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

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,	:	
	:	Index No. 650354/08
Petitioners,	:	
-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,	:	
Respondents.	:	

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR SECOND AMENDED VERIFIED PETITION

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

By: _____
Pamela D. Evans

Date: June 19, 2009

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PRELIMINARY STATEMENT

Petitioners Landmark West!, Inc. ("Landmark West!"), 91 Central Park West Corporation (the "Co-op") and Thomas Hansen ("Hansen") submit this memorandum of law in support of Petitioners' Second Amended Verified Petition (the "Petition"), which seeks to vacate and declare null and void and without force or effect the August 29, 2008 resolution (the "Resolution") of Respondent City of New York Board of Standards and Appeals ("BSA") which granted, in all respects, the application of Respondent Congregation Shearith Israel ("CSI") and granted CSI seven variances from the important requirements of the New York City Zoning Resolution (the "Zoning Resolution").

Four of the seven variances were required solely "to accommodate a market rate residential development that can generate a reasonable financial return" to be constructed through and on top of an addition to CSI's landmarked synagogue. In fact, without the construction of the five-story luxury condominium tower, approximately 2,000 square feet of additional space would be available to satisfy CSI's programmatic needs and, for this and other reasons, the other three variances granted by BSA would be unnecessary.

The Petition also demonstrates that the Resolution must be vacated due to BSA's lack of jurisdiction and other illegality in the process.

Respondent Hon. Andrew Cuomo, as Attorney General of the State of New York, is named as a necessary party due to the constitutional challenge in the Petition and Respondent New York City Planning Commission (together with BSA, the "City Respondents") is named as a necessary party pursuant to New York City Charter § 668(e).

This memorandum is submitted pursuant to the May 29, 2009 stipulation of counsel for the parties, so ordered by this Court, and in response to the May 26, 2009 Respondent Trustees of Congregation Shearith Israel's Memorandum in Opposition to Petitioners' Article 78 Petition ("CSI Memo") and the May 21, 2009 City Respondents' Memorandum of Law ("City Memo") . [1]

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[1] This is one of two proceedings before this Court challenging the same BSA Resolution. To the extent that the other proceeding, Kettaneh *v.* Board of Standards and Appeals of the City of New York, Index No. 113227/08, has asserted additional errors committed by BSA and additional grounds for vacating the BSA Resolution, this memorandum of law will not attempt to duplicate all such arguments so as not to burden the Court with unnecessary additional documents to review.

STATEMENT OF FACTS

The facts relevant to the particular claims of illegality of BSA's actions are set forth in the separate points herein.

This proceeding challenges BSA's extraordinary and unprecedented Resolution which violates the express purpose of the Zoning Resolution "to promote the public health and welfare, including provisions for adequate light, air [and] convenience of access." General City Law, § 20.

The BSA Resolution would permit CSI to violate important zoning regulations in order to construct a new building with a residential tower containing five luxury condominium apartments. As acknowledged by BSA and CSI, the luxury condominium apartments do not serve CSI's religious mission or "programmatic needs", but are to be sold to generate a cash windfall or, in the words of CSI's attorney, to "monetize" the variances from the requirements of the Zoning Resolution.

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

As is demonstrated hereafter, BSA not only violated legal requirements, including those in the New York City Charter, the Zoning Resolution and BSA's own rules, but acted on an application as to which it lacked jurisdiction for several reasons.

ARGUMENT

Point I

Petitioners Have Standing Under The Broad Rule Of Standing Which Applies To Zoning Cases

CSI claims that Petitioners lack standing to maintain this proceeding because they allegedly failed to demonstrate that:

- the Co-op and Hanson will suffer injuries specific to them as opposed to general concerns of all area residents [CSI Memo, pp. 6-7]; and
- Landmark West! has an interest in the variance which is germane to its organizational purposes [*id.*, at pp. 7-8].

No such similar frivolous claims have been asserted by the City Respondents.

As purported support for its argument, CSI relies upon irrelevant cases, including some which do not even involve zoning challenges [All the Way East Fourth St. Block Association *v.* Ryan-NENA Community Health Center, 30 A.D.3d 182, 817 N.Y.S.2d 14 (1st Dep't 2006) (adverse possession); Buerger *v.* Town of Grafton, 235 A.D.2d 984, 652 N.Y.S.2d 880 (3rd Dep't 1997) (challenge to SEQRA not part of zoning enactment which requires showing of specific environmental injury)].

In zoning cases, our Court of Appeals repeatedly has emphasized:

> Standing principles, which are in the end matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use

disputes be resolved on their own merits rather than by preclusive, restrictive standing rules.[2]

Sun-Brite Car Wash, Inc. *v.* Board of Zoning and Appeals of the Town of North Hempstead, 69 N.Y.2d 406, 413, 515 N.Y.S.2d 418, 421 (1987); *see*, East Thirteenth Street Community Association *v.* New York State Urban Development Corp., 84 N.Y.2d 287, 296, 617 N.Y.S.2d 706 (1994) (standing in zoning cases is broader than in eminent domain cases because zoning statutes seek to protect "the welfare of the entire community"); Douglaston Civic Association *v.* Galvin, 36 N.Y.2d 1, 6 - 7, 364 N.Y.S.2d 830 (1974) ("We are troubled by the apparent readiness of our courts in zoning litigation to dispose of disputes over land use on questions of standing without reaching the merits. . . . [O]ur concern is heightened because of the particular need in zoning cases for a broader rule of standing"); *see also*, Gen. City Law § 20 (height, bulk, and location zoning regulations seek "to promote the pubic welfare and health").

Consistent with this broad rule, neighboring property owners challenging a zoning board decision (as the Co-op and Hanson) have standing where such property owner:

(1) is in close enough proximity to the subject property such that it is presumed that the effect of the zoning change will be more than that suffered by the public generally; and

(2) seeks to protect an interest which is a concern of the zoning law.

Sun-Brite, *supra*, 69 N.Y.2d at 413 - 414, 515 N.Y.S.2d at 421 - 422.

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[2] Unless otherwise indicated, all emphasis herein is added and all internal citations are omitted. Bracket references preceded by "R" are to the Record of the proceedings before BSA.

As explained by the Court of Appeals, no actual injury specific to that property owner need be shown in such case, as injury is inferred from the allegation of close proximity:

> The fact that a person received, or would be entitled to receive, mandatory notice of an administrative hearing because it owns property adjacent or very close to the property in issue gives rise to a presumption of standing in a zoning case. But even in the absence of such notice . . . a person with property located in the immediate vicinity of the subject property will be adversely affected in a way different from the community at large; loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood. Thus, an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby property owner to challenge a zoning board decision without proof of actual injury.

Id.; *see*, Gernatt Asphalt Products, Inc. *v.* Town of Sardinia, 87 N.Y.2d 668, 687, 642 N.Y.S.2d 164, 176, (1996) ("A nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity. The proximity alone permits an inference that the challenger possesses an interest different from other members of the community").

The two-part standing test is readily met here by the Co-op and Hansen as each:

> (1) owns property immediately adjacent to the Development Site [Petition, ¶¶ 17, 20 24]; and
>
> (2) seeks to safeguard such property (which are the homes and major assets of Hanson and the Co-op's shareholders) from a loss of value and a reduction of light, air and convenience of access, which the Zoning Resolution is required to protect [Petition, ¶ 25].

In fact, the Co-op presumptively has standing since it is one of the "affected property owners" entitled to mandatory notice of the BSA hearing on CSI's variance

application [R 107].[3] *See*, Sun-Brite, *supra*; Center Square Association, Inc. *v.* City of Albany Board of Zoning Appeals, 9 A.D.3d 651, 780 N.Y.S.2d 203 (3d Dep't 2004) (presumption of injury for standing where entitled to mandatory notice of board's proceedings).

Thus, there is no question that the Co-op and Hanson have standing. *See, e.g.*, Wilcove *v.* Town of Pittsford Zoning Board of Appeals, 306 A.D.2d 898, 762 N.Y.S.2d 714 (4th Dep't 2003) (residential property owner had standing to challenge area variance granted to nearby housing complex); McGrath *v.* Town Board of the Town of North Greenbush, 254 A.D.2d 614, 678 N.Y.S.2d 834 (3d Dep't 1998) (petitioner allegedly residing within 500 feet of site established standing based upon close proximity sufficient to create presumption that she would be adversely affected in a way different from public at large); Committee to Preserve Brighton Beach and Manhattan Beach, Inc. *v.* Council of New York, 214 A.D.2d 335, 625 N.Y.S.2d 134 (1st Dep't 1995) (individual petitioners had standing to challenge issuance of special permits where their residences were immediately adjacent to project and would suffer presumptive diminishment of their own property interests with the change in neighborhood character); *compare:* City of Plattsburgh *v.* Mannix, 77 A.D.2d 114, 432 N.Y.S.2d 910 (3d Dep't 1980), cited by CSI, wherein petitioner did not claim to be in close proximity, but merely alleged future traffic problems affecting the general public.

Similarly, as an award-winning non-profit community organization (which, as set forth in the accompanying affidavit of Kate Wood, Executive Director of Landmark West!, has contributing supporters who own and reside on property immediately adjacent to the Development Site), Landmark West! has standing to maintain this proceeding under the three-

[3] Pursuant to 2 RCNY § 1-06(g)(5), "affected property owners" entitled to such notice are "all owners of property within a radius of 400 feet from the center of the lot [at issue]."

part test for an organization, namely, that: (1) at least one of its supporters has standing to sue; (2) the interests sought to be advanced are sufficiently germane to the purpose of Landmark West!; and (3) the participation of the individual supporters of Landmark West! is not required to assert the claim. *See, e.g.*, Center Square, *supra.*

Contrary to CSI's contention, Landmark West!'s purpose is not limited to protection of the landmarked status of the Synagogue building, but rather extends to protection of the character and development of the entire block and surrounding neighborhood, including the impact of the proposed development on light, air and convenience of access on neighboring property owners [Petition, ¶ 8]. These interests are of concern under the Zoning Resolution and are germane to the mission of Landmark West!, which, since 1985, has worked to protect historic architecture, special character and the development pattern of the Upper West Side. *See,* Defreestville Area Neighborhood Association *v.* Planning Board of the Town of North Greenbush, 16 A.D.3d 715, 790 N.Y.S.2d (3d Dep't 2005) (neighborhood association with purpose to protect quality of life and safety of residents had standing to challenge area variance); Center Square, *supra.* (association whose mission was to protect quality of life in neighborhood and which was concerned with effect that increased number of residents would have on parking had standing to challenge variances); Committee to Preserve Brighton Beach and Manhattan Beach, Inc. *v.* Planning Commission of the City of New York, 259 A.D.2d 26, 695 N.Y.S.2d 7 (1st Dep't 1999) (not-for-profit organization dedicated to preserving, beautifying and improving neighborhoods in south Brooklyn had standing to challenge planning commission's determination to allow concession in park which allegedly would

reduce open space, cause noise and traffic problems and obstruct views of neighboring residents).[4]

Moreover, the benefit of having an organization, such as Landmark West!, as the proponent of this challenge to a zoning board determination was articulated by the Court of Appeals in Douglaston, *supra*:

> [A] person desiring relaxation of zoning restrictions . . . has little to lose and much to gain if he can prevail. He is not reluctant to spend money in retaining special counsel and real estate appraisers if it will bring him the desired result. The individual owner . . . on the other hand, may not, at the time, realize the impact the proposed change of zoning will have [or] may not have the financial resources to effectively oppose the proposed change. . . . Against this background of economic disparity, an individual property owner . . . cannot be expected, nor should he be required, to assume by himself the burden and expense of challenging the zoning change. . . . By granting neighborhood and civic associations standing in such situations, the expense can be spread out over a number of property owners, putting them on an economic parity with the developer.
>
> This broader rule of standing is entirely consistent with the underlying purposes of zoning laws. Our municipalities enact zoning ordinances in order to protect the public's health, welfare and safety. A challenge to a zoning variance focuses the court's attention on this public interest. To force a court to reject such a challenge on the grounds of standing when the group contesting the variance represents that segment of the public which stands to be most severely affected by it is, in our view, an ironic situation which should not be permitted to continue.

36 N.Y.2d at 6-7 (holding that a civic association had standing to challenge a BSA decision granting a variance).

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[4] The Society of the Plastics Industry Inc. *v.* County of Suffolk, 77 N.Y.2d 761, 570 N.Y.S.2d 778 (1991), and New York City Coalition for the Preservation of Gardens *v.* Giuliani, 246 A.D.2d 399, 666 N.Y.S.2d 918 (1st Dep't 1998), cited by CSI, are not to the contrary. In Society of Plastics, a nationwide trade organization of plastics' interests was found to lack standing to challenge a local plastics law on the basis of environmental concerns since such environmental concerns were not germane to the purposes of such trade association. In New York City Coalition, the association lacked standing because its members occupied the lots at issue without permission or enforceable license.

For similar reasons, Landmark West! not only satisfies all requirements for standing to assert this challenge to the Resolution, but is well suited for this task.

Point II

BSA Lacked Jurisdiction

As set forth in the Petition [¶¶ 33 - 43], BSA lacked jurisdiction to entertain CSI's Application for the fundamental reason that the plans filed with BSA, upon which it based its Resolution, were not the plans filed with or reviewed by DOB.

Additionally, to invoke BSA's jurisdiction, CSI's Application was required to be an appeal from a determination of the DOB Commissioner or Manhattan Borough Superintendent [City Charter § 666(6)(a)] -- a requirement not satisfied here [Petition, ¶¶ 26 - 32].

Neither of these facts are disputed by Respondents. The City Respondents claim only that neither fact defeats jurisdiction as neither allegedly is required under the jurisdictional statute [May 21, 2009 City Respondents' Memorandum of Law ("City Memo"), pp. 15-16].

CSI provides no independent support for BSA's assertion that it had jurisdiction, but rather claims that BSA's construction of the Zoning Resolution on the issue, is entitled to deference [CSI Memo, pp. 13-15].

Contrary to CSI's claim, it is well settled that "where the question is one of pure legal interpretation of statutory terms, deference to the BSA is not required." Toys "R" Us *v.* Silva, 89 N.Y.2d 411,419, 64 N.Y.S.2d 100, 104 (1996); Raritan Development

Corp. *v.* Silva, 91 N.Y.2d 98, 102, 667 N.Y.S.2d 327, 328-29 (1997) (rejecting BSA's interpretation of Zoning Resolution); Exxon Corporation *v.* Board of Standards and Appeals of the City of New York, 128 A.D.2d 289, 515 N.Y.S.2d 768 (1st Dep't 1987) (vacating BSA resolution, rejecting BSA's interpretation of Zoning Resolution); *see*, KSLM-Columbus Apartments, Inc. *v.* New York State Division of Housing and Community Renewal, 5 N.Y.3d 303, 801 N.Y.S.2d 783 (2005) (agency determination not entitled to deference on issue of statutory construction since special expertise of agency is not involved); Smith *v.* Donovan, 2009 N.Y. Slip. Op. 2885, 2009 N.Y. App. Div. LEXIS 2855 (1st Dep't April 16, 2009) (same) .

The issue of jurisdiction is such a question of pure law, for which BSA's interpretation is not entitled to deference; rather, it is an issue for the Court to decide.

BSA Lacked Jurisdiction Because The DOB Objections Were Not Issued By The DOB Commissioner Or The Manhattan Borough Commissioner

BSA and the other City Respondents claim that:

- City Charter §666(5) confers jurisdiction upon BSA "to determine and vary the application of the zoning resolution" pursuant to §668;
- Section 668, in turn, sets forth the procedure for consideration of variance applications and contains no requirement that the DOB Commissioner or Manhattan Borough Commissioner issue a determination, or that DOB review an applicant's plans, prior to consideration by BSA [City Memo, p. 16].

Section 668 does not address the jurisdiction of BSA, but merely the procedure followed after an application has been properly presented, to wit:

- Section 668 (a)(1) - (7) requires BSA to forward any application filed with it for a variance or special permit to the applicable community board for review and recommendation;
- Section 668(b) requires that, after receipt of the community board report and recommendations, BSA conduct a public hearing; and
- Section 668(c) requires BSA to file a copy of its decision and the recommendations of the community board or borough board with the City Planning Commission.

Section 668 does not state how BSA obtains jurisdiction or what preliminary steps must first be taken.

Those issues are expressly governed by Section 666 ,which grants BSA the jurisdiction:

> To hear and decide appeals from and review,
>
> (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commission of buildings. . . .

The City Respondents claim that this subsection was not the basis for jurisdiction, but they admit, in paragraph 115 of their Verified Answer:

> In order to develop a property with a non-conforming use or a non-complying bulk, an applicant is first required to apply to New York City Department of Buildings ("DOB"). After DOB issues its denial of the non-conforming or non-complying proposal, a property owner may apply to the BSA for a variance.

Moreover, BSA's Resolution, itself, states that it "is limited to the relief granted by the Board in response to specifically cited and filed DOB/other objection(s) only."

In footnote 7 to their Answer, the City Respondents claim: "[W]hile the BSA requires variance applicants to submit Notices of Objections from DOB, the requirement was implemented administratively, as a practical matter, not as a pre-requisite for jurisdiction."

The City Respondents cite to no evidence in the Record and no other documentary support of this bold statement, which flies in the face of the express Charter requirement cited herein.

The City Respondents' claim must be rejected as nothing more than an attempted coverup of their obviously embarrassing error.

While the City Respondents argue that City Charter § 666(6)(a) is not the basis for its jurisdiction, Respondents cannot dispute that:

> A variance application, like all other applications to [BSA], is technically in the form of an appeal from a determination by the N.Y.C. Buildings Department that the proposed use of structure is one which does not comply with the applicable provisions of the [Zoning Resolution]. This determination is made by filing an application for a building or an alteration permit with the Buildings Department and having that application reviewed for zoning compliance. The Department's determination of non-

compliance will be in the form of an "objection" authorizing an appeal to the [BSA].

16 N.Y. Practice Guide: Real Estate §16.05(4)(h)(iii); *see generally*, Warren's Weed New York Real Property §161.06(1) (unless provided otherwise by local legislation, jurisdiction of zoning board of appeals, is appellate only).

Indeed, BSA's own website explains:

> 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.

The Zoning Handbook, published by the New York City Department of City Planning (January 2006), describes the role of the Department of Buildings in the process of administering the Zoning Resolution in the following terms:

> The NYC Department of Buildings has primary responsibility for enforcing the Zoning Resolution and for interpreting its provisions. Among its responsibilities, the Department of Buildings:
>
> - Grants applications for building permits when the provisions of the Zoning Resolution, the Building Code and other applicable laws are met;
>
> * * *
>
> - Interprets the provisions of the Zoning Resolution, subject to appeal to the BSA, and promulgates procedures and guidelines for its administration. . . .

Similarly, the Zoning Handbook, in describing BSA's role, states (p. 101):

> The BSA, composed of five commissioners appointed by the Mayor, is empowered to hear and decide requests for variances from property owners whose applications to construct or alter buildings have been denied by the Department of Buildings or another enforcement agency as contrary to the Zoning Resolution or other building ordinances. . . .

Were the City Respondents correct that BSA's jurisdiction over variance applications was conferred by City Charter § 666(5) -- without reference to § 666(6)(a), BSA would have original jurisdiction over such applications, with no requirement that an applicant first obtain a DOB determination. Since this is not the rule, Respondents' claim that compliance with City Charter § 666(6)(a) is not a prerequisite to BSA's appellate jurisdiction on variance applications, is contrary to all reason and the plain meaning of the statutory language.[5]

As held by the Court of Appeals in affirming a trial court's dismissal of a challenge by an applicant for a variance, a board of appeals has no authority to hear an application for a variance in the first instance, but only for an appeal from a designated enforcement officer and any determination made by the board not based upon an appeal is a nullity. Mamaroneck Commodore, Inc. *v.* Bayly, 260 N.Y. 528 (1932); *see also,* Von Elm *v.* Zoning Bd. Of App., 258 A.D.989, 17 N.Y.S.2d 58 (2d Dep't 1940).

CSI's failure to have complied with § 666(6)(a) left BSA without jurisdiction.

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[5] The City Respondents provide no legal authority which supports their conclusion. In fact, there was no issue of jurisdiction in the three cases they cite, except for Galin *v.* Board of Estimate of the City of New York, 52 N.Y.2d 869, 437 N.Y.S.2d 80 (1981), which is improperly cited by the City Respondents for the Court's "finding" when, in actuality, they are relying upon the dissenting opinion therein.

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

Similarly, since the DOB determination which was the basis for CSI's Application to BSA was premised on the review of different plans than those submitted to BSA, BSA lacked jurisdiction to entertain CSI's appeal.

Moreover, until the second BSA hearing, CSI had represented that the plans which it filed with BSA to commence its Application and which 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 the same plans filed at DOB which resulted in the Original DOB Notice of Objections.

This representation which was the basis of CSI's Application admittedly was untrue.

The response by BSA, both at the time of this revelation and now, that this disparity is "irrelevant", merely underscores BSA's refusal to consider evidence contrary to CSI's Application and BSA's lack of concern for misrepresentations by CSI which permeated its Application and which BSA adopted in issuing the Resolution.

Point III

Standard Of Review: BSA's Invalid and Illegal Resolution Should Be Annulled

The extensive discussions by Respondents on the "arbitrary and capricious" standard which applies to administrative determinations have no relevance to the issues

here. While the BSA Resolution is undoubtedly arbitrary and capricious, as will be established, the Resolution is invalid and must be set aside on even more fundamental grounds of illegality and want of authority. *See, e.g.*, Levy *v.* Board of Standards and Appeals of the City of New York, 267 N.Y. 347 (1935) (annulling grant of variance where BSA failed to adhere to limitations of zoning ordinance in reaching determination); *accord,* Van Deusen *v.* Jackson, 35 A.D.2d 58, 312 N.Y.S.2d 853 (2d Dep't 1970), *aff'd*, 28 N.Y,2d 608, 319 N.Y.S.2d 855 (1971); Swartz *v.* Wallace, 87 A.D.2d 926, 450 N.Y.S.2d 65 (3d Dep't 1982).

Further, as set forth in the preceding Point II, where the issue is one of pure law, BSA's interpretation is not entitled to deference.

Point IV

BSA Applied An Unprecedented Standard – With No Basis In The Law -- In Granting CSI's Application

In support of its Application, CSI argued that the construction and sale of a five floor luxury residential condominium apartment building on top of the proposed addition to its synagogue and classrooms was needed to generate income to finance the addition [R 6].

BSA did not accept this argument. Instead, BSA crafted and applied an unprecedented standard for determining mixed purpose variance applications, *i.e.*, it considered the revenue generating residential portion of the proposed development separately from the community facility portion [R 3].

Even CSI has questioned the basis for applying such a combined test [*see*, CSI Memo, pp. 23-24].

While the City Respondents attempt to justify BSA's approach, they fail to cite a single legal authority discussing, much less applying, such an extraordinary procedure.

Moreover, to apply such a new test after CSI's application had been reviewed by the Community Board and after the parties had made their submissions to BSA, changed the rules in mid-course, which should have required that a new application be submitted, with Community Board review and the opportunity of Petitioners to contest it in the first instance.

Since there is no statutory, regulatory or decisional basis for CSI's decision, the Resolution cannot stand. *See*, Van Deusen *v.* Jackson, *supra* ("A zoning board of appeals cannot under the semblance of a variance exercise legislative powers").

In applying this bifurcated approach, BSA skewed the requirements under Zoning Resolution § 72-21, granting CSI's Application without the required showing thereunder and improperly accorded CSI deference as a religious, not-for-profit organization to allow CSI to construct a revenue generating enterprise with no relation to its programmatic needs.

No legal authority supports the creation of a new non-statutory standard, which will apply to future variance applications to effectively grant religious and

educational institutions exemption from zoning laws even when acting as profit-generating enterprises rather than seeking to satisfy their programmatic needs.

BSA, itself, previously rejected such a test in connection with another religious institution, Yeshiva Imrei Chaim Viznitz, Calendar No. 290-05-BZ (copy attached as Addendum A hereto), in which a Jewish religious school sought a variance to operate a catering establishment to serve its religious community and to generate income to support its school and synagogue. As noted by BSA, in rejecting the application:

> [W]ere [BSA] to adopt Applicant's position and accept income generation as a legitimate programmatic need sufficient to sustain a variance, then any religious institution could ask the Board for a commercial use variance in order to fund its schools, worship spaces, or other legitimate accessory uses. . . .

See also, BSA decision in 739 East New York Avenue, Brooklyn, BSA Calendar No. 194-03-BZ, discussed in 290-05-BZ.

BSA's ruling in Yeshiva Imrei Chaim Viznitz is an inescapable legal conclusion. Equally, it exhibits common sense.

There was no basis – nor has BSA offered one – for applying a new and illogical standard here.

Point V

BSA Erred As A Matter Of Law In Applying The Wrong Standard In Finding "Unique Physical Conditions" Inherent In The Zoning Lot Which Create A Hardship In Strictly Complying

Under Zoning Resolution § 72-21(a), a variance applicant is required to show:

> 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.

In concluding that this requirement had been met, BSA erred, as a matter of law, in several respects.

1) BSA's Improper Reliance On CSI's Programmatic Needs

First, BSA improperly relied upon "unique physical conditions [but only] in light of CSI's programmatic needs" [R 8]. Indeed, BSA focused its inquiry on CSI's alleged programmatic needs despite recognizing that [R 6]:

> New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization [even where there is] an intent to use the revenue to support a school or worship space.

While BSA separately analyzed the requirements for the revenue generating residential portion of the proposed building without consideration of CSI's alleged

programmatic needs, this bifurcated approach distorted the analysis. The proper inquiry should have been – as it always has been – whether there are "unique physical conditions" which create a hardship relating to CSI ability to meet its programmatic needs or relating to CSI's ability to realize a reasonable return. *See*, Pine Knolls Alliance Church *v.* Zoning Board of Appeals, 5 N.Y.3d 407, 804 N.Y.S.2d 708 (2005) (examining programmatic, and not economic, needs of religious institution in determining special permit request for expansion for non-profit purposes); Foster *v.* Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981) (applying reasonable return test to variance request for property owned by school, but leased to commercial entity); Bright Horizon House *v.* Zoning Board of Appeals of the Town of Henrietta, 1212 Misc.2d 703, 469 N.Y.S.2d 851 (Sup. Ct., Monroe Co, 1983) (applying reasonable return test to not-for-profit religious institution's variance request relating to non-religious use).

Petitioners demonstrated that CSI could easily meet all of its programmatic needs and more if it chose to devote a new as-of-right building to such needs and could have realized a return well in excess of reasonable if it chose to devote such a building to income generation.[6]

In failing to determine either of these issues and applying a different legal standard, BSA erred as a matter of law. *See, e.g.*, Cornell University *v.* Bagnardi, 68

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[6] Even under the improper bifurcated approach applied by BSA, Petitioners demonstrated that both uses would be satisfied with an as-of right-building. BSA was only able to justify its finding to the contrary by: (a) focusing on irrelevant issues (such as the claimed obsolescence of the existing community house building when there was nothing to prevent CSI from replacing the community house building with a new updated building without a single variance) and (b) ignoring numerous inconvenient facts (such as CSI's failure to include the rental income it receives from the Beit Rabban Hebrew School for space leased in its building for purposes of its reasonable rate of return calculation, but including the space needed for such unrelated entity's school programs in determining whether CSI's programmatic needs could be met).

N.Y.2d 583, 510 N.Y.S.2d 861 (1986) (zoning board determination was improper where Board applied wrong legal standard or criteria to determine special permit application); Gross *v.* New York City Alcoholic Beverage Control Board, 7 N.Y.2d 531, 540, 200 N.Y.S2d 12 (1960) (board was "without power to adopt a scheme of its own to deal with applications for licenses and employ it as a substitute for that provided by the Legislature"); Lafiteau *v.* Guzewicz, 2007 Misc. LEXIS 829, 237 N.Y.L.J. 41 (Sup. Ct. Suffolk Co. 2007) (zoning board decision was improper where board failed to follow appropriate legal standard in determining special permit request).

2) BSA's Finding Was Contrary To The Express Statutory Language

BSA also failed to cite any conditions on the Zoning Lot which qualify as "unique physical conditions" under the statute. The conditions identified by BSA which allegedly satisfy this requirement -- the landmark status of the synagogue building and obsolescence of the existing community house building -- are not physical conditions inherent in the Zoning Lot. *See*, 9 White Street Corp. *v.* Board of Standards and Appeals of the City of New York, 122 A.D.2d 742, 506 N.Y.S.2d 53 (1st Dep't 1986).[7]

BSA's interpretation is contrary to the express language of Zoning Resolution § 72-21(a) that the "unique physical conditions" be "peculiar to and inherent in the particular zoning lot". There was no basis for BSA to ignore the plain meaning of

[7] Contrary to Respondents' claims, a reading of the Resolution and the transcript of hearings makes it clear that considerations such as division of boundary line and the "sliver law" were not an essential part of BSA's finding. [*See, e.g.*, R 7-8, noting that the landmarked synagogue building limits the developable portion of the property to the Development Site; *see also*, R 12, listing "the existence and dominance of the landmarked synagogue" as the first of three alleged "unique physical conditions" as the reason for the alleged hardship and accepting CSI's claim that "the conditions originate with the landmarking of the synagogue building and zoning."]

this provision. The cases claimed by the City Respondents to support BSA's "interpretation" have no resemblance to the facts here. *See,* 97 Columbia Heights Housing Corp. *v.* Board of Estimate of the City of New York, 67 N.Y.2d 725, 499 N.Y.S.2d 943 (1986) (involved a building so badly damaged by fire that City of New York cooperated with applicant in razing it); UOB Realty (USA) Limited *v.* Chin, 291 A.D. 248, 736 N.Y.S.2d 874 (1st Dep't 2002) (variance granted solely to allow installation of new elevator bank in building's rear yard where installation in premises' interior space was problematic due to premises' construction on pilings); Dwyer *v.* Poisinello, 160 A.D.2d 1056, 553 N.Y.S.2d 888 (3d Dep't 1990) (parish would suffer unnecessary hardship due to costs of demolishing building and removing asbestos therefrom, if variance was not granted and sale of building could not occur; did not involve New York City's Zoning Resolution which expressly requires, unlike other New York State zoning ordinances, that the unique physical conditions be "physical"); Commco, Inc. *v.* Amelkin, 109 A.D.2d 794, 486 N.Y.S.2d 305 (2d Dep't 1985) (school would suffer unnecessary hardship due to costs to demolish building if variance was not granted and sale of building could not occur; did not involve New York City's Zoning Resolution); 260 West Broadway Associates *v.* Board of Estimate of the City of New York, 72 A.D>2d 505, 421 N.Y.S.2d 184 (1st Dep't 1979) (merely states that the trial court's judgment is affirmed).

Moreover, as Point VIII demonstrates, BSA should not have granted relief to CSI based upon alleged prejudice stemming from the landmark status of a building on its property since the decision to grant such relief was within the province of the City Planning Commission and Landmarks Preservation Commission.

For these additional reasons, BSA's finding under Zoning Resolution § 72-21(a) has no basis in law and should be set aside. *See, e.g.*, Raritan *v.* Silva, *supra*

(annulling BSA's determination which was counter to clear wording to Zoning Resolution); Smith *v.* Donovan, *supra*; Exxon Corporation *v.* NYC Board of Standards and Appeals, *supra.*

Point VI

BSA Erred As A Matter of Law In Applying The Wrong Legal Standard In Finding An Inability To Realize A Reasonable Return

As acknowledged by BSA in its Resolution, a not-for-profit institution is not required to establish an inability to achieve reasonable financial return to obtain a variance under the Zoning Resolution [R 8]:

> [U]nder ZR § 72-21(b), the Board must establish that the physical conditions of the site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return, and that the grant of a variance is therefore necessary to realize a reasonable return (the "(b) finding"), unless the applicant is a nonprofit organization, in which case the (b) finding is not required for the granting of a variance. . . .

Similarly, the inability to realize reasonable return does not warrant the issuance of a variance for a non-profit institution. *See, e.g.,* Pine Knolls Alliance Church, *supra* (examining programmatic needs of church in determining special permit request to expand for these purposes); Society for Ethical Culture in the City of New York *v.* Spatt, 51 N.Y.2d 449, 434 N.Y.S.2d 932 (1980) (noting, in the landmark regulation context, that "because charitable organizations are not created for financial return in the same sense as private businesses, for them the standard is [whether they are able to carry] out [their] charitable purpose").

CSI cannot have it both ways.

The determination must either be based upon whether an as-of-right development as a income generating enterprise is able to realize a reasonable return or whether an as-of-right development is able to satisfy CSI's programmatic needs.

If the proper test is applied, then, even assuming the conditions cited by BSA constitute "unique physical conditions", such conditions would not prevent CSI from realizing a reasonable return either from a mixed use or all residential as-of-right building.

The variances merely allow for greater profits, which is not a proper basis for such relief. *See*, Colonna *v.* The Board of Standards and Appeals of the City of New York, 166 A.D.2d 528, 560 N.Y.S.2d 705 (2d Dep't 1990); Abbey Island Park *v.* Board of Zoning Appeals of the Town of Hempstead, 133 A.D.2d 150, 518 N.Y.S.2d 823 (2d Dep't 1987); *see also*, Fuhst *v.* Foley, 45 N.Y.2d 441, 410 N.Y.S. 2d 56 (1978) ("an applicant does not qualify for an area variance by showing that he is merely inconvenienced by the zoning restrictions").

By limiting the inquiry to whether only a portion of an as-of-right development is capable of yielding a reasonable return, BSA improperly changed the calculation to benefit CSI and rendered a determination which cannot support a finding that CSI could not earn a reasonable return under Zoning Resolution § 72-21(b). *See*, Citizens for Ghent, Inc. *v.* Zoning Board of Appeals of Town of Ghent, 175 A.D.2d 528, 572 N.Y.S.2d 957 (3rd Dep't 1991) (since appraisal report provided dollars and cents evaluation of only a portion of property, there was no proof that the entire property could not allow a reasonable return); Concerned Residents of New Lebanon *v.* Zoning Board of

Appeals of Town of New Lebanon, 222 A.D.2d 773, 634 N.Y.S.2d 825 (3rd Dep't 1995) (rate of return analysis limited to leasehold portion of property of owner was deficient).[8]

Moreover, by devising and applying this unsound and unprecedented standard for mixed use developments, BSA has left the door wide open for other developers to exploit their sites, ultimately destroying the character of this and other New York City neighborhoods which the Zoning Resolution was designed to protect.

As explained by the Court of Appeals:

> Absent a uniform and rigorous standard, it is apparent that even a well-intentioned zoning board by piecemeal exemption which ultimately changes the character of the neighborhood * * * may create far greater hardships than that which a variance may alleviate. Unjustified variances likewise may destroy or diminish the value of nearby property and adversely affect those who obtained residences in reliance upon the design of the zoning ordinance.

Village Board of the Village of Fayetteville *v.* Jarrold, 53 N.Y.2d 254, 260, 440 N.Y.2d 908, 911 (1981); *see*, Van Deusen, *supra.*

Point VII

BSA Applied An Improper Standard In Finding That The Variances Granted Were The Minimum Necessary

CSI argued, and BSA found, that the seven variances granted to allow CSI to construct five floors of luxury condominiums on top of a new, four-story community

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[8] BSA's determination was also improper as it was not based upon an analysis which included consideration of CSI's equity in the property (*see,* Crossroads Recreation, Inc. *v.* Broz, 4 N.Y.2d 39, 172 N.Y.S.2d 129 (1958); Concerned Residents, *supra*) – as BSA's own guidelines even require.

facility in a mid-block contextual zoning district and Upper West Historic District, is the minimum necessary to alleviate the claimed hardship so as to satisfy Zoning Resolution § 72-21(e).

This finding, which hinges on BSA's other flawed findings discussed above, is similarly premised on the wrong test.

1) BSA Applied The Wrong Test

BSA should have -- consistent with its conclusion that the residential tower was not required to meet CSI's programmatic needs -- eliminated the residential tower from the equation. By BSA's own calculations, this would add over 2,000 square feet of space in the community facility otherwise required for the residential tower (approx 1,018 sq. ft. of first floor lobby and elevator space, approx 325 sq. ft. of elevator, stair and core building space on each of the second, third and fourth floors, and an undefined amount of cellar level mechanical space and accessory storage space [R 6]).

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. At the least, the variances for base height, building height, front setback and rear setback , admittedly authorized solely to permit construction of the residential tower [City Brief, p. 30], were not necessary and should not have been granted.

The test for a religious not-for-profit institution is the fulfillment of its programmatic needs. The programmatic needs, in this context, cannot include earning

income, since Zoning Resolution § 72-21(b) expressly eliminates "reasonable return from such zoning lot" from the five-part test when the applicant is a non-profit organization.

The rationale applied by BSA would permit CSI (and other religious institutions) to obtain a use variance to build a movie theater or other profit generating enterprise on top of a building it uses for religious and related purposes.

This is not and should not be the rule, as recognized by BSA itself in Yeshiva Imrei Chaim Viznitz.

2) BSA's Undue Deference To CSI

As stated in Petitioners' petition, throughout the proceedings on CSI's Application, BSA refused to consider opposing presentations and evidence and afforded unwarranted deference to CSI.

Contrary to Respondents' claims, the deference given was not limited to, or a discrete function of, discussions or findings relating to the community facility portion of the proposed development. The deference permeated every aspect of the process and, more importantly, each determination by BSA, effectively permitting CSI to frame the requirements for the variances sought, with the exception of minor window dressing (*e.g.*, requiring a "compliant court").

For these and other reasons, BSA did not ensure that the variances granted were the minimum necessary.

Point VIII

By Granting Multiple Variances Due To A Landmarked Structure On One Of CSI's Properties, BSA Illegally Usurped The Authority Of The Landmarks Preservation Commission And The City Planning Commission

Pursuant to Zoning Resolution § 74-711, 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."

CSI and the City Respondents claim that BSA was permitted to consider the fact that one of CSI's parcels contains its landmarked synagogue to satisfy the requirements for a finding of unique physical conditions, practical conditions and practical difficulties or unnecessary hardship for the issuance of a variance pursuant to Zoning Resolution § 72-21.

Nowhere does the Zoning Resolution mention, much less provide for relief with respect to, the hardships created by landmarking. However, the Landmarks Law, NYC Administrative Code § 25-309 (formerly § 207-7.0), provides for remedies when the existence of a landmarked structure creates hardships for a property owner. *See generally*, Church of St. Paul and St. Andrew *v.* Barwick, 67 N.Y.2d 510, 505 N.Y.S.2d (1986).

In Church of St. Paul, *supra*, the facts were remarkably similar to those here presented. As discussed by the Court of Appeals:

> [P]laintiff does not plan to replace the designated landmark. On the contrary, it proposes to renovate the church structure under a rebuilding program with a private partner, which includes a separate development for a commercial high-rise condominium. Plaintiff alleges that its severely deteriorating church . . . is unsuitable . . . [and proposed] "to provide a new building with appropriate facilities and income for plaintiff's continuing religious and charitable program, thereby assuring its survival."

67 N.Y.2d at 516, 505 N.Y.S.2d at 28.

When the church challenged the Landmarks Law as unconstitutionally restricting its right to use its property for such purposes, the Court of Appeals dismissed the claim as premature because the church had not availed itself of the specific hardship remedy of the Landmarks Law, by applying to the Landmarks Preservation Commission for relief pursuant to NYC Administrative Code § 25-309.

So, too, here, CSI could have availed itself of such relief before the Landmarks Preservation Commission but elected not to do so. Under the circumstances, it is not for BSI now to relieve CSI of this self-imposed hardship, especially since BSA lacks statutory authority to do so.

Relief also was available to CSI under the Zoning Resolution, itself, but not from BSA.

Pursuant to Zoning Resolution § 74-711, the City Planning Commission may issue a special permit which modifies the use and bulk regulations of a zoning lot containing a designated landmark or within a designated Historic District where it will result in the maintenance or preservation of the designated landmark.

The special permit issued by the City Planning Commission effectively provides the same potential relief as a variance provided by BSA, except that the City Planning Commission must consider the presence of a landmarked structure on the property, while BSA has no authority to do so.

Here, CSI initially advised the Landmarks Preservation Commission that it would seek relief under Zoning Resolution § 74-711. CSI then, inexplicably, elected not to do so.

Clearly, that election did not grant BSA the right to assume the authority vested solely in the City Planning Commission and its attempt to do so must be rejected.

The only case cited by CSI or the City Respondents to support their argument that BSA has the authority to grant a variance based upon the presence of a landmarked structure on the zoning lot is East 91st St. Neighbors to Preserve Landmarks, Inc. *v.* NYC Board of Standards and Appeals, 299 A.D.2d 126, 740 N.Y.S.2d 876 (1st Dep't 2002).

Contrary to the description of the decision by the City Resondents as "upholding BSA's granting of a variance of construction on a lot containing landmarked buildings" [City Memo, p. 34], the sole issue was whether a modification of a pre-existing variance could be processed as an "amendment" pursuant to BSA's "Special Order Calendar" or whether it required an application for a new variance. (While the Appellate Division opinion is in summary form, the underlying facts are set forth in the April 2, 2001 decision and order of Justice Elliott Wilk, Sup. Ct., N.Y. Co., Index No. 102087/01.)

Accordingly, since BSA lacked authority to base its determination on the presence of CSI's landmarked synagogue –a right reserved solely to the Landmarks Preservation Commission and the City Planning Commission – BSA's determination must be vacated.

CONCLUSION

For each of these reasons and others, the Resolution is void and illegal and should be annulled.

Dated; New York, New York
June 19, 2009

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ADDENDUM A

290-05-BZ
APPLICANT – Stuart A. Klein, for Yeshiva Imrei Chaim Viznitz, owner.
SUBJECT – Application September 19, 2005 and updated April 19, 2006 – Variance pursuant to Z.R. §72-21 to permit a catering hall (Use Group 9) accessory to a synagogue and yeshiva (Use Groups 4 and 3). The site is located in an R5 zoning district.
PREMISES AFFECTED – 1824 53rd Street, south side, 127.95' east of the intersection of 53rd and 18th Avenue, Block 5480, Lot 14, Borough of Brooklyn.
COMMUNITY BOARD #12BK
APPEARANCES –
For Applicant: Stuart A. Klein.
ACTION OF THE BOARD – Application denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Vice Chair Collins and Commissioner Ottley-Brown.....3
THE RESOLUTION:

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated February 28, 2006, acting on Department of Buildings Application No. 301984342, reads in pertinent part:

"Proposed Catering Use (UG 9) is not permitted in an R5 Zone"; and

WHEREAS, this is an application under ZR § 72-21 to permit, within an R5 zoning district, the use of the cellar of a three-story building for a Use Group ("UG") 9 catering establishment, which is contrary to ZR § 22-00; and

WHEREAS, the appeal was brought on behalf of Yeshiva Imrei Chaim Viznitz, a not for profit religious institution (hereinafter "Applicant"), the owner of the building at the subject premises; and

WHEREAS, a public hearing was held on this application on June 13, 2006 after due notice by publication in *The City Record*; and

WHEREAS, a continued hearing was held on August 15, 2006, on which date the hearing was closed and decision was set for September 19, 2006; and

WHEREAS, at the request of Applicant, the decision date was deferred to September 26, 2006; and

WHEREAS, the Board reopened the hearing on this date, but Applicant's counsel was unable to attend; and

WHEREAS, decision was deferred to October 24, 2006; and

WHEREAS, the matter was again reopened on October 24, and a continued hearing date was set for November 21, 2006; and

WHEREAS, a continued hearing was held on November 21, and a decision was set for January 9, 2007; and

WHEREAS, the site was inspected by a committee of the Board; and

WHEREAS, the Board also notes that at the request of Applicant, the Board's counsel and staff met with Applicant during the hearing process to provide suggestions on how to approach the application; and

WHEREAS, Community Board 12, Brooklyn, recommends approval of this application, on condition that the catering use at the premises close by 1 am and that Applicant consult with elected officials and the Community Board to address traffic concerns on the subject block; and

WHEREAS, certain neighbors appeared and made submissions in opposition to this application; and

WHEREAS, many members of the broader Viznitz community appeared in support of the application; and

WHEREAS, in addition, Applicant provided letters from other individuals supporting the application; and

WHEREAS, the Board notes that while Applicant claimed to have the support of certain elected officials, no elected official appeared at hearing and no letters of support from elected officials were submitted; and

WHEREAS, the subject premises is located in an R5 residential zoning district on 53rd Street between 18th and 19th Avenues and is currently improved upon with a three-story with cellar building (the "Building"); and

WHEREAS, the Building is across the street from and adjacent to numerous two-story semi-detached dwellings; and

WHEREAS, Certificate of Occupancy No. 300131122, issued for the Building on May 26, 1999 (the "CO"), lists the following uses: (i) UG 4 assembly hall and kitchen and UG 9 catering use in the cellar; (ii) UG 4 synagogue and UG 3 classrooms on the first and second floors; and (iii) UG 3 classrooms on the third floor; and

WHEREAS, this CO was the subject of a 2005 application by DOB, who sought to revoke or modify it pursuant to City Charter §§ 666.6(a) and 645(b)(3)(e), on the basis that the CO allows conditions at the referenced premises that are contrary to the Zoning Resolution and the Administrative Code; and

WHEREAS, DOB argued that the catering use did not possess lawful non-conforming UG 9 status and

was therefore illegal; and

WHEREAS, specifically, DOB suggested that the prior UG 16 use on which the status of the UG 9 designation was predicated had been discontinued for more than two years and that the prior building housing this use had been demolished; DOB contended that this had not been revealed by the permit applicant; and

WHEREAS, under either circumstance, DOB alleged that there is no legal basis for a UG 9 catering establishment designation on the CO for the cellar of the Building; and

WHEREAS, a public hearing was held on DOB's application on May 17, 2005, but before the next continued hearing, Applicant obtained a court order, dated July 8, 2005, enjoining the Board from acting on the application and from conducting further proceedings on it; and

WHEREAS, this court order also directs Applicant to file a variance application at the Board; and

WHEREAS, months later, Applicant filed the instant variance application; and

WHEREAS, Applicant also filed an appeal of a DOB determination that the UG 9 catering use in the cellar was not a UG 3 school or UG 4 synagogue accessory use, under BSA Cal. No. 60-06-A; and

WHEREAS, since the two matters were filed at the same time and both concerned the use of the Building's cellar for commercial catering purposes, the Board, with the consent of all parties, heard the cases together and the record is the same; and

WHEREAS, Applicant states that the Building currently contains a UG 3 religious school for approximately 625 boys (the "School"), a UG 4 synagogue space (the "Synagogue"), and a UG 9 catering establishment that serves the needs of the broader orthodox Jewish community in the vicinity of the site (the "Catering Establishment"); and

WHEREAS, the Synagogue is located on parts of the first and second floor mezzanine; and

WHEREAS, specifically, as illustrated on the plans for the first floor submitted by Applicant, stamped May 5, 2006, the first floor Synagogue space is for men, and adjoins a classroom with a removable partition; it is approximately 1,900 sq. ft.; and

WHEREAS, the second floor Synagogue space is for women, and is 1,380 sq. ft; and

WHEREAS, Applicant states that the Synagogue is attended by approximately 300 people on the Sabbath, and approximately 100 people and approximately 400 students on weekdays; and

WHEREAS, the remainder of the first and second floors, and the entirety of the third floor, appear to be occupied by the School's classrooms and other School-related spaces; and

WHEREAS, Applicant claims that the School serves many economically disadvantaged children, and that 85 percent of the children receive government-sponsored school lunch money; and

WHEREAS, both the School and Synagogue are permitted uses in the subject R5 zoning district; and

WHEREAS, the Catering Establishment, which is not a permitted use in the subject R5 zoning district, was listed on the CO on the alleged basis that it is a lawful non-conforming use, as discussed above; and

WHEREAS, the Catering Establishment is located in the cellar of the Building; the same cellar space is also apparently used for the School's cafeteria and assembly hall; and

WHEREAS, the Catering Establishment occupies approximately 18,000 sq. ft. of floor space in the cellar, with a primary event space, two adjoining lobbies and bathroom areas (one for men and one for women), as well as two kitchens; and

WHEREAS, the record indicates that the Catering Establishment has separate management and staff from the School and separate entrances with awnings reflecting the business name, that the food for events is made on the premises, that a guard is provided from 6 pm to 12 pm to assist with guest parking, and that waiters and busboys are hired on an "as needed" basis; and

WHEREAS, Applicant alleges that most events are held from approximately 6 pm to 12 am, and that 90 percent of the guests leave the Building at 11:30 pm; and

WHEREAS, Applicant states that ceremonies (held under Chuppahs, which look like canopies) related to the catered events are often conducted outside; and

WHEREAS, Applicant alleges that attendance at each event ranges between 340 and 400 people, though evidence submitted by Applicant indicates that some events are scheduled to have at least 500 guests; and

WHEREAS, Applicant provided information revealing that 166 events were held in 2004, and 154 events were held in 2005; and

WHEREAS, Applicant states that the catered events are offered at reduced rates relative to other catering establishments, with weddings costing approximately 25 dollars per plate; and

WHEREAS, members of the broader Viznitz community stated that the reduced rates were attractive to members of the larger orthodox and Hasidic Jewish community in Brooklyn; and

WHEREAS, these same members stated that the Catering Establishment serves the needs of this community; and

WHEREAS, the Catering Establishment has a license from the Department of Consumer Affairs for a catering establishment; and

WHEREAS, the Board notes that the Catering Establishment advertises in the Verizon Yellow Pages (both on-line and in print) under the listing "Banquet Facilities" as "Ohr Hachaim Ladies" and "Ohr Hachaim Men", with the address and phone number listed; and

WHEREAS, Applicant does not address the Verizon Yellow Pages advertisement, but in its last submission alleges that it does not pay for similar advertising that apparently runs in the Borough Park Community Yellow Pages, does not desire this advertising, and has informed the publisher of the Borough Park Community Yellow Pages to stop running the advertisements; and

WHEREAS, the applicant, in sum and substance, represents that the finding set forth at ZR § 72-21(a) may be satisfied in the case of a applicant that is a non-profit religious entity solely with evidence that that the requested waiver is necessary because of a programmatic need of the religious entity; and

WHEREAS, ZR § 72-21(a) requires that the Board find that the applicant has submitted substantial evidence of unique physical conditions related to the site that create practical difficulties or unnecessary hardship in using the site in strict conformance with the applicable use regulation; and

WHEREAS, Applicant claims that the Catering Establishment satisfies a religious duty on the part of the broader Viznitz community and also provides a funding stream for the costs of operating the Synagogue and School that cannot be offset by tuition and donations alone; and

WHEREAS, Applicant claims that the Viznitz community totals about 6,500 members, but the Board notes that there is nothing in the record specifying where these 6,500 members reside; and

WHEREAS, moreover, the Board notes that there is nothing in the record to suggest that all 6,500 members of the Viznitz community cited by Applicant are regular members of the Synagogue or students or family members of students of the School; and

WHEREAS, in fact, the Board observes that the Synagogue attendance figures and School enrollment figures provided by Applicant would belie any such claim; and

WHEREAS, nevertheless, Applicant claims that there is a direct relationship based upon programmatic need between the School and the Synagogue and the Catering Establishment; and

WHEREAS, the Board recognizes that many variances it has granted in the past to religious or educational institutions have been predicated, in part, on the programmatic needs of the institution; and

WHEREAS, further, the Board does not question the sincerity of Applicant's belief that the provision of space for weddings, receptions, and other life events in general fulfills a religious need, nor the veracity of the contention that the revenue raised from the catering function is used in part for School and Synagogue purposes; and

WHEREAS, however, the Board does not consider either of the two alleged programmatic needs to be the equivalent of the type of programmatic need that can justify a use variance at this location; and

WHEREAS, first, as to the question of fulfillment of religious duty, while Applicant has claimed that in the Jewish faith there is a custom of incorporating wedding festivities as part of the marriage ritual, no explanation has been given as to how such a custom justifies the location of a UG 9 commercial catering establishment in a zoning district where it is not allowed; and

WHEREAS, the Board observes that Applicant has not made any credible claim that the lawful existence or operation of the School or the Synagogue depends on the existence of a UG 9 catering establishment within the Building; and

WHEREAS, the Board further observes that both the Synagogue and the School are as of right uses, and no claim is made that the Building's square footage is somehow incapable of accommodating the current congregation and enrollment absent the presence of the Catering Establishment; and

WHEREAS, the Board notes that Applicant has not claimed that the Synagogue is used during all catered events; and

WHEREAS, to the contrary, Applicant indicated during the hearing process that most of the celebrants prefer to have the ceremony outside in a Chuppah; and

WHEREAS, specifically, in its July 11, 2006 submission, Applicant notes that the usual schedule for a catered event features a Chuppah, which is held outdoors when possible; and

WHEREAS, further, Applicant has not provided any credible evidence that the School has any operational integration whatsoever with the Catering Establishment; and

WHEREAS, most importantly, the Board notes that it is not the School or Synagogue use that is generating the alleged programmatic need; rather, as conceded on multiple occasions by Applicant, the need appears to arise from general demand for low-cost catered events from the broader Hasidic and orthodox Jewish community in Brooklyn, regardless of any connection to the School or Synagogue; and

WHEREAS, a letter from another caterer, submitted to the Board by Applicant, confirms that the alleged programmatic need has nothing to do with the School or the Synagogue; this letter specifically states "[i]f the [Catering Establishment] would cease to function, it would cause much hardship to the Boro Park Community"; and

WHEREAS, the Board has never granted a variance based on such a broad-based need that is non-specific to the religious institution making the application and occupying the site; instead, the Board looks for a clear nexus between the requested variance and the specific programmatic needs of the institution on the site; and

WHEREAS, the Board observes that none of the cases cited by Applicant in its submission require the Board to grant the requested variance; and

WHEREAS, nor do any of the Board's prior decisions cited by Applicant in its initial submission; and

WHEREAS, three of these prior decisions were for bulk variances, needed by congregations in order to create a building with sufficient square footage to accommodate increased attendance; none of them were commercial use variances for a catering establishment; and

WHEREAS, the record also contains mention of two other occasions on which the Board has considered an application for a commercial catering variance: (1) BSA Cal. No. 194-03-BZ, concerning 739 East New York Avenue, Brooklyn, decided on December 14, 2004; and (2) BSA Cal. No. 136-96-BZ, concerning 129 Elmwood Avenue, Brooklyn, decided on June 3, 1997; and

WHEREAS, first, the Board notes that generally prior variances are not viewed as precedent for future applications; and

WHEREAS, instead, because each variance is based upon special circumstances relating to the site for which it is proposed, the past grant or denial of variances for other properties in the area does not mandate similar action on the part of the Board; and

WHEREAS, second, even assuming that past grants do function as binding precedent, the Board finds that both of these matters are distinguishable from the instant matter, and support the Board's rejection of it; and

WHEREAS, in the East New York Avenue matter, the applicant, a religious school, originally attempted to argue that the variance could be predicated on the alleged programmatic need of creation of a revenue stream for the school; and

WHEREAS, however, the Board rejected this argument, and instructed the applicant to approach the case as if it were a for-profit applicant, since the proposed use was UG 9 commercial catering that would serve the larger community; and

WHEREAS, thus, the applicant was required to establish that the site presented a unique physical condition and to submit a feasibility study in order to establish hardship; and

WHEREAS, as reflected in the resolution for that matter, the applicant was able to meet these requirements and the variance was granted; and

WHEREAS, as conceded by Applicant at the August 15, 2006 hearing, there is no such uniqueness present at the subject site or as to the Building; and

WHEREAS, accordingly, Applicant did not even attempt to make a similar argument in this proceeding, but instead attempted to argue the application based solely on programmatic needs; and

WHEREAS, in the Elmwood Avenue matter, the applicant, another religious school, applied to the Board for multiple bulk waivers related to the proposed construction of a religious school on a site split by M1-1, R3-1 and R5 zoning district boundaries; and

WHEREAS, the applicant applied for a use variance for the school in the M1-1 zoning district, and also for various height, setback and rear yard requirements; and

WHEREAS, as initially argued by the applicant, the site suffered a hardship due to irregular shape, substandard depth, grade condition and adjacency to a railroad cut; and

WHEREAS, a catering hall was also proposed, though initially the applicant did not request a use variance for it; and

WHEREAS, instead, the catering hall was proposed to be located entirely within the M-1 zoning district, on an as of right basis; and

WHEREAS, however, during the course of the hearing process, the applicant revealed that the kitchen for the catering facility (which was also the kitchen for the school) was partially within the residential zone; and

WHEREAS, accordingly, a use variance for this small portion of the catering facility was required; and

WHEREAS, the Board asked that the applicant attempt to isolate the catering use to the M1-1 zoning district through the erection of a wall in the cellar; and

WHEREAS, the applicant explained that the site was split by a district boundary, and it was this unique physical condition that caused the need for the small use waiver for the catering establishment; and

WHEREAS, the Board observes that it was only the presence of the district boundary line that caused the need for a minor use variance for the kitchen; and

WHEREAS, the resolution for this matter also cites to the irregular shape and narrow depth of the site as the cause of the practical difficulties and unnecessary hardship; and

WHEREAS, as noted above, the subject site suffers no unique physical hardship, a fact conceded by Applicant; and

WHEREAS, in sum, neither of the two prior commercial catering variance applications require the Board to grant the requested variance here, since they were predicated on the site's actual physical uniqueness; and

WHEREAS, in addition to the guidance that these two cases provide, the Board notes that when it grants
applications from religious and educational institutions for variances based upon programmatic need, it routinely places conditions in said grants to prohibit commercial catering within the schools or places of worship; and

WHEREAS, the applicants in such cases accept this condition without question, and agree to make only accessory use of the spaces within the buildings; rarely if ever do applicants argue, as has Applicant here, that unrestricted UG 9 commercial catering is a programmatic need; and

WHEREAS, the second claimed programmatic need is that income from the Catering Establishment is purportedly used to support the School and Synagogue and that the School and Synagogue would close without this income; and

WHEREAS, the Board again disagrees that this is the type of programmatic need that can be properly considered sufficient justification for the requested use variance; and

WHEREAS, while the Board recognizes that the Applicant believes that the School and Synagogue are important to the broader Jewish community in Brooklyn, it is not required on this basis to grant a use variance for a commercial use on the same site as the School and Synagogue; and

WHEREAS, were it to adopt Applicant's position and accept income-generation as a legitimate programmatic need sufficient to sustain a variance, then any religious institution could ask the Board for a commercial use variance in order to fund its schools, worship spaces, or other legitimate accessory uses; and

WHEREAS, again, none of the case law or prior Board determinations cited by Applicant stand for this proposition; and

WHEREAS, the Board observes, in fact, that the East New York Avenue case is a repudiation of Applicant's unfounded contention; and

WHEREAS, further, the Board observes that such a theory, if accepted, would subvert the intent of the ZR's distinction between community facility uses, which are allowed in residential districts, from commercial uses, which are not; and

WHEREAS, the Board notes that UG 9 catering establishments are only permitted in commercial zoning districts, and, pursuant to ZR § 32-18, is the type of commercial use that provides "primarily . . . business and other services that (1) serve a large area and are, therefore, appropriate in secondary, major or central commercial shopping areas, and (2) are also appropriate in local service districts, since these are typically located on the periphery of major secondary centers"; and

WHEREAS, the Board further observes that the goals of the commercial regulations in the ZR include the protection of nearby residences against congestion that can result from commercial uses; and

WHEREAS, Appellant has offered no justification for its blanket assertion that a primary commercial use should be permitted in a residential district anytime a religious institution desires to generate revenue by engaging in commercial activity; and

WHEREAS, based on the above, the Board finds that Applicant has failed to establish that it has a programmatic need that requires the requested variance; and

WHEREAS, in a later submission, Applicant also argued that it was entitled to the proposed use variance based upon its good faith reliance on the DOB-issued permit that precipitated the issuance of the CO; and

WHEREAS, Applicant claims that it spent "millions" of dollars constructing the Building and then "hundreds of thousands" more subsequent to the issuance of the CO; and

WHEREAS, the record is devoid of any evidence of these expenditures or the precise amount, but even if such had been established, the Board notes that the Building includes the School and the Synagogue, as well as a cellar that can lawfully be used as the School's cafeteria and for other accessory uses; and

WHEREAS, thus, all such expenditures would not be wasted; and

WHEREAS, additionally, since Applicant has had the benefit of the Catering Establishment since the CO was issued, consideration of the cumulative financial gain over the last seven years would be a relevant consideration; Applicant did not engage in this analysis however; and

WHEREAS, even had expenditures been proven and discussed in any comprehensible manner by Applicant, the Board observes that the good faith reliance doctrine is not a categorical substitute for uniqueness or hardship; and

WHEREAS, rather, expenditure made in good faith reliance upon a permit is merely one of the factors that may be considered by the Board, and physical uniqueness is still relevant; and

WHEREAS, as noted above, Applicant concedes that the site and the Building present no unique physical features; instead, the site is regular in size and shape, and the Building is recently constructed and not obsolete as a school or synagogue building; and

WHEREAS, again, the site itself does not present any hardship; and

WHEREAS, additionally, Applicant made no attempt to establish that the purported reliance was made in good faith; and

WHEREAS, the Board notes that it is Applicant's responsibility to convince the Board that the permit and CO were obtained with all relevant facts being disclosed to DOB by the owner of the premises and the filing professional who obtains the permit; and

WHEREAS, here, the record contains no evidence that this responsibility was met; and

WHEREAS, in sum, the Board notes that Applicant failed to present any evidence as to alleged good faith reliance that would allow it to fully determine this claim, notwithstanding the fact that the Board stood ready to consider such evidence; and

WHEREAS, finally, Applicant suggests that the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a federal law, requires that the Board issue the requested variance; and

WHEREAS, RLUIPA provides that no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest; and

WHEREAS, first, the Board observes that whether the Board grants the variance or not, the School and the Synagogue are permitted uses under the R5 zoning district regulations and may remain legally on the site; and

WHEREAS, further, as expressed in the resolution for the companion appeal, Applicant is free to hold, and charge money for, events in the cellar to the extent that they are accessory to the School or Synagogue; and

WHEREAS, there is no evidence that would support the conclusion that the Board, in denying this variance application, is imposing a substantial burden on or even interfering with the exercise of religious freedom or religious practices of the School or the Synagogue; and

WHEREAS, Applicant's contention that the School and the Synagogue would not be able to cover expenses without the on-site Catering Establishment, even if proved to be a fact, does not lead to a contrary conclusion; and

WHEREAS, additionally, it is difficult for the Board to understand why RLUIPA should function to support the granting of a commercial use variance in order to support a revenue stream for a religious entity that is unable to support its non-commercial uses through traditional means; and

WHEREAS, accordingly, the Board declines to apply RLUIPA in the novel way that Applicant suggests; and

WHEREAS, further, the Board notes that the court in Episcopal Student Foundation vs. City of Ann Arbor, 341 FSupp2d 691 (ED Michigan 2004) held that that zoning regulations that imposed financial burdens on a church do not constitute substantial burdens under RLUIPA; and

WHEREAS, thus, even if the Catering Establishment is required to be relocated at a cost, or if the activities conducted there are limited to events that are accessory, with a resulting decrease in revenue, this is not a substantial burden under RLUIPA; and

WHEREAS, in addition, the Episcopal Student Foundation court held that a zoning ordinance does not infringe on the free exercise of religion where religious activity can occur elsewhere in the municipality; and

WHEREAS, thus, even if the operation of the Catering Establishment can properly be characterized as religious in nature (despite its status under the ZR as a commercial use), since it is allowed in commercial zoning districts that are mapped liberally throughout the City, Applicant's alleged free exercise rights are not compromised; and

WHEREAS, in sum, the Board finds that all of Applicant's arguments as to why the finding set forth at ZR § 72-21(a) is met or why the request for the variance is otherwise justified are without merit; and

WHEREAS, because Applicant has failed to provide substantial evidence in support of this finding or persuade the Board as to why the finding should be overlooked, consideration of the remaining findings is

unnecessary; and

WHEREAS, however, merely because this application was fundamentally flawed and poorly presented does not mean that the Board is blind to the concerns of Applicant; and

WHEREAS, the Board again observes that Applicant can use the cellar legally for accessory purposes; and

WHEREAS, further, if Applicant determines that it must engage in commercial catering activities, there is no reason why these activities may not occur on a site that is commercially zoned; the income that is generated can still be used to support the School and Synagogue; and

WHEREAS, the Board finds that these alternative measures will enable Applicant to pursue its proposed catering use in full compliance with the law without incurring excessive additional costs.

Therefore it is Resolved that the decision of the decision of the Brooklyn Borough Commissioner, dated February 28, 2006, acting on Department of Buildings Application No. 301984342 is upheld and this variance application is denied.

Adopted by the Board of Standards and Appeals, January 9, 2007.