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 THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL *Respondents.*	:	Index No. 113227-08

RESPONDENT TRUSTEES OF CONGREGATION SHEARITH ISRAEL'S
MEMORANDUM IN OPPOSITION TO PETITIONERS' ARTICLE 78 PETITION

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INTRODUCTION

Respondent Congregation Shearith Israel (the "Congregation") respectfully submits this memorandum of law in opposition to the verified petition under Article 78 of the CPLR (the "Petition") of petitioners Nizam Peter Kettaneh and Howard Lepow (the "Petitioners"). The unanimous administrative decision of respondent Board of Standards and Appeals of the City of New York (the "BSA") is neither arbitrary nor capricious. Accordingly, the Petition should be denied.

Petitioners are asking this Court to conduct a *de novo* review of a zoning law variance that will enable the Congregation to construct a mixed-use community facility and residential building at 8 West 70th Street in Manhattan. The crux of Petitioners' over-sized Petition and memorandum of law is that Petitioners are unhappy with each of the key factual findings that the BSA made in its August 26, 2008 resolution granting the Congregation a zoning variance (the "Resolution").[1]

Yet, Petitioner's efforts to secure *de novo* review are impermissible. A court may not overturn an administrative agency's determination simply because it would have come to a different conclusion.

Indeed, this case is controlled by the New York Court of Appeals' decision in *Matter of SoHo Alliance v. New York City Bd. of Standards & Appeals*, 95 N.Y.2d 437, 440, 718 N.Y.S.2d 261, 262, 741 N.E.2d 106, 108 (2000). In *SoHo Alliance*, the Court explained that the BSA may grant a zoning variance by making the five factual findings referenced in Section 72-21 of the

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[1] Exclusive of their table of contents and table of authorities, Petitioners' Memorandum of Law in Support of Petition spans 102 pages, and is therefore 72 pages in excess of the motion paper length limit prescribed by the New York County Supreme Court, Civil Branch Rules of the Justices ('Rules"). Rule IV(b) of the Rules explain that "unless advance permission otherwise is granted by the court for good cause, memoranda of law shall not exceed 30 pages each (exclusive of table of contents and table of authorities)."

New York City Zoning Resolution. *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citing N.Y. City Zoning Resolution § 72-21). Holding that a lower court erred in vacating the variance and granting the Article 78 petition, *SoHo Alliance* concluded that a BSA's variance must "'be sustained if it has a rational basis and is supported by substantial evidence.'" *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citation omitted).

Here, the BSA's detailed Resolution is supported by an extensive administrative record – almost 6,000 pages in eleven volumes. Accordingly, Petitioners' efforts to re-litigate this administrative matter in this forum are to no avail. Indeed, it is evident from the BSA's eighteen-page Resolution that the BSA carefully weighed the competing interests and facts presented at each of the many public hearings. The BSA indisputably made each of the five factual findings referenced in Section 72-21 of the Zoning Resolution. The BSA also acknowledged and considered arguments presented by Petitioners, and ultimately found them unpersuasive. Since the BSA's determination is neither arbitrary nor capricious, the Petition should be denied.

BACKGROUND

In April 2007, the Congregation submitted a variance application to the BSA seeking waivers of zoning regulations to construct a community facility and residential development at 8 West 70th Street in Manhattan. In support of its application, the Congregation also submitted, among other things, a statement in support of its application, a zoning analysis, an economic analysis, and an Environmental Assessment Statement. The Congregation's submission followed a unanimous decision by the Landmarks Preservation Commission ("LPC") that the Congregation's proposed construction would be appropriate in regard to its relationship to both

the Congregation's landmarked Synagogue and the Upper West Side/Central Park West Historic District.

To facilitate its review of the Congregation's request, the BSA conducted four public hearings over the course of eight months. BSA Res. ¶ 4.[2] To maximize public involvement, the Congregation's application to the BSA was announced in the *City Record* and in letters sent by certified mail to all owners of record within 400 feet of the proposed development site. *Id.* Moreover, Community Board 7's Land Use Committee also held public hearings regarding the Congregation's proposed construction.

Both supporters and opponents of the Congregation's requested variance testified at the BSA hearings, including members of the Congregation, area residents, legislators, and a community group. BSA Res. ¶¶ 7-11. Proponents and opponents of the Congregation's application also submitted written materials to the BSA, including financial feasibility studies. (*See* BSA Res.) As a result, a massive, eleven-volume administrative record, consisting of 5,795 pages, was compiled by the BSA.

On August 26, 2008, the BSA issued a Resolution granting the variance and expressly making the five findings referred to in Section 72-21 of the New York City Zoning Resolution. The BSA found that: (a) there are unique physical conditions that create practical difficulties in strictly complying with the zoning requirements; (b) the physical conditions of the development site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return; (c) the variance will not alter the essential character of the neighborhood or district in which the Congregation is located; (d) neither the

[2] "BSA Res." refers to the copy of the BSA Resolution that Petitioners have annotated with paragraph numbering. *See* Petitioner Appendix A, Volume 1.

Congregation nor its predecessor in title created the practical difficulties that the Congregation claims as a ground for the variances; and (e) the variance is the minimum necessary to afford the Congregation relief. BSA Res. ¶¶ 122, 148, 201, 205, 210-11. Having made the five statutory findings, the BSA granted the variance.

On September 29, 2008, Petitioners filed this Article 78 Petition. In their Petition and accompanying memorandum of law, Petitioners attempt to persuade that the BSA reached the wrong conclusion with respect to each of the five statutory findings.

ARGUMENT

A. This Court's Standard of Review is Exceedingly Deferential

The New York Court of Appeals has explained that, in general, under the New York City Zoning Resolution, the BSA may grant a variance if it makes five factual findings: "(a) because of 'unique physical conditions' of the property, conforming uses would impose 'practical difficulties or unnecessary hardship;' (b) also due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property; (c) the proposed variances would 'not alter the essential character of the neighborhood or district;' (d) the owner did not create the practical difficulties or unnecessary hardship; and (e) only the 'minimum variance necessary to afford relief' is sought." *Matter of SoHo Alliance v. New York City Bd. of Standards & Appeals*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (quoting N.Y. City Zoning Resolution § 72-21).

Once the BSA makes these five findings, the judiciary's role is extraordinarily limited. The New York Court of Appeals has held that a court's "review of the BSA's determination to grant the variances sought is limited by the well-established principle that a municipal zoning board has wide discretion in considering applications for variances." *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108. "The BSA, comprised of five experts in land

use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution." *Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418, 654 N.Y.S.2d 100, 104, 676 N.E.2d 862, 866 (1996). As a result, the Court of Appeals has held that a BSA decision granting a variance "'may not be set aside in the absence of illegality, arbitrariness or abuse of discretion,' and 'will be sustained if it has a rational basis and is supported by substantial evidence.'" *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citation omitted).

Under this Court of Appeals test, "a reviewing court may not substitute its judgment for that of the BSA – even if the court might have decided the matter differently" provided that substantial evidence exists. *Toys "R" Us*, 89 N.Y.2d at 423, 654 N.Y.S.2d at 107, 676 N.E.2d at 869. The supporting evidence will be considered "substantial" provided that key findings are substantiated by more than a "scintilla of evidence," *i.e.*, that "a reasonable mind ***might*** accept [the proof] as adequate to support the [agency's] conclusion." *Bethlehem Steel Corp. v. New York State Division of Human Rights*, 36 A.D.2d 898, 899, 320 N.Y.S.2d 999, 1001 (4th Dep't 1971) (emphasis added). "That conflicting inferences may have been drawn from this evidence is of no moment." *Toys "R" Us*, 89 N.Y.2d at 424, 654 N.Y.S.2d at 107, 676 N.E.2d at 869. Since "'weighing the evidence and making the choice'" is the exclusive province of the BSA, the courts "'may not weigh the evidence or reject the choice'" that the BSA has made. *Id.* (citation omitted); *see also Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599, 363 N.E.2d 305, 310, 394 N.Y.S.2d 579, 584 (1977) ("[T]he responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi- administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the

development of their community. . . . It matters not whether, in close cases, a court would have, or should have, decided the matter differently.").

Since the agency is charged with weighing the evidence, it follows that it is the agency's province to decide what types of proof the agency will deem reliable. Thus, in *SoHo Alliance*, the Court of Appeals held that the BSA can "reasonably rely upon expert testimony submitted by the owners" to support the agency's findings of fact. *SoHo Alliance*, 95 N.Y.2d at 441, 718 N.Y.S.2d at 263, 741 N.E.2d at 108. In other words, here, the Congregations submissions, where relied on by the BSA, can be "substantial evidence."

Not surprisingly, the First Department has repeatedly applied this liberal, *SoHo Alliance* standard to uphold BSA decisions to grant zoning variances. *See, e.g., Torri Associates v. Chin*, 282 A.D.2d 294, 295, 723 N.Y.S.2d 359 (1st Dept' 2001) ("Despite petitioner's numerous challenges, 'it cannot be said that there was an absence of substantial evidence to support the Board's findings as to each of the five requirements necessary to issue the proposed . . . variances here' . . . . Accordingly, the challenged determination must be confirmed.") (citations omitted); *UOB Realty (USA) Ltd. v. Chin*, 291 A.D.2d 248, 249, 736 N.Y.S.2d 874, 875 (1st Dep't 2002); *see also Mainstreet Makeover 2, Inc. v. Srinivasan*, 55 A.D.3d 910, 914, 866 N.Y.S.2d 706, 710 (2d Dep't 2008) ("decision of the BSA may not be set aside in the absence of illegality, arbitrariness, or abuse of discretion"); *Vomero v. City of New York*, 54 A.D.3d 1045, 1046, 864 N.Y.S.2d 159, 161 (2d Dep't 2008) ("Local zoning boards have broad discretion, and judicial review is thus limited to determining whether a zoning board's determination was illegal, arbitrary and capricious, or an abuse of discretion.").

While Petitioners repeatedly assert that some of their specific contentions were not explicitly "mentioned" by the BSA in its Resolution, this argument is legally irrelevant (and

false). An agency's decision "need not be exhaustive." *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768, 777, 809 N.Y.S.2d 98, 109 (2d Dep't 2005) (upholding variance); *cf. Gulf States Utilities Co. v. Federal Power Commission*, 518 F.2d 450, 458-59 (D.C. Cir. 1975) ("cursory" agency decision may be adequate; "a detailed semantic exigesis" is not required where agency's "'path may reasonably be discerned'" to establish that it "'genuinely engaged in reasoned decision-making'") (citation omitted). The evidence submitted by a party opposing a variance will only be relevant in an Article 78 proceeding challenging the grant of a variance where the opponent's evidence is "conclusive." *Vomero*, 54 A.D.3d at 1046, 864 N.Y.S.2d at 161 (variance upheld "despite the presence of countervailing evidence" since that evidence "was not conclusive"). Petitioners do not contend that they submitted "conclusive" evidence. Thus, it is enough that the BSA made the five, statutory factual findings – each one indisputably and explicitly set forth in the Resolution.

B. The Board of Standard and Appeals' Decision is Not Arbitrary or Capricious

The BSA's Resolution is a model of rational decision-making. It thoroughly considered the five factual areas referenced by the statute, made the required findings, and, accordingly, granted the variance. The BSA's findings are plainly supported by more than a "scintilla" of evidence. *See Bethlehem Steel*, 36 A.D.2d at 899, 320 N.Y.S.2d at 1001.

The BSA made each of the factual findings referenced in Section 72-21 of the New York City Zoning Resolution, referenced in *SoHo Alliance*. Indeed, the BSA made detailed factual findings regarding: (a) unique physical conditions; (b) financial return; (c) neighborhood character; (d) self-created hardship; and (e) minimum variance. *See* BSA Res. ¶¶ 37-215:

- ***"Unique Physical Conditions," ZR § 72-21(a).*** Eighty-five paragraphs of the BSA's Resolution were devoted to the BSA's conclusion that "the unique physical conditions"

of the site "create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations" the "required finding under ZR § 72-21(a)." BSA Res. ¶ 122; *see id.* ¶¶ 37-122.

- ***No "Reasonable Return," ZR § 72-21(b).*** Twenty-five paragraphs of the BSA's Resolution addressed the BSA's finding that "because of the subject site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return." *Id.* ¶ 148; *see id.* ¶¶ 123-48.

- ***Neighborhood Character, ZR § 72-21(c).*** The BSA devoted fifty paragraphs of its Resolution to explaining its conclusion that "neither the proposed community facility use, nor the proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare." *Id.* ¶ 201; *see id.* ¶¶ 149-201.

- ***No "Self-Created Hardship," ZR § 72-21(d).*** The BSA also explicitly found, in a four-paragraph discussion, that "the hardship herein was not created by the owner or by a predecessor in title." *Id.* ¶ 205; *see id.* ¶¶ 202-05.

- ***"Minimum Variance," ZR § 72-21(e).*** Finally, the BSA, in a ten-paragraph review of alternate scenarios – including modifications to the Congregation's proposal that the Congregation had already adopted at the BSA's request – concluded that "none" of the additional "lesser variance scenarios" would be appropriate, such that the variance granted was the "minimum" necessary. *Id.* ¶¶ 210-211; *see id.* ¶¶ 206-215.

In each of the five sections of its Resolution, the BSA addressed each of Petitioners' objections to the Congregation's request for a variance. While the BSA dealt explicitly with the

issues that Petitioners raise here, the BSA also noted that the contentions it failed to address in detail were nonetheless considered, evaluated, and rejected as unpersuasive. *See* BSA Res. ¶ 216 (determining that "all cognizable issues" including any objections raised but "not specifically addressed herein . . . are addressed by the record").

Given the BSA's thorough analysis, "'it cannot be said that there was an absence of substantial evidence to support the Board's findings as to each of the five requirements necessary to issue the proposed . . . variances here.'" *Torri Associates*, 282 A.D.2d at 295, 723 N.Y.S.2d 359 (citation omitted). "Accordingly, the challenged determination must be confirmed." *Id.*

C. Petitioners' Contentions Are Without Merit

In their 102-page memorandum in support of their Petition, Petitioners attempt to entice this Court to re-do the work of the BSA. This Court should resist that invitation. The BSA applied its expertise to this matter by visiting the site, listening to hours of testimony, suggesting and then considering alternative approaches, and reviewing a massive record of written submissions. This Court should defer to the BSA in accordance with *SoHo Alliance*

The case for deference here is particularly strong given that aspects of the Congregation's proposal bear on its religious programmatic mission. In this Court's already narrow Article 78 review, even greater care must be taken not to second-guess the Congregation's assessment of what it needs to further that religious purpose. *See Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Town of Moreau*, 5 N.Y.3d 407, 413, 804 N.Y.S.2d 708, 713, 838 N.E.2d 624, 630 (2005); *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509 (1986) (holding that the law will presume that educational and religious uses benefit the public health, safety and welfare); *Albany Preparatory Charter Sch. v. Albany*, 31 A.D.3d 870, 818 N.Y.S.2d 651, 653 (3d Dep't 2006), ("because of their inherently beneficial nature, educational

institutions enjoy special treatment and are allowed to expand into neighborhoods where nonconforming uses would otherwise not be allowed . . . educational use is consistent with the public good"); *see also Trustees of Union College v. Schenectady City Council*, 91 N.Y.2d 161, 164, 667 N.Y.S.2d 978, 981 (1997) (holding that a city law denying educational institutions from a residential historic district was unauthorized and unconstitutional).

Petitioners' attack on each of the BSA's five findings are discussed below. Petitioners are unable to show, with respect to any of them, any irrationality or failure of proof.

1. The BSA's Finding of "Unique Physical Conditions" Was Rational

Petitioners argue that the BSA should not have found that there were unique physical conditions at the site that create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations, BSA Res. ¶ 122. *See* Petitioners' Mem. at 35-50. Specifically, Petitioners contend that (1) the "access, accessibility, and circulation" needs of the Congregation could have been addressed by constructing an as-of-right structure, without a variance (Petitioners' Mem. at 35), (2) the existing structure's accessibility limitations did not amount to "physical obsolescence" under the case law (*id.* at 41), (3) the landmarked status of the Congregation's synagogue could not properly be considered in evaluating whether the site next to that landmark suffered from a unique physical condition (*id.* at 43), (4) the fact that the site straddles a zoning district boundary could not be a unique physical condition (*id.*), and (5) the BSA purportedly failed to identify the religious programmatic needs of the Congregation that warranted a finding a unique physical condition leading to a difficulty or hardship (*id.* at 47).

Petitioners' contentions turn on a narrow construction of the Zoning Resolution, which Petitioners seek to support by citing a lower court decision, *Vomero v. City of New York*, 13

Misc. 3d 1214(A), 824 N.Y.S.2d 759 (Richmond Cty. Sup. Ct. 2006) (cited in Petitioners' Mem. at 31-32, 33). That decision did, indeed, suggest that it would be difficult for the BSA to find the presence of "unique physical conditions" in many circumstances. Petitioner fails to note, however, that the cited opinion in *Vomero* was ***reversed*** by the Second Department in *Vomero v. City of New York*, 54 A.D.3d 1045, 1046, 864 N.Y.S.2d 159, 161 (2d Dep't 2008).

The narrow view of the law espoused by Petitioners has not carried the day in New York. Indeed, the First Department warned against such second-guessing the BSA's expert view of the Zoning Resolution's "unique physical conditions" provision. For example, in *UOB Realty*, the First Department, citing the deference required in *SoHo Alliance*, "reject[ed the] petitioners' contention that the requirement of 'unique physical conditions' in New York City Zoning Resolution § 72-21(a) refers only to land and not buildings." *UOB Realty*, 291 A.D.2d at 249, 736 N.Y.S.2d at 875.

In fact, the "unique physical conditions" standard has not been construed strictly. It has been employed as a flexible standard that focuses on the statutory purposes of the variance provision. Thus, "[u]niqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship." *Douglaston Civic Association v. Klein*, 51 N.Y.2d 963, 965, 435 N.Y.S.2d 705, 707, 416 N.E.2d 1040, 1042 (1980), 416 N.E.2d 1040 (citations omitted). "What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed." *Id.* As a result, a property's location can lead to "unique physical conditions." *See Matter of Elliott v Galvin*, 33 N.Y.2d 594, 596, 347 N.Y.S.2d 457, 459, 301 N.E.2d 439, 441 (1973), 301 N.E.2d 439 (location

of zoning lot within two different zoning districts constituted "unique physical condition" within the meaning of zoning resolution).

Under the deferential standard of Article 78 review, each of Petitioners' objections quickly crumbles:

First, while Petitioners assert that the Congregation's accessibility needs could have been addressed by building an alternate structure as-of-right (Petitioners' Mem. at 35), the BSA considered such alternatives but found that they would not be viable. *See* BSA Res. ¶¶ 60-61. The BSA's reliance on materials indicating that such alternatives would not be workable clearly satisfies the more-than-a-scintilla "substantial evidence" test. *See Bethlehem Steel*, 36 A.D.2d at 899, 320 N.Y.S.2d at 1001.

Second, Petitioners' "physical obsolescence" argument (Petitioners' Mem. at 41) similarly ignores that it was within the BSA's province to find the existing structure obsolete and the as-of-right alternatives unworkable. *See* BSA Res. ¶¶ 60-61, 72; *see also Commco, Inc. v. Amelkin*, 109 A.D.2d 794, 796, 486 N.Y.S.2d 305, 307 (2d Dep't 1985) ("the requirement that the hardship be due to unique circumstances may be met by showing that the difficulty complained of relates to existing improvements on the land which are obsolete and deteriorated").

Third, Petitioner's contention concerning the landmarked status of the Congregation's synagogue is similarly unavailing. The "takings" cases cited by Petitioners (Petitioners' Mem. at 43-44) nowhere suggest that, in evaluating whether a site suffers from a unique physical condition under Section 72-21 of the New York City Zoning Resolution, the BSA cannot consider the limitations in developing a site that abuts a landmark. In any event, the Resolution

does not suggest that the BSA, here, treated the landmarked status of the synagogue as a hardship.

Fourth, contrary to Petitioners' unsupported assertions (Petitioners' Mem. at 43), the courts have specifically held that the fact that a site straddles a zoning district boundary can contribute to unique physical conditions at the site. *See Matter of Elliott*, 33 N.Y.2d at 596, 347 N.Y.S.2d at 458, 301 N.E.2d at 440. Moreover, the BSA's prior similar holdings, in connection with other variance applications (BSA Res. ¶ 104) further undermines Petitioners' assertion that a lot's split-zone condition cannot be considered by the BSA. *See Vomero*, 54 A.D.3d at 1046, 864 N.Y.S.2d at 161 (relying on prior BSA rulings).

Fifth, while the BSA Resolution does not identify the religious programmatic needs of the Congregation in the particular, summarizing paragraph that Petitioners' cite (BSA Res. ¶ 122; *see* Petitioners' Mem. at 47), those programmatic needs are described and analyzed by the BSA in detail elsewhere. *See, e.g.*, BSA Res. ¶¶ 42, 57. The summary paragraph clearly refers back to those early, more descriptive discussions of the Congregation's needs.

In sum, the BSA considered Petitioners' arguments with respect to "unique physical conditions," but rejected them as unpersuasive. Given that the BSA's finding regarding "unique physical conditions" is rational and supported by substantial evidence, this Court should not disturb it.

2. The BSA's Finding of "No Reasonable Return" Was Rational

Petitioners also argue that the BSA should not have found that, because of the site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return, BSA Res. ¶ 148. *See* Petitioners' Mem. at 71. Petitioners' convoluted attacks on the expert financial

analyses cited by the BSA do not undermine the conclusion that the evidence before the BSA was "substantial."

a. No Finding Was Required

As a threshold matter, the BSA did not even have to consider "financial return" under Section 72-21(b) of the New York City Zoning Resolution. While that provision ***generally*** requires a finding that "there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of [the zoning requirements] will bring a reasonable return," the provision concludes: "***this finding shall not be required for*** the granting of a variance to ***a non-profit organization***." N.Y. City Zoning Resolution § 72-21(b) (emphasis added). The record clearly shows, and it is undisputed, that the Congregation is a "non-profit organization" within the meaning of the Zoning Resolution.

The BSA, however, nevertheless proceeded to take testimony regarding whether the residential portion of the Congregation's proposal satisfied the "reasonable return" standard usually applied to for-profit enterprises. In proceeding with such caution, the BSA cited three decisions. *See* BSA Res. ¶ 125. Those cases did not deal with the New York City Zoning Resolution or hold that municipalities may not legislatively exempt not-for-profits from a "reasonable return" requirement statutorily-imposed on other zoning variance applicants. *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 395 N.Y.S.2d 428, 363 N.E.2d 1163 (1977), only held that, when a town operates a for-profit enterprise, it has an "obligation to comply with the zoning regulations." *Foster v. Saylor*, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981), merely held that a school's lease of school property to a corporation was "subject to local zoning regulations" and that the school's showing regarding its inability to sell the property satisfied those particular regulations. Finally, *McGann v. Incorporated Village of Old Westbury*,

170 Misc. 2d 314, 647 N.Y.S.2d 934 (Nassau Cty. Sup. Ct. 1996), concerned a church's First Amendment challenge to a local zoning ordinance and held that "because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of legality," which must be overcome "beyond a reasonable doubt." The Congregation did not argue that it was exempt from zoning regulations or that the zoning regulations were unlawful. To the contrary, the BSA was not required to consider "reasonable return," because the lawful zoning regulations, promulgated by the legislature, state: "this finding shall not be required for the granting of a variance to a non-profit organization." N.Y. City Zoning Resolution § 72-21(b).

Significantly, the Zoning Resolution's statement that "reasonable return" findings are not required "for the granting of a variance to a non-profit organization" applies without regard to whether the non-profit is seeking a variance that may facilitate the construction of residential homes. The statute and cases focus on the nature of the applicant, not the project. For example, recently, in *Fisher v. New York City Bd. of Standards and Appeals*, 21 Misc. 3d 1134(A), 2008 WL 4966546 (N..Y. Cty. Sup. Ct. Nov. 21, 2008), the court considered a project "to permit the construction of a twenty story hotel." 2008 WL 4966546 at *2. The court stated, without regard to the nature of the hotel: "As a non-profit organization, Xavier was not required to demonstrate the second criteria, that the subject premises could not yield a reasonable return without the variance (Zoning Resolution § 72-21[b])." *Id.*; *see also Homes for Homeless, Inc. v. Bd. of Standards and Appeals*, 24 A.D.3d 340, 345 n.1, 807 N.Y.S.2d 36, 40 n.1 (1st Dep't 2005) (McGuire, J., dissenting) ("A fifth showing, that due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property, is inapplicable where, as here, the applicant is a not-for-profit entity (NY Zoning Resolution § 72-21[b])."), *rev'd*, 7 N.Y.3d 822, 855 N.E.2d 1166, 822 N.Y.S.2d 752 (2006).

b. The Finding Was Supported By "Substantial Evidence"

In any event, despite Petitioners' diatribe, the BSA was clearly entitled to rely on the expert financial analysis submitted by the Congregation at the BSA's request. The record before the BSA on this point was exhaustive. *See, e.g.*, City's Filed Administrative Record at 133-161, 283-307, 3608-10, 3847-77, 4223-30, 5773-91. The BSA was provided with proof that only the proposed building was feasible, and that an as-of-right building would not result in a reasonable financial return. BSA Res. ¶ 133. The Congregation also provided the BSA with an alternative analysis that considered the rear terraces of the residential facility as sellable and revised the sales prices of the units accordingly. *Id.* ¶ 135. The Congregation then, at the BSA's request, analyzed data for the following scenarios: the proposed building; an eight story building; a seven story building, and the as-of-right building. *Id.* ¶ 136, 137. The Congregation then submitted a revised analysis of the as-of-right building using a revised estimated value of the property, which still showed that the as-of-right alternative would lead to a substantial loss. *Id.* ¶ 138. Based on this extensive record, the BSA found that, as a result of the property's unique physical condition, there was no reasonable possibility that development in strict compliance with applicable zoning requirements would result in a reasonable return. *Id.* ¶ 148.

While Petitioners now want to quibble with some of the expert analysis relied on by the BSA here, that assessment was for the BSA to make. In *SoHo Alliance*, the New York Court of Appeals expressly stated that the BSA can "reasonably rely upon expert testimony submitted by the owners" to support a "reasonable return" finding. *SoHo Alliance*, 95 N.Y.2d at 441, 718 N.Y.S.2d at 263, 741 N.E.2d at 108; *see also William Israel's Farm Co-op. v. Board of Standards and Appeals*, 22 Misc. 3d 1105(A), 2004 WL 5659503, *4 (N.Y. Co. Sup. Ct. Nov. 15, 2004) (approving BSA's reliance on submissions from developer's "financial expert").

Moreover, the courts have repeatedly declined to micromanage such agency analyses. *See, e.g., West Village Tenants Association v. New York City Bd. of Standards and Appeals*, 302 A.D.2d 230, 231, 755 N.Y.S.2d 377, 378 (1st Dep't 2003) (BSA is not required to consider the return for every permissible use). The Court should not disturb the BSA's "reasonable return" finding here.

3. The BSA's "Neighborhood Character" Finding Was Rational

Petitioners assert that the BSA should not have found that the variance would not "alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare," BSA Res. ¶ 201. *See* Petitioners' Mem. at 82. Petitioners argue that the variance will result in the closure of seven lot line windows (those located on a wall abutting a property line) and will consequently reduce air and light. *Id.* Petitioners also contend that development in accordance with the variance will reduce air and light in the neighborhood. Petitioners' Mem. at 87. Petitioners argue that, as a result, the Board could not make the required finding. Petitioners' Mem. at 82. Petitioners' contentions are without merit.

Petitioners' contention ignores the fact that Section 72-21(c) of the Zoning Resolution merely requires a finding that the variance "will not ***substantially*** impair the appropriate use or development of adjacent property." N.Y. City Zoning Resolution § 72-21(c) (emphasis added). The assessment of whether a project's effect on an adjacent property will "impair" its use or development, as that term is used in the Zoning Resolution, lies exclusively within the province of the BSA.

Here, the BSA could reasonably conclude that the impact on lot line windows, light, and air – and any other effect on neighbors – would not be "substantial" such that the use or

development of the adjoining property would be "impaired," especially considering that the LPC had already unanimously determined that the proposed construction would be an appropriate addition to the historic district. These are precisely the kind of "sensitive planning decisions" that the New York Court of Appeals has held should be left to the "quasi-legislative, quasi-administrative boards composed of representatives from the local community," here the BSA, because those officials "possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community." *Cowan*, 41 N.Y.2d at 599, 394 N.Y.S.2d at 584, 363 N.E.2d at 310. Thus, it matters not whether this Court would have "decided the matter differently" after considering any impacts on neighbors. *See id.* The only question is whether the BSA's conclusion was rational.

With respect to the lot line windows, Petitioners cite no authority suggesting that such windows enjoy any special legal protection, nor can they since such windows may not even be used to provide legally required light and air to the rooms they service. (In fact, Petitioners do not cite any legal authority in the section of their memorandum in which they contest the BSA's "neighborhood character" finding). Moreover, any impacts were minimized. In a neighborly effort to block as few lot line windows as possible, the Congregation modified its original development plans by pulling back its rear wall to create terraces and thereby free up four or five lot line windows on 18 West 70th Street. Indeed, Petitioner Lepow cannot complain at all since his building at 18 West 70th Street has an outer court along its shared property line with the Congregation that contains columns of windows that are not on the lot line. The new building will not affect those windows.

Petitioners' contentions that the development will reduce air and light are similarly misplaced. Petitioners' Mem. at 87. The BSA acted well within its discretion in relying on the

shadow study, commissioned by the Congregation, comparing the shadows cast by the existing building with those cast by the proposed building. The BSA could reasonably conclude, based on the study of shadows cast over the course of the year, that the variance would lead to few additional shadows and that those few shadows would be insignificant in size. *See* BSA Res. ¶ 199.

4. The BSA's Finding of "No Self-Imposed Hardship" Was Rational

Petitioners contend that the BSA should have deemed the Congregation's inability to use portions of the community house to meet school needs a "self-imposed hardship." Petitioners' Mem. at 91-98. Petitioners suggest that the toddler program is a sham, and was included only to justify the variance request. *Id.* at 92. Petitioners also argue that, if the Congregation moved the caretaker's apartment, certain variances would be unnecessary. *Id.* at 94. Petitioners' arguments fail to establish that the BSA's finding of "no self-imposed hardship" was irrational.

The BSA acted rationally in accepting statements from the Congregation that it needed a toddler program and a live-in caretaker. Petitioners' assertions of "sham" notwithstanding, there was evidence before the BSA that the Congregation had a toddler program and always intended to expand it to accommodate 60 toddlers. The record confirms that the Congregation described the toddler program to the BSA during the first BSA hearing. Similarly, the BSA acted rationally in accepting proof from the Congregation that it needed a caretaker to live in the community house. *See* Petitioners' Mem. at 93. The BSA did not act irrationally in rejecting Petitioners' attempts to design the Congregation's building for the Congregation or to determine for the Congregation which needs are actually important. *See* Petitioners' Mem. at 91-98.

The BSA's conclusion that the Congregation did not create any of the limitations that warranted the variance is unassailable. *See* BSA Res. ¶ 205. Petitioners have certainly not established that the conclusion was arbitrary or capricious.

5. The BSA's "Minimum Variance" Finding Was Rational

Finally, Petitioners' brief contains this throw-away comment pertaining to the BSA's "minimum variance" finding: "Since space claimed for the programmatic needs can be accommodated in a conforming building or elsewhere on the zoning lot, the minimum variance is no variance." Petitioners' Mem. at 98. This comment certainly does not establish that the BSA's finding was arbitrary or capricious.

Indeed, the BSA considered this precise argument and found it unpersuasive. The BSA noted that Petitioners had argued "that the minimum variance finding is no variance because the building could be developed as a smaller as-of-right mixed-use community facility/ residential building that achieved its programmatic mission, improved the circulation of its worship space and produced some residential units." BSA Res. ¶ 212. Yet, the BSA found, based on the evidence in the record, that the Congregation had "fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission." *Id.* ¶ 213.

Petitioners cannot show that this finding was irrational. To the contrary, the BSA required the Congregation to scale back its proposal (*see* BSA Res. ¶¶ 207-209) and also considered numerous alternatives to the Congregation's proposal to determine whether an alternative approach would accommodate its needs (*see id.* ¶¶ 210-211). The record is replete with analyses of alternatives, including as-of-right approaches. *See, e.g., id.* ¶¶ 128, 129, 132, 133, 147, 211. Based on this record, the BSA determined that the Congregation's final proposal

would involve the minimum variance. *Id.* ¶ 212-15. This Court should not upset the BSA's "minimum variance" finding.

CONCLUSION

For the reasons stated above, the Court should deny the Petition.

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