

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

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NIZAM PETER KETTANEH  
and HOWARD LEPOW,

Petitioners,

For a Judgment Pursuant to Article 78  
Of the Civil Practice Law and Rules

-against-

BOARD OF STANDARDS AND APPEALS OF THE  
CITY OF NEW YORK, MEENAKSHI SRINIVASAN,  
Chair of said Board, CHRISTOPHER COLLINS, Vice  
Chair of said Board, and CONGREGATION SHEARITH  
ISRAEL a/k/a THE TRUSTEES OF CONGREGATION  
SHEARITH ISRAEL IN THE CITY OF NEW YORK,  
Respondents.

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: Index No. 113227/08  
: (LOBIS)  
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: NOTICE OF MOTION  
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PLEASE TAKE NOTICE that, upon the annexed Affirmation of Alan D. Sugarman dated June 16, 2009 and upon all prior pleadings and proceedings herein Nizam Peter Kettaneh and Howard Lepow shall move this Court in the Motion Submission Part (Room 130) of the New York County Courthouse, 60 Centre Street, New York, New York 1007, on June 26, 2009 at 9:30 A. M. for an Order providing permission to the Petitioners to file a further Reply in the pending proceeding, as required by Rule 13(b) of the Local Rules of the Court, and for such other relief as may be appropriate

Dated: June 16, 2009  
New York, New York



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Attorney for Petitioners

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Shearith Israel aka Trustees of  
Congregation Shearith Israel in the City of  
New York



3. Petitioners Kettaneh and Lepow seek to further reply to the Answering Memoranda of Law served on or about May 26, 2009 by the Respondents BSA and Congregation in the related action, Landmark West! v. City of New York Board of Standards and Appeals, Index No. 650354-08.<sup>1</sup> The Landmark West action was filed initially as a plenary action; the respondents therein moved to dismiss, asserting that the case should have been filed as an Article 78 proceeding.

4. A joint hearing for the instant proceeding and the Landmark West action was held on March 31, 2009. Prior to the hearing, the Kettaneh proceeding had been fully briefed; the Respondents had served their answering papers February 9, 2009 and the Kettaneh Petitioners had served their reply March 23, 2009.

5. Subsequent to the hearing, the Court ordered the Landmark West action be converted to an Article 78 proceeding. Respondents therein (which include the Respondents BSA and Congregation) served answering papers on or about May 26, 2009. The Kettaneh Petitioners were provided with courtesy copies by the Respondents. Landmark West is expected submit their Reply papers on or about June 19, 2009.

6. At the hearing of March 31, 2009, counsel for the Congregation asked the Court for permission to provide a sur-reply, including providing references to the record. Hearing Tr. at 36 and 43.<sup>2</sup> The Congregation's counsel had argued that the BSA Resolution and Record were replete with the necessary substantial evidence to support the "magic words" (to use the Congregation's terminology) required for the Z.R. §72-21 findings. Hearing Tr. at 36. The Court did not allow the filing of a sur-reply. Notwithstanding, in many respects the Congregation's and BSA's answers to the Landmark West amended petition are in effect a sur-reply to Petitioners' last pleading in Kettaneh; the Congregation has sought to include exactly the material which at the hearing the Court had not allowed

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<sup>1</sup> The Answering Memoranda in the Landmark West case are referred to herein as the "New Memoranda."

<sup>2</sup> The Transcript of the March 31, 2009 hearing before this Court is cited as "Hearing TR."

the Congregation to supply. The Respondents added further arguments and new case citations as to issues previously briefed in the instant proceeding.<sup>3</sup>

7. In addition to the new legal argument, Petitioners are of the view that Respondents have materially mischaracterized the Record and the BSA Resolution, in both subtle and not so subtle ways.

8. As one example, the Congregation mischaracterizes the Record and the BSA Resolution to make it appear that the BSA had made a finding that the all-residential as-of-right scheme, using the revised site value, would earn neither a profit nor or a reasonable return. This is not so and relates to a critical error made by the BSA in not requiring the Congregation to complete the Scheme C analysis. The Record is conclusive that the an all-residential as-of-right building would earn a reasonable return - in its New Memorandum, the Congregation has attempted to obscure the clarity of the Record in that respect.

9. As another example, the Respondents has reasserted falsely that the Eighth Objection was omitted from the DOB because of a changes in plans submitted to the DOB. Another example is

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<sup>3</sup> New arguments by the City address these issues: the Eighth Objection (n. 8 at p. 16); supporting condominium variances by reliance upon programmatic needs (p. 21); landmarked Synagogue and Parsonage as basis for finding (a) (p.33); encroachment on powers of City Planning and LPC (pp. 34-35); the BSA ignoring its own written guidelines (p. 42); rational explanation of methodology of analysis of reasonable return (p. 42), reasonable return by Congregation (p. 43); assertions that variance is the minimum variance (p. 53); and assertion that Z.R. §74-711 is a parallel remedy (p. 54-5).

New arguments by the Congregation address these issues: nine new precedents (pp. ii-iv); misleading citations to supporting evidence in record (p. 1); false assertions re obsolete building and incorrect citations to Record (p. 3); unsupported assertions that sliver law and floor plates and underdevelopment are physical conditions (p. 3); assertion that the condominiums are to defray costs of community facility (p. 4); discussion of development rights (p. 4); discussion of substantial evidence (p.9); nature of the proceedings and whether quasi-judicial (pp. 9-10); reliance on hearsay sufficient to support substantial evidence (p. 10); reliance on unsworn conclusory statements of counsel (p.10); rational basis of agency decision (pp. 11, 13); that hearsay from applicant may only be opposed by conclusive evidence from opponents (p.12); jurisdiction of BSA to consider zoning regulations requiring waiver absent formal action by the DOB (p.14); deference to BSA interpretation of statute (pp. 14-15); asserted evidentiary support (pp.16-18); conflating evidentiary support for programmatic and non-programmatic variances (pp. 14-19); deferring to religious organization for non programmatic variances (p. 19); improper use of fact that Synagogue is landmarked as a unique physical condition (p. 20-22); false assertions at to irregular shape of land (p. 21); false assertion that BSA Resolution consists largely of factual findings (p. 22); false claims as to BSA factual findings as to physical hardships (p. 22); incorrect assertions that non-profits need not satisfy finding (b) for revenue generating condominiums (p. 23); unsupported assertions as to rational basis of reasonable return analysis (pp. 25-26); false assertion that BSA requested analysis of a single as of right building scheme (p. 26); false assertion that BSA found that "any" as of right building would result in "substantial loss." (n. 3, p. 27); and, incomplete discussion of whether BSA provided a minimum variance ignoring allowance of excessive return (pp. 28-29).

the Respondents obscuring the dominant role exercised by the City Planning Department as to relief from landmarking hardships, to the exclusion of a role by the BSA.

11. Because the two proceedings are so similar, due process requires that Petitioners herein be afforded an opportunity to respond to the new material submitted to the Court by Respondents in the parallel action. Otherwise, the Petitioners' will not have had an opportunity to respond to the new "answers" of the Respondents.

12. Petitioners have completed their proposed further reply memorandum and will be able to file the memorandum forthwith, without delaying the proceeding.

13. Attached as Exhibit 1 are excerpted pages from the transcript of the March 31, 2009 hearing.

Dated: June 16, 2009  
New York, New York



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2 SUPREME COURT OF THE STATE OF NEW YORK  
3 COUNTY OF NEW YORK: TRIAL TERM PART 6

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

7 Plaintiffs

8 - against -

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

12 Defendants

13 -----

14 Index No. 650354-2008

15 -----

16 NIZAM PETER KETTANEH and HOWARD LEPOW,

17 Petitioner

18 - against -

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

24 Respondents

25 -----

26 Index No. 113227-08

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

Lester Isaacs - Official Court Reporter

## Proceedings

1  
2 problem where the congregation would have cut back  
3 on its programs. BSA does look at this. They did an  
4 extensive review, in terms they would have to cut  
5 back the number of children that could be provided  
6 service. The number of classrooms. The classroom  
7 side, therefore, the number of students, that they  
8 could have in that building. They wouldn't be able  
9 to cut on what was planned. In terms of the  
10 financial hardship that was looked at, I will go over  
11 it, unless you don't want me to --

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

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

Lester Isaacs, Official Court Reporter

## Proceedings

1  
2 THE COURT: At this point you have given me a  
3 lot more to look at.

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

8 THE COURT: Are they in the papers?

9 MR. MILLMAN: I'm not sure.

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

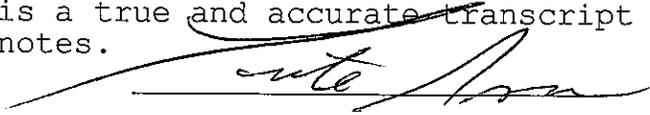
14 Thank you very much.

15 Very interesting argument.

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## C E R T I F I C A T E

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

21   
22 Lester Isaacs, S.C.R.  
23 Official Court Reporter.  
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25  
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Lester Isaacs, Official Court Reporter