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

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
	:	Index No. 113227/08
	:	(Justice Lobis)
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, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,		
Respondents.		

Petitioners' Further Reply Memorandum of Law In Support of Verified Petition.

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June __, 2009

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PETITIONERS' FURTHER REPLY MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PETITION

Petitioners Kettaneh and Lepow 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.[1] 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.

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.

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.

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.[2] 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.

[1] The Answering Memoranda in the Landmark West case are referred to herein as the "New Memoranda."

[2] The Transcript of the March 31, 2009 hearing before this Court is cited as "Hearing TR."

Notwithstanding, in many respects the Congregation's and BSA's answers to the Landmark West amended petition are little more than 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 the Congregation to supply. The Respondents added further arguments and new case citations as to issues previously briefed in the instant proceeding.[3]

Because the two proceeding 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.

This further reply will be confined to addressing the new legal argument and assertions made by the Congregation and City in their New Answering Memoranda.

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[3] 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 as 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).

I. Zoning Resolution Provisions

For the convenience of the Court, following is a list of certain relevant provisions from the Zoning Resolution, which are discussed herein.

Z.R. §72-21	Variances
Z.R. §72-21(a)	Unique Physical Conditions
Z.R. §72-21(b)	Reasonable Return
Z.R. §72-21(c)	Essential Character of Neighborhood
Z.R. §72-21(d)	Not Self Created Hardship
Z.R. §72-21(e)	Minimum Variance
Z.R. §73-52	Modifications for Zoning Lots Divided by District Boundaries (authority given to BSA to do so by Special Permits as to Use, but not as to Height and Setback)
Z.R. §73-711	Building Separation ("Eighth Objection")
Z.R. §23-692	"Sliver Law" Height limitations for narrow buildings or enlargements
Z.R. §74-79, Z.R. §74-791, Z.R. §74-792	Transfer of Development Rights from Landmark Sites
Z.R. §74-793	Transfer instruments and notice of restrictions - Landmark Sites
Z.R. §74-711	Landmark Preservation
Z.R. §74-712	Developments in Historic Districts
Z.R. §74-721(d)	Height and setback and yard regulations - Landmark Sites
Z.R. §74-852	Development of Lots Divided - Height and Setback Wide Streets ("Split Lots")
Z.R. §77-28; Z.R. §77-29	Zoning Lots Divided by District Boundaries ("Split Lots")

II. The Record Shows Conclusively that an All Residential As-of-Right Building Would Earn a Reasonable Return - And That There is No Basis for the BSA's Implicit Finding that 10.93% Was The Minimum Reasonable Return for the Project

If the Congregation is able to earn a reasonable return from an as-of-right development, a variance cannot be granted for the construction of the condominium component of the proposed project (which accounts for 90% of the variance area at issue in the proceeding.) Z.R.§ 72-21(a). The Record is conclusive that the Congregation can earn such a reasonable return. *See* e.g. Petitioners' Reply Memorandum at 8-11. Where

it is conclusively shown that the BSA made incorrect findings, Respondents acknowledge that BSA findings should be vacated. Congregation's New Memorandum at 12.

That the Record is conclusive that a reasonable return may be earned by an as-of-right building on the development site can be seen from the following table, which summarizes the result of return on investment computations supplied by the Congregation and its experts or by the BSA:

Return on Investment for the Shearith Israel Project As Approved by the BSA in August, 2008. See BSA Answer, ¶292.	10.93%
Return on Investment for Shearith Israel Project Deemed by Freeman Frazier to be Acceptable - i.e., a reasonable return. R-140.	6.55%
Return on Investment for the Shearith Israel Scheme C "Not Really" All Residential Project as Computed by Freeman Frazier, with site value prior to revision. December 21, 2007. R-1977,	3.63%
Return on Investment for the Shearith Israel Scheme C "Not Really" All Residential Project Based on Freeman Frazier analysis with revised site value as supplied by the BSA in its Verified Answer at ¶292.	7.70%
Return on Investment for Condominium Project Found by BSA and Freeman and Associates to be acceptable in William Israel, *infra.*	4.35%
Note: The investment returns above do not include the return inherent in the $12,347,000 acquisition site "payment" to the Congregation. The above returns are computed on a "return on investment" basis, not on the much higher "return on equity" basis.[4]	

A. The Congregation Mischaracterizes Both Resolution ¶138 and R-001977

[4] The Congregation's initial Economic Analysis Report at R-00133, states that that the target assessed value of the development site land is $2,002,500, as contrasted with the revised site value of $12,347,000.

In its New Memorandum, the Congregation once again has again attempted to mislead as to the reasonable return analysis under §72-21(b). The Congregation at footnote 3 on page 27 asserts falsely:

> "The BSA agreed with the Congregation's expert that, with respect to the residences, **any** as-of-right development would result in a "substantial loss." (See, e.g., BSA Res. ¶138; R. 1977.) (Emphasis added)"

B. BSA Resolution ¶138 Refers to A Single As-of-Right Analysis - Scheme A, Ignoring Scheme C

The first assertion by the Congregation is completely false, has no factual basis in the Record, is not supported by the cited R-1997, and completely misrepresents the cited ¶138 of the BSA Resolution. The Resolution at ¶138 is not all encompassing as claimed by the Congregation:

> WHEREAS, the applicant also submitted **a** revised analysis of **the** as-of-right **building** using the revised estimated value of the property; this analysis showed that **the** revised as-of-right **alternative** would result in substantial loss; (Emphasis added)

Not only did the BSA not make a factual finding in this paragraph other than to state what the Congregation claimed in its submission, but also the BSA clearly referenced only a single as-of-right alternative analysis, presumably the Congregation's Scheme A "two-floor condominium" analysis.

C. The Citation to R-001977 Refers to Scheme C As of December, 2007, Prior to the Site Value Revision: Said Scheme Was Profitable

As described in great detail in the Petition, however, the BSA had also required the Congregation to provide an analysis of another "all-residential" as-of-right scheme, "Scheme C", and the Congregation's Record citation to R-001977 is to the December 21, 2007 Freeman Frazier Feasibility Study respecting Scheme C, but a study prepared prior to the preparation of the revised site value mentioned in the Resolution ¶138. Here, in R-001977, Freeman Frazier concludes that Scheme C would earn a profit of $2,894,000 (R-

001980)(directly contradicting the Congregation's mischaracterization) and a Return on Investment of 3.63% (R-001977):

> As shown in Schedule A, the development of the All Residential Development would provide an Annualized Return on Total Investment of 3.63%. This is below the level necessary to justify an investment.

D. After the Site Value Was Revised, Its Rate of Return Was 7.7%, In Excess of a Reasonable Return

Yet the December 21, 2007 analysis acquisition site value was later revised, as the BSA has conclusively acknowledged. In fact, ¶138 of the Resolution just quoted above mentions the revision of the "estimated site value." According to the BSA's Answer at ¶292, if the revised value were used for the Scheme C analysis, then the Annualized Return on Total Investment would be 7.7%, rather than 3.63%. The BSA admission is conclusive. Thus, the Congregation misrepresents by citing to the R-1977, because the analysis there was completed prior to the revision downward of the acquisition costs later in the BSA proceeding.

In earlier expert opinions in the proceeding, the Congregation's feasibility expert/economist Jack Freeman of Freeman Frazier opined conclusively and without equivocation at R-140 that a reasonable return of 6.55% was an "acceptable return for this project.[5]" Thus, the Record is conclusive that the Congregation would earn a return in excess of that its own financial expert considered reasonable and acceptable for the project. Indeed, the 7.7% return is earned by the Congregation even ignoring just two of the glaring errors in the Scheme C computation - (i) not taking into account the profit in the $12,347,000 return that the Congregation as the owner would earn, and (ii) the fact that the "all-residential" scheme was indeed not an all residential scheme. Correcting

[5] The Congregation also falsely suggests that there were multiple economic "experts" - indeed, there was one, Jack Freeman, who frequently prepares feasibility analyses for BSA variance applications. R-002008.

these errors would significantly increase the Congregation's return beyond the 7.7% already admitted by the BSA.

E. The BSA In Another Case Accepted 4.35% As A Reasonable Return For A Condominium Project

Ironically, the reasonableness of a 7.7% return is illustrated by a case cited for the first time by the Congregation in its New Memorandum at 27, William Israel's Farm Co-op v. Board of Standards and Appeals, 22 Misc. 3d 1105(A), No. 110133/2004 (Sup. Ct. N.Y. Co. Nov. 15, 2004). In that case, the expert therein was also Jack Freeman of Freeman Frazier.[6] Based on the expert opinion of Mr. Freeman, the BSA in William Israel's found that a return of 4.35% was sufficient for the development (a condominium development). As stated by the Supreme Court in its decision:

> A supplemental analysis of the modified plan for which the BSA finally granted the variance indicated the rate of return on that plan would be 4.35%. (R. 725).

F. The 10.93% Return For The Project As Approved by the BSA Far Exceeds a Reasonable Return, And The Variances Approved Were Not the Minimum Variances Under §72-21(e)

That a return of 4.35% in William Israel's was found to be reasonable, is contrasted with the 10.93% return for the condominiums to the Congregation Shearith Israel as approved by the BSA, and is not significantly higher than even the uncorrected 3.63% return in Freeman Frazier's December 21, 2007 computation. The 10.9% numerical value of the return to Shearith Israel and approved by the BSA was not stated by the BSA in the text of its Resolution and is excessive when compared to the return in William Israel's, as well as to the return of 6.55% which Mr. Freeman found to be reasonable. See ¶ 292 of the BSA Answer to the Kettaneh Petition. Indeed, there is no

[6] Mr. Freeman's expert opinion is available in the Court files as well as on-line at Westlaw as an additional document associated with the decision. Economic Analysis Report, 25 Bond Street, Freeman/Frazier Associates, December 4, 2003, Re Tri-Beach Holdings, 2003 WL 25547597.

discussion of what is a reasonable return anywhere in the BSA Resolution or anywhere in the Record, except in that the opinion of the Congregation's expert, Mr. Freeman, 6.55% was a sufficient return.

What the BSA did not explain is why it allowed a return of 10.93% that so far exceeds the reasonable return deemed sufficient by the Congregation's expert and so far in excess of returns allowed in other BSA matters. This is proof that the BSA finding that the approved variances were the minimum variances was incorrect and conflicted with undisputed conclusive evidence. Clearly, the variance approved is not the minimum variance required under Z.R. §72-21(e).

G. The Record is Devoid of Any Rationale Justifying the BSA's Implicit Finding that 10.93% Was the Minimum Return Reasonable

It is also clear that the BSA failed to discuss at all one of the most relevant issues - the acceptable return - and indeed ignored the Congregation's expert opinion on the issue. Thus, there is nothing in the Record to substantiate the implicit BSA finding that 10.93% was a reasonable return.

H. The Congregation Then Completely Misrepresented Both ¶138 and R-001977

It is hardly surprising that a prime piece of real estate consisting of three brownstone lots on West 70th Street, of regular shape and excellent ground conditions, and 100 feet from Central Park West and a subway stop would earn a reasonable return - in fact, any contrary conclusion would call into question the objectivity and competence of the analysis. The BSA, in not requiring the Congregation to revise the Scheme C analysis during the proceedings, was intentionally blinding itself to the facts, and demonstrating that it was not engaged in a good faith deliberative process.

III. There Is No Substantial Evidence of Any Obsolescence That Would Provide a Basis for A Variance

The New Memoranda offer new assertions that obsolescence can be a physical condition that would support a finding under Z.R. §72-21(a), asserting a physical condition thereunder can be a physical condition of the property itself or building on the property. Congregation's New Memorandum at 3, 20, and 21.

Even if a physical condition is shown to exist, it must be both unique and arise out the strict application of the zoning regulation.

A. Merely Identifying An Alleged Obsolete Feature On A Site is Insufficient To Establish a Qualifying §72-21(a) Physical Condition

Respondents assume, incorrectly, that merely identifying an obsolete condition on the zoning site or development site satisfies the requirements of Z.R. §72-21(a). Such an assumption is not the result of rational, logical, and deductive thinking, and, thus, is an example of the type of irrationality, which is a ground for overturning an administrative agency determination.

If an asserted obsolescence hardship can be resolved by an as-of-right building, then it is irrelevant to a §72.21(a) finding. Further, BSA precedent (supported by logical thinking) is clear that if an obsolete building is to be demolished, then it cannot support the (a) finding.

In an obvious response to Petitioners' objection at the March 31, 2009, hearing to the vagueness of the Congregation's claims as to obsolescence and the lack of citation to the record, the Congregation's New Memorandum provide a table at page 18 purporting to identify those parts of the record which allegedly substantiate the five findings. *See* analysis below. After a careful review of the Congregation's citations to the Record in its new table, and in particular the testimony of Congregation officers and its architect, it is

apparent that the Congregation's claim as found in the Record is that the obsolete configurations within the Existing Community House create substantial access and circulation issues to and from the landmarked Sanctuary.

B. The Congregation's Assertions of Obsolescence Are Merely Another Expression of the Access and Circulation Hardships Caused by the Existing Community House

It is also apparent that the Congregation's claim of obsolescence is in fact just another way of expressing its asserted access and circulation hardship. Petitioners have conclusively demonstrated that the access and circulation hardships are fully resolved by an as-of-right building, and thus it cannot be said that this hardship (even if characterized as obsolescence) arises out of the strict application of the zoning law, and therefore any (a) finding, based even in part upon this hardship, fails the requirements of the statute.

As discussed in Petitioners' previous submissions (*see, e.g.,* Petitioners' Memorandum in Support, January 2, 2009, at 22), the Congregation's expert architect conclusively testified to the contrary - he testified that an as-of-right building fully resolves all access issues. The Congregation and BSA are unable to present any evidence that contradicts the Congregation's expert.

That the Congregation considers the access and circulation to be the heart of is obsolescence claim is clear from the Congregation's assertions in is New Memorandum at 20:

> Among other things, the BSA found that access routes through the buildings on the site are obsolete … (See BSA Res. ¶¶ 41, 46, 60, 61, 71, 72, 74, 88, 94, and 110.)

This assertion is not supported by the cited paragraphs in the resolution: ¶¶ 41 and 72, (which with ¶¶ 60, 61, 72, and 74 concern only the Community House variance) refer to "representations" by the Congregation for a need for a variance request due to

"physical obsolescence and poorly configured floor plates of the existing Community House which constrain circulation and interfere with its religious programming."

C. The Cited Obsolescence is Within the Existing Community House - And It Is To Be Demolished And Be Replaced by an As-of-Right Community Building That Fully Eliminates the Hardship

The Resolution at ¶41 refers to the existing" Community House.' There are no findings, and no references to multiple "**buildings"**. None of the other cited Resolution paragraphs make the statement that "access routes through the site are obsolete" as the Congregation falsely claims. The BSA statements refer only to access and circulation involving the to–be-demolished, Existing Community House building. Similarly, at p. 3 the Congregation falsely cites to the Record claiming that at R. 4542-46 states that there are "partially-obsolete structures" - yet the cited pages are once again the conclusory assertions of Attorney Friedman in his May 13, 2008 version of his Statement in Support, and provides no substantial evidence as to "partially obsolete structures."

But, it is of no matter, since the obsolescence claim is just another way of expressing the access and circulation hardship.

D. The BSA Has Held That A Building to Be Demolished Cannot Support The Unique Physical Condition Requirement of §72-21(a)

In other BSA cases, the BSA has rationally explained the relevance of the obsolescence of a building to a claimed hardship in order to support a variance. Where an obsolete building is to be demolished, it cannot support the (a) finding as to unique physical condition. This issue arose in 460 Union Street, BSA No. 75-02-BZ (N.Y.C. Bd. of Standards and Appeals, February 3, 2004).[7]

[7] BSA Resolutions are available at New York Law School's "New York City Law." http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library.

This New York Law School site describes the BSA as follows:

> WHEREAS, the Board notes that the proposed application contemplates the demolition of the existing building, thus obviating any claim of uniqueness on that basis;

This is of course the rational approach to the consideration of obsolescence in the (a) finding concerning physical condition - if the building is being demolished, then it is not a factor as explained in 460 Union Street. (*See also* discussion of Homes for the Homeless case at pages 42-43 of Petitioners' Memorandum in Support, January 2, 2009).

E. Although The BSA Has Held That An Obsolete Structure That Cannot be Demolished Will Support a §72-21(a) Condition, That Situation Does Not Exist In This Proceeding

Another circumstance where the BSA has considered obsolescence is if a building on part of a site is very expensive to demolish. The claim then is that it may in some way be obsolete and may justify a variance on another part of the site, or even a use variance for the existing building. Williams Israel, *supra,* cited by the Congregation, is not helpful to the Respondents on this point on the issue of whether excessive demolition costs could constitute a unique physical condition:

> Secondly, the BSA found that demolition of the garage could likewise not occur without great expense, due to structural features.

The construction estimates provided by the Congregation show conclusively that demolition of the existing community house would cost only $100,000, almost pocket change on a project of this size. Petitioners' Reply Memorandum at 29. Demolition of an obsolete building that is impractical or very expensive does not exist in this case. Only an excess of irrational fuzzy thinking can suggest that there is any obsolescence that can be the basis of a "unique physical condition" finding.

> "The Board is a quasi-judicial body, which means that it can only act upon specific applications brought by landowners or interested parties who have received prior determinations from one of the enforcement agencies noted above. The Board cannot offer opinions or interpretations generally and it cannot grant a variance or a special permit to any person who has not first sought a proper permit or approval from an enforcement agency."

Thus, the factor of obsolete access and circulation in the Existing Building is completely irrelevant to the Shearith Israel variance requests.

IV. The Congregation's New Table of "Evidence" Fails To Identify Any Substantial Factual, Non-Conclusory Evidence

At page 18 of its New Memorandum, the Congregation supplied a table of references in the Record that it claimed supported the BSA findings. The Congregation had offered to supply such a table to the Court at the March 31, 2009 hearing. But the Court refused the Congregation's offer.

Close inspection shows that the Congregation once again erroneously confuses conclusory assertions by counsel with substantial evidence. The table also conflates the community house variances (10% of the variance area) with the condominium variances (90% of the variance area). Indeed, the chart conflates all 7 variances into one. It is absolutely clear that Z.R. §72-21 requires, for each variance, a separate finding for each of the five factors, and thus 35 ultimate findings are required to be made by the BSA. By dispensing with the rigor required by §72-21, the BSA and the Congregation are able to gloss over the discrepancies and inconsistencies in their analysis, and avoid providing specific substantiation for specific paragraphs of the Resolution.

A. Congregation's New Citations Purporting to Support BSA Z.R. §72-21(a) Finding

The following table is based upon the Congregation's new table showing the substantial evidence the Congregation claims support the BSA "findings" under Z.R. §72-21(a) as found in ¶¶ 37-132 of the Resolution.

BSA Description of Documents	**Entire Document**	**Citation by Congregation As Support for ¶¶ 37-132**	**Author or Witness**
Applicant Statement In Support (submitted with April 1, 2007 letter)	R-00019-48	R-00039-43	Attorney Friedman
Economic Analysis Report (submitted with April 1, 2007 letter)	R-00133-61	R-000139	Jack Freeman
Applicant Statement In Support, revised September 7, 2007 (submitted with September 10, 2007 letter)	R-00312-47	R-000319, 37-42	Attorney Friedman
Transcript of BSA Public Hearing held on November 27, 2007	R-001726-1813	R-001733-35	Architect Dovell - re access
		R-001739-1740	Congregation - Kay - need for classrooms
		R-001744-45	Congregation-Nathan - access
		R-0001751	Attorney Friedman
Statement in Support (with exhibits), revised May 13, 2008 (submitted with May 13, 2008 letter)	R-004533-96	R-004565-4576	Attorney Friedman
Letter from Shelly S. Friedman (on behalf of Applicant) to BSA Chair Meenakshi Srinivasan, dated May 13, 2008, in response to comments	R-004859-62	R-004859-4861	Attorney Friedman
Statement in Support, revised July 8, 2008 (submitted with July 8, 2008 letter)	R-005114-69	R-005147-5157	Attorney Friedman
Closing Statement in Response to Opposition of Certain Variances, dated August 12, 2008 (submitted with August 12 letter)	R-005752-66	R-005763	Attorney Friedman

Four of the citations are to various versions of Attorney Friedman's Statements in Support - of April 1, 2007 (R-39-48), September 7, 2007 (R-0319, R-3337-342), May 13, 2008 (R-04565-76), and July 8, 2008 (R-5147-5157), and supplemented by yet two other argumentative briefs from Attorney Friedman, a letter from Attorney Friedman on May 13, 2008 asking that the hearing be closed, and a closing statement from Attorney Friedman (R-005763) - *i.e.* brief in support.[8]

[8] The cited page, R-005763, is a manifestly incorrect legal argument asserting that the BSA can ask for no proof of programmatic need under §72-21(a), but must accept instead the arguments and posturing of counsel: "Requiring proof of programmatic need is not permitted." Even if this were true, there is nothing in Attorney Friedman's argument showing how this would pertain to the §72-21(a) finding for the condominium variances.

B. The Claimed Substantial Evidence Consists Almost Entirely of Conclusory Claims and Briefs of Counsel

In other words, in order to stretch for evidence to support the BSA findings, the Congregation in its New Memorandum relies primarily on four different versions of the Attorney Friedman Statement in Support, as buttressed by two other briefs by Attorney Friedman.[9]

The cited Dovell, Kay, and Nathan's testimony relates only to the need for classrooms and the need to resolve the accessibility issues caused by the existing community house. There are no statements as to any obsolete conditions in the Sanctuary, no claim that an as-of-right building would not resolve the access problems, and no reference by these fact and expert witnesses as to the other alleged conditions for the (a) finding (or indeed any other findings).

Finally, the Congregation cites to statements of its financial expert economist, Mr. Freeman, but not for issues within his competence, but for conclusory assertions outside of his competence as to the unique conditions - hardly substantial evidence.

C. The Respondents Fail to Provide Citations to Evidence To Support the BSA Findings

There is no citation to the facts that support the inherent assertion that the access hardship arises out of the strict application of the zoning regulations, (unlikely, since the issues are resolved by an as-of-right building). There is no citation to the page allegedly stating the rent being paid currently by the school or the rent being paid by the private

[9] In considering the submissions of Attorney Friedman, it is not possible to distinguish between his conclusory and argumentative assertions and statements of facts without the ever-present spin, distortions, and mischaracterizations. *See* "Summary of Flaws Preventing Reasoned Analysis of Applicant's Request for Variances," Dated June 10, 2008, Submitted by Opponent Kate Wood (R-004790-R-004800).

individual renting the Parsonage. [10] There is no citation to any part of a feasibility study where the actual rent being paid by the school is used in the feasibility analysis. There is no citation to the explanation as to why the caretakers' apartment must be on the fourth floor. There is no citation as to the BSA's balancing of the equities of the 18 West 70th Street owners having legal windows bricked up as compared to the equities to the members of the Congregation having reduced financial obligations. There is no citation to the BSA having computed the construction costs per square foot of the various condominium schemes. There is no citation to any explanation of how the construction costs were allocated. There is no citation to any discussion of how and why and on what basis the BSA determines what is reasonable return. There is no citation to any single fact showing how the plans were allegedly revised when submitted the second time to the DOB.

V. Conclusory Assertions of the Congregation's Counsel Cannot Provide Substantial Evidence

Assertions by the Congregation's counsel, whether made in this proceeding or made below in the BSA proceeding, cannot provide the substantial evidence required to support findings by the BSA. The analysis of the Congregation's New Memorandum table at page 18 shows that the Congregation relies almost entirely upon conclusory or argumentative assertions from their counsel. There is an absence of substantial evidence where an agency decision is based upon conclusory evidence and there was no factual basis. Meyer v. Bd. of Trs. of the N.Y. City Fire Dep't, 90 N.Y.2d 139, 147-148 (1997).

[10] Whenever the Congregation claims that the construction of the condominiums is needed to fund the community house component, then the Congregation has made a claim of financial hardship and also raised the question as to the revenue being generated by the School, the Toddler "Day School", the Banquet Hall, and, indeed, even the rental of the Parsonage as a private residence. See, for example, Congregation New Memorandum at 4, stating the need for the condominiums "to defray roughly six million of the much-larger project cost."

At the March 31, 2009 hearing, the Congregation argued that conclusory, unsupported assertions of Attorney Friedman, counsel for the Congregation, and submitted to the BSA could provide the substantial evidence to support the "magic words" used in the BSA findings, even where the assertions are contradicted by conclusive evidence and statements from the Congregation's consultants/experts.

The Congregation's New Memorandum provides numerous citations to precedent in its attempts to bolster this assertion. The Congregation asserts at pages 10-11 of its New Memorandum that "Thus, the BSA may properly rely upon the unsworn statements of counsel appearing before it to support its findings." For authority it cites to several cases which are wholly inapposite: Hirsch v. Corbiseiro, 155 A.D. 2d 325 (1st Dep't 1989); p. 11 *citing* Millennium Custom Homes, Inc. v. Young, 58 A.D.3d 740 (2d Dep't 2009); Hampton Management v. Division of Housing and Community Renewal, 255 A.D.2d 261, 261 (1st Dep't 1998); Hart v. Holtzman, 215 A.D.2d 175 (1st Dep't 1995); and RHS Realty Co. v. Conciliation and Appeals Bd. of City of New York, 101 A.D.2d 756(1st Dept' 1984). These cases provide no precedents for the proposition that Attorney Friedman's unsupported conclusory claims can provide the substantial evidence required to support the required findings. Both Hampton and Hart concerned an isolated factual assertion made in letter by counsel for the concerned governmental agencies. RHS Realty, Hirsch, and Millenium stand only for the proposition that in an administrative hearing an agency may accept unsworn testimony. These cases cited by the Congregation in no way support the proposition that the conclusory unsupported legal briefs and argument of counsel for the Congregation can constitute substantial evidence, or even can be all the evidence.

The issue, though, as to the submissions of Attorney Friedman is not just hearsay but that the statements are entirely conclusory and do not include or cite the underlying facts or cite to the source of the claims. An example is the factual context of the Eight Objection. Attorney Friedman may claim expansively that changes were made to the submissions to DOB - that is a conclusory statement. A factual statement would be to identify with some specificity the changes made. This was not provided. Further, when Attorney Friedman asserts that he is repeating a conclusion of another, it is not merely hearsay, but it is hearsay of a conclusory assertion by a third person.[11] Thus, if Attorney Friedman asserts that the someone else claimed there were changes made to the plans, then we have not only hearsay, but hearsay of conclusory claims.

VI. The BSA Improperly Utilized Landmark Status as a Hardship to Support A Variance

The BSA and Congregation in their New Memorandum have twisted themselves in knots as to fact that the BSA used landmark status as a hardship to justify a variance, as urged on by the Congregation. It is apparent that under the BSA and Congregation's interpretation of "hardship" under Z.R. § 72-21 (a), Z.R. §74-711 would have no meaning, since the BSA could provide all of the relief provided under §74-711, with none of the restrictions and protections provided therein.[12] Astonishingly, the BSA allowed "use" of the landmark status of the Sanctuary and Parsonage, and imposed no restrictions

[11] Here the Petitioners were prevented from questioning those to whom assertions are attributed, thus, increasing the lack of reliability of hearsay or repeated statements of other person, and the BSA refused even to ask specific questions proposed by opponents. Thus even many hearsay "exceptions" are inapplicable.

[12] See Statement of Attorney Friedman and LPC Hearing of February 23, 2003, p. 35, R-02712. "74-711 [original corrected] has been used by this Commission many times in the past, in some cases simply to remove air rights from over the landmark, so it can be no longer be developed."

at all on further development of the landmarked properties and without receiving any commitment to maintain the properties, as contemplated by §74-711.

A. When the Congregation Asserts that the Existence of The Synagogue on the Zoning Lot Is A Hardship, It Is Invoking the Landmark Status of the Synagogue

In its New Memorandum, as support for the BSA findings related to the hardships Z.R. § 72-21 on the site to justify the unique physical condition requirement, the Congregation points to the existence of the landmark Synagogue on the zoning site as a hardship. Yet, the Congregation (at page 22) seems to argue that landmarking was not utilized by the BSA:

> In sum, while the BSA did not treat the landmarked status of the Synagogue as a hardship, the BSA could have rationally based a finding of hardship on the impact that the Synagogue has on the lot.

The Congregation in its table of supporting evidence for Z.R. §72-21(a) cites R-1751, from the statement of Attorney Friedman at the November 27, 2007 BSA hearing. Attorney Friedman is clear that the hardship is landmarking:

> 545 But this one is relatively simple. Because of the Landmarks status of this building,
> 546 we can't change this building. We don't want to change this building.
> 547 If it wasn't landmarked, the stewardship of this synagogue is such they wouldn't
> 548 change the building.
> 549 But, the fact of the matter is that for all of the floor area on this zoning lot, we are
> 550 sequestered from using all but a very small percentage of the footprint and even that has
> 551 to give rise to the fact that the community house has to cover the lower portions of that
> 552 footprint.
> 553 That boxes into, we believe, a justifiable recognized hardship and we need to
> 554 present that to you financially and we're prepared to do that today or hear your comments
> 555 on that and come back and prove it to you and convince you in further submissions.

The only plausible, common sense interpretation of this statement (as well as the entire Record) is that the Congregation is arguing that because the Sanctuary is landmarked, this landmarking is a hardship that supports a variance for both the community space and the condominiums, and, that it need not be subjected to the conditions that would be imposed had it obtained relief under Z.R. §74-711. [The Congregation never presented evidence

as to the financial hardship created by the landmarking, and, indeed never opened up its finances, never stated the actual rent it received from the Parsonage or the tenant school.]

The BSA in its resolution directly addresses the landmarked Synagogue at ¶¶107, 108, 112, 120 and 122, and indirectly in other paragraphs. The BSA so much as admits that it is using the landmark hardship under Z.R. §72-21 in ¶120 (quoted below).

Moreover, the BSA does not explain why it is that it feels it has jurisdiction to "transfer" available development right form a landmark building in a §72-21 variance proceeding, and, even to transfer development rights so as to have the effect of superseding height and setback requirements. Clearly, the BSA is just making up law as it goes along, providing to itself discretion that is clearly not allowed by other provisions of the zoning regulations.

It was shown conclusively in our prior submissions that the Congregation cooked the numbers upwards for site value of the two floor condominium "Scheme A" proposal by using unused development rights over the Parsonage to value land right in the separate development site.

Clearly, only landmarking issues prevent development of the Parsonage. Among other things, development of the Parsonage site would block light into the Sanctuary through the south side Tiffany windows and would require the removal of the intricate and architectural eaves in the Sanctuary which project over the Parsonage. See Petitioner's Reply Memorandum at 16 quoting the Congregation's architect that additional floors would block the historic lead windows. Respectfully, the statements of the Congregation's architects should take precedence over the conclusory, non-fact based assertions of the BSA and the Congregation's counsel.

Of course, the only conceivable "impact of the Synagogue" on the development lot arises out of its landmark status - otherwise it could be demolished or otherwise altered.

B. The City Planning Commission has the Primary Role in Modifying Zoning Regulations For Hardships Arising from Landmarking

The City and Congregation's New Memoranda address Z.R. §74-711, but are silent as to the regulatory structure that assigns a dominant role to the City Planning Commission in providing relief from landmarking hardships. In its resolution, the BSA in ¶120 states, without citing the other Zoning Resolution provisions:

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

It is true that the Zoning Resolution includes several provisions concerning the transfer of development rights from landmark buildings and other provisions providing for modifications due to hardships from landmarking. But, none of those provisions vest the authority to do so in the hands of the BSA - requiring instead the action of both the City Planning Commission and in some regulations, of the LPC as well. Below are some Zoning Resolution provisions explicitly assigning a role to the City Planning Commission for the modification of regulations for landmark hardships. None of these provide a role to the BSA.

Z.R. §42-142	Modification by authorization of the City Planning Commission of use regulations in M1-5A and M1-5B Districts
Z.R. §74-711	Landmark preservation in all districts
Z.R. §74-712	Developments in Historic Districts
Z.R. §74-721	Height and setback and yard regulations
Z.R. §74-79	Transfer of Development Rights from Landmark Sites
Z.R. §74-791	Requirements for application
Z.R. §74-792	Conditions and limitations
Z.R. §74-793	Transfer instruments and notice of restrictions
Z.R. §81-254	Special permit for height and setback modifications
Z.R. §81-266	Special permit for height and setback modifications

Z.R. §81-277	Special permit for height and setback modifications
Z.R. §81-63	Transfer of Development Rights from Landmark Sites
Z.R. §81-631	Requirements for application
Z.R. §81-633	Transfer instruments and notice of restrictions
Z.R. §81-634	Transfer of development rights by certification
Z.R. §81-635	Transfer of development rights by special permit
Z.R. §81-741	General provisions
Z.R. §99-08	Authorization to Waive Midblock Transition Portion Heights Limitation

The BSA's statement then is disingenuous. Not only does the BSA have no role whatsoever in transferring rights from a landmark building or site or providing landmarking hardships, but the City Council in adopting the Zoning Resolution repeatedly assigned jurisdiction for landmarking hardships to the City Planning Commission. The BSA "interpretation" of the statute is nothing more than a usurping of power; nor may the City Planning Commission cede its authority and attempt to duck uncomfortable actions.

Moreover, the BSA's just ignores completely the spirit and underlying policy of requirements such as Z.R. §74-792 which require restrictions on the landmarked property from which the rights are transferred:

> (d) In any and all districts, the transfer once completed shall irrevocably reduce the amount of floor area that can be developed upon the lot occupied by a landmark by the amount of floor area transferred. In the event that the landmark's designation is removed or if the landmark building is destroyed, or if for any reason the landmark building is enlarged or the landmark lot is redeveloped, the lot occupied by a landmark can only be developed up to the amount of permitted floor area as reduced by the transfer.

The BSA completely ignored the principles behind these requirements - thus, it permits development rights over the Parsonage to be used to establish the (b) finding, but imposed no restrictions of record on the Parsonage to prevent use of those same development right - true double-dipping. Not only has the BSA has clearly usurped a role that is not its own, it then poorly performed that role.

The Congregation now claims that it had exhausted its remedies under Z.R. §74-711 citing to the R-5129-30 (pages 15 and 16 from the Statement submitted by the Congregation's counsel on July 8, 2008). These two pages are perfect examples of the type of unsourced conclusory assertions of the counsel for the Congregation who claims without any corroboration at all: "In returning to the LPC with the smaller New Building, CSI indicated its willingness to seek the variance requested in this Application." This is pure argument and conjecture to suggest that the LPC was authorizing or directing the BSA to grant a variance bases upon the landmarked status.

The basic problem confronted by the Congregation is that the LPC did not consider there to be any hardship. Indeed, at the cited page R-005129 Counsel quotes LPC Commissioner Gratz, a former member of the Congregation, who had presided over the restoration of another NYC historic synagogue. Commissioner Gratz, incidentally, voted “No” (R-002492) for the final LPC Certificate of Appropriateness, noting among other things in her statement that the Congregation's new building would add to the "already generous space the synagogue enjoys." R-002489-90. (Translation -"no hardship.")

The Respondents, though, misconstrue the objection of the Petitioners as to the relevance of the landmarking and Z.R. §74-711 of the Zoning Resolution.[13] It is not disputed by the Congregation that the Congregation withdrew its application to the Landmark Preservation Commission for hardship relief under Z.R. §74-711 and did not exhaust all of its administrative remedies. Had the Congregation not withdrawn its Z.R. §74-711 application to the LPC, and the LPC and/or City Planning had denied the application, what reason is there for believing that the Congregation would then have

[13] Petitioner's Verified Reply mistakenly cited to §74-41 rather than §74-711 at pages 5 and 6 and similarly in its Reply Memorandum of Law at page 3.

been able to nonetheless seek the same relief from the BSA based on the same landmarking, alleging that the landmarking is a physical condition under Z.R. §72-21(a)?

The Petitioners' objection to the BSA action does not just rely on this failure to exhaust administrative remedies - the impropriety of the BSA action was to consider landmarking as a physical condition and hardship under Z.R. §72-21 to justify the granting of a variance. There is nothing in the statute to provide authority to the BSA to consider landmarking in determining hardships and physical condition - and, since this a purely a statutory issue, the Court should give no deference whatsoever to the BSA's view.

Thus, the last section of the City's brief is an attempt to divert attention - by claiming that the issue is exhaustion of remedies, and ignoring the issue of the improper use of landmarking as a hardship under Z.R. §72-21; the Corporation Counsel apparently wished to avoid confronting an uncomfortable admission by the City Planning Commission and the Landmark Preservation Commission, concurring that the BSA could use landmarking as a hardship under Z.R. §72-211: to do so would not only be inconsistent with the regulatory regime established by the Zoning Resolution, but would establish precedent which would no doubt later haunt the City Planning Commission.

So, the City's position is to adopt the fiction that the BSA did not utilize landmarking as a hardship and assert that the issue presented by the opposition was a mere technical issue of exhaustion of remedies. City New Memorandum at 54-55. The City's position also further distorts the issue by citing a number of cases that have nothing at all to do with the paramount issue of whether the BSA is authorized to consider the impact of landmarking as a hardship and or physical condition required to s support granting a variance. Any such holding is difficult to discern in E. 91St Neighbors

to Pres. Landmarks, Inc. v. N.Y. City Bd. of Stds. and Appeals, 294 A.D.2d 126 (1st Dep't. 2002) cited by the City - indeed, the decision has no discussion at all of landmarks, except for the name of one of the parties. Similarly, the other cases cited by the City for this proposition do not even mention the Board of Standards and Appeals and its jurisdiction under Z.R. §72-21: 67 Vestry Tenants Ass's v. Raab, 172 Misc. 2d 214 (Sup. Ct. N.Y. Co. 1997); Mattone v. N.Y. City Landmarks Pres. Comm'n, 5 Misc. 3d 1013A (Sup. Ct., N.Y. Co., 2004); Stahl York Ave. Co. LLC v. City of New York, 240 N.Y.L.J. 63 2008, No. 107666/2007 (Sup. Ct. N.Y. Co. 2008). These cases have no bearing on the issue of whether the BSA can circumvent protections of the landmark law by issuing variances based upon alleged landmark hardships. And, notwithstanding the City's citations, Z.R. §74-711 clearly involves City Planning and LPC, but does not involve BSA, which is evident from the words of that provision.

The Congregation's position is to claim that landmarking was not used as a factor (p. 22), but then to claim that even so, that Z.R. §74-711 is not an exclusive remedy. Congregation New Memorandum at 28. It is not so much that Z.R. §74-711 is an exclusive remedy, but that nothing authorizes the BSA to engage in hardship relief with none of the very specific protections required under Z.R. §74-711 - and without the participation of LPC and City Planning.

VII. The Sliver Law and Split Lots Are Always Hardships to Any Affected Property and Can Form No Basis For a Hardship Claim Under §72-21(a)

The BSA has trod on very thin ice in seeming to accept the argument that the application of the "sliver law" (Z.R. §23-692) is a hardship, or that split lots are physical hardships.

In all situations, the restrictions of the sliver law will be viewed by an owner as an undue burden. This is not at all unique. For example, the BSA seems to accept the fact

that development of the Parsonage is limited by the sliver law, and thus is a unique physical condition creating a hardship that justifies a variance.[14] But as every brownstone lot in the city will be subject to the sliver law in limiting the height of tall buildings on the narrow lots, this is basically a claim that any zoning regulation an owner does not like is a unique physical condition and a hardship so that the owner should receive a variance, the result being able to disregard any zoning regulation. It seems under the BSA's logic that any zoning regulation can be construed to be a unique physical condition. Thus, the BSA has rendered Z.R. §72-21(a) meaningless.

Similarly, split/divided lots are not a rarity. The Zoning Resolution has specific provisions for addressing the hardships of split lots and determining whether the less burdensome zoning in split lot can be applied to the entire lot and describes the circumstance where an owner should receive relief from the divided lot. Z.R. §77-00 to §77-40. So, what is exactly "unique" about the circumstances in which the Congregation found itself?

Z.R. §73--52, Modifications for Zoning Lots Divided by District Boundaries, authorizes the BSA to provide relief from a split lot as to height and setbacks, but only pursuant to an entirely different procedure, the "special permit" proceeding, not the variance proceeding. The Zoning Resolution, by requiring a special permit, implicitly is considering variance proceedings not to be available as the avenue of relief for split lots. But under the BSA's expansive approach, Z.R. §73-52 is irrelevant, since BSA has arrogated to itself the right to consider split lots as physical conditions, and provide variances, disregarding the specific limitations of Z.R. §73-52.

[14] The BSA accepted the conclusory claims of Attorney Friedman, ignoring the factual testimony of the Congregation's Architect who pointed to the fact that a development on the Parsonage site would block up the leaded stained glass windows - designed by Louis Tiffany - on the south wall of the Sanctuary.

The Congregation does not satisfy Z.R. §73-52. Thus, the Congregation is in the position of every other owner of land that does not meet the requirements to apply the less burdensome zoning will claim a hardship. What the BSA has done here is by fiat to say is that any owner of a split lot which does not satisfy Z.R. §73-52, nonetheless has met requirement of a physical condition hardship in a Z.R. §72-21 proceeding, and the BSA will grant an easy variance without making the owner go through the process of a special permit.

There is nothing "unique" about the Congregation claiming to suffer a hardship because of the impact of the split lot or the sliver law. In any event, the actual reason the Congregation cannot build a tall residential building on the development site is the overriding provisions of requiring a building separation - i.e., the Eighth Objection.

Indeed, had the Congregation decided to not have the Eighth Objection removed, using the false reasoning applied by the BSA, the building separation requirement of Z.R. §73-711 of the Zoning Resolution could also be characterized, improperly, as a "unique physical condition." Using this aberrant reasoning, there is virtually no restriction in the zoning regulation that could not be construed as being a "unique physical condition" and thus, the BSA approach assures the wholesale granting of variances by the BSA, subject only to the unrestrained discretion of the BSA, making it vulnerable to those with political influence seeking preferences for favored applicants and uses.

VIII. There is No Evidence that the Congregation Modified its Plans In Any Way Pertaining to the DOB Eighth Objection Concerning Building Separation.

The BSA has asserted that a formal Notice of Objection from the DOB is not required in order for the BSA to acquire jurisdiction as to granting a variance for a violation of the Zoning Resolution. BSA New Memorandum, n. 7 at 16. If that is so, then the BSA had complete jurisdiction to consider the applicability of Z.R. §23-711 to

the Congregation's proposed project. Certainly, the BSA was aware that the project required an additional variance as to §23-711 - yet, it approved the Congregation's project, intentionally blinding itself as to the impact of Z.R. §23-711.

No matter how many conclusory assertions are made by the Congregation and the BSA, the fact is that no revisions of the plans relating to the building separation were made between the initial March, 2007 plans and the plans submitted to the DOB in August, 2007. The DOB's initial letter of objection contained the so-called Eighth Objection, which would have required a variance in that the zoning resolution was clear that a 40-foot separation zone was required between the Synagogue and the Proposed Building on the upper floors. Z.R. §23-711. Thus, even apart from the sliver law requirement that would have prevented a tall residential building on the development site, the overriding restriction upon the development site was the building separation requirement. Z.R. §23-711 was discussed in memoranda by BSA staff, and there seemed to be no question as to the need for a variance as to this objection.

Petitioners assert that there were no changes made in the plans when refiled in August 2007 that in any way concerned the Eighth Objection and submitted an exhibit to this Court showing no changes. At the March 31, 2009, hearing, Petitioners made the assertion that changes had not been made and challenged the Respondents to show exactly where there were changes - on the large poster sized exhibit. Instead, the City and Congregation are back, with the City reasserting the following in footnote 8 on page 16: "Indeed, as reflected by the Record, after submitting its variance application, to the BSA in April 2007, the Congregation submitted revised plans to DOB. " Yet, the City and the Congregation are still unable to show where in the record there is any evidence to

show that the plans were revised in any way relating to the Eighth Objection. The fact that the Congregation could have revised the plans is not relevant - they did not.[15]

The BSA Commissioners assert they are experts on the Zoning Resolution and for months after the initial filing accepted the validity of the need for a building separation. The Congregation with its zoning expert consultants agreed as to the application of §73-711. In its initial Statement in Support of March 30, 2007, at R-00043 (and cited by the Congregation in the New Memorandum at 18), the Congregation itself fully accepted the applicability of Z.R. §23-711:

> Building Separation. (Objection 8) ZRCNY Sec. 23-711 imposes a 40 ft separation between the facing walls of the Synagogue and New Building. Inasmuch as the Synagogue and the New Building are connected for the full height of the Synagogue, there is no separation between the two buildings, thus generating the objection. Given the remaining depth of the zoning lot beyond the Synagogue's footprint is only 64 ft, providing a complying 40 ft setback for the height of the Synagogue's sloped roof would leave a developable footprint of 24 ft, which is wholly impractical.

Yet, even as experts on zoning, the BSA is unable to explain how the Zoning Resolution law suddenly changed in August, 2007 so as to no longer require a building separation that everyone previously had acknowledged was required by Z.R. §73-52. So, one is left with the uncomfortable conclusion that the BSA is more than willing to approve projects when it is fully aware that the project is not in compliance with the Zoning Resolution. It would seem that the BSA did not want to acknowledge the need for this waiver - for then the whole hand-waving bogus argument that a split lot is a physical condition justifying a variance could not be used to support a flimsy claim that a physical condition existed.

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[15] The City in its New Memorandum at footnote 8, page 16, asserts again that the Congregation submitted "revised" plans "as reflected in the Record", but, like the Congregation, the City remains unable, even after the pointed comments by Petitioners' counsel at the March 31, 2009, hearing, to identify the basis for this assertion in the "Record" that any changes that in any way impacted on §23-711.

IX. The Development Site is a Regularly Shaped Rectangle, Suffering From No Unique Physical Condition

Another example of the attempt by Counsel to convert assertions into fact is the attempt to deny the simple fact that the development site is a perfect rectangle, 64 feet by 100 feet, and highly developable - and the fact that the development site suffers from no unique physical conditions. Basically, the City and the Congregation just misrepresent the Record. The Congregation completely invented a fact that appears nowhere in the record:

> Second, the fact that the Congregation, faced with an inability to develop the underdeveloped land occupied by the Synagogue, can only use the remaining "L" shaped portion of the lot, is a rational ground upon which to find a "unique physical condition." (R. 5147-57.)

Congregation's New Memorandum, Page 21. Once again, the Congregation can only cite to another version of the conclusory Statement in Support submitted by Attorney Friedman, a statement replete with overstatements, mischaracterizations, false statements, and unsupported assertions. There is not one reference at all in the cited pages to an "L-shaped" lot, and, indeed, the Congregation itself conclusively admitted in its Verified Answer that the development lot was a regularly shaped lot. Congregation Verified Answer at ¶31. So, here we have an instance of the Congregation citing to the "Record", which consists of Attorney Friedman's argumentative brief - and, then upon inspection of the cited 11 pages, there is not even a reference to "L-shaped" lot.

Similarly, the Congregation in its New Memorandum at Page 20 attempts to bootstrap itself again and falsely claims that the BSA found that the site is "small" and "irregularly shaped":

> Among other things, the BSA found … the unencumbered portion of the lot is small and irregularly shaped, that the lot is split by a zoning boundary, and that development is hindered by the "sliver law." (See BSA Res. ¶¶ 41, 46, 60, 61, 71, 72, 74, 88, 94, and 110.)

This is a complete invention by the Congregation!! Not one of the cited Paragraphs states at all that the site is "irregular" and nothing states that the development site itself is

"small", only that the development site represents a "small part" of the larger Congregation site.[16] Clearly, the Congregation was responding to the Petitioners' showing that precedents as to finding (a) invariably show the existence of a "physical condition" such as the "swampy nature of the property in Douglaston Civic Assoc. v. Galvin, 36 N.Y.2d 1 (1974) and Douglaston Civic Association v. Klein, 51 N.Y.2d 963 (1980). Petitioners' Reply Memorandum at 25. The Congregation's response here is just to claim the Record says that which it does not say.

The Congregation would take the position that "exaggerations" like this provided by their Counsel before the BSA and in the Article 78 proceeding should be considered substantial evidence. But, of course, these exaggerations are mere assertions of counsel and are not to be considered substantial evidence, whether submitted to the BSA or the Court herein. In any event, the physical dimensions of the site in no way can be described as a "unique physical condition."

X. The Congregation's Claim that 72-21(b) Is Not Applicable When a Non-Profit is Engaged in a For-Profit Condominium Development Is Violative of Zoning Law Policy

New York City's Zoning Resolution Z.R. §72-21 is based upon New York case law relating to due process and the taking of property as a result of government land use regulation. New York City has legislated its own stricter standards - it requires that a hardship showing for both use and bulk (height and setback) variances have "unique physical conditions", where there is no such requirement in other New York jurisdictions. The specific language of Z.R. §72-21(b) requiring a reasonable return is not found in

[16] The development site at 64' x 100' is 6400 square feet. Lots 36 and 37 combined are 17,286 square feet. *See,* R-004673, Proposed Site Plan Drawings, Zoning Calculations for Single Zoning Lot, Item 2, Lot Area Thus, the development site is 27% of the entire Zoning Lot, hardly a "small part." The BSA could not make a finding that the lot was too small to develop, but so as to throw sand at a court, rather used this characterization that could, and was, so easily mischaracterized.

other New York statutory provisions, but the requirement that a "dollars and cents" analysis of reasonable return is embedded in a multitude of New York State cases. The dollars and cents requirement is not applied to variances, which have a purpose of allowing non-profit religious organizations to meet their programmatic needs; yet the organization must still show a hardship resulting from the zoning regulation. Some New York State cases impose a higher burden on programmatic uses that are earning income for the organization, though not altogether denying variances where income is being produced.

The argument by the Congregation that Z.R. §72-21(b) allows all non-profits to escape the burden of showing a hardship when the non-profit elects to pursue a pure income generating development is at odds with general New York State variance law. E.g., New York State Town Law Section 26. See P-00176.

Were the court to accept the arguments of the Congregation that Z.R. §72-21(b) is to be strictly construed, the impact would be the near death of zoning regulation in New York City. Any developer could create a non-profit to engage in development or arrange for a non-profit to front for the developer, and then claim exemption from this most important part of the zoning regime. After all, there is no requirement in Z.R. §72-21(b) that the non-profit be a charitable, educational, or religious organization. The non-profit does not even have to be tax exempt. Already, a great proportion of the real estate in Manhattan in owned by non-profits - some using the real estate for a charitable mission and some using the real estate as a pure investment. Many developers in New York City have indeed taken on non-profits as fronts for development and many non-profits are not distinguishable from for-profit organizations.

To provide such an advantage to non-profits would be a violation of the due process rights of all other property owners. For example, Petitioner Kettaneh would very much like to add floors to his brownstone across the street or at the least to add an extension in the back yard for an elevator which would add value to the top floors of his building. In the end, it is the members of the Respondent Congregation who receive the financial benefit from the condominium variances, in the form of reduced membership dues and support for building construction.

XI. Interpretations of the Meaning of a Statute Are Not Wholly Within the Purview of the BSA

The Congregation cites to a new case at page 15 of its New Memorandum for the proposition that the courts are bound to defer to the interpretation of the BSA as to statutory matters (see page 15). Yet, the statutory interpretations of the BSA, where irrational and unreasonable, and inconsistent with the statute, are not to be accorded deference as the Congregation, acknowledges. *See,* Soho Community Council, *infra*. Moreover, New York law is clear that deference to an agency "is not required where the question is one of pure legal interpretation." Teachers Insurance and Annuity Assoc. v. City of New York, 82 N.Y. 2d 35, 48 (1993) (finding that the Court need not give deference to the New York City Landmarks Preservation Commission in interpreting the terms "customarily open or accessible to the public" which the Court of Appeals found to be "pure legal interpretation.') *See also* J & M Harriman Holding Corp. v. Zoning Board of Appeals, __ A.D.3d __, 2009 NY Slip Op. 3731, 2009 WL 1238520 (2nd Dep't, May 5, 2009)[17]

[17] Nor is the BSA infallible. when interpreting the Zoning Resolution. The BSA is even willing to assert patently incorrect statutory interpretations before the Supreme Court and Appellate Division, until confronted by the Court of Appeals. In a recent case, only when forced to justify its improper statutory interpretation to the Court of Appeals, did the BSA finally acknowledge to the Court of Appeals that it had

XII. Legal Issues Presented

In addition to ascertaining whether the BSA Resolution is supported by substantial evidence, is rational, and is neither arbitrary nor capricious, certain legal questions are raised as to the legality of the BSA actions that show the BSA is in violation of law.

The refusal of the BSA to ask the Congregation to identify exactly how an as-of-right building would not resolve the access issues demonstrates convincingly the intentional blindness by the BSA and that the BSA was not "genuinely engaged in reasoned decision making." Gulf States Utilities Co. v. Federal Power Commission, 518 F.2d 450, 458-59 (D.C. Cir. 1975) cited by the Congregation's New Memorandum at 12. Presumably, the Congregation cites to a federal law case, because federal administrative law parallels New York State law in the use of the concepts of arbitrary and capricious and substantial evidence in the review of agency decisions.

Respondents assume that if there is substantial evidence to support the BSA decision, then that is the end of the review exercise, but, that it not an accurate statement. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290 (1974) ("though an agency's finding may be supported by substantial evidence [citation omitted], it may nonetheless reflect arbitrary and capricious action.")

The U.S. Supreme Court has provided this explanation as to some of the elements of arbitrary and capricious action by an agency in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983):

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of

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-through three levels of proceedings -improperly construed a statute, and the BSA conceded that its determination must be vacated. Matter of GRA V, LLC v. Srinivasan, __ N.Y.3d __ (New York Court of Appeals, June 4, 2009).

> the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

In SoHo Community Council v. New York State Liquor Authority, 173 Misc. 2d 632, 639 (Sup. Ct. N.Y. Co. 1997), the court described the ways in which the agency had acted in an arbitrary and capricious manner, citing with approval the seminal United States Supreme Court case, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) and made clear that the role of the New York State Court: "In an article 78 proceeding, the reviewing court does not act as a rubber stamp, but, rather, exercises a genuine judicial function and does not confirm a determination simply because it was rendered by an administrative agency." *Id.* at 635. *See also*, Fields v. New York City Campaign Finance Board, 2009 N.Y. Misc. LEXIS 79, Index. No.104389/2008 (Sup. Ct. N.Y. Co. January 13, 2009) (finding agency action to be arbitrary and capricious and an abuse of discretion.)

New York State law applies the same standards of Motor Vehicle Mfrs. and other federal cases. The BSA manifestly did not attempt to consider all the facts, and, indeed, deliberately foreclosed consideration of relevant facts and issues. Brady v. City of New York, 22 N.Y.2d 601, 606 (1968) ("It is precisely because of the severe limitations on the availability of judicial review of determinations made by bodies such as the pension board that such bodies must make a careful and painstaking assessment of all the available evidence."). Rosenkrantz v. Dept. of Corrections, 131 A.D.2d 389 (1st Dep't 1987).

For example, the BSA failed to set forth is reasoning for departing from using as a basis for determining the financial return it found to be reasonable in William Israel's.

See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973).

The BSA cannot depart from its formal written guidelines without formally changing the guidelines -" it must either follow[s] or consciously change its rules." Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 41 (1st Cir. 1989) (Breyer, J.). The BSA distinction that its Guidelines were not a rule or regulation because not formally adopted was rejected in Allied Manor Road LLC v. Grub, 2005 N.Y. Misc. LEXIS 3440; 233 N.Y.L.J. 75 (Civil Ct., Richmond Co. 2005).

In denying that it should have exercised its powers to conduct a quasi-judicial proceeding, the BSA is undermining its assertion that the standard of substantial evidence applies. "The hearing is nonadjudicatory, quasi-legislative in nature. It is not designed to produce a record that is to be the basis of agency action -- the basic requirement for substantial-evidence review." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). United States v. Mead Corporation, 533 U.S. 218, 229 (2001). Indeed, the Congregation (at its New Memorandum, p. 9-10) cited language from Matter of Halperin v. City of New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005); Halperin supports the concept that the existence of substantial evidence alone is insufficient to support a BSA hearing, if conducted in a non quasi-judicial manner. Deference by a court to an agency factual determination as to substantial evidence is greater where there a quasi-judicial proceeding is in actuality conducted. By definition, the absence of substantial evidence to support findings is arbitrary and capricious and an abuse of discretion. So, the fact that there is substantial evidence that is all hearsay is of no help to the Respondents. (Congregation New Memorandum at 10).

Legal issues presented to the Court herein, based upon these principles, include:

- May the BSA consider landmarking as a unique physical condition hardship to support a variance under Z.R. §72-21(a) with no support in the language of the Zoning Resolution?
- May the BSA allow landmarking to support variances under Z.R. §72-21 that waive the height and setback restrictions?
- May the BSA allow landmarking to support variances under Z.R. §72-21 without imposing restrictions upon the landmarked properties as required by other more specific zoning resolution provisions, such as §74-711?
- In a mixed use programmatic-condominium/income generating development by a religious non-profit organization, may the development satisfy §72-21(b) as to the income generating condominium portion, if the record shows that the an all-residential development would generate a reasonable return?
- Is the religious organization entitled to both satisfy its programmatic needs and earn a profit on another slice of the property?
- May the BSA find that it has approved the minimum variance under §72-21(e), when the record shows that the financial return is far in excess of the financial return which the applicant has agreed is a sufficient rate of return, and where the BSA engaged in no discussion of its standards of what is a reasonable return, much less a rational discussion?
- Can the BSA consider as hardships under the §72-21(a) finding a hardship that is fully resolved by a building that conforms with the zoning resolution?

- May the BSA consider the obsolescence of a building to be demolished in a proposed development as a unique physical condition hardship under 72-711(a)?
- May the BSA in considering variances, ignore the more restrictive New York City Law, and rely upon New York Stated case law interpreting statutes that do not have the same requirements of the need to establish a unique physical condition under §72-21(a)?
- May the BSA consider a divided/split lot as a unique physical condition hardship under §72-21(a) when the zoning resolution at §73-52, §77-28, and §77-29 strictly defines the circumstances under which zoning relief may be provided as to height and setbacks?
- In the analysis of reasonable return, can BSA ignore clear case law and its own written guidelines that require that the original acquisition cost of the property be considered?
- Can the BSA grant a variance when the Record is conclusive that there are other material violations of the Zoning Resolution as to which the BSA was aware and chose to ignore without any deliberative explanation?
- Should a court accord deference to an administrative determinations where the Record conclusively shows deliberate blindness by the administrative body to salient facts and issues, demonstrating that it was not "genuinely engaged in reasoned decision making". *See* Gulf States Utilities Co., *supra?*
- Should a court accord the same deference to administrative determinations conducted as a result of quasi-judicial proceedings presided over by

independent hearing examiners and conducted in accordance with generally accepted administrative hearing procedures, as to determinations from an agency such as the BSA. which at least in this case did not?

- Where the BSA makes an ultimate findings based upon non-specified "other factors" or other non-specific "facts", should the finding be rejected and the matter remanded to the BSA to define the other factors?
- Where the BSA makes an ultimate finding upon multiple factors and one or more of the factors is found to have been considered improperly or to lack substantial evidence, should not the matter be remanded to the BSA to reconsider whether it would make the ultimate findings on proper factors?

Dated: June __, 2009
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