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

NIZAM PETER KETTANEH and HOWARD LEPOW, Petitioners-Appellants, 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-Appellees.	:	Index No. 113227/08 (LOBIS) **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that the Petitioners, NIZAM PETER KETTANEH and HOWARD LEPOW, hereby appeal to the Appellate Division of the Supreme Court, First Department, from a decision, order and judgment entered in the above entitled special proceeding in the office of the Clerk of New York County on July 24, 2009, and served by mail upon Petitioners-Appellants on July 29, 2009, which order denied Petitioners-Appellant's Article 78 petition to annul and vacate a determination of the Respondent-Appellee Board of Standards and Appeals and dismissed said petition, and this appeal is taken from each and every part of said decision, order, and judgment as well as from the entirety thereof.

Dated: August 27, 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:

Clerk of the County of New York
Room 141 B
60 Centre Street
New York, NY 10007

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 City 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

Courtesy copy to:
David Rosenberg
Marcus Rosenberg & Diamond LLP
488 Madison Avenue
New York, New York 10022
(212) 755-7500
Attorneys for Petitioners Landmark West et al
In Related Matter:
Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
	:	New York County
Petitioners-Appellants,	:	Index No. 113227/08
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules	:	
	:	**PRE-ARGUMENT STATEMENT**
-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-Appellees.	:	

Petitioners-Appellants Nizam Peter Kettaneh and Howard Lepow submit this Pre-Argument Statement pursuant to Section 600.17(a) and (b) of the Rules of the Appellate Division, First Department.

1. FULL TITLE OF THE ACTION

The full title of the action is as appears above.

2. FULL NAMES OF THE PARTIES

The full names of the original parties are as appears above. There have been no changes in the parties.

3. NAME AND ADDRESS OF COUNSEL FOR APPELLANTS

The counsel for Petitioners-Appellants is Alan D. Sugarman, Law Office of Alan D. Sugarman, 17 W. 70th Street, New York, NY 10023, 212-873-1371.

4. NAMES AND ADDRESSES OF COUNSEL FOR RESPONDENTS

Counsel for the BSA Respondents-Appellees are Jeffrey Friedlander, Esq., First Assistant Corporation Counsel of the City of New York and Christina L. Hoggan, Esq., Assistant Corporation Counsel, 100 Church Street, Room 5-153, New York, New York 10007, 212-788-0790.

Counsel for the Congregation Respondent are Louis M. Solomon, Esq. and Claude M. Millman, Esq., Proskauer Rose L.L.P., 1585 Broadway, New York, New York 10036, 212-969-3000.

5. COURT FROM WHICH APPEAL IS TAKEN AND ORDER APPEALED FROM

This appeal is taken from a decision, order, and judgment of the Honorable Joan B. Lobis of the Supreme Court of the State of New York, County of New York. The decision, order, and judgment were dated July 10, 2009, were entered in the County Clerk's Office of New York County on July 24, 2009, and were served upon Petitioners-Appellants by mail on July 29, 2009.

6. NATURE AND OBJECT OF THE CASE

The object of the Article 78 proceeding was to annul and vacate variances granted by the Respondent New York City Board of Standard and Appeals to the Respondent Congregation Shearith Israel and for other related relief. The variances related to a mixed use development consisting of five upper floors of luxury condominiums and a four floor community house on the lower floors. The condominium floors variances allow windows of cooperatives owned by Petitioner Lepow to be covered and were justified solely on the basis of money to benefit the membership of the Congregation. An as-of-right development would have allowed for only two floors of condominiums and would not block Petitioner Lepow's windows. Ninety per cent of the additional area allowed by the variances is for the luxury condominiums, and the remaining 10% of variance area is for the religious community house.

7. RESULT REACHED IN THE COURT BELOW

The court below denied Petitioners-Appellants request to annul and vacate the BSA's determination and dismissed the Article 78 Petition.

8. GROUNDS FOR APPEAL

Petitioners-Appellants seek to reverse the judgment dismissing the Article 78 Petition on the following grounds:

The lower court overlooked or failed to take into account key parts of the records, petitioners' legal contentions, and applicable law on pertinent issues, including, without limitation the following:

The lower court's decision is erroneous as a matter of law and erroneous in accepting arbitrary and capricious determinations of the BSA and in accepting the BSA's arbitrary and capricious deliberate disregard of relevant facts and issues.

The lower court erred in not properly applying the substantial evidence requirement explicitly stated in §72-21 of the Zoning Resolution, in not applying the statutory language of §72-21, and by ignoring clear and specific precedent.

The lower court erred in upholding the BSA's finding under §72-21(b) as to the luxury condominium variances that a conforming as-of-right building on the development site would not earn a reasonable return.

- First, the lower court erred as a matter of law in accepting the BSA's implicit position that a religious non-profit owner of property is entitled to both satisfy its religious programmatic needs by constructing a community house on most of the site, as well as at the same time earn a reasonable financial return by constructing luxury condominiums on the remaining upper part of the site.
- The lower court erred as a matter of law in accepting the BSA's "bifurcated" financial analysis of the development site, that is, an analysis in which the BSA considered the

financial return obtainable only from the upper two floors of the site, rather than as to an all-condominium as-of-right building using the entire site. The lower court decision ignored this issue, although such issue featured was prominently by Petitioners.

- The lower court erred in accepting the BSA's arbitrary and capricious, and indeed deliberate, refusal, after first having requested such an analysis, to complete the analysis of the all residential as-of-right building, and in accepting the BSA's deliberate disregard of the fact that such a building would earn a return in excess of the return undisputedly admitted by the Congregation as exceeding a rate of return satisfactory to the Congregation. The BSA in its Article 78 Answer verified by the Chair of the BSA, completed the computation, conclusively demonstrating that a reasonable return would be earned by the Congregation.

- The lower court erred as a matter of law in accepting the BSA's deliberate refusal to evaluate the Congregation's financial return based upon the original amounts paid by the Congregation for the site, since the Congregation financial analysis showed that the Congregation would receive a $12.3 million site payment in addition to millions of dollars of profit from the development of the condominium project itself and the Congregation would still retain ownership and use of the property allocated to the community house.

- Even as to the improper bifurcated analysis of solely the two-floor residential part of the site, the lower court erred in allowing the BSA to arbitrarily and capriciously evaluate the site value based upon the total value of the site including the part of the site used by the community house and as to which the Congregation would retain ownership and use.

- Even as to the improper bifurcated analysis, the lower court erred in allowing the site valuation to be based irrationally upon the Congregation's inability to develop air rights over the parsonage because of landmarking, in effect allowing the transfer of air rights without any statutory basis and without even discussing the irrational result that the future development on the transferring property was not restricted, restrictions generally required when air rights are transferred from landmarked property.

- Even as to the improper bifurcated analysis, the court below erred in accepting the BSA's arbitrary and capricious and deliberate acceptance of partial, altered and materially incomplete construction cost reports and the BSA's deliberate act of not requiring complete reports, when the Congregation had filed complete reports as to the other proposed schemes and the materiality and relevance of the complete reports were established by petitioners, and when the BSA could have simply required the filing of the complete report including the pages deliberately concealed by the Congregation.

- Even as to the improper bifurcated analysis, the court below erred in allowing the BSA to deliberately conceal from the record the very generous return on equity from the project when the BSA guidelines explicitly required a return on equity analysis together with a return on investment analysis.

- The court erred as well in stating that the return on equity issue was Petitioners' primary objection to the reasonable return analysis, and after misconstruing the arguments, then using the misconstruction in such as a way to ignore Petitioners' clearly expressed objections.

The lower court also erred as a matter of law in its consideration of the unique physical condition requirement of §72-21(a) of the Zoning Resolution as to the variances relating to the condominiums.

- The lower court erred as a matter of law in accepting the BSA's finding as to §72-21(a) in the absence of any physical condition and the BSA's apparent reliance upon case law interpreting zoning regulations which did not include the specific New York City requirement of "physical".

- The lower court erred as a matter of law in accepting the BSA's finding as to §72-21(a) insofar as the finding relied primarily on the existence of landmarked structures on the zoning site, when there is no authority under New York City's Zoning Resolution allowing the BSA to consider such factors in considering variances and where jurisdiction for providing relief for said hardships is exclusively assigned to the City Planning Commission pursuant to strict requirements when such relief is afforded, said requirements then having been ignored by the BSA. The decision below misconstrued the issue to be one of exhaustion of remedies alone, rather than the issue of whether the BSA had the power to do what it did.

- The lower court erred as matter of law in accepting the BSA's §72-21(a) finding for the condominiums in that the BSA clearly and improperly relied in part upon the programmatic needs of the Congregation as a hardship under §72-21(a) as to the luxury condominiums.

- The lower court erred as a matter of law in accepting the BSA's reliance upon a split zoning lot as a physical condition under §72-21(a): the lower court first having ignored the fact that such a situation is not a physical condition and that even the Zoning

Resolution authorizes relief for split lots only under specific conditions, conditions not met by the Congregation, and allowed the BSA to engage in circular reasoning of describing a zoning regulation as a physical condition.

- The lower court erred in accepting the BSA's deliberate disregard of the Zoning Resolution provision requiring a building separation on the upper floor, which provision would prevent construction of a tower condominium, even in the absence of the split lot, and the BSA's approval of a building knowing that it violated said specific prohibition in the Zoning Resolution, and in so doing the BSA's condoning and sanctioning questionable if not illegal and improper action by the Department of Buildings.

The lower court erred, as to its finding under §72-21(c) of the Zoning Resolution, in determining that the BSA's did not act arbitrarily and capriciously in deliberately failing to provide a rational basis for allowing legal lot line windows in apartments owned by Petitioner Lepow to be blocked by the luxury condominium allowed by the variances, when an as-of-right building would not block the windows and in failing to balance the economic harm done to said Petitioner as compared to the economic benefit to each and every member of the Congregation resulting from the economic benefit in allowing larger condominiums to be constructed.

The lower court erred, as to the BSA's finding under §72-21(e) finding of the Zoning Resolution as to the condominium variances. This section requires that the variance be the minimum variance. The lower court erred in not determining that the BSA acted arbitrarily and capriciously in deliberately failing to consider whether a courtyard modification would allow said windows not to be blocked or in failing to consider a condominium tower lesser in height, in that the return on investment

approved by the BSA substantially exceeded the return on investment which the Congregation stated was adequate and satisfactory.

The lower court erred, as to the §72-21(a) finding of the Zoning Resolution for the community house variances, in that there was no evidence at all to support a programmatic need for the 10 foot rear set- back variance for the fourth floor of the Community House, the Congregation having alleged that the fourth floor setback variance was to provide for larger classrooms, when the evidence conclusively showed that larger classrooms could be provided by simply moving a caretakers' apartment from the fourth floor to the fifth floor of the same building, but the Congregation did not wish to do so, asserting the unlawful legal privilege of both accommodating its programmatic needs and earning a reasonable economic return from the same property since the Congregation wished to develop a luxury condominium on the fifth floor.

The lower court erred in holding as proper and acceptable that the Chair and Vice-Chair of the BSA, knowing the identity of opponents to the project, conducted a lengthy formal secret private ex parte meeting with the Congregation and its lawyers, consultants and officers, and at the meeting reviewed the exact same building as approved by the Landmarks Preservation Commission and as would then be submitted to the BSA by the Congregation, and the BSA and the Chair and the Vice-Chair then having arrogantly refused to disclose what took place at said meeting.

The lower court erred in according deference to the determinations of the BSA despite the demonstrated repeated instances of the BSA deliberately ignoring relevant matters, refusing to collect relevant information from the applicant Congregation, and holding secret ex parte meetings with the applicant Congregation.

The lower court erred in accepting assertions by the Respondents that substantial evidence existed in the record in lieu of exact citations by the Respondents to supporting non-conclusory facts in the record.

9. RELATED ACTIONS OR PROCEEDINGS OR APPEALS

There are no additional appeals pending in this action. A related action is Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08, Supreme Court of the State of New York, County of New York, also before the Honorable Joan B. Lobis. In a decision dated August 4, 2009, the Court dismissed said proceeding; at page 2 of the Court's decision in the Landmark West decision, the Court incorporated by reference the July 10, 2009 decision being appealed herein.

Dated: August 27, 2009
New York, New York

Alan D. Sugarman

Attorney for Petitioners-Appellants

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

To:

Clerk of the County of New York
Room 141 B
60 Centre Street
New York, NY 10007

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-Appellee

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

Courtesy copy to:
David Rosenberg, Esq.
Marcus Rosenberg & Diamond LLP
488 Madison Avenue
New York, New York 10022
(212) 755-7500
Attorneys for Petitioners Landmark West et al
In Related Matter:
Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08

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

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NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

- 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.

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NOTICE OF ENTRY OF DECISION, ORDER AND JUDGMENT

INDEX NO. 113227/08

PLEASE TAKE NOTICE that the within is a true copy of a Decision, Order, and Judgment signed by the Honorable Joan B. Lobis on July 10, 2009, and filed and entered in the office of the Clerk of the Court on July 24, 2009.

Dated: New York, New York
July 29, 2009

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Respondents
100 Church Street, Room 5-154
New York, New York 10007
(212) 788-0461

By: _____
Christina L. Hoggan
Assistant Corporation Counsel

To:
ALAN D. SUGARMAN
Attorney for Petitioner
17 West 70th Street, Suite 4
New York, New York 10023
(212) 873-1371

Claude M. Millman
PROSKAUER ROSE LLP
Attorneys for Congregation Shearith Israel
a/k/a The Trustees of Congregation
Shearith Israel in the City of New York
1585 Broadway
New York, New York 10036
(212) 969-3200

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

PRESENT: Joan B. Lobis PART 6

Index Number : 113227/2008
KETTANEH, NIZAM PETER
vs.
BOARD OF STANDARDS AND APPEALS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.
MOTION DATE 3/31/09
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of ~~Motion~~/ Petition/ Order to Show Cause — Affidavits — Exhibits ...	1-27
Answering Affidavits — Exhibits	28-71; 72
Replying Affidavits	73-103

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FOR THE FOLLOWING REASON(S):

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

Dated: 7/10/09

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

Index No. 113227/08

-against-

Decision, Order and Judgment

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.

----------X

JOAN B. LOBIS, J.S.C.:

Nizam Peter Kettaneh and Howard Lepow bring this petition, pursuant to Article 78 of the C.P.L.R., seeking to annul and reverse the August 26, 2008 determination of the Board of Standards and Appeals of the City of New York and its chair and vice-chair, Meenakshi Srinivasan and Christopher Collins, respectively (collectively referred to as the "BSA" or the "Board"). The determination is set forth in Resolution 74-07-BZ (the "BSA Resolution"). The BSA Resolution approved the application of respondent Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel (the "Congregation"), a not-for-profit religious institution, for a variance for the property located at 8-10 West 70th Street in Manhattan (the "Property"), which is adjacent to the Congregation's sanctuary, located at 6 West 70th Street. The Congregation seeks to build a structure containing four floors of community space and five floors of luxury condominiums (the "proposed building" or the "Project"). The Board found that the Congregation had satisfied the criteria set forth in New York City Zoning Resolution § 72-21 for a variance. Respondents BSA and the Congregation oppose the petition.

The Property is located within the Upper West Side/Central Park West Historic District and is in a residential zoning district. Petitioner Kettaneh owns and resides in a townhouse located at 15 West 70th Street, which is opposite the Congregation's sanctuary. Petitioner Lepow resides at 6 East 79th Street. Mr. Lepow owns ten (10) cooperative apartments in a building located at 18 West 70th Street (the "West 70th Building"), which is the building adjoining the Property.

The Property is comprised of two tax lots—Block 1122, Lots 36 and 37—with a total lot area of 17,286 square feet. The lots constitute a single zoning lot because the tax lots have been in common ownership since 1984, which is the date of the adoption of the existing zoning district boundaries. The bulk of the site is in the R8B zoning district, known as contextual mid-block zoning, with height and setback limitations. The remainder of the Property is in the R10A zoning district, which has less restrictive zoning requirements. The zoning lot has 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage on Central Park West. Lot 36 consists of the synagogue building, an historic landmark, which was constructed in 1896. Adjacent to the south side of the synagogue, on Central Park West, is a townhouse known as the Parsonage, which was also constructed in 1896. The Parsonage is 75 feet tall and holds 27,760 square feet. Lot 37, which is on West 70th Street, just off Central Park West, is 64 feet by 100 feet. This lot is the combination of three residential house lots, once owned by the Congregation, but sold in 1896 to private owners for the construction of private residences, with the restriction that no structure would exceed the height of the Synagogue building itself. In 1949, two of these lots were conveyed back to the Congregation and in 1954, row houses were constructed on this portion of the Property, creating the Community House. The third lot was conveyed back to the Congregation in 1965. While there were three structures originally, in 1970, the building on the lot acquired in 1965 was

demolished, leaving a vacant lot. Presently, this vacant part of Lot 37 contains a trailer that is used for classrooms. The other part of the lot contains the four-story Community House, which totals 11,079 square feet, and occupies approximately 40% of the tax lot area; the remaining 60% is vacant. The Beit Rabban Day School, a private, nonsectarian Jewish day school that is not affiliated with the Congregation, is the primary user of the Community House, and pays rent to the Congregation.

The Application Process

In order to develop a property that has a non-conforming use or non-complying bulk, the applicant must submit an application to the Department of Buildings ("DOB"). After the DOB issues its denial of the non-conforming or non-complying proposal, the property owner may then apply to the BSA[1] for a variance. The BSA is required to hold hearings and comply with other statutory procedures. Specific findings must be made in the BSA determination to grant or deny a variance. (See below.) Each of the five criteria must be satisfied before a variance may be granted. If the BSA does not grant a variance, the property owner may only develop the property in conformance with the use and bulk regulations for the particular zoning district.

The Zoning Regulations as to the Granting or Denial of a Variance

In determining whether or not to grant a variance, Z.R. § 72-21 requires the BSA to make "each and every one" of five specific findings of fact, as follows: (1) that the subject property

[1] The BSA is empowered to hear, decide and determine whether to grant or deny requests to vary the zoning laws. New York City Charter (the "Charter") §§ 666(5), 668; Z.R. §§ 72-01(b) and 72-20 et seq. The BSA is comprised of five commissioners, who are appointed by the Mayor of the City of New York, each for a term of six years. Pursuant to § 659 of the Charter, at least one member must be a planner with professional qualifications; another member is required to be a licensed professional engineer; and, another member is required to be a registered architect. All three of these professionals must have at least ten years' experience.

has "unique physical conditions" which create "practical difficulties or unnecessary hardship in complying strictly" with the permissible zoning uses and that such practical difficulties are not due to the general conditions of the neighborhood; (2) that the physical conditions of the property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a reasonable return" from the property; (3) that the variance "will not alter the essential character of the neighborhood" or "substantially impair the appropriate use or development of adjacent property" and "will not be detrimental to the public welfare"; (4) that the "practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner"; and, (5) that the variance be "the minimum variance necessary to afford relief." The BSA is further required to set forth in its determination

> each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be supported by substantial evidence of other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board.

The Congregation's Application to the BSA

On or about March 27, 2007, the Manhattan Borough Commissioner of the DOB denied the application, citing eight objections.[2] After the application was revised, the DOB issued a second determination, which eliminated one of the prior objections. The DOB's second determination, issued on or about August 27, 2007, was the basis for the variance application.

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[2] Prior to this application, the Congregation submitted an application to the Landmarks Preservation Commission ("LPC"). As set forth at p. 29, infra, the LPC issued a Certificate of Appropriateness in March 2006.

On April 1, 2007, the Congregation submitted its variance application to the BSA. As a result of its growth in membership from 300 families when the synagogue first opened, to its present membership of 550 families, the Congregation asserted that it needed a new facility to accommodate its religious mission. In addition, the Congregation claimed that it needed to update the 110-year-old building to make it more easily handicapped accessible.

To this end, the plan seeks to demolish the existing Community House occupying tax lot 37, and replace it with a nine-story (including penthouse and cellar) mixed-use community facility/residential building. The use of the Property conforms with the zoning regulations (i.e., as-of-right), so no use waivers were requested; the variance request was with respect to non-complying bulk. The Congregation sought a waiver of certain regulations, since the proposed building does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear setback for the zoning district.[3] The proposed building will have a total floor area of 42,406 square feet, which is comprised of 20,054 square feet of community facility floor area and 22,352 square feet of residential floor area. The base height along West 70th Street is 95 feet, 1 inch, which is just over 35 feet higher than the maximum permitted height of 60 feet; the front setback is 12 feet, which is 3 feet short of the minimum permitted distance of 15 feet; the total height is 105 feet, 10 inches, which is just over 30 feet higher than the maximum permitted height; the rear yard is 20 feet for the second through fourth floors, which is equal to the required minimum; the rear

[3] "Lot coverage" is that portion of a zoning lot which, when viewed from above, is covered by a building."Rear yard" is that portion of the zoning lot which extends across the full width of the rear lot line and is required to be maintained as an open space. "Base height" is the maximum permitted height of the front wall of a building before any required setback. "Building height" is the total height of the building, measured from the curb level or base plane to the roof. A "setback" is the portion of a building that is set back above the base height before the total height of the building is achieved.

setback is 6 feet, 8 inches, which is more than 3 feet short of the minimum required distance of 10 feet; and, the interior lot coverage is 80%, which is 10% greater than the maximum permitted lot coverage of 70%.

In support of the application, the Congregation submitted a zoning analysis, a statement in support, an economic analysis, drawings, and photographs. The Congregation also submitted an Environmental Assessment Statement. An Economic Analysis Report, dated March 28, 2007 (the "March 2007 Report"), was submitted by the Congregation's consultant, Freeman/Frazier & Associates, Inc. ("Freeman/Frazier"). The March 2007 Report analyzed the feasibility of two alternatives for the development of the site— an as-of-right residential/community facility consisting of a six-story building, with condominium units on the fifth and sixth floors, and a proposed residential/community facility. The latter proposal would require a variance from the BSA, since the proposal called for an eight-story plus penthouse mixed-use building, with condominiums on floors five through eight, plus the penthouse.[4]

On or about June 15, 2007, the BSA issued a Notice of Objections to the variance application, to which Freeman/Frazier responded; the BSA issued a second set of objections on October 12, 2007, comprising twenty-two (22) objections, to which Freeman/Frazier also responded. The crux of the response related to the second prong of the required finding of fact, i.e., the

[4] Freeman/Frazier subsequently made revisions to the March 2007 Report, and submitted letters and/or reports dated September 6, 2007; October 24, 2007; December 21, 2007; January 30, 2008; March 11, 2008; April 1, 2008; May 13, 2008; June 17, 2008; and, July 8, 2008.

reasonable return analysis. Freeman/Frazier also provided a revised as-of-right development, since the prior as-of-right proposal actually violated the rear yard limitations and was not as-of-right. The revised proposal also reduced the floor-to-ceiling heights, which resulted in a seven-story building with a total of six residential units. Freeman/Frazier concluded that an as-of-right building would result in an annualized capital loss in the amount of $23,000, while the revised proposed development would yield an annualized return on total investment of 8.16%.

The Community Board 7 Land Use Committee ("CB7") held hearings on October 17 and November 19, 2007. A number of community residents and elected officials spoke in opposition. The Congregation pointed out that the design had changed slightly after the Congregation appeared before the Landmarks Preservation Commission ("LPC"), with respect to the decrease in size of the proposed building and certain elements of the façade.[5] CB7 expressed concern as to whether all of the residential space in the proposed building was really necessary to finance the Project and the Congregation's programmatic needs. The opposition raised this as a concern, and also questioned the Congregation's use of the Parsonage as rental property rather than as space for its programmatic needs; the excessive garbage that would pile up after events; excessive traffic from the school; and, the shadows that will result from the height of the new building. CB7 questioned the need for five condominiums; whether five condominiums was truly the minimum number necessary for a reasonable return; and, why a Congregation with a large number of wealthy members needed this manner of financing for its programmatic needs.

[5] At the time of the presentation to the LPC, the Congregation sought to construct a fourteen-story building.

The Congregation asserted that it was not required to satisfy the finding of a reasonable rate of return, and that it was optional for the BSA to make that finding. The Congregation stated that the Parsonage was not suitable for community facility use, in that there were too many building code violations for multi-purpose use, so that it is only suitable as a residence. CB7 rejected the variances for the condominiums, but approved the smaller, lower floor variances, essentially approving the horizontal variances but not the vertical variances. On December 4, 2007, the entire Community Board rejected all seven of the variances.

After notice by publication and mailing, the BSA held its first hearing on November 27, 2007. Representatives from the Congregation addressed the reasons for the proposed building, which included the need to accommodate the growth in membership and the need to make the building more handicapped accessible. The BSA asked the Congregation to consider only the value of the residential portion of the site in calculating the reasonable return, and eliminate the community facility from the site value.[6] By letter dated December 21, 2007, Freeman/Frazier submitted its revisions. Five development alternatives were set forth: (1) a revised as-of-right community facility/residential development, which is a revision to the proposal submitted in the March 2007 Report; (2) a lesser variance alternative as-of-right community facility/residential development, which is based on the proposal that was submitted in response to the Board's June 15, 2007 Notice of Objections; (3) a claimed as-of-right structure with tower development, which would consist of a tower with floors five through sixteen comprising thirteen residential units, but would have a smaller zoning floor area than the proposed development; (4) the proposed development, which

[6] The term "site value" is used interchangeably with the terms "acquisition cost" and "market value" of the Property.

consists of new construction of an eight-story building, plus penthouse; and, (5) an as-of-right residential development. Also, pursuant to the Board's request, the economic feasibility analysis was performed considering only the value of the residential portion of the site. The first three alternatives all resulted in annualized losses. The fourth proposal of the mixed use building with five condominiums provided an annualized return on total investment in the amount of 12.19%, while the fifth proposal provided an annualized return on total investment in the amount of 3.63%. Freeman/Frazier acknowledged its failure to respond to the opposition's concerns, including not valuing income from the school, Parsonage and basement/banquet space.

The public hearing continued on February 12, April 15, and June 24, 2008. Each date, testimony was presented by opponents to the Project and written submissions were prepared by both the Congregation and the opponents to the Project after each hearing. Freeman/Frazier's March 11, 2008 letter and report responds specifically to concerns raised at the February 12, 2008 hearing, and to the report of Martin Levine, of Metropolitan Valuation Services ("MVS"), the expert for the opposition. The BSA asked Freeman/Frazier to review the estimated property value of the residential development portion of the site, using the as-of-right zoning floor area determined by assuming the building lot to be a single split zoning lot, and to consider the financial feasibility of several new alternatives. Freeman/Frazier re-examined comparable sites for land prices, and examined alternatives such as increasing the courtyard space (which would decrease the sellable area on each floor), and reducing the height of the proposed building by one story. The revised proposals would provide an annualized return on total investment of 8.58% and 1.94%, respectively.

MVS submitted a report in which the principal complaint was with respect to the economic feasibility of the Project. MVS questioned Freeman/Frazier's land value of $750 per square foot of buildable area, claiming that this number was arrived at using "cherry picked" data. Rather, MVS argued that a land value of $500 per buildable square foot was a more probable indicator of the Property's market value. MVS also questioned the construction costs. At the April 15 hearing, the Board focused on the price per foot for development, the comparables that were used, and the programmatic needs of the Congregation. The Chair questioned the credibility of the site value, and questioned whether the current proposal before the Board really was the minimum variance required, which is the fifth required finding. The opposition questioned why the BSA was not scrutinizing the Congregation's financial statements to see what available resources it has, other than potential income from the sale of the condominiums. The BSA concluded the hearing by requesting that the Congregation address the issue of shadows and the implication of a larger building on the surrounding buildings. The BSA also requested clarification to demonstrate that the additional ten-foot encroachment is driven by the Congregation's programmatic needs.

Freeman/Frazier's May 13, 2008 response contained a revised proposal consisting of a building with eight floors and a penthouse, with a complying courtyard in the rear in order to continue providing light and air to three lot line windows in the West 70th Building. The courtyard would start at the sixth floor, which would reduce the size of floors six through eight, and the penthouse. A second revised proposal was the same as above, but eliminated the penthouse. A third alternative eliminated the eighth floor, but retained the penthouse, because the LPC believed the architectural character of the penthouse was an important design feature. The three proposals yielded an annualized return on total investment of 10.66%, 3.82%, and 0.93%, respectively. Although the

BSA specifically requested that the Congregation address the impact of shadows and the programmatic needs of the Congregation, these issues were not addressed.

MVS raised additional objections, to which Freeman/Frazier responded by noting that the same objections were set forth previously. A member of the opposition (petitioners' counsel herein) expressed concern about the practice of measuring return on investment, rather than a return based on equity. Freeman/Frazier responded that it is customary in a condominium development project to use return on investment (see pp. 23-24, infra), and also addressed other concerns raised by opponents to the Project.

At the June 24 hearing, a question arose concerning the failure to account for the terraces in the proposed pricing of the condominiums. The BSA also questioned how the efficiency ratio was calculated, the comparables that were used, and whether the comparables calculated square footage solely based on the interior of an apartment or whether the square footage also included common areas. Freeman/Frazier responded to issues raised at the June 24 hearing, MVS' June 23, 2008 report, and a letter from Mr. Sugarman. Freeman/Frazier's July 8 submission updated the prices for the condominium units, since they now had terraces on the fifth and sixth floors; the proposed apartment prices were still lower than in the March 2007 Report, since there is now less sellable square footage per floor than in the original plan. The additional value as a result of the terrace areas increased the annualized return on investment from 10.66% to 10.93%. The revisions to the as-of-right development resulted in an annualized capital loss of $4,569,000. Freeman/Frazier also responded to the question concerning the efficiency ratio, noting that the variations occurred as the sellable areas change, while the common areas remain the same size. The opponents continued

to question the methodology to determine the acquisition costs, and the decision to utilize a return on investment analysis, rather than a return based on equity. Freeman/Frazier responded by noting that the concerns were repetitive, or rejected the comments outright.

In a decision dated August 26, 2008, the BSA adopted unanimously, by a vote of 5-0, the Resolution granting the variance. The BSA Resolution approved the construction of a new building which will contain both community space and five luxury condominium apartments. The relevant portion of the Resolution provides that the BSA

> permit[s], on a site partially within an R8B district and partially within an R10A district within the Upper West Side/Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to Z.R. §§ 24-11, 77-24, 24-36, 23-66, and 23-633; on condition that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received May 13, 2008" - nineteen (19) sheets and "Received July 8, 2008" - one (1) sheet; and on further condition:
>
> **THAT** the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80. . .

Other conditions include, inter alia, that the Congregation obtain an updated Certificate of Appropriateness from the LPC prior to any building permit being issued by the DOB; that substantial construction be completed in accordance with Z.R. § 72-23; and, that the DOB ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction. The Resolution was filed on August 29, 2008. This Article 78 proceeding was commenced on September 29, 2008.

As approved, the proposed building includes mechanical space and a multi-function room on the sub-cellar level, with 360-person capacity[7] for a banquet hall for various life cycle events; a cellar level with separate dairy and meat kitchens and childcare space. The first floor consists of the synagogue lobby, small synagogue, rabbi's office, and library and archive space; the second floor contains toddler classrooms; the third floor contains Hebrew School classrooms and the Beit Rabban Day School; and, the fourth floor consists of a caretaker's apartment and adult education classrooms. The residential condominiums are on the fifth through eight and ninth (penthouse) floors. Portions of the ground through fourth floor contain elevators for the synagogue.

Petitioners' Allegations

Petitioners raise numerous objections to the BSA's determination. The primary claim is that there was no need for the zoning variance at all. Petitioners assert that the Congregation stated repeatedly during the course of the proceedings before the BSA that the purpose of the variances was to fund the Congregation's programmatic needs, through income from the condominiums. Petitioners argue that the Congregation failed to demonstrate financial need; indeed, petitioners assert that the historic Congregation can raise the necessary funds from its members. They also object to the BSA's failure to inquire of the Congregation as to the rent being paid by the Beit Rabban Day School; the rent being paid by the residential tenant of the six-bedroom luxury Parsonage residence, which is apparently rented to Lorin Maazel, the Musical Director of Lincoln Center, at a monthly rent of $19,000; and, income from the banquet facilities.

[7] During the November 19, 2007 CB7 public meeting, a representative of the Congregation stated that the capacity was 440 persons.

Petitioners further allege that a conforming as-of-right mixed-use building could be built, with two floors of luxury condominiums, with setbacks and height limitations of 75 feet, consistent with the brownstones on the block, or, a conforming all-residential building could be built that would allow for seven floors of condominiums, with two sub-basements. The proposed building will adversely affect the light and air in the courtyard that these apartments face. Two of the apartments owned by Mr. Lepow—apartments 7B and 8B—will be "bricked up" by the proposed building as a result of the variances. In a conforming, as-of-right structure, however, his apartments would not be bricked up. Similarly, the other units face a courtyard; in an as-of-right structure, there would be little, if any, adverse impact.

Petitioners allege that on November 8, 2006, before the application was filed, respondents Srinivasan and Collins held what petitioners describe as an "ex parte" meeting with the Congregation's lawyers and consultants at BSA headquarters without notifying the opponents of the project, and refused to provide information concerning what occurred at the meeting.

Finally, petitioners allege that because the Congregation did not exhaust its administrative remedies provided by §74-711, claiming that the Congregation failed to complete the review process before the LPC. Petitioners contend that the BSA should not have entertained the application, since the Congregation is asserting the same landmark hardships and economic need inherent in a § 74-711 application.

Article 78 Standard of Review

"'It is not the function of judicial review in an article 78 proceeding to weigh the facts and merits *de novo* and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis.'" Clancy-Cullen Storage Co., Inc. v. Board of the Elections in City of New York , 98 A.D.2d 635, 636 (1st Dep't 1983) (emphasis in original), quoting Kayfield Const. v. Morris, 15 A.D.2d 373, 378 (1st Dep't 1962). "[A]n agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable." In re Smith v. Donovan, 61 A.D.3d 505 (1st Dep't 2009), citing Seitttelman v. Sabol, 91 N.Y.2d 618, 625 (1998).

Moreover, there is a special deference given to determinations of zoning boards and other bodies. Khan v. Zoning Bd. of Appeals of Village of Irvington, 87 N.Y.2d 344, 351 (1996); Parsons v. Zoning Bd. Of Appeals, 4 A.D.3d 673, 674 (3d Dep't 2004). "Local zoning boards have broad discretion in considering applications for variances and interpretations of local zoning codes, and the scope of judicial review is limited to whether their action was arbitrary, capricious, illegal, or an abuse of discretion." Matter of Marino v. Town of Smithtown, 61 A.D.3d 761 (2d Dep't 2009), citing Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613 (2004); Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 62-63 (1st Dep't 2000). A determination is considered to be rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." Halperin v. City of New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005), lv. dismissed, 6 N.Y.3d 890, lv. denied, 7 N.Y.3d 708 (2006). Furthermore, "[w]hile religious institutions are not exempt from local zoning laws, 'greater flexibility is required in evaluating an application for a religious use than an

application for another use and every effort to accommodate the religious use must be made.'" Halperin, supra, at 773, citations omitted.[8] In challenging any zoning determination as arbitrary, "the burden of establishing such arbitrariness is imposed upon him who asserts it." Robert E. Kurzius, Inc. v. Incorporated Vil. of Upper Brookville, 51 N.Y.2d 338, 344 (1980), cert. denied, 450 U.S. 1042 (1981), quoting Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121 (1951).

The Five Factors

As set forth at pp. 3-4, supra, pursuant to Z.R. § 72-21, the BSA is required to examine five factors before granting a variance. Each of these findings is addressed below.

The First Finding - Unique Physical Conditions

Under § 72-21(a), there must be a finding that the property at issue has "unique physical conditions" which create practical difficulties or unnecessary hardship in complying strictly with the permissible zoning provisions, and that such practical difficulties are not the result of the general conditions of the neighborhood. The unique physical conditions must be "peculiar to and inherent in the particular zoning lot." The Congregation argued that the site's physical conditions created an unnecessary hardship in developing the site in compliance with the zoning regulations

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[8] Of course, where the proposed use is solely or primarily for religious purposes, flexibility and greater deference must be accorded. Here, the variance is sought for a mixed use building. "Affiliation with or supervision by religious organizations does not, *per se*, transform institutions into religious ones. 'It is the proposed use of the land, not the religious nature of the organization, which must control.'" Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710, 711 (2d Dep't 1988), quoting Bright Horizon House v. Zoning Bd. of Appeals of Town of Henrietta, 121 Misc. 2d 703, 709 (Sup. Ct. Monroe Co. 1983). The record reflects that the BSA gave the Congregation deference with respect to the variance request for the community facility, but did not accord the Congregation deference to the extent that it was seeking a variance for the revenue-generating, residential portion of the Project.

with respect to lot coverage and yards. Were the Congregation required to comply with the 30 foot rear yard and lot coverage, it argued, the floor area of the community facility would be reduced by approximately 1,500 square feet, which would severely restrict the Congregation's programmatic needs. The Congregation argued that it needed to expand the lobby ancillary space; expand the toddler program; develop classroom space for the Hebrew school and adult education program; provide a residence for an onsite caretaker; and, provide classrooms for the Beit Rabban Day School.

The BSA separated its analysis of the first finding into two parts: the community facility portion of the Project and the residential portion of the Project. This separation was necessitated by the fact that the Congregation is not accorded the deference as a non-profit for the residential portion of the Project. With respect to the community facility portion of the Project, the BSA rejected the opposition's claim that the Congregation was required to establish a financial need for the project as a whole, since nothing in the zoning law requires a showing of financial need as a prerequisite for the granting of a variance. Rather, all that is required is that the existing zoning regulations impair its ability to meet its programmatic needs The BSA rejected petitioners' contentions that the Congregation should have sought to raise funds from its members instead of seeking the requested variances, stating that the wealth of the property owner is irrelevant to the hardship finding.

The BSA determined that, when considering the physical conditions together with the programmatic needs of the Congregation, denying the variance would constitute an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations." The BSA rejected petitioners' contention that the programmatic needs were too

speculative; that both the Beit Rabban Day School and the toddler program were not reasonably associated with the overall religious purpose of the Congregation; and, that the Congregation's programmatic needs could be satisfied within an as-of-right building. In response to the BSA's request, the Congregation submitted a detailed analysis of the programmatic needs on a space- and time-allocated basis, which demonstrated that daily simultaneous use of the majority of the space required waivers of the zoning regulations with respect to floor area. Because of the areas needed for an elevator and stairs, and the height limit of an as-of-right building due to the width of the Parsonage, an as-of-right building would gain little additional floor area. The BSA Resolution cites Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that it is inappropriate for a zoning board to second guess a non-profit organization with respect to the location in which to place its programs.

Turning to the residential portion of the Project, among the unique physical conditions of the site include the fact that the lot is divided by a zoning district boundary, with 73% of the lot in R10A and 27% of the lot in R8B. The total height limitation for R10A is 185 feet, with a maximum base height of 125 feet, while the R8B portion has a total height limit of 75 feet and a maximum base height of 60 feet. Applying the R8B restrictions, less than two full stories of residential floor area would be permitted above the four-story community use facility.

Petitioners argued that the lot was not unique, solely because of the presence of a zoning district boundary within the lot, pointing out that other properties owned by religious institutions and the Museum of Natural History in the areas bounded by Central Park West and Columbus Avenue, and by 59th Street and 110th Street, had the same zoning district boundaries.

The BSA noted that the presence of other lots with the same zoning district boundaries does not defeat the claim of "uniqueness;" rather, the parcel's conditions must be such that they are not generally applicable to other lots in the vicinity.

An applicant's claim of uniqueness necessarily requires a comparison between similarly situated lots in the neighborhood with those of the applicant's lot. Soho Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441 (2000). "Unique physical conditions" may include the idiosyncratic configuration of the lot (Soho Alliance, supra) or unique characteristics of the building itself. UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248, 249 (1st Dep't 2002). A unique consideration here is that a large portion of the lot is occupied by the landmark Synagogue; the BSA noted that the limitations on development on the Synagogue portion of the lot result in that portion being underdeveloped. Because of the landmark status, the Synagogue is permitted to use only 28,274 square feet for an as-of-right development, although it has approximately 116,752 square feet in developable floor area. The unique physical conditions, the BSA concluded, "when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations," which satisfied the requirement of subdivision (a) of the zoning regulations. This finding is sufficient to support the BSA's determination that the Property is unique.

The Second Finding - Inability to Earn a Reasonable Return

Second, the BSA must find that the physical conditions of the Property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a

reasonable return" from the property.[9] Failure to meet the burden of proof that an as-of-right building in conformity with the zoning requirements will not bring a reasonable return requires denial of the variance. Petitioners assert that the BSA failed to properly analyze the reasonable return of a conforming as-of-right building.

The Congregation argued initially that it did not even need to show a reasonable return, since the Congregation is a not-for-profit corporation. Section 72-21(b) sets forth that "this finding shall not be required for the granting of a variance to a non-profit organization." But, the BSA specifically requested that the Congregation submit reasonable return analysis, concluding that the exemption from this requirement did not apply when a non-profit was seeking variances for a total or partial for-profit building. Alternatively, the Congregation argued that even if the Congregation had to satisfy the requirement of the reasonable return analysis, the Congregation demonstrated that a conforming as-of-right structure would not result in a reasonable rate of return.

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[9] The term "reasonable return" is not defined. In its memorandum of law, the Board suggests that "reasonable return" does not mean "any sort of profit whatsoever," but rather a profit margin "substantial enough to actually spurt development." The rate of return for the proposed development, as approved by the BSA, is 10.93%. In SoHo Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441, a reasonable rate of return was found to be 9.9%. In Mt. Lyell Enterprises, Inc. v. DeRooy, 159 A.D.2d 1015, 1016 (4th Dep't 1990), an 11.76% rate of return after three years was found to be "not unreasonably low." But, in Ryan v. Miller, 164 A.D.2d 968 (4th Dep't 1990), a use variance was denied when a conforming use would still earn 5.7%, even though other conservative investments were earning 10-11% return at that time. The Appellate Division decision in SoHo Alliance flatly rejected any effort to determine that a specific percentage is reasonable as a matter of law: "[w]e are unaware of any hard and fast rule as to what constitutes a reasonable rate of return. Each case turns on facts that are dependent upon individualized circumstances." Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 69 (1st Dep't), aff'd, 95 N.Y.2d 437, 441 (2000).

Petitioners assert that although the BSA required the analysis to be performed, the BSA never explicitly addressed how the reasonable return analysis should be conducted, since there is no language in the statute as to how to consider a mixed-use profit and non-profit structure. Freeman/Frazier's March 2007 Report concluded that there is no return on investment provided by the as-of-right development. The first proposed development provided a 6.55% annualized return on total investment. Freeman/Frazier notes that this is at the low end of the range that typical investors would consider for an investment opportunity. The Congregation then submitted a study that analyzed an as-of-right community facility/residential building within an R8B envelope; an as-of-right building with a floor area ratio ("FAR") of 4.0;[10] a proposed building requiring a variance; and, a community facility and residential building that is smaller than the third proposal. In November 2007, the BSA asked the Congregation to revise the evaluation, which it did, by including an as-of-right community facility and residential tower using a modified site value. None of these analyses, other than the original proposed structure, resulted in a reasonable return.

The BSA asked the Congregation to submit additional revisions, after it was determined that the proposed tower on the R10A portion of the lot was contrary to Z.R. § 73-692, the "Sliver Law."[11] At the February 12, 2008 and April 15, 2008 hearings, the BSA questioned the Congregation's basis for the valuation of its development rights, and asked for a recalculation of the value of the site, together with a revised plan with a court to the rear of the building, above the fifth floor. Another revised plan was submitted, which assessed the financial feasibility of: the original proposed building, but with a complying court; an eight-story building with a complying court; and,

[10] The FAR permitted for district R8B is 4.0; the FAR for district R10A is 10.0.

[11] The Sliver Law applies to lots under 45 feet and limits the height of a building on such a lot to a height of 60 feet.

a seven-story building with a penthouse and complying court, using revised site values. Once again, only the original proposed building was shown to be financially feasible. The Board asked for further clarifications; in a July 8, 2008 response, Freeman/Frazier recalculated the value of the apartments with the addition of rear outdoor terraces, and revised the sale prices of two units. Again, the revised analysis that was submitted failed to demonstrate a reasonable return.

Petitioners assert that the BSA failed to adhere to its own guidelines because it did not require the Congregation to provide the original acquisition price of the Property. But, the BSA points out that this is not required, since it is contained in the general guidelines. In any event, the Congregation did submit the acquisition costs, which were provided in the deeds to the Property. Petitioners also assert that the Congregation never complied with the request to provide an analysis of an all-residential building, and instead, provided an analysis for a partially residential building, without including basement and sub-basement space. The methodology utilized by the Congregation's expert, petitioners contend, inflated the largest single cost component—the site value—in concluding that the Congregation could not obtain a reasonable return. Petitioners questioned the use of comparable sales prices based on property values from the period of mid-2006 to 2007, rather than more current sales prices, and questioned the methodology of calculating the financial return based on profits, rather than by calculating the projected return on equity. They also questioned the omission of income from the Beit Rabban Day School from the feasibility study. Finally, petitioners' biggest complaint was that the Congregation's expert did not utilize the return on equity analysis in determining the Project's rate of return.

Freeman/Frazier responded that it was more appropriate to use a return on profit model, which evaluated profit or loss on an unleveraged basis, to evaluate the feasability of the Project, rather than to evaluate the Project's return on equity on a leveraged basis. Freeman/Frazier argued that the methodology it used is typically used for condominium or home sale analyses, and is more appropriate for this Project, while the methodology petitioners wanted to use is typically used for income producing residential or commercial rental projects. Petitioners assert, in contrast, that not only do the BSA guidelines ask for an analysis on a leveraged basis, but that many reported decisions show that return on equity is the factor commonly used. Petitioners point out that Freeman/Frazier used the return on equity analysis in the project that was the subject of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 2006 WL 1547635, 1 (Sup. Ct. Kings Co. 2006), rev'd, 49 A.D.3d 749 (2d Dep't 2008). Petitioners contend that both the BSA and Freeman/Frazier were unable and unwilling to explain why a leveraged return on equity analysis was appropriate in the Red Hook project, but not for the Congregation's Project. What neither side points out is that the Red Hook project consisted of both condominiums and retail space; according to one decision, four of the six floors were condominiums, while the other two floors were retail space.[12] See, Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 11 Misc. 3d 1081(A), 2006 WL 1023901, 1 (Sup. Ct. Kings Co. 2006). This mixed-use of commercial rental and residential areas explains why Freeman/Frazier employed the return on equity analysis in the Red Hook case, while here, it used a return on profit model. It cannot be found to be arbitrary and capricious to use a return on profit model for that portion of the Project that consists solely of residential condominiums.

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[12] The Board incorrectly refers to the Red Hook project as a conversion from a warehouse to luxury rental apartments. Petitioners simply refer to the Red Hook project as a residential building.

The other cases cited by petitioners that employed a return on equity analysis were requests for variances for conversions for commercial use. Kingsley v. Bennett, 185 A.D.2d 814 (2d Dep't 1992) (real estate office in a one- and two-family residential zoning district); Morrone v. Bennett, 164 A.D.2d 887 (2d Dep't 1990) (restaurant/bar with cabaret sought to expand its facility in a commercial district mapped within a residential district); Lo Guidice v. Wallace, 118 A.D.2d 913, 915 (3d Dep't 1986) (request to open an Italian restaurant in an area zoned as two-family residential). In contrast, a return on profit analysis was utilized in Cook v. Haynes, 63 A.D.2d 817 (4th Dep't 1978), which concerned a request by a landowner for a variance to build a residence on a lot that was zoned for both residential and agricultural purposes.

Here, the BSA agreed that the return on profit model, which evaluates profit or loss on an unleveraged basis, is the customary model for evaluating market-rate residential condominium development. Using the return on profit model, Freeman/Frazier concluded that the Congregation could not obtain a reasonable return from a conforming, as-of-right structure. Petitioners contend that Freeman/Frazier's reports used inconsistent terms, provided incomplete and unsigned reports by the estimator of construction costs, and used different values for the total square footage. In the petition, petitioners accuse Freeman/Frazier of "transparently manipulating the numbers," by decreasing the number of square feet in each report as the value per square foot increases, thereby allowing the Project to show a loss. The expert retained by the opposition, Martin Levine, of MVS, pointed out the Congregation's faulty approach, which the Congregation never corrected, based on its contention that the BSA did not ask for any additional information concerning the reasonable return for an all-residential building and the Congregation's failure to include the sub-sub-basement. Mr. Levine questioned Freeman/Frazier's non-compliance with BSA guidelines; construction cost

estimate fallacies; incomplete documents; and, exaggerated soft costs. Petitioners contend that the BSA ignored every issue raised by Mr. Levine, except his criticism of the return on equity, which the BSA considered but rejected.

These are but some of the challenges petitioners raise in their attempt to challenge the subdivision (b) finding. This court has considered all of their objections and finds them to be unavailing. The record reflects that the BSA responded to the concerns raised by petitioners during the underlying proceedings, particularly in that the BSA required numerous revisions to the Freeman/Frazier submissions. Contrary to petitioners' contentions, the BSA Resolution does more than merely "indicate" that there would be no reasonable return; the BSA makes the requisite finding. Based on the foregoing, and the deference that must be accorded the BSA's determination that the proposed building is necessary to enable the Congregation to realize a reasonable return from the Property, this court determines that the finding is not arbitrary and capricious.[13]

The Third Finding — Not Altering the Essential Character of the Neighborhood and Not Impairing the Use of Adjacent Property

Petitioners challenge the BSA finding that the granting of a variance will not alter the essential character of the neighborhood; will not "substantially impair the appropriate use or development of adjacent property;" and, "will not be detrimental to the public welfare." Rather, they argue that (1) the variance results in the bricking up of windows in the West 70th Building and (2) the shadows cast on other buildings on the block will have a negative effect on the public welfare and the environment.

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[13] Given the current economic climate, it is uncertain whether the reasonable return as calculated by Freeman/Frazier remains a viable figure.

The initial proposal would have resulted in the closure of seven windows in six cooperative apartment units in the West 70th Building. The BSA required the Congregation to reduce the size of the condominiums in the rear of the building and create a courtyard to prevent the rear windows in the West 70th Building from being bricked up. But, petitioners assert that the BSA and the Congregation "collaborated" to create a record that would obscure the facts as to the number of windows that would be bricked up. Petitioners argue that it was arbitrary and capricious and an abuse of discretion for the BSA to require courtyards in the rear of the building but not to require a courtyard for the identically situated apartments in the front part of the eastern face of the building. As approved, the proposed building results in windows on the eastern face of the West 70th Building losing light and air, together with views of Central Park, while a conforming, as-of-right building would not block any windows in the West 70th Building.

The BSA points out that a property owner has no protected right to a view, and that lot line windows cannot be used to satisfy light and air requirements. Nevertheless, the BSA required the Congregation to provide a fully compliant outer courtyard to the sixth through eighth floors of the Project, which would retain three more lot line windows than had been proposed originally, notwithstanding the fact that there was no requirement to do so. The fact that four lot line windows in the front of the West 70th Building adjacent to the Project will be blocked is not grounds to reject the Project.

As part of the variance application, an environmental review was conducted in accordance with the State Environmental Quality Review Act, Article 8 of the State Environmental Conservation Law ("SEQRA") and the City Environmental Quality Review, Title 62, Chapter 5 of

the Rules of the City of New York ("CEQR"), which found that the Project would not have a significant adverse impact on the environment. Once the BSA made this finding, there was no need for the BSA to prepare an Environmental Impact Statement, pursuant to 43 RCNY § 6-07(b). Petitioners criticize the BSA's reliance on CEQR regulations, which provide that shadows on streets and sidewalks or on other buildings generally are not considered significant.[14] Petitioners contend that there is a conflict between CEQR, and the mid-block zoning resolution and subdivision (c). Petitioners further assert that there was no proper analysis of the street shadows and no comparison of the difference in shadows between an as-of-right building and the Project.

The BSA notes that while petitioners argued that the proposed height of the Project was incompatible with the neighborhood character, the West 70th Building has approximately the same base height as the proposed Project and no setback. The West 70th Building also has a FAR of 7.23, while the Project has a FAR of 4.36. Other buildings directly to the north and south on Central Park West have a greater height than the proposed building. Finally, since no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street, any incremental shadows would not constitute a significant impact on the surrounding community.

The Fourth Finding — Practical Difficulties or Unnecessary Hardship Have Not Been Created by the Owner

Subdivision (d) requires that the evidence support a finding that the claimed hardship was not created by the owner of the premises or a predecessor in title. The BSA found that the

[14] An adverse shadow impact occurs when the shadow from a proposed project falls upon a publicly accessible open space, an historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation.

hardship was not self-created, but originated from the fact that the Synagogue building is landmarked. The hardship is a further result of the 1984 rezoning of the site, the site's unique physical conditions, and the site's location on a zoning lot that is divided by a district boundary. This finding has ample support in the record, and is not specifically challenged by petitioners.

The Fifth Finding — Variance is the Minimum Variance Necessary to Afford Relief

Petitioners argued that the minimum variance necessary would actually be no variance at all, claiming that the Congregation could have built an as-of-right structure to meet its programmatic needs. After changes were made to the Project's design, the BSA determined that the Congregation had "fully established its programmatic needs for the proposed building and the nexus of the proposed uses within its religious mission." As to the community use portion of the Project, the BSA again cited to the line of cases, including Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, supra, 38 N.Y.2d 283; Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968); and, Jewish Recons. Synagogue of North Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that a zoning board must accommodate a proposal by religious and educational institutions for projects in furtherance of their mission, unless the proposed project is shown to have "significant and measurable detrimental impacts on surrounding residents." The BSA found that no such showing had been made.

As to the condominium portion of the Project, the BSA found that the modifications to the proposal, which included adding an outer court and reducing the floor plates of the upper floors, thereby reducing the variance for the rear yard setback, when considered in conjunction with the reasonable return analysis, led to the determination that the variance is the minimum required to afford relief. This finding is supported in the record and is not arbitrary and capricious.

Other Arguments Raised By Petitioners

In addition to their contentions that the Congregation's proposed building did not satisfy the need for a variance, and that the Board's findings under §72-21 were arbitrary and capricious, petitioners raise other challenges to the Board's determination, and contend that the process was flawed. All of these allegations are addressed below.

First, petitioners contend that prior to seeking a variance from the BSA, the Congregation was required to submit an application to the LPC for a special permit under Zoning Resolution § 74-711, and that its failure to do so precludes its application to the BSA for a variance. In 2001, the Congregation applied to the LPC for a special permit under Zoning Resolution § 74-711. A hearing was held on November 26, 2002. The Congregation subsequently withdrew the application and requested a Certificate of Appropriateness, which was considered at a public hearing on February 11, 2003. Following comments at that hearing, the proposal was revised, and a hearing was held on July 1, 2003; additional changes were made, and two additional hearings were held on January 17 and March 14, 2006. At the conclusion of the March 14 hearing, the LPC indicated that it was approving the proposed building, and issued a Certificate of Appropriateness, dated March 21, 2006, solely as to whether the structure would be appropriate for a landmark district. As the BSA points out in its papers, there is no legal requirement that a party seek a special permit from the LPC. A party may elect to seek either a special permit or a variance. The only requirement that the Congregation had to fulfill was to apply for a Certificate of Appropriateness, which the Congregation did. Therefore, the Congregation fulfilled the prerequisite before applying to the BSA for a variance.

Another argument raised by petitioners is that it was improper for the BSA to meet with representatives of the Congregation on November 8, 2006, months before the application was even brought before the BSA. Petitioners assert that the Board had already determined to grant the variances before the hearings had even begun. In response to this claim, the BSA asserts that pre-application meetings are a routine part of practice before the Board. Indeed, annexed as Exhibit E to the Board's answer is a document entitled "Procedure for Pre-Application Meetings and Draft Applications." The document sets forth that "[t]he BSA historically has offered some form of pre-application meeting process to potential applicants." Pre-application meetings are strongly encouraged, so that the application process proceeds more smoothly. After petitioners' counsel complained about the pre-application meeting, the BSA offered counsel the opportunity for his own pre-application meeting, but counsel refused.

At the start of the public hearing in this matter, the Chair of the BSA addressed the concerns of the community that an "ex parte" meeting had been held some months before, and the opposition's request that the BSA members who met with representatives from the Congregation should recuse themselves. The Chair of the BSA explained that pre-application meetings are routine, and that the meeting is not barred under section 1046 of the Charter, Administrative Procedure Act ("APA"), since APA does not apply to proceedings before the BSA.[15] See, Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25

[15] Section 1046 pertains to rules for adjudication when an agency is authorized to conduct an adjudication. The term "adjudication" is defined in § 1041 as "a proceeding in which the legal rights, duties or privileges of named parties are required to be determined by an agency on a record and after an opportunity for a hearing." This section applies to hearings before an administrative law judge or hearing officer, not an agency such as the LPC or BSA. Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25 A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y. 3d 710 (2006).

A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y.3d 710 (2006); but see, Carroll v. Srinivasan, Index No. 110199/07 (Sup. Ct. N.Y. Co. Jan. 30, 2008) (holding that BSA hearings are subject to § 1046 of the City Charter). Since nothing in the law prohibits the BSA from holding pre-application meetings, petitioners' claim that the meeting was improper is without merit.

Finally, petitioners challenge the manner in which the hearing was conducted and the entire proceeding as arbitrary and capricious. Petitioners challenge the time limits on their presentations at the hearing; the BSA's failure to question some of the opposition's expert witnesses; the refusal to allow the opposition architect to inspect the premises; and, the BSA's refusal to subpoena witnesses. In response to these allegations, the BSA notes that since the applicant has the burden to support its case for each of the five required findings under Z.R. § 72-21, applicants must be given the opportunity to do so. But, the BSA maintains that the opponents were in no way strictly limited to a three minute time limit during the four hearings dates.

First, nothing requires sworn testimony, cross-examination of witnesses, or the subpoenaing of witnesses at a BSA hearing. Under section 663 of the Charter, it is wholly discretionary for the chair or vice-chair to administer oaths or compel the attendance of witnesses. Similarly, § 1-01.1(j) and (k) of the Rules of the City of New York provides that the Chair controls the admission of evidence and order of the speakers, and allows the Chair to limit testimony.

The administrative record that was submitted in this case belies petitioners' contention that they did not have an adequate opportunity to be heard. The transcripts of the BSA hearings reflect that at every hearing date, community members who opposed the project—including

petitioners, petitioners' counsel, elected officials and other members of the community—were permitted to speak.[16] In addition, opponents to the Project, including petitioners' counsel, submitted numerous letters, documents and reports to the BSA in opposition to the Project.

Petitioners' contentions as to the conduct of the hearing are wholly devoid of merit. The public hearing is not a judicial or quasi-judicial proceeding. Opponents to an application have no due process right to cross-examine applicants for a variance. See note 15, supra. For all of these reasons, petitioners' claim that the procedures employed by the BSA were improper is rejected.

Conclusion

If this court were empowered to conduct a *de novo* review of the BSA's determination, and were not limited to the Article 78 standard of review of a reasonable basis for the determination, the result here might well be different. The facts are undisputed that the Congregation receives substantial rental income from the Beit Rabban Day School and the rental of the Parsonage; the Congregation may have additional earnings from renting the banquet space. There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage. It is also undisputed that the windows of some apartments in the building adjacent to the Project will now be blocked, whereas the windows would not be blocked by an as-of-right structure, which could have been built with two floors of condominiums.

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[16]For example, at the November 27, 2007 hearing, representatives from the offices of State Senator Tom Duane and Assembly Member Richard N. Gottfried spoke in opposition to the Project, as did Mark Lebow, Esq. an attorney for another group of opponents to the application; Norman Marcus, a retired attorney who previously served as general counsel to the Planning Commission; Alan Sugarman, Esq., counsel for petitioners herein; and, many other community residents. Indeed, of the 88-page transcript for that day's hearing, 43 pages contain opposition testimony.

Community residents expressed concern that approval of the variances at issue here opens the door for future anticipated applications by other not-for-profits in the Upper West Side historic district. The concern for precedential effect may well have merit. But, "in reviewing administrative determinations, a court may not overturn an agency's decision merely because it would have reached a contrary conclusion." Matter of Sullivan County Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 278 (1972). This court cannot substitute its judgment for that of the BSA. When viewing the record as a whole, and giving the BSA's determination the due deference that it must be afforded, it cannot be said that the BSA's determination that the Congregation's application satisfied each of the five specific findings of fact lacked a rational basis. Matter of Sullivan County Harness Racing Ass'n, supra, at 277-78 (1972) ("if the acts of the administrative agency find support in the record, its determination is conclusive."). The record reflects that the BSA "balanced and weighed the statutory facts, and its findings were based on objective facts appearing in the record." Halperin, supra, 24 A.D.3d 773. Accordingly, the decision must be confirmed. Id.

Based on the foregoing, the [illegible] is denied, and the petition is dismissed. The decision of the BSA is confirmed in all respects. This constitutes the decision, order and judgment of the court.

Dated: July 10, 2009

JOAN B. LOBIS, J.S.C.

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NEW YORK

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Clerk

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Index No. ~~104077~~/2008

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

NIZAM PETER KETTANEH and
HOWARD LEPOW,

Petitioners,

- against -

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL aka THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents.

DECISION, ORDER, AND JUDGMENT

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Respondents
100 Church Street, Room 5-153
New York, N.Y. 10007

Of Counsel: Louise Leppin
Tel: (212) 788-0793

Due and timely service is hereby admitted

New York, N.Y. ..... 200...

..... *Esq.*

Attorney for.....

Index No.104077/2008

SUPREME COURT OF THE STATE OF NEW YORK
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Respondents.

NOTICE OF ENTRY OF DECISION, ORDER AND JUDGMENT

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Respondents
100 Church Street, Room 5-154
New York, N.Y. 10007

Of Counsel: Christina L.Hoggan
Tel: (212) 788-0461

Due and timely service is hereby admitted.

New York, N.Y. ....., *200* . . .

..... *Esq.*

Attorney for.....

SUPREME COURT
STATE OF NEW YORK , COUNTY OF MANHATTAN **INDEX No 113227/08 (LOBIS)**

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners-Appellants

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-Appellees

NOTICE OF APPEAL
with
PRE-ARGUMENT STATEMENT

Law Offices Of
ALAN D. SUGARMAN
17 West 70th Street
Suite 4
New York, NY 10023
212-873-1371

Attorneys for Petitioners-Appellants

To:

Clerk of the County of New York - Room 141 B
60 Centre Street
New York, NY 10007

Signature (rule 130-1.1-a)

_____
Alan D. Sugarman
August 27, 2009

Jeffrey Friedlander
First Assistant Corporation Counsel of the
City of New York
Christina L. Hoggan CHoggan@law.nyc.gov
Assistant Corporation Counsel
100 Church Street, Room 5-153
New York, New York 10007
Phone: (212) 788-0790
Attorneys for City Respondents-Appellees

Louis M.. Solomon Lsolomon@proskauer.com
Claude M. Millman cmillman@proskauer.com
Proskauer Rose
1585 Broadway
New York, New York 10036
(212) 969-3000
Attorneys for Respondent-Appellee Congregation Shearith Israel aka Trustees of Congregation Shearith Israel in the City of New York

I affirm that I am counsel for Petitioners-Appellants and the within was served by mail, with e-mail copy, upon counsel for Respondents-Appellees and upon counsel for Landmark West, sent on August 27, 2009.

_____
Alan D. Sugarman
August 27, 2009

_____
Courtesy Copy To:
David Rosenberg, Esq.
Marcus Rosenberg & Diamond LLP
488 Madison Avenue
New York, New York 10022
(212) 755-7500
Attorneys for Landmark West et all