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

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

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

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INTRODUCTION

Respondent Congregation Shearith Israel (the "Congregation") respectfully submits this memorandum of law in opposition to the verified second amended petition under Article 78 of the CPLR (the "Petition") of petitioners Landmark West! Inc., 91 Central Park West Corp., and Thomas Hansen (the "Petitioners"). Petitioners are challenging the issuance of a zoning law variance that will enable the Congregation to construct a mixed-use community facility and residential building at 8 West 70th Street in Manhattan.

Under Section 72-21 of the Zoning Resolution, respondent Board of Standards and Appeals of the City of New York (the "BSA") can grant a property owner a variance from zoning restrictions by making up to five findings of fact. As is documented in the 5,700-page administrative record filed by the City Respondents ("R."), the BSA held four hearings (on November 27, 2007, February 12, 2008, April 15, 2008, and June 24, 2008; *see* R. 1726-1813, 3654-3758, 4462-4515, 4937-4974), studied the issue for fifteen months, credited the testimony of the Congregation's Rabbi (R. 1736-39), education director (R. 1739-42), architects (R. 1733-36), financial experts (R. 3669-79, 4463-83) and counsel, and then explicitly made the factual findings referenced in the statute. Petitioners are, nevertheless, challenging the BSA's factual findings.

Petitioners lack standing to challenge the variance. Moreover, even if they had standing, it would be appropriate to deny Petitioners relief given that (i) the BSA plainly had jurisdiction to issue the variance, and (ii) the BSA's August 26, 2008, unanimous resolution granting the Congregation the zoning variance (the "Resolution") is neither arbitrary nor capricious. The Petition should be denied.

Petitioners have amended their petition to drop former parties who were closest to the Congregation's site. The remaining Petitioners lack standing. The Petition may be dismissed on that ground. (*See* Point I.) But Petitioners' challenges are also baseless. (*See* Point II.)

First, the Petitioners' challenge to the BSA's broad jurisdiction is without merit. (*See* Point II(B).) Petitioners do not (and cannot) deny that the BSA is authorized to issue variances under Section 668 of the New York City Charter regardless of whether there are technical defects in the property owner's application to the Department of Buildings or in the Department of Building's objections to the application. While Petitioners claim that the only provision that vests the BSA with jurisdiction is New York City Charter Section 666, this ignores the fact that Section 666 authorizes the BSA to "vary the application of the zoning resolution as may be provided in such resolution and ***pursuant to section six hundred sixty-eight.***" N.Y.C. Charter § 666(5) (emphasis added).

Second, while Petitioners are unhappy with certain of the factual findings in the BSA Resolution, their efforts to secure *de novo* review are impermissible. (*See* Point II(C).) A court may not overturn an administrative agency's determination simply because it would have come to a different conclusion. *See Matter of SoHo Alliance v. New York City Bd. of Standards & Appeals*, 95 N.Y.2d 437, 440, 718 N.Y.S.2d 261, 262, 741 N.E.2d 106, 108 (2000).

In *SoHo Alliance*, the New York Court of Appeals explained that the BSA may grant a zoning variance by making the five factual findings referenced in Section 72-21 of the New York City Zoning Resolution. *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citing N.Y. City Zoning Resolution § 72-21). Holding that a lower court erred in vacating the variance and granting the Article 78 petition, *SoHo Alliance* concluded that a BSA's variance

must "'be sustained if it has a rational basis and is supported by substantial evidence.'" *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citation omitted).

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

BACKGROUND

The Congregation owns a parcel of property on the northwest corner of Central Park West and West 70th Street in Manhattan. (R. 4534.) The property consists of two merged tax lots. (*Id.*) On the southeast corner of the lot is the historic Spanish and Portuguese Synagogue, the heart and soul of the Congregation's mission. (R. 4538-42.) Confined by partially-obsolete structures and faced with a need to grow, the Congregation needs to develop that property further in order to pursue its religious mission. (R. 4542-46.)

Unfortunately, a peculiar set of circumstances left the Congregation with no choice but to seek relief from the Zoning Resolution. A variety of factors – the size and location of the historic Synagogue, the odd position of a zoning boundary that bi-sects the property, obsolete floor plates and internal access routes, and the "sliver law," among other things – have caused the tax lot owned by the Congregation to be, in the BSA's words, "underdeveloped." (R. 4566;

BSA Res. ¶ 100.)[1] As a result of these unique factors, the Congregation can only develop 28,274 square feet of its property as-of-right even through, were it not for the unusual constraints, the Congregation would be entitled to develop over 116,752 square feet of its property. (BSA Res. ¶ 114.)

In April 2007, the Congregation submitted a variance application to the BSA seeking waivers of zoning regulations to construct a community facility and residential development on its property at 8 West 70th Street. (R. 20-48.) As amended, the application contemplated a project in which the two cellar floors and first four floors would directly redress the Synagogue's disability access and programming needs (a synagogue lobby, Rabbi's office, archival space, a modest reception room, dairy and meat kitchens, babysitting space, storage space, classrooms, and a caretaker's apartment) and four floors would house five residential apartments that could be sold to defray roughly six million dollars of the much-larger project cost. (R. 4536, 5178.) This expansion would only use up 70,166 square feet of the 116,752 square feet of development rights that would normally be supported on the property. (BSA Res. ¶ 115.)

The Congregation's submission followed a unanimous decision by the Landmarks Preservation Commission ("LPC") that the Congregation's proposed construction would be appropriate in regard to its relationship to both the Congregation's landmarked Synagogue and the Upper West Side/Central Park West Historic District. (R. 215-16.) Among other things, LPC was informed of larger buildings in the vicinity of the Synagogue, including 18 West 70th Street (associated with a petitioner in a companion case) (nine stories, 95 ft. high with no setback), 101 Central Park West (15 stories), and 91 Central Park West (a ***Petitioner*** in this action) (13 stories). (BSA Res. ¶ 1179-81.)

[1] "BSA Res." is a reference to the BSA Resolution challenged by Petitioners. The parties are using a copy of the Resolution, supplied to the Court, that has been annotated with paragraph numbering.

To facilitate its review of the Congregation's request, the BSA conducted four public hearings over the course of eight months. (R. 1726-1813, 3654-3758, 4462-4515, 4937-4974; BSA Res. ¶ 4.) To maximize public involvement, the Congregation's application to the BSA was announced in the *City Record* and in letters sent by certified mail to all owners of record within 400 feet of the proposed development site. (BSA Res. ¶ 4.) Moreover, Community Board 7's Land Use Committee also held public hearings regarding the Congregation's proposed construction.

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

On August 26, 2008, the BSA issued a Resolution granting the variance and expressly making the five findings referred to in Section 72-21 of the New York City Zoning Resolution. The BSA found that: (a) there are unique physical conditions that create practical difficulties in strictly complying with the zoning requirements; (b) the physical conditions of the development site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return; (c) the variance will not alter the essential character of the neighborhood or district in which the Congregation is located; (d) neither the Congregation nor its predecessor in title created the practical difficulties that the Congregation claims as a ground for the variances; and (e) the variance is the minimum necessary to afford the

Congregation relief. (BSA Res. ¶¶ 122, 148, 201, 205, 210-11.) Having made the five statutory findings, the BSA granted the variance.

Unhappy with the BSA's decision, Petitioners filed this action. In their Petition, Petitioners challenge the BSA's jurisdiction and attempt to persuade that the BSA reached the wrong conclusion with respect to some of the five statutory findings.

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE BSA RESOLUTION

In a meager effort to establish standing, the Petition includes a few conclusory remarks about the three Petitioners. The Petition alleges that Petitioner Landmark West! Inc. is a not-for-profit organization that protects the "historic architecture and development patterns of the Upper West Side." (Petition ¶ 8.) It alleges that the two remaining Petitioners are owners of a building (91 Central Park West, on the corner of West 69th Street), around the corner from the West 70th property at issue. (*See id.* ¶¶ 11, 12.) The Petition asserts, with no further elaboration, that Petitioners are "within a zone immediately and directly impacted by the New Building" (*id.* ¶ 24) and that they "will experience a reduction of the light, air and convenience of access" as a result of the issuance of the variance (*id.* ¶ 25). Nowhere else in the Petition is there any allegation about "light, air [or] access" or any other information about how Petitioners are in the purportedly impacted "zone." The Petition's "vague, conclusory and unsubstantiated allegations" are insufficient to establish standing. *See All Way East Fourth St. Block Ass'n v. Ryan-NENA Community Health*, 30 A.D.3d 182, 182, 817 N.Y.S.2d 14, 14 (1st Dep't 2006).

To establish standing, a petitioner must show that the petitioner will suffer injuries of the type that the statute (here, the Zoning Resolution) is designed to protect and that those alleged injuries are "specific to petitioner" and not "general concerns shared by all the residents of the

area." *Buerger v. Town of Grafton*, 235 A.D.2d 984, 652 N.Y.S.2d 880, 881-82 (3d Dep't 1997). Thus, in *Buerger*, the Court denied standing to a neighbor "within 600 feet" of an affected site who was a member of a property association that owned 400 acres of land contiguous to the development property since the flood damage, forest habitat degradation, and lake despoliation complained of, while "serious concerns," were "shared by all residents of the area," and thus insufficient to support standing. *Id.*; *see also Soc. of the Plastics Indus. Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774, 570 N.Y.S.2d 778, 785, 573 N.E.2d 1034, 1041 (1991) ("In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large."); *Matter of City of Plattsburgh v. Mannix*, 432 N.Y.S.2d 910, 77 A.D.2d 114 (3d Dep't 1980) (holding that petitioner lacked the necessary standing to challenge the issuance of a variance because it failed to demonstrate how its personal or property rights would be directly and specifically affected apart from any damage suffered by the public at large).

The standing test for an organization is even higher because, among other things, the entity must also establish that the interests asserted in the litigation are germane to its organizational purposes. *See Soc. of the Plastics Indus.*, 77 N.Y. at 775, 570 N.Y.S.2d at 786, 573 N.E.2d at 1042 (no standing found); *see also New York City Coalition for the Preservation of Gardens v. Giuliani*, 666 N.Y.S.2d 918, 246 A.D.2d 399 (1st Dep't 1998) (holding that an organization was without standing to bring action to enjoin construction).

The Petitioners here cannot meet those tests. The Petition is devoid of any substantive allegation that the variance will block Petitioners' windows, affect their views, affect their light, or limit their ability to enter their buildings. Petitioners can make no such claims. Indeed, various as-of-right developments would have greater impacts on the supposed "neighbors,"

Petitioners 91 Central Park West Corporation and Thomas Hansen, than the variance at issue. (*See, e.g.,* R. 4664; BSA Res. ¶ 61.) Moreover, Petitioner Landmark West! Inc., with its purported interest in all Upper West Side landmarks, can claim no unique interest in the variance, as it will protect, not undermine, a significant, landmarked Synagogue. Petitioners' claims, which focus on purported defects in the BSA's jurisdiction (Petition ¶¶ 26-43), the BSA's analysis of finances (*id.* ¶¶ 44-78), the BSA's purported deference to religion (*id.* ¶¶ 79-86), and the BSA's purportedly excessive concern for landmarks (*id.* ¶¶ 87-96), are not "specific to [P]etitioner[s,]" germane to the organizational purposes of Landmark West Inc., or pertinent to the Zoning Resolution's statutory purposes. Petitioners clearly lack standing to challenge the BSA Resolution.

II. PETITIONERS' CHALLENGES ARE MERITLESS IN ANY EVENT

A. <u>This Court's Standard of Review is Exceedingly Deferential</u>

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

Once the BSA makes these five findings, the judiciary's role is extraordinarily limited. The New York Court of Appeals has held that a court's "review of the BSA's determination to

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

SoHo Alliance's use of the term "substantial evidence" was not an indication that a BSA decision must meet the "substantial evidence" test of CPLR 7803(4). Years before *SoHo Alliance*, the Court of Appeals distinguished decisions of a zoning board, which it described as "administrative or quasi-legislative in character," subject to a "rationality . . . standard of review," from "quasi-judicial determinations reached upon a hearing involving sworn testimony." *Sasso v. Osgood*, 86 N.Y.2d 374, 384 n.2, 657 N.E.2d 254, 259 n.2, 633 N.Y.S.2d 259, 264 n.2, (1995). The *Sasso* Court said: "When reviewing the determinations of a Zoning Board, courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination." *Id.* The Second Department has recently explained further:

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[2] *Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599, 363 N.E.2d 305, 310, 394 N.Y.S.2d 579, 584 (1977) ("[R]esponsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. . . . It matters not whether, in close cases, a court would have, or should have, decided the matter differently.").

> Municipal land use agencies like the Zoning Board are "quasi-legislative, quasi-administrative" bodies . . . , and the public hearings they conduct are "informational in nature and [do] not involve the receipt of sworn testimony or taking of 'evidence' within the meaning of CPLR 7803(4)" . . . . While parties may have a right to be heard by such agencies and to present facts in support of their position, the forum in which they do so is not "a quasi-judicial proceeding involving the cross-examination of witnesses and the making of a record within the meaning of CPLR 7803(4)" . . . . Accordingly, determinations of such agencies are reviewed under the "arbitrary and capricious" standard of CPLR 7803(3), and not the "substantial evidence" standard of CPLR 7803(4).

Matter of Halperin v. City of New Rochelle, 809 N.Y.S.2d 98, 105, 24 A.D.3d 768, 772 (2d Dep't 2005) (citations omitted).

Of course, even the "substantial evidence" test of CPLR 7803(4) (inapplicable here) is extremely deferential. Supporting evidence will be considered "substantial" provided that key findings are substantiated by more than a "scintilla of evidence," *i.e.*, that "a reasonable mind ***might*** accept [the proof] as adequate to support the [agency's] conclusion." *Bethlehem Steel Corp. v. New York State Division of Human Rights*, 36 A.D.2d 898, 899, 320 N.Y.S.2d 999, 1001 (4th Dep't 1971) (emphasis added). Under that standard, the evidence relied on "may consist entirely of hearsay." *Hirsch v. Corbisiero*, 548 N.Y.S.2d 1, 2, 155 A.D.2d 325, 325 (1st Dep't 1989).

Where, as with the BSA, the agency's public hearings are "informational in nature and [do] not involve the receipt of sworn testimony or taking of 'evidence,'" *Matter of Halperin*, 809 N.Y.S.2d at 105, 24 A.D.3d at 772, even less is required. There need only be some "'rational basis'" in the record for the BSA's findings. *See Pell v. Board of Ed. of Union Free School Dist. No. 1*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974) (citation omitted). Thus, the BSA may properly rely on the unsworn statements of counsel appearing

before it to support its findings. *See, e.g.*, *Millennium Custom Homes, Inc. v. Young*, 58 A.D.3d 740, 873 N.Y.S.2d 91, 92 (2d Dep't 2009) (zoning board properly relied on "oral statements from area residents" and "memoranda" submitted by town); *Hampton Management v. Division of Housing and Community Renewal*, 255 A.D.2d 261, 261, 680 N.Y.S.2d 245, 245 (1st Dep't 1998) ("letter from counsel's office responding to [agency's] inquiries, provided [agency] a rational basis for its [factual] finding"); *Hart v. Holtzman*, 215 A.D.2d 175, 626 N.Y.S.2d 145 (1st Dep't 1995) ("IAS court properly found that the determination of the Comptroller had a rational basis relying upon two Opinion Letters issued by the Corporation Counsel"); *RHS Realty Co. v. Conciliation and Appeals Bd. of City of New York*, 101 A.D.2d 756, 475 N.Y.S.2d 72 (1st Dept' 1984) (rational basis was "properly supplied" by affirmations that were "not sworn to").

Accordingly, as long as the Congregation's submissions support the BSA's findings, it will be appropriate for this Court to uphold the BSA Resolution as founded on a "rational basis." Indeed, it is for the agency, not the reviewing court, to assess whether the information presented as part of the record is reliable and persuasive. The "reviewing court may not substitute its judgment for that of the BSA – even if the court might have decided the matter differently" provided that there is a rational basis for the finding in the record. *Toys "R" Us*, 89 N.Y.2d at 423, 654 N.Y.S.2d at 107, 676 N.E.2d at 869. "That conflicting inferences may have been drawn from this evidence is of no moment." *Toys "R" Us*, 89 N.Y.2d at 424, 654 N.Y.S.2d at 107, 676 N.E.2d at 869. The courts "'may not weigh the evidence or reject the choice'" that the BSA has made, *id.* (citation omitted); it is the agency's province to decide what types of proof are reliable. Thus, in *SoHo Alliance*, the Court of Appeals held that the BSA could "reasonably rely upon expert testimony submitted by the owners" to support the agency's findings of fact. *SoHo Alliance*, 95 N.Y.2d at 441, 718 N.Y.S.2d at 263, 741 N.E.2d at 108.

By contrast, the evidence submitted by a party opposing a variance will only be relevant in an Article 78 proceeding challenging the grant of a variance where the opponent's evidence is "conclusive." *Vomero v. City of New York*, 54 A.D.3d 1045, 1046, 864 N.Y.S.2d 159, 161 (2d Dep't 2008) (variance upheld "despite the presence of countervailing evidence" since that evidence "was not conclusive"). Petitioners do not contend that they submitted "conclusive" evidence.

Finally, an agency's decision "need not be exhaustive." *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768, 777, 809 N.Y.S.2d 98, 109 (2d Dep't 2005) (upholding variance); *cf. Gulf States Utilities Co. v. Federal Power Commission*, 518 F.2d 450, 458-59 (D.C. Cir. 1975) ("cursory" agency decision may be adequate; "a detailed semantic exigesis" is not required where agency's "'path may reasonably be discerned'" to establish that it "'genuinely engaged in reasoned decision-making'") (citation omitted). Thus, it is enough that the BSA made the five, statutory factual findings – each one indisputably and explicitly set forth in the Resolution.

Not surprisingly, the First Department has repeatedly applied this liberal, *SoHo Alliance* standard to uphold BSA decisions to grant zoning variances. *See, e.g., Torri Associates v. Chin*, 282 A.D.2d 294, 295, 723 N.Y.S.2d 359 (1st Dept' 2001) ("Despite petitioner's numerous challenges, 'it cannot be said that there was an absence of substantial evidence to support the Board's findings as to each of the five requirements necessary to issue the proposed . . . variances here' . . . . Accordingly, the challenged determination must be confirmed.") (citations omitted); *UOB Realty (USA) Ltd. v. Chin*, 291 A.D.2d 248, 249, 736 N.Y.S.2d 874, 875 (1st Dep't 2002); *see also Mainstreet Makeover 2, Inc. v. Srinivasan*, 55 A.D.3d 910, 914, 866 N.Y.S.2d 706, 710 (2d Dep't 2008) ("decision of the BSA may not be set aside in the absence of

illegality, arbitrariness, or abuse of discretion"); *Vomero*, 54 A.D.3d at 1046, 864 N.Y.S.2d at 161 ("Local zoning boards have broad discretion, and judicial review is thus limited to determining whether a zoning board's determination was illegal, arbitrary and capricious, or an abuse of discretion."). As shown below, the *SoHo Aliance* standard is easily met in this case.

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

The BSA's Resolution is a model of rational decision-making. It thoroughly considered the jurisdictional issue raised by Petitioners as well as the five factual areas referenced by the statute. The BSA made the required findings, and, accordingly, granted the variance. The BSA's findings clearly have a "rational basis" in the record. *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108.

1. The Board of Standard and Appeals' Jurisdiction Finding is Rational

Petitioners claim that some sort of technical defect in the Department of Building's signing of its objections to the Congregation's application for a building permit divested the BSA of jurisdiction to issue a variance to the Congregation. (*See* Petition ¶ 27.) This is nonsense. The BSA considered this issue and concluded that its broad jurisdiction over zoning matters was unfettered by the purported defect. This Court should defer to the BSA's construction of the Zoning Resolution in this regard. The BSA's finding that it had jurisdiction is plainly rational.

The BSA explicitly addressed the jurisdiction issue in footnote two of its Resolution, which states in full:

> A letter dated January 28, 2008 to Chair Srinivasan from David Rosenberg, an attorney representing local residents, claims that a purported failure by the Department of Buildings ("DOB") Commissioner or the Manhattan Borough Commissioner to sign the above-referenced August 28, 2007 objections, as allegedly required by Section 666 of the New York City Charter (the "Charter"), divests the Board of jurisdiction to hear the instant application. However, the jurisdiction of the Board to hear an application for variances from zoning regulations, such as the

> instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner.

Petitioners now argue that Section 668 of the New York City Charter (cited by the BSA in the paragraph quoted above) has no bearing on the BSA's jurisdiction. (*See* Petition ¶¶ 29-30.) This misses the BSA's point. The BSA jurisdictional provision cited by Plaintiffs, New York City Charter Section 666 (*see* Petition ¶ 26), states that the BSA "shall have power . . . . [t]o determine and vary the application of the zoning resolution as may be provided in such resolution and ***pursuant to section six hundred sixty-eight.***" N.Y.C. Charter § 666(5) (emphasis added). Accordingly, the BSA's conclusion that (a) Section 668 "does not require a letter of final determination" and (b) Section 668 (through Section 666) empowers the BSA to grant variances, is a rational construction of the Zoning Resolution.

Petitioners also argue that, according to the BSA website, the BSA will not grant a variance to a property owner "who has not first sought a proper permit or approval from an enforcement agency." (Petition ¶ 31.) Yet, even if an agency's website summary could constrict an agency's statutory jurisdiction (which it cannot), Petitioners jurisdictional attack would fail. Petitioners are not alleging that the Congregation failed to seek a permit from the Department of Buildings; they are claiming that the Congregation failed to submit the final plans and that Department of Buildings failed to select the correct signatory for its objections. (*See* Petition ¶¶ 32, 42.) Even accepting the BSA website summary as binding (for the sake of argument), nothing in that website summary bars the BSA from issuing a variance in the alleged circumstances.

That Petitioners may disagree with the BSA's construction of the Zoning Resolution is of no moment. The BSA's interpretation of the Zoning Resolution is entitled to deference. *See*

Toys "R" Us, 89 N.Y.2d at 418-19, 654 N.Y.S.2d at 104, 676 N.E.2d at 866 ("The BSA, comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution . . . . Consequently, in questions relating to its expertise, the BSA's interpretation of the statute's terms must be "'given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute.'"); *cf. NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830, n.7 (1984) ("We have never . . . held that such an exception [for issues of statutory jurisdiction] exists to the normal standard of review . . . .; indeed, we have not hesitated to defer"). The BSA's interpretation of the Zoning Resolution is certainly rational and consistent with the broad authority granted to the BSA by the legislature.

2. The Board of Standard and Appeals' "Five Findings" Are Rational

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

- ***"Unique Physical Conditions," ZR § 72-21(a).*** Eighty-five paragraphs of the BSA's Resolution were devoted to the BSA's conclusion that "the unique physical conditions" of the site "create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations" the "required finding under ZR § 72-21(a)." (BSA Res. ¶ 122; *see id.* ¶¶ 37-122.)
- ***No "Reasonable Return," ZR § 72-21(b).*** Twenty-five paragraphs of the BSA's Resolution addressed the BSA's finding that "because of the subject site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return." (*Id.* ¶ 148; *see id.* ¶¶ 123-48.) (As explained below, this finding, which should be viewed as

an alternate ground, was unnecessary because the Congregation is a not-for-profit organization. *See* Point II(C)(2)(b), below.)

- ***Neighborhood Character, ZR § 72-21(c).*** The BSA devoted fifty paragraphs of its Resolution to explaining its conclusion that "neither the proposed community facility use, nor the proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare." (*Id.* ¶ 201; *see id.* ¶¶ 149-201.)
- ***No "Self-Created Hardship," ZR § 72-21(d).*** The BSA also explicitly found, in a four-paragraph discussion, that "the hardship herein was not created by the owner or by a predecessor in title." (*Id.* ¶ 205; *see id.* ¶¶ 202-05.)
- ***"Minimum Variance," ZR § 72-21(e).*** Finally, the BSA, in a ten-paragraph review of alternate scenarios – including modifications to the Congregation's proposal that the Congregation had already adopted at the BSA's request – concluded that "none" of the additional "lesser variance scenarios" would be appropriate, such that the variance granted was the "minimum" necessary. (*Id.* ¶¶ 210-211; *see id.* ¶¶ 206-215.)

In each of the five sections of its Resolution, the BSA addressed each of Petitioners' objections to the Congregation's request for a variance. The BSA also noted that the contentions it failed to address in detail were nonetheless considered, evaluated, and rejected as unpersuasive. (*See* BSA Res. ¶ 216 (determining that "all cognizable issues" including any objections raised but "not specifically addressed herein . . . are addressed by the record").)

The BSA found support for its five findings in the oral statements and written reports of the Congregation's leaders, architects, economists, and attorneys. Committed to conducting a thorough inquiry, the BSA took nothing initially presented by the Congregation at face value. After reviewing the Congregation's initial application (R. 15, 133, 161), the BSA proceeded to "check under the hood and kick the tires," by peppering the Congregation with questions (R. 253), which were answered (R. 283), asking more questions (R. 512), which were answered (R. 516), holding numerous hearings (R. 1728, 3653, 4462, 4937), and requiring that the

Congregation revise its factual, architectural, and economic submissions over and over and over (R. 1897, 3611, 3841, 4222, 4531, 4859, 5112, 5751) – a rigorous process that lasted more than 15 months. As a result, the BSA was able to rely on final submissions from the Congregation that had bested cross-examination from the Congregation's opponents, the BSA's staff, and the BSA's Commissioners. These submissions more than satisfy the "rational basis" test.

Indeed, as the chart below demonstrates, the BSA Resolution contains the five factual findings ("BSA Finding Cite") that correspond perfectly to the five statutory requirements ("Statutory Cite" and "Statutory Language"). Each of the five factual findings is supported by information submitted by the Congregation ("Record Support Cite," a non-exclusive list), either from a Congregation leader, an architect, an economist, or counsel, in his capacity as the Congregation's authorized agent. The chart on the next page shows that the BSA Resolution plainly has a "rational basis" in the record:

	Statutory Language	BSA Finding Cite		Record Support Cite	
Zoning Resolution ("ZR") 72-21(a)	"There are unique physical conditions . . . and that, as a result . . . , practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the Resolution [that] . . . 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."	¶¶ 37-122		R. 39-43; 139; 319-320; 337-342; 1733-1735; 1739-1740; 1744-1745; 1751; 4565-4576; 4859-4861; 5147-5157; 5763	
		Applicant is Non-Profit	Alternative Ground	Applicant is Non-Profit	Alternative Ground
ZR 72-21(b)	"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[.]" "[T]his finding shall not be required for the granting of a variance to a non-profit organization."	¶¶ 3; 31; 124	¶¶ 36; 125-148	R. 43-44; 342; 567; 1729-1733; 4576; 4861-4862; 5763-5764	R. 133-161; 342-343; 567-568; 4576-4577; 5157-5159
ZR 72-21(c)	"The variance . . . 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."	¶¶ 149-201; 222		R. 44-45; 121-130; 343-344; 3845-3846; 4577-4582; 4597-4635; 4917-4920; 5159-5164; 5764; 5767-5771	
ZR 72-21(d)	"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"	¶¶ 202-205		R. 45-46; 344-345; 4582; 5764	
ZR 72-21(e)	"The variance, if granted, is the minimum variance necessary to afford relief."	¶¶ 206-222		R. 4582-4586; 5164-5167; 5765-5766; 5785	

The case for deferring to the BSA's factual findings ("BSA Finding Cite," above) and its reliance on the administrative record complied ("Record Support Cite," above), all shown in the chart above, is particularly strong given that the Congregation's proposal bears on its religious programmatic mission. In this Court's already narrow Article 78 review, even greater care must be taken not to second-guess the Congregation's assessment of what it needs to further that religious purpose. *See Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Town of Moreau*, 5 N.Y.3d 407, 413, 804 N.Y.S.2d 708, 713, 838 N.E.2d 624, 630 (2005); *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509 (1986) (holding that the law will presume that educational and religious uses benefit the public health, safety and welfare); *Albany Preparatory Charter Sch. v. Albany*, 31 A.D.3d 870, 818 N.Y.S.2d 651, 653 (3d Dep't 2006), ("because of their inherently beneficial nature, educational institutions enjoy special treatment and are allowed to expand into neighborhoods where nonconforming uses would otherwise not be allowed . . . educational use is consistent with the public good"); *see also Trustees of Union College v. Schenectady City Council*, 91 N.Y.2d 161, 164, 667 N.Y.S.2d 978, 981 (1997) (holding that a city law denying educational institutions from a residential historic district was unauthorized and unconstitutional).

In short, the BSA applied its expertise to this matter by visiting the site, listening to hours of testimony, suggesting and then considering alternative approaches, and reviewing a massive record of written submissions. This Court should defer to the BSA in accordance with *SoHo Alliance.* As the chart above and the the BSA's thorough analysis reflects, "'it cannot be said that there was an absence of substantial evidence to support the Board's findings as to each of the five requirements necessary to issue the proposed . . . variances here.'" *Torri Associates*,

282 A.D.2d at 295, 723 N.Y.S.2d 359 (citation omitted). "Accordingly, the challenged determination must be confirmed." *Id.*

We show below that, with respect to each of the BSA's five findings, Petitioners do not show any irrationality. The BSA's Resolution should be upheld.

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

The BSA found unique physical conditions at the Congregation's site that create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations. (*See* BSA Res. ¶ 122). Among other things, the BSA found that access routes through the buildings on the site are obsolete, that the unencumbered portion of the lot is small and irregularly shaped, that the lot is split by a zoning boundary, and that development is hindered by the "sliver law." (*See* BSA Res. ¶¶ 41, 46, 60, 61, 71, 72, 74, 88, 94, and 110.)

Petitioners challenge this finding, claiming that it turned on a representation by the Congregation that "as-of-right development of the site" would be "constrained by the existence of the landmarked Synagogue building," a fact that Petitioners' did not and cannot dispute. (*See* Petition ¶ 89, quoting BSA Res. ¶ 6). Petitioners' complaint regarding the presence of a landmarked Synagogue on the site is meritless.

First, Petitioners' characterization of the Resolution is incorrect. As noted above, the BSA emphasized unique physical characteristics pertaining to accessibility, size, division by a zoning boundary, and the "sliver law." The BSA's Resolution did not turn on the fact that two-thirds of the lot is consumed by a Synagogue that is central to the Congregation's mission and cannot be disturbed without compromising that mission.

Second, the fact that the Congregation, faced with an inability to develop the underdeveloped land occupied by the Synagogue, can only use the remaining "L" shaped portion of the lot, is a rational ground upon which to find a "unique physical condition." (R. 5147-57.) Petitioners cite no authority holding that, in evaluating whether a site suffers from a unique physical condition under Section 72-21 of the New York City Zoning Resolution, the BSA cannot consider the limitations in developing a site that includes a building that for legitimate reasons cannot be modified.

The Zoning Resolution's provision regarding "unique physical conditions" has been construed as a flexible standard designed to further the statutory purposes of the variance provision. For example, "[u]niqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship." *Douglaston Civic Association v. Klein*, 51 N.Y.2d 963, 965, 435 N.Y.S.2d 705, 707, 416 N.E.2d 1040, 1042 (1980), 416 N.E.2d 1040 (citations omitted). "What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed." *Id.* Similarly, a property's location can lead to "unique physical conditions." *See Matter of Elliott v Galvin*, 33 N.Y.2d 594, 596, 347 N.Y.S.2d 457, 459, 301 N.E.2d 439, 441 (1973), 301 N.E.2d 439 (location of zoning lot within two different zoning districts constituted "unique physical condition" within the meaning of zoning resolution). In addition, the requirement "may be met by showing that the difficulty complained of relates to existing improvements on the land which are obsolete and deteriorated." *Commco, Inc. v. Amelkin*, 109 A.D.2d 794, 796, 486 N.Y.S.2d 305, 307 (2d Dep't 1985). Ultimately, whether circumstances warrant the finding of a "unique physical condition" is a question peculiarly within the province of the BSA. *See, e.g.*,

UOB Realty, 291 A.D.2d at 249, 736 N.Y.S.2d at 875 (upholding BSA's rejection of "petitioners' contention that the requirement of 'unique physical conditions' in New York City Zoning Resolution § 72-21(a) refers only to land and not buildings").

Petitioners argue that the BSA's Resolution – which largely consists of factual findings – is not fully supported by *Cornell University v. Bagnardi*, 68 N.Y.2d 583 (1986), *Jewish Reconstructionist Synagogue of the North Shore v. Roslyn Harbor*, 38 N.Y. 283 (1975), *Guggenheim Neighbors v. Bd. of Estimate*, No. 29290/87 (N.Y. Sup. Ct. June 10, 1988), *aff'd* 145 A.D.2d 998, 535 N.Y.S.2d 509 (1st Dep't 1988), which Petitioners characterize as holding that courts will not look behind a not-for-profit organization's representation that it needs to expand into a particular neighborhood. (*See* Petition ¶¶ 79-80). Yet, even if these cases were so limited, the BSA's decision did not turn on them. While the BSA, construing the Zoning Resolution, concluded that "religious institutions . . . need not demonstrate that the site is . . . encumbered by a physical hardship" to secure a variance (BSA Res. ¶ 52), the BSA did not stop there. It cited multiple factual grounds for its finding of unique, physical hardship. (*See* BSA Res. ¶ 74.)

In sum, while the BSA did not treat the landmarked status of the Synagogue as a hardship, the BSA could have rationally based a finding of hardship on the impact that the Synagogue has on the lot. The BSA considered Petitioners' arguments with respect to "unique physical conditions," but rejected them as unpersuasive. Given that the BSA's finding regarding "unique physical conditions" is rational, this Court should not disturb it.

b. <u>The BSA's Finding of "No Reasonable Return" Was Rational</u>

Petitioners argue that the BSA should not have found that, because of the site's unique physical conditions, there is no reasonable possibility that development in strict compliance with

applicable zoning requirements would provide a reasonable return, BSA Res. ¶ 148. (*See* Petition ¶¶ 44-67, 79-86.) Petitioners contend that, in conducting its financial analysis, the BSA improperly deferred to the Congregation. (*See id.* ¶¶ 79-86.) They then pursue various attacks on the expert financial analyses cited by the BSA. (*See id.* ¶¶ 44-67.) These challenges do not undermine the rationality of the BSA's finding.

i. No Finding Was Required

The BSA did not engage in what Petitioners describe as "improper" deference to the Congregation. (*See* Petition ¶¶ 79-86). The BSA did not defer at all. (*See* BSA Res. ¶ 10) ("the Board further notes that . . . a nonprofit organization is entitled to no special deference for a development that is unrelated to its mission"). Indeed, the BSA required the Congregation to make the financial showing typically required of for-profit organizations. As we show in this section, the BSA should not have required the Congregation to make any "reasonable return" showing.

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

The BSA, however, nevertheless proceeded to take testimony regarding whether the residential portion of the Congregation's proposal satisfied the "reasonable return" standard

usually applied to for-profit enterprises. In proceeding with such caution, the BSA cited three decisions. (*See* BSA Res. ¶ 125). Those cases did not deal with the New York City Zoning Resolution or hold that municipalities may not legislatively exempt not-for-profits from a "reasonable return" requirement statutorily-imposed on other zoning variance applicants. *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 395 N.Y.S.2d 428, 363 N.E.2d 1163 (1977), only held that, when a town operates a for-profit enterprise, it has an "obligation to comply with the zoning regulations." *Foster v. Saylor*, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981), merely held that a school's lease of school property to a corporation was "subject to local zoning regulations" and that the school's showing regarding its inability to sell the property satisfied those particular regulations. Finally, *McGann v. Incorporated Village of Old Westbury*, 170 Misc. 2d 314, 647 N.Y.S.2d 934 (Nassau Cty. Sup. Ct. 1996), concerned a church's First Amendment challenge to a local zoning ordinance and held that "because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of legality," which must be overcome "beyond a reasonable doubt." The Congregation did not argue that it was exempt from zoning regulations or that the zoning regulations were unlawful. To the contrary, the BSA was not required to consider "reasonable return," because the lawful zoning regulations, promulgated by the legislature, state: "this finding shall not be required for the granting of a variance to a non-profit organization." N.Y. City Zoning Resolution § 72-21(b).

Significantly, the Zoning Resolution's statement that "reasonable return" findings are not required "for the granting of a variance to a non-profit organization" applies without regard to whether the non-profit is seeking a variance that may facilitate the construction of residential homes. *See also Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (zoning board was required, under federal statute, to accommodate expansion of religious

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

ii. The Finding Was Rational

Petitioners make various assertions about the BSA's "reasonable return" analysis. First, Petitioners suggest that there was some improper reliance on income generation prospects as the basis for authorizing a variance. (*See* Petition ¶¶ 44-53.) Second, they argue that there was something "non-sensical" about the financial methods referenced by the BSA. (*Id.* ¶¶ 54-60.) Third, they argue that the BSA should have found that an as-of-right alternative would have generated a reasonable return. (*Id.* ¶¶ 601-66.) These arguments are baseless. The BSA's (unnecessary) "reasonable return" finding has a rational basis.

First, the BSA did not base its variance on the Congregation's legitimate need for income. The BSA's statements, taken out of context by Petitioners, did not pertain to a general desire for a "higher return than permitted by the zoning regulations," they concern the BSA's

finding that, in the absence of a variance, the property would be unable to realize a "reasonable" rate of return. (BSA Res. ¶ 126.) In any event, as noted above, these findings were statutorily unnecessary.

Second, while Plaintiffs' criticize a financial formula referenced by the BSA, which the BSA described as "the profit or loss from net sales proceeds less the total project development cost on an unleveraged basis" (BSA Res. ¶ 12), the applicability of this formula was amply supported in the record. (*See, e.g.*, 4223-30, 5157-59.)

Third, the BSA was entitled, as fact finder, to reject Plaintiffs' arguments regarding financial feasibility to find that "of the five scenarios only the original proposed building would result in a reasonable return." (*See* BSA Res. ¶ 11). The record before the BSA on this point was exhaustive. (*See, e.g.*, R. 133-161, 283-307, 3608-10, 3847-77, 4223-30, 5773-91.) The BSA was provided with proof that only the proposed building was feasible, and that an as-of-right building would not result in a reasonable financial return. (BSA Res. ¶ 133). The Congregation also provided the BSA with an alternative analysis that considered the rear terraces of the residential facility as sellable and revised the sales prices of the units accordingly. (*Id.* ¶ 135). The Congregation then, at the BSA's request, analyzed data for the following scenarios: the proposed building; an eight story building; a seven story building, and the as-of-right building. (*Id.* ¶ 136, 137). The Congregation then submitted a revised analysis of the as-of-right building using a revised estimated value of the property, which still showed that the as-of-right alternative would lead to a substantial loss. (*Id.* ¶ 138). Based on this extensive record, the BSA found that, as a result of the property's unique physical condition, there was no reasonable

possibility that development in strict compliance with applicable zoning requirements would result in a reasonable return. (*Id.* ¶ 148).[3]

While Petitioners now want to quibble with some of the expert analysis considered by the BSA here, that assessment was for the BSA to make. In *SoHo Alliance*, the New York Court of Appeals expressly stated that the BSA can "reasonably rely upon expert testimony submitted by the owners" to support a "reasonable return" finding. *SoHo Alliance*, 95 N.Y.2d at 441, 718 N.Y.S.2d at 263, 741 N.E.2d at 108; *see also William Israel's Farm Co-op. v. Board of Standards and Appeals*, 22 Misc. 3d 1105(A), 2004 WL 5659503, *4 (N.Y. Co. Sup. Ct. Nov. 15, 2004) (approving BSA's reliance on submissions from developer's "financial expert"). Moreover, the courts have repeatedly declined to micromanage such agency analyses. *See, e.g.*, *West Village Tenants Association v. New York City Bd. of Standards and Appeals*, 302 A.D.2d 230, 231, 755 N.Y.S.2d 377, 378 (1st Dep't 2003) (BSA is not required to consider the return for every permissible use). The Court should not disturb the BSA's "reasonable return" finding.

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

Petitioners do not challenge the BSA's finding that a variance would not "alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare," BSA Res. ¶ 201. Accordingly, Petitioners have failed to establish that this finding is arbitrary or capricious.

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

Petitioners do not dispute the BSA's finding of "no self-imposed hardship," BSA Res. ¶ 205. Accordingly, the finding should be upheld.

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[3] The BSA agreed with the Congregation's expert that, with respect to the residences, any as-of-right development would result in a "substantial loss." (*See, e.g.*, BSA Res. ¶ 138; R. 1977.)

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

Petitioners do challenge the BSA's "minimum variance" finding. Specifically, they contend that (1) the "residential tower," as they call it, *i.e.*, the few floors of the building that may be used for residential purposes, and portions of the cellar, lobby, elevator, and staircase that may service it are "not necessary" for the Congregation to fulfill its programmatic needs (Petition ¶ 70); and (2) the Congregation "could have obtained relief" from limitations in the Zoning Resolution by submitting "an application to the City Planning [C]omission for a special permit, pursuant to Zoning Resolution § 74-711," but failed to seek such relief (Petition ¶ 76). These attacks fail to establish that the BSA's Resolution is arbitrary and capricious.

The BSA found that the few residential floors proposed by the Congregation were "necessary," in that without them the property would be incapable of earning a reasonable return. This finding is well supported in the record. (*See, e.g.*, 4223-30, 5157-59.)

The BSA also correctly rejected Petitioners' assertion that the purported availability of an alternative type of relief, under Zoning Resolution § 74-711, warranted the denial of a variance. First, the Congregation had already exhausted its remedies. (R. 5129-30.) Second, nothing in Zoning Resolution § 74-711 remotely suggests that it is an exclusive remedy. *See* N.Y. City Zoning Resolution § 74-711 ("the City Planning Commission may permit modifications of use and bulk regulations"). The BSA's rejection of Petitioners' arguments clearly had a rational basis.

In any event, the BSA listed, in detail, efforts that it undertook to ensure that the "variance sought" was the "minimum necessary to afford relief" under Section 72-21(e) of the Zoning Resolution. (*See also* BSA Res. ¶ 17) ("Whereas, the Board finds that the requested lot coverage and rear yard waivers are the minimum necessary to allow the applicant to fulfill its

programmatic needs and that the front setback, rear setback, base height and building height waivers are the minimum necessary to allow it to achieve a reasonable financial return[.]"). In reaching that conclusion, the BSA considered Petitioners' arguments and found them unpersuasive. The BSA noted that Petitioners had argued "that the minimum variance finding is no variance because the building could be developed as a smaller as-of-right mixed-use community facility/ residential building that achieved its programmatic mission, improved the circulation of its worship space and produced some residential units." (BSA Res. ¶ 212.) Yet, the BSA found, based on the evidence in the record, that the Congregation had "fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission." (*Id.* ¶ 213.)

Petitioners cannot show that this finding was irrational. To the contrary, the BSA required the Congregation to scale back its proposal (*see* BSA Res. ¶¶ 207-209) and also considered numerous alternatives to the Congregation's proposal to determine whether an alternative approach would accommodate its needs (*see id.* ¶¶ 210-211). The record is replete with analyses of alternatives, including as-of-right approaches. (*See, e.g., id.* ¶¶ 128, 129, 132, 133, 147, 211). Based on this record, the BSA determined that the Congregation's final proposal would involve the minimum variance. (*Id.* ¶ 212-15). This Court should not upset the BSA's "minimum variance" finding.

CONCLUSION

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

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