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

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
Petitioners,	:	Index No. 113227/08 (LOBIS)
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules	:	
-against-	:	**REVISED VERIFIED PETITION**
BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair of said Board, CHRISTOPHER COLLINS, Vice Chair of said Board, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, Respondents.	:	

The above described Petitioners allege as follows for their Revised Petition:

Preliminary Statement

1. This is a special proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules by Petitioners against the Board of Standards and Appeals of the City of New York ("BSA'). Petitioner seeks to annul and reverse a decision of the BSA (the "Resolution" or "Decision") decided August 26, 2008 and filed August 29, 2008, Case No. 74-07-BZ and CEQR 07 BSA 071M (P-0001, R-00001)[1], granting certain variances to the Respondent Trustees of Congregation Shearith Israel for a proposed building at 8 West 70th Street, adjacent to the Congregation's sanctuary at 6 West 70th Street and Central Park West. The BSA proceeding was

[1] Because of the length of the decision, Petitioners have inserted paragraph numbers in the Board's August 26, 2008 decision ("Decision") at P-00001 and have provided a reformatted large-type version with paragraph numbers at P-00019. (Exhibit A to Verified Petition). References to " P-" are to Petitioners' Appendix A, which consists of 13 volumes of documents filed with the BSA in this matter. Attached as Exhibit A to the Verified Petition is the Table of Contents for the 13 volumes. A revised and corrected table of contents will be provided with Petitioners reply herein.

an appeal from the purported denials by the Manhattan Borough Commissioner of DOB on March 27, 2007 and August 28, 2007, 104250481. The initial Verified Petition herein was filed on September 29, 2008. On December 2, 2008, Respondent BSA filed its 5794 page record (the "BSA Record"), cited herein a R-nnnnn. Pursuant to a Stipulation So Ordered on December 17, 2008, Petitioners were permitted, on or before January 2, 2009, to serve an amended petition and memorandum of law to provide corrections and include the citations to the BSA Record.

Jurisdiction and Venue

2. This Court has jurisdiction pursuant to Article 78 of the CPLR to review discretionary actions by zoning boards. See also NYCC Section 669(D).

3. The decision by the BSA is a final decision from which no appeal lies to any court or administrative body and Petitioners have no right to a rehearing. 2-RCNY 8 1-10.

4. As and when the initial Petition was filed herein, thirty (30) days had not elapsed since the filing on August 29, 2008 of the said determination of the BSA. N.Y. Admin. Code 4 25-207.

5. No previous application for this or any similar relief has been made by or on behalf of Petitioners to this or any other court.

6. Venue is proper in New York County pursuant to CPLR 506(b) because, among other reasons, the judicial district where the Respondent BSA made the determination complained of is New York County and the property subject to the variances is in New York County.

Parties

7. Petitioner Nizam Peter Kettaneh is a resident of the City of New York and owns and resides in a townhouse at 15 W. 70th St., New York, New York, directly opposite Congregation Shearith Israel and within a 400-foot radius of the site of the proposed building, and is directly affected by the variances granted by the BSA.

8. Petitioner Howard Lepow is a resident of the City of New York with an address at 6 East 79th Street, New York New York 10021. He owns the following cooperative apartments in on the east side of 18 West 70th Street that will be affected by the proposed building: 1B, 1C, 2C, 4B, 4C, 4H, 5B, 6B, 7B, and 8B. The 18 W. 70th St. building adjoins the development site and is within the 400-foot radius of the site of the proposed building, and is directly affected by the variances granted by the BSA. The east facing windows in two cooperative apartment units — 7B and 8B — will be bricked up by the building for which variances were granted, but would not be bricked up by a conforming as-of-right building. The other units face a courtyard, and the proposed non-conforming building will detrimentally affect the light and air in the courtyard that those units face.

9. Respondent BSA is an agency of the City of New York that is empowered under City Charter § 666, among other things, on appeal from decisions of the Department of Buildings, and after a quasi-judicial hearing, to grant zoning variances upon a convincing showing of unique physical conditions resulting in hardship or difficulties arising out of the strict enforcement of the Zoning Resolution and meeting other required standards.

10. Respondent Congregation Shearith Israel a/k/a/ The Trustees of Congregation Shearith Israel is a religious entity, the nature of which has not been disclosed.

11. Respondents Meenakshi Srinivasan and Christopher Collins are respectively the Chair and Vice Chair of Respondent BSA, and are named in this matter because of the manner in which the BSA proceeding was conducted, including the participation by said Respondents in at least one improper ex parte meeting with Respondent Congregation Shearith Israel and as to other partiality shown in the BSA proceedings below.

Summary Allegations As To Significant Issues In The Appeal

12. Page 53 of the Congregation's Statement in Support dated July 8, 2008 (P-03876) states falsely that "Without the waivers requested in this Application, CSI will not be able to build a Community House in a manner which addresses the access deficiencies of the Synagogue ..."

13. The access deficiencies of the Synagogue are fully satisfied in a building that is in strict conformity with the provisions of the New York City zoning resolution.

14. The building approved by the BSA in the Decision at ¶223 addresses the access deficiencies of the Synagogue in the same manner as a building that is in strict conformity with the provisions of the NYC zoning resolution.

15. The Decision cited no facts and made no findings that would make the following statement untrue: “The building approved by the BSA in the Decision at ¶223 addresses the access deficiencies of the Synagogue in the same manner as a building that is in strict conformity with the provisions of the NYC zoning resolution.”

16. The Decision states the following in ¶ 148:

> ¶148. WHEREAS, based upon its review of the applicant's submissions, the Board has determined that because of the subject site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return; and

Nowhere in the Decision did the Board make any other finding identifying the particular feasibility analysis upon which the statement in this paragraph is based.

17. In the BSA proceeding, the Congregation through its consultant Freeman Frazier submitted multiple feasibility studies of as-of-right scenarios, using different values per square foot, different site areas, different site values, and different methods to arrive at differing results.

18. The Decision states the following in ¶130:

> ¶130. WHEREAS, the feasibility study indicated that the as-of-right scenarios and lesser variance community facility/residential building, would not result in a reasonable

financial return and that, of the five scenarios only the original proposed building would result in a reasonable return; and

19. The Congregation provided multiple feasibility studies of a scenario described as Scheme A. Scheme A consists of a community house on floors 1-4, a basement and 6400 square foot sub-basement, and two for-profit condominiums on floors 5 and 6.

20. The Congregation chose in Scheme A not to use the space on floors 5 and 6 to satisfy its programmatic needs. This fact is not mentioned in the Decision.

21. The Congregation sought, and the BSA approved, variances relating to floors 2, 3, and 4 for a total of approximately 1500 square feet.

22. According to the studies submitted by the Congregation for Scheme A, floors 5 and 6 contained approximately 5022 square feet of sellable area and 7594 square feet of built area. This fact is not mentioned in the Decision.

23. In the last of the many studies of Scheme A, the Congregation used in its computation of site value, a site area of 19,094 square feet. This fact is not mentioned in the Decision.

24. In the study of Scheme A as submitted by the Congregation, the site cost is the largest single cost. This fact is not mentioned in the Decision.

25. In the study of Scheme A as submitted by the Congregation, the construction cost is a major part of the costs. The Congregation submitted unsigned, undated construction costs reports in support of Scheme A, which reports were all missing 13 of 15 pages. Based upon other complete reports from the same company, the missing pages were highly material. The BSA was advised of this omission for months prior to the close of the hearing, and failed to require the complete reports to be filed. The BSA then relied upon these reports in making its (b) finding, as it were. No mention of this matter, including the objections of opponents, is made in the Decision.

26. In response to the BSA request for an all-residential as-of-right scheme, the Congregation prepared other studies of an as-of-right scheme described initially as Scheme C. This scheme was not all residential. The Scheme C study showed a profit. But the site cost had been reduced in the July 28, 2008, feasibility study. However, Scheme C was never revised to show the even greater profit that would have resulted from using the reduced site cost in the July 28, 2008, feasibility study. The BSA decision makes no reference to any of these facts.

27. On November 8, 2006, Respondents Srinivasan and Collins held an ex parte meeting with the Congregation's lawyers and consultants at BSA headquarters, did not notify opponents of the project, and since has refused to provide information to opponents as to what occurred at said meeting.

Background

28. Congregation Shearith Israel is the owner of two adjacent lots, tax lots 36 and 37, located at the corner of Central Park West and West 70th Street in the Borough of Manhattan, which lots are located in the West Side Historic Landmark District. In lot 36 on Central Park West, the Congregation owns a Synagogue constructed in 1896, which is an individual historic landmark. Also in lot 36 on Central Park West and south and adjacent to the Synagogue is a townhouse known as the Parsonage, and also constructed in 1896.

29. Lot 37 is adjacent to and west of the Synagogue on West 70th Street, on which is located an existing Community House building. Lot 37 is the combination of three residential house lots, once owned by the Congregation and sold by the Congregation in 1896 to private owners for the construction of private residences, with the restriction that no structure would exceed the height of the Synagogue itself. These three lots were conveyed back to the Congregation in 1949 and 1965.

30. An existing Community House is located on two of the original lots; the building on the third original residential lot was demolished by the Congregation in 1970, and is now a

vacant lot, yet occupied by a trailer used for classrooms. The three house lots were recombined into a single lot, Lot 37.

31. Lot 37 is a regularly shaped lot, 64 feet by 100 feet. The subsurface conditions permit construction of a valuable basement and sub-basement, as included in the structure proposed by the Congregation. The site, located just 100 feet from Central Park West is a highly desirable site in a highly desirable location. A conforming Community House building for a nonprofit owner may occupy the entire lot up to 23 feet, with setbacks for the upper floors, with a maximum height of 75 feet. The Congregation, in pursuing its variance application, has portrayed this pristine silk purse as a flea-bitten sow's ear, but it is not. There are no physical conditions on the site that in any way prevent the full beneficial use by the Congregation of this highly desirable property. The Congregation has stated that the 3 house lots, that now comprise Lot 37, were reacquired by the Congregation.

32. The Congregation desires to demolish the existing community house on Lot 37 and replace the structure with a new mixed-use building occupying all of lot 37. The existing community house currently provides a lobby and elevator to assist in access to the adjoining Synagogue, a caretaker's apartment, and school facilities, which are leased to an independent nondenominational Jewish private day school, Beit Rabban.

33. The Congregation wishes to construct a new facility providing better access to the Synagogue, providing more and modern classroom space, and expanding a small synagogue.

34. Rather than raise funds from its members so as to construct a new school and other facilities and to resolve accessibility issues within its historic Synagogue, Congregation Shearith Israel, one of the nation's oldest and most substantial congregations, requested that the City of New York set aside its zoning laws. The BSA approved these variances, which upset longstanding principles of landmark and zoning laws.

35. The Congregation stated repeatedly in the course of the proceedings that the purpose of the variances is to fund the Congregation's programmatic needs, by allowing the Congregation to construct luxury condominiums atop a new community house. The community house itself includes the construction of space to be rented to a private school, expected to yield over $1 million per year in rent. Not only has the Applicant not shown any indication of financial need, all public facts as to the Applicant are to the contrary. The financial beneficiaries from the variances, in reality, are not the institution, but the individual members of the Congregation, members who, as a result of the variances, will have much less need to provide financial support for their own institution.

36. These members, who include well-known philanthropists and business people, apparently would rather not engage in fund-raising as has the New York Historical Society (which just announced the raising of $50 million for a renovation and the cancellation of its own condominium project on West 76th St.), the Eldridge Street Synagogue (which under the auspices of Roberta Brandes Gratz raised millions for restoration [see Opp. Ex. D 9-11, P-00257 at P-00266]) and the 76th Street Jewish Community Center (which raised millions from the community to construct an as-of-right community facility at Amsterdam and 76th Street, but was not supported by Congregation Shearith Israel because of certain policies. See Opp. Ex. D 21-23.) (P-00257 at P-00278). Many of the members of the Congregation, including counsel for the Respondent Congregation (R-001260 and R-001543), submitted completed BSA forms dated to December, 2008 "consenting" as included in the BSA Record R-000650 at R-001068 to R-001619. The BSA consent forms under BSA rules are intended to be completed by property owners residing within 400 feet of the project. In accordance with BSA rules as to notice to owners within 400 feet of the project, the Applicant filed an Affected Property Owners List on April 1, 2007 (R-000105), None of the members of the Congregation filing these "Consent" forms are on the list, and only 4 of the members of the Congregation filing the so-called consent

reside or own property within the 400 foot zone. See Exhibit K attached to the Revised Complaint showing a map analysis of the consent and objection forms. Although all of the notices objecting to the project are date stamped (R-000650 to R-0001068), none of the so called "consents" are stamped. The BSA table of contents states that these forms were filed between November 2007 and February, 2008, but the BSA provides no transmittal letter showing when the "consents" were filed. Moreover, the consents are nearly 50% duplicates. Thus, the BSA seemed to be helping the Respondent Congregation to pad the record as to the true number of consenting owners within the 400 foot zone. In fact, substantially all supporters of the variances are members of the Congregation who stand to financially benefit from the variances.

37. To obtain the variances (seven in number), the Congregation effectively asks that the requirements of Section 72-21 of the Zoning Resolution be ignored. The Congregation cannot show a factual basis for the five findings required for any of the variances.

38. The Congregation has not and cannot show any relationship between the heart of its case, accessibility to the Sanctuary, and any of the variances claimed. Even the rear yard variances, claimed to be based on a need for classroom space, on closer inspection are revealed merely as a contrivance so as to not impinge upon the use of the fifth and sixth floors of an as-of-right building for income producing condominiums.

39. The Respondents and the Decision fail to identify specific pages of the record that are claimed to be the "substantial evidence" upon which the Decision allegedly rests.

40. A mere assertion in the Decision that substantial evidence exists is insufficient to support a conclusory finding.

Specific Factual Statements

The Site

41. The building site is a rectangular 64 x 100 foot site just off Central Park West on West 70th Street and constitutes the entirety of Tax Lot 37.

42. The proposed building is a 105-foot tall building with four floors of community space and five floors of luxury condominiums.

43. A conforming, as-of-right mixed-use building would allow, without the need for variances, a four-story community house with sub-basements and two floors of luxury condominiums, with setbacks and height consistent with the brownstones on the street: under 75 feet.

44. A conforming all-residential building would allow seven floors of condominiums, with two sub-basements.

The Sanctuary

45. The Decision at ¶16 misleadingly states that the Synagogue has a height of 75 feet. That is true as to the peak of the roof only; in actuality, the West 70th Street wall of the Synagogue rises to approximately 53 to 62 feet and sets back before rising to the peak of the roof. See, EX-14, Elevation West 70th St. (P-01365), and EX-13, Existing Elevation, West Side of Central Park West (P-01364).

46. In Congregation drawings for a conforming as-of-right building, at AOR-14 (P-01349), the Synagogue, although on a corner, substantially complies with the height and setback that is required by mid-block contextual zoning, reflecting the sensitivity of the original architects as to the narrow width of West 70th Street.

The Split Lot

47. A small part of the development site (Lot 37) is in the R10A zoning district, with most of the site being in the R8B zoning district, which is also known as contextual mid-block zoning with height and setback limitations.

48. The Decision materially confuses the facts when it suggests in ¶20 that the district boundary is at a "depth of 47 feet within the lot". As noted, the lot is 64 feet by 100 feet.

The width of the lot is 64 feet. The depth is 100 feet. The Decision misuses the word "depth" displaying a lack of understanding by the BSA as to what it was approving.

49. Viewing the development site from West 70th Street looking south, 17 feet of the left (easterly) portion of the lot is in R10A and 47 feet of the right (westerly) portion of the lot is in R8B. Thus, 73.4% of the development site — Tax Lot 37 — is in the R8B district with the more restrictive zoning.

50. The BSA decision later holds, essentially, that because 26.6% of Tax Lot 37 is in R10A, the height and zoning restrictions in 73.4% of the lot should be ignored.[2]

Condominium Variances Account For 90% Of Variance Area

51. Using floor area as a measure, 90% of the variances floor area is provided by the four variances for the luxury condominiums, with the other 10% relating to three rear yard variances allowing an additional area of 1500 square feet of school space.

52. The four upper floor variances provided an additional area of 12,715 square feet of luxury condominium space.

53. Even though the variances do result in additional floor area, no variances are required to transfer zoning lot floor area to the development site, though the Decision's discussion of transfer of zoning lot floor area provides an incorrect impression that transfer is required.

Light

54. Petitioner Kettaneh owns a historic brownstone directly across the street from the proposed building and is directly impacted by the loss of sunlight and light and air intended to be protected by the contextual zoning. The claim by the Congregation's expert that only a few

[2] ¶¶21 and 22 of the Decision confuse the facts by describing, not the percentage within Lot 37, but the division within Lot 36 and Lot 37 combined, i.e., the sanctuary, the parsonage, *and* the community house site. The Decision then, in ¶21, refers to the Zoning Resolution §72-21, which permits zoning floor area averaging, even though no averaging is required for the proposed building.

buildings are impacted by shadows is of no importance to Petitioner Kettaneh. AKRF Study May 12, 2008 at B-12. (P-03373 at P-03411; R-004693 at R-004635). The Congregation and the BSA responded with shadow studies of Central Park itself, an issue never raised by the opposition. (August 2007 Shadow Study, P-02015, R-000372; December 19, 2007 Shadow Study, P-02602; R-002009) The BSA and the Congregation obsessed with shadow studies of Central Park, ignored specific requests to analyze the street shadows with street level three-dimensional studies and provided scant attention to the streets that the mid-block zoning was intended to protect.(P-01638, R-000221) Opponents, to demonstrate the reasonableness of providing meaningful street level three dimensional studies provided graphics created with a free program provided by Google. P-00457, R-003597. In response, the Congregation's consultants, over a year after the application was filed, provide small scale studies of shadows of the side street from thousands of feet in the air. AKRF Study May 12, 2008 (P-03373; R-004693). These studies suffered from many deficiencies, not the least of which was lack scientific validity in comparison with actual photographs of shadows . Clearly, small narrow streets require appropriate street level studies. In addition, the studies failed to show the comparison of shadows between an as of right building and the proposed building, and was not validated with actual photographs of the streets showing actual shadows cast. The proposed building shadows would have the most impact in the winter months. The Applicant's AKRF consultant provided a shadow study for 10:00 AM on December 21 at 10:00 AM. (Fig- B-11 at P-03413, R-missing.) In order to test the validity of the shadows shown, even though after the close of the hearing, this could only be tested on or around December 21, 2008. Opponents objected clearly to the BSA that the studies used a flawed computer model and should be tested. Attached then as Exhibit L is a post-hearing photograph which shows that there is no scientific basis for the shadow study shown by AKRF and relied upon by the BSA. Even worse, the BSA Record conveniently fails to include the December 21, 2008 10:00 AM shadow study in its version of the AKRF Study at R-004597. Page R-004635 refers to the Winter shadow study diagrams, but the BSA did not include these Diagrams in the

BSA Record. See Fig. B-10 and B-11 R-004635. P-03412-13. These should have been reproduced between R-004635 and R-004636.

Economic Engine

55. The rationale for the luxury condominiums consistently offered by the Congregation in seven years of proceedings is that the luxury condominiums were an "economic engine" needed to create funds for the Congregation to permit the construction of the community house. See e.g, Applicant Statements re Economic Engine, Opp. Ex. A, P-00218 et seq.; R-003328 et seq.

56. Having raised this argument repeatedly, the Congregation, the oldest and one of the wealthiest synagogues in the City, made no showing of financial hardship, and acted offended (and the BSA acted offended[3]) when opponents offered evidence of the financial resources of the Congregation. The Congregation complained that it was unable to build a skyscraper on top of its historic sanctuary and parsonage on Central Park West, but was unwilling to accept the restrictions of record on those properties restricting future development.

57. As the BSA acknowledges in its Decision, raising funds is not a programmatic need recognized as a legal justification for a variance. See Decision at ¶78 and ¶79.

58. The Respondent Chair noted in the first BSA hearing that the Congregation with its financial need claim had put the Board in a "hard place" (November 27, 2007 BSA Transcript, p. 23, line 510 (P-02440 at P-02463, R-001726 at R-001749)[4];

[3] Vice Chair Collins castigated opposition witnesses for the audacity of offering evidence of financial resources of the Congregation in response to the Congregation's implicit claims of need. See BSA Transcript, February 12, 2008, p. 85 (P-02896).

[4] November 27, 2008 BSA Transcript, p. 26, line 571 (P-02440 at P-02466, R-001726 a6 R-001752):

571 COMM. OTTLEY-BROWN: Just a comment back that
572 it's my opinion that residential use to raise capital funds to correct programmatic
573 deficiencies is not in and of itself a programmatic need. It may be a resolution to a
574 problem or a way of financing a resolution to a programmatic need.

59. At the same time, counsel for the Congregation was boasting to CB7 that the project had "the imprimatur of the Bloomberg Administration." (Community Board 7 Land Use Committee Hearing, October 17, 2007, Page 7-8 (P-02080 at P-02081; R-002827 at R-002833-4) (Also filed as Opp. Ex. N at P-00334-5, R-003458-9)) A trustee of the Congregation, and the lead witness in the 2002 LPC proceedings, was Jack Rudin, well-known real estate developer and confidant of Mayor Bloomberg. See, November 26, 2002 Landmarks Preservation Commission Transcript, p. 50, line 1(R-002594) (Filed as Opp. Ex. D-2-3, P-00259-60, P-00260, R-003373-74). Another fact witness appearing at this hearing on behalf of the Congregation was Louis Solomon, who subsequently filed an appearance for the Congregation is the present litigation. (Id., p. 79, at R-002623). The New York City Corporation Counsel, Michael A Cardozo, was formerly a litigation partner in Proskauer's 275 lawyer litigation department, for which Mr. Solomon is co-chair.

60. Ignoring the Congregation's inability to meet the requirements of Zoning Resolution §72-21(b), the BSA was willing to accommodate the Congregation's desire for variances, but only if the Congregation would file a new version of its Statement in Support, deleting the offending phrase "addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough capital funds to correct the programmatic deficiencies described throughout this Application."[5] The Congregation (CSI) complied only as to this phrase and deleted this phrase in the fifth do-over of its Statement in Support filed in July 8, 2008 (although leaving in other substantially similar offending references). See Applicants July 8, 2008 Statement in Support at p. 4, line 7: p. 43, second line from bottom; and at pp. 54-55, R-

[5] June 24, 2008 Official Transcript BSA Hearing, p. 36 (R-004937 at R-004973, P-03762 at P-03798):

7 I
8 think the comment that Commissioner Ottley-Brown made about the programmatic need
9 regarding revenue generation, I think we've already said that many times; that we feel
10 that that in and of itself is not a part of the programmatic need.
11 I know you have it still in your papers. The Board may reject that argument. But,
12 I know that we thought it would be better for the papers to take that out.

005118, R-005157, R-005168-9. See e.g., Sugarman Statement in Opposition, July 29, 2008 pp. 10-11, P-03923 at P-03925-7; R-005311 at R-005323-24). The Board then granted variances — fabricating a new rationale to substitute for the true rationale.

Reasonable Return

61. In order for the BSA to grant the condominium variances, the BSA needed to find that the Congregation would be unable to earn a reasonable return, under Zoning Resolution §72-21(b), from a conforming building on the property[6]. Decision, ¶148.

62. This key finding — reasonable return from the condominium construction — concerns 90% of the variances' benefits, but is addressed by the Board in only 16 of the 230 paragraphs, paragraphs lacking any factual findings.[7]

63. The Decision completely ignores the six separate submissions of an opposition expert, Martin Levine, who is a certified MAI real estate valuation expert.

64. Levine deconstructed the Congregation's submissions. Levine showed that the BSA ignored its own detailed requirements for §72-21(b) findings as set forth in the BSA's own written guidelines (which are consistent with valuation practices and case law) and showed that a conforming as-of-right building would earn a positive return.

65. Even worse, the BSA evidently wished to conceal from other applicants and the land use and zoning community that the basis of the §72-21(b) finding, was the use of a site value based upon development rights in another part of the site, because it well knew that every developer in New York City would be lining up to assert the same position.

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[6] The July 8, 2008 Congregation Statement in Support at pages 3-4 (R-005117-18, P-03826-27) states:
"As further described throughout the Application, the New Building addresses the programmatic difficulties by providing: ...(3) residential use on floors 5 - 8 (plus penthouse) to be developed as a partial source of funding to remedy the programmatic religious, educational and cultural shortfalls on the other portions of the Zoning Lot."

[7] The Decision ¶¶125 -148 cursorily addresses whether a conforming as-of-right building would return a reasonable return under Zoning Resolution §72-21(b). But seven of these paragraphs (¶130 and ¶¶132-137) address the financial return of the proposed building (apparently as to finding (e)). Even worse, these 16 paragraphs are lacking any finding of facts — containing only a conclusory final finding at ¶148.

66. The BSA Decision completely ignored the objections raised as to the computation of site value, not even mentioning the issues that had been raised repeatedly by opponents.

The Congregation Never Provided The Reasonable Return Analysis Of The As-Of-Right Schemes As Requested By BSA Staff And As Required By Law

67. Although not readily apparent from the Decision, the cornerstone of the upper floor condominium variances is the reasonable return analysis for the conforming as-of-right schemes under §72-21(b).

68. The Congregation argued that the literal requirements of §72-21(b) relieved nonprofits of the requirement to satisfy the (b) finding, even for a profit-making project such as condominiums. See this and other extraordinary propositions advanced by the Congregation in Closing Statement in Response to Opposition of Certain Variances, August 12, 2008, P-03972, R-005793.

69. The BSA rejected this strict reading of the §72-21(b), apparently holding that, despite the language that "this finding shall not be required for the granting of a variance to a non-profit organization," such provision did not apply where a nonprofit was seeking variances for a total or partial for-profit building.

70. An issue not explicitly addressed by the BSA was how to conduct the reasonable return analysis, since §72-21(b) does not explicitly address either the mix of profit and nonprofit in the same structure or the mix of profit and nonprofit on the same zoning site.

71. The BSA apparently first asked the Congregation to evaluate a conforming as-of-right scheme ("Scheme A"). Then, the BSA staff asked for an evaluation of reasonable return for an all-residential building on the site ("Scheme C").

72. The Congregation never complied with the request to provide analysis of an all-residential building, providing instead a part residential building and not including valuable basement and sub-basement space.

73. Congregation studies, prepared by Freeman, Frazier and Associates ("Freeman Frazier" or "FFA"), purported to show that an owner could not obtain a reasonable return, principally by inflating the largest single cost component — the site value.

74. The Decision notes only that the studies "indicated" that there would be no reasonable return (¶130), but never made the requisite factual findings concerning the studies.

75. The BSA thereafter never mentions the fallacious approach of the Congregation. However, Martin Levine of Metropolitan Valuation Services ("MVS"), the opposition's expert valuation witness, repeatedly pointed this out. Nowhere in its decision does the BSA even mention with the documented opposition claims of inflated "site value", which is fatal to a finding that the requirements of §72-21(b) of the Zoning Resolution have been met.

76. The response of the Congregation is telling — the Congregation does not deny that it failed to provide proper analysis of Schemes A and C. Rather, its defense, as presented by the Congregation's consultant Freeman Frazier in their last submission of August 12, 2008 Freeman Frazier Letter for Applicant of August 12, 2008, pp. 2-3, (P-03952 at P-03955-55; R-005773 at R-005774-75), is as follows:

> Sugarman Allegation #1: Sugarman alleges that a revised Scheme C was not provided in the FFA submission of May 13, 2008, the original Scheme C having unexplained high loss factors, and not including a valuable sub-sub-basement.
>
> FFA Response to Allegation #1: As noted on page 7 of the July 8, 2008 Response, the BSA did not request a submission of an analysis of a revised Scheme C. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.
>
> * * *

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

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

Site Details

77. The development site, Tax Lot 37, currently is occupied by a to-be-demolished, four-story community house and vacant lot. It is a perfectly rectangular site, 64 by 100 feet. The site is located adjacent to the Congregation's historic 1896 synagogue sanctuary at Central Park West and 70th Street.

78. The site has excellent subterranean conditions, allowing the construction of both a basement and a sub-basement. The sub-basement alone will provide the Congregation with an additional 6400 square feet of meeting area, permitting the assembly of 340 persons, where the Congregation proposes to create a large banquet hall.

79. The site is in a prime Manhattan residential location, 100 feet from Central Park West and a subway station and bus stop.

80. The Congregation does claim a programmatic need/hardship to construct an elevator to access the sanctuary, but admits that such an elevator would require only 100 square feet on each of the 5000 to 6400 square foot first four floors of a conforming building.[8]

[8] Congregation's Statement in Support dated July 8, 2008, p. 38, 4th line from bottom (P-03823 at P-03861, R-005114 at R-005152): "the allowable footprint above the first floor, which is 64 ft. wide by 70.5 feet deep, minus approximately 100zsf from each floor "taken" by the Synagogue for its elevator shaft on each floor." Access and lobby space requires minimal area in the adjoining building. See also "Areas in AOR Requiring Access" Opp. Ex. GG-12, R-004168, P-00477, filed with Letter from Mark Lebow dated March 25, 2008 (R-003967) as discussed in Letter from Craig Morrison dated March 24, 2008 at p. 2 (P-03093 at -94; R-003930 at -31). (Attached to the Petition as Ex. H.)

Site History

81. Originally owned by the Congregation when the synagogue was constructed, what is now Tax Lot 37 was conveyed in 1896 by the Congregation to developers; three row houses were constructed thereon. In 1949, the Congregation reacquired two of the row houses and then in 1954 reconstructed the row houses, demolishing their façade, eliminating the setback and creating the existing four-floor community house. This community house provides lobby space and an elevator for access to the synagogue building. In 1965, the Congregation reacquired the third lot and in 1970 demolished the row house thereon, leaving a non-income-producing vacant lot.

82. The primary user of the community house is a private day school, Beit Rabban, which is not only unaffiliated with the Congregation, but is Jewish nonsectarian, as contrasted with the orthodox Congregation.

83. The school pays the Congregation as much as $500,000 a year in rent for a building the Congregation describes as obsolete and dilapidated.

84. The programmatic need charts submitted by the Congregation on December 27, 2007 are clear: the exclusive user of the second floor in the existing community house is the Beit Rabban School. See Applicant Programmatic Drawings, Community Facility Second Floor Existing, Prog E-8, December 26, 2007, P-02604 at P-02606, R-002009 at R-002012 attached as Petitioners Exhibit J. Thus, the statements by the Congregation that Beit Rabban was and will only use space not used by the Congregation is absolutely false. Further, analysis of the claimed programmatic needs show that the dominant user of the proposed school is Beit Rabban, not the Congregation. Decision at ¶55.

85. The BSA Decision refers to the Beit Rabban as if it were part of the Congregation. But, in contradictory fashion, the BSA never required the Congregation to provide programmatic need information as to Beit Rabban when providing information to the BSA.

86. The BSA never inquired of the Congregation as to the rent being paid by the Beit Rabban School.

87. Similarly, the BSA never inquired of the Congregation as to the rent being paid by the residential tenant of the six-bedroom luxury parsonage residence, although, in contradictory fashion, the BSA apparently was willing to permit development rights over the parsonage to be used to compute site value.

Sites Acquired To Satisfy Programmatic Needs

88. Importantly, in all of its five versions of its statements in support submitted to the BSA, the Congregation states that the three lots (now comprising the single Lot 37) were acquired to meet the development needs of the synagogue and the community house:

> CSI acquired Lot 36 in 1895 and the separate portions of Lot 37, in 1949 and 1965, respectively. Both were purchased specifically for development of the Synagogue and Community House, respectively.

See for example, Statement in Support, July 8, 2008, p. 50, second line in first paragraph (P-03823 at P-03873, R-005114 at R-005164)

89. The Congregation now asserts the right to satisfy all of its programmatic needs and also receive a return on its property as if there were no development needs of the Congregation being satisfied on the site. It also attempts a back-door use of zoning floor area rights over the Parsonage to trump the specific height and setback limitations of contextual zoning.

§74-711 Application

90. Prior to the initiation of the BSA variance proceeding in April 2007, because the site is located in a Landmark District, the Respondent Congregation first was required to apply for a Certificate of Appropriateness from the Landmarks Preservation Commission, which it did in 2001. Initially, the Congregation asked for a special permit under Zoning Resolution §74-711, but perhaps because the Congregation realized that unacceptable conditions might be placed on

such a permit, the Congregation withdrew its application and requested only a Certificate of Appropriateness.[9]

91. As Norman Marcus observed at page 40 of the February 12, 2008 BSA Hearing (line 878, R-003693, P-02850):

> 878 The last time I was here, Commissioner Collins, you asked me suppose they had
> 879 applied for a Special Permit? And, I said to you, gee, that makes all the difference or
> 880 makes a big difference because they did not apply that way. Why? Because the
> 881 Landmarks Commission would not join that application for a Special Permit and so the
> 882 applicant had to come, on its own, here, for a 72-21 variance which is very different
> 883 findings then a Special Permit.[10]

92. After hearings and modifications, finally, in March 2006, the LPC approved a Certificate of Appropriateness, not as to the appropriateness as to impact on the neighbors, or as to shadows or bulk, or as to zoning, or as to compliance with zoning laws, but solely as to appropriateness for a landmark district.

93. The fact remains, though, that the Congregation did not pursue its administrative remedies provided by §74-711, and, because it did not exhaust its administrative remedies, it cannot now in disguise seek the same relief from the BSA. For that reason alone, the BSA should

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[9] See LPC Hearing, January 17, 2006, p. 7 (R-002406 at R-002412; P-01213 at P-01214) ("we are no longer requiring 74-711 transfer of bulk across the district boundary … the building is now as for right as to the distribution of bulk across the site."

The fact that the Congregation withdrew its request for a special permit under §74-711, as the BSA was aware, makes this statement in the Decision all the more peculiar:

> ¶120. WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of available development rights from a landmark building within the lot on which it is located or to an adjacent lot,

The Board seems to be stating that even though the Congregation failed to meet the requirements for a special permit, the BSA would in substance provide the same relief to the Congregation for which it did not qualify, and as to which the BSA had no authority to grant in a variance proceeding.

[10] Essentially, the BSA variance issuance can be viewed from the perspective that Commissioner Collins and the BSA seemed to feel that the LPC and City Planning should have provided the Congregation with a special permit under §74-711, and so the BSA substituted its judgment for that of not only the City Council's mid-block zoning, but also for the judgment of the LPC and City Planning that would have, but did not formally, rejected a §74-711 special permit. The question that Respondent Collins could have asked is whether the Congregation should have first exhausted its administrative remedies under §74-711 before coming to the BSA.

not have entertained the application in light of the Congregation asserting the same landmark hardships and economic need inherent in a §74-711 application.

Community Board 7

94. The Community Board 7 Land Use Committee held two hearings in October and November 2007. As well, the Congregation held ex parte meetings between the Congregation and Community Board 7, which excluded opponents of the project. See March 11, 2008 Letter, Friedman to BSA (R-003841, P-03036), responding to Sugarman Letter to BSA, March 7, 2008 (R-003827, P-02985). The Community Board 7 Committee rejected, by a virtually unanimous vote, the variances for the condominiums, but on a split vote approved the smaller lower floor variances (described below).

95. With the opponents having used the BSA objections to defeat the condominium variances before the CB7 Committee, the BSA Commissioners had a change of heart, and, over the objection of the opposition, changed the hearing schedule. Without waiting for the various omissions and discrepancies noted by its staff and by the opposition to be remedied (which indeed, never were remedied), the BSA went ahead, over the objections of the opposition and the Community Board, with a scheduled hearing for November 27, 2007, on short notice[11], even before Community Board 7 was able to hold its own full board meeting on this issue.

96. With more complete information, including the testimony from the BSA hearing of November 27, 2007, on December 4, 2007, the full Community Board 7 rejected all the variances after a thoughtful analysis of the Congregation's presentation.[12]

[11] The Rules of The City of New York, Title 2, BSA, § 1-06, provide that 30 days' notice be provided — the BSA only provided 29 days (P-00130). See letter dated October 31, 2007 from Mark Lebow, Esq. to BSA (R-001628, P-02314). The same rule requires the BSA examiners to "have determined the application to be substantially complete." Such a determination was never provided by the examiner, and, clearly, the Congregation had yet to respond fully to each objection in the BSA Objection letters, although claiming to have done so.

[12] See Transcript of Community Board 7, December 4, 2007 R-003160 P-02528; December 4, 2007 Resolution of CB7 Opposing Variances R-001886, P-02554; October 17, 2007 Transcript of CB7 Land Use

The Seven Variances

97. The BSA variance proceeding granted seven variances described in ¶1 of the Decision, as reflected in the letter of objection from the Department of Buildings ("DOB") dated August 24, 2007. See DOB Letter of Objection (P-01796). The August 24, 2007 letter was the second Letter of Objection from DOB to the Applicant.[13] When the DOB denies a requested permit, it is standard practice to issue such a Letter of Objection, which an applicant may then appeal to the BSA. The DOB Letters of Objection are not to be confused with two separate Objection Letters which the BSA sent to the Applicant Congregation. The Decision separates these seven variances as falling into two categories: Community Center Use and Residential Use. Four upper floor variances permit the construction of the condominiums, and three lower floor variances provide rear setbacks for the school facilities.

98. The three lower floor variances allow the addition of ten feet in depth to each of floors two, three, and four, allegedly to allow larger classrooms. Because the lot is 64 feet wide, these three variances would allow an additional 1960 gross square feet, or approximately 1500 square feet of additional net space as stated by the Decision in ¶46. See Rear Yard Variances for Proposed Scheme (right column), Opp. Ex. GG at GG-10 (R-004156 at R-004166, P-00465 at P-

Committee R-002827, P-02080; November 19, 2007 Transcript of CB7 Land Use Committee (R-002929, P-02330); Resolution of CB7 Land Use Committee (R-002979, P-02376.

[13] The initial application of the Congregation to the BSA sought eight variances based upon the DOB Notice of Objections of March 27, 2007, Objection 8 (R-000018, P-01301). The Eighth Variance, as to ZR §23-711, related to a 40-foot separation required between the sanctuary and the upper floors. The BSA thereafter cited the Congregation for failing to describe this separation in the zoning schematics filed with the application. BSA Objection Letter to Applicant, June 15, 2007 at page 3, Objection 25 (R-000253 at R-000256, P-01724 at P-01727). On August 28, 2007, without explanation, the Congregation refiled its plans with the DOB and a new set of objections was issued by the DOB eliminating the eighth objection. DOB Notice of Objections, August 24, 2007 (R-000348, P-01796). Although the Decision states in ¶ 7 footnote 1 that the Congregation had filed revised plans, insofar as any plans implicating the 40-foot separation, no changes at all were provided by the Congregation to the DOB. Opponents through FOIL requests sought information as to the elimination of the eighth variance, but DOB refused to provide information, claiming that the building was "9/11" sensitive. See e.g. Letter dated October 30, 2007 from David Rosenberg to Shelly Friedman, (P-02306, R-001620). The Congregation would not provide information and the BSA would not ask for or subpoena the information from the DOB. The Congregation's maneuver is related to its §72-21(a) argument as to the split lot and to its inability to build on the R10A portion of the lot because of the sliver rule. But, clearly, §23-711 would not permit the construction of tall condominiums on the R10-A portion, and the record is completely devoid of any explanation as to the surreptitious elimination of variance 8.

00475. Opposition architectural expert Craig Morrison provided a foundation for this exhibit GG in his statement of March 24, 2008 (P-03093, R-003930) and in his testimony at the April 15, 2008 BSA Hearing, Transcript at p. 27, line 590 (P-03245 at P-03272; R-004462 at R-004489). At the conclusion of his testimony, the BSA Commissioners asked no questions of Mr. Morrison.

99. Disproportionate attention is paid in the Decision to the lower floor variances, and much of the attention discusses irrelevancies. Any and all discussion sprinkled throughout the Decision that refers to religious deference, religious uses, schools, programmatic need, etc., could relate conceivably only to the 10-foot rear extensions and the resulting extra 1500 square feet, less than 10%, of the space provided by all seven variances. Because the rear 10 feet of the proposed building has no elevators, stairs, or access points with the synagogue, there is no relationship between the 10-foot extension and access and circulation.[14]

100. The upper floor variances allow the construction of luxury condominiums on top of the community house. To accomplish this, variances for height and setback are required. Two of the condominiums on floors five and six could be built as of right, so the upper variances relate primarily to floors seven, eight, and nine, although setback variances are also requested for floor six. The BSA states in its Decision:

> ¶84. WHEREAS, the first floor is proposed to have approximately 1,018 sq. ft. of residential floor area, the second through fourth floors will each have 325 sq. ft. of residential floor area, the fifth floor will have 4,512 sq. ft of residential floor area, the sixth through eighth floors will each have approximately 4,347 sq. ft. of residential floor area and the ninth (penthouse) floor will have approximately 2,756 sq. ft., for a total residential floor area of approximately 22,352 sq. ft.; and

101. To clarify this, the upper floor variances would allow 4347 square feet (seventh floor) plus 4347 square feet (eighth floor) plus 2756 square feet (ninth floor). The proposed sixth

[14] As discussed below, the lower floor variances in fact are related directly to the condominium project, for the simple reason that the programmatic needs claimed to support the 1500 square feet of variances could easily be accommodated in the fifth and sixth floors of a conforming as-of-right building.

floor is 4347 square feet, which is 1265 square feet larger than a conforming as-of-right sixth floor, which would have 3082 square feet. Thus, the upper variances for the condominium add 12,715 additional square feet of condominium space.

102. Comparing the upper floor condominium variances at 12,715 square feet to the lower floor "school" variance at 1500 square feet, the upper floor variances represent 90% of the area for which variances are sought. Despite the impression that might be given in the Decision, these condominium variances are unrelated to the religious status of the applicant or to any programmatic needs for classroom or access space and require no transfer of zoning area rights from any other part of the zoning lot. A review of the DOB objections shows that there is no objection at all relating to floor area ratio and no variances are needed for the bulk of the proposed building — only the height and setbacks in the front and rear on the upper floors are relevant. Thus, all discussion of the transfer of zoning bulk is wholly irrelevant. See LPC Hearing, January 17, 2006, p. 7 (R-002406 at R-002412; P-01213 at P-01214) ("we are no longer requiring 74-711 transfer of bulk across the district boundary … the building is now as for right as to the distribution of bulk across the site." The differences between an as-of-right building and the proposed building is disclosed by the graphics shown in Exhibit C Attached hereto. P-00434, P-02429, P-02430; R-003571, R-001833, R-001834, submitted to the BSA by Alan Sugarman at the hearing of November 27, 2008. See Transcript, p. 46 at line 1022 et seq.

No Use Variances Were Requested Or Granted

103. Notwithstanding the impression that could be obtained from an initial reading of the Decision, the Congregation did not apply for a "use" variance for its proposed project, or for the "Toddler" day care center, the private school rental, the banquet hall, or the luxury condominiums. Nor did opponents argue that these uses were not proper accessory uses for a Synagogue. There were no issues suggestive of a desire by opponents to persuade the Board to engage in any restrictive or exclusionary zoning against religious or educational institutions. The

opponents who testified, many of whom are Jewish, uniformly supported the Congregation in its desire to build a new conforming Community Center, but not the proposed project with condominiums. Yet, the Decision repeatedly cites to court cases involving use variances where often there was a clear indication of hostility or discrimination against the religious and accessory uses sought. Even worse, the BSA wrote its decision in such a way as to mischaracterize the opposition. All that the opposition demands is a fair and equitable application of the zoning law and in particular the mid-block contextual zoning regulations.

104. The BSA goes so far in its decision to cite ZR §73-52 as a basis for a "unique physical condition."

> ¶98. WHEREAS, the Board further notes that that the special permit provisions of ZR § 73-52 allow the extension of a district boundary line after a finding by the Board that relief is required from hardship created by the location of the district boundary line;

105. But ZR §73-52 does not in any way state, suggest or imply that a split is a physical condition. Moreover, a split lot clearly applies only to use variances, not height and setback variances.

> 73-52
> Modifications for Zoning Lots Divided by District Boundaries
> Whenever a zoning lot ...is divided by a boundary between two or more districts in which different uses are permitted, the Board of Standards and Appeals may permit a use which is a permitted use in the district in which more than 50 percent of the lot area of the zoning lot is located to extend not more than 25 feet into the remaining portion of the zoning lot, where such use is not a permitted use, provided that the following findings are made:

106. Finally, the Decision's obsessive attention to these issues of use and the non-existent discrimination in fact apply only to the lower floor variances, accounting for only about ten percent of the area allowed by the variances, and serve primarily to confuse and disguise the BSA's intention to provide variances solely to provide income from the condominiums in contravention of clear BSA policy and clear law.

No Variances For The Transfer Of Zoning Lot Floor Area Or FAR Were Requested Or Granted

107. Similarly, despite the repeated discussion in the Decision of the transfer of zoning lot floor area from one part of the zoning lot to another, no variances whatsoever are required for any transfers of zoning floor area (also referred to as a transfer of FAR). Indeed, even a conforming as-of-right building under the applicable height and setback requirements in no way requires transfer of zoning floor area. See Friedman & Gotbaum letter to BSA dated February 4, 2008, R-003615, P-02772) ("CSI's Application does not request additional floor area..."); Statement of Shelly Friedman, LPC Hearing Transcript, January 17, 2006, p. 7 (R-002406 at R-002412; P-01213 at P-01214). ("We are no longer requiring 74-711 transfer of bulk across the district boundary ...The building is now as of right with regard to its distribution of bulk..."). In a gross abuse of discretion, the BSA seemed to use §74-711, not as authority to transfer bulk, but as authority to ignore the height and setback restrictions for the condominium portion of the building.

108. The BSA was well aware that floor area transfer was a non-issue, for the irrelevancy of such a transfer was pointedly raised by the opposition. (Sugarman Further Statement in Opposition, July 29, 2008, p. 16, n. 9, R-005311 at R-005329, P-03923 at_P-03941) Yet knowing this, the BSA engaged in lengthy, irrelevant discussions of floor area transfer at ¶¶ 97, 99, 108, 109, 113, 114, 115, 117, and 120 of its Decision.

Access, Accessibility And Circulation

109. The Congregation describes the need for resolving existing problems relating to access, accessibility and circulation as the "heart" of its application and sprinkled references to these issues throughout its submissions from counsel for the Congregation. Yet, because these problems are resolved fully by a conforming as-of-right building, the issue is wholly irrelevant to this variance application, as discussed below. Even the most cursory comparison of the conforming as-of-right building to the proposed-approved building shows that these issues are

handled the same way in both, as opined by the opposition architectural expert Craig Morrison. Letter from Craig Morrison, Opposition Expert, dated January 28, 2008 (P-02730, R-003282).

110. Most significantly, Mr. Charles Platt of Platt Byard Dovell White, the architects for the Congregation, agreed that the conforming as-of-right schemes addressed this issue, as discussed below. Letter from Charles A Platt on Behalf of Applicant dated February 4, (P-02768, R-003611), Yet, the BSA, in disregard of all reality and evidence not refuted, notwithstanding, found that this created a programmatic need and hardship and used this hardship as a basis for the (a) finding for both the lower floor variances and even the upper floor condominium variances in this so-called finding related to the condominium variances.

> ¶122. WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a); and

111. The BSA was also in error when making the following findings because the ¶213 reference to programmatic need suggests a reference back to circulation in ¶212, and, if so, then the BSA finding in ¶213 is highly erroneous and flawed.

> ¶212. WHEREAS, however, the Opposition argues that the minimum variance finding is no variance because the building could be developed as a smaller as-of-right mixed-use community facility/ residential building that achieved its programmatic mission, improved the circulation of its worship space and produced some residential units; and
>
> ¶213. WHEREAS, the Synagogue has fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission; and

112. These findings were made in the discussion of finding (e) as to both the upper condominium variances and the lower school variances. If ¶213 refers only to the lower floor variances, and includes circulation as a programmatic need, then ¶213 is demonstrably false. In addition, if ¶213 does not refer to the condominium variances, then no (e) finding was made for the condominium variances.

Failure To Properly Analyze The Reasonable Return Of Conforming As-Of-Right Building

113. For the Congregation to obtain variances for the upper floor condominiums, the Congregation, under Zoning Resolution § 72-21(b), has the burden of proving that an as-of-right development in strict conformity with the zoning requirements will not bring a reasonable return to the owner.

114. If the Congregation does not meet this burden of proof, then the BSA must deny the variances for the upper floor condominiums.

115. In order to attempt to meet this burden, the Congregation provided purported analyses of a conforming mixed-use building with two condominium floors (aka "Scheme A") and a conforming "all-residential" building (aka "Scheme C"). Scheme A Drawings were filed by the Applicant on April 2, 2007 (P-01335, R-000069), September 10, 2007 (P-01832, R-000421) and October 22, 2007 (P-02134, R-missing from BSA Record). Scheme C drawings were submitted on September 10, 2007 (P-01864, R-(missing from BSA Record compilation) and October 25, 2007 (P-02151, R-000625). The "all residential" building in Scheme C was incorrectly described in that it was not "all residential" and included community space; as well the "all residential" building failed to include the value of the potential basement and sub-basement areas.

116. The Congregation failed to meet its burden to show that it could not earn a reasonable return, and for that reason alone, the upper floor condominium variances must be denied.

117. Analyses of reasonable return that are based upon expert opinions that are confusing, disorganized, conflicting, and varying and that rely upon unsubstantiated and incomplete cost reports, and that reach irrational conclusions and are opposed as well by qualified expert opinion are insufficient to support a finding that an owner cannot earn a reasonable return.

118. A court need not defer to the expertise of an administrative agency when the agency's decision shows no evidence, as with the reasonable return analysis, of the application of its supposed expertise and rationality as to the material issues.

119. "Reasonable return to the owner" is a legal concept used by the New York and federal courts in assuring that property owners do not suffer an unconstitutional taking as a result of land use and zoning regulation. The use of "reasonable return" in ZR § 72-21 is to be interpreted according to case law. When the City Council adopted the Zoning Resolution, there is no evidence that it assigned to the BSA the right to depart from the accepted meanings of this phrase.

120. Analysis of the possible reasonable return from conforming as-of-right structures on the site is a key element in a zoning variance proceeding under ZR § 72-21.

121. BSA has issued formal instructions for use by Applicant for a variance under ZR § 72-21 that includes detailed instructions for the feasibility/reasonable return analysis as well as other requirements. See Detailed Instructions for Completing BSA Application ("BSA Instructions") (P-00139 also submitted as Opp. Ex. KK-1 R-004267, P-00450). Instructions for so-called feasibility studies are found at Item M of the BSA Instructions (P-00145-47, R-004273-75).

122. In Item M of the Detailed Instructions, the BSA uses the term "Financial Feasibility Study" in describing the reasonable return analysis required under ZR § 72-21(b) and under case law.

123. The BSA has admitted in response to a FOIL request by Petitioners' attorney that, other than the BSA Instructions, there are no guidelines, policy statements, or regulations of the BSA as to the reasonable return analysis. Letter dated May 7, 2008, BSA to Sugarman (P-03371, Opp. Ex. PP-104 at R-005511 responding to Sugarman FOIL request of April 22, 2008 at R-005622). . The BSA attempted to conceal these important letters from the court by excluding

them from its chronological Record, but, did not realize that these documents were included in exhibits filed by the Opposition and included in the Record.

124. The Congregation retained the services of Freeman Frazier to conduct the feasibility studies of conforming as-of-right buildings on the property.

125. Between April 2, 2007 and August 12, 2008, Freeman Frazier provided approximately 14 submissions to the BSA with a total of 298 pages and provided testimony at several BSA hearings.

126. The Congregation and Freeman Frazier had ample opportunity during the 17-month proceeding to provide reasoned, rational, and clear proof and explanations of the reasonable return from conforming as-of-right buildings.

127. A conforming as-of-right building is one that can be constructed "in strict conformity with the provisions of the [Zoning] Resolution." § 72-21(b). Under variance case law, a reasonable return analysis considers whether the owner can obtain a reasonable return using the maximum rights available under the zoning regulation. The proof must consist of a real world, rational "dollars and cents" proof.

128. The conclusions from the Freeman Frazier reports were not consistent and varied widely from report version to report version.

129. The value per square foot claimed by Freeman Frazier in the multiple versions of their reports varied between $450 per square foot and $750 per square foot.

130. The number of square feet in the subject two-floor site claimed by Freeman Frazier to be appropriate for valuation ranged from 19,755 to 37,889 square feet, rather than the 5022 square feet of sellable condominium space on the two floors being developed.

131. It is not possible to review a single Freeman Frazier report version and receive a complete explanation as to either of the as-of-right analyses described below. Freeman Frazier

uses terminology not in the zoning resolution or guidelines, and uses varying terminology to refer to the same issues or schemes.

132. Freeman Frazier uses the phrase "acquisition cost" apparently to refer to the "market value" of the land. The Guidelines refer to "market value of the property" and "acquisition costs and date of acquisition." Freeman Frazier improperly conflates the two terms. The BSA in its Decision uses the term "site value," e.g., at ¶128, rather than either the term "acquisition cost" used by Freeman Frazier or "market value" as used in the Instructions.

133. The inconsistent use of terms is intended to create complexity and make it difficult for courts to review the assertions of the Congregation and the findings of the BSA.

134. In support of the construction costs for the conforming schemes, Freeman Frazier provided incomplete, unsigned reports by the estimator of construction costs, and refused to provide the missing pages in the estimation of construction costs report despite repeated objections by opponents.

135. The conclusion by Freeman Frazier that the Congregation could not obtain a reasonable return from this prime piece of residential real estate is highly improbable, if not completely irrational.

136. The opposition retained a professional real estate valuation expert, Martin Levine of Metropolitan Valuation Services ("MVS"). Mr. Levine holds an MAI certification in real estate and provides real estate valuations for banks and insurance companies. Mr. Levine provided over 100 pages of detailed professional real estate analysis in multiple reports responding to the multiple submissions of Freeman Frazier as follows:

January 24, 2008	P-02681, R-002506
February 8, 2008	P-02785, R003630
March 25, 2008	P-03167, R-004093
April 15, 2008	P-03310, R-004254
June 10, 2008	R-004800
June 23, 2008	R-004932
July 29, 2008	P-03907, R-005210

The BSA in its decision essentially ignores the expert analysis of Mr. Levine, except for minor instances where the report was mischaracterized. When Mr. Levine testified at hearings, the BSA Commissioners had no questions to ask of him, clearly demonstrating the intention of the BSA to blind itself to the facts.

137. Mr. Levine concluded that all of the Freeman Frazier reports were highly flawed and that both the Scheme A and Scheme C conforming as-of-right buildings would earn a reasonable return for the owner whether using return on investment or return on equity.

138. Mr. Levine states in his final submission of July 29, 2008, pp 11-12 (P-03907 at P-03917-18, R-005210 at R-005220-21):

> We are both troubled and puzzled by Freeman/Frazier's reliance on their repeated statement of justification for their questionable procedures and methodology as contained within their July 8, 2008 letter (Opp. Ex. M:M-110) that:
>
> > "As stated above, in our response to a similar concern expressed in the MVS Report, the methodology utilized in our submissions is typical for BSA condominium project applications, and has been a long standing accepted practice at the BSA."
>
> It would appear that Freeman/Frazier are absolving them self (sic) from rendering expert opinion and judgment, but rather are merely processing mathematical models. By making this statement they absolve them self (sic) of professional responsibility and authority for the conclusions that result. Accordingly, the value of their opinions concerning feasibility are worthless.
>
> Repeated attempts by Freeman/Frazier to prove that this regularly shaped rectangular level site, located just off Central Park West is not economically feasible to develop within as of right zoning criteria is a notion that defies rational discussion. Through gross distortions, manipulative and questionable arithmetic, uncertain and apparent bias in the apportionment of construction costs, unsound economic assertions and conflicting value assumptions, does the applicant make a case for economic hardship. Given the enormity of the flaws, errors and misrepresentations contained within all their submissions, it should be a simple matter to conclude that granting a variance based upon economic hardship is totally without merit.

139. Mr. Levine also testified at the hearing criticizing issues such as Freeman Frazier's noncompliance with BSA guidelines, construction cost estimate fallacies and incomplete documents, exaggerated soft costs, etc. See e.g., BSA Transcript of February 12, 2008, p. 46, line 1013 (P-02810 at P-02856; R-003653 at R-003699); BSA Transcript of April 15, 2008, p. 23, line 497 (P-03245 at P-03268, R-004462 at R-004485). Every single issue raised by Mr. Levine was ignored in the Decision, save for one relating to return on equity, which received

a purely cosmetic, ex cathedra response without rational explanation. The BSA's failure to address these issues suggests that the BSA failed to apply any expertise in its conclusory finding approving the unsubstantiated and unidentified conclusions of Freeman Frazier. ¶¶141-144.

Scheme A — The Analysis Of The Reasonable Return Of Two Floors Of Condominiums

140. As part of the Congregation's initial application, the Congregation provided the first of many reports from its consultant Freeman Frazier.

141. Freeman Frazier's first report, filed with the Application on April 2, 2006 (P-01414-42, R-000133-61), contained an analysis of a conforming as-of-right Scheme A building consisting of (i) a four-floor, basement and sub-basement community house and (ii) a two-floor market-rate area on floors 5 and 6 dedicated to luxury condominiums. The building was referred to as "AOR Scheme A," although the same building in other submissions by Freeman Frazier is referred to as the "As of Right Residential Development."

142. Subsequently, Freeman Frazier revised its As-of-right Scheme A analysis in five further submissions. The following Freeman Frazier reports analyzed Scheme A: March 28, 2007 (P-01414); October 24, 2007, December 22, 2007, March 11, 2008 (P-03005), May 13, 2008 (P-03688), and June 17, 2008 (P-03688). The May 13, 2008 report did not analyze Scheme A as such, but provided an analysis of site value then used in the June 17, 2008 report to analyze Scheme A.

143. The Freeman Frazier reports reached widely divergent conclusions as to the results, raising the question as to whether the conclusions offered expert opinions of Freeman Frazier.

144. Following is a summary of conclusions reached by Freeman Frazier. (The last column is a computation using Freeman Frazier's figures: the computation multiplies (i) the built residential area in the two condominium floors times (ii) the value per square foot.)

Date	Cite	Value /sq. foot	Area	Acquisition Cost	Loss/Profit	Market Site Value Sellable 5022 sq. ft.	Built 7594 sq. ft.
Mar. 28, 2007	P-01414	$500	37,889	$18,944,000	($8,672,000)	$2,511,000	$3,797,000
Oct. 24, 2007	P-02231	$450	27,772	$17,050,000	($7,468,000)	$2,259,900	$3,417,300
Dec. 21, 2007	P-02568	$750	19,755	$22,875,000	($6,109,000)	$3,766,500	$5,695,500
Mar. 11, 2008	P-03005	$750	17,845	$13,384,000	NA	$3,766,500	$5,695,500
May 13, 2008	P-03007	$625	19,094	$12,347,000	NA	$3,138,750	$4,746,250
Jun. 17, 2008	P-03688	$625	19,094	$12,347,000	($8,757,000)	$3,138,750	$4,746,250
July 8, 2008	P-03811	same as June 17, 2008					

145. Freeman Frazier manipulated their figures to justify the conclusions sought at various stages of the variance proceeding.. In the different versions of the Freeman Frzazier reports, as the value per square foot increases, the number of square feet decreases, all keeping the project in a loss. Because Freeman Frazier uses an artificial approach to determine the site size, an approach that is unrelated to the actual number of square feet on the two floors of condominiums, the project is then forced to show a loss. The last two columns show the site value if Freeman Frazier's Sellable Area of 5022 square feet and Built Residential Area of 7594 square feet is used in the computation.

146. The supposed objective of the reports as to Scheme A was to ascertain whether the two floors of condominiums atop the community house would provide a reasonable return to the owner.

147. Freeman Frazier's reports assumed that the two condominium floors contained 7594 of built residential area and 5022 square feet of sellable area. (Freeman Frazier Report, March 28, 2008, p. 8, P-01414 at P-01422, R-000133 at R-000141) (In some versions of the Freeman Frazier reports, these figures were 5316 and 7594, respectively.)

148. MVS concluded that the 7594 figure is overstated due to including as condominium space areas that should have been allocated to the school space and that 5022 is closer to the appropriate figure. See Martin Levine Reply Statement, July 29, 2008, p. 4-5 (P-03907 at P-003910; R-005210 at R-005213).

149. Part of the Freeman Frazier analysis was to determine the "acquisition cost" of the site. (The Decision uses the term "site value.") The site value is a component of the project cost including other costs such as construction costs.

150. In the Freeman Frazier analysis, increasing the site value increases the loss and diminishes the rate of return.

151. The site value in the Freeman Frazier reports was the largest component of the costs.

152. In the various Scheme A reports, Freeman Frazier concluded that an as-of-right building would result in a loss.

153. Only by artificially inflating costs was Freeman Frazier able to "conclude" that the site could not earn a reasonable return.

154. In all five versions of the Scheme A analysis, Freeman Frazier arrived at the acquisition cost/site value by using a three-step process: (i) an estimated value of "land" or "development rights" was based upon comparables in other land sites; (ii) a determination was made as to the number of square feet of space to be valued; and (iii) the results of (i) and (ii) were multiplied together.

155. The aforesaid process is the same process used by ordinary people buying and selling apartments, homes, and land, i.e., multiplying the number of square feet times a comparable value per square foot.

156. The multiplication of value per square foot times the number of square feet does not require any expertise beyond the use of arithmetic.

157. The BSA was unable or unwilling in reviewing the Freeman Frazier studies of Scheme A to multiply the number of square feet in the two floors of condominium by the value per square foot estimated by Freeman Frazier to arrive at site value. Had the BSA exercised the expertise that it is supposed to possess and itself made the simple calculation, , the site value

would have been substantially diminished. If the diminished site value had been used, any loss would have been converted to a profit.

March 28, 2007 Report — Scheme A

158. The March 28, 2007 Freeman Frazier study concluded that the vacant land sale price was $500 per square foot based upon comparable vacant properties. (Section 2.10, P-01414 at P-01417, R000133 at R-000138).

159. In the March 28, 2007 report, rather than use the actual number of feet relating to the two condominium floors (either 5022 sq. ft. or 7594 sq. ft), the study used the "potential residential zoning area" of 37,889 square feet. Thus, the site value estimated by Freeman Frazier was $18,944,000 for the two floors, resulting from multiplying $500 per square foot times 37,889 square feet.

160. Freeman Frazier states at said Section 2.10 of the March 28, 2007 report:

> The site area is approximately 6,427 sq.ft. with a potential residential zoning floor area of 37,889 (sic) sq.ft., therefore, the acquisition cost for Lot 37 for residential use is estimated at $18,944,000.

161. Using "potential residential zoning area" was an irrational and deceptive approach to valuing the development rights pertaining to the specific "site" being valued, which was the two floors of three dimensional space available for the two condominium floors.

162. Thus, rather than use land values of $2,511,000 to $3,798,000, Freeman Frazier used the absolutely outrageous value of $18,944,000, causing the property to show a loss. The project would have shown a profit if the lower, correctly calculated, site values were used.

163. Community opponents identified this deception in a Community Objection #44 to the BSA dated June 20, 2007, p. 8 (P-01777 at P-01784, R-000263 at R-000271).

> COMMUNITY #44 .... The study states that the residential sellable area in the as of right proposal would be 5,002 sq ft., which the report then assigns a land cost of $18,944,000, or

> $3,787.29 per square foot, which is far higher than the selling price per sq. ft. of an apartment. Does this not then suggest that the land cost to allocate to residential has been greatly exaggerated, or even "cooked."

164. The BSA ignored Freeman Frazier's improper use of "potential residential zoning area" as the multiplier, but, in an apparent effort to demonstrate objectivity, the Board objected to the $500 per square foot comparable.

October 24, 2007 Report — Scheme A

165. In response, on October 24, 2007, Freeman Frazier prepared a new report, slightly changing the recipe, and reducing the per square foot value from $500 to $450, reducing the site value slightly from $18,944,000 for the two floors of space to a new value of $17,050,000, and still using an inflated site area of 37,889 sq. ft. to value 5000-7600 sq. ft. of condominium space. Letter dated October 24, 2007 from Freeman Frazier on behalf of Applicant, p. 5, (P-02224 at P-02229; R-00516 at R-000520).

166. By this time, opponents and the Land Use Committee of Community Board 7 had objected to this ridiculous approach of valuing 5000-7600 sq. ft. of space as if it were 37,889 sq. ft., where, in concept, the Congregation was selling land to the developer, but was still using most of it for the community house and grossly overstating the value of the site so as to show a loss and purportedly satisfy the § 72-21(b) finding.

167. Had Freeman Frazier and the Congregation responded by multiplying $450 times the actual number of square feet relating to the two condominium floors, the project would have shown a profit, not a loss, and there would have been no chance for the Congregation to obtain the condominium variances because the § 72-21(b) finding could not be made.

168. Evidently stung by these universal denunciations of Freeman Frazier's approach, the BSA, at its first hearing on November 27, 2007, asked that the Congregation consider only the value of the residential portion of the site. See Decision ¶128:

> ¶128. WHEREAS, at hearing, the Board questioned why the analysis included the community facility floor area and asked the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of right development;

December 21, 2007 Report — Scheme A

169. Freeman Frazier and the Congregation devised a new approach to valuing the land and arrived at a value of $750 per square foot, rather than the original $500 and then $450 per square foot. See the Scheme A Analysis at p. 8-9 of Freeman Frazier December 21, 2007 Report, p. 5, 8-9, 11 P-02557, at -61, -64, -65, -68; R-001968 at -73, -76, -77-. -80) So as to perpetrate confusion to obscure analysis and review, this report on page 11, rather than refer to a Scheme A Development, refers to "Revised As of Right Residential Development:.

170. At the same time, in a cosmetic ploy, in this version, Freeman Frazier and the Congregation reduced the number of square feet from 37,889 square feet to 19,755 square feet, yielding a land value of $14,816,000 (See page 6 of the report, Id.).

171. Yet, even then, it was erroneous and irrational to use 19,755 square feet rather than actual number of feet relating to the two condominium floors (either 5022 sq. ft. or 7594 sq. ft.).

172. Freeman Frazier did not respond to the plain meaning of the BSA request.

173. Opponents again pointed out the absurdity of this approach.

174. The BSA realized that any reasonable analysis of the two-floor condominium would show a profit. Rather than act impartially, because the BSA all along was searching for a basis to grant the condominium variances, the BSA thereafter did not pursue the issue again, ignoring a constant stream of objections from opponents and opponents' experts, and then, astoundingly, in the Decision, completely ignoring the issue of the appropriate number of square feet for valuation.

March 11, 2008

175. On March 11, 2008, Freeman Frazier was back again with another report (P-03005, R-003847), reducing the square foot valuation basis from 19,755 to 17,845 square feet.

176. Opponents continued to castigate the Congregation for its duplicitous approach and the BSA for turning a blind eye to that duplicity.

May 13, 2008

177. The May 13, 2008 report analyzed a new "acquisition cost," which was then used in the June 17, 2008 report and is discussed below. No analysis of the Scheme A was provided on May 13, 2008.

June 17, 2008
Valuing Development Rights Over The Parsonage To Value Two Floors Of Condominium Development Rights

178. In another cosmetic move, the BSA objected to the $750 figure, but gave the Congregation yet another chance to create a defensible Scheme A valuation.

179. Once again, the Congregation and Freeman Frazier returned with another recipe from their cookbook, which resulted in another slight reduction in land value, this time to $12,347,000 in the June 17, 2008 report (Freeman Frazier Report On Behalf of Applicant date June 7, 2008, p.6, P-03688, P-03694, R-004863 at R-004869) using a land value derived in Freeman Frazier's May 13, 2008 report (P-03494, R-004668).

180. The land value approach used in Freeman Frazier May 13, 2008 report was not just novel, but was completely ridiculous, disingenuous, and insulting to any rational person.

181. The May 13, 2008 report valued the remaining "allowable floor area" over the Parsonage in Lot 36. The report concluded that 19,094.20 square feet of remaining allowable floor area existed (see Section At Parsonage W/ Allowable Floor Space, Exhibit One, Freeman Frazier letter of May 13, 2008 (P-03494 at P-03510, R-004648 at R-004644) and then multiplied

that number (19,094.20) by a land value of $625 per square foot, to arrive at a site value of $12,347,000.

182. The May 13, 2008 valuation is irresponsible and absurd if it is valuing the ability for the Congregation to earn a reasonable return on the remaining two floors of space in a conforming building. As a hypothetical, if the Congregation decided to use the fifth floor for school space, under the Congregation's theory, it would not matter — the "acquisition cost" would still be the same: $12,347,000. Indeed, the further extension of this argument suggests the question with this approach: what if the Congregation wished to use all the floors of a conforming building for school space? Under the Congregation's approach, they could still value zero square feet of space at the same $12,347,000.

183. The Congregation still retains the right to engage in development of the Parsonage site, so this type of approach would have required analyzing the development of the Parsonage site. The Congregation has expressly reserved the right to develop the Parsonage space. See the group exhibit at, filed with the BSA as Opp. Ex. C on January 28, 2008 (P-00247, R-003359 as Submitted To BSA By Sugarman Affirmation of January 28, 2008 (P-00202, R-003311). See Transcript of Community Board 7 Land Use Committee, October 17, 2007, p. 135, l. 7, (P-02080 at P-02113, R-002827 at R-002961) also excerpted in Opp. Ex. C at P-00256, R-003369):

> 7 MS. NORMAN: Would it be
> 8 possible then the synagogue would come
> 9 back at a later date and suggest that
> 10 they need to use those air rights to
> 11 build above the parsonage.
> 12 MR. FRIEDMAN: Anything is
> 13 possible.

184. Most objectionable to valuing development rights over the Parsonage is that the BSA adamantly refused to inquire about or even consider the rental income being earned by the Congregation from renting the Parsonage as a single-family six-bedroom house. This is only one example of the Congregation and Freeman Frazier, acting in concert with the BSA, looking at

only the loss or cost side of the income statement, contriving creative losses throughout the zoning site, and ignoring the income side.

185. The BSA not only cast a blind eye toward the substantial Parsonage rental income, but also to the much larger, commercial rental income from the Beit Rabban School, the potential rental income (or value) from the proposed sub-basement banquet hall rental, and day care center income from its planned and greatly expanded Toddler program. See the group exhibit at P-00247-P-00256, filed with the BSA as Opp. Ex. C on January 28, 2008. See IRS filings by Beit Rabban showing $450,000 a year in rental payments at P-00478, R-004169.

Other Scheme A Errors

186. Although the approach to site valuation is the largest error in terms of dollars, other egregious errors were made in the Scheme A valuation as shown in the Levine expert analysis, cited above, and which are incorporated herein.

Freeman Frazier Not Only Failed, But Refused To Explain How Construction Costs Were Allocated To The Condominiums

187. Of particular interest, and which would objectionable even to a court applying the most relaxed evidentiary concepts, is the failure of Freeman Frazier and the Congregation to provide an explanation of the construction costs allocable to the condominiums. The construction costs were contained in a "report" by a construction estimator, McQuilkin Associates, and this is the source of the construction costs shown in the last of many versions of Freeman Frazier's Schedules A1 and B, see Freeman Frazier Letter of June 17, 2008, p. 6 (P-03688 at P-03694-95; R-004863 at R-004869-70).

188. Although the June 17, 2008 statement includes construction cost estimate for the proposed schemes (e.g., at P-03697, R-004872), the only Scheme A construction cost estimate is found attached to the December 22, 2007 report at P-02584, R-001966. The attachment is dated August 6, 2007. It is not signed or sealed and contains no indication of the schematics reviewed.

There is no explanation of how costs in this mixed-use scheme were allocated between the school and the residential areas.

189. The Scheme A and Scheme C construction cost estimates included with the Freeman Frazier December 21, 2007 report are incomplete documents and each is missing pages 3-15. See Freeman Frazier Letter to BSA, December 21, 2007 (Scheme A: P-02557 at P-02584-85; R-001968 at R-001996-97) (Scheme C: P-02557 at P-02592-93; R-001968 at R-00204-5) Opponents repeatedly pointed this out and demanded that a complete copy be filed. See e.g. BSA Hearing Transcript, June 24, 2008, Testimony of Alan D. Sugarman, p. 17, line 20 (P-03762 at P-03779, R-004937 at R-004954); Sugarman Surreply Statement of June 19, 2008 at p. 4 (P-03746 at P-03749; R-004925 at R-004928); Letter of Martin Levine dated July 29, 2008, p. 8 (P-03907 at P-03914; R-005210 at R-005217). The response from Freeman Frazier and the Congregation to these requests for the missing pages was essentially that neither the opposition nor the BSA requested the complete report. E.g. Freeman Frazier July 8, 2008 Report at p. 5, (P-03803 at P-03808 , R-005170 at R- 005175).

190. Clearly, Freeman Frazier provided false, altered, incomplete documents with the intention to mislead the BSA and opponents. This was not immediately apparent: only a year after the April 2007 submission did a neighborhood opponent see that the two-page document was part of a 15-page document, noticing the legend “page 2 of 15” at the bottom of the second page. The fact that the document was altered by deleting material pages was brought to the attention of the BSA.

191. After having been advised of this omission by the opposition (BSA Hearing Transcript, June 24, 2008, Testimony of Alan D. Sugarman, p. 17, line 20 (P-03762 at P-03779, R-004937 at R-004954)), the BSA did not ask for the missing pages, nor did it remonstrate Freeman Frazier or the Congregation.

192. Freeman Frazier and the Congregation never provided the missing pages 3-15 for the construction cost estimate for Scheme A or Scheme C.

193. Although in an administrative proceeding the strict rules of evidence do not apply, an incomplete, unsigned document prepared by an entity under the control of the party submitting the document should never be admitted or considered.

194. The BSA acted arbitrarily and capriciously for not demanding that the missing pages be supplied.

195. The Congregation, by choosing to conceal and withhold the missing 13 pages from the construction estimates included in the reasonable return analyses, destroyed any credibility in the reports and the Freeman Frazier reports should be rejected. Without the Freeman Frazier reports, the Congregation fails to establish its burden under §72-21(b).

196. Opposition expert Levine described several construction cost allocation issues for which answers are required and for which the missing pages would assist, although further information would be required.

> • The estimates improperly allocate to the condominium development the cost of construction of the caretaker's apartment.
> • The estimates appear to improperly allocate to the condominium development the cost of access stairs and service areas, though the Congregation submissions describe these as school costs.
> • The estimates provide no explanation of why the school development is not charged for the costs of the roof.

197. As to the proper allocation of space between community house and school, it is clear that the service elevator and stairs in the new building are on floors 1-4, and are needed for the school regardless of whether there were residential condominiums or not. As the final statement in support states (Statement in Support, July 8, 2008 on page 38, 2 lines from bottom (P-03823 at P-03861; R-005114 at R-005152):

"When taking into account that each floor must provide for adequate circulation and two egress points to stairs ..."

198. Yet, it appears that this space has been allocated to the condominiums, increasing both construction cost and site acquisition cost.

199. The Levine reports cited above detail other deficiencies including:

- The cost to market a mere two condominiums, not including the fee to the broker, was $198,000.
- Other issues set forth in the Levine reports including improper construction interest, excessive soft cost, double developer's profit, etc.
- The failure to follow the BSA Instructions as providing in an analysis of return on equity.

200. The Decision addresses only one of the many issues raised by Levine — the failure of Freeman Frazier to provide a return on equity analysis. Decision ¶141 to ¶144.

201. In rejecting the need for return on equity analysis, the Decision failed to mention the following in Item M of the BSA Instructions: "Generally, for cooperative or condominium development proposals, the following information is required...percentage return on equity (net profit divided by equity)." Financial Feasibility Study, Item M to BSA Detailed Instructions. ¶ 4, Opp. Ex. KK at KK-8 (P-00512 at P-00518; R-004267 at R-004273).

202. The Decision provides no reasoned analysis why a return on equity analysis was not appropriate in view of the Instructions and, considering the minimal risk involved in the sale of two highly desirable condominiums (the BSA never asked the obvious question as to whether the two condominiums might be sold to Trustees and members of the Congregation, thereby eliminating all risk).

203. As stated by Levine, Scheme A (and Scheme C discussed below), would show reasonable returns not only on a return on investment basis, but also for a return on equity basis.

204. The Decision discussion of return on equity is not only not candid, but suggests, falsely, that this was the only issue raised by opponents as to the reasonable return/feasibility reports.

205. The Decision refers, at ¶141 and ¶143, to "financial return based on profits." There is no such concept as a "financial return based on profit." That the BSA made such a simplistic misstatement reveals that the BSA did not exhibit or apply any financial or economic expertise in reviewing the Freeman Frazier reports, and, therefore, it would not be appropriate for the Court to defer to the BSA's wholly conclusory finding as set forth in ¶148.

206. The Congregation and Freeman Frazier intended to confuse and confound any analysis and oversight on its valuation of Scheme A by providing a multitude of inconsistent reports, spreading information amongst numerous different reports, changing terminology, providing incomplete documents, and not providing rational explanations. Freeman Frazier had a year prior to the April 2, 2007 filing to prepare a proper report. Subsequently, it had repeated opportunities to respond to elementary questions. The burden of proof is upon the applicant to satisfy § 72-21(b). The Congregation failed to meet its burden.

Conforming As Of Right Scheme C — The Supposedly All Residential Scheme

207. After submission of the initial financial report in April 2007, the BSA asked the Congregation and Freeman Frazier to provide an analysis of an all-residential as-of-right building on the development site (aka Scheme C or AOR FAR Developtment).

208. The analysis of the so-called all residential scheme suffers from many of the same deficiencies as existed as to the Scheme A reports.

209. In a mixed-use project such as that proposed by Applicant, where the Applicant is arguing that there has been a taking in a sense that it cannot earn an economic return, the Applicant should not be able to slice off an uneconomic piece and then claim the inability to earn an economic return.

210. Accordingly, the BSA staff properly asked for an all-residential analysis. BSA Notice of Objections, June 15, 2007, p. 4, ¶ 31 (P-01724 at P-01728; R-00253 at R-000257). In response, Freeman Frazier provided a purported analysis in its report of September 6, 2007 (P-01904, R-00289), described as "As of Right Residential F.A.R Development," but later described in other reports as "Scheme C."

211. The September 6, 2007 Scheme C building is shown as having 25,642 square feet of built residential area and 15,883 square feet of sellable area. Freeman Frazier Letter September 6, 2007, p. 7 (P-01880 at P-01886; R-00283 at R-000289). The acquisition cost is shown as $18,944,000. A loss of approximately $5 million is shown. Id.

212. Once again, Freeman Frazier played games with the acquisition cost. Rather than multiply $450 x 26,642 square feet and obtain a land value of approximately $12,000,000, Freeman Frazier contrived a value of nearly $19,000,000 by using a hypothetical site area. Making this correction alone would have made the project return positive.

213. The final Freeman Frazier report on the so-called all residential Scheme C building is in the December 21, 2007 report (filed December 22, 2007). P-02557, R-001968. That report described this scheme as “All Residential F.A.R. 4.0.”, changing the prior description.

214. Although purporting to be an all residential Scheme, the Scheme C aka All Residential F.A.R. 4.0 scheme was in fact not an all residential scheme.

215. This report used a new acquisition value of $14,816,000 and found an estimated profit of $2,894,000.

216. Had Scheme C utilized all the space for residential purposes and assigned value to the 6400 square foot sub-basement, it would have shown a substantially higher profit than $2,894,000.

217. When Freeman Frazier provided its final report, the acquisition value for all of the other schemes had become $12,347,000, but Freeman Frazier never modified the conforming

all residential Scheme C analysis of December 21, 2007, which, using the same methods of the final report of July, 2008. Doing so would have resulted in a $5,363,000 developer's profit.

218. When challenged, Freeman Frazier stated in its July 8, 2008 report at page 7 (P-03803 at 03810: R-005170 at R-005177):

> Revised Scheme C
> Mr. Sugarman is concerned that a revised Scheme C was not provided.
> We note that the BSA did not request a submission of an analysis of a revised Scheme C.

219. When challenged again, Freeman Frazier responded thusly in its final reply statement of August 12, 2008 at page 2 (P-03952 at P-03954; R-005772 at R-005774):

> Sugarman Allegation #1: Sugarman alleges that a revised Scheme C was not provided in the FFA submission of May 13, 2008, the original Scheme C having unexplained high loss factors, and not including a valuable sub-sub-basement. (Page 5)
>
> FFA Response to Allegation #1: As noted on page 7 of the July 8, 2008 Response, the BSA did not request a submission of an analysis of a revised Scheme C. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

220. The failure and refusal of Freeman Frazier to revise Scheme C was a deliberate act by the Congregation and Freeman Frazier in collusion with the BSA to conceal the profitability of Scheme C.

221. Had Freeman Frazier and the Congregation updated the Scheme C analysis with the latest reduced site value/acquisition cost, then the profit would have been $5,363,000, as compared to the $6,815,000 profit the BSA found sufficient for the Proposed Scheme, and such $5,363,000 Scheme C profit would be without taking into account the additional value and income from a residential first floor and the valuable sub-basement that was excluded by the Congregation and Freeman Frazier from the so-called all-residential Scheme C.

222. However, despite the name "all-residential," the actual analysis performed by Freeman Frazier still allocated the first floor for community use. And although the proposed

building developed the sub-basement with an enormous 6400 square foot hall, the proposed Scheme C building fails to include the same sub-basement that was included in the community space schemes.

223. Thus, the Scheme C analysis ignored over 11,000 square feet of developable real estate — 6400 square feet in the sub-basement, and 4480 square feet on the first floor.

224. An all residential FAR 4.0 building on Lot 37 using all space solely for residential purposes and using the available basement and sub-basement for rental to other tenants would result in a positive return to the owner. These factors alone, as Martin Levine shows, would result in a reasonable return.

225. This glaring error, identified by the Opposition expert Martin Levine in his July 29, 2008 Statement (P-03757 at P-03758; R-005210 at R-005211) was defended by Freeman Frazier in their last report of August 12, 2008, page 3, P-03952 at P-03995, R-005772 at R-005775 as follows:

> MVS Allegation #1: MVS alleges that FFA failed to respond the BSA's request to provide an all Residential Scheme in response to the Notice of Objections dated June 15, 2007. (Page 2)
>
> FFA Response to Allegation #1: FFA provided a response to the BSA's request on page 26 of the December 21, 2007 Response, that eliminated all community facility related programmatic needs from the building. The ground floor synagogue lobby and core remained to alleviate the circulation problems. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

226. There are two undisputed omissions in the Congregation's Scheme C analysis: failure to update the acquisition cost and failure to provide a best use all residential conforming scheme.

227. Freeman Frazier admits these omissions and, consequently, its use of the phrase "all-residential" is deceptive.

228. It is not for the BSA to advise the applicant as to when it has not proved its case. The burden is on the Congregation, not the BSA. The Congregation failed to provide this analysis, and thus cannot even make the § 72-21(b) argument.

Is It Reasonable Return To The Owner Or Reasonable Return To A Hypothetical Developer?

229. Both the case law and the zoning variance regulation concern the reasonable return to the owner, which in this case is the Congregation ("that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return" ZR §72-21(b).)

The Amount An Owner Paid For A Site Is A Reasonable Starting Point For Analyzing The Return To The Owner

230. For that reason, case law, the language of §72-21(b), and the BSA Instructions address the return to the owner as distinguished from a hypothetical third party.

231. To evaluate the return to the owner, the BSA Instructions require information such as the date of acquisition and acquisition costs.

Item M of the BSA Instructions states:

> 5. Generally, for cooperative or condominium development proposals, the following information is required: market value of the property, acquisition costs and date of acquisition;
>
> Financial Feasibility Study, Item M to BSA Detailed Instructions Opp. Ex. KK at KK-7 (P-00512 at P-00518; R-004267 at R-004273)

232. The Congregation failed to provide both the market value of the property or the acquisition cost and date of acquisition as required by Item M. The "acquisition cost" as provided by Freeman Frazier not only is an artificial contrivance, but would not seem to meet the definition of market price. It certainly does not meet the meaning of "acquisition cost" as used in Item M. Financial Feasibility Study, Item M to BSA Detailed Instructions Opp. ¶ 5, Ex. KK at KK-8 (P-00512 at P-00519; R-004267 at R-004274)

233. Case law is very clear that failure to provide the acquisition costs at which the owner acquired the property in and of itself is sufficient grounds to deny a variance where the owner claims that it cannot earn a reasonable return.

The Amount Of Cash To Be Received By The Owner Is An Obvious Measure In Computing The Owner's Reasonable Return In The As-Of-Right And Proposed Scenarios

234. Zoning Resolution § 72-21(b) refers to the reasonable return to the owner, yet the Freeman Frazier reports only discuss the return to a hypothetical developer. Under the Freeman Frazier approach, the hypothetical developer pays an acquisition cost between $12,000,000 and $19,000,000, depending on which version of the report is used.

235. In fact, all the Freeman Frazier reports assume, but conceal, that the "acquisition cost" is being paid to the Congregation as the owner.

236. Under the final Scheme C scenario of December 21, 2007, the $14,816,000 for the "acquisition cost" would result in a cash payment to the Congregation of $14,816,000.

237. Under the latest Scheme A scenario provided by Freeman Frazier, where the Congregation is able to develop its community house, the Congregation receives a cash payment of $12,347,000.

238. Under the final Revised Proposed Development scheme for the building approved by the BSA, the Congregation would receive $12,347,000 as a cash payment for the acquisition cost. Thus, in the scheme approved by the BSA, a hypothetical developer would earn $6,815,000, after making the $12,347,000 payment to the Congregation.

239. If the Congregation as owner acted as its own developer, in a Revised Proposed Development scheme, it would receive the sum of $19,162,000, which is the "return" to the owner.

240. The Congregation had stated that it would act as its own developer. One of the Congregation's trustees, Jack Rudin, is one of the largest real estate developers in New York City. P-00332; R-003449 and P-00257; P-003359.

241. The BSA was aware of these facts and failed to mention the actual financial return to the Congregation as to any of the schemes, so as to disguise what it was in fact approving.

Access, Accessibility And Circulation Are Not Hardships Under §72-21(a) Because They Do Not Result From The Strict Application Of The Zoning Regulations And Are Resolved in a Conforming As-Of-Right Building

242. In an attempt to identify a physical condition in order to support a finding under §72-21(a), the Congregation and the BSA have diverted attention by discussing the problems of access, accessibility and circulation (collectively referred to herein as the "access issue").

243. The specific hardship for the Congregation is that the sanctuary first floor is not at ground level and has an inadequately sized lobby, thus lobby space is needed in the adjoining building, as well as an elevator that stops at all levels of the sanctuary. The 1954 community house was intended to resolve these issues but did not. Resolving the issue required either rehabilitation or a new building, but only an as-of-right building.

244. The references to access are not hardships under §72-21 (a) of the Zoning Regulations for the simple reason that this alleged hardship is resolved completely by a conforming as-of-right building, without even the lower floor variances.

245. The Zoning Resolution is quite clear that any hardship upon which a variance is based must arise out of the strict application of the Zoning Resolution.

246. The mere existence of a hardship is not sufficient — there must be a logical relationship between the hardship, the Zoning Resolution, and the variance. Here, there is none.

247. In the Congregation's own words, the need to remedy alleged access and circulation issues relating to the synagogue is "the heart of its application" as stated in its June 17, 2008 filing[15].

248. To emphasize this claim, the Congregation mentions this issue on 30 separate occasions of its final version of its Statement in Support, and similarly in the four earlier versions of the report.[16]

249. The issue of access has great emotional and public relations appeal. The BSA's acceptance of this false issue would suggest that the BSA acted emotionally or cynically.

250. Yet, it is indisputable that access and accessibility issues are fully resolved by a conforming as-of-right building that provides the large lobby and modern elevator needed to resolve these problems. See Petitioners' Exhibit H attached hereto filed as Opp. Ex. GG at GG-12 (P-00465 at P-00477, R-004156 at P-004168). The areas marked in red are those that address the access and circulation issues, and involve a very small part of each floor.

251. Simple comparison of the as-of-right plans to the proposed plans shows that the access and accessibility (i.e., elevators and lobbies) are designed identically in both schemes. See "Access Comparison - Conforming AOR to Proposed, filed January 28, 2008 as Opp. Ex. FF" (P-00459 at P-00460-64; R-003600 at R-003602 et. seq.).

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[15] "... the significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application." June 17, 2008 Friedman & Gotbaum to BSA, p. 2, last line second full paragraph (P-03742 at P-03743; R-004859 at R-004860).

[16] The public relations emotional appeal is shown in this quotation attributed to Shelly Friedman in the Jewish Week, which is the same as statements made in the proceeding.

> "There are real benefits here, providing for better circulation outside the sanctuary," says Shelly Friedman, a land use lawyer who represents both Shearith Israel and Kehilath Jeshurun. "A number of services end in the sanctuary and continue downstairs in the social hall. Many of the older congregants and even younger congregants who are physically challenged literally had to be carried downstairs."

September 10, 2008 NY Jewish Week - *On The Upper West Side, A Building Battle Continues* (P-00049). Mr. Friedman neglects to mention that, without any variances, a conforming building would permit physically challenged congregants to use a modern elevator.

252. But comparison of the floor plans is not needed to establish the important point shows that the access and accessibility are designed identically in both the as-of-right and proposed schemes The opposition expert witness Craig Morrison, an AIA certified architect, stated unequivocally that a conforming as-of-right building resolved all of the access and circulation issues (Letter from Craig Morrison, Opposition Expert, January 28, 2008, P-02730, R-003282). In response, the Congregation's rebuttal expert witness, Charles Platt, its architect from Platt Byard Dovell White, acknowledged that Mr. Morrison was absolutely correct in a letter submitted February 4, 2008 to the BSA (P-02768, R-003614) and attached to this Verified Petition as Exhibit G:

> Access and circulation in the proposed and as-of-right schemes are discussed in these paragraphs. Mr. Morrison correctly points out that both the as-of-right and proposed schemes relieve the now untenable access to the synagogue. Both schemes remedy the circulation through the addition of an ADA compliant elevator adjacent to the historic synagogue building. In each scheme, the proposed elevator serves both the historic synagogue and the community facility floors of the proposed building. Unlike the existing non-compliant elevator, the proposed elevator is sized and configured to meet program needs and ADA requirements. Most importantly, it stops on all levels of both the existing synagogue and the community facility floors of the proposed building. Because the current elevator does not stop at the level of the main sanctuary, disabled congregants must now be carried up a flight of stairs to reach the main sanctuary. The proposed elevator is a necessary and required improvement to the synagogue's everyday circumstances and is used in both the proposed and as-of- right schemes.

(emphasis supplied)

253. Yet even after the definite statement of its expert witness to the BSA that access and circulation problems were resolved by a conforming as-of-right building, the Congregation's counsel persisted in hundreds[17] of false references to assert the contrary (without objection or

[17] The false assertion was stated or implied at least 30 times in each of the multiple versions of the Statements in Support filed by the Congregation, in addition to being referred to in other documents and in testimony.

question from the BSA). See Sugarman Supplemental Statement in Opposition of June 10, 2008, pp. 17-20 (P-04200 at P-04219, R-004818 at R-004837).

254. For example, in a statement repeated many times, the final version of the Congregation's Statement in Support of July 8, 2008 falsely states at page 53, last paragraph, that

> Without the waivers requested in this Application, CSI will not be able to build a Community House in a manner which addresses the access deficiencies of the Synagogue.
>
> (P-03823 at P-03876 , R-005114 at R-005167)

255. Because the access hardship is fully resolved by a conforming as-of-right building, the Decision should have ignored the access hardship. This is variance law 101. Zoning Resolution §72-21(a) is quite clear that the hardship upon which a variance is granted must result from the strict application of the zoning resolution. A conforming as-of-right building is a building that strictly applies this zoning resolution. If a hardship is remedied by a conforming building, then it is not a hardship cognizable under finding (a).

256. Petitioners repeatedly objected to the BSA as to the abusive repetition by the Congregation of the false claims concerning access and circulation. (See, June 10, 2008 Landmark West Summary of Flaws (P-03620; R-004790), where opponents identified 30 instances of false statements just in the Congregation's latest version of its Statement in Support;[18] see also, June 19, 2008, Sugarman letter brief to the BSA at page 3 (P-03746 at P-

[18] "So, why does the Applicant persist with its irrelevant assertions? Primarily, because the BSA allows them to do so. The BSA Board does not engage in questioning of the witnesses of Applicant's in such a way as to create a clear record of the facts — here the clear fact that the as-of-right and proposed buildings resolve access issues identically. One result is that 15 months and thousands of pages into this proceeding, the BSA has utterly failed to narrow the issues, which it quite clearly could accomplish if it so wished. So rather than the BSA engaging in a few minutes of careful questioning of the Applicant's witnesses and its consultants (and not only the Applicant's conclusory attorney) designed to elicit clear admissions, we have again the same irrelevant, and indeed false, statements polluting the record and creating complexity out of nothing. Unlike most administrative adjudicatory proceedings, the BSA does not allow opponents to cross-examine (sic) of the applicant's for relief." See June 10, 2008, Sugarman Supplemental Opposition Statement, n. 6, p. 16 (P-04200 at P-02418, R-004818 at R-004836).

03748, R-004925 at R-004927).[19]) At the final hearing, counsel for Petitioners confronted the BSA Commissioners as to their refusal to clear the record.

> 16 Now, in this case, the applicant has kindly stated in its last submission that access
> 17 and accessibility of hardships are the heart of its application.
> 18 In fact, it referred to it thirty times in its last submission. And, yet, the Board has
> 19 really never gone into that to figure out what they are talking about as it relates to finding
> 20 (a), which requires that connection between the hardship arising from the strict
> 21 compliance with the Zoning Resolution.
> 1 So, here we have an issue that is without question legally relevant in the
> 2 mandatory findings and the applicant says is the heart of its application. So, what do we
> 3 have in the record?
> 4 We keep asking the Board to ask and get into these issues and, frankly, I think
> 5 we're ignored.
> 6 I don't understand how this wasn't taken care of months or over a year ago where
> 7 we [unintelligible] not see it thirty times; thirty times in one submission?
> 8 So, here's the question. Can the applicant explain how a building strictly
> 9 complying with the Zoning Resolution, does not address the access and accessibility
> 10 difficulties; a hardship described by the applicant as the heart of its application.
> 11 I've never heard that question asked. Has the Chair asked that? No. Has the
> 12 Vice-Chair? No. Has Commissioner Hinkson so inquired? No. Neither Commissioner
> 13 Ottley-Brown or Commissioner Montanez? Has the applicant answered this? No.
> 14 Where is the connection of the heart of its application to this mandatory finding which
> 15 wasn't even referred to yesterday?
> 16 So, I don't know how the Board is going to make this finding (a), which is
> 17 critical, particularly as it applies to the upper buildings.
> 18 We have provided our expert architect providing information on that. We have
> 19 provided schematics, analysis, everything you can possibly do. And, interestingly, when
> 20 the opposition testifies, no one questions it. None of the Commissioners question it. The
> 21 applicant doesn't question it.
> 22 So, it seems to me that the answer to the question is there is no relationship
> 23 whatsoever between this hardship and any requested variance.[20]

257. In response, the BSA did and said nothing and did not ask the questions Instead, in its Decision, the BSA repeated the Congregation's false claim, ignoring in the hearing and in its Decision the objections of the opponents on this issue. (Decision ¶ 41).

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[19]

> "For too long in this proceeding, Applicant has fouled the record and wasted the time and energy of all by its wholly irrelevant assertions as to access and circulation. Rather than explain or respond to our detailed discussion in our June 10, 2008, brief and previously, the only response from the Applicant is to now assert 'Moreover, development of the Parsonage parcel would do nothing to remedy the significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application.' Page 2, second full paragraph, June 17, 2008 Applicant Reply Statement."

(P-03746 at P-03748, R-004925 at R-004927).

[20] June 24, 2008 Official Transcript BSA Hearing, pp. 15-16 (P-03672 at P-03776-77, R-004937 at R-004953-4).

258. Notwithstanding the overwhelming facts and in the face of the specific and repeated objections by opponents, the BSA in its Decision referred to this irrelevant issue repeatedly, sometimes directly (¶¶41, 45, 61, 72, 73, and 74), and other times indirectly, having included resolution of this "hardship" as a programmatic need or as related to "floor plates" or "obsolescences" (¶¶44, 46, 47, 50, 57, 69, 75, 76, and 122).

259. The Congregation and the Decision also base the claimed obsolescence upon the same issues of access, accessibility and circulation. In searching the record, the only obsolescence that is asserted is the fact that the existing elevator in the community house is not ADA compliant and does not stop at all floors, and that the lobby in the community house is not adequately sized or convenient — all part of the access hardship and all conditions resolved in a conforming building. The importance is that in order to satisfy the language of (a), a "physical" condition is required — and the Congregation and the BSA are trying to bootstrap the physicality into the requisite facts required for finding (a).

260. The Decision thus bootstraps the so-called physical access hardship as part of both the programmatic need and as physical obsolescence. Then, the hardship and obsolescence are conflated into programmatic need, which is then used to support both the school and condominium variances.

261. In relying upon the Congregation's claim of access and accessibility hardship to support the variance, the BSA was not confused, but rather was making a deliberate effort to mislead this Court on a basic issue and was trying to disguise the fact that variances are being provided to the Congregation solely to provide money to the Congregation, and for no other reason. Most importantly, the BSA's conduct on this issue demonstrates the BSA's lack of impartiality,

Finding §77-21(c) Lot Line Windows

262. The building initially proposed by the Congregation would have resulted in the closure of 7 windows in six cooperative apartment units in the adjacent 18 West 70th Street building, which abuts and is to the west of the development site.

263. A conforming as-of-right building would not brick up any windows in 18 West 70th Street. See Graphic of Images, Exhibit C, P-00434, R-003571.

264. Although initial filings of the Congregation suggested that 18 West 70th Street windows would be impacted (see P-01443-44 ; R-000162-63) as filed by the Congregation), the fact that a conforming building would not block up windows was concealed from the BSA.

265. The drawings filed by the Congregation did not show windows in the 18 West 70th Street building's eastern face. See, Drawing AOR-3 dated March 27, 2007, P-01335 at P-01338; R-000053 at R-000072.

266. After complaints from 18 West 70th Street condominium owners and other opponents, the BSA staff required the Congregation to show on its drawings the windows being blocked by the proposed building.

267. In the drawings filed by the Congregation on October 22, 2007 at P-4A, the Congregation finally showed the windows on the proposed scheme, but omitted the outline of an as-of-right building. Thus, the Congregation continued to obscure the fact that a conforming building would block no windows in 18 West 70th Street. Within days, the Land Use Committee of Community Board 7 voted to deny the upper floor condominium variances. See Minutes of Community Board Land Use Committee, November 19, 2007 (P-0235). Report of Community Board Land Use Committee, November 19, 2007 (P-02376; R-002979):

> Most importantly, the proposed height and setback variances will substantially impair the use of a portion of the adjacent property. These variances, if granted, would allow a building to abut 18 West 70th Street in such a way as to block entirely seven lot line windows in that building. Moreover, the increase in building height from a permitted 75 feet to 105 feet will exacerbate the

> reduction in light and air enjoyed by residents whose windows face a courtyard on the east side of West 70th Street. Community Board 7 believes that it would be an abuse of the variance process to permit one landowner to exceed zoning restrictions at the expense of its neighbors. The blockage of lot line windows and, to a somewhat lesser extent, the reduction of light and air in the courtyard do not constitute mere inconveniences, but, in a very real sense, a taking of property in a way which the zoning resolution was designed to prevent.

268. When plans for the proposed building were submitted by the Congregation to the LPC, the plans showed no windows and the LPC was never apprised of the fact that a conforming building would not block windows in 18 West 70th Street, but the proposed building would block windows. Thus, when the LPC approved the proposed building, it was not aware of that fact.

269. No laws are violated by the lot line windows in 18 West 70th Street. Thus the windows are not illegal.

270. If a building were constructed by the Congregation without a variance and blocked the lot line windows in 18 West 70th Street, then such a building would be illegal.

271. The Congregation in its variance request was effectively asking the BSA to make an otherwise illegal act legal, which legalized act would allow the lot line windows to be blocked.

272. The Board avoided making actual factual findings relating to the 18 West 70th Street windows, merely repeating assertions of the opposition and the Congregation.

> ¶188. WHEREAS, the Opposition contended specifically that the proposed building abuts the easterly wall and court of the building located at 18 West 70th Street, thereby eliminating natural light and views from seven eastern facing apartments which would not be blocked by an as-of- right building; and
>
> ¶192. WHEREAS, nonetheless, the Board directed the applicant to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows than originally proposed; and
>
> ¶193. WHEREAS, the applicant submitted revised plans in response showing a compliant outer court; and

273. Although the BSA seems to claim that §72-21 (c) issues were not raised, the BSA, as indicated in ¶192, required the Congregation to create courtyard that affected the windows in the rear of 18 West 70th Street that would be completely blocked by an as-of-right building

274. The Congregation submitted a drawing, Proposed Lot Line Window Diagram, on March 11, 2008 (Drawing P-4A rev. dated March 11, 2008, P-03041 at P-03044; R-0003890 at 003897 - incomplete replication) and refiled May 13, 2008 (P-03518 at P-03523, R-004672 at R-004692). This is a section drawing. The drawing fails to show the outline of a conforming building so as to disguise the impact of the proposed building when compared to a conforming building.

275. The Congregation did not submit any three-dimensional drawings of the proposed building showing the windows and the so-called compliant courtyard.

276. The BSA and the Congregation collaborated to create a record which obscured the fact that the similarly situated lot line windows in the front of the building would still be bricked up.

277. The BSA, by forcing the Congregation to reduce the size of the condominiums in the rear and to create a "courtyard" that would prevent the rear windows from being bricked up in effect acknowledged that the proposed building would substantially impair the appropriate use of adjacent property and would be in conflict with §72-21 (c).

278. The BSA term "compliant outer court" is not found in any zoning resolutions and is a misleading term, since there will remain non-complying setbacks on the easterly side of these floors.

279. The so-called "compliant outer court" will not alter the fact that the extra condominium floors will also block the air and light into a courtyard abutting the lot line, and into the windows facing the courtyard.

280. The BSA provided no rationale whatsoever as to why it required a courtyard to keep the three windows in the rear unblocked, but ignored the situation as to the four lot line windows in the front portion of the lot.

281. The BSA therefore acted in an arbitrary and capricious manner by providing relief to the apartments in the rear of 18 West 70th Street, but not to the front apartments on the eastern side of the building.

282. The BSA required the Congregation to provide the courtyards in the rear because the variances extending the upper condominium floors to the rear were in conflict with Zoning Resolution §72-21(c), which bars granting variances that adversely affect adjoining property owners.

283. It was an abuse of discretion and arbitrary and capricious for the BSA to require courtyards in the rear of the building but not to require a courtyard for the identically situated apartments in the front part of the eastern face of the building.

284. The variances affecting the windows are unrelated to any programmatic need of the Congregation.

285. Petitioner Lepow owns two of the three apartments that have windows in the front part of the eastern face of the building, and the apartments will lose light and air and views of Central Park and will be adversely affected by the variances.

286. The variances affecting the windows are unrelated to any programmatic needs of the Congregation.

287. The variances are a subsidy to the trustees and members of the Congregation since the effect and purpose is to provide a monetary benefit to the Congregation. The effect of the variances is to transfer value from Petitioner Lepow personally into the pockets of Congregation members, who will not have to contribute to a building fund like members of other religious congregations.

288. Accordingly, it was arbitrary, capricious, erroneous and irrational for the BSA to make the §72-21(c) finding as to the upper floor condominiums because it ignore the direct impact upon the cooperative apartments in 18 West 70th Street, especially the lot line windows in the front of the building.

The Respondent Chair And Vice Chair Held An Improper Ex Parte Meeting Just Prior To The Commencement Of The Proceeding

289. The Congregation waited for over a year after the 2006 LPC approval to file its application for variances with the BSA. In the meantime, the Congregation held an ex parte meeting with the Chair and Vice-Chair of the BSA. See BSA Meeting Record, November 8, 2006 (P-01245), attached to this Verified Petition as Exhibit D.

289a. The Respondent City when compiling the BSA Record assumed, improperly, that documents relating to the improper November 8, 2006 ex-parte meeting and requests for recusal were not part of the record, even though the matters discussed at the meeting concerned the same project as to which the LPC Certificate of Appropriateness applied, and as to which was submitted first to the DOB and then to the BSA, and even though the matter was discussed by the Respondent Chair Srinivasan at the first BSA hearing of November 27, 2007 at p.1 (P-02440 at P-02441; R-001726 at R-001727). The following documents filed by Petitioner with its intial Petition related to the improper ex-parte meeting and the recusal request were omitted by the BSA from the BSA Record served December 2, 2008:

01199-01200	September 1, 2006	September 1, 2006 Letter Sugarman to BSA Objecting to BSA Variance and Inquiring as to Status
01238-01239	September 1, 2006	September 1, 2006 Sugarman to BSA FOIL Request and Status
01242-01242	October 13, 2006	October 13, 2006 Letter from Friedman & Gotbaum re Upcoming ex parte Meeting
01243-01243	November 3, 2006	November 3, 2006 Letter from Freidman & Gotbaum to BSA Enclosing Plans of Proposed Building for Improper Ex Parte Meeting
01244-01244	November 8, 2006	November 8, 2006 BSA Memorandum Scheduling Ex Parte Meeting
01245-	November 8, 2006	November 8, 2006 Sign In Sheet for Improper Ex Parte Meeting at

01245		BSA with Two BSA Commissioners and Entire Applicant Team
□01252-01252	November 14, 2006	November 14, 2006 Letter BSA to Sugarman FOIL Response
□01246-01251	November 14, 2006	November 14, 2006 Documents Sent to Sugarman from BSA After Ex Parte Meeting of November 8, 2006
□01201-01206	November 15, 2006	November 15, 2006 Documents Provided By BSA to Sugarman re FOIL - Ex Parte Meeting
□01207-01209	November 20, 2006	November 20, 2006 Letter Sugarman to BSA re Ex Parte Meeting
□01261-01263	November 20, 2006	November 20, 2006 Sugarman Letter to BSA re Ex Parte Meeting
□01253-01257	November 27, 2006	November 27, 2006 Letter BSA Counsel to Sugarman Re FOIL
□01210-01211	December 18, 2006	December 18, 2006 Sugarman to BSA FOIL Ex Parte Meeting Notes
□01258-01259	December 18, 2006	December 18, 2006 Letter Sugarman to BSA Counsel Re Notes of Improper Meeting
□01212-01212	December 19, 2006	December 19, 2006 Sugarman FOIL Request to BSA
□01260-01260	December 19, 2006	December 19, 2006 Letter from Sugarman to BSA FOIL Request
□04087-04095	April 10, 2007	Opp. Ex. PP-14 Request for Recusal April 10, 2007
□01539-01545	April 10, 2007	April 10, 2007 Sugarman Letter to BSA Srinivasan and Collins Requesting Recusal
□01546-01578	April 17, 2007	April 17, 2007 BSA to Sugarman Response Letter with Documents
□01579-01579	April 19, 2007	April 19, 2007 Letter from BSA to Sugarman re Recusal
□01648-01651	April 24, 2007	April 24, 2007 Letter to NYC Boards of Standards and Appeals re Freedom of Information Law
□01605-01637	April 25, 2007	April 25, 2007 Letter Mulligan to Sugarman re FOIL December 19, 2006
□03371-03372	May 5, 2007	May 5, 2007 BSA to Sugarman FOIL Response re (b) Regulation
□01658-01658	May 9, 2007	May 9, 2007 Letter from Public Advocate to Sugarman
□01659-01660	May 10, 2007	May 10, 2007 Letter BSA to Sugarman Denying FOIL Appeal
□01671-01672	May 29, 2007	May 29, 2007 Letter from BSA to Public Advocate Re Recusal
□01240-01241	September 14, 2007	September 14, 2007 Landmark West FOIL Request to BSA
□02070-02070	October 3, 2007	October 3, 2007 Letter Public Advocate to Sugarman
□02079-02079	October 17, 2007	October 17, 2007 BSA to Public Advocate
□02323-02324	November 7, 2007	November 7, 2007 Letter Margaret Stix to Dick Gottfried Re Ex Parte Meetings
□02327-02328	November 14, 2007	November 14, 2007 Sugarman to BSA re Stix Letter re Recusal

□

290. The complete details as to the meeting and the legal issues raised thereby are described in Petitioners" Exhibit I attached to this Petition. See Letter of Alan D. Sugarman dated April 10, 2007 (P-04088). The statements in the letter are incorporated herein and, for the sake of brevity, will not all be repeated

291. On September 1, 2006, Alan Sugarman wrote a letter to Respondent Srinivasan expressing opposition to the Congregation's project, which had been approved by LPC on or about March 14, 2006. P-01199. The letter also requested documents under the Freedom of Information Law.

292. Respondent Srinivasan had also received a letter or letters from other opponents to the project.

293. On November 8, 2006, Respondents Srinivasan and Collins held a meeting at the offices of the BSA with the Congregation's representatives, as shown by the BSA Meeting Record. P-01245. Present at the meeting were said Respondents, Shelly Friedman and Lori Cuisinier (counsel for the Congregation), Jack Freeman of Freeman Frazier (real estate consultant for the Congregation), Ray Dovell and Kathryn Growley of PBDW (architects for the Congregation) and three BSA staff members.

294. The meeting was confirmed by Friedman & Gotbaum on October 13, 2006 in a letter to Respondent Srinivasan on October 13, 2006.

295. On November 3, 2006, Friedman & Gotbaum delivered to respondent Srinivasan proposed and as-of-right plans for the proposed Shearith Israel development. P-01243.

296. In most material respects, the plans submitted to the BSA on November 3, 2006 were substantially the same as the plans submitted by the Congregation to the BSA with its application of April 2, 2007, which plans, as far as zoning envelope issues, were the same as those approved by the LPC on March 13, 2006.

297. Respondent Srinivasan did not invite Mr. Sugarman and other opponents known to Respondent Srinivasan to the November 8, 2006 ex parte meeting.

298. After the November meeting, the BSA responded to the FOIL request and provided the limited documents referred to above concerning the ex parte meeting.

299. Sugarman then sent a FOIL request to the BSA asking for information about what occurred at the meeting, including notes of the participants, which request was denied. One of the grounds for denial was that providing the records would interfere with judicial proceedings under FOIL § 87.2. See Letter of November 27, 2006 to Sugarman. P-01253.

300. On April 10, 2007, after the application was refiled by the Congregation, Sugarman immediately requested that Respondents Srinivasan and Collins recuse themselves on account of the highly improper ex parte meeting, for the reasons set forth in detail in the April 10, 2007 letter. P-04087. (Also filed as Opp. Ex. PP-14 (P-04807; R-005511 at R-005638).

301. In a letter dated November 7, 2007 (P-02323), Margaret Stix, BSA General Counsel, responded to a letter from Assemblyman Dick Gottfried concerning the ex parte meeting. Stix claimed that the meeting was not improper because the application had yet to be filed. This is similar to stating that is allowable to have an ex parte meeting with a judge to discuss a case that will be filed, but not after the case is filed.

302. At the first hearing of November 27, 2007, the Respondent Srinivasan stated she would not recuse herself. Transcript, BSA Hearing, November 27, 2007 at p.1 (P-02440 at P-02441; R-001726 at R-001727). Respondent Collins never responded at all to the April 10, 2007 request for recusal.

303. Neither Respondent Srinivasan nor Respondent Collins has ever explained the content of the meeting of November 8, 2006.

No Deference Should Be Paid To The Findings Of The BSA In This Proceeding

304. To the Congregation, a BSA proceeding is nothing more than "a colloquy between the Applicant and the Board, with public input, to explore all aspects of the case." June 17, 2008 Friedman & Gotbaum Reply, p-1, (P-03742, R-004859). According to the Applicant, the BSA is the "easier agency". October 17, 2007 CB7 Land Use Committee Hearing Transcript, p. 15, line 11(P-02080 at P-02083; R-002827 at 002841), (which is to respond to the "the imprimatur of the Bloomberg administration") Id. at p. 8, line 18 (P-02081; R-002834).

305. According to the Applicant, the BSA has no powers to question a nonprofit's description of its programmatic need, and further that:

> "Accordingly, we ask that none of the material submitted by the opponents, whether in oral testimony at the hearings on this application, in direct written submissions or in written response to the applicant's papers, such as the material in the Opposition Papers challenging Shearith Israel's statements of programmatic need, be permitted to enter the Board's deliberations with regard to the required findings."

August 12, 2008 Friedman & Gotbaum Reply Statement in Response, p. 9, first full paragraph (P-03973 at -82; R-005752 at -61).

306. The BSA in all of its statements and actions clearly shares this perspective. Opponents to Applications before the BSA are warned that "Please understand that the applicant has paid a fee and is prosecuting the application. So applicants and their witnesses are entitled to speak longer than three minutes" but not opponents. (BSA Guidelines For Hearing Attendees, P-00154). Opponents are merely tolerated as an inconvenience by the BSA - the professional architects, financial and real estate experts who appeared to testify against the variance application were not questioned and treated with condescension by the BSA.

307. The BSA did not ask questions that would embarrass the Congregation, such as why the Toddler program was first raised in December 2007 and why the earlier plans for the second floor never mentioned the toddler classrooms, but instead showed offices. The BSA

would not question the Applicant as to how much it would cost to fix its access problems by remodeling the elevator, and why the Applicant had not addressed the issue since 1954. The BSA would not question the Applicant was to what its financial lease arrangements were with the tenant school. The BSA would not question the Applicant as to the missing pages from the construction estimates and as to how allocations were performed. The BSA would not question the Applicant as to why the Scheme C all-residential analysis was never completed. The BSA would not question the Applicant as to why the caretakers apartment could not be located on the fifth or sixth floors. The BSA would not disclose what it discussed with the Applicant at the November 8, 2006 improper ex-parte meeting.

308. Opponents to Applications to the BSA may speak, but are not allowed to ask questions of the Applicant — completely eliminating the ability to cross-examine Applicants on any issues of fact. Although the BSA has the right to subpoena witnesses that might clarify assertions of an Applicant, it does not exercise that power. (See Decision in *Carroll v. Srinivasan*, Index No. 110199/07, N.Y. Sup. Ct. (February 7, 2008) discussing New York City Charter, Chapter 45, City Administrative Procedures Act, § 1046 Adjudications, reproduced at P-00170) (P-00183).

309. The Board is authorized to "administer oaths and compel the attendance of witnesses" (New York City Charter, Chapter 27, Board of Standards and Appeals, § 663) (P-00163), yet it fails to exercise either of these powers. The Board, instead of administering oaths, relies largely on conclusory statements of counsel for applicants and ignores and indeed condones false statements.

310. Instead of taking steps to assure the truth, accuracy, and completeness of the representations and facts made to the BSA, the BSA does the opposite. In this proceeding, it asked the Applicant to remove from its supporting statement the accurate representation by the Applicant that the condominium apartments were intended to provide economic support for the

community facilities and other religious programmatic needs of the applicant. At the same time, despite overwhelming evidence and admissions by the Applicant, the BSA allowed the Applicant to repeatedly assert that the upper floor variances were needed to resolve programmatic needs, never questioning the Applicant on the issue, and permitted this patent falsehood to remain in the Applicant's supporting material.

311. Where, as here, an Applicant submits a poorly substantiated Application, the Board extends itself to allow the Applicant to submit and resubmit is application material, with one do-over after another.

312. Opponents to Applications to the BSA have no procedural due process. Opponents are not allowed to intervene as parties, and thus are accorded no rights of subpoena or cross-examination, as is permitted to parties under City Charter § 1046(c). (P-00170). See *Carroll v. Srinivasan*, No. 110199/08, February 7, 2008, N.Y. Sup. Ct. (P-00183).

313. Thus, important questions just were not asked, and then the BSA ignored the issues in its Decision, issues such as the site area and site value, the income from Beit Rabban, the failure to ask for the missing construction estimate pages, and the income from the Parsonage.

314. Exhibiting their schizophrenic world view, the Respondents justified the ex parte meeting by on the one hand claiming that the BSA was not a quasi-judicial agency and that the application had not been filed yet, but then seeming to acknowledge that such a meeting would have been improper, perhaps, if the application had been filed, and, then, confused as to what type of body or proceedings, arguing in response to FOIL requests that its deliberative processes were exempt from FOIL and refusing to provide information as to the ex parte November 8, 2006 meeting. If the meeting was deliberative, then it was improper; if the meeting was not deliberative, then all notes taken at the meeting should have been disclosed in response to FOIL requests.

315. In further demonstration of its cavalier approach to due process in procedure, the Board in this proceeding repeatedly ignored the law and its own rules.

316. It commenced the proceeding with improper and incomplete documentation of the action of the DOB.

317. Once this was pointed out, Applicant refiled with the DOB and again submitted the DOB objection to the BSA signed by an unauthorized DOB officer and with improperly dated and unstamped drawings from the Applicant.

318. The BSA ignored its rule that a hearing would not be scheduled until there was a determination that the application was complete.

319. It then scheduled the first hearing without providing the required 30-day notice.

320. Just a few days before the Board's decision in this case, the Applicant for the first time provided legal case law to support its position in a reply, having never provided it previously –and without providing opponents any opportunity to respond.

321. Then, when the time came for the Board's decision, rather than vote on each finding for each variance as required by law, at the meeting of August 26, 2008, counsel for Applicant made a motion to the Board to approve the application, and the BSA Commissioners each voted Aye, but there was no resolution before the Board. –None. And it was only days later when the resolution appeared and was filed with the BSA clerk. Transcript of BSA Vote on Application held on August 26, 2008, R-005794. Clearly, on August 26, 2008, there was no compliance by the BSA with this dictate: "The board shall keep minutes of its proceedings, showing the vote of each member upon every question." New York City Charter, Chapter 27, Board of Standards and Appeals, § 663 – Meetings, P-00163.

322. The BSA will now ask that the Court provide deference to the determinations from this caricature of an adjudicative or deliberative process.

323. On account of the manner in which the BSA conducted itself in this proceeding, close scrutiny should be paid as to the findings of the BSA. On this record, little or no deference should be paid to the determinations of the BSA.

324. Based upon the foregoing, the following are specific allegations as to the arbitrary and capricious nature of the Decision, which lacked rationality, and was not consistent with the law.

FIRST CAUSE OF ACTION - NO FINDINGS OF FACT TO SUPPORT MATERIAL ISSUES

325. The BSA failed to make findings of facts as to material issues in violation of § 72-21. The BSA failed to make findings of facts and relied upon assertions and claims made by the Congregation without finding that the assertions or statement were fact. Findings are required to be supported by substantial evidence, but as described above, many findings cited no evidence at all. The absence of findings of facts to support the mere conclusory ultimate findings which parrot the statutory requirements requires vacating and annulling the decision.

SECOND CAUSE OF ACTION- SPECIFIC FINDINGS

326. Zoning Resolution 72-21 requires that the "decision or determination of the Board shall set forth each required finding in each specific grant of a variance" There were seven separate variances and the BSA failed to provide the required specific findings for each variance. Conclusory findings are not sufficient to support the findings.

327. Furthermore, the Decision itself shows, and as revealed by the transcript for the final meeting approving the variances shows (R-005794), the BSA commissioners did not vote uponthe specific findings, voted prior to the preparation of the decision, and voted on all variances in one vote, which does not satisfy §72-21.

THIRD CAUSE OF ACTION - FINDINGS (A) and (B) LOWER FLOORS

328. The findings failed to identify physical conditions arising out of the strict application of the zoning resolution as to the lower floor variances

329. Because the alleged hardships relating to access, accessibility and the alleged obsolescence are resolved in a conforming as of right building, these alleged hardships may not be used to support an (a) finding for the lower floors.

330. Because the alleged hardship relating to extending the classrooms on floor 3 and 4 to add a total of 1000 square feet could be resolved by moving the caretaker's apartment to the fifth floor of a conforming as-of-right building, the hardship alleged by the Congregation is not "unnecessary" or a "practical difficulty" since the Congregation provided no facts to show why the apartment could not be moved up one floor , except that the Congregation wishes to use the fifth floor for market rate luxury condominiums. Further, nothing in the Decision would prevent the Congregation from housing the caretaker in another location, such as the Parsonage now being rented as a residence, and converting the caretaker's apartment to a condominium.

331. Because the Congregation never provided any testimony other than conclusory statements from counsel as to the need to use the second floor for 60 toddlers rather than a smaller number, there was no showing of an inability for the Congregation to meet its programmatic needs.

332. Because the initial plans of the Congregation and previous plans supplied to the LPC showed office space rather than toddler space in the rear of the second floor and the so-called compelling need for 60 toddlers was expressed by counsel for the Congregation in December 2007, having never been mentioned in the 6 years of prior proceedings and not having been mentioned by the Rabbi and Education Director in their testimony of November 27, 2007 before the board, it was arbitrary and capricious and an abuse of discretion to accept the

unsubstantiated claims for the hardship. The evidence is clear that the Toddler program was an artifice to fabricate a programmatic need.

333. Because the BSA failed to make a finding that there was no reasonable possibility, based upon the record, that the 1500 square feet of uses alleged by the Congregation could be accommodated on the fifth and sixth floors of the same building, then there is no basis for using programmatic need as a substitution for the (b) finding.

FOURTH CAUSE OF ACTION - FINDING (D) AND (E) LOWER FLOOR VARIANCE

334. Because the desire to not use the fifth and sixth floors of a conforming as of right building or in other parts of the building to accommodate the 1500 square feet, is a decision of the Congregation and not compelled by an programmatic or other reasons, the alleged difficulty relating to the lower floor variance is completely self -imposed.

335. Similarly, because a conforming as of right building could accommodate the needs alleged as to the lower floor variances, it was an abuse of discretion for the BSA to find, if it did, that the lower floor variances are the minimum variances needed as required by §72-21 (e).

336. The BSA acted irrationally, arbitrarily and capriciously, by making the findings related to §77-21(d) and §72-21 (e) as to the lower floors.

337. Further, the BSA abused its discretion in not pressing the Congregation to provide any reason for not utilizing the fifth and sixth floors to satisfy programmatic need, other than the need for income, a reason the BSA admits is not a qualifying reson under the Zoning Resolution.

FIFTH CAUSE OF ACTION - FINDING (A) - ALL VARIANCES

338. In making the conclusory findings as to the findings required under §77-21(a), the Decision failed to make the necessary specific factual findings to support the required element

that (i) the physical condition must cause the hardship or difficulty and (ii) the hardship or difficult must arise out of the strict application of the zoning resolution.

339. A hardship that is resolved by a conforming as-of-right building is accordingly not a hardship or difficulty that meets the requirement of §77-21(a), and, accordingly, any alleged physical condition causing such hardship does not meet the requirement of §77-21(a).

340. The decision cites obsolescence as a physical condition under §77-21(a), but makes no finding as to the hardship or difficulty arising therefrom. If the hardship or difficulty is "access, accessibility, and circulation" to and within the sanctuary, then such hardships or difficulties are resolved by an as of right building, and, accordingly do not meet the requirements of §77-21(a).

341. The Decision further cites other physical conditions as creating a hardship or difficulties relating to "access, accessibility, and circulation". For the same reasons just stated, that the hardships or difficulties are resolved in an as-of-right building, those other physical conditions do not meet the requirements of §77-21(a).

342. The Decision further cites resolution of hardships or difficulties relating to "access, accessibility, and circulation" as a programmatic need. Since the underlying hardship or difficulty is resolved by an as-right building, then the programmatic need is satisfied. Further, if the programmatic need is satisfied by an as-of-right building, then a minimum variance under §77-21(e) would be no variance.

343. In support of the §77-21(a) finding for the upper floor condominium variances, the Decision finds:

> ¶122. WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a);

Although referring to "and in light of the Synagogue's programmatic needs", there is no supporting factual finding whatsoever to identify said "programmatic needs" creating hardships relating to the upper floor variances. If the "programmatic needs" is referring to that related to "access, accessibility, and circulation", then it fails as a supporting factor as to the upper floor variances.

344. As a result of the lack of specificity as to what the Decision is referring to as "programmatic need" and the reliance upon said unknown programmatic need, then ¶122 of the Decision must be stricken and then there is no support in the Decision as to the §77-21(a) finding for the upper floor condominium variances.

345. Further, as to the upper floor condominium, the Decision cites other alleged hardships or difficulties relating to the landmarking of the zoning site and the split lot. Standing alone, absent any physical condition creating any hardship, the alleged hardship or difficulties are not physical conditions satisfying §77-21(a). Under the rationale, all split lots necessarily create a financial hardship in that the owner cannot fully develop the entire lot to meet the owner's financial desires. Not making more money is not a hardship. Thus, accepting the Decision's rationale, not only would all split lots result in variances, but all zoning restrictions would be conditions supporting a hardship, because all negatively impact value in one way or the other. Further, the specific provisions of the Zoning Resolution as to split lots could just be ignored.

346. As to the landmark hardship, it is not a physical condition and moreover the Congregation did not exhaust its administrative remedies.

347. For this and the other reasons set forth above, there is no rational basis of the §77-21(a) finding, which finding is not supported by law and is arbitrary and capricious.

SIXTH CAUSE OF ACTION - REASONABLE RETURN - UPPER FLOOR VARIANCES

348. As the facts described above state, the Congregation failed, after18 months and voluminous submissions, to support a finding that it could not earn a reasonable return from the development of either a two floor condominium or an all residential building. Thus, the Congregation utterly failed in showing that the zoning regulations in any way prevented it from earning a reasonable return.

349. Moreover, the Congregation, as a religious non-profit, is able to satisfy its programmatic needs from the conforming development of the property, and, therefore there is no taking that would in any way suggest that the Congregation's property rights were improperly taken by the land use regulations.

350. That the Decision ignored any discussion of the many well founded objections as to the reasonable return studies, demonstrates the capricious and arbitrary nature of the findings, if they indeed exists, as to reasonable return.

351. The basis apparently accepted by the Decision as to the determination of site area and site value was irrational.

352. The findings as to §72-21(b) for the reasonable return were entirely conclusory - the paragraphs in the Decision referring to statements and assertions are not findings of fact as to those statements and assertions.

353. It was improper for the BSA to accept as a basis for its reasonable return conclusory finding altered and incomplete construction cost estimates.

354. The reasonable return analysis did not comply with the BSA's own written guidelines and was not consistent with applicable law.

SEVENTH CAUSE OF ACTION - FINDING (C)

355. The upper floor condominium variances clearly have an adverse consequence on the adjoining properties as to windows, light, and air.

356. It was arbitrary and capricious for the BSA to require redesign of the proposed building so as to not block rear lot line windows, but to ignore identically situated windows in the front of the building.

357. It was admitted by the Congregation that the proposed building would light and sun on the narrow West 70th street, the specific interest protected by the zoning regulations which the variance approval disregarded. The BSA substituted its own views for the legislative finding inherent in the adoption of mid-block zoning.

358. The Decision failed to note clearly that the sanctuary building essentially conformed to the mid-block height and setback restrictions of mid-block zoning, making the non-complying tall building even more discordant and undercutting the Decision's rationale that the proposed building would not alter the essential character of the neighborhood.

359. For these and all the other reasons set forth below, the BSA's findings as to §72-21(c) for the upper floor variances should be vacated and annulled.

EIGHTH CAUSE OF ACTION - LACK OF IMPARTIALITY

360. The BSA actions as described above including the ex parte meeting, the deceptive manner in which relevant issues were addressed in the Decision, the manner in which the proceedings below were conducted, the ready acceptance of false and inconsistent information from the Applicant Congregation as the basis for its decision, and the other facts set forth above show a lack of impartiality and a wholly capricious proceedings.

361. As a result, the Court should not accord any deference to the findings of the BSA below and should not defer to the expertise of the BSA.

CONCLUSION

For the foregoing reasons, the determination of the BSA should be annulled and the following relief should be granted:

362. Declaring as arbitrary, capricious, illegal, unlawful, and irrational the Decision of the Respondent Board of Standards and Appeals of the City of New York ("BSA") in Calendar No. 74-07-BZ, issued August 26, 2008, and filed August 29, 2008, granting height and setback variances under Zoning Resolution §72-21 to the Respondent The Trustees of the Congregation Shearith Israel (the "Congregation") for the construction of a mixed use building at 8-10 West 70th Street in the Borough of Manhattan, on appeal from an alleged determination of the Manhattan Borough Commissioner of the New York City Department of Buildings ("DOB") (the "Variances");

363. Annulling, vacating, and reversing the Decision;

364. Should the Court in its discretion determine that the Decision be remanded for further proceeding, ordering that in any proceeding, the Respondent BSA be ordered to allow Petitioners to intervene, to question representatives of the Respondent Congregation as to material issues, to propound written questions and request for documents, and to have the other rights of a party to the proceeding and declaring that, upon the evidence, the Respondents BSA Chair MEENAKSHI SRINIVASAN and BSA Vice-Chair CHRISTOPHER COLLINS may not participate in any rehearing as a result of improper ex parte meetings with the Respondent Congregation and the lack of impartiality of said Chair and Vice-Chair in the proceeding below; and

365. Any further relief this Court deems just and proper.

Dated:

New York, New York
September 23, 2008 as Revised January 2, 2009 - V-2

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Attachments to Revised Verified Petition:

Exhibit A	Reformatted BSA August 26, 2006 Decision with Numbered Paragraphs	P-00019	See R-000001-R-000024
Exhibit B	Table of Contents to Appendix A — 13 Volumes - Revised January 2, 2009 to Show BSA Record References		Not in BSA Record
Exhibit C	Color 3-D Graphics of Project	P-00434	R-003571

		P-02429 P-02430	R-001833 R-001834
Exhibit D	BSA Meeting Record November 8, 2006 Improper Ex Parte Meeting	P-01245	Not in BSA Record
Exhibit E	June 27, 2007 Community Objections to BSA	P-01777	R-000263
Exhibit F	July 29, 2008 Letter to BSA of Martin Levine, Metropolitan Valuation Services	P-03907	R-005210
Exhibit G	Letter Dated February 4, 2008 from Charles Platt to BSA Re Access Hardships Being Resolved by Conforming Building	P-02768	R-003611
Exhibit H	Graphic Showing Areas of New Building Addressing Access and Circulation and Showing Lower Floor Variances Filed as Opp. Ex. GG-12 and GG-10.	P-00477, P-00475	R-004156 at P-004168 R-004156 at P-004166
Exhibit I	Letter of April 10, 2007from Alan D. Sugarman to Srinivasan and Collins Requesting Recusal	P-04088	R-005511 at R-005638
Exhibit J	Programmatic Drawings Floors 2, 3, 4	P-02606-08	R-002009-R-002012
Exhibit K - new 1/2/09	Analysis of Consent Forms Submitted by Respondent BSA on December 2, 2008 in the BSA Record.	P-04244-59	SEE 005189-005209
Exhibit L New 1/2/09	West 70th Street Shadows December 21, 10 AM, Shadow Study versus Actual Photographs	P-04260-60	SEE 005187-005188