

Note: This transcript is not exact and did not benefit from a recording of the hearing. In many instances, the stenographer confused Landmarks Preservation Commission and Landmark West, and mis-transcribed the word "programmatic", as examples of errors.

2 SUPREME COURT OF THE STATE OF NEW YORK

3 COUNTY OF NEW YORK: TRIAL TERM PART 6

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5 LANDMARK WEST, INC., 103 CENTRAL PARK WEST CORP., 18 OWNERS
6 CORP., 91 CENTRAL PARK WEST CORP. AND THOMAS HANSEN,

7 Plaintiffs

8 - against -

9 THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS, NYC
10 PLANNING COMMISSION, HON. ANDREW CUOMO, AS ATTORNEY GENERAL
11 OF THE STATE OF NEW YORK AND CONGREGATION SHEARITH ISRAEL,

12 Defendants

13 - - - - -

14 Index No. 650354-2008

15 - - - - -

16 NIZAM PETER KETTANEH and HOWARD LEPOW,

17 Petitioner

18 - against -

19 BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,
20 MEENAKSHI SRINIVASAN, CHAIR, CHRISTOPHER COLLINS,
21 VICE-CHAIR, AND CONGREGATION SHEARITH ISRAEL a/k/a THE
22 TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW
23 YORK,

24 Respondents

25 - - - - -

26 Index No. 113227-08

March 31, 2009
60 Centre Street
New York, New York 10007

Lester Isaacs - Official Court Reporter

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B E F O R E: HON. JOAN B. LOBIS, Justice.

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4 THE COURT: For the record. Today I will have
5 argument on two cases that are slightly different in
6 procedural posture, both involve around the
7 determination by the Board of Standards to grant
8 variances to the a building and zoning code to allow
9 accommodation to Congregation Shearith Israel to
10 proceed with construction of a nine story building on
11 property that fronts on West 70th Street, is that
12 correct? And the synagogue that occupies the corner
13 of 70th and Central Park West, and is a landmark
14 structure sometime referred to as the Spanish and
15 Portuguese Synagogue.

16 This is an Article 78 brought by two individual
17 petitioners to have this Court set aside the
18 determination of the Board of Standards on an Article
19 78 standard, under Article 78 standard.

20 The other case that is Landmark West versus the
21 City, includes a cause of action against the
22 Commission, which is now the caption of the 78. It's
23 not completely the defendant or that's not really
24 true?

25 MR. ROSENBERG: That's correct.

26 THE COURT: So the variances are all of the
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2 defendants represented in Landmark here today, are
3 they all here?

4 MR. ROSENBERG: They are here. They are all
5 represented by the same counsel, which is the
6 Corporation Counsel and the City of New York.

7 THE COURT: Also covering?

8 MR. ROSENBERG: Congregation Shearith Israel.

9 MS. HOGGAN: I don't represent the Congregation.

10 THE COURT: That's one part in the second case.
11 Are they involved with the defendant?

12 MR. ROSENBERG: Your Honor, plaintiff named the
13 Attorney General, because we raised constitutional
14 issues and we have not received any communication
15 from the Office of the Attorney General.

16 THE COURT: And they were served with the
17 motion?

18 MR. ROSENBERG: Yes, they were served with the
19 complaint. We served them with our responsive
20 motion, I think the motion was served.

21 THE COURT: Do we have any idea if they are
22 taking no position, or are they defaulting?

23 MS. HOGGAN: They never appeared, that's why I
24 guess, they never appeared in the case.

25 THE COURT: It's one of those probable cases
26 that we have to tie up before any decision can be

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2 reached.

3 What I would like to do now is briefly address
4 the differences between the Article 78 by the two
5 individuals and the Landmark West case which is
6 different. I assume, that basically why the
7 Landmarks is a 78 is because it's 78 is more narrow,
8 but you were timely in bringing the action so there
9 would be no impediment to converting it as a 78; is
10 that correct?

11 MR. ROSENBERG: That's correct, your Honor.

12 THE COURT: What are the other issues, to set
13 aside zoning provisions itself, is that what it is?

14 MR. ROSENBERG: No, Your Honor.

15 THE COURT: Why don't you explain the
16 difference?

17 MR. ROSENBERG: Well, I don't know everything
18 that's in their papers. Yesterday I received from
19 Mr. Sugarman, the attorney for the plaintiff in the
20 other case, I think a couple thousand pages of
21 documents, which I had not seen previous. So I'm not
22 fully familiar with their case. I wasn't served with
23 the papers in that case.

24 THE COURT: But what I thought I could do today,
25 I would be able to do, is to combine the two
26 arguments.

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2 MR. ROSENBERG: I don't know. I know that my
3 case -- I don't know what the differences between
4 their cases are.

5 THE COURT: Counsel for the City, since you're
6 involved in both cases and you're moving to dismiss,
7 anyone that's in the Landmark case.

8 MS. HOGGAN: Yes.

9 THE COURT: Can you distinguish the differences
10 between the two cases?

11 MS. HOGGAN: If you give me a minute.

12 THE COURT: Sure.

13 MR. SUGARMAN: Your Honor, if I may. While
14 counsel is looking at our papers, would you like my
15 view?

16 THE COURT: My law secretary, Ms. Sugarman, we
17 determined that there was no relationship.

18 MR. SUGARMAN: None at all.

19 THE COURT: Unless you're trying to get me off
20 the case?

21 MR. SUGARMAN: No. I think one of the important
22 issues in the case is the problem in the City
23 Planning, the Department of City Planning. With
24 Landmarks, the have over seen jurisdiction over
25 granting waivers of the zoning laws for the purpose
26 based upon Landmark's hardships, that's not what is

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2 BSA. So the landmark question as to them, as a
3 defendant and properly so, we believe we raise the
4 same issue.

5 THE COURT: If I understand it, in reviewing. I
6 made a start review, I have not read everything. I
7 have read mostly the papers in the Kettaneh, but not
8 in the Landmark cases, I thought Landmark approved
9 it.

10 MR. SUGARMAN: Landmark approved the project
11 from the point of view of from the certificate
12 appropriateness. They do not look at the Zoning Law.
13 They are specifically prohibited from doing this.
14 Landmark has a whole separate procedure of 74, 711
15 where they consider the hardship by the applicant.
16 And the applicant has to show their financial
17 hardship. They have to show that information and
18 generally their encumbrances and other conditions put
19 on the property, as part of that process, and then
20 it's pursued. But the Department of City Planning,
21 that's to get a waiver of the Zoning Laws, that the
22 Board of Standards and Appeals is not involved in
23 that process.

24 This applicant started off in 2001, that's when
25 the case started, asking for 74 711 relief from
26 Landmarks and for whatever reason they withdraw it

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2 because it was telegraphed to them they weren't going
3 to get it.

4 THE COURT: So as to the project.

5 MR. SUGARMAN: To get a waiver of Zoning Laws,
6 so the Landmarks Commission did -- they said, look
7 this is the maximum height that we think
8 architecturally it will fit here. We are not making
9 any determination as to the other requirements for
10 obtaining a variance under the Zoning Law. And you
11 guys go to the BSA and see if you can prove to them
12 that you meet those standards. But they didn't take
13 the position or whether or not they meet the
14 standards.

15 Did they receive much of the evidence that would
16 apply to those standards. For example, Landmarks was
17 never advised that windows could be blocked up in the
18 adjoining building. That's an issue to be considered
19 by the BSA.

20 THE COURT: But if the BSA, I guess I need some
21 background on BSA between Landmark and who trumps
22 whom?. If one doesn't know, can landmark say no to
23 the variance?

24 MS. HOGGAN: That's why I have to go to
25 Landmark. They, an applicant, would go because they
26 are the Landmark. They go get a certificate of

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2 appropriateness from Landmarks. Then they have --

3 THE COURT: They have it.

4 MS. HOGGAN: They have it, it's not an issue.

5 They go to BSA. They apply for the variances,
6 which I don't think the procedural is incorrect.

7 It's fine, it's represented.

8 THE COURT: If Landmark says it's okay from what
9 they saw, it goes to the Board of Standards and
10 Appeals, that's where the fight has been in the
11 community apparently, is that it?

12 MS. HOGGAN: Yes, that's what the hearing is
13 for, that's what the determination is.

14 THE COURT: But that's where the 78 comes in,
15 because the Board has approved the variance to a
16 project that is a nine story project?

17 MR. SUGARMAN: Yes.

18 THE COURT: They have to go back to Landmark at
19 this point?

20 MS. HOGGAN: No.

21 MR. SUGARMAN: Not technically for a rubber
22 stamp, but it goes back. Landmarks had trumped the
23 BSA, if they go through the 78, 711 process, but
24 that's not done here.

25 THE COURT: So they have a choice?

26 MR. SUGARMAN: No, if you want to use Landmark

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2 as a hardship you have to go through the Landmark
3 Commission. There is nothing in the variance part of
4 the zoning resolution for variances that recognizes
5 landmarking as a hardship, because if you were to do
6 that, then that would make 74 711 meaningless among
7 other things.

8 MR. ROSENBERG: We are on accord on that point,
9 at least one of them is clearly on accord.

10 The other point is that the only agencies that
11 are permitted to grant relief under the City Charter
12 are either the City Planning Commission or Landmarks
13 itself. You can't then go to the BSA and in order to
14 argue I'm a Landmark, so therefore, I'm holding a
15 special variance.

16 THE COURT: That's not what they did.

17 MR. ROSENBERG: They did.

18 THE COURT: I thought they went based on the
19 standards that are incorporated in the zoning
20 themselves?

21 MR. SUGARMAN: On the surface it would look like
22 that, but they actually new landmarking hardships --
23 as part of the evidence for finding A or B, finding A
24 is the hardship finding. So they used the Landmark
25 hardship as the hardship under defining A, which is
26 not permitted.

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2 Number two, they did something very different.

3 Finding A requirement in order to obtain a
4 variance request and the first thing that has to be
5 shown in the New York City law.

6 THE COURT: Is finding first A?

7 MR. SUGARMAN: Yes, first finding A. The
8 applicant has to show a hardship or practical
9 difficulty. It has to arise out of a physical
10 condition.

11 THE COURT: That can't be, because it's a
12 Landmark building and it's on adjoining property.

13 MR. SUGARMAN: That's one of our points, yes,
14 your Honor.

15 Most important is the causation issue here. The
16 hardship or difficulty has to single out, how it will
17 be related to the Zoning Law. In other words, the
18 hardship has to arise out of the strict application
19 of the Zoning Law. You can't just say oh, we have
20 this hardship with access to circulation and
21 therefore we meet finding A. You can't do that
22 because if the access of circulation as is here can
23 be fully resolved by what's called an asset right on
24 conforming a building or that condition or hardship
25 cannot arise out of the strict application of the
26 Zoning Law, because the Zoning Law fully permits them

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2 to resolve that issue.

3 What they did with landmarking though they tried
4 to make that a condition, but more importantly in a
5 very subtle way and the finding B, which is the
6 reasonable return part. What they have to show is
7 that their building cannot earn a reasonable return,
8 a for profit building.

9 THE COURT: That's the question I have about the
10 two differences, if it's considered a religious not
11 for profit or a for profit, because it's five stories
12 of condominium.

13 MR. SUGARMAN: The way the BSA looked at it, we
14 agree the lower floors which really, your Honor, only
15 represent ten percent of the variances here.

16 THE COURT: That's the set back.

17 MR. SUGARMAN: That's the ten feet set back.
18 Most of the variance relates to the profit, the
19 luxury condominium. So that's 90 percent of the
20 case. So, for that they have to earn, they have to
21 be able to show that they can't earn if they comply
22 with the zoning.

23 THE COURT: Is there any dispute about that
24 standard applying? Because that's the question that
25 I had, when I was looking at it, because it's a
26 religious building and the argument they don't really

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2 have to make is a showing and that they are kind of
3 sitting back on their religious part, for the rest of
4 the building.

5 MR. MILLMAN: The way we look at it, we look to
6 the statute itself. Here is what the statute said in
7 7221 (B) which is the place where it talks about
8 reasonable -- it says quote, this finding shall not
9 be required for the granting of a variance to a
10 nonprofit organization.

11 It does not say to a nonprofit organization when
12 it's pursuing something related to its program.

13 For example, if you were dealing with Lincoln
14 Center and it's a nonprofit organization they were
15 seeking a variance, you wouldn't have some special
16 rules to deal with the fact that part of the theatre
17 is involved. A restaurant, which doesn't relate to
18 the theatre directly, even though that's there for
19 profit -- not for profit, but for financial gain. So
20 that can be restored to the mission of the
21 non-for-profit.

22 THE COURT: Then what is the Board of Standards
23 asking for?

24 MR. MILLMAN: What they did, what they said,
25 what we would like to do is separate the project into
26 two basement floors.

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2 THE COURT: They want to do this expansive and
3 somewhat complicated evaluation?

4 MR. MILLMAN: They believe, even though the
5 statute says non-for-profit organization, didn't talk
6 about the specific view. They believe that it makes
7 sense in this kind of a situation to separate out the
8 analysis, but that as we have the benefit here on
9 review, your Honor, of being able to uphold them
10 either because in fact the statute says that you
11 don't have to do that or because in fact they found
12 that a smaller amount of residential use, any
13 smaller, would be as an as of right use would
14 actually result in a loss. And they looked at the
15 expert reports provided by the congregation
16 indicating there would be a loss and they found those
17 reported to be persuasive.

18 THE COURT: There is two very different issues
19 here, that's one, because it's a synagogue or
20 non-for-profit you never have to make the reasonable
21 return analysis. And then I think it's your argument
22 that they did the wrong analysis once they got to it,
23 they used the wrong standard for rate of return or
24 valuation.

25 MR. SUGARMAN: That's part of it. We will get
26 to that in more detail, that's part of our argument.

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2 But if you were to -- first of all, I think what the
3 Board of Standards and Appeal did was proper or what
4 they did was they looked at all the case law that
5 applies to variances and taking the constitutional
6 law. So when this was written, no one was looking at
7 multi level buildings and things like that, air
8 rights. And that logically it doesn't make sense. I
9 know the synagogue wants to have a strict reading of
10 B, but they don't want to have a strict reading of A,
11 which says physical condition. But it's the
12 congregation's position here that if they are going
13 to take this position that B doesn't apply at all,
14 then it's clear. If you go to the constitutional law
15 on this, in the Penn Central case, they are able to
16 accommodate the needs of the congregation in an as of
17 right building, with a ten percent variance. But in
18 a as of right building, if they are coming into a
19 pure nonprofit, then they will say forget about
20 money. Can you resolve your needs in a conforming
21 building. The answer is, yes. According to their
22 own testimony, except for property, ten percent.

23 THE COURT: That will get to the difference of
24 whether I'm doing a de novo view of what was before
25 the Board of Standards or the arbitration or the
26 other standard for a review on an Article 78, because

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2 you're saying as a matter of law, that they don't get
3 past A.

4 MR. SUGARMAN: Yes.

5 THE COURT: But if you get past A, then there is
6 a determination how they apply B. Is that pretty
7 much a short hand way?

8 MR. SUGARMAN: Not only affirmatives, I don't
9 know if your Honor got to the answer and reply. They
10 actually admit now they do earn a reasonable return
11 on a conforming building. I can go through it, I
12 have some exhibits, also some posters which are
13 copies of the exhibits.

14 THE COURT: I mean, I have got all this stuff
15 upstairs, these are parts of the yellow bound book?

16 MR. SUGARMAN: Yes, your Honor.

17 THE COURT: Why don't you walk me through that
18 now. I would like to get through the differences
19 between the two.

20 MR. SUGARMAN: Well, real quickly, we did start
21 off asking questions about Landmark and that got into
22 the finding B. What they did was they used the fact
23 that the adjoining property was Landmark to increase
24 the site value on the development site.

25 THE COURT: They did that by saying they can't
26 develop.

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2 MR. SUGARMAN: The area of the parsonage. But
3 increasing that value they make it impossible to earn
4 a reasonable return.

5 I don't know if the respondents will now concede
6 but 90 percent of this building, are variances.
7 There are the read, and the blue are the ones for the
8 community house.

9 THE COURT: Okay.

10 MR. SUGARMAN: You can look at that and see
11 there is a disproportion.

12 The other thing, this is the first floor and
13 under the first floor, New York City law gives
14 community organizations like this, the right to fill
15 up the entire lot. Why is that significant here.

16 First, it's an accommodation, but secondly this
17 is where all the access -- most of the access of
18 circulation arise.

19 THE COURT: Let's jump to something that doesn't
20 seem to be really argued by petitioner, which is that
21 there is really no impact, except for the height of
22 the building on the community.

23 The central character of the neighborhood, it's
24 really the height. If they have a community center
25 and they rent the center to a school, that will
26 change the characteristics.

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2 MR. SUGARMAN: We did not make that argument.
3 We concede that we would be quite happy to have the
4 congregation build a community center, rent it out to
5 a school, if they want, if they need the income.

6 THE COURT: At sometime you said it was for a
7 school.

8 MR. SUGARMAN: The conforming ability allows
9 them to go 75 feet, not on all the floors, or ten
10 feet high. The building, they are proposing first
11 for the community place, the next four are here. The
12 next two floors are the condominium. That's all
13 within the conforming.

14 MR. MILLMAN: Your Honor, the as of right
15 structure.

16 THE COURT: Can you say your name?

17 MR. MILLMAN: Claude Millman, for the
18 congregation. The as of right structure that Mr.
19 Sugarman is describing was actually found by BSA to
20 be insufficient to solve even the problematic needs,
21 the religious needs of the congregation.

22 THE COURT: Where did they make that?

23 MR. MILLMAN: Where did they make that finding?

24 THE COURT: Yes.

25 MR. MILLMAN: As to the three floors, you have
26 that finding, Paragraph 68.

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2 THE COURT: If they did a higher building, but
3 not the nine story building.

4 MR. MILLMAN: They specifically found that an as
5 of right structure which is the one that the
6 petitioner is describing would not -- because of
7 various foot prints and also the space that would be
8 needed for school space would not be sufficient.

9 MR. ROSENBERG: But he is talking about a
10 different variance, about a variance.

11 MR. MILLMAN: No.

12 MR. SUGARMAN: You have to show me how these
13 variances here, Mr. Millman, related to the
14 problematic needs?

15 THE COURT: Why don't you take a couple of
16 minutes to see about a presentation. Why, as a
17 matter of law, this has to be reversed because it's
18 arbitrary and capricious, and then I want to have a
19 question. I think counsel was looking to answer when
20 we went totally in another direction.

21 MR. SUGARMAN: There are six thousand pages of
22 records.

23 THE COURT: I know.

24 MR. SUGARMAN: So we can get a visual, these are
25 the two floors in the conforming building. The top
26 two floors. They can build as of right. And our

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2 position on the 10 percent variances is that these
3 uses could be moved up here.

4 There is one use or which is the caretakers
5 apartment on the fourth floor can easily be moved to
6 these other two floors and the BSA did not pay any
7 attention to that.

8 MR. MILLMAN: These are the arguments, your
9 Honor, that were in fact made to the board and the
10 board rejected moving those things up.

11 THE COURT: I'm fascinated with the underlying
12 facts. I'm not actually doing that kind of review,
13 that's one of the things that I wanted to focus on.
14 This is just to help me understand what the
15 controversy has been, its been a long standing
16 controversy.

17 MS. HOGGAN: Legally, we can't tell a religious
18 organization, please move your child care center from
19 the first floor to the fifth floor. It's not proper.
20 There is case after case that I cited them, it's not
21 proper.

22 MR. ROSENBERG: One of the points in our case,
23 is that that's a difference to a religious
24 institution.

25 THE COURT: Is constitutional.

26 MR. ROSENBERG: That's a clear constitutional
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2 matter.

3 THE COURT: There was a dissent recently in one
4 of the Court of Appeals cases, that the difference is
5 no longer one in the twenty first century, that
6 should have a plan to give various ways in which to
7 develop property.

8 MR. SUGARMAN: Your Honor, we have cited many
9 cases where the court's have scrutinized what
10 religious operations do, and they are in our briefs
11 and there are cases on both sides.

12 THE COURT: If it ended up that there was no
13 impediment to the synagogue doing what it wanted for
14 its community needs and issues, and the need to have
15 the entrance way for the community, and the value of
16 having a religious school, although not affiliated
17 with the synagogue there for the congregants, you
18 still can't do that within the building, that they
19 continue to go up?

20 MR. MILLMAN: No, Your Honor.

21 THE COURT: What don't you get if you do the
22 building this way?

23 MR. SUGARMAN: What you do not get?

24 MR. MILLMAN: What the Board found, you would
25 have to move us higher up in the building.

26 THE COURT: Like what, parcels? The apartments?

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2 MR. MILLMAN: There are various options. One of
3 the options were discussed, have the caretaker
4 apartment up. The board found that and there was
5 evidence you need to have a caretaker closer down in
6 order to be more responsive to various historical
7 objects that are in the synagogue, also as to
8 emergencies that are in the synagogue.

9 MR. SUGARMAN: Your Honor --

10 THE COURT: Let him speak, he hasn't had the
11 floor at all. Other than the fact that it may take a
12 caretaker a couple of minutes to get down to the
13 synagogue area, what are the other things that the
14 congregation couldn't do.

15 MR. MILLMAN: I think I'm able to go through
16 every single one of them. But I think the main point
17 is this, your Honor. There were six hearings where
18 every one was present, the Landmark would like to
19 challenge deference. In fact, the Board mentioned
20 deference, but they required all sorts of submissions
21 like how the facilities would be used.

22 There was testimony where witnesses said that
23 they stood in front of the synagogue, believe it or
24 not, and them walking in, whether they were disabled.
25 Ultimately all that evidence, roughly 7,000 pages was
26 related to the Board. They are the ones who made the

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2 decision on this and they concluded that from a
3 Paragraph 68 of their finding. They said that there
4 is evidence here that from a programmatic point of
5 view the variances were required.

6 THE COURT: Other than relying on the Standards
7 because it's what the City is doing. Can the
8 accommodation address the first point about the way
9 the the Board considered the first of the five
10 findings, that the court has to make. What is that
11 argument? That's just not to the deference of the
12 Board, but a clear arbitrary capricious determination
13 of the law.

14 MR. MILLMAN: I think there is an assumption
15 that it's incorrect to begin with.

16 First of all, the property, the property for
17 zoning purposes, your Honor, is not what's called lot
18 37 which is the property. That's off a little bit
19 from Central Park West. Every one has agreed here
20 that for zoning purposes, at least one merged lot for
21 zoning purposes. What you have here is a lot on the
22 corner, is a very important and hystoric synagogue,
23 you have also very old parsonage, slightly to the
24 South and slightly to the west.

25 You have this community center that is of no
26 significance, and then an empty lot. So if one were

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2 to preserve the synagogue and, yes, it landmarked,
3 but its also central to the mission of a
4 non-for-profit, that is making the application here.

5 There whole point of being, they only exist by
6 virtue of their hystoric relationship to this
7 building and so put aside landmark. It would destroy
8 their mission, to take down that building.

9 THE COURT: Is this the zoning?

10 MR. MILLMAN: Your Honor, this is part of the
11 record in this, the history of the building is
12 actually of significance.

13 THE COURT: Is of significance, but the
14 congregation could theoretically --

15 MR. ROSENBERG: Not only could, but they went
16 from downtown and moved progressively uptown as the
17 population moved. This is not the original synagogue
18 of the congregation. It's a lovely synagogue, it's
19 to preserve it, it's landmarked.

20 MR. MILLMAN: Their preserving of the synagogue,
21 it is not the site of the synagogue, so the landmarks
22 they would still want to preserve the synagogue.

23 THE COURT: That's irrelevant.

24 MR. MILLMAN: The purposes of the A finding in
25 terms of physical, the physical conditions, it's very
26 important because what it means is that you have a

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2 piece of property that is taken up. All there is, is
3 a lot of development space. There si 144,000 square
4 feet of development space. That's that vast part,
5 that is taken up. But, this building you want to
6 keep, you end up with a little L shape face to build
7 upon.

8 It was concluded that one part of the L, where
9 the parsonage is, is a little small to go on and they
10 have you end up with a community house and the strip
11 of vacant property.

12 It was concluded by the BSA, unless you develope
13 something there and what you are allowed to use, you
14 would not solved the problematic use of the
15 synagogue. You would not be able to address or
16 access the classrooms, the achieves offices, things
17 like that.

18 In addition to that, the synagogue would ask
19 that they place some apartments only in the end.
20 They originally were seeking 14 floors, your Honor,
21 but in the end after going through a seven years
22 process, with Landmarks before BSA and hearing the
23 community, not only was there a change from 14 to
24 eight and a mall penthouse, but in addition it was
25 also altered so that there could be a courtyard.

26 This process worked, your Honor. The A finding
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2 is met here, because there is a historic building on
3 the site.

4 There is also a zoning boundry that runs right
5 through the middle of the site, which is very unusual
6 for normally zoning lots have their own zone.

7 And, in addition, the community center building
8 itself is completely obsolete. There is no
9 accessibility to the synagogue. But my point, your
10 Honor, those are the A findings.

11 And, in addition, there is case law that says
12 you don't even need a physical impediment when you
13 are dealing with a nonprofit religious organization.
14 So there is no basis for upsetting that A finding.

15 MR. ROSENBERG: He says we don't need the A
16 finding. We satisfied the A finding for the
17 Landmark. The Landmark is not a unique physical
18 condition that wants a variance.

19 THE COURT: But the actual lot they mentioned to
20 building on, they argued.

21 MR. SUGARMAN: It's three brownstone lots, they
22 can go down two levels.

23 MR. ROSENBERG: It's not unusual.

24 MR. SUGARMAN: It's a perfect lot.

25 MR. ROSENBERG: What they have not addressed is
26 this unique area is not used for other things, they

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2 aren't, it's out. It's a property for unrelated use
3 and so some feel that should be included in the
4 custodial part.

5 THE COURT: But the needs -- I may actually have
6 to you come back again, but I may not, because it's a
7 pretty complicated and obviously an enormous amount
8 of thinking and time went into the record that has
9 already been created on this. What is needed to
10 understand -- the way I have to understand it, with
11 them going to what is requested in both actions.

12 Let's get back to why I started asking the City
13 about and wrap it up. For now I'll give you a couple
14 of minutes to highlight whatever you would like.

15 Counsel for the City, what do you think the
16 differences are between the two cases.

17 MS. HOGGAN: There is two differences that are
18 primarily one, there is jurisdictional grounds that
19 are raised in Landmark. That is not in the other
20 case, but it is not BSA, couldn't even hear the
21 application.

22 Also in terms of how they framed their argument.
23 The essence is the same regarding the job prints and
24 as far as the application of, but if you couch it in
25 a program, there is a primary factual constitutional
26 aspect --

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2 THE COURT: The fact that there is a
3 constitutional aspect to Landmarks, the fact that
4 they mention your motion to dismiss the Landmark
5 action, it wasn't served on the State, so there is a
6 bit of a problem.

7 MR. MILLMAN: I think we can fix that, your
8 Honor.

9 THE COURT: You're going to have to.

10 MR. MILLMAN: I think that the key here on the
11 motion to dismiss is that while they just couch their
12 argument, I actually think that the case law is
13 essentially the same while they couch the Landmark,
14 they couched their argument in a constitutional way,
15 in a code of constitutional claim.

16 What in fact, what they are saying, the Board of
17 Standards and Appeals didn't follow its statutory
18 obligations. They are not saying that the fact sheet
19 itself is unconstitutional, when you're arguing that
20 the statute is unconstitutional, that's when you
21 notify the Attorney General. That's when you have
22 been seeking a declaratory judgment.

23 THE COURT: There is as an applied argument.

24 MR. MILLMAN: I don't think it's an applied
25 argument. The statute as applied, is
26 unconstitutional, they are saying the statute itself

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2 is not observed. That the requirements of the
3 constitutionality are not observed, that's simply a
4 statutory reference.

5 I think as to, I suppose if the Board of
6 Standards and Appeals does not follow what is
7 constitutionally required to do, then there may be
8 circumstances in which the constitution is abridged.
9 However, that doesn't make it a constitutional
10 argument. What the First Department said on the
11 issue, it says where the issue is the propriety of
12 the proceeding taken under and other wise, states an
13 Article 78 proceeding is the proper vehicle. That's
14 as to the Rosenthal case, cited on page three of our
15 reply brief in that motion. It cites a Sulnick
16 decision from the New York Court of Appeals and over
17 and over again the declaratory judgment they dismiss.

18 THE COURT: Or converted?

19 MR. MILLMAN: I'm sorry?

20 THE COURT: Or converted.

21 MR. MILLMAN: Or converted yes, your Honor.

22 Because the fact that no claim is being made
23 that the statute was unconstitutional.

24 THE COURT: Let me hear from Mr. Rosenberg as to
25 that.

26 MR. ROSENBERG: Your Honor has the right to
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2 convert it, but there are numerous cases that come
3 down everyday. I just looked on line the other day
4 where the courts, especially the Appellate Division
5 have treated actions like this and they quote, they
6 say, it's in part like a 78 and in part it's like a
7 declaratory judgment -- as where such declaratory
8 relief as to the underlying jurisdiction of the BSA
9 in this case and it's not an Article 78.

10 THE COURT: Can you argue that a little bit,
11 what is your claim with jurisdiction.

12 MR. ROSENBERG: There are a couple of claims,
13 one is that the termination, which is the basis for
14 the application for the variance.

15 In other words, to get to the BSA, one must
16 first go to the Department of Buildings and get
17 rejections, then appeal that to the BSA and that's
18 what gives the BSA jurisdiction under the City
19 Charter. In the City Charter it expressly says that
20 rejections must be issued by either the Commissioner
21 of Buildings or what used to be cured by the Borough
22 supervisor, the deputy commissioner for, in this case
23 the Borough of Manhattan.

24 In this case the document which they relied upon
25 as the ticket to get to the BSA was signed by some
26 person in a civil service line, who had not been

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2 delegated the authority.

3 THE COURT: You are saying there was an action
4 taken by the the Department of Buildings and that
5 triggered the next step?

6 THE WITNESS: No, the statute says it must be
7 triggered by a document signed either by the
8 Commission of Buildings or the Borough supervisor or
9 the Borough Commissioner, as it is now in court.

10 THE COURT: Is there anyone that can comment on
11 that.

12 MS. HOGGAN: We actually have jurisdiction under
13 the Charter, under 668 that's the problem, but it was
14 procedural, it's just in the statute.

15 MR. MILLMAN: The Board's point, the Board of
16 Standards and Appeals addressed these and explains
17 why it felt it had jurisdiction.

18 MR. ROSENBERG: But that doesn't mean it does,
19 that's for the Court to determine.

20 The second point on jurisdiction, that the plans
21 that they claim had been presented to and rejected by
22 the Department of Buildings, which resulted in the
23 list of objections from the Department of Buildings
24 presented a base for the application for the variance
25 of the Board of Standards and Appeals. Those plans
26 are not the plans that were presented to the Board of

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2 Standards and Appeals, and they admitted on the
3 record the attorneys for the congregation, Shelly
4 Freedman admitted on the record, we have the quote in
5 the document itself, it's actually in the complaint
6 that this was not the same set of plans, that's the
7 second jurisdictional claim.

8 THE COURT: Let me go over that once again, so
9 that diminish it or is it a whole different concept
10 that they are talking about?

11 MR. MILLMAN: What happened was, your Honor,
12 there was a change in the plans that were made in
13 order to obviate one of the objections. The
14 Department of Buildings' objection and after that the
15 Department of Buildings just cut one of their
16 objections back, so that relief was required. It's
17 not like a something was being submitted to the BSA,
18 it's the opposite.

19 THE COURT: So you're arguing that it is
20 something that has to be strictly construed, but it
21 has to be the identical plans, where they can move
22 forward.

23 MR. ROSENBERG: They never put before the BSA
24 this whole process that he committed a second set of
25 plans to remove this objection. None of that was in
26 the record, ministerially the objections disappeared.

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2 THE COURT: But doesn't that indicate what was
3 done?

4 MR. ROSENBERG: We didn't get the plans.

5 MS. HOGGAN: Your Honor, it was --

6 MR. SUGARMAN: Your Honor, can I?

7 THE COURT: It gets too confusing when you jump
8 in.

9 MR. SUGARMAN: I'm sorry.

10 THE COURT: Mr. Rosenberg, that's a
11 jurisdictional issue.

12 MR. ROSENBERG: Yes, your Honor.

13 THE COURT: The other problem is, she was
14 asserting that the need to get the best procedural,
15 the issue, the issue of the deference to the
16 religious.

17 MR. ROSENBERG: That was one of them, with
18 deference to use the Landmark status, the A which was
19 already talked about.

20 THE COURT: I am just trying to get the
21 differences between the two.

22 MR. ROSENBERG: I think the rest of the issues
23 are probably encompassed in Mr. Sugarman's petition.

24 MS. HOGGAN: I will agree.

25 THE COURT: The City, has last comment.

26 MS. HOGGAN: I actually wanted to say what BSA
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2 says.

3 First's in terms of the issue with regard to the
4 motion to dismiss. Landmark says in speaking, in
5 dealing with it as Mybrid, the only time a Mybrid,
6 they are saying I address all the cases cited and in
7 our reply he is misrepresenting cases. This will be
8 simple. The only time you separate out a challenge
9 in the constitutionality of the law, it's simply that
10 is not being done. Everything here is in terms of
11 the decision made by BSA and the challenge to that.
12 I don't think each relief that he seeks, I didn't go
13 through. I said, why and how it's an Article 78.
14 And in terms of our Article 78 relief, but it's
15 whether or not we attacked in essence in our
16 jurisdiction. That's what he is really arguing here
17 in terms of this jurisdictional argument, that
18 clearly it is Article 78.

19 I think in three or four, I don't know, I think
20 it's in my papers. So this is an Article 78. There
21 is no difference whatsoever.

22 In terms of the other matter, I would like to
23 say this was a classic process in terms of the unique
24 characteristics, what was done was not fully
25 presented here. The Landmark buildings were, there
26 were two different projects for two different things.

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2 For the submission of the objection. The second was
3 for the condo portion. There were put four different
4 reviews. In terms of religious status in terms of
5 the characteristics, their problematic needs. There
6 is case law on that. We have cited the case law. It
7 is sufficient in terms of being a unique
8 characteristic, and in terms of what has been
9 referred to in terms of the Landmark being physical
10 that's not restricted to the physical nature of the
11 lot. That's also the building on the lot and there
12 is case after case against it, that the building can
13 be considered. We did that. We considered the
14 building, the Landmark building is Landmark. It's in
15 the middle of the lot. It's just you can't build on
16 that lot. It just creates a problem. We considered
17 the fact that after the building was placed, the lot
18 was then cut by two different zoning provisions. So
19 on one part of the lot you can have a building that
20 is 75 feet, and another one hundred twenty-five feet
21 in terms for width of the building, can be
22 interpreted differently. Assume there is another
23 problem, because there is another law. This applies
24 to part of the property, but would then have to be
25 extended to all of them. In terms of their problems
26 they face the problem with circulation. They face a

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2 problem where the congregation would have cut back
3 on its programs. BSA does look at this. They did an
4 extensive review, in terms they would have to cut
5 back the number of children that could be provided
6 service. The number of classrooms. The classroom
7 side, therefore, the number of students, that they
8 could have in that building. They wouldn't be able
9 to cut on what was planned. In terms of the
10 financial hardship that was looked at, I will go over
11 it, unless you don't want me to --

12 THE COURT: Not on this stage. I need an
13 analysis on what I have to do, at least on the 78 to
14 the declaratory judgment, that's brought out over
15 what I do need to review on an agency finding,
16 anything.

17 MR. MILLMAN: Yes, your Honor. I believe your
18 Honor that the analysis in particular on the Article
19 78 though I think ultimately, it's the same analysis,
20 that was asserted, is what one does, one looks at the
21 five findings, which is maximum, would have to be
22 made. One says you look at the BSA decision. You
23 see the magic words in each of the five. Then after
24 that, you go to the 6,000, 7,000 page record and look
25 to see whether there is some, something, someone is
26 uttering those words in testimony or submission to

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2 the BSA. And, clearly, with respect to every single
3 finding there is some submission.

4 For example, on pages 5112 through 5181, there
5 is a submission document from the congregation,
6 summing up all their findings that itself is evidence
7 because it is being submitted by zoning law experts.
8 A people who have a reptation and in effect legal
9 recognition when they commit submissions that are not
10 accurate to the board. It is perfectly appropriate
11 for the Board to consider that and right after it,
12 the financial analysis on the economics. Is point is
13 simple, all one really has to do is look to see are
14 the findings made? An if there is something in the
15 record, where the is the Board?

16 THE COURT: That is soho.

17 MR. MILLMAN: That is Soho your Honor. After
18 that work is done if there are any questions about
19 some of them, there is a financial return. If it was
20 questionable, that if it hadn't been an economist
21 that submitted something, that's what we are saying
22 had, would be a lot in as, as of rights projection.
23 If you didn't have that, then would you look to the
24 case law and say something about the B finding,
25 doesn't have to be made, same thing with respect to A
26 finding on physical impediment. They did make a

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2 finding on physical impediment. They found zoning
3 line right down the middle, which is something that
4 was used by the court in the matter of the Elliott
5 Case. They used the same law that was a New York
6 Court of Appeal case issue.

7 You look at those things, you say are those
8 physical impediments? They clearly are under the
9 case law. The City claims you can look at things
10 beyond the structure of land. Once you exclude the
11 synagogue itself, you have an L shape piece of
12 property.

13 You can look at all those things and those are
14 physical impediments. But under the case law, you
15 would have to find a physical impediment.

16 Our view of this is almost a chart exercise, or
17 saying the findings made, you can see them on each
18 paragraph, is there something in the 11 volumes of
19 materials before the BSA, where they can see
20 something. While BSA didn't have a page number
21 because the records were made afterwards, clearly
22 there is something in the record for each and every
23 one of those findings, they are not making that up.

24 MR. SUGARMAN: Well, the counsel for the
25 respondent has three to four months to search their
26 number of records. If you look at their answer they

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2 cite basically to BSA resolution. The BSA resolution
3 was the magic words they rely upon magic words
4 presented by counsel. For the BSA in their
5 submission to the BSA counsel for the respondent --
6 I'm sorry -- that's not the factual standard. There
7 are plenty of cases that show that even BSA cannot
8 come in and utter these conclusory findings.

9 THE COURT: But if the record is there, they
10 made findings, they maybe didn't articulate enough,
11 is that a basis for me to reverse on 78 standards?

12 MR. SUGARMAN: They can't show you where it is
13 in the record. They cannot show you if the record
14 there is a change in the Department of Buildings
15 plans. They cannot show that to you.

16 They cannot show you where assess of circulation
17 is affected. And not cured by the conforming
18 building. In fact there own architect agreed with us
19 that's an as of right. During their access of
20 circulation the building, I made big mistakes. And I
21 didn't get to lead with my most important point.

22 THE COURT: You get to end with it.

23 MR. SUGARMAN: Your Honor, there are a lot of
24 issues with their economic study, and some of them
25 may fall within the discretion of the BSA. But you
26 get to a certain point where you're beyond the realm

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2 of reason. For example, the site value they use for
3 the two floors of condominium, is beyond reason. And
4 that clearly kills what is called the skim man out,
5 in the scheme city. The idea is if you have this
6 operation, and you come in and you want a variance
7 based upon economic needs, you have to look at the
8 entire building.

9 This is the so-called all residential building.
10 The BSA asked them to do it. They provided it. It
11 wasn't all residential. They, putting that aside, if
12 you look in the answer this is in my reply. And I
13 have excerpts here. I don't have a poster. But the
14 City, the BSA never fixed the scheme C or residential
15 analysis. They went back and they fixed it. They
16 concluded that an all residential building would earn
17 a six point 7 percent return.

18 Now, the question, your Honor, is that a
19 reasonable return. If you read that decision over
20 and over and over again, you will never see a
21 reference to any greater return in the decision.
22 Certainly not what is what is considered an adequate
23 rate of return. They said six point 7 percent, so we
24 went back into their record, their initial
25 application and this here is an exhibit. R 140 in
26 the record. It's their economic expert saying in

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2 this application as an conclusion, that six point
3 55 percent is an adequate return. This is an annual
4 leased return. We discussed, we didn't get into the
5 return of equity. This is the best way you can do
6 it, six point 55 percent, its adequate. They show in
7 their papers, that six point 7 percent is the return
8 they get from not even an all residential building.
9 That's the end of finding B, they are done, that's
10 over.

11 As a matter of law, because this in the record
12 the verified answer that's in the record, there is no
13 dispute that its in there. There is no dispute this
14 is here. That is the end of their case.

15 I have other, many other points I can make.
16 I'll just state that 90 percent of the time what the
17 respondents counsel said applies to 10 percent of the
18 variance.

19 MR. MILLMAN: Your Honor.

20 MS. HOGGAN: I will say on page 55, we do
21 address this basic argument. Just the point,
22 bringing to counsel's attention, the rate of return
23 was issued to be 11 percent by the congregation, and
24 I did find the record.

25 We find those references to 11 percent and, this
26 would not be a legal way of describing the

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2 percentages.

3 MR. MILLMAN: There is a reason why the BSA in
4 it's decision never made a finding as to what the
5 minimum rate of return was, because what they
6 concluded, what they concluded was that if the
7 congregation were allowed to satisfy its needs by
8 putting up the building, the problematic needs and
9 adding five apartments to that or if they were then
10 to add five apartments or two apartments. The
11 apartments one -- would only look at the apartments
12 to determine whether or not there is some sort of
13 rate of return. The first part, the problematic
14 needs are clearly within the law that says you don't
15 look at rate of return for non-for-profit. All this
16 residential structure, okay.

17 What he is saying is, if the congregation
18 decided that it doesn't care about access to the
19 synagogue and educating its members, it, if it
20 decides that's not important, instead just wants to
21 go into real estate, he claims, I think the numbers
22 are wrong. That they will then make a minimum, a
23 very right on the edge minimum rate of return, for
24 that residential project. That's not the question.

25 If your Honor would put us in that position,
26 that would really be undermining our position.

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2 THE COURT: At this point you have given me a
3 lot more to look at.

4 MR. MILLMAN: Your Honor, would it be helpful
5 regarding the issue of page numbers? And in the
6 record, we could provide your Honor with very simple
7 one page or two page identifying the findings.

8 THE COURT: Are they in the papers?

9 MR. MILLMAN: I'm not sure.

10 THE COURT: We have two problems. The Attorney
11 General, the lack of the Attorney General's presence
12 and to convert the landmark to a 78, what procedures
13 do I have to follow to do that.

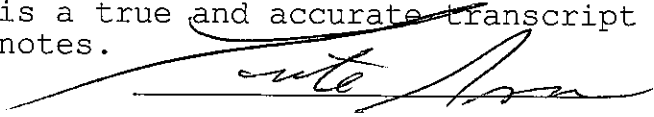
14 Thank you very much.

15 Very interesting argument.

16 * * *

C E R T I F I C A T E

17
18 I, Lester Isaacs, an official court
19 reporter of the State of New York, do hereby certify
20 that the foregoing is a true and accurate transcript
of my stenographic notes.

21 
22 Lester Isaacs, S.C.R.
23 Official Court Reporter.
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