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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AFFIRMATION IN OPPOSITION TO THE PETITIONERS' MOTION FOR LEAVE TO SUBMIT A FURTHER REPLY

INDEX NO. 113227/08

CHRISTINA L. HOGGAN, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms under the penalties of perjury, pursuant to Civil Practice Law and Rules §2106, as follows:

1. I am an Assistant Corporation Counsel in the Office of Jeffrey Friedlander, First Assistant Corporation Counsel of the City of New York, attorney for Respondents, Board of Standards and Appeals of the City of New York, Meenakshi Srinivasan, Chair and Christopher Collins, Vice Chair (collectively "BSA").

2. I submit this affirmation in opposition to the Petitioners' motion for leave to submit a further reply.

3. Petitioners, in an effort to submit additional papers in the instant proceeding, assert that Respondents, in answering the Petition in Landmark West! Inc., v. City of New York Board of Standards and Appeals, Index No. 650354/08, raised new arguments which in actuality respond to the instant proceeding. As set forth below, not only is Petitioners' request procedurally

improper, but Petitioners misrepresent City Respondents' answering papers in Landmark West! Inc..

ARGUMENT

4. Petitioners' request to submit a reply is procedurally flawed because there are no papers in the instant proceeding for Petitioners to reply to. Indeed, the last papers submitted in the instant proceeding were filed by Petitioners on or about March 31, 2009. Specifically, Petitioners filed: 1) a 60 page reply Affirmation; 2) a 68 page Verified Reply to BSA Statement of Facts; 3) a 114 page Marked Petition to Show Answers with Reply;[1] 4) a 56 page Reply Memorandum of Law; and 5) a 217 page Revised Binder of Exhibits comprised of Petitioners' Exhibits A-S. Consequently, since there are no papers in the instant proceeding for Petitioners to reply to, their request to submit a reply is procedurally improper.

5. To the extent Petitioners allege that they should be permitted to respond to City Respondents' answering papers in Landmark West! Inc., a separate Article 78 proceeding, Petitioners' argument does not merit consideration. City Respondents' answering papers in Landmark West! Inc. are not part of the record in the instant proceeding. Accordingly, it would be improper to grant Petitioners leave to reply, in the instant proceeding, to papers filed in a separate Article 78 proceeding.

6. Regardless, Petitioners' argument that they should be permitted to submit a further reply because City Respondents' answering papers in Landmark West! Inc. were in essence a sur-reply to Petitioners' voluminous reply papers in the instant proceeding is completely without merit. As noted by the parties in Landmark West! Inc., during a March 31, 2009 appearance, the

[1] The 68 page Verified Reply to BSA Statement of Facts and 114 page Marked Petition to Show Answers with Reply were submitted as attachments to the 60 page reply Affirmation.

Petition in Landmark West! Inc. raises different arguments than the Petition in the instant proceeding. Accordingly, City Respondents' answering papers in both proceedings also argue different points.

7. Despite this fact, Petitioners assert that the differing arguments were actually responsive to their papers. Contrary to Petitioners' argument, City Respondents' answering papers in Landmark West! Inc. did not reply to any papers filed in the instant proceeding. Rather, they were written in direct response to arguments set forth in Landmarks' Petition.

8. Petitioners, in support of their argument, assert that,

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

Petitioners' assertions are false.

9. First, the arguments regarding "the Eighth Objection" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at n. 8 (p. 16) respond directly to Landmark's argument that BSA lacked jurisdiction because it failed to require Congregation Seharith Israel (the "Congregation") to address the BSA's objections which were based on the objection listed as number 8 on New York City Department of Building's Notice of Objections. See Landmark West! Inc. Petition at pp. 8-13.

10. Second, contrary to Petitioners' assertion, City Respondents did not raise arguments "supporting condominium variance by reliance upon programmatic needs" at p. 21 of City Respondents' Memorandum of Law in Landmark West! Inc.. Indeed, not only are there no

arguments regarding programmatic needs on page 21 of either City Respondents' Answer or Memorandum of Law in Landmark West! Inc., but there are no arguments "supporting condominium variance by reliance upon programmatic needs" anywhere in City Respondents' Answer or Memorandum of Law in Landmark West! Inc..

11. Third, the arguments regarding the "landmarked Synagogue and Parsonage as basis for finding (a)" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p.34[2] respond directly to Landmark's argument that the BSA was not permitted to consider the presence of the landmarked synagogue because "[p]ursuant to the Charter, the Landmarks Preservation Commission and the City Planning Commission are the sole agencies authorized and empowered to consider and resolve claims of prejudice to an owner caused by landmarking." Landmark West! Inc. Petition at ¶ 94.

12. Fourth, the arguments regarding the "encroachment on powers of City Planning and LPC" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at pp. 34-35 respond directly to Landmarks' argument that the BSA improperly exercised the powers and duties delegated to the Landmarks Preservation Commission and/or City Planning Commission. See Landmark West! Inc. Petition at ¶¶94-96.

13. Fifth, the arguments regarding the "BSA ignoring its own written guidelines" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p. 42 respond directly to Landmark's argument that the Congregation did not satisfy New York City Zoning

[2] Notably, while Petitioners assert that the arguments regarding the "landmarked Synagogue and Parsonage as basis for finding (a)" are set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at page 33, it appears they are actually referring to City Respondents' arguments set forth on page 34 since the arguments set forth on page 33 repeat verbatim the arguments set forth in City Respondents' Memorandum of Law in the instant proceeding. See City Respondents' Memorandum of Law in the instant proceeding at pp. 34-5.

Resolution § 72-21(b), i.e. did not establish it could not earn a reasonable return by developing the subject premises in compliance with the Zoning Resolution, because the Congregation failed to "state the amount of equity invested [or] the return on equity" in compliance with BSA's written guidelines. See Landmark West! Inc. Petition at ¶¶ 57-8.

14. Sixth, the arguments regarding the "rational explanation of methodology of analysis of reasonable return" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p. 42 respond directly to Landmark's argument that the Congregation improperly utilized a "return on profit" methodology in order to calculate the potential financial return it could earn in developing the subject premises. See Landmark West! Inc. Petition at ¶¶54-60.

15. Seventh, the arguments regarding the "reasonable return by Congregation" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p. 43 respond directly to Landmark's argument that "the BSA improperly granted the Congregation variances to develop five market-rate residential condominium units 'solely on the ground that the use will yield a higher return than permitted by the zoning regulations.'" City Respondents' Memorandum of Law in Landmark West! Inc. at p. 43. See also Landmark West! Inc. Petition at ¶ 48.

16. Eighth, the arguments regarding the "assertions that variance is the minimum variance" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p. 53 respond directly to Landmark's argument that the Congregation did not seek the minimum variance possible because it could have reduced the number of variances needed by eliminating the proposed residential tower. See Landmark West! Inc. Petition at ¶¶72-73.

17. Ninth, the arguments regarding the "assertion that Z.R. §74-711 is parallel remedy" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at pp. 54-5 respond directly to Landmark's argument that the BSA improperly considered the Congregation's

variance application because the Congregation did not exhaust its administrative remedies prior to applying to BSA for a variance.[3] Landmark West! Inc. Petition at ¶¶74-77.

18. Moreover, while Petitioners assert that the preceding arguments were "added... as to issues previously briefed in the instant proceeding," Sugarman Affirmation at ¶6, they fail to notify the Court that City Respondents explicitly set forth in their Landmark West! Inc. answering papers that each of the alleged "new" arguments were responsive to arguments raised in Landmark's Petition. In fact, prior to each of the alleged "new" arguments raised in Landmark West! Inc., City Respondents noted either that: 1) "Petitioners' arguments are flawed;" 2) "Petitioners argue;" 3) "contrary to Petitioners' argument;" or 4) "Petitioners, in an effort to challenge BSA's findings, argue," thus clearly denoting that the City was directly responding to the arguments raised by the Landmark in its Petition. See City Respondents' Memorandum of Law in Landmark West! Inc. at pp. 16, 34, 42, 43, 53, and 54. See also City Respondents' Answer in Landmark West! Inc. at pp. 24, 38, 46, 47, and 57. Further, to the extent Petitioners suggest that Respondents, in answering the Petition in Landmark West! Inc., were limited to asserting the arguments they previously raised in response to the Petition in instant proceeding, Petitioners' argument is illogical. Indeed, under Petitioners' rational, where Petitioners in Landmark West! Inc. raised arguments not asserted by the Petitioners in the instant proceeding, Respondents would be unable to respond to the arguments.

[3] Notably, since Petitioners also asserted the Congregation was required to exhaust its administrative remedies pursuant to Z.R. §74-711, City Respondents' answering papers in both proceedings contained identical arguments. See City Respondents' Answer in Landmark West! Inc. at pp. 57-58; City Respondents' Answer in the instant proceeding at pp. 79-80. See also City Respondents' Memorandum of Law in Landmark West! Inc. at pp. 54-5; City Respondents' Memorandum of Law in the instant proceeding at pp. 61-2.

WHEREFORE, City Respondents respectfully request that the Court deny Petitioners' motion.

Dated: New York, New York
June 23, 2009

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Index No.104077/2008

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Due and timely service is hereby admitted.

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

..... *Esq.*

Attorney for.....