COURT OF APPEALS OF THE STATE OF NEW YORK

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LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION AND THOMAS HANSEN,	:	
Petitioners-Appellants,	:	New York County Index No. 650354/08
- against -	:	
CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also Described as the Trustees of Congregation Shearith Israel,	:	NOTICE OF MOTION FOR LEAVE TO APPEAL
Respondents-Appellees.	:	

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NOTICE OF MOTION

This motion is returnable: December 19, 2011

Court of Appeals Hall

20 Eagle Street

Albany, New York 12207

Relief requested: Leave to appeal from a June 23, 2011 order of the Appellate Division, First Department (the "First Department Order") [Exhibit A], which affirmed an October 6, 2009 judgment of the Supreme Court, New York County (the "Judgment") [Exhibit B].

Supporting documents: December 8, 2011 Affirmation of David Rosenberg, with exhibits; Rule 500.1(f) statement; record on appeal to the Appellate Division; First Department Order and Appellate Division briefs; and Judgment appealed.

TIMELINESS OF THE MOTION

Timeliness of this motion, under CPLR 5513(b) and 22 NYCRR 500.22(b)(2), is established by : (a) First Department Order served with notice of entry on June 30, 2011; (b) July 22, 2011 notice of motion to the Appellate Division for leave to appeal; and (c) October 20, 2011 Appellate Division order denying leave to appeal served, with notice of entry, by mail posted on November 4, 2011.

This motion is served on December 8, 2011 [Exhibit C].

JURISDICTION OF THIS COURT

This Court has jurisdiction of this appeal from a final order not appealable as of right. CPLR 5602(a)(1)(i); 22 NYCRR 50.22(b)(3).

SUMMARY OF THE MOTION

Petitioners-Appellants Landmark West!, Inc. ("Landmark West!"), 91 Central Park West Corporation (the "Co-op") and Thomas Hansen (collectively, "Appellants") seek leave to appeal the First Department affirmance of the Judgment dismissing Appellant's petition (the "Petition") to void a resolution (the "Resolution") of Respondent-Respondent City of New York Board of Standards and Appeals ("BSA"), the government body of the City of New York (the "City")[1] authorized to decide zoning variance applications under the General City Law, the New York City Charter (the "Charter") and the New York City Zoning Resolution (the "Zoning Resolution"). The Resolution granted a variance (the "Variance"), permitting Respondent Congregation Shearith Israel ("CSI") to violate multiple fundamental Zoning Resolution restrictions solely to obtain windfall profits from constructing and selling five floors of luxury condominium apartments (the "Luxury Condominium Apartments").

QUESTIONS PRESENTED AND WHY THEY MERIT REVIEW BY THIS COURT

Leave to appeal should be granted to resolve these questions:

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1 Respondents BSA and New York City Planning Commission ("CPC" and, with BSA, the "City Respondents") jointly appeared; Respondent Congregation Shearith Israel separately appeared; and Hon. Andrew Cuomo, as Attorney General of the State of New York, did not appear.

a) May BSA, in the guise of interpreting its jurisdiction, violate the jurisdictional limitations imposed by the voters in adopting the Charter?

This Court previously has entertained and decided such issues based upon their importance to the City's millions of citizens. *See, e.g.*, Matter of Faymor Development Co., Inc. *v.* Board of Standards & Appeals of City of N.Y., 45 N.Y.2d 560 (1978); Matter of Temkin *v.* Karaghevzoff, 34 N.Y.2d 324 (1974); and

b) May BSA adopt a new procedure, not authorized by the Charter, administratively creating jurisdiction for a direct application to the BSA for a variance bypassing the initial review by the highest officials of the New York City Department of Buildings ("DOB") expressly designated, by title, in the Charter?.

BSA's Rules of Practice and Procedure (the "BSA Rules') and every prior BSA holding has required such DOB review for the reasons hereafter set forth.

Leave should be granted to prevent an administrative agency from violating the will of the citizenry expressed in adopting the City Charter. *Id.*

The Preservation of These Issues

Appellants raised these issues in the Supreme Court and First Department: A131 – 138, November 5, 2010 Brief for Petitioners-Appellants ("Appellants' Brief"), pp. 21 – 26; and March 10, 2011 Reply Brief for Petitioners-Appellants ("Appellants' Reply Brief"), pp. 8 - 13.[2]

Appellants cited the many significant errors in the Resolution, but seek leave to appeal solely on BSA's lack of jurisdiction.

THE PROCEDURAL HISTORY OF THIS MOTION

The Facts

Appellants

For more than two decades, Appellant Landmark West!, an award winning non-profit community organization, has worked to protect the historic architecture, special character, and development pattern of the Upper West Side [A128]. The other named Appellants are the corporate owner of a cooperative apartment building and an individual apartment owner, both directly affected by the Resolution [A128, 129].

[2] Bracket references preceded by "A" are to pages the Appendix filed on this appeal and all emphasis herein is added.

CSI's Property

CSI owns: a landmarked Synagogue at Central Park West and West 70th Street; a parsonage building to the south; and a four-story building (the "Community House") and vacant parcel to the west [A276].

All of CSI's property (the "Property") is within the Upper West Side/Central Park West Historic District, designated by the Landmarks Preservation Commission ("LPC") in 1990 [A242].

CSI's Application For A Zoning
Variance To Construct A New Building

CSI applied for seven zoning variances to permit it to replace its Community House and vacant parcel with a nine-story building (the "New Building") containing a four floor Synagogue Annex and five floors of Luxury Condominium Apartments to be sold to wealthy individuals and not used for CSI's religious, educational or cultural purposes (its "Programmatic Needs") [A276].

The Zoning Resolution was enacted to protect "light, air [and] convenience of access". General City Law, § 20.

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CSI's Proposed Variance

CSI's application (the "Application") sought to validate five material violations of the Zoning Resolution:

1. A 14% increase in lot coverage, violating §§ 24-11 and 77-24;

2. A 33 1/3% reduction of rear yard depth, violating § 24-36;

3. A 20% reduced street set back, violating § 24-36;

4. A 33% height increase, violating §§ 23-66 and 23-633; and

5. A 33 1/3% rear yard reduction, violating § 23-633.

None of the variances were necessary for CSI's Programmatic Needs, which could be accommodated without them. They solely were to permit CSI to generate cash from the sale of the Luxury Condominium Apartments (as CSI's attorney admitted, to "monetize" the variances) [A276, 300, 311].

BSA's own calculations prove that the Luxury Condominium Apartments require a separate lobby, additional elevators and stairs and a mechanical room, occupying 2,000 square feet of space on the first four floors, which otherwise would be available for the Synagogue Annex [A280].

The New Building's increased bulk and height will block windows in neighboring apartments. [A245, 266].

CSI's Elected Procedure To
Obtain The Variance

CSI's Application expressly appealed a DOB Notice of Objections (the "DOB Objections") [A292], which rejected the New Building plans.

However, CSI's Application was not an appeal from a determination of the Commissioner of Buildings or Manhattan Borough Superintendent acting under written delegation of power from the Commissioner, as required by Charter § 666(6)(a).

The DOB Objections were issued by a "provisional Administrative Borough Superintendent" [A132], who also signed as "Examiner's Signature [*id.*], eliminating the required internal review by one of DOB's highest officials.[3]

BSA's Rejection Of Appellants'
Jurisdictional Objection

BSA's Resolution, footnote 2, states [A275]:

> [2] A letter . . . from David Rosenberg, an attorney representing local residents, claims that a purported failure by the [DOB] Commissioner or the Manhattan Borough Commissioner to sign the above-referenced August 28,

3 When DOB Objections were issued, Patricia J. Lancaster was the Commissioner of Buildings and Christopher Santulli was the Manhattan Borough Commissioner [A132].

> 2007 objections, as allegedly required by Section 666 of the [Charter], divests [BSA] of jurisdiction to hear the instant application. However, the jurisdiction of [BSA] to hear an application for variances from zoning regulations, such as the instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner.

As will be discussed, Charter § 668 is merely procedural; it does not grant jurisdiction, as the City Respondents have acknowledged by not pursuing this claim.

The Supreme Court Action

Appellants' challenge of BSA's Resolution, in an "action for declaratory and injunctive relief [A 15 – 48], converted by the court to an Article 78 proceeding [A120 - 125], cited, among other defects [A126 – 153], BSA's lack of jurisdiction.

The Dismissal Of The Petition

Accepting BSA's claims, the Judgment dismissed the Petition [A13].

The First Department Order

When Appellants' reasserted BSA's lack of jurisdiction [Appellants' Brief, pp. 21 - 26, and Appellants' Reply Brief, pp. 8 - 13], the City Respondents conceded:

> It may well be, as petitioners argue, that the BSA's appellate jurisdiction may not be invoked without a determination issued by the DOB Commissioner or a borough superintendent acting under appropriate delegation"

City Respondent's January 13, 2011 Brief ("City's Brief"), p. 4.

CSI merely speculated: "It is not unreasonable for the BSA to conclude that [the provisional employee] was acting under written authority from the Commissioner"; "BSA reasonably could have inferred that these permit denials were either signed by the Borough Commissioner or another authorized employee" CSI Brief, dated January 14, 2011, ("CSI Brief") at pp. 19 - 20. There was no factual basis for this speculation, nor did BSA endorse it.

The bulk of the First Department Order addressed the companion appeal, Kettaneh *v.* Board of Standards and Appeals, Index No. 113227/08 (the "Kettaneh Appeal"). As to Appellants' unique arguments, the First Department Order stated:

> There is no merit to the Landmark petitioners' contention that BSA lacked jurisdiction to grant the variance here. Section 666(6) of the New York City Charter gives BSA the power to hear and decide appeals from determinations made by the commissioner of buildings, or, if properly designated, a deputy commissioner or a borough superintendent of buildings. Here, the Landmark petitioners contend that the objections issued by the Department of Buildings (DOB) after review of the plans were not signed by any of these officials. However, any such failure is of no consequence because § 666(5) of the City Charter provides an independent basis for BSA's jurisdiction. Under that subdivision, BSA has the power to "determine and vary the application for the zoning resolution as may be provided in such resolution and pursuant to [§ 668 of the Charter]" (*see Matter of Highpoint Enters. v Board of Estimate of City of N.Y.*, 67 AD2d 914, 916 [1979], *affd* 47 NY2d 935 [1979]; *William Israel's Farm Coop. v*

Board of Stds. & Appeals of City of N.Y., 22 Misc.3d 1105[A] [2004], *appeal dismissed* 25 AD3d 517 [2006]). Since § 668 does not require a final determination executed by one of the designated officials, BSA properly entertained the instant variance application.

The Legal Issues As to Which Leave Should Be Granted

Point I

BSA Lacked Jurisdiction Because CSI Did Not Appeal A Determination Of A Statutorily Specified DOB Official

Charter Section 666(6)(a

Charter § 666(6)(a) states:

> The board [BSA] shall have power:
>
> * * *
>
> 6. To hear and decide appeals from and review,
>
> (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five. . . .

Since CSI's Application expressly was an appeal from DOB's refusal to approve the New Building plans -- and attached the DOB Objections as the document it

was appealing -- the determination was required to have been issued by the Commissioner of Buildings or the Manhattan Borough Superintendent acting under written delegation of power from the Commissioner.

BSA's Resolution acknowledged that BSA lacked jurisdiction pursuant to this section, but claimed "jurisdiction . . . .to hear an application for variance from zoning regulations . . . conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB . . . " [A275, *fn.* 2].

As noted, Section 668 merely describes the procedure to be followed by community boards, borough boards and BSA after an application properly is before BSA; it does not provide jurisdiction

> Community boards and borough boards shall review applications to vary the zoning resolution and applications for special permits within the jurisdiction of the board of standards and appeals under the zoning resolution pursuant to the following procedure . . . .

Respondents ignored BSA's asserted basis for jurisdiction and attempted to claim jurisdiction under Charter § 666(5) [A195 and City's Brief at p.4 and CSI Brief at p. 16], a section which states that BSA may "determine and vary the application of a zoning resolution as may be provided in such resolution and pursuant to section [668]."

In contrast to Charter § 666(6)(a), which specifically sets forth the requirements for BSA's jurisdiction to decide DOB appeals, this section merely references the Zoning Resolution.

The Zoning Resolution might be amended to provide such jurisdiction, but it does not presently do so.

Moreover, BSA's authority is derived from the General City Law, § 81-a(4):

> Hearing appeals. Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination, made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board of bureau of the city.

No "local law or ordinance" expanding BSA's jurisdiction has been cited, because none exists.

BSA's official website confirms its limited jurisdiction [A132 -133]:

> The majority of the Board's activity involves reviewing and deciding applications for variances and special permits, as empowered by the Zoning Resolution, and applications for appeals from property owners who proposals have been denied by the City's Departments of Building, Fire or Business Services. The Board also reviews and decides applications from the Departments of Buildings and Fire to modify or revoke certificates of occupancy.

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

The BSA Rules, of which this Court may take judicial notice [CPLR 4511; *see, e.g.*, Howard Stores Corp. *v.* Pope, 1 N.Y.2d 110 (1956); In re Phillies, 12 N.Y.2d 876 (1962)] state:

> § 1-06 The Zoning (BZ) Calendar
>
> (a) Subject matter
> No application for a variance of special merit shall be entertained by the Board except from an order, requirement, decision, or determination made in a specific case by the Commissioner of Buildings, any Borough Superintendent of the Department of Buildings or their authorized representative or the Commissioner of the Department of Business Services pursuant to the Board's jurisdiction as set forth in the New York City Charter.
>
> (b) Time to File
> Applications shall be filed within thirty (30) days from the date of the action of the Commissioner of Buildings, any Borough Superintendent of the Department of Buildings, or their authorized representative, or the Commissioner of the Department of Business Services which is the subject of the application.

The City Respondents' Verified Answer admitted that a DOB denial must be obtained before applying for a BSA variance [A 183]:

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

non-conforming or non-complying proposal, a property owner may apply to the BSA for a variance.

In a footnote to their appellate brief [A195, fn. 7], BSA's attorneys claimed:

> While the BSA requires variance applicants to submit Notices of Objections from DOB, the requirement was implemented administratively as a practical matter, not as a prerequisite for jurisdiction. Indeed, by requiring variance applicants to submit Notices of Objections from DOB, the BSA is able to determine whether an applicant actually requires a variance, thereby enabling it to eliminate variance applications based on supposition.

Contrary to the arguments of the City Respondents, there is no evidence, in the Record or elsewhere, to support the claim that BSA intended this rule to modify the Charter requirements for its jurisdiction, nor could it, as a matter of law.

The logic of requiring DOB review by the highest DOB officials (thereby exhausting all DOB administrative remedies) is inescapable, which is why it was required by the voters in adopting the Charter.

Moreover, the statutorily imposed 30 day Statute of Limitations for taking such an appeal would be rendered meaningless if an applicant could simply bypass DOB review.

The Errors Of The Courts Below

In accepting BSA's claims, the Supreme Court stated: [A12].

> An agency's construction of a statute or regulation it administers, "if not unreasonable or irrational, is entitled to deference."Matter of Salvati v. Eimicke, 72 N.Y. 784, 791 (1988), rearg.denied, 73 N.Y.2d 995 (1989). The BSA's interpretation that it has jurisdiction under § 668 is rational and will not be disturbed. Given the interplay in the Charter between the different ways for the BSA to acquire jurisdiction over a matter, it is appropriate to defer to the agency's interpretation. "[W]here the statutory language suffers form some 'fundamental ambiguity' . . . or "the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices' . . . , courts routinely defer to the agency's construction of a statute it administers."New York City Council v. City of New York, 4 A.D.3d 85, 97 (1st Dep't 204) (internal citations omitted). The BSA's interpretation that a review under § 668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner is entitled to deference and will not be disturbed.

The cited cases do not deal with an agency's interpretation of jurisdictional statutes. Rather, as this Court held:

> An agency charged with implementing [a law] is presumed to have developed an expertise that requires us to accept its interpretation of that law if not unreasonable. . . . Such deference . . . however, is not required where the question is one of pure legal interpretation. [A statute establishing a] jurisdictional predicate [is] a matter of pure legal interpretation as to which no deference is required.

Teachers Ins. & Annuity Ass'n *v.* City of New York, 82 N.Y.2d 35, 41 (1993).

> Where . . . the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little

> basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.

Kurcsicsv. Merchants Mutual Insurance Company, 49 N.Y.2d 451, 459 (1980):

See also, generally, Levy *v.* Board of Standards and Appeals of the City of New York, 267 N.Y. 347 (1935). *Accord*, Bikman *v.* New York City Loft Board, 14 N.Y.3d 377 (2010); KSLM-Columbus Apartments, Inc. *v.* New York State Division of Housing and Community Renewal, 5 N.Y.3d 303, 312 (2005); Raritan Development Corp. *v.* Silva, 91 N.Y.2d 98, 102 (1997) (rejecting BSA's interpretation of Zoning Resolution).

BSA's attempt to violate its own Rules similarly must be rejected.

> [A] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious.

Matter of Field Delivery Serv. [Roberts], 66 N.Y.2d 516, 517 (1985), *cited, with approval*, Knight *v.* Amelkin, 68 N.Y.2d 975, 977 (1986).

The First Department's Order cited only two decisions: Matter of Highpoint Enterprises, Inc. v. Board. of Estimate, 67 A.D.2d 914 (2d Dep't), *aff'd*, 47 N.Y.2d 935 (1979), and William Israel's Farm Coop. *v.* Board of Standards and Appeals, 22 Misc.3d 1105[A] (2004), *appeal dismissed,* 25 A.D.3d 517 (1st Dep't 2006).

Highpoint, *supra*, did not hold that Charter § 666(5) (§ 666(6) at the time of the decision) afforded original jurisdiction to BSA to grant variances. While the section mentions both variances and special permits, the holding is limited to special permits, as to which Charter § 666(10) does not require a prior determination.

The trial court decision in William Israel's Farm Coop. did not hold that BSA possessed original jurisdiction to issue a variance; it only determined that the closing of a BSA hearing was not arbitrary and capricious.

Neither case supports the First Department Order.

Conclusion

The First Department Order accepted BSA's never before asserted claims of original jurisdiction without a prior DOB review by a Charter specified official, contrary to BSA's own express Rules.

If permitted to stand, the judicial endorsement of BSA's clearly fact-driven effort to deal with a "hot potato" matter will be precedent for countless variance applications in years to come. Effectively, it will repeal the variance procedures consistently applied in New York City and elsewhere in the State and will violate the requirements of the General Municipal law and the Charter.

Leave must be granted to prevent this administrative agency, in the guise of "interpretation", to thwart the will of 8 million citizens expressed in the Charter.

Dated: New York, New York
December 8, 2011

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Court of Appeals Rule 500.1(f), Landmark West! Inc. and 91 Central Park West Corporation disclose that they are New York corporations, with no parents, subsidiaries or affiliates.

EXHIBIT A

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Richter, JJ.

4886-
4887 Index 113227/08

Nizam Peter Kettaneh, et al.,
Petitioners-Appellants,

-against-

Board of Standards and Appeals of
the City of New York, et al.,
Respondents-Respondents.

- - - - -

Landmark West! Inc., et al.,
Petitioners-Appellants,

-against-

Board of Standards and Appeals of
the City of New York, et al.,
Respondents-Respondents,

Hon. Andrew Cuomo, etc.,
Respondent.

Law Offices of Alan D. Sugarman, New York (Alan D. Sugarman of counsel), for Nizam Peter Kettaneh and Howard Lepow, appellants.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for Landmark West! Inc., 91 Central Park West Corporation and Thomas Hansen, appellants.

Jeffrey D. Friedlander, Assistant Corporation Counsel, New York (Ronald E. Sternberg of counsel), for municipal respondents.

Proskauer Rose LLP, New York (Claude M. Millman of counsel), for Congregation Shearith Israel, respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan Lobis, J.), entered July 24, 2009, denying and

dismissing the petition by Kettaneh and Lepow (the Kettaneh petitioners) to annul the determination of respondent Board of Standards and Appeals of the City of New York (BSA), dated August 26, 2008, and confirming the determination, unanimously affirmed, without costs. Order and judgment (one paper), same court and Justice, entered October 6, 2009, denying and dismissing the petition by Landmark West! Inc., 91 Central Park West Corporation and Thomas Hansen (the Landmark petitioners) to annul the aforesaid determination, and confirming the determination, unanimously affirmed, without costs.

In these article 78 proceedings, consolidated on appeal, petitioners challenge a zoning variance granted by BSA to respondent Congregation Shearith Israel (the Congregation), a not-for-profit religious institution. The subject zoning lot is located on Manhattan's Upper West Side and is currently occupied by the Congregation's landmarked synagogue, a connected parsonage house and a community house. The Congregation plans to demolish the community house and replace it with a nine-story community facility/residential building. The bottom four floors of the new building would be utilized for community purposes including a lobby/reception space for the synagogue, a toddler program, adult education and Hebrew school classes, a caretaker's unit and a

Jewish day school; the upper five stories would be occupied by residential market-rate condominium units.

Because the proposed building does not comply with zoning requirements, the Congregation sought a variance from BSA. The Congregation asserted that it needed a new facility so it could better accommodate religious and educational programs for its growing membership. BSA held a series of public hearings at which both proponents and opponents of the variance application testified and made written submissions. In a resolution adopted August 26, 2008, BSA concluded that the Congregation had shown its entitlement to the requested variance. BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing. Petitioners then brought the instant proceedings challenging BSA's resolution. In decisions rendered July 24, 2009 and October 6, 2009, Supreme Court confirmed BSA's determination, finding that it was rationally based. We now affirm.

It is well settled that municipal zoning boards have wide discretion in considering applications for variances, and judicial review is limited to determining whether the board's action was illegal, arbitrary or an abuse of discretion (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]; *Matter of SoHo*

Alliance v New York City Bd. of Stds. & Appeals, 95 NY2d 437 [2000]). Thus, a determination by a zoning board should be upheld if it has a rational basis and is supported by substantial evidence (*Matter of Ifrah* at 308). In reviewing such determinations, "courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (*Matter of Sasso v Osgood*, 86 NY2d 374, 385 n 2 [1995]).

"In order to issue the variances here, the BSA was required [under § 72-21 of the New York City Zoning Resolution] to find that the proposed development met five specific requirements: that (a) because of 'unique physical conditions' of the property, conforming uses would impose 'practical difficulties or unnecessary hardship;' (b) also due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property; (c) the proposed variances would 'not alter the essential character of the neighborhood or district;' (d) the owner did not create the practical difficulties or unnecessary hardship; and (e) only the 'minimum variance necessary to afford relief' is sought" (*Matter of SoHo Alliance*, 95 NY2d at 440; see New York City Zoning Resolution § 72-21). "[I]n questions relating to its expertise,

the BSA's interpretation of the [Zoning Resolution's] terms must be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419 [1996] [citation and internal quotation marks omitted]).

We conclude that BSA's finding that the proposed building satisfies each of the five criteria for a variance set forth in § 72-21 has a rational basis and is supported by substantial evidence (*see Matter of SoHo Alliance*, 95 NY2d at 440). BSA rationally found that there are "unique physical conditions" peculiar to and inherent in the zoning lot such that strict compliance with the zoning requirements would impose "practical difficulties or unnecessary hardship" (Zoning Resolution § 72-21[a]). Among the physical conditions BSA considered unique was that the zoning lot in question straddles two zoning districts: part of the lot is in the R10A zoning district and the remainder is in zoning district R8B, which has much stricter zoning requirements. BSA rationally concluded that the location of the zoning district boundary in the middle of the development site constrained an as-of-right development by imposing different

height and setback limitations on the two portions of the single zoning lot.

The location of the zoning district boundary, along with other factors, including the Congregation's need to preserve the existing synagogue, provides a rational basis for BSA's finding of unique physical conditions (see *Matter of Elliott v Galvin*, 33 NY2d 594, 596 [1973]). Although four nearby lots are also intersected by a zoning district boundary, it cannot be said that this condition is "common to the whole neighborhood" (*Matter of Vomero v City of New York*, 13 NY3d 840, 841 [2009] [citation and internal quotation marks omitted]; see also *Matter of Douglaston Civic Assn. v Klein*, 51 NY2d 963, 965 [1980] ["Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship"]). There is no merit to the contention that the requirement of unique physical conditions refers only to land and not buildings (*Matter of UOB Realty (USA) Ltd. v. Chin*, 291 AD2d 248 [2002], *lv denied* 98 NY2d 607 [2002]).

Section 72-21(b) of the Zoning Resolution requires a finding that due to the unique physical conditions, conforming uses would not "enable the owner to realize a reasonable return" from the

zoned property. This finding, however, is not required for the granting of a variance to a nonprofit organization (Zoning Resolution § 72-21[b]). Nevertheless, BSA determined that because the planned condominiums were unrelated to the Congregation's mission, the Congregation was required to establish its inability to obtain a reasonable return from the residential portion of the proposed building. BSA then found, based on expert submissions and its own analysis, that the Congregation made the requisite showing.

On appeal, the Congregation contends that as a nonprofit entity, it is exempt from the § 72-21(b) showing despite the fact that residential condominiums are a major part of its planned development. We need not reach this issue because BSA rationally concluded that due to the unique physical conditions, the Congregation could not realize a reasonable return from an as-of-right building. In making that finding, BSA reasonably relied upon "expert testimony submitted by the owners based upon significant documentation, including detailed economic analysis" (*Matter of SoHo Alliance*, 95 NY2d at 441). There was substantial evidence to support the remaining § 72-21 findings.

There is no merit to the Landmark petitioners' contention that BSA lacked jurisdiction to grant the variance here. Section 666(6)(a) of the New York City Charter gives BSA the power to hear and decide appeals from determinations made by the commissioner of buildings, or, if properly designated, a deputy commissioner or a borough superintendent of buildings. Here, the Landmark petitioners contend that the objections issued by the Department of Buildings (DOB) after review of the plans were not signed by any of these officials. However, any such failure is of no consequence because § 666(5) of the City Charter provides an independent basis for BSA's jurisdiction. Under that subdivision, BSA has the power to "determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to [§ 668 of the Charter]" (see *Matter of Highpoint Enters. v Board of Estimate of City of N.Y.*, 67 AD2d 914, 916 [1979], *affd* 47 NY2d 935 [1979]; *William Israel's Farm Coop. v Board of Stds. & Appeals of City of N.Y.*, 22 Misc 3d 1105[A] [2004], *appeal dismissed* 25 AD3d 517 [2006]). Since § 668 does not require a final determination executed by one of the designated officials, BSA properly entertained the instant

variance application.

We have considered petitioners' remaining arguments and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 23, 2011

CLERK

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

New York Supreme Court
APPELLATE DIVISION : FIRST DEPARTMENT

Nizam Peter Kettaneh, et al.,

Petitioners-Appellants,

-against-

Board of Standards and Appeals of the City of New York, et al.,

Respondents-Respondents.

- - - - - - - -

Landmark West! Inc., et al.,

Petitioners-Appellants,

-against-

Board of Standards and Appeals of the City of New York, et al.,

Respondents-Respondents,

Hon. Andrew Cuomo, etc.,

Respondent.

Appellate Division Order and Notice of Entry

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Respondents-Appellees
100 Church Street
New York, N.Y. 10007

Due and timely service of a copy of the within Order and Notice of Entry is hereby admitted.

New York, N.Y. ....., *2011*

.....*Esq.*

Attorney for.....

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on the 23rd day of June, 2011.

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Respondents-Appellees
100 Church Street
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Tel: (212) 788-1070

By: _____
Ronald E. Sternberg
Assistant Corporation Counsel

To: Law Offices of Alan D. Sugarman
Attorney for Petitioners-Appellants
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(212) 873-1371

Marcus Rosenberg & Diamond LLP
Attorneys for Petitioners-Appellants
488 Madison Avenue, 17th floor
New York, NY 10022
(212) 755-7500

Dated: June 30, 2011

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 6

Justice

LANDMARK WEST! INC., et al.,

Petitioners,

- V -

NYC BD. OF STANDARDS & APPEALS, et al.,

Respondents.

INDEX NO. 650354/08

MOTION DATE 6/23/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 17, were read on this Article 78 petition.

	PAPERS NUMBERED
Stipulation and second amended petition (see county clerk file)	1, 1A
Answers – Exhibits	4,5 (Ans.), 6-17 (Exh.)
Replying Affidavits	Reply: 2,3

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, this Article 78 petition is decided in accordance with the accompanying decision, order, and judgment.

Dated: 8/4/09

JOAN B. LOBIS, *J.S.C.*

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

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

Petitioners,

Index No. 650354/08

Decision, Order and Judgment

-against-

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

Respondents.

----------X

JOAN B. LOBIS, J.S.C.:

In this Article 78 proceeding, which was converted from a declaratory judgment action pursuant to this court's April 17, 2009 decision and order (the "April 2009 Order"), petitioners Landmark West! Inc. (Landmark West!"), 91 Central Park West Corporation ("91 CPW"), and Thomas Hansen (collectively referred to as "petitioners"), challenge the August 26, 2008 determination of the Board of Standards and Appeals of the City of New York (the "BSA" or the "Board"). The determination is set forth in Resolution 74-07-BZ (the "BSA Resolution"), which was filed on August 29, 2008. The BSA Resolution approved the application of respondent Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel (the "Congregation"), a not-for-profit religious institution, for a variance for the property located at 8-10 West 70th Street in Manhattan (the "Property"), which is adjacent to the Congregation's sanctuary, located at 6 West 70th Street.

The above-captioned proceeding was assigned to this Part as related to a previously-commenced Article 78 proceeding, Kettaneh v. Board of Standards and Appeals, Index No. 113227/08 ("Kettaneh"), which was also brought to challenge the BSA Resolution. Both matters were heard together at oral argument on March 31, 2009. The Kettaneh matter was fully submitted at that time, and was argued on the merits. The issue before the court in the instant matter concerned the BSA's and the Congregation's motions to dismiss on the ground that this matter should have been brought as an Article 78 proceeding. In the April 2009 Order, this court denied the motions to dismiss and ordered that the declaratory judgment action brought by petitioners herein be converted to an Article 78 proceeding. The parties were directed to serve and file additional papers.

At the March 31 oral argument, the court questioned counsel for petitioners as to the differences between the instant proceeding and the Kettaneh proceeding. Petitioners' counsel articulated two specific claims—essentially, that the BSA lacked jurisdiction and otherwise proceeded illegally—that were not raised by petitioners in Kettaneh. First, petitioners argued that the application that was presented to the BSA was not properly "passed on" by the Department of Buildings ("DOB"), in that the rejection was not issued by the commissioner or deputy commissioner, or the borough supervisor or borough commissioner, as required by the New York City Charter. Rather, petitioners assert, the document was signed by an individual in a Civil Service position, who is not authorized to sign-off on an application. Put another way, counsel argued that the "ticket" to get to the BSA was invalid. Second, petitioners argued that the plans that were presented to and rejected by the DOB were not the same as the plans that were presented to the BSA. Counsel for petitioners then stated on the record that "I think the rest of the issues are probably encompassed in [Kettaneh's] petition," to which counsel for the BSA agreed.

Therefore, except as to these two arguments, the parties agree that all of the other issues are essentially encompassed in the Kettaneh case. In a thirty-three (33) page decision, order and judgment dated July 10, 2009, this court denied the request to annul and vacate the BSA's determination and dismissed the petition in Kettaneh. The Kettaneh decision is specifically incorporated by reference herein; the factual recitations and determinations shall not be repeated, but are incorporated as if more fully set forth herein. Only those facts that are expressly required for the additional issues raised by petitioners will be set forth below.

At the outset, respondent Congregation argues that petitioners lack standing. This court finds that petitioners have standing since the claims asserted raise an "injury in fact" and the claims "fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). The Court of Appeals has held that property holders in the immediate vicinity of the premises which are the subject of a zoning determination have standing to challenge zoning determinations without their having to plead and prove special damages or injury in fact. Matter of Sun-Brite Car Wash v Board of Zoning & Appeals, 69 N.Y.2d 406, 409-10 (1987). Since Thomas Hansen, the individual property owner, and 91 CPW are in close proximity to the Property, they have standing. Accordingly, petitioners collectively have standing. This court need not reach the issue of whether Landmark West!, as an organization, has standing.

Claim that the BSA Lacked Jurisdiction

Turning to the merits of the petition, petitioners assert that the BSA lacked

jurisdiction to entertain the Congregation's application because the plans were not approved properly, in that the plans were no "passed on" by the DOB in the matter required by the City Charter. To invoke the BSA's jurisdiction, petitioners assert, the application must be an appeal from a determination of the DOB Commissioner or Manhattan Borough Superintendent. Petitioners cite to § 666(6)(a) of the City Charter, which, they assert, sets forth the jurisdiction of the BSA. Section 666(6)(a) provides that the BSA has the power

> [t]o hear and decide appeals from and review, (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five, or a not-for-profit corporation acting on behalf of the department of buildings pursuant to section 27-228.6 of the code, ...

But, as the BSA itself pointed out in a footnote to the BSA Resolution, the BSA has jurisdiction pursuant to § 668 of the Charter. The footnote sets forth that:

> an attorney representing local residents, claims that a purported failure by the . . . DOB Commissioner or the Manhattan Borough Commissioner to sign the above-referenced objections, as allegedly required by Section 666 of the . . . Charter, divests the Board of jurisdiction to hear the instant application. However, the jurisdiction of the Board to hear an application for variances from zoning regulations, such as the instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner

Section 668 sets forth the procedure for variances and special permits. This section is referenced in § 665 of the Charter, which provides that the BSA has the power "[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to section six hundred sixty-eight."

An agency's construction of a st[redacted]e or regulation it administers, "if not unreasonable or irrational, is entitled to deference." Matter of Salvati v. Eimicke, 72 N.Y.2d 784, 791 (1988), rearg. denied, 73 N.Y.2d 995 (1989). The BSA's interpretation that it has jurisdiction under § 668 is rational and will not be disturbed. Given the interplay in the Charter between the different ways for the BSA to acquire jurisdiction over a matter, it is appropriate to defer to the agency's interpretation. "[W]here the statutory language suffers from some 'fundamental ambiguity' . . . , or 'the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices' . . . , courts routinely defer to the agency's construction of a statute it administers." New York City Council v. City of New York, 4 A.D.3d 85, 97 (1st Dep't 2004) (internal citations omitted). The BSA's interpretation that a review under §668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner is entitled to deference and will not be disturbed.

The Change in the Plans Renders the Application Flawed

Petitioners argue that the plans that were presented to and rejected by the DOB were not the same as the plans that were presented to the BSA, which, they contend, defeats the BSA's jurisdiction. As set forth in the Kettaneh decision, the Congregation submitted its application to the DOB, and on or about March 27, 2007, the DOB denied the application, citing eight objections. After the application was revised, the DOB issued a second determination, which eliminated one of the prior eight objections. The DOB's second determination, issued on or about August 27, 2007, was the basis for the variance application. This chronology is also set forth in the first footnote in the BSA Resolution.

Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB, the footnote in the BSA Resolution reflects that the revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight objections. There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the Kettaneh decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the Kettaneh decision notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required finding under Z.R. § 72-21.

Petitioners have failed to demonstrate that the BSA acted illegally and without legal authority in considering the Congregation's application. For the reasons set forth herein, and for the reasons set forth in this court's decision in Kettaneh, the request to annul and vacate the BSA's determination is denied, and the petition is dismissed. The decision of the BSA is confirmed in all respects. This constitutes the decision, order and judgment of the court.

Dated: August 4, 2009

JOAN B. LOBIS, J.S.C.

Noreen Gershon
CLERK

Index No. 650354/08

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs,

- against -

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

Defendants.

JUDGMENT

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Defendants
100 Church Street
New York, N.Y. 10007

Of Counsel: Christina L. Hoggan
Tel: (212) 788-0461
NYCLIS No.

Due and timely service is hereby admitted.

New York, N.Y. ....., *200* . . .

.....*Esq.*

Attorney for.....

EXHIBIT C

INTENTIONALLY OMITTED