioned in previous submissions, the acquisition cost is based on the allowable residential floor area and not the entire building.

Return on Equity

Mr. Sugarman's concern that no explanation has been provided as to why a return on equity is not the appropriate measure has been addressed in prior submissions.

As stated above, in our response to a similar concern expressed in the MVS Report, the methodology utilized in our submissions is typical for BSA condominium project applications, and has been a long standing accepted practice at the BSA.

We have also previously noted that this is a typical methodology utilized in professional real estate analyses for condominium projects in general. This methodology appropriately considers the profit or loss from the net sales proceeds less the total project development cost.

Revised Scheme C

Mr. Sugarman is concerned that a revised Scheme C was not provided.

We note that the BSA did not request a submission of an analysis of a revised Scheme C.

Case Law

Freeman/Frazier made no reference to case law and limits consideration to financial analysis in submissions to the BSA.

Income from School

As noted above, and as noted in prior submissions, market rate rents for community facilities were provided at the request of the Board.

Please feel free to call me if you have any further questions.

Sincerely

Jack Freeman

Eleventh Freeman Frazier Submission Re Reasonable Return (for Applicant): Analysis, dated July 8, 2008 (submitted with July 8, 2008 letter) (9 of 12)

ECONOMIC ANALYSIS
10 WEST 70TH STREET
NEW YORK, NY
JULY 8, 2008
PAGE 8

SCHEDULE A: ANALYSIS SUMMARY

		REVISED AS OF RIGHT CF/RESIDENTIAL DEVELOPMENT	REVISED PROPOSED DEVELOPMENT
BUILDING AREA (SQ.FT.)			
BUILT RESIDENTIAL AREA		7,594	22,352
SELLABLE AREA		5,316	15,243
CAPITAL INVESTMENT SUMMARY			
ACQUISITION COST		$12,347,000	$12,347,000
HOLDING & PREP. COSTS		$0	$0
BASE CONSTRUCTION COSTS		$3,722,000	$7,398,000
SOFT CONSTRUCTION COSTS		$3,977,000	$6,322,000
		$20,046,000	$26,067,000
PROJECT VALUE			
SALE OF UNITS		$12,702,000	$36,394,000
(less) SALES COMMISSIONS	6%	($762,000)	($2,184,000)
EST. NET PROJECT VALUE		$11,940,000	$34,210,000
PROJECT INVESTMENT			
ACQUISITION COST		$12,347,000	$12,347,000
HOLDING & PREP. COSTS		$0	$0
BASE CONSTRUCTION COSTS		$3,722,000	$7,398,000
SOFT CONSTRUCTION COSTS		$3,977,000	$6,322,000
CARRYING COSTS DURING SALES PERIOD		$419,000	$664,000
EST. TOTAL INVESTMENT		$20,465,000	$26,731,000
RETURN ON INVESTMENT			
ESTIMATED PROJECT VALUE		$11,940,000	$34,210,000
(less)EST.TOTAL INVESTMENT		($20,465,000)	($26,731,000)
(less) EST.TRANSACTION TAXES		($232,000)	($664,000)
EST.PROFIT (loss)		($8,757,000)	$6,815,000
DEVELOPMENT/SALES PERIOD (MONTHS)		23	28
ANNUALIZED PROFIT (loss)		($4,569,000)	$2,921,000
RETURN ON TOTAL INVESTMENT		0.00%	25.49%
ANNUALIZED RETURN ON TOTAL INVESTMENT		0.00%	10.93%

NOTE : ALL $ FIGURES ROUNDED TO NEAREST THOUSAND

We note for the record that Freeman Frazier & Associate (FFA) has been submitting economic analyses before the BSA for over 20 years. We have done extensive work before the BSA and have been party to hundreds of applications submitted to the BSA, during the course of which we have acquired a substantial understanding of the BSA's policies and procedures.

Regarding the application and submissions made by FFA for this application (Calendar No. 74-07-BZ) at no time during the proceedings of the BSA did the BSA indicate that the materials submitted were inconsistent with BSA policies and procedures or, in our opinion, based on our experience before the BSA, did the BSA appear to act outside of their normal process and procedure.

We further note that numerous submissions have been made by FFA in response to questions raised by the opposition and not by the BSA. Although not obligated to do so, we have made an effort to respond as professionals to such opposition comments, as well as requests for information made by the BSA.

Sugarman Letter to BSA dated June 20, 2008

Sugarman Allegation #1: Sugarman alleges that a revised Scheme C was not provided in the FFA submission of May 13, 2008, the original Scheme C having unexplained high loss factors, and not including a valuable sub-sub-basement." (Page 5)

FFA Response to Allegation #1: As noted on page 7 of the July 8, 2008 Response, the BSA did not request a submission of an analysis of a revised Scheme C. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

Sugarman Allegation #2: Sugarman alleges that FFA "misdescribes the rationale behind case law which would require consideration in these circumstances of original cost of land." (Page 5)

FFA Response to Allegation #2: As noted on page 7 of our July 8, 2008 Response, FFA made no reference to case law and limits consideration to financial analysis in submissions to the BSA. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

Sugarman Allegation #3: Sugarman alleges that it is reasonable to project $1.2 million a year in rental income from the Beit Rabban School. (Page 5)

FFA Response to Allegation #3: The applicant is a non-profit institution and as such no economic analysis regarding such institution is required. Therefore, the BSA, appropriately, has not requested an economic analysis of the existing non-profit use or of the non-profit facility portion of the Proposed Development.

MVS Letter to BSA dated July 29, 2008

MVS Allegation #1: MVS alleges that FFA failed to respond the BSA's request to provide an all Residential Scheme in response to the Notice of Objections dated June 15, 2007. (Page 2)

FFA Response to Allegation #1: FFA provided a response to the BSA's request on page 26 of the December 21, 2007 Response, that eliminated all community facility related programmatic needs from the building. The ground floor synagogue lobby and core remained to alleviate the circulation problems. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

MVS Allegation #2: MVS alleges that according to FFA, the value of the site is $2,323 per square foot of building area. (Page 3)

FFA Response to Allegation #2: This is a misstatement of the facts. At no time did FFA state or imply that the value of this site is $2,323 per square foot of building area. As stated repeatedly, the value of the site is based on the available residential floor area. Based on the BSA's direction as to floor area to be considered, the maximum value utilized in any FFA submission was $750/sq.ft. At the request of the BSA, the July 8, 2008 FFA submission utilizing only R8 and R8B comparables was $625/sq.ft. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

MVS Allegation #3: MVS alleges that FFA failed to respond to the BSA's request to provide a single document comparing the Proposed Development to an earlier as of right scheme. (Page 3)

FFA Response to Allegation #3: In the July 8, 2008 Response to the BSA, FFA submitted an analysis of the Proposed Development and the As of Right Development. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

MVS Allegation #4: MVS alleges that FFA has not followed the BSA guidelines in determining a reasonable return.

Sugarman Allegation #6: Sugarman alleges that the acquisition cost methodology defies reality, common sense and valuation principles. (Page 23)

FFA Response to Allegation #6: Our methodology has been consistently accepted by the BSA. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter. FFA expresses no opinion on Sugarman's sense of reality or common sense.

Sugarman Allegation #7: Sugarman alleges that FFA provides no citation support for its claims as to BSA practices. (Page 23)

FFA Response to Allegation #7: Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

Sugarman Allegation #8: Sugarman alleges on page 5 of his June 20, 2008 letter to the BSA, and again in his most recent submission that no explanation is given on when a return on equity is not appropriate, and continues to allege that there is no rational basis for not using a return on equity. (Page 23)

FFA Response to Allegation #8: FFA has addressed this allegation numerous times, most recently on pages six and seven of our July 8, 2008 Response. We note that this is a typical methodology utilized in professional real estate analyses for condominium projects in general. This methodology appropriately considers the profit or loss from the net sales proceeds less the total project development cost. This is an industry standard measure and has been consistently accepted by the BSA. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

Sugarman Allegation #9: Sugarman alleges that FFA ignores the fact that difference between the prior acquisition cost and the estimated current acquisition is in fact a return to the applicant and increases the applicant return on the property. (Page 23)

FFA Response to Allegation #9: The applicant is a non-profit institution and as such no economic analysis regarding such institution is required. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

Sugarman Allegation #10: Sugarman alleges that there is no reasonable basis to include the parsonage portion of the lot as a basis for the acquisition cost. (Page 23)

FFA Response to Allegation #10: The zoning lot that is the subject of this application includes all development rights and consideration of such rights is not irrelevant in the analysis of the site in question. The residential developable area assumed of 19,755 sq.ft. can be achieved by utilizing the as of right buildable floor area from the parsonage portion of the zoning lot, as well as, floor area from the portion of the lot which the proposed building would be constructed. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

Response to the BSA

In response to information requested by the BSA, we provide the following supplemental analyses:

Rear Terrace Supplement

The rear terrace on the fifth floor on top of the community facility, where the building setbacks, and the small area on the sixth floor, created by the courtyard, were not originally designed as accessible open space on the plans provided by Platt Byard Dovell and White (PBDW). Therefore, these areas were not included in the sales price as sellable terrace areas of the respective units.

The fifth floor terrace area is approximately 555 sq.ft. This terrace exists for both the Proposed Development with Courtyard, without Penthouse, and Proposed Development with Courtyard without Eighth Floor. The sixth floor area is approximately 140 sq.ft. and exists in both of alternatives. The estimated sales prices for the affected units, including the terraces has been updated, consistent with our previous valuations of other such terrace areas, and is included in the attached Schedule C.

We note that costs related to creating the terraces such as access doors, pavers, finishes and additional drainage requirements have not been included and their inclusion could only serve to further reduce the returns shown on the following analyses and those previously submitted.

We also note that an inadvertent computer error in the analysis of the Revised Proposed Development without Penthouse and Revised Proposed without Eighth Floor occurred in the May 13, 2008 submission. The estimated sale of units on Schedule D (page 14) was correct, however the sale of units reflected on Schedule A (page 8) were incorrect, resulting in an incorrect, lower annualized return on total investment.

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

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.

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.