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

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LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION and 91 CENTRAL PARK WEST CORPORATION,	:	Index No. /08
	:	Date Purchased:
Plaintiffs,	:	
- against -	:	
CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,	:	Plaintiffs designate New York County as the place of trial
	:	
	:	SUMMONS
Defendants.	:	

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To The Above-Named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance on plaintiff's undersigned attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of the venue designated is plaintiffs' residences.

Dated: New York, New York
September 26, 2008

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Plaintiffs

By: _____
David Rosenberg
488 Madison Avenue
New York, New York 10022
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Defendants' Addresses:

Michael A. Cardozo, Esq.
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New York City Law Department
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New York City Board of Standards
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40 Rector Street
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New York City Planning Commission
22 Reade Street
Mew York, New York 10007

Hon. Andrew Cuomo
Attorney General of the State of New York
120 Broadway
New York, New York 10271

Congregation Shearith Israel
also described as the Trustees
of Congregation Shearith Israel
8 West 70th Street
New York, New York 10023

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Defendants.	:	

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Plaintiffs, by their attorneys, Marcus Rosenberg & Diamond LLP, as their verified complaint, upon information and belief, state:

<u>As And For A First Cause Of Action</u>

<u>Overview</u>

1. This action is brought to challenge an extraordinary and unprecedented resolution (the "Resolution") of defendant the New York City Board of Standards and Appeals ("BSA").

2. Pursuant to § 20 of the General City Law, the express purpose of the zoning regulations relating to the height, bulk and location of buildings, including rear yards and other open space, is "to promote the public health and welfare, including . . . provision for adequate light, air [and] convenience of access."

3. The challenged BSA Resolution would permit defendant Congregation Shearith Israel, also referred to as the Trustees of Congregation Shearith Israel (together, "CSI"), to violate important zoning regulations in order to construct a new building (the "New Building"), with a residential tower containing five luxury condominium apartments.

4. The luxury condominium apartments are not for CSI's religious mission or "programmatic needs". They are simply to be sold to generate a cash windfall or, in the words of CSI's attorney, to "monetize" the violation of the New York City Zoning Resolution (the "Zoning Resolution").

5. The BSA Resolution granted CSI other unwarranted benefits, including the right to violate height, bulk, setback and other regulations adopted by the City to protect the neighborhood and its residents.

6. In so doing, BSA permitted CSI to violate the New York City Charter (the "Charter"), the Zoning Resolution and BSA's own rules, to the extent that

BSA was deprived of jurisdiction to entertain CSI's application (the "Application") for zoning variances.

7. Throughout the process, BSA ignored the factual presentations of Plaintiffs and others, affording complete and utter "deference" to CSI's factual claims, thereby illegally abdicating its statutory responsibility.

The Parties

8. Plaintiff Landmark West! Inc. ("Landmark West!") is a New York not-for-profit corporation. Since 1985, Landmark West! has worked with other individuals and grassroots community organizations to protect the historic architecture and development patterns of the Upper West Side and to improve and maintain the community for all of its members.

9. Plaintiff 103 Central Park West Corporation ("103 CPW") is the owner of the cooperative apartment building located at 101 Central Park West, running from West 70th Street to West 71st Street along Central Park West, in the County, City and State of New York.

10. Plaintiff 91 Central Park West Corporation ("91 CPW") is the owner of the cooperative apartment building located at 91 Central Park West, at the northwest

corner of Central Park West and West 69th Street, in the County, City and State of New York.

11. Defendant BSA is the governmental body of the City of New York charged by the General City Law, the Charter and the Zoning Resolution with the authority to entertain and decide applications for variances from the requirements of the Zoning Resolution.

12. Defendant New York City Planning Commission ("City Planning Commission") is named as a defendant due to the obligation to enforce and maintain the objectives of the Zoning Resolution and to prevent "spot zoning".

13. Defendant, Hon. Andrew Cuomo, as Attorney General of the State of New York, is named by reason of the fact that issues as to violations of the New York State Constitution are raised by this action.

14. Defendant CSI is a religious organization, which owns the synagogue building (the "Synagogue") and adjacent parsonage (the "Parsonage") at 99 Central Park West, at the southwest corner of Central Park West and West 70th Street, in the County, City and State of New York, and the four-story school building (the "Community House") and a vacant parcel identified as 6-10 West 70th Street, adjacent to the Synagogue on the west (with the Community House, the "Development Site").

15. 91 CPW is adjacent to the south side of the Synagogue, Parsonage and the Development Site.

16. 103 CPW is directly across West 70th Street from the Synagogue and the Development Site.

17. 91 CPW and 103 CPW (together, the "Co-ops") are taxpayers with assessments exceeding $1,000.

18. The Co-ops contain the homes and major assets of the owners of the individual apartments, who are taxpayers and members of the community represented by Landmark West!

19. All Plaintiffs are suing to enforce their rights, to prevent illegal actions and to prevent waste of City property and assets, pursuant to General Municipal Law, § 51, and their other statutory and common law rights.

20. All Plaintiffs are within a zone immediately and directly impacted by the New Building proposed to be constructed in the Development Site.

21. All Plaintiffs will experience a reduction of the light, air and convenience of access which the Zoning Resolution is required to protect. In fact, some of the Co-ops' residents will lose the use of windows to their apartments.

BSA Lacked Jurisdiction Because The Department of Buildings ("DOB") Objections Were Not Issued By The DOB Commissioner Or The Manhattan Borough Commissioner

22. Charter § 666 states:

§ 666 Jurisdiction

The board shall have power:

* * *

6. To hear and decide appeals from and review,

(a) except as otherwise provided by law, any order, requirement, decision or determination the commissioner of buildings or any borough superintendent of buildings acting under written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five. . . .

23. Plaintiffs provided indisputable proof that the October 28, 2005 DOB Notice of Objections (the "Original Notice of Objections"), which formed the basis of CSI's Application to BSA, was not issued by the then Commissioner of Buildings, Patricia J. Lancaster, or the then Manhattan Borough Commissioner, Christopher Santulli, as

expressly required by Charter § 666, but by Kenneth Fladen, a "provisional Administrative Borough Superintendent, who also signed on the line for "Examiner's Signature".

24. CSI did not deny this or offer an explanation.

25. In its Resolution, BSA claims that jurisdiction is not required by Charter § 666 because this is an application for a variance pursuant to Charter § 668.

26. Charter § 666 expressly defines the jurisdiction and power of BSA. Section 668 merely describes the added requirements for a variance or a special permit.

27. BSA's own website describes its authority as follows:

> The majority of the Board's activity involves reviewing and deciding applications for variances and special permits, as empowered by the Zoning Resolution, and applications for appeals from property owners whose proposals have been denied by the City's Department of Buildings, Fire or Business Services. The Board also reviews and decides applications from the Departments of Buildings and Fire to modify or revoke certificates of occupancy.
>
> The Board can only act upon specific applications brought by landowners or interested parties who have received prior determinations from one of the enforcement agencies noted above. The Board cannot offer opinions or interpretations generally and it cannot grant a variance or a special permit to any property owner who has not first sought a proper permit or approval from an enforcement agency. Further, in reaching its determinations, the Board is limited to specific findings and remedies as set forth in state and local laws, codes, and the Zoning Resolution, including,

where required by law, an assessment of the proposals' environmental impacts.*

28. The failure of CSI to have obtained objections issued by the Commissioner of Buildings or the Borough Superintendent of DOB deprived BSA of jurisdiction to entertain CSI's Application, requiring that the Resolution be vacated.

BSA Lacked Jurisdiction Because The
Plans Filed With BSA Were Not The
Plans Filed With Or Reviewed By DOB

29. On April 2, 2007, CSI submitted its Application for a variance to BSA, based upon the Original DOB Notice of Objections, which included eight DOB objections to plans submitted by CSI for the New Building under DOB application No. 104250481. Objection No. 8 stated:

> PROPOSED SEPARATION BETWEEN BUILDINGS IN R10A DOES NOT COMPLY. 0.00' PROVIDED INSTEAD OF 40.00' CONTRARY TO SECTION 24-67 AND 23-711.

30. In response to the Application, BSA issued a June 15, 2007 Notice of Objections (the "Original BSA Objections"), which required CSI to address, individually, 48 BSA Objections.

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* Unless otherwise indicated, all emphasis herein is added.

31. Among the BSA Objections, the following three required CSI to address objection No. 8 to the Original DOB Notice of Objections:

> 20. Page 24: Please correct the title of the first full paragraph by replacing "Building Separation" with "Standard Minimum Distance Between Building."
>
> 21. Page 24: Please note that ZR § 23-711 prescribes minimum distance between a residential building and any other building on the same zoning lot. Therefore, with the first full paragraph, please clarify that the DOB objection for ZR § 23-711 is due to the lack of distance between the residential portion of the new building and the existing community facility building to remain.
>
> 25. It appears that the "as-of-right" scenario would still require a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings) given that it contains residential use (see Objection # 21). Please clarify.

32. CSI's September 10, 2007 response failed to address these three BSA Objections, stating:

> N/A: DOB Objection #8 omitted by DOB upon reconsideration (See, DOB Objection Sheet and Proposed Plans, dated August 28, respectively).

33. CSI has claimed that it filed an application with "Proposed Plans, dated August 28, 2007" with DOB for reconsideration of the Original DOB Notice of Objections and the August 28, 2007 DOB Notice of Objections (the "Revised DOB Notice of Objections") omitted Objection No. 8 from the Original DOB Notice of Objections.

34. DOB issued the Revised DOB Notice of Objections even though there is no indication that the "Proposed Plans" submitted with the reconsideration application were revised to comply with the noted provisions of the Zoning Resolution.

35. BSA did not produce to BSA its alleged reconsideration application or the documents allegedly submitted therewith, nor are they on file at DOB.

36. When Landmark West! raised this issue at the February 23, 2008 BSA public hearing, the following colloquy took place:

> MR. ROSENBERG: There's been no explanation required as to the difference between the original plans which formed the basis for the application to this Board and the subsequent plans which they claim were provided to DOB.
>
> VICE-CHAIR COLLINS: I don't understand the relevance of that.
>
> The Buildings Department has given an objection sheet. They told us where these filed plans don't meet the zoning. That's what we're here to rule on.
>
> MR. ROSENBERG: They're not filed plans.
>
> VICE-CHAIR COLLINS: Now, do you think that there should be further objections based on the plans that you have access to?
>
> MR. ROSENBERG: As far -- this Board should ask for the answers to its 8th objection that it raised.
>
> VICE-CHAIR COLLINS: But that objection is not before us anymore because revised plans were filed and a new objection sheet was filed. It's a common practice. We see it all the time. I think you're seeing demons where none exist.

MR. ROSENBERG: No, we haven't been told what the difference is between the revised plans and the original plans, if there is any.

VICE-CHAIR COLLINS: All of our files are completely open. You can make an appointment to come and see them. It's my understanding that they've been made available to you from the beginning. I think it is a bogus issue you're raising.

I don't think there's any legal basis for it.

MR. ROSENBERG: Well, with all due respect, what is the difference between the original plans and the revised plans?

CHAIR SRINIVASAN: It doesn't matter. We have a set of objections which is what we're reviewing.

37. In fact, CSI's attorney, Shelly Friedman, later admitted that the plans claimed to be the basis for the various applications to BSA were not the plans presented to or reviewed by DOB:

MR. FRIEDMAN: With regard to the issues raised by counsel to the building regarding the objection sheet, I'm prepared to give you an explanation, if you wish now, of what that situation is all about. It's really up to the Board.

CHAIR SRINIVASAN: Why don't you just tell us what the situation is.

MR. FRIEDMAN: Fine. I would be happy to do so.

CHAIR SRINIVASAN: It seems like you can put it to rest after that.

MR. FRIEDMAN: The original objection sheet that was obtained at the request of the counsel at the Landmarks Commission when this matter was before the Landmarks Commission, which is kind of unusual, because you're in gross schematics at that stage. You haven't really submitted anything to the Buildings Department but the Landmarks

Commission wants to know what the Building Department feels are the zoning waivers requested. We submitted that.

Originally, the building, the tower had a slot between the residential building and the synagogue. There was a physical space there that several of the Landmark's Commissioners wanted us to explore. They thought some separation between the two were important.

That gave rise to an objection regarding the separation of buildings.

Now, that zoning -- that envelope did not emerge from Landmarks, although, by that time, nobody was thinking about the objection sheet that had been asked about in 2003.

So, when we got to the Building's Department and it was submitted for zoning review, we recognized that the zoning objection sheet was in error because the building no longer contained the separation issue between the buildings because the two buildings were -- now the new and the old were now joined. That was amended.

38. In other words, until the February 12, 2008 hearing, CSI had represented that the plans which:

- CSI filed to commence its Application; and

- CSI represented under penalty of perjury to be the plans which resulted in the Original DOB Notice of Objections from which BSA's jurisdiction was sought

were not the plans filed at DOB or the ones resulting in the Original DOB Notice of Objections. Rather, the DOB Objections were issued on gross schematics of a different structure in 2003.

39. The representation which was the basis of CSI's Application to BSA was untrue. More importantly, it deprived BSA of jurisdiction, requiring that the Resolution be vacated.

BSA Improperly Authorized A Variance
Solely For Income Generation

40. CSI admitted, and BSA's Resolution held, that the New Building will violate Zoning Resolution parameters for:

> (1) Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to Section 24-11/77-24. Proposed interior portion lot coverage is 0.80;
>
> (2) Proposed rear yard in R8B does not comply. 20'.00 provided instead of 30.00' contrary to Section 24-36;
>
> (3) Proposed rear yard in R10A interior portion does not comply. 20.--' provided instead of 30.00' contrary to Section 24-36;
>
> (4) Proposed initial setback in R8B does not comply. 12.00' provided instead of 25.00' contrary to Section 24-36;
>
> (5) Proposed base height in R8B does not comply . . . contrary to Section 23-633;
>
> (6) Proposed maximum building height in R8B does not comply . . . contrary to 23-66;
>
> (7) Proposed rear setback in an R8B does not comply. 6.67' provided instead of 10.00' contrary to Section 23-633. . . .

41. CSI admitted, and BSA's Resolution held, that CSI's Application for waivers of four of seven zoning requirements (items 4 through 7 above) was required

solely "to accommodate a market rate residential development that can generate reasonable financial return".

42. CSI admitted, and BSA's Resolution held, that more than 50% of the New Building -- the upper five stories, entrance, elevators and related space, containing 22,352 of 42,406 square feet of the total floor area -- will consist of five condominium apartments and related space to be sold to the public at market rates.

43. In its Resolution, BSA noted:

> [CSI] proposed the need to generate revenue for its mission as a programmatic need, [but] New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization, notwithstanding an intent to use the revenue to support a school or worship space. . . . [F]urther, in previous decisions, [BSA] has rejected the notion that revenue generation could satisfy the (a) finding for a variance application by a not-for-profit organization (see BSA Cal. No. 72-05-BZ, denial of use variance permitting operation by a religious institution of a catering facility in a residential district) and, therefore, requested that [CSI] forgo such justification in its submissions.

44. Moreover, it has been held repeatedly that a zoning board of appeals, such as BSA, may not grant a variance solely on the ground that the use will yield a higher return than permitted by the zoning regulations.

45. As admitted in CSI's Application, "the addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough compiled funds to correct the programmatic deficiencies described. . . . "

46. Thus, the Application "[seeks to produce] capital fundraising that includes a one-time monetization of zoning floor area through developing a moderate amount of residential space. . . . "

47. In spite of this, BSA concluded "that while a nonprofit organization is entitled to no special deference for a development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to develop its property than would be imposed on a private owner."

48. Ignoring its own prior determinations that unrelated revenue generation for a not-for-profit organization does not warrant the granting of a variance, BSA granted the variance for the residential portion of the New Building solely for this purpose.

49. The Resolution, which permits CSI to construct a residential tower with five luxury apartments solely for the purpose of generating income, violates the Zoning Resolution and BSA's own precedents, requiring that it be vacated.

BSA Applied Improper Methods
For Determining Financial Return

50. Since the construction and sale of five apartments was not proposed to meet CSI's programmatic needs, BSA directed CSI to perform a financial feasibility study of CSI's ability to realize a reasonable financial return from an as-of-right residential development.

51. In calculating the financial return of the proposed and as-of-right residential development, CSI employed a rate of return on "project expense", rather than on the basis of invested equity, claiming that such methodology is "characteristically used" for condominium or home sales.

52. Other than the opinion of CSI's witness, no support was offered for this claim.

53. In response, Plaintiffs pointed out that BSA's instructions for a variance application for condominium development [Item M(5)] requires that the applicant state the amount of equity invested and the return on equity, where the project expense is the sum of borrowed funds and the development's equity.

54. Without citing to any contrary authority, and ignoring its own stated requirements and prior determinations, BSA's Resolution concluded:

> [BSA] notes that a return on profit model which evaluates profit or loss on an unleveraged basis is the customary model used to evaluate the feasibility of market-rate residential condominium development.

55. In fact, "return on profit" is a nonsensical term and not a recognized methodology.

56. Thus, the financial underpinning of the Resolution is defective and the Resolution must be vacated.

CSI Failed To Demonstrate That An As-Of-Right Building Was Financially Infeasible

57. By applying improper methodology, CSI sought to demonstrate that an as-of-right building would be financially infeasible, thereby justifying the requested variances.

58. To the contrary, Plaintiffs demonstrated that, applying well-recognized and accepted methodology, an as-of-right building would be financially feasible.

59. By refusing to apply well-recognized and accepted methodology -- and the methodology expressly required by BSA's application instructions -- BSA reached an erroneous determination, which must be vacated.

60. Moreover, in violation of its own application instructions [Item M(b)], BSA accepted from CSI unsealed construction cost estimates from an unqualified source.

61. CSI's Application was based, in large part, on its "need" to provide space for an unrelated school, which paid rent to CSI.

62. In spite of BSA's request that CSI set forth the amount of such rental income, CSI failed and refused to do so, thereby failing to establish the required element of financial infeasibility.

63. For all of these reasons, the Resolution must be vacated.

CSI Failed To Satisfy § 72-21(e)
Of The Zoning Resolution

64. As acknowledged by the BSA Resolution "as pertains to the (e) finding under ZR § 72-21, [BSA] is required to find that the variance sought is the minimum necessary to afford relief."

65. In two respects, CSI failed to establish this required element.

66. The BSA Resolution acknowledges that the residential tower is not necessary for CSI's programmatic needs.

67. Moreover, BSA's Resolution found that the addition of the residential tower on top of CSI's community facility required:

- An undefined amount of mechanical space and accessory storage space on the cellar level of the community facility;
- Approximately 1,018 square feet of lobby and elevator space on the first floor of the community facility; and
- Approximately 325 square feet of elevator, stair and core building space on each of the second, third and fourth floors of the community facility.

68. The construction of the residential tower, admittedly not required to meet CSI's programmatic needs, would eliminate over 2,000 square feet from the approximately 20,000 square foot community facility, or about 10% of that space.

69. Thus, it cannot be said that the Application established that the proposed community facility variances were the minimum necessary, since their need indisputably would be reduced were not the residential tower to be constructed on top of the community facility.

70. It also is a fundamental principle that, in order to obtain a variance, the applicant must exhaust all other administrative and other remedies to obtain relief before seeking a variance.

71. Pursuant to § 74-711 of the Zoning Resolution, where a zoning lot contains a building designated as a landmark by the Landmarks Preservation Commission or where the zoning lot is located within a Historic District designated by the Landmarks Preservation Commission -- both of which apply to CSI's property -- "the City Planning Commission may permit modification of the use and bulk regulations."

72. Here, CSI admittedly could have obtained relief pursuant to an application to the City Planning commission for a special permit, pursuant to Zoning Resolution § 74-711.

73. CSI's election not to pursue this relief, which would have eliminated the need for all or part of the variances sought, requires a finding that CSI failed to comply, as a matter of law, with Zoning Resolution § 72-21(e).

74. By reason of all of the foregoing, CSI failed to establish a required element for the variance it sought and BSA's Resolution must be vacated.

BSA's "Deference" to CSI Constituted An Improper
Unconstitutional Delegation Of Its Authority

75. In its Resolution, BSA concluded that CSI, as a religious institution, is entitled to substantial deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs in support of the subject variance application, citing Cornell University *v.* Bagnardi, 68 N.Y.2d 583 (1986), a case which merely held that the courts will not review a nonprofit institution's need to expand into a particular neighborhood, not its alleged need to a particular configuration of its building.

76. Similarly, the BSA Resolution cites Guggenheim Neighbors *v.* Board of Estimate (unreported) and Jewish Reconstructionist Synagogue of the North Shore *v.* Roslyn Harbor, 38 N.Y.2d 283 (1975), both of which are limited to the same issue as decided in Bagnardi.

77. In fact, BSA "deferred" to CSI's determination as to the need and propriety of each of the seven variances granted in the Resolution.

78. As noted previously, BSA is charged by the General City Law, the City Charter and the Zoning Resolution with the sole and exclusive authority to determine variance applications.

79. By deferring to CSI for such determinations, BSA abrogated its duty and responsibility and improperly and illegally delegated its authority to CSI.

80. In so doing, BSA refused to consider Plaintiffs' factual presentation that CSI's programmatic needs could be accommodated within an as-of-right building, especially if the space required for the residential tower's entrance, elevators, stairs and other features were included in the base building.

81. Moreover, by applying different standards to CSI as a religious institution, BSA violated the First, Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 11, of the New York State Constitution.

82. BSA's refusal to consider opposing presentations and its delegation of its authority to CSI require that the Resolution be vacated.

BSA Improperly Considered The
Landmarking Of The CSI Synagogue
As A Unique Physical Condition

83. CSI admitted, and BSA's Resolution expressly recognizes, that § 72-21(a) of the Zoning Resolution requires BSA to find (the "a finding"), as a prerequisite for a variance, that "there are unique physical conditions in the Zoning Lot which create practical difficulties or unnecessary hardship in strictly complying with, the requirements".

84. However, BSA's Resolution states that CSI, as a religious institution, need not comply with the "a finding".

85. The Resolution then recites that CSI "represents that the variance request is necessitated not only by its programmatic needs, but also by physical conditions on the subject site -- namely -- the need to retain and preserve the existing landmarked Synagogue . . . [and CSI] states that as-of-right development of the site is constrained by the existence of the landmarked Synagogue building which occupies 63 percent of the Zoning Lot footprint".

86. BSA's Resolution notes:

> WHEREAS, as to the impact of the landmarked Congregation Shearith Israel synagogue building on the ability to develop an as-of-right development on the same zoning lot, the applicant states that the landmarked synagogue occupies nearly 63 percent of the Zoning Lot footprint; and
>
> WHEREAS, the applicant further states that because so much of the Zoning Lot is occupied by a building that cannot be disturbed, only a relatively small portion of the site is available for development. . . .

87. The BSA Resolution concludes:

> WHEREAS, the Board notes that the site is significantly underdeveloped and that the location of the landmark Synagogue limits the developable portion of the site to the development site; and
>
> * * *

WHEREAS, the Opposition contends that the inability of the Synagogue to use its development rights is not a hardship under ZR § 72-21 because a religious institution lacks the protected property interest in the monetization of its air rights that a private owner might have, citing Matter of Soc. for Ethical Cult. *v.* Spatt, 51 N.Y.2d 449 (1980); and

WHEREAS, the Opposition further contends that the inability of the Synagogue to use its development rights is not a hardship because there is no fixed entitlement to use air rights contrary to the bulk imitations of a zoning district; and

WHEREAS, the Board notes that Spatt concerns whether the landmark designation of a religious property imposes an unconstitutional taking or an interference with the free exercise of religion, and is inapplicable to a case in which a religious institution merely seeks the same entitlement to develop its property possessed by any other private owner; and

* * *

WHEREAS, the Board further notes that while a nonprofit organization is entitled to no special deference for a development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to develop its property than would be imposed on a private owner; and

WHEREAS, the Board agrees that the unique physical conditions cited above, 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; thereby meeting the required finding under ZR § 72-21(a). . . .

88. Section 74-711 of the Zoning Resolution provides:

In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by the Landmarks Preservation commission, the City Planning Commission may permit modification of the use and bulk regulations.

89. In its Application, CSI expressly disavowed reliance on this provision.

90. Pursuant 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.

91. There is no authority in the General City Law, the Charter or the Zoning Resolution for BSA to entertain or decide such claims or to afford relief.

92. Thus, BSA's action, in considering the effect of the landmark status of the Synagogue was *ultra vires*. To the degree that such considerations cannot simply be excised from the Resolution, the entire Resolution is infirm and must be vacated.

Conclusion

93. Each of the foregoing material violations of applicable law and procedures requires that the Resolution be vacated; together, they conclusively require that result.

94. By reason of the foregoing, a dispute exists among the parties as to whether BSA's Resolution, and the procedures employed in considering and deciding CSI's

Application, comply with applicable statutory and common law and precedent established by BSA.

95. Lacking other adequate remedies, Plaintiffs seek a judgment from this Court vacating the BSA Resolution and declaring it to be null and void and without force or effect.

As and For a Second Cause of Action

96. Plaintiffs repeat all prior allegations.

97. A balancing of the equities favors Plaintiffs, who will be irreparably harmed, and applicable law will be violated, unless the Court issues a judgment enjoining the Defendants from proceeding pursuant to the Resolution.

98. Lacking other adequate remedies, Plaintiffs seek a judgment from this Court enjoining any action based upon the BSA Resolution.

WHEREFORE, Plaintiffs demand judgment:

(1) Vacating the BSA Resolution and declaring it to be null and void and without force or effect;

(2) Enjoining Defendants from taking any action based upon the BSA Resolution; and

(3) Granting to Plaintiffs such other and further relief as is appropriate.

Dated: New York, New York
September 26, 2008

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Plaintiffs

By: _____
David Rosenberg
488 Madison Avenue
New York, New York 10022
(212) 755-7500

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Kate Wood, being duly sworn, deposes and says:

1. I am Executive Director of plaintiff Landmark West! Inc. and make this verification on behalf of Landmark West! Inc.

2. I have read the foregoing complaint and the contents thereof and I know the same to be true to my own knowledge, except as to matters therein stated upon information and belief, as to which latter matters, my belief is based upon documents and records in our office.

Kate Wood

Sworn to before me this 26th
day of September, 2008

Notary Public

NICKALAI PILLAI
Notary Public - State of New York
NO. 01PI6161876
Qualified in Queens County
My Commission Expires

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN, *Plaintiffs,* - against - CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel, *Defendants.*	:	Index No. 650354/08 Date Purchased: 09/26/08 Plaintiffs designate New York County as the place of trial AMENDED SUMMONS

To The Above-Named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance on plaintiff's undersigned attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of the venue designated is plaintiffs' residences.

Dated: New York, New York
September 29, 2008

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Plaintiffs

By: _____
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Defendants' Addresses:

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Hon. Andrew Cuomo
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Congregation Shearith Israel
also described as the Trustees
of Congregation Shearith Israel
8 West 70th Street
New York, New York 10023

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,	:	Index No. 650354/08
Plaintiffs,	:	
- against -	:	AMENDED VERIFIED COMPLAINT
CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,	:	
Defendants.	:	

Plaintiffs, by their attorneys, Marcus Rosenberg & Diamond LLP, as their amended verified complaint, upon information and belief, state:

As And For A First Cause Of Action

Overview

1. This action is brought to challenge an extraordinary and unprecedented resolution (the "Resolution") of defendant the New York City Board of Standards and Appeals ("BSA").

2. Pursuant to § 20 of the General City Law, the express purpose of the zoning regulations relating to the height, bulk and location of buildings, including rear yards and other open space, is "to promote the public health and welfare, including . . . provision for adequate light, air [and] convenience of access."

3. The challenged BSA Resolution would permit defendant Congregation Shearith Israel, also referred to as the Trustees of Congregation Shearith Israel (together, "CSI"), to violate important zoning regulations in order to construct a new building (the "New Building"), with a residential tower containing five luxury condominium apartments.

4. The luxury condominium apartments are not for CSI's religious mission or "programmatic needs". They are simply to be sold to generate a cash windfall or, in the words of CSI's attorney, to "monetize" the violation of the New York City Zoning Resolution (the "Zoning Resolution").

5. The BSA Resolution granted CSI other unwarranted benefits, including the right to violate height, bulk, setback and other regulations adopted by the City to protect the neighborhood and its residents.

6. In so doing, BSA permitted CSI to violate the New York City Charter (the "Charter"), the Zoning Resolution and BSA's own rules, to the extent that

BSA was deprived of jurisdiction to entertain CSI's application (the "Application") for zoning variances.

7. Throughout the process, BSA ignored the factual presentations of Plaintiffs and others, affording complete and utter "deference" to CSI's factual claims, thereby illegally abdicating its statutory responsibility.

The Parties

8. Plaintiff Landmark West! Inc. ("Landmark West!") is a New York not-for-profit corporation. Since 1985, Landmark West! has worked with other individuals and grassroots community organizations to protect the historic architecture and development patterns of the Upper West Side and to improve and maintain the community for all of its members.

9. Plaintiff 103 Central Park West Corporation ("103 CPW") is the owner of the cooperative apartment building located at 101 Central Park West, running from West 70th Street to West 71st Street along Central Park West, in the County, City and State of New York.

10. Plaintiff 18 Owners Corp. ("18 W") is the owner of the cooperative apartment building located at 18 West 70th Street, in the County, City and State of New York.

11. Plaintiff 91 Central Park West Corporation ("91 CPW") is the owner of the cooperative apartment building located at 91 Central Park West, at the northwest corner of Central Park West and West 69th Street, in the County, City and State of New York.

12. Plaintiff Thomas Hansen is the owner of the shares allocated to, and is the occupant of, an apartment in the cooperative apartment building at 11 West 69th Street, in the County, City and State of New York.

13. Defendant BSA is the governmental body of the City of New York charged by the General City Law, the Charter and the Zoning Resolution with the authority to entertain and decide applications for variances from the requirements of the Zoning Resolution.

14. Defendant New York City Planning Commission ("City Planning Commission") is named as a defendant due to the obligation to enforce and maintain the objectives of the Zoning Resolution and to prevent "spot zoning".

15. Defendant, Hon. Andrew Cuomo, as Attorney General of the State of New York, is named by reason of the fact that issues as to violations of the New York State Constitution are raised by this action.

16. Defendant CSI is a religious organization, which owns the synagogue building (the "Synagogue") and adjacent parsonage (the "Parsonage") at 99 Central Park West, at the southwest corner of Central Park West and West 70th Street, in the County, City and State of New York, and the four-story school building (the "Community House") and a vacant parcel identified as 6-10 West 70th Street, adjacent to the Synagogue on the west (with the Community House, the "Development Site").

17. 91 CPW is adjacent to the south side of the Synagogue, Parsonage and the Development Site.

18. 18 W is adjacent to the west side of the Development Site.

19. 103 CPW is directly across West 70th Street from the Synagogue and the Development Site.

20. Mr. Hansen occupies an apartment in the building adjacent to the south side of the Development Site.

21. 91 CPW, 18 W and 103 CPW (together, the "Co-ops") are taxpayers with assessments exceeding $1,000.

22. The Co-ops contain the homes and major assets of the owners of the individual apartments, who are taxpayers and members of the community represented by Landmark West!

23. All Plaintiffs are suing to enforce their rights, to prevent illegal actions and to prevent waste of City property and assets, pursuant to General Municipal Law, § 51, and their other statutory and common law rights.

24. All Plaintiffs are within a zone immediately and directly impacted by the New Building proposed to be constructed in the Development Site.

25. All Plaintiffs will experience a reduction of the light, air and convenience of access which the Zoning Resolution is required to protect. In fact, some of the Co-ops' residents will lose the use of windows to their apartments.

BSA Lacked Jurisdiction Because
The Department of Buildings ("DOB")
Objections Were Not Issued By The
DOB Commissioner Or The Manhattan
Borough Commissioner

26. Charter § 666 states:

§ 666 Jurisdiction

The board shall have power:

* * *

6. To hear and decide appeals from and review,

(a) except as otherwise provided by law, any order, requirement, decision or determination the commissioner of buildings or any borough superintendent of buildings acting under written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five. . . .

27. Plaintiffs provided indisputable proof that the October 28, 2005 DOB Notice of Objections (the "Original Notice of Objections"), which formed the basis of CSI's Application to BSA, was not issued by the then Commissioner of Buildings, Patricia J. Lancaster, or the then Manhattan Borough Commissioner, Christopher Santulli, as expressly required by Charter § 666, but by Kenneth Fladen, a "provisional Administrative Borough Superintendent, who also signed on the line for "Examiner's Signature".

28. CSI did not deny this or offer an explanation.

29. In its Resolution, BSA claims that jurisdiction is not required by Charter § 666 because this is an application for a variance pursuant to Charter § 668.

30. Charter § 666 expressly defines the jurisdiction and power of BSA. Section 668 merely describes the added requirements for a variance or a special permit.

31. BSA's own website describes its authority as follows:

> The majority of the Board's activity involves reviewing and deciding applications for variances and special permits, as empowered by the Zoning Resolution, and applications for appeals from property owners whose proposals have been denied by the City's Department of Buildings, Fire or Business Services. The Board also reviews and decides applications from the Departments of Buildings and Fire to modify or revoke certificates of occupancy.
>
> The Board can only act upon specific applications brought by landowners or interested parties who have received prior determinations from one of the enforcement agencies noted above. The Board cannot offer opinions or interpretations generally and it cannot grant a variance or a special permit to any property owner who has not first sought a proper permit or approval from an enforcement agency. Further, in reaching its determinations, the Board is limited to specific findings and remedies as set forth in state and local laws, codes, and the Zoning Resolution, including, where required by law, an assessment of the proposals' environmental impacts.*

32. The failure of CSI to have obtained objections issued by the Commissioner of Buildings or the Borough Superintendent of DOB deprived BSA of jurisdiction to entertain CSI's Application, requiring that the Resolution be vacated.

BSA Lacked Jurisdiction Because The Plans Filed With BSA Were Not The Plans Filed With Or Reviewed By DOB

33. On April 2, 2007, CSI submitted its Application for a variance to BSA, based upon the Original DOB Notice of Objections, which included eight DOB objections to plans submitted by CSI for the New Building under DOB application No. 104250481. Objection No. 8 stated:

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* Unless otherwise indicated, all emphasis herein is added.

PROPOSED SEPARATION BETWEEN BUILDINGS IN R10A DOES NOT COMPLY. 0.00' PROVIDED INSTEAD OF 40.00' CONTRARY TO SECTION 24-67 AND 23-711.

34. In response to the Application, BSA issued a June 15, 2007 Notice of Objections (the "Original BSA Objections"), which required CSI to address, individually, 48 BSA Objections.

35. Among the BSA Objections, the following three required CSI to address objection No. 8 to the Original DOB Notice of Objections:

> 20. Page 24: Please correct the title of the first full paragraph by replacing "Building Separation" with "Standard Minimum Distance Between Building."
>
> 21. Page 24: Please note that ZR § 23-711 prescribes minimum distance between a residential building and any other building on the same zoning lot. Therefore, with the first full paragraph, please clarify that the DOB objection for ZR § 23-711 is due to the lack of distance between the residential portion of the new building and the existing community facility building to remain.
>
> 25. It appears that the "as-of-right" scenario would still require a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings) given that it contains residential use (see Objection # 21). Please clarify.

36. CSI's September 10, 2007 response failed to address these three BSA Objections, stating:

> N/A: DOB Objection #8 omitted by DOB upon reconsideration (See, DOB Objection Sheet and Proposed Plans, dated August 28, respectively).

37. CSI has claimed that it filed an application with "Proposed Plans, dated August 28, 2007" with DOB for reconsideration of the Original DOB Notice of Objections and the August 28, 2007 DOB Notice of Objections (the "Revised DOB Notice of Objections") omitted Objection No. 8 from the Original DOB Notice of Objections.

38. DOB issued the Revised DOB Notice of Objections even though there is no indication that the "Proposed Plans" submitted with the reconsideration application were revised to comply with the noted provisions of the Zoning Resolution.

39. BSA did not produce to BSA its alleged reconsideration application or the documents allegedly submitted therewith, nor are they on file at DOB.

40. When Landmark West! raised this issue at the February 23, 2008 BSA public hearing, the following colloquy took place:

> MR. ROSENBERG: There's been no explanation required as to the difference between the original plans which formed the basis for the application to this Board and the subsequent plans which they claim were provided to DOB.
>
> VICE-CHAIR COLLINS: I don't understand the relevance of that.
>
> The Buildings Department has given an objection sheet. They told us where these filed plans don't meet the zoning. That's what we're here to rule on.
>
> MR. ROSENBERG: They're not filed plans.

VICE-CHAIR COLLINS: Now, do you think that there should be further objections based on the plans that you have access to?

MR. ROSENBERG: As far -- this Board should ask for the answers to its 8th objection that it raised.

VICE-CHAIR COLLINS: But that objection is not before us anymore because revised plans were filed and a new objection sheet was filed. It's a common practice. We see it all the time. I think you're seeing demons where none exist.

MR. ROSENBERG: No, we haven't been told what the difference is between the revised plans and the original plans, if there is any.

VICE-CHAIR COLLINS: All of our files are completely open. You can make an appointment to come and see them. It's my understanding that they've been made available to you from the beginning. I think it is a bogus issue you're raising.

I don't think there's any legal basis for it.

MR. ROSENBERG: Well, with all due respect, what is the difference between the original plans and the revised plans?

CHAIR SRINIVASAN: It doesn't matter. We have a set of objections which is what we're reviewing.

41. In fact, CSI's attorney, Shelly Friedman, later admitted that the plans claimed to be the basis for the various applications to BSA were <u>not</u> the plans presented to or reviewed by DOB:

MR. FRIEDMAN: With regard to the issues raised by counsel to the building regarding the objection sheet, I'm prepared to give you an explanation, if you wish now, of what that situation is all about. It's really up to the Board.

CHAIR SRINIVASAN: Why don't you just tell us what the situation is.

MR. FRIEDMAN: Fine. I would be happy to do so.

CHAIR SRINIVASAN: It seems like you can put it to rest after that.

MR. FRIEDMAN: The original objection sheet that was obtained at the request of the counsel at the Landmarks Commission when this matter was before the Landmarks Commission, which is kind of unusual, because you're in gross schematics at that stage. You haven't really submitted anything to the Buildings Department but the Landmarks Commission wants to know what the Building Department feels are the zoning waivers requested. We submitted that.

Originally, the building, the tower had a slot between the residential building and the synagogue. There was a physical space there that several of the Landmark's Commissioners wanted us to explore. They thought some separation between the two were important.

That gave rise to an objection regarding the separation of buildings.

Now, that zoning -- that envelope did not emerge from Landmarks, although, by that time, nobody was thinking about the objection sheet that had been asked about in 2003.

So, when we got to the Building's Department and it was submitted for zoning review, we recognized that the zoning objection sheet was in error because the building no longer contained the separation issue between the buildings because the two buildings were -- now the new and the old were now joined. That was amended.

42. In other words, until the February 12, 2008 hearing, CSI had represented that the plans which:

- CSI filed to commence its Application; and

- CSI represented under penalty of perjury to be the plans which resulted in the Original DOB Notice of Objections from which BSA's jurisdiction was sought

were not the plans filed at DOB or the ones resulting in the Original DOB Notice of Objections. Rather, the DOB Objections were issued on gross schematics of a different structure in 2003.

43. The representation which was the basis of CSI's Application to BSA was untrue. More importantly, it deprived BSA of jurisdiction, requiring that the Resolution be vacated.

BSA Improperly Authorized A Variance
Solely For Income Generation

44. CSI admitted, and BSA's Resolution held, that the New Building will violate Zoning Resolution parameters for:

(1) Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to Section 24-11/77-24. Proposed interior portion lot coverage is 0.80;

(2) Proposed rear yard in R8B does not comply. 20'.00 provided instead of 30.00' contrary to Section 24-36;

(3) Proposed rear yard in R10A interior portion does not comply. 20.--' provided instead of 30.00' contrary to Section 24-36;

(4) Proposed initial setback in R8B does not comply. 12.00' provided instead of 25.00' contrary to Section 24-36;

(5) Proposed base height in R8B does not comply . . . contrary to Section 23-633;

(6) Proposed maximum building height in R8B does not comply . . . contrary to 23-66;

(7) Proposed rear setback in an R8B does not comply. 6.67' provided instead of 10.00' contrary to Section 23-633. . . .

45. CSI admitted, and BSA's Resolution held, that CSI's Application for waivers of four of seven zoning requirements (items 4 through 7 above) was required solely "to accommodate a market rate residential development that can generate reasonable financial return".

46. CSI admitted, and BSA's Resolution held, that more than 50% of the New Building -- the upper five stories, entrance, elevators and related space, containing 22,352 of 42,406 square feet of the total floor area -- will consist of five condominium apartments and related space to be sold to the public at market rates.

47. In its Resolution, BSA noted:

> [CSI] proposed the need to generate revenue for its mission as a programmatic need, [but] New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization, notwithstanding an intent to use the revenue to support a school or worship space. . . . [F]urther, in previous decisions, [BSA] has rejected the notion that revenue generation could satisfy the (a) finding for a variance application by a not-for-profit organization (see BSA Cal. No. 72-05-BZ, denial of use variance permitting operation by a religious institution of a catering facility in a residential district) and, therefore, requested that [CSI] forgo such justification in its submissions.

48. Moreover, it has been held repeatedly that a zoning board of appeals, such as BSA, may not grant a variance solely on the ground that the use will yield a higher return than permitted by the zoning regulations.

49. As admitted in CSI's Application, "the addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough compiled funds to correct the programmatic deficiencies described. . . . "

50. Thus, the Application "[seeks to produce] capital fundraising that includes a one-time monetization of zoning floor area through developing a moderate amount of residential space. . . . "

51. In spite of this, BSA concluded "that while a nonprofit organization is entitled to no special deference for a development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to develop its property than would be imposed on a private owner."

52. Ignoring its own prior determinations that unrelated revenue generation for a not-for-profit organization does not warrant the granting of a variance, BSA granted the variance for the residential portion of the New Building solely for this purpose.

53. The Resolution, which permits CSI to construct a residential tower with five luxury apartments solely for the purpose of generating income, violates the Zoning Resolution and BSA's own precedents, requiring that it be vacated.

BSA Applied Improper Methods
For Determining Financial Return

54. Since the construction and sale of five apartments was not proposed to meet CSI's programmatic needs, BSA directed CSI to perform a financial feasibility study of CSI's ability to realize a reasonable financial return from an as-of-right residential development.

55. In calculating the financial return of the proposed and as-of-right residential development, CSI employed a rate of return on "project expense", rather than on the basis of invested equity, claiming that such methodology is "characteristically used" for condominium or home sales.

56. Other than the opinion of CSI's witness, no support was offered for this claim.

57. In response, Plaintiffs pointed out that BSA's instructions for a variance application for condominium development [Item M(5)] requires that the applicant

state the amount of equity invested and the return on equity, where the project expense is the sum of borrowed funds and the development's equity.

58. Without citing to any contrary authority, and ignoring its own stated requirements and prior determinations, BSA's Resolution concluded:

> [BSA] notes that a return on profit model which evaluates profit or loss on an unleveraged basis is the customary model used to evaluate the feasibility of market-rate residential condominium development.

59. In fact, "return on profit" is a nonsensical term and not a recognized methodology.

60. Thus, the financial underpinning of the Resolution is defective and the Resolution must be vacated.

CSI Failed To Demonstrate That An As-Of-Right Building Was Financially Infeasible

61. By applying improper methodology, CSI sought to demonstrate that an as-of-right building would be financially infeasible, thereby justifying the requested variances.

62. To the contrary, Plaintiffs demonstrated that, applying well-recognized and accepted methodology, an as-of-right building would be financially feasible.

63. By refusing to apply well-recognized and accepted methodology -- and the methodology expressly required by BSA's application instructions -- BSA reached an erroneous determination, which must be vacated.

64. Moreover, in violation of its own application instructions [Item M(6)], BSA accepted from CSI unsealed construction cost estimates from an unqualified source.

65. CSI's Application was based, in large part, on its "need" to provide space for an unrelated school, which paid rent to CSI.

66. In spite of BSA's request that CSI set forth the amount of such rental income, CSI failed and refused to do so, thereby failing to establish the required element of financial infeasibility.

67. For all of these reasons, the Resolution must be vacated.

CSI Failed To Satisfy § 72-21(e)
Of The Zoning Resolution

68. As acknowledged by the BSA Resolution "as pertains to the (e) finding under ZR § 72-21, [BSA] is required to find that the variance sought is the minimum necessary to afford relief."

69. In two respects, CSI failed to establish this required element.

70. The BSA Resolution acknowledges that the residential tower is not necessary for CSI's programmatic needs.

71. Moreover, BSA's Resolution found that the addition of the residential tower on top of CSI's community facility required:

- An undefined amount of mechanical space and accessory storage space on the cellar level of the community facility;
- Approximately 1,018 square feet of lobby and elevator space on the first floor of the community facility; and
- Approximately 325 square feet of elevator, stair and core building space on each of the second, third and fourth floors of the community facility.

72. The construction of the residential tower, admittedly not required to meet CSI's programmatic needs, would eliminate over 2,000 square feet from the approximately 20,000 square foot community facility, or about 10% of that space.

73. Thus, it cannot be said that the Application established that the proposed community facility variances were the minimum necessary, since their need indisputably would be reduced were not the residential tower to be constructed on top of the community facility.

74. It also is a fundamental principle that, in order to obtain a variance, the applicant must exhaust all other administrative and other remedies to obtain relief before seeking a variance.

75. Pursuant to § 74-711 of the Zoning Resolution, where a zoning lot contains a building designated as a landmark by the Landmarks Preservation Commission or where the zoning lot is located within a Historic District designated by the Landmarks Preservation Commission -- both of which apply to CSI's property -- "the City Planning Commission may permit modification of the use and bulk regulations."

76. Here, CSI admittedly could have obtained relief pursuant to an application to the City Planning commission for a special permit, pursuant to Zoning Resolution § 74-711.

77. CSI's election not to pursue this relief, which would have eliminated the need for all or part of the variances sought, requires a finding that CSI failed to comply, as a matter of law, with Zoning Resolution § 72-21(e).

78. By reason of all of the foregoing, CSI failed to establish a required element for the variance it sought and BSA's Resolution must be vacated.

BSA's "Deference" to CSI Constituted An Improper
Unconstitutional Delegation Of Its Authority

79. In its Resolution, BSA concluded that CSI, as a religious institution, is entitled to substantial deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs in support of the subject variance application, citing Cornell University *v.* Bagnardi, 68 N.Y.2d 583 (1986), a case which merely held that the courts will not review a nonprofit institution's need to expand into a particular neighborhood, not its alleged need to a particular configuration of its building.

80. Similarly, the BSA Resolution cites Guggenheim Neighbors *v.* Board of Estimate (unreported) and Jewish Reconstructionist Synagogue of the North Shore *v.* Roslyn Harbor, 38 N.Y.2d 283 (1975), both of which are limited to the same issue as decided in Bagnardi.

81. In fact, BSA "deferred" to CSI's determination as to the need and propriety of each of the seven variances granted in the Resolution.

82. As noted previously, BSA is charged by the General City Law, the City Charter and the Zoning Resolution with the sole and exclusive authority to determine variance applications.

83. By deferring to CSI for such determinations, BSA abrogated its duty and responsibility and improperly and illegally delegated its authority to CSI.

84. In so doing, BSA refused to consider Plaintiffs' factual presentation that CSI's programmatic needs could be accommodated within an as-of-right building, especially if the space required for the residential tower's entrance, elevators, stairs and other features were included in the base building.

85. Moreover, by applying different standards to CSI as a religious institution, BSA violated the First, Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 11, of the New York State Constitution.

86. BSA's refusal to consider opposing presentations and its delegation of its authority to CSI require that the Resolution be vacated.

BSA Improperly Considered The
Landmarking Of The CSI Synagogue
As A Unique Physical Condition

87. CSI admitted, and BSA's Resolution expressly recognizes, that § 72-21(a) of the Zoning Resolution requires BSA to find (the "a finding"), as a prerequisite for a variance, that "there are unique physical conditions in the Zoning Lot which create practical difficulties or unnecessary hardship in strictly complying with, the requirements".

88. However, BSA's Resolution states that CSI, as a religious institution, need not comply with the "a finding".

89. The Resolution then recites that CSI "represents that the variance request is necessitated not only by its programmatic needs, but also by physical conditions on the subject site -- namely -- the need to retain and preserve the existing landmarked Synagogue . . . [and CSI] states that as-of-right development of the site is constrained by the existence of the landmarked Synagogue building which occupies 63 percent of the Zoning Lot footprint".

90. BSA's Resolution notes:

> WHEREAS, as to the impact of the landmarked Congregation Shearith Israel synagogue building on the ability to develop an as-of-right development on the same zoning lot, the applicant states that the landmarked synagogue occupies nearly 63 percent of the Zoning Lot footprint; and

WHEREAS, the applicant further states that because so much of the Zoning Lot is occupied by a building that cannot be disturbed, only a relatively small portion of the site is available for development. . . .

91. The BSA Resolution concludes:

WHEREAS, the Board notes that the site is significantly underdeveloped and that the location of the landmark Synagogue limits the developable portion of the site to the development site; and

* * *

WHEREAS, the Opposition contends that the inability of the Synagogue to use its development rights is not a hardship under ZR § 72-21 because a religious institution lacks the protected property interest in the monetization of its air rights that a private owner might have, citing Matter of Soc. for Ethical Cult. *v.* Spatt, 51 N.Y.2d 449 (1980); and

WHEREAS, the Opposition further contends that the inability of the Synagogue to use its development rights is not a hardship because there is no fixed entitlement to use air rights contrary to the bulk imitations of a zoning district; and

WHEREAS, the Board notes that Spatt concerns whether the landmark designation of a religious property imposes an unconstitutional taking or an interference with the free exercise of religion, and is inapplicable to a case in which a religious institution merely seeks the same entitlement to develop its property possessed by any other private owner; and

* * *

WHEREAS, the Board further notes that while a nonprofit organization is entitled to no special deference for a development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to develop its property than would be imposed on a private owner; and

WHEREAS, the Board agrees that the unique physical conditions cited above, 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; thereby meeting the required finding under ZR § 72-21(a). . . .

92. Section 74-711 of the Zoning Resolution provides:

In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by the Landmarks Preservation commission, the City Planning Commission may permit modification of the use and bulk regulations.

93. In its Application, CSI expressly disavowed reliance on this provision.

94. Pursuant 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.

95. There is no authority in the General City Law, the Charter or the Zoning Resolution for BSA to entertain or decide such claims or to afford relief.

96. Thus, BSA's action, in considering the effect of the landmark status of the Synagogue was *ultra vires*. To the degree that such considerations cannot simply be excised from the Resolution, the entire Resolution is infirm and must be vacated.

Conclusion

97. Each of the foregoing material violations of applicable law and procedures requires that the Resolution be vacated; together, they conclusively require that result.

98. By reason of the foregoing, a dispute exists among the parties as to whether BSA's Resolution, and the procedures employed in considering and deciding CSI's Application, comply with applicable statutory and common law and precedent established by BSA.

99. Lacking other adequate remedies, Plaintiffs seek a judgment from this Court vacating the BSA Resolution and declaring it to be null and void and without force or effect.

As and For a Second Cause of Action

100. Plaintiffs repeat all prior allegations.

101. A balancing of the equities favors Plaintiffs, who will be irreparably harmed, and applicable law will be violated, unless the Court issues a judgment enjoining the Defendants from proceeding pursuant to the Resolution.

102. Lacking other adequate remedies, Plaintiffs seek a judgment from this Court enjoining any action based upon the BSA Resolution.

WHEREFORE, Plaintiffs demand judgment:

(1) Vacating the BSA Resolution and declaring it to be null and void and without force or effect;

(2) Enjoining Defendants from taking any action based upon the BSA Resolution; and

(3) Granting to Plaintiffs such other and further relief as is appropriate.

Dated: New York, New York
September 29, 2008

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Plaintiffs

By: _____
David Rosenberg
488 Madison Avenue
New York, New York 10022
(212) 755-7500

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Kate Wood, being duly sworn, deposes and says:

1. I am Executive Director of plaintiff Landmark West! Inc. and make this verification on behalf of Landmark West! Inc.

2. I have read the foregoing amended complaint and the contents thereof and I know the same to be true to my own knowledge, except as to matters therein stated upon information and belief, as to which latter matters, my belief is based upon documents and records in our office.

Kate Wood

Sworn to before me this
30 day of September, 2008

Notary Public

BABOR A AHMED
Notary Public - State of New York
NO. 01AH6139536
Qualified in Queens County
My Commission Expires 01-07-2010

Index No. 650354/08

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

LANDMARK WEST!, INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Plaintiffs,

- against -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

AMENDED SUMMONS and AMENDED VERIFIED COMPLAINT

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Plaintiffs
488 Madison Avenue
17th Floor
New York, New York 10022
(212) 755-7500

Certified pursuant to § 130-1.1(a)
of the Rules of the Chief Administrator

By: _____
David Rosenberg

Dated: September 29, 2008

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN	:	Index No. 650354/08
Plaintiffs,	:	
	:	**STIPULATION**
- against -	:	
CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel	:	
Defendants.	:	

It is hereby stipulated and agreed, by and between the undersigned counsel for plaintiffs Landmark West! Inc., 103 Central Park West Corporation, 18 Owners Corp., 91 Central Park West Corporation and Thomas Hansen (collectively "Plaintiffs") and defendants City of New York Board of Standards and Appeals, New York City Planning Commission and Congregation Shearith Israel, also described as the Trustess of Congregation Shearith Israel (collectively "Defendants") as follows:

1. The time for Defendants to answer, move or otherwise respond to the Amended Complaint shall be and hereby is extended through and including December 5, 2008.

2. The time for Plaintiffs to thereafter respond to Defendants' responsive pleading shall be and hereby is extended through and including January 9, 2009.

3. The time for Defendant to thereafter respond to Plaintiffs' responsive pleading shall be and hereby is extended through and including January 26, 2009.

4. This Stipulation is based upon Defendants' representation that no work (demolition or construction) will be performed until after January 31, 2009.

5. The dates above set forth are for the receipt of the documents served.

6. Signatures by facsimile shall be acceptable for purposes of this Stipulation.

Dated: New York, New York

November 25, 2008

MARCUS, ROSENBERG & DIAMOND LLP

By:_____
David Rosenberg

488 Madison Avenue
New York, New York 10022
(212) 755-7500

Attorneys for Plaintiffs Landmark West! Inc., 103 Central Park West Corporation, 18 Owners Corp., 91 Central Park West Corporation and Thomas Hansen.

Dated: New York, New York

November 20, 2008

CORPORATION COUNSEL OF THE CITY OF NEW YORK

By:_____
Christina Hoggan

100 Church Street, Room 5-153
New York, NY 10007
(212) 788-0790

Attorneys for City Defendants.

Dated: New York, New York

November 20 2008

PROSKAUER ROSE LLP

By:_____
Louis M. Solomon

1585 Broadway
New York, NY 10036
(212) 969-3200

Attorneys for Defendant Congregation Shearith Israel, also described as the Trustees of Congregation Shearith Israel.

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

----------x

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs,

- against -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

----------x

AFFIRMATION IN SUPPORT OF CITY DEFENDANTS' MOTION TO DISMISS

Index No. 650354/08

CHRISTINA L. HOGGAN, an attorney duly admitted to practice law before the courts of this state, affirms the truth of the following under the penalties of perjury pursuant to Rule 2106 of the Civil Practice Law and Rules ("CPLR"):

1. I am an Assistant Corporation Counsel in the Office of MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, attorney for New York City Board of Standards and Appeals ("BSA"), and New York City Planning Commission ("City Planning") (collectively "City Defendants"), in the above-captioned matter. This affirmation is based upon my personal knowledge, my review of the records maintained by New York City ("City"), and my conversations with City employees.

2. I submit this affirmation in support of City Defendants' motion to dismiss the Complaint pursuant to CPLR §3211(a)(7) on the grounds that the Complaint fails to state a

cause of action. A copy of the Amended Summons and Complaint dated September 29, 2008 are annexed hereto as Exhibit "A."

3. Plaintiffs commenced the instant action seeking to challenge BSA's final agency determination approving co-Defendant Congregation Shearith Israel's ("CSI") application for a variance for 6-10 West 70th Street ("the subject property"), i.e., BSA Resolution 74-07-BZ. Specifically, Plaintiffs, alleging several errors by BSA in rendering the determination, seek an Order "[v]acating the BSA Resolution [74-07-BZ] and declaring it to be null and void and without force or effect" and "[e]njoining Defendants from taking any action based upon the BSA Resolution." See Complaint at Wherefore Clause. As set forth below, the Complaint should be dismissed because Plaintiffs, despite seeking to challenge a final agency determination, improperly commenced their challenge as a plenary action, rather than as an Article 78 proceeding.[1]

STATUTORY FRAMEWORK

4. Pursuant to CPLR §7803, the proper procedure for challenging an administrative body's determination is by commencing a special proceeding pursuant to CPLR Article 78. CPLR §7803 provides in relevant part:

> **§7803. Questions raised**
> The only questions that may be raised in a proceeding under this article are:
> ....

[1] Notably, Plaintiffs' flouting of Article 78 was intentional. Defendants, believing that Plaintiffs erroneous commencement of their challenge as an action, rather than pursuant to Article 78, was an innocent oversight, contacted Plaintiffs, and requested that they convert this action to an Article 78 proceeding. Plaintiffs, apparently aware that challenges to final agency determinations are brought pursuant to Article 78, refused to convert the action, and expressed that they purposefully brought their challenge as an action.

> whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

5. Pursuant to New York City Administrative Code ("Administrative Code") §25-207, a challenge to a BSA final determination must be made within thirty days of the filing of the determination in the BSA's office.

> **§25-207 Certiorari.**
> a. Petition. Any person or persons, jointly or severally aggrieved by any decision of the board may present to the supreme court a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition must be presented to a justice of the supreme court or at a special term of the supreme court within thirty days after the filing of the decision in the office of the board.

BSA

6. Absent the grant of a variance by the BSA, the use and development of property must conform to and comply with the New York City Zoning Resolution's ("ZR") use and bulk regulations. The ZR provides that the BSA may grant a variance to modify the applicable zoning regulations only where the BSA determines, among other things, that: (1) there are unique physical conditions which create practical difficulties or unnecessary hardships in carrying out the strict letter of the provision; (2) that the lot cannot be developed in accordance with the ZR so as to result in a reasonable return; and (3) that the owner did not create the hardship complained of. ZR §72-21 provides:

> When in the course of enforcement of this Resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this Resolution, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board of Standards and Appeals may, in accordance

with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.

Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this Resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:

(a) that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular #zoning lot#; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the #use# or #bulk# provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the #zoning lot# is located;

(b) that because of such physical conditions there is no reasonable possibility that the #development# of the #zoning lot# in strict conformity with the provisions of this Resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such #zoning lot#; this finding shall not be required for the granting of a variance to a non-profit organization;

(c) that the variance, if granted, will not alter the essential character of the neighborhood or district in which the #zoning lot# is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare;

(d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however, where all other

required findings are made, the purchase of a #zoning lot# subject to the restrictions sought to be varied shall not itself constitute a self-created hardship; and

(e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for.

7. In addition, ZR §72-21 requires the BSA to set forth in its decision or 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.
> Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection.

RELEVANT FACTS

8. The subject premises is located within the Upper West Side/Central Park West Historic District and consists of 2 tax lots (Block 1122, Lots 36 and 37). Presently, tax lot 36 is improved with a Synagogue, and a connected four-story parsonage house, and tax lot 37 is improved, in part, with a four-story Synagogue community house. The community house occupies approximately 40% of the tax lot area, and the remaining 60% is vacant. A copy of BSA Resolution 74-07-BZ is annexed hereto as Exhibit "B."

9. On or about April 1, 2007, CSI submitted an application to BSA for a variance permitting it to demolish the community house, and replace it with a nine-story and

cellar mixed-use community facility/residential building that does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear yard setback applicable in the residential zoning districts in which the subject premises sits. Id.

Thereafter, public hearings were held regarding the variance application on November 27, 2007, February 12, 2008, April 15, 2008 and June 24, 2008. Id. See also copies of the transcripts for the November 27, 2007, February 12, 2008, April 15, 2008 and June 24, 2008 hearings annexed hereto as Exhibits "C," "D," "E," and "F," and a copies of Plaintiffs' Statement in Opposition to Variance Application of CSI, and Summary of Flaws Preventing Reasoned Analysis of Applicant's Request for Variances, dated June 10, 2008, annexed hereto as Exhibits "G."

10. By Decision adopted August 26, 2008, the BSA unanimously granted CSI's application for a variance. In doing so, the BSA considered whether: (1) CSI was entitled to deference as a religious institution; (2) the plans and DOB objections considered were properly before it; and (3) CSI met the requirements set forth in ZR §72-21. Id.

The instant proceeding

11. By Amended Summons and Complaint dated September 29, 2008, Plaintiffs commenced the instant action seeking an order "[v]acating the BSA Resolution [74-07-BZ] and declaring it to be null and void and without force or effect" and "[e]njoining Defendants from taking any action based upon the BSA Resolution." See Complaint at Wherefore Clause.

ARGUMENT

POINT I

PLAINTIFFS IMPROPERLY COMMENCED THIS ACTION AS A PLENARY ACTION RATHER THAN AS AN ARTICLE 78 PROCEEDING

12. Pursuant to the CPLR, the proper procedure for challenging an administrative body's determination is to commence a special proceeding pursuant to CPLR Article 78. See CPLR §§7801, 7803(3). Where as here, a party seeks to challenge a BSA final agency determination, the special proceeding must be brought within 30 days of the filing of the decision in the office of the BSA. See Administrative Code §25-207. See also Caprice Homes, Ltd. v. Bennett, 148 Misc. 2d 503 (Supreme Court of New York, New York County, October 31, 1989).

13. Here, in contravention of the CPLR and Administrative Code §25-207, Plaintiffs commenced a plenary action seeking an Order "[v]acating the BSA Resolution [74-07-BZ] and declaring it to be null and void and without force or effect," and "[e]njoining Defendants from taking any action based upon the BSA Resolution." See Complaint at Wherefore Clause. To this end, Plaintiffs allege that BSA erroneously adopted Resolution 74-07-BZ, and thus improperly granted CSI a variance[2], because BSA: (1) lacked jurisdiction under New York City Charter §666 since the DOB objections the BSA considered, in adopting the Resolution, were not issued by the DOB Commissioner or DOB Manhattan Borough

[2] Pursuant to ZR §72-21, BSA may grant an applicant a variance thereby allowing an applicant to use and develop a property in a manner which does not comply with the ZR's use and bulk regulations. In doing so, BSA considers, among other things, whether: (1) the lot has unique physical conditions which create practical difficulties, or unnecessary hardships in developing the lot in the strict compliance of the ZR provision; (2) the lot can be developed in accordance with the ZR so as to result in a reasonable return; and (3) the owner created the hardship complained of.

Commissioner; (2) lacked jurisdiction since the plans BSA reviewed, in adopting the Resolution, were not filed with, or reviewed by, the DOB; (3) granted CSI a variance solely to allow CSI to generate revenue; (4) utilized the improper method in calculating the revenue CSI could generate developing the subject premises as of right, and as proposed; (5) improperly afforded CSI deference as a religious organization; (6) improperly found that the physical conditions of the subject premises barred CSI from realizing a reasonable return if it developed the subject premises in compliance with the ZR; and (7) improperly considered the subject premises' landmark status as a unique physical conditions "which create[d] practical difficulties or unnecessary hardship in strictly complying with" the ZR. As evidence by the ZR Resolution 74-07-BZ, and the underlying hearing transcripts, these very issues were addressed by the BSA in rendering the challenged determination. Indeed, BSA considered whether: (1) CSI was entitled to deference as a religious institution; (2) the plans and DOB objections considered were properly before it; and (3) CSI met the requirements set forth in ZR §72-21, i.e., if (i) the subject premises has unique physical conditions which create practical difficulties or unnecessary hardships in developing it within the strict letter of the ZR provision; (ii) the subject premises can be developed in accordance with the ZR so as to result in a reasonable return; and (iii) that the subject premises' owner created the hardship complained of. Id. See also Exhibit "D" at pp. 69-74.

14. Thus, since Plaintiffs are clearly challenging BSA's administrative determination, their only recourse was to timely commence an Article 78 proceeding. See CPLR §§7801 and 7803 (3).

15. As Plaintiffs failed to timely commence an Article 78 proceeding, and instead brought this action by Summons and Complaint, this action was improperly commenced, and should be dismissed in its entirety.

Dated: New York, New York
December __, 2008

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Defendants
100 Church Street
1ew York, New York 10007
(212) 788-0461

By: _____
CHRISTINA L. HOGGAN
Assistant Corporation Counsel

Index No. 650354/08

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs,

- against -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

NOTICE OF MOTION TO DISMISS AND AFFIRMATION IN SUPPORT OF CITY DEFENDANTS' MOTION TO DISMISS

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Defendants
100 Church Street
New York, N.Y. 10007

Of Counsel: Christina L. Hoggan
Tel: (212) 788-0461
NYCLIS No.

Due and timely service is hereby admitted.

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

.....*Esq.*

Attorney for .....

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

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LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs, Index No. 650354/08

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CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

----------x

CITY DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS

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

GABRIEL TAUSSIG,
PAULA VAN METER,
CHRISTINA L. HOGGAN
of counsel.

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

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LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

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Defendants.

----------x

CITY DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants, the New York City Board of Standards and Appeals ("BSA"), and New York City Planning Commission ("City Planning") (collectively "City Defendants"), submit this memorandum of law in support of City Defendants' motion to dismiss the Complaint pursuant to CPLR §3211(a)(7) on the grounds that the Complaint fails to state a cause of action. A copy of the Amended Summons and Complaint dated September 29, 2008 are annexed to the Accompanying Affirmation as Exhibit "A."

PRELIMINARY STATEMENT

Plaintiffs commenced the instant action seeking to challenge BSA's final agency determination approving co-Defendant Congregation Shearith Israel's ("CSI") application for a variance for 6-10 West 70th Street ("the subject property"), i.e., BSA Resolution 74-07-BZ.

Specifically, plaintiffs, alleging several errors by BSA in rendering the determination, seek an Order "[v]acating the BSA Resolution [74-07-BZ] and declaring it to be null and void and without force or effect" and "[e]njoining Defendants from taking any action based upon the BSA Resolution." See Complaint at Wherefore Clause. As set forth below, the Complaint should be dismissed because Plaintiffs, despite seeking to challenge a final agency determination, improperly commenced their challenge as a plenary action, rather than as an Article 78 proceeding.[1]

STATUTORY FRAMEWORK

Pursuant to CPLR §7803, the proper procedure for challenging an administrative body's determination is by commencing a special proceeding pursuant to CPLR Article 78. CPLR §7803 provides in relevant part:

> **§7803. Questions raised**
> The only questions that may be raised in a proceeding under this article are:
> ....
>
> whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Pursuant to New York City Administrative Code ("Administrative Code") §25-207, a challenge to a BSA final determination must be made within thirty days of the filing of the determination in the BSA's office.

---

[1] Notably, Plaintiffs' flouting of Article 78 was intentional. Defendants, believing that Plaintiffs erroneous commencement of their challenge as an action, rather than pursuant to Article 78, was an innocent oversight, contacted Plaintiffs, and requested that they convert this action to an Article 78 proceeding. Plaintiffs, apparently aware that challenges to final agency determinations are brought pursuant to Article 78, refused to convert the action, and expressed that they purposefully brought their challenge as an action.

§25-207 Certiorari.

a. Petition. Any person or persons, jointly or severally aggrieved by any decision of the board may present to the supreme court a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition must be presented to a justice of the supreme court or at a special term of the supreme court within thirty days after the filing of the decision in the office of the board.

BSA

Absent the grant of a variance by the BSA, the use and development of property must conform to and comply with the New York City Zoning Resolution's ("ZR") use and bulk regulations. The ZR provides that the BSA may grant a variance to modify the applicable zoning regulations only where the BSA determines, among other things, that: (1) there are unique physical conditions which create practical difficulties or unnecessary hardships in carrying out the strict letter of the provision; (2) that the lot cannot be developed in accordance with the ZR so as to result in a reasonable return; and (3) that the owner did not create the hardship complained of. ZR §72-21 provides:

> When in the course of enforcement of this Resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this Resolution, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board of Standards and Appeals may, in accordance with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.
>
> Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this Resolution in the specific case, provided that as a condition to the grant of any such variance, the

Board shall make each and every one of the following findings:

(a) that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular #zoning lot#; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the #use# or #bulk# provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the #zoning lot# is located;

(b) that because of such physical conditions there is no reasonable possibility that the #development# of the #zoning lot# in strict conformity with the provisions of this Resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such #zoning lot#; this finding shall not be required for the granting of a variance to a non-profit organization;

(c) that the variance, if granted, will not alter the essential character of the neighborhood or district in which the #zoning lot# is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare;

(d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however, where all other required findings are made, the purchase of a #zoning lot# subject to the restrictions sought to be varied shall not itself constitute a self-created hardship; and

(e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for.

In addition, ZR §72-21 requires the BSA to set forth in its decision or 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.
> Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection.

RELEVANT FACTS

The subject premises is located within the Upper West Side/Central Park West Historic District and consists of 2 tax lots (Block 1122, Lots 36 and 37). Presently, tax lot 36 is improved with a Synagogue, and a connected four-story parsonage house, and tax lot 37 is improved, in part, with a four-story Synagogue community house. The community house occupies approximately 40% of the tax lot area, and the remaining 60% is vacant. A copy of BSA Resolution 74-07-BZ is annexed to the Accompanying Affirmation as Exhibit "B."

On or about April 1, 2007, CSI submitted an application to BSA for a variance permitting it to demolish the community house, and replace it with a nine-story and cellar mixed-use community facility/residential building that does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear yard setback applicable in the residential zoning districts in which the subject premises sits. Id.

Thereafter, public hearings were held regarding the variance application on November 27, 2007, February 12, 2008, April 15, 2008 and June 24, 2008. Id. See also copies

of the transcripts for the November 27, 2007, February 12, 2008, April 15, 2008 and June 24, 2008 hearings annexed to the Accompanying Affirmation as Exhibits "C," "D," "E," and "F," and a copies of Plaintiffs' Statement in Opposition to Variance Application of CSI, and Summary of Flaws Preventing Reasoned Analysis of Applicant's Request for Variances, dated June 10, 2008, annexed to the Accompanying Affirmation as Exhibits "G."

By Decision adopted August 26, 2008, the BSA unanimously granted CSI's application for a variance. In doing so, the BSA considered whether: (1) CSI was entitled to deference as a religious institution; (2) the plans and DOB objections considered were properly before it; and (3) CSI met the requirements set forth in ZR §72-21. Id.

The instant proceeding

By Amended Summons and Complaint dated September 29, 2008, Plaintiffs commenced the instant action seeking an order "[v]acating the BSA Resolution [74-07-BZ] and declaring it to be null and void and without force or effect" and "[e]njoining Defendants from taking any action based upon the BSA Resolution." See Complaint at Wherefore Clause.

ARGUMENT

POINT I

PLAINTIFFS IMPROPERLY COMMENCED THIS ACTION AS A PLENARY ACTION RATHER THAN AS AN ARTICLE 78 PROCEEDING

Pursuant to the CPLR, the proper procedure for challenging an administrative body's determination is to commence a special proceeding pursuant to CPLR Article 78. See CPLR §§7801, 7803(3). Where as here, a party seeks to challenge a BSA final agency determination, the special proceeding must be brought within 30 days of the filing of the decision

in the office of the BSA. See Administrative Code §25-207. See also Caprice Homes, Ltd. v. Bennett, 148 Misc. 2d 503 (Supreme Court of New York, New York County, October 31, 1989).

Here, in contravention of the CPLR and Administrative Code §25-207, plaintiffs commenced a plenary action seeking an Order "[v]acating the BSA Resolution [74-07-BZ] and declaring it to be null and void and without force or effect," and "[e]njoining Defendants from taking any action based upon the BSA Resolution." See Complaint at Wherefore Clause. To this end, plaintiffs allege that BSA erroneously adopted Resolution 74-07-BZ, and thus improperly granted CSI a variance[2], because BSA: (1) lacked jurisdiction under New York City Charter §666 since the DOB objections the BSA considered, in adopting the Resolution, were not issued by the DOB Commissioner or DOB Manhattan Borough Commissioner; (2) lacked jurisdiction since the plans BSA reviewed, in adopting the Resolution, were not filed with, or reviewed by, the DOB; (3) granted CSI a variance solely to allow CSI to generate revenue; (4) utilized the improper method in calculating the revenue CSI could generate developing the subject premises as of right, and as proposed; (5) improperly afforded CSI deference as a religious organization; (6) improperly found that the physical conditions of the subject premises barred CSI from realizing a reasonable return if it developed the subject premises in compliance with the ZR; and (7) improperly considered the subject premises' landmark status as a unique physical conditions "which create[d] practical difficulties or unnecessary hardship in strictly

[2] Pursuant to ZR §72-21, BSA may grant an applicant a variance thereby allowing an applicant to use and develop a property in a manner which does not comply with the ZR's use and bulk regulations. In doing so, BSA considers, among other things, whether: (1) the lot has unique physical conditions which create practical difficulties, or unnecessary hardships in developing the lot in the strict compliance of the ZR provision; (2) the lot can be developed in accordance with the ZR so as to result in a reasonable return; and (3) the owner created the hardship complained of.

complying with" the ZR. As evidence by the ZR Resolution 74-07-BZ, and the underlying hearing transcripts, these very issues were addressed by the BSA in rendering the challenged determination. Indeed, the BSA considered whether: (1) CSI was entitled to deference as a religious institution; (2) the plans and DOB objections considered were properly before it; and (3) CSI met the requirements set forth in ZR §72-21, i.e., if (i) the subject premises has unique physical conditions which create practical difficulties or unnecessary hardships in developing it within the strict letter of the ZR provision; (ii) the subject premises can be developed in accordance with the ZR so as to result in a reasonable return; and (iii) that the subject premises' owner created the hardship complained of. Id. See also Exhibit "D" annexed to the Accompanying Affirmation at pp. 69-74.

Thus, since plaintiffs are clearly challenging BSA's administrative determination, their only recourse was to timely commence an Article 78 proceeding. See CPLR §§7801 and 7803 (3). See also SJL Realty Corp. v. City of Poughkeepsie, 133 AD2d 682, 683 (2d Dep't 1987) (finding that an Article 78 proceeding must be brought in order to challenge an administrative determination), citing Town of Arietta v State Bd. of Equalization & Assessment, 56 N.Y.2d 356 (1982) and Renely Dev. Co. v. Town Bd. of Kirkwood, 106 A.D.2d 717 (3d Dep't 1984). See also Fiore v. Zoning Board of Appeals, 21 N.Y.2d 393 (1968); Pecoraro v. Bd. of Appeals, 2 N.Y.3d 608 (2004); Conley v. Town of Brookhaven Zoning Board of Appeals, 40 N.Y.2d 309 (1976); Soho Alliance v. the New York City Board of Standards and Appeals, 264 A.D.2d 59 (1st Dep't 2000) aff'd 95 N.Y.2d 437; Fuhst v. Foley, 45 N.Y.2d 441 (1978); Karneil v. Bennett, 186 A.D.2d 742 (2d Dep't 1992); Faham v. Bockman, 151 A.D.2d 665 (2d Dep't 1989); Cowan v. Kern, 41 N.Y.2d 591 (1977), reargument denied. As Plaintiffs failed to timely

commence an Article 78 proceeding, and instead brought this action by Summons and Complaint, this action was improperly commenced, and should be dismissed in its entirety.

CONCLUSION

WHEREFORE, the City Defendants respectfully request that the Court dismiss the Complaint.

Dated: New York, New York
December __, 2008

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Defendants
100 Church Street
1ew York, New York 10007
(212) 788-0461

By: _____
CHRISTINA L. HOGGAN
Assistant Corporation Counsel

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

----------x

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs,

- against -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

----------x

NOTICE OF CITY DEFENDANTS' MOTION TO DISMISS

Index No. 650354/08

PLEASE TAKE NOTICE that upon the annexed affirmation of Assistant Corporation Counsel, Christina L. Hoggan, dated December 5, 2008, the undersigned will move before the Motion Submission Part of the Courthouse, room 130, located at 60 Centre Street, New York, New York, on the 28th day of January, 2009 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order pursuant to CPLR §3211(a)(7) dismissing this action on the grounds that the Complaint fails to state a cause of action, and for such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that in the event that the Court denies this motion, the undersigned hereby requests permission to serve and file an answer within thirty (30) days from service of Notice of Entry.

Dated: New York, New York
December 5, 2008

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

By: _____
CHRISTINA L. HOGGAN
Assistant Corporation Counsel

ORIGINAL

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs,

v.

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel

Defendants.

029416 018389

Index No. 650354/08

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Louis M. Solomon, dated December 5, 2008, upon Defendant Congregation Shearith Israel's Memorandum of Law in Support of Its Motion to Dismiss for Failure to State a Claim, dated December 5, 2008, and upon all prior pleadings and proceedings herein, Defendant Congregation Shearith Israel shall move before this Court in the Motion Submission Part (Room 130) of the New York County Courthouse, 60 Centre Street, New York, New York 10007 on January 28, 2009 at 9:30 A.M. for an Order pursuant to CPLR 3211(a)(7) dismissing the Amended Complaint in this Action for failure to state a cause of action, and for such further relief as may be just, proper, and equitable.

ir:

Please take notice that the within is a true
opy of
his day duly entered and filed herein in the
ffice of the clerk of .....

.....

f New York
)ated, New York *20*

Yours, etc.,
ROSKAUER ROSE LLP
:ttorneys for
:85 Broadway
ew York, NY 10036-8299

'o

.ttorneys for

---

ir:

Please take notice that an order of
vhich the within is a true copy will be pre-
ented for settlement and signature herein
)
t *of*
his Court at
1 the Borough of
City of New York,
n the day of *,20*
t o'clock in the *noon.*
)ated, New York, *20*

Yours, etc.,
'ROSKAUER ROSE LLP
Ittorneys for
:85 Broadway
ew York, NY 10036-8299

'o

Ittorneys for

INDEX NUMBER 650354 200 8

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Plaintiff,

v.

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

NOTICE OF MOTION

PROSKAUER ROSE LLP

Attorneys for Defendant,

Congregation Shearith Israel

1585 Broadway
New York, NY 10036-8299
Telephone 212.969.3000

All communications should be referred to Louis M. Solomon

Due service of a copy of the within is hereby admitted.

Dated, New York December 5, 2008

To

Attorneys for

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b), answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven (7) days before the date on which the motion is noticed to be heard.

Dated: New York, New York
December 5, 2008

Respectfully,

PROSKAUER ROSE LLP

By: _____
Louis M. Solomon

1585 Broadway
New York, New York 10036-8299
(212) 969-3000 (telephone)
(212) 969-2900 (facsimile)

Attorneys for Defendant Congregation Shearith Israel

TO: David Rosenberg, Esq.

MARCUS, ROSENBERG & DIAMOND LLP
488 Madison Avenue
New York, New York 10022
(212) 755-7500

Attorneys for Plaintiffs Landmark West! Inc., 103 Central Park West Corporation, 18 Owners Corp., 91 Central Park West Corporation and Thomas Hansen

Christina Hoggan, Esq.

CORPORATION COUNSEL OF THE CITY OF NEW YORK
100 Church Street, Room 5-153
New York, New York 10007
(212) 788-0790

Attorneys for City Defendants

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN *Plaintiffs*, v. CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel *Defendants.*	Index No. 650354/08 **AFFIRMATION OF LOUIS M. SOLOMON**

Louis M. Solomon, an attorney duly licensed to practice law before the Courts of the State of New York, hereby affirms that the following is true under penalty perjury:

1. I am an attorney at Proskauer Rose LLP, counsel for the Defendant Congregation Shearith Israel ("Congregation"). I submit this affirmation in support of Defendant Congregation's motion to dismiss the complaint of Landmark West! Inc., 103 Central Park West Corporation, 18 Owners Corp., 91 Central Park West Corporation and Thomas Hansen. Defendant Congregation's motion to dismiss the complaint relies further on the affirmation of Christina Hoggan, dated December 5, 2008, and the exhibits thereto, and the City Defendants' Memorandum of Law in Support of Their Motion to Dismiss, dated December 5, 2008.

2. A true and correct copy of the complaint is annexed hereto as Exhibit 1.

Dated: December 5, 2008

Louis M. Solomon

Proskauer Rose LLP
1585 Broadway
New York, New York 10036-8299
(212) 969-3000

Attorneys for Defendant
Congregation Shearith Israel

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN, *Plaintiffs,* - against - CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel, *Defendants.*	:	Index No. 650354/08 AMENDED VERIFIED COMPLAINT

Plaintiffs, by their attorneys, Marcus Rosenberg & Diamond LLP, as their amended verified complaint, upon information and belief, state:

As And For A First Cause Of Action

Overview

1. This action is brought to challenge an extraordinary and unprecedented resolution (the "Resolution") of defendant the New York City Board of Standards and Appeals ("BSA").

ORIGINAL

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs,

v.

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel

Defendants.

Index No. 650354/08

MEMORANDUM OF LAW OF DEFENDANT CONGREGATION SHEARITH ISRAEL IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT

PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Attorneys for Defendant Congregation Shearith Israel

Defendant Congregation Shearith Israel (the "Congregation") moves this Court, pursuant to CPLR § 3211(a)(8), for an order dismissing with prejudice the Verified Amended Complaint ("Amended Complaint"), for failure to state a cause of action because of Plaintiffs' non-compliance with CPLR § 304;[1] CPLR § 7801;[2] New York City Charter Chapter 27, § 669(d);[3] and New York City Administrative Code, Title 25, Chapter 2, § 25-207(a).[4]

Defendant Congregation adopts and relies upon the arguments in the City Defendants' Memorandum of Law in Support of Their Motion to Dismiss.

Plaintiffs, in their Amended Complaint, purport to assert a challenge to a resolution of the Defendant New York City Board of Standards and Appeals ("BSA"). Plaintiffs, however, have made two fatal errors. First, Plaintiffs have failed to file their Amended Complaint as required under CPLR § 304. The payment of a filing fee and the filing of initiatory papers commence actions or special proceedings in New York courts. *Gershel v. Porr*, 675 N.E.2d 836, 839 (N.Y. 1996); *Spodek v. N.Y. State Comm'n of Taxation & Fin.*, 651 N.E.2d 1275, 1276 (N.Y. 1995); CPLR § 304. Service of process without first paying the filing fee and filing the initiatory papers is a nullity, as an action or proceeding has not been properly commenced. *Gershel*, 675 N.E.2d at 839.

Second, Plaintiffs have improperly filed a plenary lawsuit instead of an Article 78 petition. A party seeking to review an administrative body's determination must proceed by Article 78. *Price v. N.Y.*

---

1 CPLR § 304 provides that "an action is commenced by filing a summons and complaint or summons with notice...filing shall mean the delivery of the summons with notice, summons and complaint or petition to the clerk of the court in the county in which the action or special proceeding is brought."

2 CPLR § 7801 provides that relief previously obtained by writs of certiorari shall now be obtained in article 78 proceedings.

3 New York City Charter, Chapter 27, § 669(d), explains that "any decision of the board under this section may be reviewed in accordance with § 25-207 of the Administrative Code of the City of New York."

4 New York Administrative Code, Title 25, Chapter 2, § 25-207(a) provides that "any person or persons, jointly or severally aggrieved by any decision of the board may present to the supreme court a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality."

City Bd. of Educ., 837 N.Y.S.2d 507, 512 (N.Y. Sup. Ct. 2007). *See also* New York City Charter Chapter 27, § 669(d); and New York City Administrative Code, Title 25, Chapter 2, § 25-207(a).

For the foregoing reasons, and the reasons stated in the City Defendants' Memorandum of Law in Support of Their Motion to Dismiss, Defendant Congregation requests that the Amended Complaint be dismissed with prejudice in its entirety against all Defendants.

Dated: New York, New York
December 5, 2008

PROSKAUER ROSE LLP

By: _____
Louis M. Solomon

1585 Broadway
New York, New York 10036
(212) 969-3000

Attorneys for Defendant
Congregation Shearith Israel

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

----------X

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

-against-

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel

Defendants.

----------X

AFFIDAVIT OF SERVICE

INDEX NO. 650354/08

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

KENNETH BIGLIANI, being duly sworn, deposes and states:

1. I am not a party to this action, am over 18 years of age and reside in Jersey City, NJ.

2. On December 5, 2008, I served the foregoing (i) Defendant CONGREGATION SHEARITH ISRAEL'S NOTICE OF MOTION TO DISMISS THE AMENDED COMPLAINT; (ii) MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CONGREGATION SHEARITH ISRAEL'S MOTION TO DISMISS THE AMENDED COMPLAINT ; upon the following:

MARCUS, ROSENBERG & DIAMOND LLP
488 Madison Avenue
New York, New York 10022
David Rosenberg, Esq.
Attorneys for Plaintiffs

REQUEST FOR JUDICIAL INTERVENTION

UCS-840(REV 1/2000)

Supreme COURT | New York COUNTY | 650354/08 INDEX NO. | 09/26/08 DATE PURCHASED

For Clerk Only
12-18-08
IAS entry date 029416
Judge Assigned 018389
RJI Date

PLAINTIFF(S): Landmark West! Inc, 103 Central Park West Corporation, 18 Owners Corp., 91 Central Park West Corporation and Thomas Hansen

DEFENDANT(S): City of New York Board of Standards & Appeals, New York City Planning Commission, Hon. Andrew Cuomo, as Attorney General of State of New York, and Congregation Shearith Israel

Date issue joined: _____ Bill of particulars served (Y/N): [ ]Yes [ ]No

NATURE OF JUDICIAL INTERVENTION (check ONE box only AND enter information)

[ ] Request for preliminary conference

[ ] Note of issue and/or certificate of readiness

[✓] Notice of motion (return date: 1-28-09, Relief sought dismissal)

[ ] Order to show cause (clerk enter return date: _____) Relief sought _____

[ ] Other ex parte application (specify: _____)

[ ] Notice of petition (return date: _____) Relief sought _____

[ ] Notice of medical or dental malpractice action (specify: _____)

[ ] Statement of net worth

[ ] Writ of habeas corpus

[ ] Other (specify: _____)

VAL 4

INDEX NUMBER 650354 YEAR 2008

6 RJI FEE	95.00
15 MOTIONS	45.00
TOTAL	140.00
CASH	140.00

CSNS CASHIER DATE TIME TERM
12416 3000 08 DEC 17 3:42 PM 60-1

NATURE OF ACTION OR PROCEEDING (Check ONE box only)

MATRIMONIAL
[ ] Contested -CM
[ ] Uncontested -UM

COMMERCIAL
[ ] Contract -CONT
[ ] Corporate -CORP
[ ] Insurance (where insurer is a party, except arbitration) -INS
[ ] UCC (including sales, negotiable instruments) -UCC
[ ] *Other Commercial -OC

REAL PROPERTY
[ ] Tax Certiorari -TAX
[ ] Foreclosure -FOR
[ ] Condemnation -COND
[ ] Landlord/Tenant -LT
[✓] *Other Real Property ORP -ORP

OTHER MATTERS
[ ] * -OTH

TORTS

Malpractice
[ ] Medical/Podiatric -MM
[ ] Dental -DM
[ ] *Other Professional -OPM

[ ] Motor Vehicle -MV
[ ] *Products Liability -PL

[ ] Environmental -EN
[ ] Asbestos -ASB
[ ] Breast Implant -BI
[ ] *Other Negligence -OTN

[ ] *Other Tort (including intentional) -OT

SPECIAL PROCEEDINGS
[ ] Art. 75 (Arbitration) -ART75
[ ] Art. 77 (Trusts) -ART77
[ ] Art. 78 -ART78
[ ] Election Law -ELEC
[ ] Guardianship (MHL Art. 81) -GUARD81
[ ] *Other Mental Hygiene -MHYG
[ ] *Other Special Proceeding -OSP

Check "YES" or "NO" for each of the following questions:

Is this action/proceeding against a

YES	NO		YES	NO	
[ ]	[✓]	Municipality: (Specify_____)	[✓]	[ ]	Public Authority: (Specify City of NY Board of Standards + Appeals and NYC Planning Commission)

YES	NO	
[✓]	[ ]	Does this action/proceeding seek equitable relief?
[ ]	[✓]	Does this action/proceeding seek recovery for personal injury?
[ ]	[✓]	Does this action/proceeding seek recovery for property damage?

Pre-Note Time Frames:
(This applies to all cases except contested matrimonials and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJI to filing of Note of Issue):

☐ Expedited: 0-8 months ☐ Standard: 9-12 months ☐ Complex: 13-15 months

Contested Matrimonial Cases Only: (Check and give date)

Has summons been served? ☐ No ☐ Yes, Date_____

Was a Notice of No Necessity filed? ☐ No ☐ Yes, Date_____

ATTORNEY(S) FOR PLAINTIFF(S):

Self Rep.*	Name	Address	Phone #
☐	Marcus Rosenberg + Hanford	488 Madison Ave, 17th New York, NY 10022	212 755 7500
☐			

ATTORNEY(S) FOR DEFENDANT(S):

Self Rep.*	Name	Address	Phone #
☐	Proskauer Rose LLP	1585 Broadway New York, NY 10036	212 969 3000
☐	Corporation Counsel of City of New York	100 Church Street New York, NY 10007	212 788 0790

*Self Represented parties representing themselves, without an attorney, should check the "Self Rep." box and enter their name, address, and phone # in the space provided above for attorneys.

INSURANCE CARRIERS:

N/A

RELATED CASES: (IF NONE, write "NONE" below)

Title	Index #	Court	Nature of Relationship
Ettanel V Bd + Stds.	113227/08	Supreme New York	same cause of action

I AFFIRM UNDER PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated:
12/17/08

Louis M Solomon
(SIGNATURE)

Louis M Solomon
(PRINT OR TYPE NAME)

Cong. Shearith Israel
ATTORNEY FOR

ATTACH RIDER SHEET IF NECESSARY TO PROVIDE REQUIRED INFORMATION

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

~~NIZAM PETER KETTANEH and HOWARD LEPOW,~~ LANDMARK WEST! INC., et al. Petitioners,	Index No. ~~104077/08~~ (LOBIS) 650354/2008
against	
BOARD OF STANDARDS AND APPEALS OF THE CITY 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.	**AFFIDAVIT OF SERVICE**

ALLEN F. HEALY, being duly sworn, deposes and states:

1. I am not a party to this action, am over eighteen years of age, and reside in Bronx, New York.

2. On December 17, 2008, I served, by first class mail, a true copy of the Request For Judicial Intervention, upon the following:

David Rosenberg, Esq.
Marcus, Rosenberg & Diamond LLP
488 Madison Avenue
New York, NY 10022
Attorneys for Plaintiffs Landmark West! Inc., 103 Central Park West Corporation, 18 Owners Corp., 91 Central Park West Corporation and Thomas Hansen

Christina Hoggan, Esq.
Corporate Counsel of the City of new York
100 Church Street, Room 5-153
New York, NY 10007
Attorneys for City Defendants

3. I made said services by depositing a true copy of the above referenced document, enclosed in two prepaid, sealed wrappers, properly addressed to the above-named parties, in an official depository, located on the northwest corner of Broadway and 48th Street, under the exclusive care and custody of the United States Postal Service within the State of New York.

Allen F. Healy
Process Server's License #0921311

Sworn to before me this
17th day of December, 2008.

(Notary Public)

JESUS HERNANDEZ
Notary Public, State of New York
No. 01HE4614466
Qualified in Kings County
Commission Expires Feb. 26, 2011

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Jonathan Acosta, being duly sworn, deposes and says:

1. I am over 18 years of age and reside in Bronx County, New York.

2. On January 9, 2009, at 4:29 p.m., I served a copy of the within Affirmation in Opposition and Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss upon the following:

Proskauer Rose LLP
Attorneys for Defendant
Congregation Shearith Israel
1585 Broadway
New York, New York 10036-8299
Attn: Louis M. Solomon, Esq.

by personally delivering a true copy thereof to a person who identified herself as Melanie Hills at the building's message center.

3. Ms. Hills is approximately 24 years of age, with black hair and brown eyes, and is approximately 5'4" in height.

4. For security purposes, the building does not permit deliveries to be made to the individual offices within the building but requires that they be made to the building's message center, which is then responsible for delivery to the individual offices.

Jonathan Acosta

Sworn to before me this
12th day of January, 2009

Notary Public

JACQUELINE D. SMITH
Notary Public, State of New York
No. 01SM4999010
Qualified in Kings County
Commission Expires 2/13/10

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PATRICIA BEDE, being duly sworn deposes and says:

1. I am over 18 years of age, am not a party herein and reside in Hudson County, New Jersey.

2. On January 9, 2009, I served copies of the within Affirmation in Opposition and Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss upon the below-listed attorney for defendants New York City Board of Standards and Appeals and New York City Planning Commission:

Corporation Counsel of the City of
New York
100 Church Street
Administrative Law Room 5-154
New York, New Yrok 10097
Attn: Christin Hoggan, Esq.
CHoggan@law.nyc.gov
FedEx Tracking No. 7962 4317 9066

(a) by attaching the same (without exhibits) to an e-mail at 3:49 p.m., addressed to the e-mail address listed above (copy of e-mail attached hereto), receipt of which was acknowledged; and

(b) by enclosing the same (with exhibits) in a properly addressed, Federal Express "Fedex Envelope", marked for Priority Delivery on

Monday, January 12, 2009, and depositing same in a Federal Express box located at 488 Madison Avenue, New York, New York. The domestic airbill number of such envelope is listed above.

Patricia Bede

Sworn to before me this
12th day of January, 2009

Notary Public

JACQUELINE D. SMITH
Notary Public, State of New York
No. 01SM4999010
Qualified in Kings County
Commission Expires 7/13/10

Pat Bede

From: Pat Bede

Sent: Friday, January 09, 2009 3:58 PM

To: Christina Hoggan (CHoggan@law.nyc.gov)

Cc: David Rosenberg (dr@realtylaw.org)

Subject: Landmark West!, et al. v. CSI, et al.

Attachments: 1-9-09 Landmark West Memorandum of Law.pdf; 1-9-09 Landmark West Affirmation in Opposition.pdf

As we discussed earlier, attached are the brief and an affirmation in opposition which are to be served today pursuant to the stipulation. I have not attached the exhibits to the affirmation (since you already have most, if not all, of them), but they are included with the copy being sent via Federal Express for delivery on Monday morning.

Thank you.

Pat Bede
Sec'y to David Rosenberg
Marcus Rosenberg & Diamond LLP
488 Madison Avenue, 17th floor
New York, NY 10022-5702
TEL 212-755-7500
FAX 212-755-8713
URL www.realtylaw.org

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

- x

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN, : Index No. 650354/08

Plaintiffs,

- against -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

- x

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Plaintiffs
488 Madison Avenue
17th Floor
New York, New York 10022
(212) 755-7500

Certified pursuant to § 130-1.1(a)
of the Rules of the Chief Administrator

By: ______________________
David Rosenberg

Dated: January 9, 2009

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

- x

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,	:	Index No. 650354/08
Plaintiffs,	:	
- against -	:	
CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,	:	
Defendants.	:	

- x

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

PRELIMINARY STATEMENT

This memorandum of law is submitted by Plaintiffs in opposition to the motions by Defendants seeking dismissal of the complaint.

Statement of Facts[1]

The Parties

Plaintiff Landmark West! is a not-for-profit corporation which has spearheaded efforts to protect the historic architecture and development patterns of the Upper West Side, working to improve and maintain the community for more than 25 years. Today, Landmark West! continues these efforts throughout New York City.

The other two plaintiffs in the original complaint (the "Complaint") are cooperative apartment corporations ("the "Co-ops") which own buildings near the corner of Central Park West and West 70th Street. The plaintiffs added by the amended complaint (the "Amended Complaint") are another neighboring co-op and a neighboring individual.

Defendant Congregation Shearith Israel, also referred to as the Trustees of Congregation Shearith Israel (together, "CSI") owns the synagogue building and adjacent parsonage at 99 Central Park West, at the southwest corner of Central Park West and West 70th Street, and the four-story school building and a vacant parcel identified as 6-10 West 70th Street, adjacent to the synagogue on the west.

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[1] All facts set forth herein are stated in the verified complaint, which is incorporated herein by reference.

Defendant New York City Planning Commission ("City Planning Commission") is named as a defendant due to the obligation to enforce and maintain the objectives of the Zoning Resolution and to prevent "spot zoning".

Defendant New York City Board of Standards and Appeals ("BSA" and, together with Planning Commission, the "City Defendants") is the governmental body of the City of New York charged by the General City Law, the Charter and the Zoning Resolution with the authority to entertain and decide applications for variances from the requirements of the Zoning Resolution.

Defendant Hon. Andrew Cuomo, as Attorney General of the State of New York, is named because Plaintiffs have raised constitutional issues.

Overview

This action was commenced to challenge an extraordinary and unprecedented resolution (the "Resolution") of BSA, which violates:

- The New York City Charter (the "Charter");
- The New York City Zoning Resolution (the "Zoning Resolution");
- BSA's own rules;

- The First, Fifth and Fourteenth Amendments to the United States Constitution; and

- Article 1, § 11, of the New York State Constitution.

The Resolution

The challenged BSA Resolution granted to CSI seven zoning variances that will allow it to violate legitimate height, bulk, setback and other regulations adopted by the City of New York (the "City") to protect the health, welfare and safety of the residents and property owners of the neighborhood adjacent to CSI (including Plaintiffs), as well as the historic character of the neighborhood.

The variances granted by BSA in its unprecedented resolution will allow CSI to demolish the current structure and construct a new building on its property (the "New Building") with a non-conforming residential tower containing five floors of luxury apartments (the "Luxury Apartments").

No activities related to CSI's religious mission or its "programmatic needs" will be conducted in the Luxury Apartments. CSI has been very clear that the purpose of the project is to "monetize" its variance-dependent development rights.

Throughout the process, BSA refused to consider the factual presentations by Plaintiffs and others, affording complete and utter "deference" to CSI's factual claims, thereby illegally abdicating its statutory responsibility and failing to independently determine whether the variances granted to CSI were necessary or appropriate.

Additionally, the indisputable proof reveals that BSA granted CSI these extraordinary rights in violation of the New York City Charter, the Zoning Resolution, BSA's own rules and the United States and New York State Constitutions, by among other things, improperly authorizing zoning variances to CSI for purely monetary gain, entertaining CSI's application for such variances although BSA lacked jurisdiction to do so, applying improper methodology to determine financial return and to determine that an as-of-right building was financially infeasible -- in contravention of BSA's own stated requirements and prior determinations, and applying different standards to CSI as a religious institution.

Any one of these actions, and others, provide a basis to vacate the Resolution.

The Defendants' Motion To Dismiss

Despite the serious nature of Plaintiffs' claims, none of these claims, nor the detailed factual recitation in the Amended Complaint, have been denied by Defendants, since they have elected not to answer it.

Instead of joining issue, Defendants have moved to dismiss the Amended Complaint, pursuant to CPLR 3211(a)(7), on the ground that it fails to state a cause of action.

However, Defendants' motions attack only the form in which Plaintiffs have chosen to seek judicial intervention, not the substance of Plaintiffs' well-pleaded claims. As a result, at least for purposes of these motions, the detailed facts set forth in Plaintiffs' Amended Complaint should be presumed to be true and to state legally cognizable claims.

ARGUMENT

Point I

The Action Was Commenced Properly For Declaratory And Injunctive Relief

The nine-page memorandum of law submitted by the City Defendants asserts a single argument:

> Plaintiffs Improperly Commenced This Action As A Plenary Action Rather Than As An Article 78 Proceeding

Based upon this single argument -- and without addressing the merits of Plaintiffs' claims -- the City Defendants demand dismissal of the Amended Complaint.

The three-page memorandum of law submitted by CSI expressly adopts the City Defendants' memorandum of law. Stating that "Plaintiffs have improperly filed a plenary lawsuit instead of a Article 78 petition," CSI demands dismissal with prejudice.[2]

Contrary to Defendants' claims, Plaintiffs' Amended Complaint does not merely seek a review of an administrative determination, but rather seeks a judgment declaring that:

- BSA lacked jurisdiction to entertain and decide CSI's application because DOB's objections were not issued by the DOB Commissioner or the Manhattan Borough Commissioner, as required by Section 666 of the New York City Charter;

- BSA lacked jurisdiction to entertain and decide CSI's application because the plans filed with BSA were not the plans filed with or reviewed by DOB;

- BSA's "deference" to CSI constituted an unconstitutional delegation of its authority under the General City Law, the City Charter and the Zoning Resolution;

- BSA's application of different standards to CSI as a religious institution violated the First, Fifth and Fourteenth Amendments to

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[2] CSI's other claim is addressed in Point III.

the United States Constitution and Article 1, § 11, of the New York State Constitution; and

- BSA violated the City Charter and the Zoning Resolution by determining issues solely within the jurisdiction of the City Planning Commission and the Landmarks Preservation Commission.

Where the facts are not in dispute and a constitutional question is raised, as here, an action for a declaratory judgment is the proper remedy:

> The undisputed facts in this case make it peculiarly one where the remedy of a declaratory judgment should be granted.[3] That remedy is applicable in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved. In such cases, pure questions of law are presented. It would be difficult to imagine a case where that remedy would be more applicable.

Dun & Bradstreet, Inc. *v.* City of New York, 276 N.Y. 198, 206 - 207 (1937); *see*, Horodner *v.* Fisher, 38 N.Y.2d 680, 382 N.Y.S.2d 28 (1976), wherein a driver commenced an Article 78 proceeding arguing that the revocation of his driver's license had not met the constitutional requirements of due notice and hearing. As the Court of Appeals held:

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[3] Unless otherwise indicated, all emphasis is added.

> In order for this court to properly reach the constitutional issue, it is necessary that we convert this article 78 proceeding into a declaratory judgment action. . . .

Similarly, where a public agency, as here, acts without jurisdiction, its acts are illegal and void. In such cases, an Article 78 proceeding is not an adequate remedy, but relief should be sought in an action for a declaratory judgment. Dun & Bradstreet, Inc. *v.* City of New York, *supra*, 276 N.Y. at 206. As stated in Foy *v.* Schechter, 1 N.Y.2d 604, 615, 154 N.Y.S.2d 927, 935 (1956):

> Insofar as concerns the four months' Statute of Limitations prescribed by section 1286 of the Civil Practice Act, this bars only those parts of the petition which attack the grading resolution by the Municipal Civil Service Commission upon the ground of arbitrariness. As indicated in the footnote in the *Corrigan* opinion, such an attack would need to be made in an article 78 proceeding instituted directly against the Municipal Commission, which would, of course, have to be instituted within the four months' period limited by section 1286. It is otherwise where the commission resolution is attacked for lack of power. . . .

In any event, where it is alleged that the actions of the public agency are void, those actions may be challenged in an Article 78 proceeding or a declaratory judgment action, irrespective of whether a particular proceeding has been labelled as "exclusive". Emunim *v.* Fallsburg, 78 N.Y.2d 194, 204, 573 N.Y.S.2d 43, 47 (1991); *compare*, Watchtower Bible & Tract Society *v.* Lewisohn, 35 N.Y.2d 92, 358 N.Y.S.2d 757 (1974); Toscano *v.* McGoldrick, 300 N.Y. 156, 162 (1949) (rejecting the argument that an Article 78 proceeding was the exclusive remedy, stating: "[A]rticle 78 cannot be interpreted as excluding an action at law in a heretofore appropriate case").

In Lutheran Church in America *v.* City of New York, 42 A.D.2d 547 - 548, 345 N.Y.S.2d 24 - 27 (1st Dep't 1973), the Appellate Division noted that the case originally had been commenced as an action seeking a judgment declaring that the Landmarks Preservation Law had been unconstitutionally applied to the building owned by the plaintiff church and enjoining interference by the City with the use of the building. However, the trial court "converted [it] to the semblance of an article 78 proceeding", for which reason the Appellate Division applied the "substantial evidence" test. *Id.*, 42 A.D.2d at 547, 345 N.Y.S.2d at 26.

On appeal, the Court of Appeals reversed, holding (35 N.Y.2d 121, 127 - 128, 359 N.Y.S.2d 7, 13 (1974):

> We find no justification for both courts having converted this action into a proceeding. Plaintiff started this as a declaratory judgment action and adhered to that theory.

The Court then declared that the statute, as applied, violated the plaintiff's constitutional rights.

Thus, for several reasons, this action was properly commenced for declaratory and injunctive relief.

Point II

Should The Court Conclude That This Action More Properly Is An Article 78 Proceeding, The Remedy Is Conversion, Not Dismissal

Disingenuously, and violating their obligations under EC 7-23 of the Code of Professional Responsibility,[4] counsel for none of the Defendants has mentioned CPLR 103(c) which states:

> If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.

Here, none of the Defendants has moved to dismiss for lack of personal jurisdiction, thereby conceding that the Court has jurisdiction over the parties. ("An objection based upon a ground specified in paragraph 8 . . . [of CPLR 3211(a), the court has no jurisdiction of the person of the defendant] is waived if a party moves on any of the grounds set forth in subdivision a [of CPLR 3211] without raising such objection. . . .")

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[4] "Where a lawyer knows of controlling legal authority directly adverse to the position of the client, the lawyer should inform the tribunal of its existence, unless the adversary has done so. . . . "

The application of CPLR 103(c) was clearly enunciated by Chief Judge Breitel, in First Nat. City Bank *v.* City of New York, 36 N.Y.2d 87, 94, 365 N.Y.S.2d 493 (1975):

> Under CPLR 103 (subd.[c]), the courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its proper prosecution (see, e.g., *Phalen v. Theatrical Protective Union*, 22 N.Y.2d 34, 41-42, 290 N.Y.S.2d 881, 238 N.E.2d 295, cert. den. 393 U.S. 1000, 21 L.Ed.2d 465, 89 S. Ct. 486).

Similarly, as stated in Siegel, New York Practice, Fourth Edition (2005), pp. 5 - 6:

> In older practice, the bringing of a special proceeding when an action was appropriate, or vice versa, resulted in dismissal. Dismissal is no longer permitted in that situation. Under CPLR 103(c), as long as jurisdiction over the parties has been obtained, the court today must convert the case to proper form. The defect is nothing more than a "mischaracterization".

Thus, even assuming that this action is more properly an Article 78 proceeding, the entire motion by the City Defendants and one of CSI's two arguments are frivolous.

Point III

The Service Of The Amended Complaint Before Filing Is Immaterial Since The Original Complaint -- Which Raised The Same Factual And Legal Issues -- Had Been Filed And The Fee Had Been Paid Therefor

The second argument is made solely by CSI.

CSI's notice of motion seeks solely this relief: "an Order pursuant to CPLR 3211(a)(7) dismissing the Amended Complaint in this Action for failure to state a cause of action. . . . "

CSI's memorandum of law adds the following claim:

> Plaintiffs have failed to file their Amended Complaint as required under CPLR § 304. The payment of a filing fee and the filing of initiatory papers commence actions or special proceedings in New York courts. *Gershel v. Porr*, 675 N.E.2d 836, 839 (N.Y. 1996); *Spodek v. N.Y. State Comm'n of Taxation & Fin.*, 651 N.E.2d 1275, 1276 (N.Y. 1995); CPLR § 304. Service of process without first paying the filing fee and filing the initiatory papers is a nullity, as an action or proceeding has not been property commenced. *Gershel*, 675 N.E.2d at 839.

CSI has again failed to comply with its obligation to advise the Court of the current state of the law.

The two cases cited by CSI -- Gershel *v.* Porr, 89 N.Y.2d 327, 653 N.Y.S.2d 82 (1996) and Spodek *v.* N.Y. State Comm'n of Taxation & Fin., 85 N.Y.2d 760, 628 N.Y.S.2d 256 (1995) -- stand for the proposition that there must be strict compliance with the filing fee and filing of initiatory papers in an action.

CSI fails to mention that CPLR 2001 was amended in 2007 (after CSI's two cited cases were decided), by Chapter 529 of the Laws of 2007, to add the underlined language:

> **§ 2001. Mistakes, omissions, defects and irregularities**
>
> At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.[5]

The Advisory Committee on Civil Practice, in recommending this amendment, stated:

> This measure, which would amend CPLR 2001, is offered in response to a series of recent decisions by the Court of Appeals, which have held that defects in the commencement of actions or the payment of the fee for an index number will result in outright dismissal of an action so long as a timely objection is made to such defects. See *Matter of Harris*

[5] As set forth in the January 9, 2009 affirmation of David Rosenberg, the Amended Complaint has since been filed [Exhibit D].

v. Niagara Falls Bd. of Education, 6 N.Y.3d 155 (2006); *Matter of Gershel v. Porr*, 89 N.Y.2d 327 (1996); *Matter of Fry v. Village of Tarrytown*, 80 N.Y.2d 714 (1997) [n1].

These court decisions signal a need to revise CPLR 2001 to harmonize it with the underlying purpose of chapter 216 of the laws of 1992. Although the Legislature initially acted in that year to raise revenue by requiring payment of a fee for an index number before an action could proceed, the Legislature subsequently made numerous changes to the CPLR in that same session to initiate commencement by filing to further the separate policy goal of eliminating the dismissal of cases because of non-prejudicial defects in such commencement. Unfortunately, as evidenced by these recent decisions, it is apparent that further statutory revision is in order to fully foreclose dismissal of actions for technical, non prejudicial defects.

Accordingly, this measure would amend the CPLR to give the court discretion to correct or ignore mistakes or omissions occurring at the commencement of action that do not prejudice the opposing party, in the same manner and under the same standards that it already does with regard to all other non-prejudicial procedural events.

* * *

The purpose of this measure is to clarify that a mistake in the method of filing, as opposed to a mistake in what is filed, is a mistake subject to correction in the court's discretion. . . . However, other non-prejudicial defects in commencement, such as late payment of the fee because of a bounced check (which is subsequently cured) or the failure to purchase a second index number under the facts of *Harris* would be excusable deficiencies. . . .

Thus, it is clear that the amendment to CPLR 2001 was intended expressly to eliminate the ruling in the case cited by CSI, Matter of Gershel *v.* Porr, *supra*.

The sequence of events on which CSI bases its argument (as set forth in the January 9, 2009 affirmation of David Rosenberg) are as follows:

- On September 26, 2008, Plaintiffs filed their original Complaint and paid the filing fee therefor [Exhibit A].

- Before serving the Complaint, two additional parties agreed to be named plaintiffs, 18 Owners Corp. and Thomas Hansen. They were added to the caption and identified in paragraphs 10, 12, 18, 20 and 21 added to the Complaint, which then was identified as "Amended Complaint" dated September 29, 2008 [Exhibit B]. Those were the only changes between the Complaint and the Amended Complaint.

- Without filing the Amended Complaint, it was served on Defendants. After receipt of CSI's motion, the original Complaint also was served [Exhibit C].

Whether the action is brought by the three original Plaintiffs or with the two additional Plaintiffs named in the Amended Complaint is irrelevant to the legal and factual claims presented.

Nor could CSI claim to have been prejudiced by the addition of two Plaintiffs.

As a practical matter, since none of the Defendants has answered, Plaintiff would be entitled to amend the original Complaint, to add the two additional Plaintiffs,

pursuant to CPLR 3025(a). *See, generally*, Barclays Bank P.L.C. *v.* Skulsky Trust., 287 A.D.2d 365, 731 N.Y.S.2d 445 (1st Dep't 2001); Frankart Furniture Staten Island, Inc. *v.* Forrest Mall Assoc., 159 A.D.2d 322, 552 N.Y.S.2d 599 (1st Dep't 1990).[6]

Under the circumstances, CSI's reliance on this argument underscores its absence of any real defense to Plaintiffs' claims.

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[6] Additionally, pursuant to CPLR 306-b, the original Complaint, which was served 76 days after the Complaint was filed with the Court Clerk, may be deemed to have been served within the 15-day statutory period which applies to Article 78 proceedings *nunc pro tunc*. CPLR 306-b authorizes the Court, in its discretion, to extend the applicable 120-day or 15-day period for service in the "interests of justice". *See*, Leader *v.* Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 736 N.Y.S.2d 291 (2001) (discussing that the "interest of justice" standard is more flexible than "the good cause standard . . . 'since the term, "good cause" does not include conduct usually characterized as "law office failure", proposed CPLR 306-b provides for an *additional and broader standard, i.e.*, the "interest of justice," to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant.'") Among the factors the court may consider in determining whether to grant an extension under this standard are: "expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." *Id.*

Thus, were this Court to find that this action were properly an Article 78 proceeding, an extension pursuant to CPLR 306-b would be warranted, with the original Complaint deemed to have been timely served on Defendants *nunc pro tunc*. *See, e.g.*, Abu-Aqlein *v.* El-Jamal, 44 A.D.3d 884, 844 N.Y.S.2d 385 (2d Dep't 2007); Lippett *v.* The Education Alliance, 14 A.D.3d 430, 789 N.Y.S.2d 11 (1st Dep't 2005); Wideman *v.* Barbel Trucking, Inc., 300 A.D.2d 184, 752 N.Y.S.2d 640 (1st Dep't 2002); Beauge *v.* New York City Transit Authority, 282 A.D.2d 416, 722 N.Y.S.2d 402 (2d Dep't 2001).

CONCLUSION

Defendants' objections clearly are intended to delay a resolution on the merits. These motions should be denied so that Defendants may be required to respond to the serious legal issues raised by Plaintiffs.

Dated: New York, New York
January 9, 2009

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Plaintiffs

By: _____
David Rosenberg
488 Madison Avenue
New York, New York 10022
(212) 755-7500

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN, *Plaintiffs,* - against - CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel, *Defendants.*	:	Index No. 650354/08 AFFIRMATION IN OPPOSITION

DAVID ROSENBERG, an attorney admitted to practice in the New York courts, under penalty of perjury, affirms:

1. I am a member of Marcus Rosenberg & Diamond LLP, attorneys for Plaintiffs in this action commenced to challenge an unconstitutional resolution of defendant New York City Board of Standards and Appeals ("BSA"), which granted unprecedented rights to defendant Congregation Shearith Israel, also referred to as the Trustees of Congregation Shearith Israel (together, "CSI") to violate height, bulk, setback and other regulations adopted by the City of

New York to protect the neighborhood adjacent to CSI and its residents, including Plaintiffs.

2. I submit this affirmation to place before the Court the exhibits referenced in Plaintiffs' memorandum of law in opposition to Defendants' motions to dismiss the verified complaint and to set forth the sequence of events relating to the filing and service of the original complaint and the amended complaint in this action on which CSI bases one of its two frivolous arguments for dismissal -- namely, that this action was not properly commenced since Plaintiffs failed to file their Amended Complaint prior to serving it on Defendants. None of the other Defendants have made this argument.

3. These are the relevant facts:

- Plaintiff Landmark West! is a not-for-profit corporation which works to protect the historic architecture and development pattern of the Upper West side and to improve and maintain the community. The other two plaintiffs in the original complaint (the "Complaint") are cooperative apartment corporations ("the "Co-ops") which own buildings near the buildings and land owned by CSI located at Central Park West and West 70th Street. The plaintiffs added by the amended complaint (the "Amended

Complaint") are another neighboring co-op and a neighboring individual.

- On September 26, 2008, Plaintiffs filed their original Complaint and paid the filing fee therefor [Exhibit A].

- Before serving the Complaint, two additional parties agreed to be named plaintiffs, 18 Owners Corp. and Thomas Hansen. They were added to the caption and identified in paragraphs 10, 12, 18, 20 and 21 added to the Complaint, which then was identified as "Amended Complaint" dated September 29, 2008 [Exhibit B]. Those were the only changes between the Complaint and the Amended Complaint.

- Without filing the Amended Complaint, it was served on Defendants. After receipt of CSI's motion, the original Complaint also was served [Exhibit C] and the Amended Complaint also was filed with the Clerk of the Court [Exhibit D].

4. Plaintiffs' accompanying memorandum of law establishes that, contrary to CSI's contention, these facts do not warrant dismissal of Plaintiffs' Amended Complaint.

5. Defendants' motions to dismiss the verified Amended Complaint -- which fail to appraise the Court of relevant controlling law -- should be denied.

Dated: New York, New York
January 9, 2009

David Rosenberg

Index No. 650354/08

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

LANDMARK WEST!, INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Plaintiffs,

- against -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

AFFIRMATION IN OPPOSITION

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Certified pursuant to § 130-1.1(a)
of the Rules of the Chief Administrator

By: _____
David Rosenberg

Dated: January 9, 2009

Note: This motion was submitted on the papers of the parties, without oral argument, on January 29, 2009, and is awaiting decision by the Court.

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

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LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs,

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- against -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

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CITY DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

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of counsel.

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

----------x

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs, Index No. 650354/08

- against -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

----------x

CITY DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

Defendants, the New York City Board of Standards and Appeals ("BSA"), and New York City Planning Commission ("City Planning") (collectively "City Defendants"), submit this reply memorandum of law in further support of City Defendants' motion to dismiss the Complaint pursuant to New York Civil Practice Law and Rules ("CPLR") §3211(a)(7) on the grounds that the Complaint fails to state a cause of action as against City Defendants.

Plaintiffs commenced the instant action seeking to challenge BSA's final agency determination approving co-Defendant Congregation Shearith Israel's ("CSI") application for a variance for 6-10 West 70th Street, New York, New York ("the subject property"), i.e., BSA

Resolution 74-07-BZ. City Defendants thereafter contacted Plaintiffs, and requested they convert the instant action to an Article 78 proceeding. Plaintiffs refused. Accordingly, City Defendants moved to dismiss the action because Plaintiffs, despite seeking to challenge a final agency determination, improperly commenced their challenge as a plenary action, rather than as an Article 78 proceeding.

In opposition to City Defendants' motion, Plaintiffs argue that: 1) they were not required to commence an Article 78 proceeding because they are not solely seeking review of a final agency determination; 2) where a constitutional question is raised, the proper remedy is to commence an action for a declaratory judgment; 3) "where a public agency... acts without jurisdiction, its acts are illegal and void... [and] an Article 78 proceeding is not an adequate remedy;" and 4) where a public agency's actions are void, the agency's actions may be challenged in an Article 78 proceeding or an action for a declaratory judgment. As set forth below, Plaintiffs' arguments are without merit.

Plaintiffs further argue that if the Court concludes that this action should have been commenced as an Article 78 proceeding, it is required to convert the action to an Article 78 proceeding. Plaintiffs are incorrect. In determining whether to convert a matter, the Court's actions are not mandated, rather they are discretionary. Here, since Plaintiffs purposefully commenced this action improperly, and have repeatedly refused to voluntarily convert it, the Court should decline to convert the instant action to an Article 78 proceeding.[1]

[1] Notably, as Plaintiffs are well aware, an Article 78 proceeding, Kettaneh, Nizam et al. vs. Board of Standards & Appeals, Index Number 113227/08 (N.Y. Co. Sup. Ct.), which also seeks to challenge BSA Resolution 74-07-BZ is presently pending before this Court.

ARGUMENT

POINT I

PLAINTIFFS FAIL TO ESTABLISH THAT THEY MAY SEEK REVIEW OF A FINAL AGENCY DETERMINATION IN AN ACTION

In their Opposition, Plaintiffs do not contest that the proper method for seeking review of an agency determination is to commence an Article 78 proceeding. Rather, Plaintiffs, ignoring the controlling case law regarding Article 78 proceedings, as set forth in City Defendants' motion, argue that they properly commenced an action for declaratory relief because they are not solely seeking review of a final agency determination, but are also seeking a judgment declaring:

- BSA lacked jurisdiction to entertain and decide CSI's application because DOB's objections were not issued by the DOB Commissioner or the Manhattan Borough Commissioner, as required by Section 666 of the New York City Charter;

- BSA lacked jurisdiction to entertain and decide CSI's application because the plans filed with BSA were not the plans filed with or reviewed by DOB;

- BSA's "deference" to CSI constituted an unconstitutional delegation of its authority under the General City Law, the City Charter and the Zoning Resolution;

- BSA's application of different standards to CSI as a religious institution violated the First, Fifth, and Fourteenth Amendments to the United States Constitution and Article 1, §11, of the New York State Constitution; and

- BSA violated the City Charter and the Zoning Resolution by determining issues solely within the jurisdiction of the City Planning Commission and the Landmarks Preservation Commission.

See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Plaintiffs' Opposition") at pp. 7-8. Plaintiffs' argument fails.

That Plaintiffs have chosen not to bring the instant claim as an Article 78 proceeding, but rather has denominated it as an action for declaratory judgment, does not alter the essential nature of their claim. This Court need only look to "the reality and essence of the action and not the name which the parties have given it." Belsky v. Lowenthal, 62 A.D.2d 319, 321 (1st Dep't 1978), aff'd, 47 N.Y.2d 820 (1979). See also, Solnick v. Whalen, 49 N.Y.2d 224, 229 (1980) ("it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought"); Griffith v. City of New York, 248 A.D.2d 439 (2d Dep't 1998).

Here, all of Plaintiffs' claims either challenge BSA's authority to render the final agency determination, or BSA's rationale in reaching the determination. This form of review is to be afforded under Article 78. See CPLR §§7801, 7803(2)(3). Indeed, the BSA in rendering its determination: 1) rejected Plaintiffs' argument that the BSA lacked jurisdiction under New York City Charter §666 stating that "the jurisdiction of the Board to hear an application for variances from zoning regulations... is conferred by Charter Section 668;" 2) rejected Plaintiffs' argument that the BSA could not decide CSI's application because its plans were not filed with or reviewed by DOB; and 3) found that CSI, as a religious and educational institution, and a not for profit organization, was entitled to deference based on New York State case law.[2] See a copy of BSA Resolution 74-07-BZ annexed to City Defendants' Affirmation In Support Of Their Motion To Dismiss ("City Defendants' Affirmation") as Exhibit "B." See also a copy of the

[2] Notably, in finding that CSI was entitled to deference, the BSA cited to numerous New York State cases, and detailed their rationale.

February 12, 2008 Hearing Transcript annexed to City Defendants' Affirmation as Exhibit "C" at pp. 69-75. Thus, since Plaintiffs are clearly seeking Article 78 relief, they were required to commence an Article 78 proceeding, not, an action.

POINT II

WHERE A PARTY SEEKS TO CHALLENGE A FINAL AGENCY DETERMINATION ON CONSTITUTIONAL GROUNDS, COMMENCING AN ARTICLE 78 PROCEEDING IS THE PROPER RECOURSE

Plaintiffs assert that where a constitutional question is raised, the proper remedy is to commence an action for a declaratory judgment. Plaintiffs' Opposition at p. 8. In support of their claim, Plaintiffs cite Dun & Bradstreet, Inc v. City of New York, 276 N.Y. 198 (1937); Horodner v. Fisher, 38 N.Y.2d 680 (1976). As set forth below, Plaintiffs misapply the law.

First, Dun & Bradstreet, Inc. is irrelevant because it does not address whether a party raising a constitutional question should commence an action for a declaratory judgment or an Article 78 proceeding. Indeed, the decision was rendered before CPLR Article 78 was adopted.[3]

Second, Plaintiffs misapply Horodner. In Horodner, the issue before the Court was whether: 1) New York State Vehicle and Traffic Law ("VTL") §510 was constitutional; and 2) the revocation of petitioner's New York State Department of Motor Vehicle's ("DMV") license satisfied due process. In rendering its determination, the Court converted the Article 78

[3] Notably, the Court also did not address CPLR Article 78's predecessor, New York Civil Practice Act ("CPA") Article 78 because, as with CPLR Article 78, it did not exist when Dun & Bradstreet, Inc. was commenced. Indeed, while Dun & Bradstreet, Inc. was commenced in or before 1936, CPA Article 78 was not made effective until September 1, 1937. See a copy of the relevant portions of Article 78 annexed hereto as Exhibit "A" and Dun & Bradstreet v. New York, 251 A.D. 25 (1st Dep't 1937).

proceeding to an action in order to address the constitutional challenge to VTL §510. 38 N.Y.2d 680. In its decision, the Court only ruled on the constitutionality of VTL §510. The Court did not rule on whether the revocation of petitioner's DMV license satisfied due process, and noted that the petitioner could seek review of the DMV's final agency determination to revoke his license via an Article 78 proceeding. Id at 685. While the Court was silent as to its rationale, the principal behind the Court's decision was aptly articulated in SJL Realty Corp. v. City of Poughkeepsie, 133 A.D.2d 682, 683 (2d Dep't 1987). As held there, "[a]n article 78 proceeding cannot be used to challenge the constitutionality of a general legislative act, but the fact that an attack on another kind of governmental act is mounted in constitutional terms does not render review pursuant to CPLR article 78 unavailable." 133 A.D.2d at 683. See also Overhill Bldg. Co. v. Delany, 28 N.Y.2d 449, 458 (1971); Kovarsky v. Housing & Development Administration, 31 N.Y.2d 184 (1972).

Here, unlike the Petitioner in Horodner, Plaintiffs do not seek to challenge the constitutionality of a general legislative act. Rather, Plaintiffs seek to challenge the BSA's determination to grant CSI's variance application based, in part, on constitutional grounds. Accordingly, the proper method for seeking judicial review is to commence an Article 78 proceeding. See Tappis v. New York State Racing & Wagering Board, 36 N.Y.2d 862 (1975); Fulling v. Palumbo, 21 N.Y.2d 30 (1967) (Article 78 proceeding challenging whether "the Zoning Board of Appeals abused its discretion, as a matter of law, in denying the petitioners' application for an area variance and, hence, whether the zoning ordinance in question is unconstitutional as applied to their property.") Thus, for the foregoing reasons, Plaintiffs' argument fails.

POINT III

AN ARTICLE 78 PROCEEDING IS AN ADEQUATE REMEDY WHERE, AS HERE, A PARTY SEEKS A DETERMINATION AS TO WHETHER AN AGENCY PROCEEDED IN EXCESS OF ITS JURISDICTION

Plaintiffs assert that "where a public agency... acts without jurisdiction, its acts are illegal and void... [and] an Article 78 proceeding is not an adequate remedy." Plaintiffs' Opposition at p. 9. In support of their claim, Plaintiffs rely on Dun & Bradstreet, Inc., 276 N.Y. 198, and Foy v. Schechter, 1 N.Y.2d 604 (1956). Plaintiffs once again misrepresent the case law upon which they rely.

First, Dun & Bradstreet, Inc. is irrelevant because it does not address whether Article 78 review is an adequate remedy where a public agency acts without jurisdiction. Indeed, as set forth above, the decision was rendered before CPLR Article 78 was adopted.

Second, as in Dun & Bradstreet, Inc., the Court in Foy did not address whether Article 78 review is an adequate remedy where a public agency acts without jurisdiction. Rather, the Court considered whether employees were "to be paid at the prevailing rate of wage under section 220 of the Labor Law." 1 N.Y.2d at 607. In examining this issue, the Court considered whether a decision in a prior Article 78 proceeding barred one of the petitioners from seeking relief in the Article 78 proceeding then before the Court since the petitioner was a party in the prior Article 78 proceeding and sought the same relief. Id. The Court found that "[n]otwithstanding the rule against collateral attack, a decision [of an administrative body] may be subject to such attack where it is absolutely void... [i.e.,] where it is made either without statutory power or in excess thereof." Id at 612.

Third, Plaintiffs' argument runs contrary to the language of Article 78. Pursuant to CPLR §7803(2), a party may commence an Article 78 proceeding to determine "whether the

body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction." Here, Plaintiffs claim that BSA lacked jurisdiction to grant CSI's variance application because: 1) "DOB's objections were not issued by the DOB Commissioner or the Manhattan Borough Commissioner, as required by Section 666 of the New York City Charter;" and 2) "the plans filed with BSA were not the plans filed with or reviewed by DOB." Clearly, Plaintiffs seek nothing more than the review permitted by CPLR §7803(2), i.e., a determination of whether BSA "proceeded... in excess of jurisdiction." Accordingly, Plaintiffs' argument fails.

POINT IV

WHERE A PARTY SEEKS TO CHALLENGE A FINAL AGENCY DETERMINATION ON CONSTITUTIONAL GROUNDS, COMMENCING AN ARTICLE 78 PROCEEDING IS THE PROPER RECOURSE

Plaintiffs, having just argued that Article 78 review is an inadequate remedy where a public agency acts without jurisdiction, assert that where a public agency's actions are void, i.e., it acted without jurisdiction, the agency's actions may be challenged in an Article 78 proceeding or an action for a declaratory judgment. In support of their claim, Plaintiffs rely on Emunim v. Fallsburg, 78 N.Y.2d 194 (1991), Watchtower Bible & Tract Society v. Lewisohn, 35 N.Y.2d 92 (1974), Toscano v. McGoldrick, 300 N.Y. 156 (1949), and Lutheran Church in America v. City of New York, 42 A.D.2d 547 (1st Dep't 1973) overruled by 35 N.Y.2d 121 (1974). Setting aside, the contradiction in Plaintiffs' argument, Plaintiffs' claim is without merit.

First, Emunim and Watchtower Bible & Tract Society are inapplicable to the case at hand because they apply solely to tax assessment challenges. Emunim, 78 N.Y.2d 194 (finding that a "'void' [tax] assessment may be challenged in an Article 78 proceeding or in a declaratory judgment action"); Watchtower Bible & Tract Society, 35 N.Y.2d 92 (finding that an

Article 78 proceeding was not an inappropriate method to seek review of municipality's decision to place petitioner on tax roll). Indeed, a separate doctrine of law exists as to such challenges. Id.

Second, Toscano is inapplicable. Toscano was brought by Mr. Toscano's widow to recover unpaid salary which she claimed her husband had been unlawfully deprived of when the city attempted to abolish his job. 300 N.Y. 156. Subsequent to the City's actions, it voluntarily restored Mr. Toscano to his position. Id. Consequently, the Court found that since the City voluntarily restored Mr. Toscano to his position, everything which could have been addressed by an Article 78 proceeding had already been accomplished. Id. The Court went on to find that "[n]othing remained except the payment of salary at the budgetary rate which did not involve the exercise of either administrative or judicial discretion nor present any question requiring review in a section proceeding (Civ. Prac. Act., art 78)." Id at 160. Accordingly, the Court permitted Mr. Toscano's widow to maintain an action solely for the purpose of recovering unpaid salary. Id. See also Gerber v. New York City Housing Authority, 42 N.Y.2d 162, 165 (1977) citing Hussey v Town of Oyster Bay, 24 AD2d 570 (2nd Dep't 1965) and Toscano, 300 N.Y. 156. Thus, contrary to Plaintiffs' argument, this case has no bearing on the instant action since it does not hold that where a public agency's actions are void, the actions may be challenged in an Article 78 proceeding or an action for a declaratory judgment.

Third, Lutheran Church in America is irrelevant to the case at hand. In Lutheran Church in America, the Court of Appeals addressed whether: 1) the lower courts improperly converted Plaintiffs' action for declaratory judgment to an Article 78 proceeding; and 2) certain sections of the New York City Landmarks Preservation Law were constitutional. The Court of Appeals found that the lower courts had improperly converted Plaintiffs' action to an Article 78

proceeding because: 1) Plaintiffs' action was based solely on a challenge to the constitutionality of the New York City Landmarks Preservation Law, and 2) Plaintiff had strictly adhered to its theory. Accordingly, since Plaintiffs in the instant action do not challenge the constitutionality of a law, as litigated in Lutheran Church in America, but rather seek to challenge the BSA's final agency determination based on constitutional grounds, Lutheran Church in America is inapplicable.

Thus, for the reasons set forth above, Plaintiffs' argument fails.

POINT V

WHERE A PARTY IMPROPERLY COMMENCES AN ACTION THE COURT IS NOT REQUIRED TO CONVERT IT TO THE PROPER FORM

Plaintiffs argue that if the Court concludes that this action should have been commenced as an Article 78 proceeding, it is mandated under CPLR §103(c) to convert the action to an Article 78 proceeding. Plaintiffs are incorrect.

A determination as to whether to convert a matter is discretionary. Jerry v. Board of Education, 35 N.Y.2d 534 (1974); Essenberg v. Kresky, 265 A.D.2d 664 (3d Dep't 1999); Smith Corona Corp. v. Village of Groton, 221 A.D.2d 707 (3d Dep't 1995); People ex rel. DeFlumer v. Strack, 212 A.D.2d 555 (2d Dep't 1995); Manshul Constr. Corp. v. Board of Educ., 154 A.D.2d 38 (1st 1990). Here, the Court should decline to exercise its discretion in Plaintiffs' favor. Indeed, not only did Plaintiffs purposefully commence this suit in the incorrect form, but when given the opportunity, on numerous occasions,[4] to voluntarily convert this action so as not

[4] On January 9, 2008, City Defendants, upon receiving Plaintiffs' Opposition, reached out to Plaintiffs, and extended them another opportunity to voluntarily convert this action to an Article 78 proceeding, provided they accept the offer by January 16, 2008. Plaintiffs never responded.

to waste the resources of both the Court and the parties, Plaintiffs refused.[5] Accordingly, the instant action should be dismissed.

CONCLUSION

WHEREFORE, the City Defendants respectfully request that the Court dismiss the Complaint, or in the alternative convert it to an Article 78 proceeding.

Dated: New York, New York
January 26, 2009

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[5] Since an Article 78 challenge, Kettaneh, Nizam, et al. v. Board of Standards and Appeals, Index No. 113227-08 (N.Y. Co. Sup. Ct.), which also seeks to challenge BSA Resolution 74-07-BZ, is already pending before the Court, conversion of this action will only serve to duplicate an already existing Article 78. Notably, City Defendants will be serving and filing a Verified Answer and Memorandum of Law in Kettaneh because, unlike the instant action, it was properly commenced.

Exhibit A

twelve hundred and seventy-eight of this act, the matter is deemed adjourned without an order to that effect to the next term of the appellate division of the supreme court to be held in the same department; and thereafter to each successive term until such an order or direction is made. The prisoner is bound to attend at each successive term of the appellate division; and the recognizance is valid for his attendance accordingly without any notice or other formal proceedings.

Source—CCP § 2084—Revisers' Note.

§ 1281. Delivery of copy of mandate or other authority. An officer or other person who detains any one by virtue of a mandate or other written authority must deliver, upon reasonable demand and tender of his fees, a copy thereof to any person who applies therefor, for the purpose of procuring a writ of habeas corpus or a writ of certiorari in behalf of the prisoner. If he knowingly refuses so to do, he forfeits two hundred dollars to the prisoner.

Source—CCP § 2085—Revisers' Note.

§ 1282. Application of article to other writs of habeas corpus. Except as otherwise expressly prescribed by statute, the provisions of this article apply to and regulate the proceedings upon every common law or statutory writ of habeas corpus, as far as they are applicable; and the authority of a court or a judge to grant such a writ, or to proceed thereupon, by statute or the common law, must be exercised in conformity to this article in any case therein provided for.

Source—CCP § 2086—Revisers' Note. CCP § 1991 omitted as unnecessary as all writs are abolished except writ of habeas corpus and certiorari to inquire into the cause of detention of person imprisoned. It was necessary to give a common name to all the writs to avoid duplication of materials in §§ 1991–2007. CCP § 2007 omitted as unnecessary in view of abolishing of all writs, except habeas corpus and certiorari to inquire.

Star (*) means read Not into note heading.

Conformity to requirements of article necessary—*Prisoner held as insane, provisions of Insanity Law § 93 govern (PxThaw 154 NYS 965). To substitution (Pxciamaldi 160 AD 480, 145 NYS 1064).

Cited but not applied—PxCurtis 225 NY 299.

CASES SINCE CIVIL PRACTICE ACT IN EFFECT

SECTION APPLICABLE—

Domestic Relations Law, § 70: to determine custody of child (Warren 126 Mis 103, 213 NYS 476).

ARTICLE 78

PROCEEDING AGAINST A BODY OR OFFICER

Editorial note: New Article 78 §§ 1283–1306 added, and old Articles 78–80 §§ 1283–1355 repealed, by L. 1937, ch. 526, in effect Sept. 1. Both new Article 78 (at pp. 700-1—700-6) and old Articles 78–80 (at pp. 700-6—700-44) are included in this Edition.

Section

(Old §§ 1283 – 1355 repealed Sept. 1, 1937; see note p. 700-1)

§ 1283. Classifications of certiorari to review, mandamus and prohibition abolished. The classifications, and forms and orders of certiorari to review, mandamus and prohibition are hereby abolished. The relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article. Wherever in any statute reference is made to a writ or order of certiorari to review, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Nothing in this section shall be construed as abolishing the writ of certiorari under the tax laws or under any other general or special statute, to review assessments for purposes of taxation which are placed upon the tax rolls. [Added L. 1937, ch. 526, in effect Sept. 1.]

§ 1284. Definitions. 1. The expression "body or officer" includes every court, tribunal, board, corporation, officer or other person or aggregation of persons, whose action may be affected by the proceeding under this article.

2. The expression "to review a determination" refers to the relief heretofore available in a certiorari or a mandamus proceeding for the review of any act or refusal to act of a body or officer exercising judicial, quasi-judicial, administrative or corporate functions, which involves an exercise of judgment or discretion.

3. The expression "to compel performance of a duty specifically enjoined by law" refers to all other relief heretofore available in a mandamus proceeding.

4. The expression "to restrain a body or officer exercising judicial or quasi-judicial functions from proceeding without or in excess of jurisdiction" refers to the relief heretofore available in a prohibition proceeding.

Nothing in this article shall be deemed to continue or establish distinct remedies. [Added L. 1937, ch. 526, in effect Sept. 1.]

§ 1285. When relief not available. Except as otherwise expressly prescribed by statute, the procedure under this article shall not be available to review a determination in any of the following cases:

1. Where it was made in a civil action or special proceeding by a court of record or a judge of a court of record.

2. Where it was made in a criminal matter, except a criminal contempt of court.

3. Where it does not finally determine the rights of the parties with respect to the matter to be reviewed.

4. Where it can be adequately reviewed by an appeal to a court or to some other body or officer.

5. Where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application, unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed. [Added L. 1937, ch. 526, in effect Sept. 1.]

§ 1286. Limitations of time. A proceeding under this article to review a determination or to compel performance of a duty specifically enjoined by law, must be instituted by service of the petition and accompanying papers, as prescribed in section twelve hundred eighty-nine of this article, within four months after the determination to be reviewed becomes final and binding, upon the petitioner or the person whom he represents, either in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform his duty, as the case may be; or, with the court's permission, within two years, where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under the age of twenty-one years, or insane, or imprisoned on a criminal charge or under sentence for a term less than life. [Added L. 1937, ch. 526, in effect Sept. 1.]

§ 1287. Where proceeding to be brought. The petitioner shall apply for relief at a special term of the supreme court held within the judicial district, embracing the county wherein the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or wherein the proceedings are brought or taken in the course of which the matter sought to be restrained originated, as the case may be, or wherein it is alleged in the petition that the material

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AFFIRMATION OF SERVICE

Sheryl Neufeld, an attorney admitted to practice before the courts of the State of New York, affirms, pursuant to CPLR Rule 2106 and subject to the penalties of perjury, that on the 26th day of January, 2009, I served the annexed Memorandum of Law in Further Support of City Defendants' Motion to Dismiss by facsimile and mail upon all counsel of record, enclosed in postpaid wrappers in a post office box regularly maintained by the United States Postal Service addressed to said counsel at the addresses set forth below, being the addresses within the state theretofore designated by them for that purpose:

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January 26, 2009

SHERYL NEUFELD