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-	:	PETITIONERS VERIFIED REPLY (corrected)
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.	:	

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Petitioners Nizam Peter Kettaneh and Howard Lepow, by their attorney Alan D. Sugarman, for their Verified Reply to the Answers of the BSA Respondents dated February 6, 2009, herein allege as follows:[1]

[1] Accompanying this Reply and a part hereof are two attachments. In the first Attachment A, Petitioners provide a response to each of the averments in the Statement of Facts and Affirmative Defenses appearing at pages 29-87, ¶¶ 196- 394 of the Answer of the City Respondents and interpolating those averments. The second Attachment B is a marked copy of the Petition interpolated with the answers of the respondents and additional citations to the record.

The Verified Answer of the City Respondents, served February 9, 2009, (City Answer) consisted of 86 pages, of which 57 pages consisted of a Statement of Material Facts. The Congregation Verified Answer contained no Statement of Facts. Respondents Srinivasan and Collins did not submit separate Verified Answers.

On December 5, 2008, the City served the BSA Record consisting of 5795 pages.
Citations to R-00000 are to the BSA Record.

Pet. shall mean Petitioners' Verified Petition as revised January 2, 2009.

With the Petition dated September 29, 2008, Petitioners served Appendix A, which consists of 4199 pages. Certain BSA documents are in Appendix A, but not included in the BSA Record.

Citations to P-00000 are to Petitioners' Appendix A.

On January 2, 2009 Petitioner served a revised version of its Memorandum of Law and the Petition dated January 2, 2009.

Citations to BSA Res."¶ " are to the paragraph numbered version of the BSA Resolution (aka Decision) at Exhibit A to the Petition and at P-00001 and P-00019. The parties by stipulation have agreed to cite to these paragraph numbers.

1. Respondents have now conceded that a development of the Congregation's site would earn a reasonable return to the Congregation. In their Answers, the BSA acknowledged that the return to the Congregation for its version of a residential as-of-right scheme was greater than, as stated by the Congregation, a reasonable and adequate return for such a development.[2] Accordingly, and without regard to the other reasons described herein, the BSA's finding under Z.R. §72-21(b) must be annulled.[3] *See* discussion at ¶43 below. Without a (b) finding by the BSA, the condominium variances must be annulled.[4]

2. Moreover, the failure of the BSA to consider use of the fifth and sixth floors of the as-of-right building to support programmatic needs is a sufficient reason to annul the lower floor community house variances. A six floor structure conforming as-of-right structure will allow the Congregation to meet all of it programmatic needs - the full lot coverage on the first floor resolves all the access and circulation needs of the Congregation.

Reply Exhibits

3. In order to reply to the Answers of Respondents, Petitioners supply herewith Petitioners' Exhibits M through S. Frustrating the Petitioners' efforts to clarify the facts, Respondents in their Answers deny nearly everything. The BSA Resolution itself is opaque and non-transparent, not reciting basic facts needed to understand the project and the factors utilized by the BSA in its finding-deficient Resolution.

4. Because the Respondents deny that 90% of the variances relate to the condominiums, Petitioners were forced to compile information from the record to establish this relevant fact, a fact not at all apparent from the Resolution. *See* Respondents answer to Pet. ¶21 et. seq. Pet. Ex. M-1 visually

[2] *See* City Answer, ¶292.

[3] *See* BSA Res ¶149.

[4] *See* R-140 and R-287. *See* Pet. Ex. N-1, N-1-A to C.

shows each variance on the floor plans of each of the eleven levels of the proposed building (the BSA never required the Congregation to provide this most basic of drawings.) Merely glancing at Pet-Ex. M-1 shows that the blue community house variances are a small percentage of the red condominium variances. Furthermore. obviously the blue community house variances are a very small percentage of the as-of-right space in the lower six floors and basement space available for programmatic needs. All of this information is derived from the drawings filed with the BSA at R-4695 and R-4701-4711. Pet. Ex. M-2 and M-3 merely reformat and present clearly the exact same facts shown confusingly in the Congregation's tables at R-4967 and R-594.

5. Pet. Ex. N-1-A are excerpts concerning rate of return contrasting the BSA's Answer at ¶292 with the statement of the Congregation as to the acceptable rate of return. Pet. Ex. N-3 is in reply to the false denial by the Respondents to the Petition's averment that Freeman Frazier's site area and site value per square foot varied wildly, and contains excerpts from the Freeman Frazier reports. Pet. Ex. N-6 shows the irrationality of using the Parsonage "development rights" to defined the number of square feet for the two floors of condominiums, in reply to the denials of Respondents.

6. Pet. Ex. N-2 computes base unit construction costs as was invited the BSA in its answer at ¶291 and shows that the construction costs for the as-of-right condominiums indeed were exaggerated. . Pet. Ex. N-8 is in reply to the false claim by Respondents that revised drawings to the DOB resulted in removal of the eighth objection requiring a 40 foot separation between building when there is no evidence of revisions. Pet. Ex. N-9 graphically displays the 40 foot zone. Pet. Ex. O-2 and O-3 are in reply to the false denial by the Respondents that the Congregation building envelope is substantially the same as a conforming as-of-right building on Site 37, making the BSA description of the neighborhood context a gross misrepresentation.

7. In reply to the Respondents denial of Petitioners' averments as to floors 2-4 that the Congregation had first designed the building, and then contrived the programmatic need, Pet. Ex. S are

excerpts from the LPC drawings submitted by the Congregation to the BSA at the November 8, 2006 ex parte meeting. *See* Pet. Ex, Q. These show that the space on the second floor, for example, was programmed for offices and meeting rooms, not the post facto "critical" toddler facility contrived to support the variances.

8. The reply exhibits are based entirely on source documents in the record and merely excerpt and reformat documents in the record. No new information is provided that is not already in the record, For the convenience of the Court, the initial exhibits and the reply exhibits are bound into a separate single volume.

Overview

9. The variances for the proposed building allow approximately 14,204 additional square feet of area over that allowed by an as-of-right building — approximately 10% of the area relates to the Congregation's community space, and the other 90% to luxury condominiums. Because the Answers deny this basic fact, Petitioners have prepared a compilation exhibit at Pet. Ex. M-1 showing all eleven levels of the proposed building with the location of the variances highlighted.

10. Because the site is in a landmarked district and the Synagogue is an individual landmark, the Congregation first sought (in 2001) and obtained a certificate of appropriateness (in 2006) from the Landmarks Preservation Commission (LPC) for a building with reduced height, but only as to the appropriateness of the building for design reasons. The LPC did not pass upon (and had no authority to pass upon) zoning matters, issues of height and scale, and impact on the area such as shadows on the mid-block streets. Factors considered by the LPC in issuing a certificate of appropriateness include: "architectural features" and "aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color."

11. The LPC in conjunction with the City Planning Commission may consider relief from hardships caused by landmarking under Z.R. §74-711. Initially, in 2001, the Congregation had sought

relief from the LPC under Z.R. §74-711, but did not pursue such relief, withdrawing its request. The BSA has no role at all in providing relief from landmark hardships; the BSA provides variances on appeal from denials of permits by the Department of Buildings for violations of the Zoning Regulations; if Respondents argue the BSA can grant relief from landmark hardships not provided by the LPC, then it would seem that the Congregation did not avail itself of its remedies from the LPC.

Summary of Significant Issues

12. First, Respondents in their Answer have now established that the Congregation can obtain a reasonable and adequate return from an as-of-right building. Thus, there is no basis whatsoever for the so-called Z.R. 72-21(b) finding for the condominium variances. Thus, the condominium variances must be annulled. See discussion at ¶43 below.

13. Second, Respondents have been unable to show any rationality at all in assigning a site area of 19,775 square feet (oddly derived from unused air rights over the adjoining Parsonage) as the site area for computing reasonable return for the two condominiums in the mixed use Scheme A conforming as-of-right building. The Congregation claims that having satisfied its programmatic needs in floors 1-4 of the mixed use building, it is entitled to earn a reasonable return from two condominiums on the remaining floors five and six. But, these two floors do not contain 19,775 square feet, but only 5,316 square feet. By using this bizarre approach, the Congregation inflated cost and thereby eliminated the return.

14. Third, Respondents have been unable to cite to even a scintilla of evidence that an as-of-right building does not fully satisfy the Congregation's asserted programmatic needs of access and circulation.

15. Fourth, Respondents have been unable to identify a single "physical" condition, such as swampy land or an L-shaped lot, to create a hardship arising out of the strict application of the zoning

regulations and preventing the development of the 64x100 foot development site. Under the BSA usage of "obsolete", any building that an applicant asserts, correctly or not, has outlived its usefulness satisfies the physical condition requirement of finding Z.R. §72-21(a).

16. Because of the possibility of appeal, it is necessary to fully discuss all the significant issues.

17. Review of the BSA Resolution is made complex because the BSA Resolution does not include findings of important material facts. Important feasibility studies are not presented as single integral studies; but rather require reviewing reports scattered throughout the record. The lengthy BSA Resolution contains substantial discussions of little or no relevance.

18. As just one example, the Congregation must establish that an "as-of-right building" would not earn a reasonable financial return to the owner. But, the BSA paid scant attention to the financial return of an as-of-right building, but rather focused on financial analysis of multiple and repetitive submissions of various proposed schemes requiring variances. The LCP had already limited the height of the building, so the BSA exercise of analyzing the proposed building was a meaningless exercise, more for "show" than substance. So, the BSA reviewed the complete construction estimates (all 15 pages) for the approved building where the estimates had no significance (R-4872 to R-4916), but looked the other way and accepted only 2 of 15 pages for the important constitutionally mandated analysis of reasonable return for the as-of-right scenarios where the full report would show the allocations between the two components of the building. (R-1996-1997). At hearings, the BSA engaged in dialogue and questioning with Mr. Freeman of Freeman Frazier, but asked nary a question of the even more experienced and certified opposition expert, Martin Levine, who was questioning the as-of-right analysis by Mr. Freeman. See Transcript R-4485-4488. The Chair rushed and dismissed Mr. Levine after he spoke for 3 minutes. Mr. Freeman, though, was questioned by Commissioners in the same hearing. R-4463-4483, yet not one Commissioner asked Mr. Freeman why the proper site value for an as-of-right scheme A would not be the area of the two condominium floors times the value

per square foot. *See* reports critiquing Freeman Frazier studies by opposition certified real estate appraiser Martin Levine of Metropolitan Valuation Services November 2, 2007 (R-1631); January 25, 2008 (R-02506); February 8, 2008 (R-3630); March 20, 2008 (R-4093); April 15, 2008 (R-4254); June 10, 2008 (R-4800); June 23, 2008 (R-4932); July 29, 2008 (R-5210), which reports demonstrate the substantial deficiencies in methodology in the Freeman Frazier reports.

19. The BSA Resolution relies largely on conclusory assertions, and the Answers largely cite to the Resolution or the Record as a whole. The BSA Resolution and Answers mischaracterize opposition positions. The Answers attribute to Petitioners claims of "opponents" not made in the Petition and in general ignore even assertions by opponents supported by detailed expert reports. In making its findings, the BSA erroneously relied on factors in approving the variances not permitted by law: asserting landmarking hardships, asserting religious programmatic needs to justify the condominiums, asserting hardships not physical in nature, and asserting hardships lacking causation — *i.e.*, not arising out of the strict application of the zoning laws.

20. As to the (b) findings for the as-of-right residential condominiums. the BSA discussion is found at BSA. Res. ¶123 to ¶149 of the resolution. The BSA confuses the discussion by addressing in this section the feasibility analysis of the proposed building at ¶129-30, ¶132-36, ¶140, an issue that should have been addressed under the (e) finding, minimum variance.

Summary of Basic Facts Not In Dispute

21. The Answers of Respondents attempt to thwart all effort to describe the basic facts. The BSA Resolution on the whole resorts to either conclusory findings or findings that merely parrot the words of the Zoning Regulation and fails to make findings of specific facts., and also resulting in an non-transparent decision. Notwithstanding, the following critical facts, as to which the BSA did not make factual findings in the BSA Resolution, are material to understanding the Resolution, yet appear not to be in dispute.

- 6.55%. The minimum acceptable rate of return for a finding under §72-21(b). Pet. Ex. N-1-B.
- 10.93%. The Annualized Rate of Return on Investment for the proposed development project as approved by the BSA. BSA Answer ¶292. Pet. Ex. N-1-A.
- 6.7%. The Annualized Rate of Return on Investment for the threshold as-of-right Scheme C. *Id.*.
- 5,316 square feet (sellable) 7,594 square feet (gross). The Site Area of the Two Floors of Condominiums in the Mixed Use As-of-Right Building Scheme A. Pet. Ex. N-4.
- 19,775 square feet. The Site Area Used by the BSA to Compute Site Value. Pet. Ex. N-6 and N-7.
- 12,704 square feet. The Additional Area Provided for the Variances for the Condominiums. Pet. Ex. M-2 and M-3.
- 10%. The Proportion of the Variances That Relate to the Resolution Discussion as to Religious Programmatic Need and Deference to Religious Institutions. Pet. Ex. M-2 and M-3.
- 4%. The Proportion of the Community House Variances Area to the Area Available for Programmatic Needs in an As-of-Right Community House. Pet. Ex. M-2 and M-3.
- No Evidence Cited. Evidence that access and circulation issues are not completely addressed by an as-of-right building.
- No Evidence Cited. Evidence that the Congregation Provided Revisions of Drawings to the DOB so that the Eighth Variance Would Be Removed.
- No Evidence Cited. Citation to the Record Showing the Actual Rent Paid by the Parsonage Tenant and the Beit Rabban Tenant.
- No Evidence Cited. Citation to the Record Showing Evidence of Obsolescence.
-

Discussion of Basic Facts not in Dispute.

22. The minimum acceptable rate of return for a finding under §72-21(b): **6.55%**. A threshold issue for the condominium variances is whether the Congregation can earn a reasonable return on an as-of-right buildings. The Resolution is silent as to what was considered to be the minimum acceptable return. The Congregation's initial application states without equivocation that a reasonable "acceptable" "Annualized Return on Total Investment[5]" is 6.55%. R-140, Freeman Frazier Report of March 28, 2007 . *See* Pet. Ex. N-1-B.

23. The Annualized Rate Of Return On Investment for the proposed development project as approved by the BSA: **10.93%.** The BSA Resolution was silent as to the rate of return for the

[5] In the proceeding, two methods of assessing return were discussed; return on investment (referred to by the Congregation as above) and return on equity. There are also different ways of computing these returns - one on an annualized basis and the other on the total return. The annualized return is always a smaller amount than the total return figure - and, extending the construction period lowers the annualized return. The BSA Guidelines refer to total return, not annualized return, but the BSA ignores this.

approved building - it was in fact a 10.93% Rate Of Return On Investment, far in excess of the acceptable reasonable return. *See* BSA Answer - Statement of Facts at ¶ 292, n. 19 including this "detail." . *See,* BSA Res. at ¶130 which omits this "detail."

24. The Annualized Rate Of Return On Investment for the threshold as-of-right Scheme C: **6.7%**. Computation of the financial return for an all residential/income producing building on the development site is a threshold issue under §72-21(b), which resulted in the Congregation submitting AOR Scheme C aka FAR 4.0. Although not truly all-residential, the BSA Answer now confirms that the Annualized Rate Of Return On Investment is 6.7%, in excess of a reasonable return. See BSA Answer - Statement of Facts at ¶ 292. *See* , BSA Res. at ¶127, ¶129.[6]

25. The Site Area of the Two Floors of Condominiums in the Mixed Use As-of-Right Building Scheme A: **5,316 square feet** (sellable) **7,594 square feet** (gross.) Although disclosed prominently in every Freeman Frazier Scheme A analysis, the site area/building area for the two floors of condominium was never stated anywhere in the BSA Resolution. R-5178. The feasibility analysis was represented as evaluating whether the two floor condominiums would provide to the Congregation a reasonable rate of return for the purposes for the §72-21(b) finding, a second level threshold analysis. See BSA Res. ¶138.

26. The Site Area Used By the BSA to Compute Site Value: **19,775 square feet**. Not only did the BSA Resolution not disclose that the BSA was relying upon the unused development rights over the adjacent Parsonage to compute site area, but the Resolution did not disclose the square feet of the site area it was using for the analysis of reasonable return of the two floors of condominiums was 19,775 square feet. R-4651-2, Freeman Frazier May 13, 2008.

27. The Additional Area Provided for the Variances for the Condominiums: **12,704 square feet**. Although the Resolution mentions that the lower floor rear yard variances for the community space

[6] At Resolution ¶138, the BSA only considered a recomputation of the Scheme A, but not Scheme C.

would provide an additional 1500 square feet (BSA Res. at ¶46), the Resolution does not describe the area being provided by the proposed/approved condominium variances. This 12,704 square 49feet. *See* Pet. Ex. M-2, 2, and 3..

28. The Proportion of the Variances That Relate to the Resolution Discussion as to Religious Programmatic Need and Deference to Religious Institutions: **10%**. The Resolution extensively addresses the BSA's perceived need to defer to religious institutions - those discussions concern only 10% of the variance area at issue in this Article 78 proceeding. See Pet. Ex.M-1, 2, and 3.

29. The Proportion of the Community House Variances Area to the Total Area in an As-of Right Community House: **4%**. Although the BSA Res. at ¶ 26 states the total area of the proposed building, it oddly does not state anywhere the total area of an as-of-right building. The Community House variances total 1500 sq ft. (BSA Res., ¶46). This represent 4% of the total area of 34,048 of square feet available for programmatic needs in an as-of -right community house: 20,054 sq. ft. above ground (BSA Res., ¶46), 6400 sq ft. in basement and 7,594 sq. ft on floors 5 and 6. The Congregation also has for programmatic need space in the Parsonage and 10,000 square feet under the Sanctuary.

30. Evidence that access and circulation issues are not completely addressed by an as-of-right building: **No Evidence Cited**. The Resolution directly refers to access and circulation as a hardship/programmatic need at ¶41, ¶48, ¶61, ¶72, ¶73, and ¶213 and indirectly refers to the access and circulation issues whenever it used the words hardship or programmatic need or obsolescence. When put to the test, neither the BSA nor the Congregation could provide a single citation to evidence in the record that these issues were not fully resolved by an as-of-right building. The Congregation could cite only to the Resolution's repetition of the conclusory assertions of the Congregation as to the heart of its case.. The BSA could only lamely respond that the lack of the connection between the access hardship and the proposed building and variance was of "no moment", essentially saying that an essential element of variance law was of "no moment."

31. Evidence that the Congregation Provided Revisions of Drawings To the DOB so that the Eighth Variance Would be Removed. **None**. Respondents could provide no evidence, and, this means that the split zoning lot argument is of no merit, since the building separation zoning regulation would have prohibited a tall building on the R10A portion of the lot.

32. Citation to the Record Showing the Actual Rent Paid by the Parsonage Tenant and the Beit Rabban Tenant: **No Citation**. Respondents claim that the Congregation provided this information - when put to the test, they could not show where these rent figures appear in the record.

33. Citation to the Record Showing Evidence of Obsolescence. **None**. There are many claims of obsolescence, but facts are obscure. It is not even sure whether Respondents refer to the Synagogue as being obsolete, or to the Community House. In any event. obsolescence cured by an as-of-right building is no grounds for a variance.

Non-Issues in This Proceeding

34. The BSA Resolution and Answers raise issues and engage in extensive discussion of issues of no relevance to this proceeding. But Respondents seem now to agree that:

- No floor area (FAR) is required to be transferred to the development site on Lot 37 from Lot 36 where the Synagogue and Parsonage are located. Thus, all discussion of this issue in the Resolution and in the Answers is irrelevant to issues before this proceeding. BSA Answer ¶ 248.
- No use variances are required; Petitioners do not challenge the uses proposed by the Congregation as proper programmatic accessory uses, and all discussion in the Resolution and Answers as to these issues are irrelevant to this proceeding. BSA Answer ¶ 239.
- All discussion in the Resolution as to religious deference applies only to the community house variances, which constitute 10% of the variance area in dispute.
- Because access and circulation may be resolved by an as-of-right building, no hardship or claims of obsolescence or programmatic needs are relevant to this proceeding.
- Compliance with SEQR and CEQR are non-issues in the Article 78 proceeding. The only related relevant issue is compliance with Z.R. §72-21(c).

Abusive Answers

35. The BSA absolves itself from answering any averment in the Petition if it "can be construed as alleging that the BSA acted improperly or contrary to law." (The Congregation, rather than provide specific citations, refers the Court to the entire record.)

36. Where the Petition alleges that some fact or document did not exist in the record, Respondents simply deny these averments, and then refer the Court to the entire Record and ask the Court to find the non-existent information in the record.

37. Thus, Respondents as well were simply unwilling to admit to even the most basic facts, which should not be in dispute -- thus throwing mud in the water to obscure the many other problems with their positions and to force Petitioners to burden themselves and the Court to prove and dwell on incontrovertible facts.

38. Just as an example, Respondents would not admit these averments. Other example may be easily identified in the attached marked Petition showing answers of Respondents.:

> ¶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.
>
> ¶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. But see R-3228.
>
> ¶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.
>
> ¶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.
>
> ¶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."

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

¶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.

¶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.

¶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.

The BSA Resolution Frustrates Court Review

39. The BSA conducts its hearing and prepares its resolutions in a manner which, by intent or effect, frustrates and avoids review by a court, and preserves for the BSA the ability to act arbitrarily and capriciously. The applicants are not asked questions that would elicit inconvenient facts in conflict with the BSA's predilection to grant variances, especially to religious applicants. Disproportionate attention is paid to certain issues. The BSA seemingly writes its resolution not as an unbiased adjudicator but as an advocate to prevent later review.

40. The result is that the BSA resolutions seem to attempt to frustrate, if not foreclose, the ability of courts to provide judicial review. Notwithstanding, the Court is empowered to conduct hearings as described below. Even so, the record establishes that the Congregation had the opportunity to make a record, chose not to, and the variances thus should be annulled.

41. In an Article 78 proceeding, if the agency or other party baldly denies facts, the court is not required to accept those bare denials. Otherwise, agencies could defeat all Article 78 proceedings, especially where the record is lengthy, by referring in answers broadly to the entire record or by generally "denying" matters. This would place the burden on the court and the petitioner to identify parts of the record that show the agency denials are false. If this were allowed, the agency could also create a complex record for the simple reason of thwarting court review — or permeate its decision

and the record with irrelevant matters. It is for exactly these reasons that the CPLR and the City Administrative Code are clear that a hearing is required if there is a question of substantial evidence.

42. Simple facts such as stating how many square feet of additional area are being granted by the variances are simply left out, and the BSA does not ask that they be supplied by the Congregation. The Congregation was not required to show floor plans that illustrate the portion of the floor for which variances are sought. (See R-514.) See Pet. Ex. M-1.

Citations In The Answers to the Entire Record Rather Than Specific Parts of the Record

Examples of Respondents intent lies in reference in their Answers to non-existent facts, stating that a fact exists in the record but without actually identifying the citation to the BSA Record. Thus, Respondents claim that the following is in the record, but can provide no citation to the record:

- The dollars and cents estimate to renovate or retrofit the existing elevator in the existing community house to address access issues.
- The costs to the Congregation paid for the acquisition of the three lots that are part of Lot 37. See BSA Answer ¶ 294.
- A Scheme C as-of-right reasonable return analysis which is all residential on all seven floors and includes the income/value of the two basements.
- The exact ways in which an as-of-right building does not resolve the asserted access and circulation issues.
- The exact ways in which the approved building resolves access and circulation issues in ways that are different from the as-of-right building.
- The explanation of how construction cost allocations were made between the residential and community building for the as-of-right scheme C.
- The market site value of the two floors of condominiums in the as-of-right Scheme C.
- The rationale why the caretaker's floor may not be moved to the fifth or sixth floors of the as-of-right building.
- A single integrated report from Freeman Frazier including in a single document all information and analysis used in the Scheme A analysis.
- A complete construction estimate with all 15 pages for the Scheme A building.
- Changes in the building drawings submitted to the DOB in August 2007 which resulted in the elimination of the requirement for the building separation of 40 feet on the upper floors and allowing the BSA to assert that the split lot is the limiting factor in developing the 17 foot slice of Lot 37.
- Differences in the building drawings reviewed by the Chair and Vice-Chair at the November 8, 2006 improper ex parte meeting and the drawings submitted several months later to the BSA in April, 2007 as part of the application.
- That the BSA asked the Congregation to provide the actual rent paid for the school by Beit Rabban and by the residential town house tenant for the Parsonage.

The actual number in dollars of the rent paid by Beit Rabban and the Parsonage tenant.
That the Congregation currently makes any use of the classroom on the second floor of the community house, which classrooms are rented to Beit Rabban.
That the Congregation mentioned a second floor 60 toddler program earlier than 6 months after the application was filed (7 years after the LPC application was filed.)

Respondents Admit that the Congregation Is Able to Earn a Reasonable Return from an All Residential As-of-Right Building

43. It is now clear that the Congregation is able to earn a reasonable return for an as-of-right residential Scheme C building on its development site of at least 6.7% (BSA Answer, ¶292), which is in excess of the 6.55% the Congregation deemed adequate in its initial application to the BSA. (R-140, R-287.) Thus, the condominium variances must be annulled, since the essential §72-21(b) finding cannot be made. *See* Pet. Ex. N-1.

44. The Scheme C analysis is required under applicable precedent requiring that the entire site be analyzed for reasonable return, not merely analyzing the slice of the property the owner wishes to develop. In this discussion, we ignore the 10% of variances for the Community House and assume for argument's sake that the 2nd, 3rd, and 4th floor variances are proper.

45. In their Answering Memoranda Respondents ignore, and apparently concede, the assertion by Petitioners that, under §72-21(b) and case law, a religious organization proposing a mixed-use building may not bifurcate its property — meeting its programmatic needs in one slice of the property, and then claiming that it cannot earn a reasonable return as to the remaining portion. See Pet. Mem. of Law at page 74.

46. The Congregation admits in its Statement in Support that the lots were purchased specifically for development of the Community House; the proposed Community House without the variances responds to the needs of the Congregation. Pet. at 88.

47. The BSA has not only failed to require the Congregation to analyze a truly all-residential scheme, but opponents claimed, and the Petition stated, that the "not-really" all-residential scheme of

December 2007 had not been updated to utilize a reduced site value computed by the Congregation in April 2007, which reduced site value would have boosted the rate of return in the Scheme C analysis. The BSA ignored opponents' request, and would not ask the Congregation to update Scheme C, and the Congregation did not volunteer. *See* BSA Answer to ¶ 292 of Petition, reproduced at Pet. Ex. N-1-A.

48. Yet the BSA did not completely ignore this assertion in its Answer. After all, it was the BSA itself that initially requested that the Congregation provide an all-residential analysis. The professional staff of BSA, after it received the initial application, asked the Congregation for a "reasonable return (aka "feasibility") study" for an all-residential project (Pet. at ¶ 210).[7] (The "all residential" analysis was not in fact all-residential. Petition ¶ 207 to ¶ 228, also reducing the financial return.[8])

49. The BSA, when pressed by the Petition, felt compelled to complete the analysis by using the new reduced site value, computing a rate of return of 6.7%. As stated in Paragraph 292 of the BSA Answer (reproduced as Pet. Ex. N-1)[9]:

> 292. Second, petitioners argue that, prior to adopting the Resolution, BSA should have required the Congregation to revise its December 21, 2007 Scheme C study (all residential scheme). Specifically, petitioners claim that the Congregation should have been required to recalculate its estimated financial return for an all residential scheme utilizing the $12,347,000 acquisition value set forth in the Congregation's final July 2008 report because doing so would have shown a profit of approximately $5 million. Petitioners' argument is flawed. As set forth above, under Z.R. §72-21(b), BSA examines whether an applicant can realize a reasonable return, not merely a profit. While utilizing the revised acquisition value, i.e., $12,347,000, would have resulted in a profit of approximately $5

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[7] BSA Notice of Objections to Congregation June 15, 2007. R-253 at 257, 258:

> 31. Please provide a full plan set for a complying, 4.0 FAR residential building on Lot 36 (sic) that includes a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings).
>
> "37. Provided that the alleged hardship claim for the development site (Lot 36) (sic) is an inability to accommodate CSI's programmatic needs on Lot 37 (sic), please analyze a complying, fully residential development on Lot 36 (sic)as requested within Objection # 31. This analysis is requested for the purposes of gauging what the economic potential of the development site would be without the alleged hardship."

BSA Second Notice of Objections to Congregation, October 12, 2007. R-512 at 514.

[8] The Congregation supplied an analysis known as "Scheme C" or "F.A.R. 4" and labeled it an "all residential" analysis. In fact, the Scheme C proposal was not all-residential, and failed to consider the value of 11,000 square feet of valuable rentable space. Even without the 11,000 missing square feet, the Scheme C analysis showed a positive return. The opposition contended that a properly conducted analysis of Scheme C, which fully utilized all available space in an as-of-right building would yield a return on investment of 31%, an annualized return on investment of 16.4%, and a return on equity of 63%. R-3464. MVS-Martin Levine, February 8, 2008.

[9] The City Answer was verified by Respondent Srinivasan, the Chair of the BSA.

> million, the rate of return would have only been increased to 6.7%. As established by the Congregation's experts, a reasonable rate of return for the subject premises was approximately 11% [R. 4652-3, 4656, 4868-69, 5172, 51781. Accordingly, since petitioners' proposed calculation would not have resulted in a reasonable return, petitioners' argument fails.[19]
>
> [19] Notably, the rate of return for the proposed development as approved by BSA is 10.93%.

50. The BSA has now confirmed the key assertion of the Petitioners: a reasonable return, of at least 6.7%, to the Congregation would be provided to the Congregation even by this "not-really" all residential building. How can we be so sure that 6.7% is a reasonable return? Simply because the Congregation and Freeman Frazier so said in the initial feasibility study accompanying the Congregation's application in April, 2007 (R-140)? Freeman Frazier, March 28, 2007 (Pet. Ex. N-1-B):

> 5.00 Conclusion 7.4 0.7.
>
> The Proposed Development provides a 6.55% Annualized Return on Total Investment. This return is at the low end of the range that typical Investors would consider as an investment opportunity, taking into account the potential risks inherent in this type of development project, and few, if any, investment options. The returns provided by the Proposed Development alternative, in this case would, therefore, be considered acceptable for this project. (emphasis added)

51. Because the Congregation can earn, without doubt, a reasonable return on the entire development site used for residential purposes, it is not necessary to analyzing whether a mixed use facility could earn a reasonable return from the two floors of condominiums on the fifth and sixth floors, The Congregation cannot have its cake and eat it too — satisfy its programmatic needs as a religious entity in the lower floors, and then claim it cannot earn a reasonable return for the upper two floors.

The Congregation Can Earn A Reasonable Return from the Two Condominiums in the As-of-Right Scheme A Building

52. A bifurcated analysis can work to exclude a variance to the Congregation for the revenue-generating component, if it is shown that the revenue-producing component can indeed earn a profit. A proper analysis of the Scheme A two-condominium project - correcting site area, site value, construction costs, and other elements, would yield a reasonable return.

53. The reports critiquing Freeman Frazier studies by opposition certified real estate appraiser Martin Levine of Metropolitan Valuation Services are found at: November 2, 2007 (R-1631); January 25, 2008 (R-02506); February 8, 2008 (R-3630); March 20, 2008 (R-4093); April 15, 2008 (R-4254); June 10, 2008 (R-4800); June 23, 2008 (R-4932); July 29, 2008 (R-5210).[10]

54. Thus, finding (b) could not be properly made either for the all-residential scheme or the mixed use scheme,

55. In the Petition, Petitioners show that the BSA had no basis on which to make the finding under §72-21(b) that the Congregation could not earn a reasonable return from Scheme C. In answer, Respondents continue to inaccurately portray improperly Petitioners' objections to the Congregation's reasonable return/feasibility study as being based on a single flaw: that a return on equity analysis should have been used as specifically required in the Board's written guidelines.

The Market Value of the Site for the Two Floors of Condominium Development Rights Is $2.6 Million, Not $12.3 Million

56. The BSA continued to ignore the largest single flaw in its (b) finding for the as-of-right Scheme A building — the computation of site value — the largest cost component in the financial analysis. Correcting this single error (and there are others) would establish a satisfactory return to the owner, whether the return on equity or return on investment approach is used. See generally Pet. Ex. N-4 to N-7.

57. The proper computation of site value is simple — multiply site area times the site value per square foot. The two condominium floors in the as-of-right building contain 5316 sq. ft. (7594 gross), as stated in the Freeman Frazier analyses. R-4869. Freeman Frazier estimated a value of $450 per sq.

[10] In his reports, Freeman stated that the proper method of allocating costs for Scheme A would first be to cost out a complete four story community house with all necessary features including elevators and the roof. Then one would cost out the complete Scheme A structure and subtract one from the other.

ft. for condominium development space. R-520. Thus, the site value for the two condominiums would be the product of 5316 sq. ft. x $450 per sq. ft. or $2.6 million. *Id.*

58. Yet, for this site area, two floors of space with an area of 5,316 sq. ft., the Congregation used a site value of $12,347,000 (R-4869), based upon a site area of 19,975 square feet (R-4651-4652), and in the process boosted the site value per square foot from $450 to $675. To achieve this alchemy, the BSA allowed the Congregation to use the unused development rights over the adjoining Parsonage, and to value the space as if it overlooked Central Park. Pet. Ex. N-6. Although the BSA is required to make findings of fact, it did not include findings as to any of these facts in its lengthy Resolution.

59. Clearly, the Congregation was exaggerating site value in a way to guarantee that any analysis of an as-of-right building would show a loss. An inflated site value is the cornerstone of the Congregation's strategy to satisfy the (b) finding, and, initially, the Congregation attempted to include the Community House space as part of site area.

The Chair observed at the November 27, 2007 hearing:

> CHAIR SRINIVASAN
> 591 Freeman needs to explain to us what he's done on his financials. We've seen it. I think
> 592 we have some concerns which we raised yesterday and either he can go back and look at
> 593 that or we can state them for the record, but I think some of the issues have to do with
> 594 how the site is valued and how a good portion of what is anticipated as the developer
> 595 paying for that site is not going to be used by the developer because it's being used by the
> 596 synagogue.
> 597 So, it's almost like you should take that out of the equation and then you have this
> 598 value on this property without that 20,000 square feet that's being used for the
> 599 synagogue.

Transcript of November 27, 2007 at R-1753.

60. At this juncture in the proceeding, Freeman Frazier was computing site value based upon a site area/building size of 37,889 sq. ft., a number apparently made up by Freeman Frazier. Pet. Ex. N-3. The as-of-right building was not 37,889 sq. ft., but 27,771.61 sq. ft. *See* As of Right Floor Area Schedule, October 22, 2007, AOR-A-2 at R-594 (the amount 27,771.61 is in the lower right corner of

the table). Most of the 27,271.61 sq. ft. was occupied for community purposes. See Pet. Ex. M-1, M-2. The actual site area was closer to this figure minus 20,000 sq. ft., *i.e.*, 7,771.61 sq. ft.

61. When Freeman Frazier next submitted a Scheme A Analysis, the site area was reduced from 37,889 to 19,775, but the site value per square foot was raised from $450 per sq. ft. to $750 per sq. ft. This was a transparent manipulation of the numbers. Compare R-133 with R-516. See Pet. Ex. N-3.

62. The BSA Res. at ¶ 114 states that the Congregation represented that a 28,274 sq. ft. would be permitted in an as-of-right building. The BSA Answer repeats this figure citation to the BSA Record. The source of this figure is not known.

63. Whether the Chair understood that the correct size of the building was 27,761 sq. ft., and not 37,889 sq. ft., was not clear. It is clear that if 20,000 square feet were subtracted from 27,761 sq. ft. to yield site area, then the condominium variances were doomed. The Congregation could only satisfy the (b) finding by exaggerating site value. (In reply to Respondents denial of Pet. ¶206 that Freeman Frazier provided a number of inconsistent reports, Petitioners compiled the varying methods of computing site value at Pet. Ex. N-3.)

64. The actual amount of space for the two floors of condominiums shown on all of the Scheme A studies is 5316 sq. ft. "sellable" (7594 sq. ft. "built"). R-4869. The Answers of Respondents completely ignore this issue. It was this site area that a "developer would use and pay for," in the words of the Chair, which was to be used for the computation of site value in the Scheme A as-of-right building. *See* Pet. Ex. N-1 *et seq*. The failure to present the site value of the two floors of condominiums alone should give great pause to both this Court and to anyone considering the feasibility study of Freeman Frazier taken as whole. This should call into question the entirety of the Freeman presentations. And the refusal of the BSA to discuss the computation, since the issue was fully raised by opponents, raises questions as to the candor and impartiality of the BSA itself.

65. Ultimately, when it was clear that the standard method would doom the (b) finding, the Congregation concocted the method of using unused development space over the adjoining Parsonage to define site area for the condominiums atop the Community House.

66. Petitioners contend that it is within the purview of the Court to make this computation and that remand is not required. *See* Pantelidis v. New York City Bd. of Stds. & Appeals, 43 A.D.3d 314 at 317 (1st Dep't 2007), aff'd 10 N.Y.3d 846 (2008), aff'g 10 Misc. 3d 1077A (Sup. Ct. N.Y. Co.), *infra*. The irrationality is apparent. Because the computation by the BSA was clearly erroneous, the variances granted below must be annulled.

Market Value and Acquisition Cost Are Not One and the Same

67. The BSA Respondents contend in their answer that "market value" and "acquisition cost" are one and the same, and, that the use of the phrase "Acquisition Cost" in the various Freeman Frazier studies is supposed to mean market value.

> As is common with the English language, various words and phrases are used interchangeably. Terms utilized by the BSA are no different. The terms "acquisition cost," "market value," and "site value" are used interchangeably for no other reason than that they each designate the as-is fair market value of a property and are all in common usage. … The market value of the property which, as stated above, is synonymous with the acquisition cost.

BSA Mem. at 42. BSA Answer at ¶ 294. The BSA is attempting to distract the Court's attention from the fact that the reasonable return analysis failed to consider the amount paid by the owner for the property. Item M of the BSA Instructions clearly distinguishes between market value and the cost of acquisition of the site by the owner "market value of the property, acquisition costs and date of acquisition." R-4267 at R-4273. Pet. Ex. R.

68. Acquisition price is a factor not to be ignored under applicable case law (Pet. Mem. of Law Page 70 at page 69 and 80 *et seq.*) The price paid by an owner for his property is needed to show the return on investment upon the owners original investment in the property. Under the feasibility studies, the Congregation is to receive $12.4 million of cash as the market value of the site. However, during the time the Congregation owned the property, it received value in the form of use and rent.

Thus, a return on investment for the Congregation would include factoring in the original acquisition cost, the value of the use and the rent received, and the amount received as the market value on the hypothetical sale to the hypothetical developer.

Value of the Development Rights over the Adjoining Parsonage as Site Value

69. The BSA then argues that market value of the space available to the developer is the measure of site acquisition cost. But it then departed from that measure when it chose to use the value of the development space over the adjoining parsonage as the site value of the two floors of condominiums. Pet. ¶¶ 182-185. Pet. Ex. N-5. BSA Answer at ¶295 and Pet. Reply thereto. Although the two floors of condominiums have a site area of 5,320 square feet (sellable) and 5,316 square feet (built), the BSA and Congregation approach was to use a site area of 19,775 sq. ft. See Pet. Ex. N-4 to N-7.

70. By so doing the BSA and the Congregation inflated the site value for the two condominiums from $2.4 million to $12.3 million.

71. The irrationality of this approach is addressed in the Pet. Mem. of Law at 53 *et seq*. Apart from the departure from the common sense approach, discussed above, the Petition notes:

- The Parsonage approach ignores the unused development space in the 64' x 100' construction site.
- Under the Parsonage approach, the Congregation essentially transfers air rights, but retains them at the same time - since, under the sleight of hand, the Congregation could still claim the air rights that were in effect transferred.
- The Parsonage approach ignores the unused development space over the Synagogue.
- Although using the development rights over the Parsonage, the feasibility study ignores the residential rental income from the Parsonage.

- The Parsonage approach measures the site value without regard to the actual development — the same value would be used whether the Congregation chose to use two floors for condominiums or four floors.

72. It also seems clear that further development over the Parsonage is limited by the landmark laws. As noted by the Congregation's architect while discussing the Parsonage in his letter to the BSA of (February 4, 2008, R-3611 at R-3613, Pet. Ex. Ex. G):

> Additional floors would block the historic leaded glass windows that provide southern light to the main sanctuary. In any case, its designation as a contributing building for landmarks would make these additional floors unlikely.

Not mentioned by the architect, but obvious from observation of the Parsonage is that large and architecturally integral cornices of the landmarked Synagogue actually extend over the Parsonage. See Pet. Ex. O-3. Development of the Parsonage would mean defacing the landmarked Synagogue. Thus, "assigning" the value of air rights over the Parsonage to the separate development , is nothing more than using the landmarking of the Synagogue as a basis for a variance.

73. The assignment of air rights value is effectively assigning FAR from Lot 36 to Lot 37, not to increase the FAR on Lot 37, but to obtain waivers for height and setback requirements. But, it is already seen that moving air rights from one part of a zoning lot to another can transfer FAR, but cannot waive height and setback requirements.

74. The BSA attempts in vain to respond to this illogical approach — and was unable to even attempt to rationalize the last point — that the site value is the same whether the Congregation chose to develop as condominiums 1, 2, 3 or 4 floors of the as-of-right building. BSA Answer at ¶295 and Pet. Reply.

75. Tellingly, the BSA Resolution is silent as to all of these facts: it did not mention that use of the site area of the adjoining Parsonage or that the site area was being applied to the two condominiums. By so doing, the BSA disguised the shocking fact that it was engaged in an exercise that in effect involved the transfer of FAR from the Parsonage to Lot 37, where no FAR, as admitted by the BSA,

needs to be transferred, and without then restricting the available air rights for future development over the Parsonage.

The Missing 15-Page Construction Cost Estimate

76. The BSA was arbitrary and capricious in refusing to consider the demonstrated over-allocation of construction costs in the as-of-right schemes, thereby increasing the construction costs for the as-of-right condominiums. Even the analysis suggested by the BSA in its Answer at ¶ 291 (computing base unit costs) shows that overstatement occurred. *See* discussion of Pet. Ex. N-2, below. The overstatement had the effect of reducing the rate of return for the as-of-right scenario. If not for this and other errors, the as-of-right condominium projects would earn a reasonable return. Accordingly, the condominium variances must be annulled, because there is no foundation for the (b) finding.

77. Because the schemes analyze a mixed-use building, the methodology for allocating costs is highly important, it is possible to over-allocate costs to the condominiums and thereby reduce the return. Opposition expert Levine states did in fact occur. See Pet. ¶ 138, 139, 188. R-5210, Pet. Ex. F.

78. The BSA did not even collect or analyze the basic information or consider the reasoning behind the cost allocations between community house and as-of-right condominiums. Despite repeated requests by opponents, the BSA refused to require the Congregation to provide the complete construction cost reports for the threshold as-of-right buildings (Scheme A and C) (R-4863-5; R-1968 at R-1996), while at the same time considering complete reports for the less relevant proposed schemes. Pet. at ¶ 25, ¶187. (See complete McQuilken reports at R-4865.)

79. The Scheme A construction reports were not included with the earlier May 13, 2008 report at R-4649, but were included in an even earlier report, establishing that no single Freeman Frazier report supplies the complete as-of-right analysis of Pet. ¶ 131. In a July 8, 2008 report, the Freeman excuse was that "the opposition did not specifically request the entire construction cost estimates for each previous scenario." R-5175.

80. In response, the BSA admits that the BSA did not seek these reports — and the Congregation did not provide the reports — because the BSA did not request the reports (R-4863 at 4865). The BSA asserts that it "did not seek the missing pages because they were immaterial" on the reasoning that the BSA could have analyzed the base unit construction costs:

> The BSA, in examining whether construction prices are reasonable, reviews the base unit price (sic-cost), i.e., the construction cost divided by the square footage. Here, since the Congregation submitted the construction cost and the square footage, BSA had the necessary elements to calculate and review the base unit price [R. 1997, 5178-79]. Accordingly, the additional pages were irrelevant because they were not needed for BSA's review.

BSA Answer ¶291. Yet, the BSA provides no evidence at all that the BSA conducted such a computation. Nor is there any narrative in the Record to explain how the Congregation allocated construction costs.

81. In reply to the BSA Answer, Petitioners indeed have compared the base unit construction costs for Scheme A with that for the approved project. Using the last schedule provided by Freeman Frazier on July 8, 2008, the simple computation shows base unit construction costs of $700 a square foot for the as-of-right condominiums of Scheme A, but only $485 a square foot for the condominiums of the proposed/approved building. Pet. Ex. N-2. Clearly, the Congregation did exactly what the Petitioners always claimed — over-allocated construction costs to the as-of-right condominiums, so as to manipulate the rate of return.

82. It is proper to draw the inference that the "missing" evidence would have shown that the (b) finding could not be made for the as-of-right schemes. Thus, the Court should annul the condominium variances. There is no need for a remand. This was not an oversight by the Congregation — it deliberately withheld information. The Congregation had the opportunity to supply the information and chose not to do so.

The BSA Written Guidelines As to the §72-21(b) Finding

83. An administrative body cannot ignore without justification its own written regulations, yet the BSA did ignore its instructions as to the §72-21(b) Finding: The BSA accepted an unleveraged return

on investment approach where the Instructions require a leveraged return on equity approach. The BSA accepted an annualized return approach when the Instructions require a total return approach. The BSA accepted unsigned incomplete construction cost estimates (which over-estimated AOR construction costs) where the Instructions require signed and sealed estimates. The BSA failed to require an analysis of a return on investment by the Congregation based upon the original acquisition price/cost for the Lot 37 properties, taking into account the value of use and income derived from the property, as a result of the $12,346,875 to be "received" by the Congregation for the market value of the property.

84. The Instructions at Item M of the BSA guidelines provide detailed and rational instructions for preparing the reasonable return (aka feasibility) studies. R-4273. Pet. Ex. R. These are BSA's only regulations or guidelines, and they are consistent with both real estate economics and precedent. Pet. ¶¶ 121 and 123.

85. The BSA was unable to provide any explanation for ignoring its own material and rational written instructions. The BSA could only claim that its only written instructions were merely guidelines and are not "absolute requirements," and could be ignored on the whim of the BSA. BSA Answer, ¶ 65. Had the Guidelines been followed, the BSA would have been unable to properly make the required (b) finding for the condominium variances.

BSA Consideration of Z.R. 72-21(b) - Irrelevant Issues

86. The BSA Resolution provides the false impression that extended and deliberate attention was paid to the as-of-right feasibility studies, when in fact the BSA glossed over the as-of-right analysis. The (b) Finding concerns whether a reasonable return can be obtained from an as-of-right building; whether the proposed building yields a reasonable return is a matter for the (e) finding of minimum variance. The BSA Resolution at ¶¶125-148 mixes together the analysis of the two separate findings. BSA Res. ¶127, ¶132, ¶133, ¶134, ¶135, ¶136, and ¶137. The Court should not be misled by the

confusing presentation of the BSA: careful reading shows that the BSA paid little attention to the as-of-right findings, and, importantly, failed to articulate the underlying factual assumptions, such as using a site area of 19,975 square feet to value a site of 5,316 square feet. The BSA findings are just conclusory parroting of the language in the zoning regulation: the BSA omits the factual findings required, obscures the facts and prevents meaningful review.

Even If the Leveraged Return on Equity Approach to Reasonable Return Is Not Used, the As-Of-Right Schemes Still Earn a Reasonable Return to the Congregation

87. The Respondents continue to misrepresent the objections to the report as being only an objection to whether they are a return on investment or a return on equity (required by the BSA Guidelines). Whether the return on investment method is used or the return on equity method specified in the BSA guidelines is used, if the site value correction is made and the construction cost allocations are adjusted and other padding of the analysis removed, both the Scheme A and Scheme C as-of-right schemes show an adequate return to the Congregation. In any event, a return on equity analysis was appropriate, because the BSA failed to provide a condition in the Resolution requiring that Congregation's residential units be marketed only as rental, rather than condominium, units. Thus, for that reason alone, not considering the return on equity was capricious.

Reasonable Return Analysis Is Grounded in the Constitutional Principles of Preventing Takings Without Due Process

88. Petitioners had correctly observed in their Initial Memorandum that the necessity of analyzing whether a property owner could obtain a reasonable return is grounded in whether the zoning regulation amounts to a confiscatory taking. Similarly, the hardship issue is based on the concept that a land use regulation cannot create a taking. Although denying this assertion, the BSA Memorandum of Law is peppered with references to the Constitution and zoning regulation. The point is that the BSA is not free to come up with its own idiosyncratic definitions and applications of the concept of economic return. Zoning appeals boards exist to assure that zoning regulations are constitutional and

that owners are able to use their property and/or to earn a reasonable return. Thus, as discussed elsewhere, the BSA is not free to suggest its own interpretation of constitutional requirements, for example, by allowing a religious property owner to fully meet its programmatic needs in half a building and then claim it cannot earn a reasonable return in the other half.

Under Z.R. §72-21 (b), Where a Religious Non-Profit Seeks to Build Revenue Producing Facilities, It Is Indeed Required to Show the Inability to Earn a Reasonable Return

89. If a religious non-profit seeks a variance to construct revenue-producing facilities such as luxury condominiums, then it must satisfy the reasonable return finding of Z.R. §72-21 (b). Petitioners concur with the position stated by the BSA on this issue. The Congregation's position is directly in opposition to the BSA position.

90. The Congregation disagrees and argues that the language of 72-21(b) provides that no reasonable return finding is required for any variances if the property owner is a religious non-profit organization. As noted accompanying Reply Memorandum of Law, the authorities cited by the Congregation in support of this proposition are inapposite.

91. Petitioners contend that in interpreting the application of Z.R. §72-21(b) where a non-profit organization seeks to develop a mixed-use project requiring variances, the constitutional underpinnings of this provision need to be considered, to avoid an unconstitutional taking by the land use regulation.

As Shown in Cases Cited by the Respondents, Z.R. §72-21 (a) Requires that The Unique Condition Be Physical

92. The BSA seeks to divert the Court’s attention by incorrectly describing Z.R. §72-21(a) on Page 18 of its Memorandum by heading its discussion of the issue with "(a) Unique Characteristic" when the statute clearly refers to "unique physical conditions." The primary issue presented by Petitioners is not whether the characteristic is "unique," but whether the condition is "physical." Because there is no evidence at all of any physical condition, then there is no substantial evidence for finding (a) and thus the variances must be annulled. Z.R. §72-21(a) not only requires a "physical condition," it then

describes examples of what it meant by a physical condition: "including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions." Accordingly, cases that describe other difficulties and hardships when addressing a Z.R. §72-21(a) finding still identify some type of a "physical condition."

93. The Congregation admits that "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." Cong. Answer to Pet. ¶ 41. In fact, the construction site consists of the combination of three rectangular brownstone lots, of which there are 117 nearby brownstone lots as shown just in the surrounding area diagram the Congregation filed with its application. R-53. The Congregation intends to build deep into the bedrock with two subbasements, one a banquet hall of 6400 square feet. There simply are no physical conditions at all, unique or otherwise, and certainly none within the definition of Z.R. §72-21(a), which would constitute a hardship or practical difficulty. Were the Respondents to argue that the rectangular lots are a physical condition, they are not unique. Judicial notice should be taken of several townhouses in Manhattan that became "lots" in the last year as a result of destruction by construction accidents or explosions.

94. The New York City cases cited in the Respondent Memoranda indeed are all careful to refer to specific physical conditions to justify the finding under Z.R. §72-21(a). The Respondents cite to a number of cases interpreting zoning statutes that do not include a requirement for a "physical" condition as the hardship and thus are inapposite.

95. See New York State Town Law Section 267-b-2-(b) ("that the alleged hardship relating to the property in question is unique" and (c). See P-180-1. It is regrettable that many courts in BSA zoning cases involving statutory interpretation may not have been advised by the parties of the differences between City and State law. Perhaps the Corporation Counsel believes this is of "no matter"; we

would disagree. Many New York City zoning practitioners are not aware of the differences existing outside their own jurisdiction.

96. Additional cases cited by the Congregation are similarly inapposite as to interpretation of the statutes' use of "physical" as they relate to whether a condition must be unique. It is still clear that the perfectly rectangular shape of townhouse lots is hardly unique in the area. *See* Cong. Answer ¶ 31 ("The Congregation denies the allegations in paragraph 31 of the Petition, except admits that Lot 37 is a regularly shaped lot, 64 feet by 100 feet.")

The BSA Failed to Identify Any Evidence in the Record As to Obsolescence — It Is Not Even Clear Which Building Is Obsolete and How It Creates a Hardship Arising out of the Zoning Resolution

97. The Respondents expend a great deal of energy in trying to explain that a physical condition can include a physical condition of a building, apparently conceding that a "physical" condition is required under §72-21(a). It seems perhaps that the physical building condition upon which the Respondents rely is "obsolescence." However, there is scant discussion of what is "obsolete" — is the Respondent claiming that the Synagogue is obsolete or the existing community house is obsolete? The Respondents can point to nothing evidentiary as to either, except possibly to a 54-year-old elevator that requires replacement. Nor is there any explanation as to the causation — how the so-called physical obsolescence (*i.e.*, physical condition) creates a hardship "arising out of" the strict enforcement of the zoning resolution.

98. BSA Staff, in its June 15, 2007, R-255, focused on the issue of "causation" and requested:

> 14. Page 20: Within the first paragraph, one of the elements of the suggested "(a) finding," is "...the dimensions of the zoning lot that preclude the development of floor plans for community facility space required to meet CSI's ...programmatic needs." Please specifically explain in what way the site's "dimensions" hamper CSI's programmatic needs.

No response was provided by the Congregation. The Congregation claims at R-309 that it responded at R-338-39. The response consists of a barrage of conclusory verbiage from counsel for the Congregation, with no evidentiary support.

99. If it is the community house that is "obsolete," then an as-of-right building resolves any obsolescence, but, again, it is not clear upon what particular facts in the Record the Respondents rely. If the Synagogue is "obsolete," again an as-of-right building resolves the issues of egress and circulation. So, the hardship does not "arise out of" the strict application of the zoning regulation.

Obsolescence Is Not an Appropriate Factor in a Bulk Variance Case for a New Building

100. Similarly, the assertion that the existing building that occupies two-thirds of the frontage of the lot is somehow obsolete to a depth of 60 feet is not a basis for the Z.R. §72-21(a) finding because there is no showing that the variances in any way relate to the conditions — there is no showing of "arising from." There is no showing of any difficulty or excess cost in demolishing the existing community house — to the contrary. There is no evidence that the existing building is obsolete — there are only assertions of ultimate fact. This relatively small 4-floor existing building is being rented partially to Beit Rabban for $500,000 year. The building is no more obsolete than any other brownstone on the block. Nothing is cited in the record. Further, with the cooperation of the BSA, the opposition expert architect was unable to visit the interior of the existing community house (requested over 5 months prior to the close of the hearing), and it was an abuse of discretion for the BSA to consider unspecified claims of obsolescence while not instructing the Congregation to provide access to the building to the opposition's expert. R-3825, R-3877, R-3906, P-166. Without specifying any facts as to the claimed obsolescence, it is not possible to ascertain the relationship between the hardship claimed and the variance - the arising from requirement. [On the return of the Petition — the City failed to fill in the record as to facts Commissioners' may have obtained from their inspection — thus, presumptively, there are no such facts as to the Commissioners' inspections that may be used to support the findings.]

101. Where a new building is to be constructed, and the obsolete building is to be demolished, and where an as-of-right building resolves all hardships associated with the alleged obsolescence, then there is a failure of the causation arising from requirement in §72-21(a). The BSA cites to 97

Columbia Heights contending on page 19 "reinstating a variance and finding that the uniqueness requirement was satisfied by the demolition of a building, resulting in increased costs." There is no showing here of any special increased costs in dollars and cents. The demolition costs are minimal. Were the BSA's view to be accepted, then any building which an owner wishes to replace with a variance requiring structure can be described as obsolete and then a finding (a) obtained to build a larger building, even though an as-of-right building responds to the hardships which the applicant asserted were caused by the obsolescence.

102. Some argue that obsolescence could be an appropriate factor in a case where a building may be too expensive to modify or demolish - but no such evidence exists here, and the "arising from" condition would still be need to be satisfied. The existing community house can be demolished for a nominal amount based upon the construction cost estimates provided by the Congregation. The total hard construction cost of the as-of-right Scheme A building is estimated to be $19 million, of which only $100,000 is for demolition. R-4873. Under the BSA logic, almost any building that someone wishes to replace could satisfy finding (a), rendering the requirement of physical condition to be meaningless. The citations by the BSA to non-New York City cases as interpreting whether obsolescence can be a physical condition under New York City Z.R. §72-21(a) are irrelevant.

103. In Homes for Homeless, Inc. v. Bd. of Standards and Appeals, 24 A.D.3d 340 (1st Dep't 2005), *rev'd,* 7 N.Y.3d 822 (2006), the BSA stated in its appellate brief (Brief Available on WestLaw):

> The record reflects substantial evidence supporting the BSA's finding that the site does not have unique physical conditions that create an unnecessary hardship, or practical difficulties that require an expansion of the existing use. The Court of Appeals has determined that for entitlement to a variance, a petitioner generally "must show that as a practical matter he cannot utilize his property or a structure located thereon 'without coming into conflict with certain restrictions of the [zoning] ordinance.'"

Not of "No-Moment" - the Causation Requirement of Z.R. §72-21(a)

104. The BSA has ignored the causation "arising out of" requirement in making its hardship findings under §72-21(a). Astonishingly, as to the access and circulation hardship, the BSA states that it is irrelevant that an as-of-right building resolves the hardship; it is of "no-moment."

105. One of the "hard spots" for the BSA (R-1749) was to find a "physical condition" to support the (a) finding or to find a hardship or difficulty or programmatic need, hopefully physical in nature, to shoehorn into the (a) finding. The Congregation settled on the programmatic need of physical access and circulation to and from and within the Synagogue Sanctuary building. See extensive detailed factual averments at Pet. 242 *et seq*., and the overbroad denials by Respondents. Access and circulation were so important that the Congregation drummed in the issue over and over again in its multiple submissions of its 50-page statement in support, sometimes mentioning the issue 30 times in a single document. The "hardship" had all the elements of drama, including a landmarked sacred site and handicapped and aged people too embarrassed to attend religious services. If the flag could have been used, it would have been. Unfortunately, the facts do not support the claim. An as-of-right building resolves the problems. (The Congregation never even identified a single fact that it could not replace its 55-year-old elevator without erecting a new building.)

106. The Congregation responded in its brief by asserting a scintilla standard, without showing the scintilla. The BSA, realizing that the Petitioners were overwhelmingly correct on this issue, abruptly announced that this was of "no-moment," something the BSA did not have the gall to assert in its Resolution, so ridiculous is the proposition.

107. Ignoring Z.R. §72-21 and the very purpose of zoning variances, the BSA astonishingly and incorrectly asserts that a variance may be granted even if there are no supporting hardships arising from the strict application of the zoning regulation:

> Furthermore, a zoning board may not wholly reject a request by a religious institution, but must instead seek to accommodate the planned religious use without causing the institution to incur excessive additional costs [R. 5 (¶ 63), citing, Islamic Soc. of Westchester, supra]. Thus, the Opposition's suggestion that the Congregation's programmatic needs, and access and circulation issues [Petition ¶¶ 247-261] could have been addressed by an as-of-right development, are of no moment.

BSA Answer at ¶ 247. BSA Memorandum of Law at page 25, with no further explanation. This is an extraordinary proposition: that the BSA would grant a variance to a religious institution asserting a hardship, when the religious institution does not need the variance to resolve the hardship.

108. The record has no substantive evidence as to any "excessive additional costs." One of the questions the BSA never would ask is the cost to the Congregation of replacing the 1954 elevator with a modern elevator. It is as if a $35 million building must be built to replace a $100,000 elevator.

109. The BSA was responding to the Petitioners' still unrefuted assertions that the claimed access and circulation hardship of the Congregation would be resolved by an as-of-right building without the need for any variances. Pet. ¶ 247-261. Accordingly, the BSA was not authorized by the zoning resolution to grant a variance based on that hardship.

110. The BSA's position is a fundamental error of law. Any reading of §72-21 and variance law shows that the purpose of variances is to relieve property owners from unreasonable hardships created by the zoning law. Z.R. §72-21(a) is clear in stating that there must be a finding that "practical difficulties or unnecessary hardship arise in complying strictly with the use of bulk provisions of the Resolution."

111. It is clear that if a hardship can be resolved in an as-of-right building with no variances, then it is not a hardship that "arise[s] in complying" with the Resolution.

112. Similarly, Z.R. §72-21(e) makes the purpose of variances more explicit: "(e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief." In other words, the purpose of the variance is to relieve the property owner from a hardship. If the owner can be relieved of the hardship without a variance, then the minimum variance under §72-21(e) is no variance.

113. The BSA incorrectly states that the "arise in complying strictly" and "minimum variance" requirements are not applicable to a variance application by a religious organization. Were the BSA to be correct, there would then be no need for the BSA and hearings when a religious organization applied for a variance.

114. In this proceeding, however, the BSA used the access and circulation hardship to justify the need for a variance for the revenue-generating condominiums, which is clearly outside the argument that the BSA must defer to assertions of fact by religious organizations that are inconsistent with rationality and the real world.

115. If the BSA now states that it is of "no moment" that an as-of-right building resolves the access and circulation hardships, then it needs to explain why the difficulty was mentioned in the decision, why it is included as a programmatic need, and why the BSA did not require the Congregation to remove from its statement in support the repeated references to access and circulation hardships, as the BSA did when it had asked the Congregation to remove the assertion that revenue generation from the condominiums was a legally cognizable basis for the variances.

No Scintilla of Evidence - Access and Circulation Issues

116. The Congregation suggests the scintilla standard, to support its central argument, that only variances would remedy asserted hardships of access and circulation; for the access and circulation finding, the BSA and the Congregation cite not to facts in the record, but only to the BSA references to "representations" by the Congregation and to "indications." Cong. Memo at 12. BSA Res. §60, §72, §73. Indications and representations are not facts. The BSA has not cited to any facts to support the findings based upon "representations."

117. Similarly, the BSA states in is Memorandum at 20:

> Moreover, the Congregation represented that the proposed building will provide new horizontal and vertical circulation systems to provide barrier-free access to the Synagogue's sanctuaries and ancillary facilities [R. 5 (¶ 73)].[8] The BSA, citing to case law, rationally found that the Congregation's programmatic needs constituted an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations" [R. 5 (¶ 64) …

(*See also* Congregation Memorandum at 12 "The BSA's reliance on materials indicating that such alternatives would not be workable clearly satisfies the more-than-a-scintilla 'substantial evidence' test" without identifying the scintilla).

118. Clearly the BSA was unable to find any evidentiary facts to support this proposition, since the BSA Resolution could point only to that which "the Congregation represented." Second, the BSA even there sailed right through the causation requirement in §72-21(a). Although the Congregation asserted that the proposed building will provide these systems to make the facilities barrier free, it did not assert that an as-of-right building would NOT do the same thing. Of course, since opponents raised this issue repeatedly, when the BSA made its so-called findings, it was cleverly trying to distort its way around the requirement of causation (while, at the same time illustrating a lack of impartiality by the BSA). For example, see June 20, 2007 Community Objection #30, R-269 (Pet. Ex. E) and references cited in Pet. at ¶¶ 109 *et seq.*

119. The Respondents must identify facts in the record, not conclusory findings by the BSA and not assertions of counsel inconsistent with physical reality and the opinions of the Congregation's own experts, and certainly not to "indications."

120. After scrutinizing the record for months, the Respondents simply have been unable to identify any evidence (even a scintilla) to support the assertion that variances are required to resolve an asserted religious programmatic hardship for access and circulation to its Sanctuary. The existence of a hardship is not a sufficient basis to obtain a variance. What is necessary is that a variance must be granted in order to resolve the hardship.

121.The Congregation described this asserted hardship as central to its variance application and the Respondent relied upon this hardship to find programmatic needs to support the community house and condominium variances. *See* Congregation June 17, 2008 Letter, R-4859 at R-4860 ("significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application."). See Pet. Ex. P-1 reproducing R-4860.

122. The Respondents rely upon the asserted access and circulation hardship to underpin all of the variances. First, the Respondents claimed that these access hardships were "physical" in nature and

supported the Z.R. §72-21(a) requirement for a "unique physical condition." Next the Respondents used this hardship to assert that the there was "obsolescence" that satisfied the physical condition requirement. Then the Respondents claimed that resolving these access hardships were programmatic needs. Finally, the BSA in its decision used "programmatic needs" as a hardship to support, not just the lower floor religious community house variances, but also the upper floor luxury condominium spaces, which account for 90% of the variances.

123. The BSA, notwithstanding, did use religious programmatic need as a basis for its (a) and (e) finding for the revenue-generating programmatic needs. BSA Res. ¶122, ¶214 and ¶215, and, even the Congregation cannot explain what the BSA had in mind. Cong. Mem. at 13.

124. Yet the Respondents have not been able to identify any evidence in the record to support the claim that variances are needed to resolve this alleged hardship. There is a simple fact that frustrates the Congregation and the BSA in supporting their false assertion. The Zoning Resolution, as a generous accommodation to religious organizations, permits without any variances at all, an as-of-right community building to occupy not 70% but 100% of the entire lot up to 23 feet above street level. For the Congregation, all circulation and access issues are addressed on the first floor, except for a 100 square foot elevator shaft that is in the as-of-right part of the proposed building. It is for this reason that the distinguished architect for the Congregation was unwilling to misrepresent to the BSA that variances were needed to resolve access and circulation issues.

125. The Congregation's architect, in a specific statement in response to contentions by opponents on this specific issue, agreed that no variances were required to meet this programmatic need. The BSA and Congregation did not deign to discuss this probative and conclusive admission by its own expert.

126. In summary, analysis of the circumstances surrounding the false assertions by the BSA and the Congregation as to access and circulation are illustrative of the arbitrary and capricious and irrational conduct of the BSA in the BSA proceeding and its response to the Petition.

- A 6500-page record and 18 months of hearings do not establish that matters were considered by the BSA or found in the record.
- Representations and indications are not facts.
- The BSA accepting facts that conflict with reality is irrational.
- The BSA capriciously shaped the record by being careful not to ask the Congregation expert to explain the claimed relationship between the access and circulation and the variances.
- There must be a causal relationship between an alleged hardship such as access and circulation and the variances sought.

The Proper Remedy for a Property Owner Seeking Relief from Hardships Created by the Landmark Law Is Under Z.R.§74-711: The BSA Has No Role in Providing Relief to Landmarking

127. The BSA improperly used landmarking as a unique physical condition hardship to satisfy Z.R. §72-21(a). Not only is the alleged hardship resulting from landmarking not a physical condition under Z.R. §72-21(a), but Respondents were unable to show how this hardship, especially as to the revenue-generating condominiums, arises out of the strict application of the zoning regulations as required in Z.R. §72-21(a). Thus, the variances as to the condominiums must be annulled for that reason, but another reason is that the BSA is not authorized to consider the hardship of landmarking.

128. The landmarking hardship alleged by the Respondents arises, not out of the strict application of the zoning regulations, but out of the regulation of the New York City landmark laws, which apply generally to the West Side blocks surrounding the Synagogue. The Zoning Regulation clearly removes the BSA from any role in deciding when a hardship from landmarking requires relief. The LPC has a role and the City Planning Commission has a role, but the BSA has absolutely no role.

129. BSA knew that what it was being asked to do, taking into account that the landmark status was improper — this was the "hard place" the Respondent Chair referred to at the first hearing:

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

R-1749. The Congregation acknowledges that the LPC would not provide 74-711 relief to the Congregation, in its letter of June 17, 2008, R-4859 at R-4861: "Its request for Landmarks cooperation on a ZRCNY Sec. 74-711 special permit was denied, thus properly bringing this Application to the Board for relief." Of course, there is nothing at all proper about asking the BSA to do what the LPC would not do under §74-711, when the BSA has no authority under such provision.

130. The Congregation describes it decision to withdraw it §74-711 request at page 15 of its July 9, 2008, its last version of its Statement in Support (R-5129-5128) and outrageously claimed that having been turned down by the LPC for a §74-711 special permit, that the LPC "signaled" that its issuance of a Certificate of Appropriateness (COA) for a smaller building would meet the preservation purposes required. But, if this were so, first of all the LPC would indeed have approved a special permit under §74-711 - and it did not do so. All the LPC said in effect was - "here is your COA - go to the BSA and see if you meet their other standards, because we are not giving you a special permit." The Congregation claimed that "that CSI took every available step to seek the administrative relief provided in the Zoning Resolution for seeking a special permit to modify the bulk regulations for which this variance Application now seeks waivers, thereby exhausting its administrative remedies prior to the filing of this Application." Of course, that is false - the Congregation did not take the "available step" of applying for the special permit.

131. The BSA Memorandum at 55 acknowledges that the BSA took the landmark status of the Synagogue into account in both the 90% upper floor condominium variances and the 10% lower floor community house variances.

> The Record before the BSA demonstrated that the hardship in developing the Zoning Lot with a complying building was not created by the Congregation, but originated from the landmarking of the Synagogue and the 1984 rezoning of the site.

Z.R. §74-711 is the exclusive remedy for a party to seek relief from a hardship created by the landmarking of the property. There is nothing in Z.R. §72-21 to suggest that landmarking is a "unique physical condition" under §72-21(a) or a hardship recognized thereunder. Z.R. §74-711 provides in part:

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

132. Allowing a property owner to use landmarking as a hardship constituting a unique physical condition under §72-21 (a) not only flies in the face of the language of Z.R. §72-21 (a) but also renders Z.R. §74-711 meaningless.

133. The Congregation played the same double game with the landmark "hardship" as it did with the "access and accessibility" issue and the "money is needed for programmatic needs" issue. It peppered its submissions with references to these issues, hoping to influence the BSA incorrectly, but then claims that the issue was just provided for context and in passing.

134. The Congregation, knowing that Z.R. §74-711 is the exclusive remedy for landmark hardships, states at page 12-12 of its Congregation Memorandum at 12-13: "In any event, the Resolution does not suggest that the BSA, here, treated the landmarked status of the synagogue as a hardship."

135. But the Congregation is incorrect. The BSA did improperly take the landmark hardship into account in making the (a) finding. The problem with the BSA position is that whenever the LPC landmarks a district or building, then the BSA arrogates to itself the right to grant variances and otherwise ignore the requirements of §72-21(a).

136. Finally, the BSA fails completely to identify any facts that illustrated why the landmark status of the Synagogue or even the landmark status of the entire West Side district prevents the

Congregation from developing the construction site. The BSA's logic merely is "the Synagogue was landmarked so it creates a hardship in developing the development site." Or is the Congregation claiming that it is the application of the landmarks laws on the development site that creates the hardship? The record is silent. Where is the explanation for this logic? How do the variances relate to this hardship? Where is the causation? How do the variances provide relief from the hardship?

Landmarks Law Prevents the Congregation From Building a 17-Foot Wide Tower and the BSA May Not Grant Relief From This Hardship

137. The split lot is a physical condition, according to Respondents, because the sliver law limitations of Z.R. §23-692 allegedly prevent the construction of a narrow 17-foot tower in the R10A portion of Lot 37. See BSA Res. ¶94. Yet, it is the limitations of the landmarking law that prevent the construction of a sliver tower on Lot 37, not the sliver law, and not a result of the split zoning. Landmarks Preservation Commission made it clear that the maximum height it would allow on any part of Lot 37 was 95 feet in the R10A part of Lot 37. Alleged hardships imposed by application of the landmarks laws are not hardships caused by a physical condition, and, even if they are, they are not hardships for which relief may be provided under Z.R. §72-21(a). For the reasons discussed elsewhere, hardships resulting from the landmark laws are not the basis for a variance under §72-21. The Congregation's Architect, in a letter to the BSA dated March 28, 2008, stated that Section 23-692 is not applicable. R-4332, ¶ 2. This suggests perhaps that the sliver building is a ruse seized upon by the Congregation and the BSA to help contrive the split lot hardship claim.

138. Lot 37 is 64 feet wide; the east portion of the 17 feet is in an R10A district, which permits building to the height of 185 feet. *See* Resolution ¶93. The R10A portion of the lot is the least restrictive portion of the lot. The rest of Lot 37 is in the more restrictive R8B district, which applies the contextual zoning limit of 75 feet. Under circumstances not applicable here, Z.R. §73-52 (*see* Resolution at ¶98) and Z.R. §77-00 provide relief from the split lot condition.

139. The Congregation is unable to satisfy the requirements of these provisions, but the BSA ignores this limitation. Both provisions restrict relief to where 50% or more of the lot is less restrictive; here the R10A portion is far less than 50% of the lot. More importantly, however, is that for bulk variances, Z.R. §77-00's only relief is to realize the transfer of air rights from one part of the lot to another; it does not provide relief from height and setback requirements. This is one reason that Petitioners have stressed that this case does not involve the transfer of air rights. The Respondents do not disagree. Without such transfer, then, most of the BSA discussion in the resolution as to split lots as a hardship is irrelevant.

140. Although there is no need for the transfer of air rights from one part of the lot to another in this application, the BSA then states disingenuously in its decision:

> ¶99. WHEREAS, the applicant represents, however, that because of the constraints imposed by the contextual zoning requirements and the sliver law, the Synagogue can transfer only a small share of its zoning lot area across the R8B district boundary; and

Not only it there no need to "transfer a small share of its zoning lot area," but the dominant constraint here is the landmark restriction, not just the contextual zoning and the sliver law, so what the board is doing here is considering landmarking as the hardship for which relief is being granted and, most importantly, relying upon a hardship not arising out of the strict application of the zoning laws. Since there is no need to transfer zoning lot area in this matter, then there is no "arising from" as it relates to this claimed hardship.

The Eighth DOB Objection Requiring a 40-Foot Separation Between Upper Floors and the Synagogue Lot Prevents a Tall Building on the R10A 17-Foot Sliver

141. Another constraint against a tall building on the 17-foot wide R10A sliver that was ignored by the Board is Z.R. §23-711, which requires that there be a 40-foot separation between a residential building on a lot on the upper floors. With the initial application, the DOB had required a variance for this 40-foot separation, and the drawings submitted by the Congregation to the DOB and BSA referred to the "40 foot standard minimum distance between building" objection. The BSA staff agreed with

the DOB and asked why the separation was not shown on the as-of-right drawings. *See* Pet. N. 13 to ¶ 97. The Congregation's architect agreed with the DOB as well. There was no indication at all that the DOB mistakenly applied Z.R. §23-711.

142. The BSA staff, in its first notice of objection of June 15, 2007, R-253 at R-256, specifically pointed out the need to meet this requirement:

> 21. Page 24: Please note that ZR § 23-711 prescribes a required minimum distance between a residential building and any other building on the same zoning lot. Therefore, within the first full paragraph, please clarify that the DOB objection for ZR § 23-711 is due to the lack of distance between the residential portion of the new building and the existing community facility building to remain.
>
> 25. It appears that the "as-of-right" scenario would still require a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings) given that it contains residential use (see Objection # 21). Please clarify.

143. An opposition expert with extensive planning experience, Simon Bertrang, provided a cogent explanation of Z.R. §23-711 in a letter dated June 28, 2007, R-279 at R-281:

> BUILDING SEPARATION AND AS-OF-RIGHT DRAWINGS: ZR §23-711 requires a minimum distance between a residential building and any other building on the same zoning lot — in this case, with both buildings over 50' tall and with blank wall facing blank wall, the minimum distance is 40'. The As-of-Right drawings submitted by CSI in support of their BSA application are not as-of-right since the new building shown there would need a variance. Since As-of-Right drawings are a required part of any BSA submission, CSI's application is currently incomplete. A truly as-of-right building would either show the separation (40' minimum distance) or not include residential so that such a minimum distance was no longer required (a new community facility building would not trigger the requirement). Another way of avoiding the need for a 40' separation between the residential building on Lot 37 and the synagogue on Lot 36 would be to continue to treat them as separate zoning lots (i.e. not combine them in the way that CSI is proposing). Of course, as stated above, this would mean that their as-of-right FAR would be much lower: 5.59 instead of 8.36.

144. The Eighth Objection from DOB created a problem for the BSA — if the zoning resolution required a 40-foot separation in the upper floors, then the entire argument claiming that a split lot was a physical condition under 72-21(a) would not be a valid argument for the simple reason that even if all

of Lot 37 was in the 10A zone, the Congregation still could not build a tall structure on the eastern 40 feet of the 64-foot wide lot.

145. The DOB eighth objection was curiously and mysteriously removed in August 2007, without any changes to plans and without any explanation or curiosity on the part of the BSA. The BSA Statement of Facts at ¶ 205 asserts that:

> "After revisions to the application by the Congregation, the Manhattan Borough Commissioner issued a second determination on the Congregation's application which eliminated one of the prior objections."

and again claims, incorrectly, at N. 7 to ¶ 230:

> 7 That the Congregation's initial application initially requested waivers related to Z.R. §23-711 (minimum distance between buildings), but then later withdrew its request for that variance after obtaining revised objections from DOB which, based upon revised plans, did not object to the distance between buildings at the site, is, contrary to petitioners' contentions [Petition, ¶ 97, fn. 13], of no moment. Indeed, this issue was addressed by the Board during the February 12, 2008 hearing where Chair Srinivasan and Vice-Chair Collins explained first that it is typical for an applicant to submit revised plans to DOB and receive updated objections which become the subject of the BSA's review, and second, that all that is being reviewed and acted upon by the Board are the requested zoning waivers, not the differences between the first and second sets of plans submitted to DOB [R. 3724-28].

146. However, there were no such revisions to the plans, and the Congregation's "direct[ing] the Court to the record" is not at all helpful in identifying that which is non-existent. In light of these denials and factual distortions, Petitioners in reply provide herewith a composite showing that there were no changes in the drawings between April 2007 and August 2007. Pet. Ex. N-8.

The 40 foot separation objection was presented at the improper November 8, 2006 ex parte meeting, and based upon the check mark next to the relevant item 20, appears to have been discussed. Pet. Ex. Q-1, P-4261.

147. The fact is that the DOB initially required the separation and the BSA staff agreed, but then the Congregation and BSA needed to conjure up a physical condition. So without any discernible changes in drawings and with no explanation, the Congregation was able to refile the same building and have the DOB remove the eighth objection, and the BSA asked no questions. These machinations allowed the Congregation to contrive the split lot as a physical condition — if the eighth objection were still in effect, the split lot argument would have been even more baseless. It is also curious, to say the least,

that the BSA in any proceeding would observe that an applicant was violating a provision of the zoning resolution not in the DOB objection, and be silent.

The Board's Findings Under Z.R. §72-21(c) and §72-21(e) as to the Blocked Windows

148.Petitioner Lepow owns two apartments in the adjoining 18 West, which apartments have windows that would be blocked by the proposed building, but would not be blocked by an as-of-right building; thus, variances blocking the window run afoul of Z.R. §72-21(c), as is fully described in the Petition. Pet. at ¶¶ 8, 262-288. The BSA action as to the windows violated Z.R. §72-21(e) as well.

By Instructing the Congregation to Create a Courtyard to Relieve the Adverse Impact Upon Adjoining Property Owners with Lot Line Windows, the BSA Implicitly Invoked Z.R. §72-21(c)

149. The BSA instructed the Congregation to modify its building to create a courtyard in the rear to accommodate the rear side lot line windows in 18 West 70th Street, but acted arbitrarily and capriciously by not so instructing the Congregation to create a courtyard to accommodate the front side lot line windows. According to the Resolution and the BSA Answer at ¶319, the waivers of variance law to the Congregation resulting in the blocking of the lot line windows did not impair the appropriate use of the 18 West 70th Street cooperative apartment owners under Z.R. §72-21(c). The setback requirements in the zoning regulations would have protected these windows. The BSA dismissed the impairment of these cooperative apartments as being of "no moment."

150. The BSA provides no explanation of the distinction drawn between the nearly identical front and rear cooperative apartments. Even so, despite the BSA's "no moment" statement of dismissal of the concerns of the cooperative owners, BSA did in fact realize that there was an impairment under Z.R. §72-21(c). This section requires a BSA finding that the variance, if granted "will not substantially impair the use … of adjacent property."

151. The BSA falsely claims (BSA Answer ¶ 18) that Petitioners or other opponents asserted that the windows were legally required or that it had a legal right to not have the windows blocked under

the building code or under general property rights and can provide no statement in the record that such assertion was ever made by other opponents.

152. Obviously, the BSA did recognize the impairment, otherwise it was acting upon an arbitrary whim in instructing the Congregation to create the rear courtyard. The BSA just does not have the power to order applicants to modify buildings on a whim. Zwitzer v. Zoning Board of Appeals of the Town of Canandaigua, 74 N.Y.2d 756 (1989).

153. This was a "compromise," but if the cooperative owners had no claim, then what was being "compromised"? BSA Answer at ¶319. Certainly, it was a compromise that in no way benefits owners of the front apartments.

A Front Courtyard Not Blocking the Front Windows Would Have Still Permitted the Congregation to Earn a Reasonable Return -— Z.R.§72-21(e) — the Minimum Variance

154. Ultimately, waiving the setback regulation in the front increases income to the Congregation, and thereby reduces the financial burdens borne by members of the Congregation - and the BSA should have expressly balanced the equities, but did not do so, especially where the proposed building so exceed a reasonable return to the Congregation. The BSA did not even make the required specific finding as to the front setback variance which results in the blocking of the windows - and improperly lumped all the condominium variances into one finding.

155. The BSA Answer at ¶292 crystallizes the fact that the rate of return approved by the BSA was nearly 11%, but that this is in excess of the return that the Congregation acknowledges as sufficient. The BSA's failure to require a courtyard for these windows was also in violation of Z.R.§72-21(e) which provides that a variance must be the minimum variance,, since the proposed/approved building earned a rate or return far in excess of the adequate reasonable return of 6.55%, and indeed was 67% in excess of the rate of return (6.55%) the Congregation itself deemed to be adequate. R-140, R-287.

Satisfaction of CEQR and SEQR Is Not Sufficient - Must Satisfy Z.R. §72-21(c) and Act Consistently With the Purposes of the Zoning Regulation

156. The Answers of the Respondents, as well as the BSA Resolution at ¶¶ 194-201, focus almost exclusively, when considering the impact on light and air, upon the provisions of CEQR and SEQR. See BSA Answer at ¶320. Yet, a project could satisfy SEQR and CEQR, but still not satisfy Z.R. §72-21(c). Oddly, Respondents focus on issues never raised by opponents (such as shadows in Central Park) and on issues not raised in the Petition. BSA Memorandum, p. 8-10, 11-13, 40, 48, 53-54. It almost as if the Respondents are responding to another petition in another matter. *See* Pet. ¶ 54.

157. When the Congregation filed its application, it provided no shadow studies. Opponents requested street level shadow studies of West 70th Street; the BSA responded with a non-issue, a request for shadow studies of Central Park (R-198-208), resulting in more community objections. When the BSA did ask for a West 70th Street shadow study, it requested minimalist studies of no value in evaluating the impact in the real world. The street shadow studies were not conducted over a period of a year, but were supplied a year after the variance application was filed. BSA Answer ¶322.

158. The BSA findings at BSA Res. ¶ 197 and ¶200 are wholly conclusory, and in conflict with reality. In its Answer at ¶ 320, the BSA states that "BSA properly considered and rejected the Opposition's assertion that the proposed building will cast shadows on the midblock of West 70th Street [R. 12 (¶ 194)]." The photographs (for example, those at Pet. Ex. L and R-1831-1850) and even the AKRF shadow study show this is not true at all, for they show sun where the studies show shadows.. There also seemed to be a belief that existing shadows from the tall building at 91 West Central Park West were already casting the street into the dark, but the photographs show that this is not the case.

159. It is incumbent upon the BSA to respect the purposes of the zoning regulations: the mid-block contextual zoning regulations establish height and setback requirements to allow light and air into the

narrow streets. Further, satisfaction of CEQR and SEQR requirements in no way means that Z.R §72-21(c) has been satisfied, or that the purposes of the particular zoning regulation are honored.

160. Dr. Elliot Sclar of Columbia University, who helped draft and implement the studies and reports underlying contextual zoning in 1984, submitted a letter in opposition to the Congregation project. Although the purpose of contextual zoning are self-evident from the parameters of the specific height and setback limitations, Dr. Sclar stated that:

> The Upper West Side today is a delicate balance of intense and highly congested urban living. The low-rise midblocks give the area the necessary respite of light, air and human scale to remain vital.

Letter of Dr. Elliot Sclar, February 12, 2008. R-3762 at 3763.

161. The proposed tower building will have a substantial detrimental impact on the character of West 70th Street and will be detrimental to the public welfare as a consequence of, among other things, the shadows that would be cast upon the mid-blocks by the tower building, and thus runs afoul of Z.R §72-21(c). The impact of shadows from the proposed building on the narrow mid-block streets would be substantial, especially in the winter months, when the sun is low in the sky. At that time, even adding a mere 10 feet to a building height can have a substantial impact. Sunlight in the winter is known to have health and psychological benefits. And sunlight provides heat energy, lowering winter heating costs. What is not of consequence — of "no matter" — to the BSA is of great consequence to Mr. Kettaneh, who owns a historic brownstone across the street from the proposed tower, and to the many members of the community and the public who enjoy historic West 70th Street. Clearly, City residents who live close to the project nearly uniformly oppose the project. The Congregation could only muster 3 or 4 residents in the 400-foot zone to file statements in support of the project. Pet. Ex. K.

162. In analyzing the impacts described in §72-21(c), the BSA is obligated to consider the impact that the zoning regulation sought to protect, and, further, to utilize a methodology that reveals rather than conceals the impact that contextual zoning seeks to protect. Because of the scale of the studies and the absence of street-level analysis, it is simply not possible to use the Congregation studies to

evaluate the street-level impact of shadows. With the availability and wide if not universal use of three-dimensional computer software, there can be no excuse for not considering the impact from a vantage point high in the sky and for limited periods.

163. After the filing of this case, Petitioners had the first opportunity subsequent to the consultant's report to take further photographs in late December 2008 of existing conditions.

164. The BSA, in its misplaced reliance upon CEQR and SEQR, its misunderstanding of its obligations under 72-21(c), its rejection of any consideration of the purposes of the zoning regulation in question, its failure to require meaningful studies for analysis, and then its own reliance upon meaningless studies and the conclusory statements of a paid consultant for the applicant, was in violation of law, was arbitrary and capricious, and was without support in the record in making the finding under Z.R. §72-21(c).

As to 10-Foot Rear Yard Variances for the Second, Third, and Fourth Floors of the Community House, Respondents in Their Answers Were Unable to Show the Programmatic Needs Could Not Be Addressed Elsewhere in an As-of-Right Building

165. Before the BSA considered whether to provide variances to the Congregation for rear yard variance on the second, third, and fourth floors, under the minimum variance requirement of §72-21(e) — as well as the "arising from" requirement of §72-21(a), the BSA should have considered whether the uses could be accommodated on floors five and six of the as-of-right building, where the Congregation wished to have condominiums.

The Caretaker's Apartment and the Adult Classroom Can Be Accommodated on the Fifth Floor of an As-of-Right Building — And Thus There Is No Support for Finding (a) and (e) for the Fourth Floor Variance

166. Respondents could not cite evidence as to why the caretaker's apartment on the fourth floor could not be moved from the fourth floor to the fifth floor. *See* Answers to Pet. ¶ 307, 330. The BSA's conclusory findings lacked any evidence to support findings under (a) or (e). Respondents could only repeat the assertion that the apartment needed to be in the community house rather than the parsonage

(currently rented as a private residence), rather than explain why it could not be on the fifth floor. BSA Mem. at p. 20, Answer at ¶ 236. *See also*, Congregation Mem. at p. 19. The BSA provided the fourth floor variance to the Congregation for the simple reason of supporting income generation, not programmatic need. The BSA did not impose a condition that the caretaker's apartment must be used for the caretaker. There is nothing in the conditions to the BSA Resolution that would prevent the Congregation from renting this apartment at market rates, in the same way that it has rented the Parsonage at a monthly rent of close to $20,000.

The Rationale for Second Floor Variances Was Contrived — Even the Last Statement in Support Shows That the Congregation Intends Offices on That Floor

167. The Respondents were unable to cite to any evidence that disputed the assertions in Petition ¶307 that the 60-student toddler program need was a contrivance. From 2001 to December 2007, no plans showed an all-toddler program on this floor. Until late in the game, the 10-foot waiver in the back was always shown to provide larger offices, not to accommodate "toddlers." See Pet. Ex. S, the drawings shown to the Chair and Vice Chair at the November 8, 2006 improper ex parte meeting, which show no reference at all to toddlers on the second floor - only offices and meeting rooms. R-4275-4277. The Congregation's statement of July 8, 2008 is unambiguous: the second floor is for 1,473 sq. ft. of offices, not toddler classrooms. See 4th column, 6th row of table at R-5114 at R-5144.

168. Without specific citation, the Congregation in its Memorandum asserts that "The record confirms that the Congregation described the toddler program to the BSA during the first BSA hearing." The transcript belies this assertion — there is passing testimony to a very small toddler program, which the Congregation wished to expand from 2 to 5 mornings. R-1741, line 332. The 60-toddler "need" was contrived later — 50 toddlers would not justify a variance, but 60 would. *See* Pet. ¶¶331-332. The BSA Resolution does not require the Congregation to use the space for the contrived toddler programs.

Respondents Failed to Provide Any Citations to Evidence As to the Need for the Third Floor Variances

169. Respondents were unable to cite to a pressing programmatic need for the third floor 10-foot rear yard variance. The Congregation claims that the floor is designed to accommodate larger classrooms, but these are easily accommodated on the fifth or sixth floors of the as-of-right building. Respondents are as well unable to respond to the point that, were it not for the common areas on that floor allocated for residential use, the floor plates would be larger to accommodate larger classrooms. Even though a religious entity, the Congregation cannot expect to have the ideal, especially when the ideal is so obviously based upon contrivance and conclusory use of code words, such a floor plates.

The Standard of Review

170. Z.R. §72-21 is clear; a BSA resolution must have "a rational basis and is supported by substantial evidence in the record." Rational basis and substantial evidence are not direct equivalents. Substantial evidence is not a minimal standard, requiring merely some evidence or a scintilla of evidence. And ultimate facts are not evidence at all. BSA findings that merely parrot assertions of the Congregation, themselves based on conclusory statements of counsel, do not constitute substantial evidence absent any actual evidence.[11] Nor are citations to the BSA Resolution substantial evidence, or any evidence. A review of the Respondents' Answers show that most "fact" citations are to the BSA Resolution.

171. Yet, on the basis of repetition of assertions unsupported by ANY evidence, the Respondents seem to maintain that the role of the Court in reviewing a BSA variance determination can be nothing more than to rubber stamp the BSA, to be the proverbial potted plant. Their contention is that no review is the "standard of review," even in the many instances in this matter where the BSA cannot

[11] The BSA cites to a Court of Appeals case that mandates that proof that a property may not earn a reasonable return must be shown "beyond a reasonable doubt," a standard not met here. See, Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267 (2d Dep't 1983), discussed *supra*. *See also,* Spears v. Berle, 48 N.Y.2d 254, 263 (N.Y. 1979) *supra*.

point to any facts (much less substantial facts) to support its conclusory findings. The Respondents appear to go so far as to suggest that the BSA may make, rather than only interpret, the law.

Scintilla of Evidence Is Not the Standard

172. Notwithstanding the clear expression in Z.R. § 72-21 as to the requirement of substantial evidence, the Congregation asserts improperly that only a bit more than a scintilla of evidence is needed to support a BSA finding, clearly the standard is one of at least substantial evidence.

173. The Congregation resorts to the scintilla of evidence rule when it is unable to cite to the Record for support of key BSA "findings," findings that:

- are purely conclusory; and/or
- rest entirely on representation and assertions by the Congregation, or by Counsel for the Congregation; and/or,
- rest on assertions by one Congregation representative asserting that another representative had made a statement; and/or
- have no support of substantial evidence; and/or
- have no support even of a scintilla of evidence — example: false assertion that an as-of-right building does not resolve access and circulation.

Court Have Overturned BSA and Other Zoning Board Actions and Have Scrutinized Claims of Religious Programmatic Needs

174. Respondents wish to mislead the Court into accepting that BSA and New York State zoning board decisions essentially are unreviewable and are always affirmed by the courts. Similarly, Respondents wish the Court to believe that courts have rejected applying scrutiny to the assertions of religious and community organizations. Neither do the issues here involve facts so complex and technical that the Court must defer to the BSA in every respect, especially where common sense dictates to the contrary. Nor do the cases cited by Respondents support the view that zoning boards and courts must defer to whatever assertions are made by religious organizations. Cases that support the proposition that there must be some deference at the same time have not accepted the characterizations and wishes of the organization, particularly with regard to "accessory uses." These matter are fully discussed in Petitioner's Reply Memorandum of Law.

175. Thus, while respectful to the wishes of churches and schools, courts have indeed scrutinized requests of religious organizations with greater care. Even Westchester Reform v. Brown, 22 N.Y. 2d 488 (1968), relied upon heavily by the BSA, was a regulation that excluded the religious use (which is not the situation here) and the court clearly stated that even in an exclusion case "the power of regulation has not been obliterated."

176. Nor can the backdoor attempt to use religious programmatic need disguised as a landmark hardship be used to avoid the land use regulation here. In other words a religious institution is not entitled to the "ideal facilities" standard.

Arbitrary and Capricious Blindness to the Facts — Fashioning the Record

177. A BSA decision is to be annulled if it arbitrary and capricious. An example of a zoning board acting in an arbitrary and capricious manner would be deliberate blindness to the most critical facts, as the Second Circuit stated in describing the arbitrary and capricious behavior of a local zoning board in a leading case involving deference to religious organizations:

> In sum, the record convincingly demonstrates that the zoning decision in this case was characterized not simply by the occasional errors that can attend the task of government but by an **arbitrary blindness to the facts**. As the district court correctly concluded, such a zoning ruling fails to comply with New York law. (emphasis supplied)

Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 351 (2d Cir. 2007).

178. The BSA repeatedly displayed the same deliberate blindness; the unwillingness to either discuss or make findings regarding such critical facts was apparently deliberate in that opponents, including counsel for Petitioners, repeatedly asked that the BSA inquire as to important facts. By not asking critical questions, the BSA shaped the record. The BSA could then claim to ignore any and all conflicting evidence from opponents. If the BSA had asked and required answers to inconvenient questions, then the BSA would not have been able to ignore as easily the facts disclosed in the answers to the questions.

179.An example of intentional blindness is the BSA claiming that the drawings provided to the Chair and Vice Chair at the ex parte meeting are not part of the record and need not be considered. These drawings show without doubt that the Congregation's toddler and other programmatic needs are contrivances. Pet. Ex. S.

180. Indeed, the BSA proceeding below should be viewed not as a fair effort to seek the full facts, but as a way for the BSA to elicit just enough from the applicant with or without factual support so as to support a variance, while at the same time keeping the applicant from being forced to respond to questions from the BSA that would elicit an applicant statement that the BSA could not ignore. However, as Westchester Day School makes clear, intentional blindness is every bit as actionable as the record that would have been created. The attempt at "record fashioning" by the BSA is more effective where, as here, the Department of Buildings decides not to send an attorney to oppose an applicants' appeal from the DOB decision denying the building permit.

181. The BSA argues that it did ask questions suggested by opponents. That the BSA refused to request an updated Scheme C analysis, did not ask for the missing construction estimate pages, and did not ask the Congregation to identify its access and circulation issues with specificity shows that the BSA argument here is wrong.

182. Examples of the BSA deliberately blinding itself are as follows:

- Not asking the Congregation to provide an explanation of how it allocated construction costs between the community and residential components of the proposed building, thereby permitting the artificial inflation of construction costs.
- Not requiring the Congregation to provide missing pages from construction cost analysis in the as-of-right schemes, which would reveal the allocations methodology between the condominium and community space. (By allocating, for example, the caretakers apartment as a residential cost as the opposition expert surmised, the condominium construction costs increase, thereby lowering the financial return.)
- Not asking the Congregation why it allocated no part of the costs of construction to a roof for the community spaces, thereby lowering the financial return.
- Not asking the Congregation to respond in a complete manner to the BSA staff's thoughtful request for a reasonable return analysis of an all residential building on the construction site, and letting the Congregation include non-residential space thereby keeping the fact

from the record that an if the Congregation desired, it could earn a reasonable return on an all residential building.

Not asking the Congregation to provide a reasonable return analysis based on return on equity, despite the requirement in the BSA's own guidelines that such an analysis be provided for condominium projects.

Not asking the Congregation to show on its drawings exactly where the proposed building addresses access and circulation in a manner different from an as of right building.

Not asking the Congregation for the cost of retrofitting the existing elevator so that it would serve the basement floor of the Sanctuary. (This would show that the Congregation proposed a $24 million building to resolve a $150,000 problem at most and that that the obsolescence alleged could be resolved by normal repair and modernization of a 50 year old elevator.)

Not asking the Congregation for the actual rent being paid by the Beit Rabban School (Respondents claims that this was asked and that it is in the record, but were unable to state what the rent in fact is and where such is located in the record.) Based upon inferential information in the IRS forms filed by Beit Rabban, this would show that a so-called obsolete building was yielding a very high rent and would show that the market rents for community space used in the feasibility study was far lower than the rent then being charged to Beit Rabban, establishing the lack of credibility of the Congregation's feasibility consultant.)

While allowing the Congregation to utilize many floors of unused development space above the Parsonage in Lot 36 in order to value (sic) two floors of condominium development rights in an as of right building on Lot 37, not asking the Congregation how much rent it was charging for renting the Parsonage as a luxury Central Park West townhouse.

Not asking the Congregation to articulate the reasons why the caretakers apartment or the adult classroom could not be located on the fifth floor of an as-of-right building, rather than the fourth floor.

Accepting from the Congregation a shadow study of the side streets, which study did not provide a close up meaningful representation of the shadows at street level.

Respondents Srinivasan and Collins Acted Improperly and Should Be Barred From Future Proceedings, if Any

183. The impropriety of the ex parte meeting by Srinivasan and Collins on November 8, 2006 is self-evident. *See* Pet. ¶¶ 289-303. Letter Requesting Recusal, April 10, 2007, R-5527, reproduced at Pet. Ex. I. The BSA now claims that Petitioners' Attorney did not ask to participate in the meeting, notwithstanding that he learned of the meeting only after it was held, and that the BSA offered Petitioners' counsel to have a similar improper ex parte meeting — an offer he immediately refused since he considered that to be unethical, as an attorney.

184. Rules permitting BSA staff to meet in pre-application meetings do not authorize the Chair and Vice-Chair of the BSA to have a full-scale meeting with the Congregation and its attorneys, architects, and financial consultant. Plans submitted at the meeting were substantially identical to those submitted in April 2007 with the Application (copies of these drawings were not provided by the BSA in the Exhibits attached to its Answer).

185. Respondents refuse to provide notes of the meeting as part of the BSA Record herein, yet these notes are not protected from disclosure under The Public Meetings Law, §108. The BSA position is that notes of meetings between the Chair and Vice-Chair (and other documents related to the variance application and in the BSA files) are part of the BSA Record only if the Chair and Vice-Chair deign to designate them as part of the record. The Public Meetings Law, by implication, states that BSA proceedings although quasi-judicial proceedings, are still subject the disclosure requirements under the law. ("Nothing contained in this article shall be construed as extending the provisions hereof to: 1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals.")

186. Until days before the filing of this reply, Petitioner has been unable to obtain the drawings submitted by the Congregation to the BSA, until the BSA provided them on March 16, 2009. See Pet. Ex. S. The drawings show that the proposed building externally is the same as that for which the formal variance application was made and that the zoning calculation show as item 20 the variance requirement relating to the "40 foot standard minimum distance between building", which bears a handwritten checkmark. Pet. Ex. Q-1, P-4261. The drawings for the floorplans, however, are different and provide conclusive evidence of the contrived programmatic needs as to the second, third, and fourth floors. See Pet. Ex. S. The second floor provides meeting rooms and offices, but no toddler facility at all. R-4274, Pet. Ex. Q-15.

187. As stated in the Petition and the Petitioners' Initial Memorandum of Law at 100, the BSA possesses all the powers needed to conduct a quasi-judicial proceeding; it has subpoena power, can order inspection and was established as part of the City's Office of Administrative Trials and Hearings.

188. After the commencement of a variance proceeding, the BSA seems to agree that ex parte meetings involving the Chair and Vice-Chair would be improper, but not improper if the meeting preceded the application. See Letter of Margaret P. Stix, BSA General Counsel to Assemblyman Richard N. Gottfried dated November 7, 2007, page 1, last paragraph, Ex, Z to BSA Answer, P-2323 (making a distinction that the meeting was not an official hearing.) That Respondents held the meeting, did not invite known opponents, and refuse to provide any indication of what took place at the meeting is sufficient to bar these Respondents from future involvement in this case.

Urgency of the Case — Construction Not Stayed

189. The Congregation is not prevented from moving ahead with obtaining demolition and construction permits from the DOB and commencing construction. The Petitioners are not aware of the intentions of the Congregation. Unlike other permitting actions, the DOB web site omits reference to the Congregation's permit application. DOB refuses to release to the public any information as to the Congregation's applications and permits without the permission of the Congregation, and the Congregation will not provide such permission (R-235, R-1626, P-1283, P-1286, P-1293). Accordingly, Petitioners request that this proceeding move along without delay.

190. A New York City Administrative Code, Title 25, §25-207 provides: "f. Preferences. All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.". *See* P-159.

191. Because it now appears that there is no basis for the variances for the condominiums because it is clear that as-of-right buildings will yield a reasonable return to the Congregation, Petitioners request that those variances be annulled. As to the Community house variances, the evidence is overwhelming

that the programmatic needs asserted by the Congregation in support of the variances are contrived, and, to the extent not contrived, are readily accommodated in the as-of-right building in floors 5 and 6. Because there is no dispute as to these facts, those variances should be annulled as well. The other issues accordingly would become moot.

Attachments to Verified Reply Incorporated Herein

Attachment A - Verified Reply to BSA Statement of Fact
Attachment B Marked Petition To Show Answers With Reply

Dated: March 18, 2009 corrected March 30, 2009
New York, New York

Alan D. Sugarman

Attorney for Petitioners

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

To:

Jeffrey Friedlander
First Assistant Corporation counsel of the
City of New York
Christina L. Hoggan, Esq.
Assistant Corporation Counsel
100 Church Street, Room 5-153
New York, New York 10007
Phone: (212) 788-0790
Attorneys for BSA Respondents

Louis M.. Solomon, Esq.
Claude M. Millman, Esq.
Proskauer Rose L.L.P.
1585 Broadway
New York, New York 10036
(212) 969-3000
Attorneys for Respondent Congregation
Shearith Israel aka Trustees of
Congregation Shearith Israel in the City of
New York

Table of Contents of Petitioners' Exhibits

Exhibits Provided With Revised Verified Petition

Pet. Ex. A	Reformatted BSA August 26, 2006 Decision with Numbered Paragraphs	P-00019	See R-000001-R-000024
Pet. Ex. B	Table of Contents to Appendix A — 13 Volumes - Revised January 2, 2009 to Show BSA Record References		Not in BSA Record
Pet. Ex. C	Color 3-D Graphics of Project	P-00434 P-02429 P-02430	R-003571 R-001833 R-001834
Pet. Ex. D	BSA Meeting Record November 8, 2006 Improper Ex Parte Meeting	P-01245	Not in BSA Record
Pet. Ex. E	June 27, 2007 Community Objections to BSA	P-01777	R-000263
Pet. Ex. F	July 29, 2008 Letter to BSA of Martin Levine, Metropolitan Valuation Services	P-03907	R-005210
Pet. Ex. G	Letter Dated February 4, 2008 from Charles Platt to BSA Re Access Hardships Being Resolved by Conforming Building	P-02768	R-003611
Pet. Ex. 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
Pet. Ex. I	Letter of April 10, 2007from Alan D. Sugarman to Srinivasan and Collins Requesting Recusal	P-04088	R-005511 at R-005638
Pet. Ex. J	Programmatic Drawings Floors 2, 3, 4	P-02606-08	R-002009-R-002012
Pet. Ex. K -	Analysis of Consent Forms Submitted by Respondent BSA on December 2, 2008 in the BSA Record.	P-04244-59	SEE 005189-005209
Pet. Ex. L	West 70th Street Shadows December 21, 10 AM, Shadow Study versus Actual Photographs	P-04260-60	SEE 005187-005188

Exhibits Provided With Petitioners' Reply

Pet. Ex. M-1	Location of Variances on Each Floor of Proposed Building R-4695. Composite. Diagram Showing Location of the Variances on Each of the Floors in the Proposed Building. In Reply to BSA and Congregation Denials of Petition ¶¶ 21 et. seq.
Pet. Ex. M-2	Allocation of Variance Areas in Proposed and As-of-Right Buildings. M-2 and M-3 Show Source Of Averment That 90% Of Variances Relate To Condominiums. In Reply To Respondents Denial Of Petition ¶21 et. seq. and ¶51, 52 et. seq.
Pet. Ex. M-2-A	Computation of Variances - Approved Building
Pet. Ex. M-2-B	Sources of Information - Area of Approved Building
Pet. Ex. M-3-A	Computation of Areas of AOR Building
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Pet. Ex. N-1	To Scheme C Earning a Reasonable Return. Excerpts from Record. In Reply to BSA Answer at ¶292.
Pet. Ex. N-1-A	¶ 292 of BSA Answer.
Pet. Ex. N-1-B	Acceptable rate of return R-140.
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Pet. Ex. N-2	Base Unit Condominium Construction Costs. Computation In Reply to And As Described by BSA Answer at ¶291.
Pet. Ex. N-3	Excerpts from BSA Record Showing Multiple Valuations of Site Values by Freeman Frazier. In Reply To BSA Answer At ¶ 296 And Respondents Answer To ¶ 206 Of The Petition Denying That Freeman Frazier Reports Were Varying And Conflicting.
Pet. Ex. N-4	Location Of The Two Condominium Floors In As-Of-Right Scheme A Building. In Reply To Respondents Bad Faith Denials To ¶22 Of The Petition As To Number Of Square Feet On Floors Five And Six.
Pet Ex. N-5	Value Of The Two Condominium Floors In As-Of-Right Scheme A Building
Pet. Ex. N-6	Location of Parsonage and Two Condominiums in Scheme A Building. R-605, R-606, R-4694. Composite, In Reply To Denials As To The Lack Of Relationship Between AOR Scheme A Condominiums And The Air Rights Over The Parsonage.
Pet. Ex. N-7	Summary and Metrics Site Value Two Condominium Floors In As-of-Right Scheme A Building.
Pet. Ex. N-8	Missing 8th Objection - R-85. R-88. R-402, R-405. In Reply To Respondents False Assertion That DOB Removed Eighth Objection In Response To Revisions To Plans. BSA Answer ¶205.
Pet Ex. N-9	Sliver Building and 40-Foot Zone R-3871. In Reply To Respondents Assertion That The DOB Removed Eighth Variance In Response to Revisions to Plans. BSA Answer ¶205.
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Pet. Ex. O-1	Elevation Existing Looking South.
Pet. Ex. O-2-	Elevation AOR Looking South R-592, Provided To Respond To The False Denial Of The Respondents Of ¶45 And ¶46 Of The Petition. ¶
Pet. Ex. O-3	Elevation AOR Looking West R-607
Pet. Ex. O-4	Elevation Approved Looking South R-4694
Pet. Ex. P-1	Circulation Heart of Application. June 17, 2008. Congregation statement — Egress and Circulation Are Heart of Application. R4860
Pet. Ex. Q	Drawings Submitted By Congregation For BSA Meeting of November 8, 2006 - As Supplied By BSA On March 16, 2009. P-4261-4301
Pet. Ex. R	Item M to BZ Instructions. R-4273-4275.
Pet. Ex. S	Second, Third, Fourth Floors Drawings Submitted to BSA November 8, 2006 (Pet. Ex. R.) in Reply to BSA Answer ¶¶ 337-344 and In Reply to False Statement at BSA Answer 202 as to the Intended Use