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

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| LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN, | : | |
| | : | Index No. 650354/08 |
| Petitioners, | : | (LOBIS) |
| -against- | : | NOTICE OF MOTION FOR LEAVE |
| 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, | : | TO INTERVENE<br><br>Movants: Nizam Peter Kettaneh and Howard Lepow |
| Respondents. | | |

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PLEASE TAKE NOTICE that, upon the annexed Affirmation of Alan D. Sugarman dated November 9, 2009 and the exhibits attached thereto, Nizam Peter Kettaneh and Howard Lepow shall move this Court in the Motion Submission Part (Room 130) of the New York County Courthouse, 60 Centre Street, New York, New York 1007, on December 3, 2009 at 9:30 A. M. for the entry of an order pursuant to C.P.L.R. § 101I2(a)(2) or § 1013 granting intervention to this action as intervening petitioners and for such other relief as may be appropriate.

Dated: November 9, 2009
New York, New York

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Attorney for Movants/Intevening Petitioners

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Shearith Israel aka Trustees of
Congregation Shearith Israel in the City of
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SUPREME COURT OF THE STATE OF NEW YORK
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| -against- | : | AFFIRMATION IN SUPPORT OF |
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AFFIRMATION OF ALAN D. SUGARMAN

ALAN D. SUGARMAN, an attorney duly admitted to practice law in the courts of the State of New York, pursuant to New York Civil Practice Law and Rules ("CPLR") § 2106 and under the penalties of perjury, affirms:

1. I am the attorney for Nizam Peter Kettaneh and Howard Lepow, Movants and Intervening Petitioners (the "Kettaneh Parties"). The Kettaneh Parties are the petitioners in a related proceeding, Kettaneh v. Board of Standards and Appeals, Index No. 113227/08, (the "Kettaneh Case"), an Article 78 proceeding appealing the very same decision and resolution of the Board of Standards and Appeals on appeal to this Court in the within Article 78 proceeding (the "Landmark West Case"). Landmark West has moved to reargue the Court's August 4, 2009 decision dismissing the Landmark West Case, which decision incorporated by reference the Court's earlier July 10, 2009 decision dismissing the Kettaneh Case.

2. In its motion to reargue, Landmark West asserts that its reargument issues were not addressed by the Court in either decision - which is true - but, then asserts, inaccurately and

gratuitously, that the issues had not been asserted by the Kettaneh Parties - which is not so.[1] Moreover, Landmark West in its reargument motion superficially states some of the arguments as to these issues. The Kettaneh Parties have appealed, and, its Preargument Statement[2] describes in some detail the errors in the Kettaneh Decision. It is likely that any appeal from the Landmark West decision will be joined and heard together with the Kettaneh Appeal, and any further decision by this Court grounded upon incomplete argument in the Landmark West Case on these issues under appeal could be prejudicial to Kettaneh.

3. CPLR. § 1012(a)(2) provides, in relevant part, that "any person shall be permitted to intervene" in an action when three conditions are satisfied: (1) the movant has a legally cognizable interest, (2) that interest is not adequately represented by the parties to the proceeding and (3) the movant's claim will be effectively determined by the proceedings, i.e., the movant may be bound by the outcome of the litigation. Clearly, as described in the Kettaneh Decision, the Kettaneh Parties have a legally cognizable interest; but, as discussed below, Landmark West is not adequately representing that interest. As to the third factor, a new decision would effectively determine the claims of the Kettaneh Parties as just discussed in the preceding paragraph. Additionally, a finding that the Kettaneh Parties had not raised these issues in the Kettaneh Case would also prejudice the appeal by the Kettaneh Parties.

**BSA's Usurpation of Authority**

4. The Court's decisions misconstrued the arguments of Kettaneh and Landmark West as to the powers of the BSA to consider a landmark hardship under §72-21(a) of the Zoning Resolution as a basis for a variance. Landmark West seeks reargument on that issue. The Court's error was accepting the framing of the issue by the respondents that the petitioners were making solely an exhaustion of remedies argument.[3] The Court did not address the more

[1] At the March 31, 2009 hearing, Landmark West conceded that its case was nearly the same as the Kettaneh Case, except for the jurisdiction issue. Now, in the reargument motion, Landmark West asserts that it was mistaken, only having made this "concession" at the hearing, because it had just received allegedly thousands of pages of documents. Yet in fact, the two issues relating to the bifurcated analysis and the BSA hardship jurisdiction were issues unambiguously raised in the Kettaneh Case, even though the Court did not address the issues in its decisions. After the March 31, 2009 hearing, Landmark West had two opportunities to distinguish its case, if such were indicated by the facts: on May 9, 2009, when Landmark West filed its Article 78 Petition and on June 19, 2009, when Landmark West served its one and only memorandum of law. On this motion for reargument, all Landmark West needed to state was the fact that it and the Kettaneh Parties raised issues not addressed by either decision. Landmark West need make no excuse for the Court not addressing these clearly identified issues.

[2] Ket. Ex. A, Kettaneh Petitioners Notice of Appeal With Preargument Statement, August 27, 2009. Attached hereto are the Kettaneh Exhibits ("Ket. Ex.").

[3] *See* Ket. Ex. I, City Respondents Memorandum of Law in Landmark West Case, May 21, 2009, where the City Respondents inaccurately framed the argument of the Kettaneh Petitioners on this issue. Because Landmark West

fundamental arguments of either petitioners that the BSA utterly lacked the power to provide relief from landmarking hardships in a variance proceeding. Not only was the Court's decision silent as to discussing the basic issue, but the briefs of Respondents were silent as well, attempting to avoid the issue.

5. The Kettaneh Parties in their March 2009 Reply brief pointed out the mischaracterization by the Respondents and the Respondents' failure to address the issue. The Reply Brief argued that "the BSA has no role at all in providing relief from landmark hardships".[4] The Kettaneh Reply devoted a full section to this argument under the heading: "*G. The Proper Remedy for a Property Owner Seeking Relief from Hardships Created by the Landmark Law Is Under Z.R.§74-711 And The BSA Has No Role in Providing Relief For Such Hardships.*"[5] At the March 31, 2009 joint hearing, Counsel for the Kettaneh Parties clearly argued that the LPC lacked jurisdiction to provide landmarking hardship relief in a §72-21 variance proceeding.[6]

6. At the time of the March hearing, briefing in the Kettaneh Case had closed - but briefing had not closed in the Landmark West Case. The City Respondents then filed on May 26, 2009 in the Landmark West Case a memorandum continuing to falsely frame the position of the Kettaneh Parties on this issue, the Court not having yet reached a decision in the Kettaneh Case.[7] For this and other reasons, the Kettaneh Parties on June 16, 2009 moved this Court for leave to file a supplemental memorandum,[8] but, the Court denied the motion on July 8, 2009,[9]

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would not file its Memorandum of Law until weeks later, it was clear that the City was focused on the arguments made by Kettaneh, even though filed in the companion case.

[4] See Ket. Ex. C, Kettaneh Reply Memorandum, March 23, 2009, page 3:

> The LPC in conjunction with the City Planning Commission may consider relief from hardships caused by landmarking under Z.R. §74-41 [sic: 74-711]. Initially, in 2001, the Congregation had sought relief from the LPC under Z.R. §74-41 [sic: 74-711], but did not pursue such relief, withdrawing its request. Despite the improper inference drawn from the positions expressed by the BSA in its Answer, the BSA has no role at all in providing relief from landmark hardships; the BSA provides variances on appeal from denials of permits by the Department of Buildings for violations of the Zoning Regulations; if Respondents argue to the contrary that the BSA can grant relief from landmark hardships not provided by the LPC, then it would seem that the Congregation did not avail itself of its remedies from the LPC.
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> (emphasis supplied)

[5] Id., p. 35.

[6] Ket. Ex. E., March 31, 2009 Hearing Transcript, pp. 6-7.

[7] Ket. Ex. I, Excerpt from City Respondents Memorandum of Law in Landmark West Case, May 21, 2009.

[8] Ket. Ex. F, Kettaneh Petitioners Motion of July 8, 2009 Requesting Permission to File Additional Reply Memorandum.

[9] Ket. Ex. G, Decision of Justice Lobis denying Further Reply Memorandum, July 8, 2009.

stating that the two cases were separate and the court would not rely upon the Landmark West papers in reaching the decision in Kettaneh:

> The papers to which petitioners now seek to respond were submitted by respondents in another case. It is wholly inappropriate for petitioners to seek to reply to those papers, which are not being considered by the court in this underlying application.

7. Yet, in fact, when the Court issued its Kettaneh Decision on the merits on July 10, 2009, coincidentally or not, it fully adopted the City's mischaracterization contained in the City's Landmark West May 26, 2009 memorandum.[10] This City memorandum and the Court's decision both avoided any discussion of the statutory basis for the BSA's providing relief for landmarking hardships.

8. Subsequently, the Court's Landmark West Decision incorporated the Kettaneh Decision on this issue as against Landmark West. Yet, the Court stated that the Landmark West papers were "not being considered by the court" in reaching its Kettaneh Decision. Thus, the Court would seem to be saying that it completely ignored the arguments of Landmark West in reaching the Kettaneh Decision, yet then applied the Kettaneh Decision against Landmark West. So, either Kettaneh's arguments on this issue, or Landmark West's additional arguments, were ignored by the Court.

9. When the Kettaneh Parties requested an opportunity to file a supplemental memorandum, they represented to the Court that they had completed a supplemental memorandum in final form. A full section of that memorandum addressed the fundamental issue of the BSA's lack of jurisdiction over landmark hardships and described a statutory scheme reflected in numerous other laws that unmistakably assigned these responsibilities to City Planning, sometimes with the participation of LPC.[11] These provisions of the Zoning Resolution concerning relief from landmark hardships, which never mention the BSA at all, include: Z.R. §42-142; Z.R. §74-711; Z.R. §74-712; Z.R. §74-721; Z.R. §74-79; Z.R. §74-791; Z.R. §74-792; Z.R. §74-793; Z.R. §81-254; Z.R. §81-266; Z.R. §81-277; Z.R. §81-63; Z.R. §81-631; Z.R. §81-633; Z.R. §81-634; Z.R. §81-635; Z.R. §81-741; and Z.R. §99-08. Not only do these numerous statutory provisions fail to mention any role whatsoever for the BSA in affording landmark hardship relief, but they place specific limitations on the actions by City Planning and LPC when providing relief for landmark hardships. What the BSA wants to do is not only write itself into a regulatory scheme where it had been specifically excluded, but then to ignore the various

[10] Ket. Ex. I, Excerpts from City Respondents Memorandum of Law In Landmark West Case, May 21, 2009, re BSA Jurisdiction as to Landmarking Hardships.

[11] Ket. Ex. H, Kettaneh's Unfiled Further Reply Memorandum, dated June 16, 2009, p. 19.

restrictions applying to the other agencies in these statutes. In doing so, the BSA is able to award to non-qualifying, but favored, applicants millions of dollars of benefits, as it had done here. The Court condoned this usurpation of power.

10. The Court in the Kettaneh decision did not address these issues - to wit the lack of any basis for BSA to use landmarking as a hardship to support a variance under the Zoning Resolution. We note that the Respondents in none of their hundreds of pages of submissions attempted to explain the source of the BSA's jurisdiction on this matter in a variance case under §72-21 of the Zoning Resolution. Perhaps the Court was misled by the absence of discussion by Respondents.

**Bifurcated Reasonable Return Analysis Issue**

11. Landmark West in its motion to reargue correctly asserts that the Court failed to address the issue of the use by the BSA of an improper bifurcated reasonable return analysis. The reasonable return analysis required by §72-21(b) requires an analysis of rate of return that could be obtained by development of the entire site, such as an all-residential as-of-right building. But Landmark West then asserts incorrectly that this issue was not addressed by the Kettaneh Parties. Although we concur with Landmark West that the Court failed to address this issue in either decision, it is clear that the issue was raised fully by the Kettaneh Parties.

12. Unfortunately, and adverse to the interests of the Kettaneh Parties, the Landmark West reargurments fall short of providing a complete argument on the bifurcation issue.[12] Indeed, the sole precedents cited in the Landmark West motion for reargument are two earlier BSA decisions in which the BSA made clear that a variance for a religious organization could not be premised upon financial need for the organization.[13] However, the two BSA cases cited by Landmark West have little, if anything to do, with the fact that the BSA as a matter of the non-discretionary application of law should not have adopted the bifurcated analysis as the basis for

[12] Landmark West also erroneously states that the bifurcation analysis was raised by the applicant late in the BSA process. This is not correct. The first application to the BSA included an analysis of the return from just the two condominium floors, but failed to include an all residential analysis - Scheme C. The BSA initially requested such an analysis, but, when it became apparent to the BSA in December 2007 that a complete all residential analysis would show that an adequate rate of return would be earned and would prevent the BSA's delivering a variance to the Congregation, the BSA thereafter overtly ignored the Scheme C analysis. The Kettaneh Parties believe that this all residential analysis was the topic of the secret ex-parte meeting of November, 2006.

[13] These two BSA decisions are included as exhibits to the Landmark West motion for reargument. LW Ex. Q January 9, 2007 BSA resolution in Yeshiva Imrei Chaim Viznitz, Calendar No. 290-05-BZ; and LW Ex. R, December 14, 2004 BSA resolution in 739 East New York Avenue, Brooklyn, Calendar No. 194-03-BZ.

satisfying §72-21(b).[14] Were the Court only to read those two BSA decisions cited by Landmark West, it may well not reconsider its decisions, or may reach an incorrect conclusion.

13. Should the Court elect to reconsider this bifurcation issue, the Kettaneh Parties respectfully request that the Court consider the full discussion of these issues in the papers previously submitted. The Kettaneh Parties were exceedingly clear that the BSA should have considered the reasonable return on the entire site, the so-called all-residential Scheme C, rather than the bifurcated analysis of just the two floors of the condominium.[15] Indeed, at the March 31, 2009 hearing, Counsel for the Kettaneh Parties stated that the all-residential Scheme C financial analysis was its "*most important*" point - the inherent issue there being that there was no basis in the law for the bifurcated approach.[16] The Kettaneh Decision did not address this "most important" point.

14. We respectfully request that the Court should not conflate the two separate as-of-right analyses - the never completed all-residential Scheme C analysis and the factually and legally flawed two-floor Scheme A bifurcated analysis. For example, the Court correctly noted on page 8 of its Kettaneh Decision that "The BSA asked the Congregation to consider only the value of the residential portion of the site in calculating the reasonable return, and eliminate the community facility from the site value." Here, the Court was referring to the bifurcated analysis of the two condominium floors, Scheme A. Unfortunately, the Court did not seemed to understand that thereafter, the Congregation applicant never complied with the BSA request and never used a site value equal to the value of the residential two floors of the as-of-right site. (The BSA did not later require the Congregation to provide this common sense rational analysis, for to do so would have tied BSA's hands so that variances could not be granted.) On the next page, the Kettaneh Decision then refers to an analysis of an all-residential development provided in December, 2008. This would be the Scheme C version. The Court simply ignored the fact that the analysis was never completed, and on its face was not "all -residential".

15. Moreover, the Court should not conflate those as-of-right analyses with the numerous analyses of the proposed buildings, where it seemed the BSA and the applicant played

[14] The BSA decisions do seem to suggest that the BSA's prolix and lengthy proceedings and findings were mere window dressing for the real basis for the BSA decision - to provide financial support to the Shearith Israel religious institution. The two BSA cases cited by Landmark West show that in the past the BSA would not approve projects on that basis.

[15] The Kettaneh Parties also argued that the two-floor bifurcated analysis was fatally flawed - an issue not addressed by the Court in either decision.

[16] Ket Ex. E, Excerpts from Hearing Transcript of March 31, 2009 Showing Kettaneh Petitioners Arguments re lack of BSA landmark hardship power and most important point re the all-residential and not-bifurcated reasonable return analysis.

with the numbers to lower the embarrassingly high rate of return that a proper analysis would show. Thus, the only analyses relevant to the §72-21(b) finding was the Scheme C analysis — an analysis never completed. The many analyses of the non-as-of right schemes were nothing more than window dressing exercises — at least as they might relate to the (b) finding. So, the Court was misled in thinking that the BSA was engaged in thoughtful review, when it was in fact reviewing issues completely irrelevant to the (b) finding. The Kettaneh Decision ignored these important distinctions.

16. The BSA's erroneous acceptance of a bifurcated reasonable return analysis was thoroughly addressed by the Kettaneh Parties in their Memorandum of Law of January 2, 2009.[17] In a section bearing the heading "*Zoning Law Provides No Authority for a Bifurcated Feasibility Study of Only a Portion of the Property"***,** Kettaneh cited to Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (U.S. 1978), Northern Westchester Professional Park Associates v. Bedford, 60 N.Y.2d 492, 503-504 (N.Y. 1983); Koff v. Flower Hill, 28 N.Y.2d 694 (N.Y. 1971); and Concerned Residents v. Zoning Bd. of Appeals, 222 A.D.2d 773, 774-775 (N.Y. App. Div. 3d Dep't 1995). In their responses, Respondents made no effort to distinguish these cases or to even discuss the issue; Kettaneh clearly brought the avoidance of this issue to the attention of the Court in its Reply Memorandum of March 23, 2009,[18] also citing further precedent: Spears v. Berle, 48 N.Y.2d 254, 263 (N.Y. 1979). Similar to the non-reaction by the Respondents, the Court in the Kettaneh Decision altogether ignored these precedents and indeed did not address the issue at all.

17. Thereafter on June 19, 2009, when Landmark West finally filed its Memorandum of Law,[19] it raised the same bifurcated analysis issue raised in Kettaneh (and in a clearer fashion than described in Landmark West's ambiguous May 2009 Amended Verified Petition), properly citing 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) and 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). (Oddly, Landmark West did not cite these same decisions in its reargument motion in connection with the bifurcation issue; instead, Landmark West relied upon two BSA decisions discussed of

[17] Ket. Ex. B, Kettaneh Parties Memorandum of Law of January 2, 2009, pp. 73-76.
[18] Kef. Ex. C. Excerpts From Kettaneh Petitioners Reply Memorandum of Law, March 23, 2009 re No BSA Landmark Hardship Jurisdiction and Bifurcated Analysis, p. 9.
[19] Ket. Ex. D, Landmark West Memorandum of Law of June 19, 2009 . pp. 25 -26.

little relevance to the issue at hand - *see* ¶ 12 above.) The Court's Landmark West Decision similarly ignored these court cases and the related issues.

**Jurisdictional Issue**

18. The Kettaneh Petitioners concur with Landmark West that the August 24, 2007 DOB Notice of Objection[20] was insufficient to provide jurisdiction to the BSA, in that a non-authorized officer of the DOB signed the objection from which the Respondent Shearith Israel appealed. It further is clear that the August 2007 drawings submitted to the BSA as part of the appeal from the DOB did not bear any DOB stamp proving that they had been received or reviewed by the DOB. The surrounding circumstances make clear that the drawings submitted to the BSA were not those submitted to the DOB. [21] If these were the same, the Congregation's architects could have represented that these were the exact same drawings as submitted to the DOB, but they did not do so, and their silence speaks as well.

19. Landmark West mentions the "mysterious" disappearance of the Eighth Objection in the August 28, 2007 DOB objection document. This was indeed a "mysterious" disappearance because previously, the DOB, the BSA and BSA staff, the Congregation's Architects, and even opposition architects, all were in agreement that the approved residential building, which in this respect is no different from the profile of the building depicted in the March, 2007 application, required a 40 foot residential separation on the East Side of the building, effectively preventing residential upper floors. This issue was briefed in the Kettaneh Petitioners Reply Memorandum.[22] The responses of Respondents ignored the inconvenient —

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[20] Ex. O to Landmark West's Motion for Reargument.

[21] *See* Platt Byard Dovell White Drawings at R-000386-000468 dated August 28, 2007. Each of these drawings is stamped with the Registered Architect seal and also stamped with the receipt stamp of the BSA dated September 10, 2007. There are no stamps from the DOB. The DOB objection letter at R-000348 is dated August 24, 2007, but the DOB denial stamp on the DOB letter is dated August 28, 2007. It is obvious that the drawings submitted by the applicant to the BSA dated August 28, 2007 cannot have been the same drawings submitted to the DOB examiner on August 24, and stamped approved by the examiner on August 24. As pointed out by Landmark West in its motion for reargument, the signatures for the "Examiner" and the "Boro Commissioner" are one and the same. The Court might take judicial notice of the crane collapses in the construction of buildings approved by the DOB during this same period of time, which situations also involved the DOB approving Manhattan buildings that violated the zoning regulations. See *High-Rise Approved in Error Before Crash*, New York Times, April 18, 2008. http://www.nytimes.com/2008/04/18/nyregion/18crane.html?_r=1&ref=nyregion.

Another irregularity is that the DOB's on-line database - Buildings Information System (BIS) - even now in 2009, has no record at all of the objection of August 24/28, 2007. The BIS does have a record of the October 7, 2005 disapproval for 104250481 (this is the number that appears on both Notices of Objections.) http://a810-bisweb.nyc.gov/bisweb/JobsQueryByNumberServlet?requestid=4&passjobnumber=104250481&passdocnumber=01. The August 2007 DOB action should have appeared on the Property Profile Overview for Bin No. 1028510, but does not. http://a810-bisweb.nyc.gov/bisweb/PropertyProfileOverviewServlet?requestid=2&bin=1028510. There is an absence of regularity.

[22] Ket. Ex. C, Kettaneh Reply Memorandum of March 23, 2009, p. 40.

the Respondents would not and could not offer an explanation that supported the elimination of the Eighth Objection, except for the hypothetical and untrue claim that the building profile had changed. The Court seemed to accept that it was not arbitrary and capricious for the BSA to have just invented a rationale that some never-defined change in the plans accounted for the removal of the Eight Objection. One can only rationally conclude that the building finally approved by the BSA violated the 40 foot separation, and the BSA was well aware that the building violated the 40 foot separation, and that both the DOB and BSA were acting in collusion with the applicant.

**Conclusion**

20. The Kettaneh Parties do not concur with Landmark West having made its motion for reargument, even though well grounded. Yet, we disagree with the decisions which seem to operate on the principle that the absence of any evidence to support various findings is not arbitrary and capricious, such as the absence of evidence as to actual building plans filed with DOB or the absence of evidence that the building plans were changed. The decisions are also ripe for reargument in that the decisions seem to accept that the BSA may rewrite statutes and a court should then defer to the BSA's self-interested expansion of its power and relaxation of statutory requirements which operate to provide the BSA with nearly unlimited discretion to do anything it wishes. Since the motion was made, and the interests of the Kettaneh Parties are impacted – potentially adversely – we ask the Court to grant this motion to intervene and also now allow the Kettaneh Parties to file Ket. Ex. H, Unfiled Kettaneh Petitioners Further Reply Memorandum, June 16, 2009. We also ask that any modified decision of the Court accurately reflect the issues raised by the Kettaneh Parties in the Kettaneh Case.

**Exhibits:**

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| Ket. Ex. A | Kettaneh Petitioners Notice of Appeal With Preargument Statement, August 27, 2009. |
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| Ket Ex. D | Excerpts From Landmark West Memorandum of Law, June 19, 2009 re Bifurcated Analysis. |
| Ket Ex. E | Excerpts from Hearing Transcript of March 31, 2009 Showing Kettaneh Petitioners Arguments re lack of BSA Landmark Hardship power and "Most |

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| Ket. Ex. J | DOB Buildings Information System Report of Permit Applications from Applicant as of November 7, 2009. |

Dated: November 9, 2009
New York, New York

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Kettaneh Exhibit A

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COUNTY OF NEW YORK

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| NIZAM PETER KETTANEH and HOWARD LEPOW, | : | |
| Petitioners-Appellants, | : | Index No. 113227/08 (LOBIS) |
| For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules | : | |
| | : | **NOTICE OF APPEAL** |
| -against- | : | |
| BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair of said Board, CHRISTOPHER COLLINS, Vice Chair of said Board, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, Respondents-Appellees. | : | |

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**PLEASE TAKE NOTICE** that the Petitioners, NIZAM PETER KETTANEH and HOWARD LEPOW, hereby appeal to the Appellate Division of the Supreme Court, First Department, from a decision, order and judgment entered in the above entitled special proceeding in the office of the Clerk of New York County on July 24, 2009, and served by mail upon Petitioners-Appellants on July 29, 2009, which order denied Petitioners-Appellant's Article 78 petition to annul and vacate a determination of the Respondent-Appellee Board of Standards and Appeals and dismissed said petition, and this appeal is taken from each and every part of said decision, order, and judgment as well as from the entirety thereof.

Dated: August 27, 2009
New York, New York

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*In Related Matter:*
*Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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| NIZAM PETER KETTANEH and HOWARD LEPOW, | : | |
| | : | New York County |
| Petitioners-Appellants, | : | Index No. 113227/08 |
| For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules | : | |
| | : | **PRE-ARGUMENT STATEMENT** |
| -against- | : | |
| BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair of said Board, CHRISTOPHER COLLINS, Vice Chair of said Board, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, Respondents-Appellees. | : | |

Petitioners-Appellants Nizam Peter Kettaneh and Howard Lepow submit this Pre-Argument Statement pursuant to Section 600.17(a) and (b) of the Rules of the Appellate Division, First Department.

1. FULL TITLE OF THE ACTION

The full title of the action is as appears above.

2. FULL NAMES OF THE PARTIES

The full names of the original parties are as appears above. There have been no changes in the parties.

3. NAME AND ADDRESS OF COUNSEL FOR APPELLANTS

The counsel for Petitioners-Appellants is Alan D. Sugarman, Law Office of Alan D. Sugarman, 17 W. 70th Street, New York, NY 10023, 212-873-1371.

4. NAMES AND ADDRESSES OF COUNSEL FOR RESPONDENTS

Counsel for the BSA Respondents-Appellees are Jeffrey Friedlander, Esq., First Assistant Corporation Counsel of the City of New York and Christina L. Hoggan, Esq., Assistant Corporation Counsel, 100 Church Street, Room 5-153, New York, New York 10007, 212-788-0790.

Counsel for the Congregation Respondent are Louis M. Solomon, Esq. and Claude M. Millman, Esq., Proskauer Rose L.L.P., 1585 Broadway, New York, New York 10036, 212-969-3000.

5. COURT FROM WHICH APPEAL IS TAKEN AND ORDER APPEALED FROM

This appeal is taken from a decision, order, and judgment of the Honorable Joan B. Lobis of the Supreme Court of the State of New York, County of New York. The decision, order, and judgment were dated July 10, 2009, were entered in the County Clerk's Office of New York County on July 24, 2009, and were served upon Petitioners-Appellants by mail on July 29, 2009.

6. NATURE AND OBJECT OF THE CASE

The object of the Article 78 proceeding was to annul and vacate variances granted by the Respondent New York City Board of Standard and Appeals to the Respondent Congregation Shearith Israel and for other related relief. The variances related to a mixed use development consisting of five upper floors of luxury condominiums and a four floor community house on the lower floors. The condominium floors variances allow windows of cooperatives owned by Petitioner Lepow to be covered and were justified solely on the basis of money to benefit the membership of the Congregation. An as-of-right development would have allowed for only two floors of condominiums and would not block Petitioner Lepow's windows. Ninety per cent of the additional area allowed by the variances is for the luxury condominiums, and the remaining 10% of variance area is for the religious community house.

7. RESULT REACHED IN THE COURT BELOW

The court below denied Petitioners-Appellants request to annul and vacate the BSA's determination and dismissed the Article 78 Petition.

8. GROUNDS FOR APPEAL

Petitioners-Appellants seek to reverse the judgment dismissing the Article 78 Petition on the following grounds:

The lower court overlooked or failed to take into account key parts of the records, petitioners' legal contentions, and applicable law on pertinent issues, including, without limitation the following:

The lower court's decision is erroneous as a matter of law and erroneous in accepting arbitrary and capricious determinations of the BSA and in accepting the BSA's arbitrary and capricious deliberate disregard of relevant facts and issues.

The lower court erred in not properly applying the substantial evidence requirement explicitly stated in §72-21 of the Zoning Resolution, in not applying the statutory language of §72-21, and by ignoring clear and specific precedent.

The lower court erred in upholding the BSA's finding under §72-21(b) as to the luxury condominium variances that a conforming as-of-right building on the development site would not earn a reasonable return.

- First, the lower court erred as a matter of law in accepting the BSA's implicit position that a religious non-profit owner of property is entitled to both satisfy its religious programmatic needs by constructing a community house on most of the site, as well as at the same time earn a reasonable financial return by constructing luxury condominiums on the remaining upper part of the site.
- The lower court erred as a matter of law in accepting the BSA's "bifurcated" financial analysis of the development site, that is, an analysis in which the BSA considered the

financial return obtainable only from the upper two floors of the site, rather than as to an all-condominium as-of-right building using the entire site. The lower court decision ignored this issue, although such issue featured was prominently by Petitioners.

- The lower court erred in accepting the BSA's arbitrary and capricious, and indeed deliberate, refusal, after first having requested such an analysis, to complete the analysis of the all residential as-of-right building, and in accepting the BSA's deliberate disregard of the fact that such a building would earn a return in excess of the return undisputedly admitted by the Congregation as exceeding a rate of return satisfactory to the Congregation. The BSA in its Article 78 Answer verified by the Chair of the BSA, completed the computation, conclusively demonstrating that a reasonable return would be earned by the Congregation.

- The lower court erred as a matter of law in accepting the BSA's deliberate refusal to evaluate the Congregation's financial return based upon the original amounts paid by the Congregation for the site, since the Congregation financial analysis showed that the Congregation would receive a $12.3 million site payment in addition to millions of dollars of profit from the development of the condominium project itself and the Congregation would still retain ownership and use of the property allocated to the community house.

- Even as to the improper bifurcated analysis of solely the two-floor residential part of the site, the lower court erred in allowing the BSA to arbitrarily and capriciously evaluate the site value based upon the total value of the site including the part of the site used by the community house and as to which the Congregation would retain ownership and use.

- Even as to the improper bifurcated analysis, the lower court erred in allowing the site valuation to be based irrationally upon the Congregation's inability to develop air rights over the parsonage because of landmarking, in effect allowing the transfer of air rights without any statutory basis and without even discussing the irrational result that the future development on the transferring property was not restricted, restrictions generally required when air rights are transferred from landmarked property.

- Even as to the improper bifurcated analysis, the court below erred in accepting the BSA's arbitrary and capricious and deliberate acceptance of partial, altered and materially incomplete construction cost reports and the BSA's deliberate act of not requiring complete reports, when the Congregation had filed complete reports as to the other proposed schemes and the materiality and relevance of the complete reports were established by petitioners, and when the BSA could have simply required the filing of the complete report including the pages deliberately concealed by the Congregation.

- Even as to the improper bifurcated analysis, the court below erred in allowing the BSA to deliberately conceal from the record the very generous return on equity from the project when the BSA guidelines explicitly required a return on equity analysis together with a return on investment analysis.

- The court erred as well in stating that the return on equity issue was Petitioners' primary objection to the reasonable return analysis, and after misconstruing the arguments, then using the misconstruction in such as a way to ignore Petitioners' clearly expressed objections.

The lower court also erred as a matter of law in its consideration of the unique physical condition requirement of §72-21(a) of the Zoning Resolution as to the variances relating to the condominiums.

- The lower court erred as a matter of law in accepting the BSA's finding as to §72-21(a) in the absence of any physical condition and the BSA's apparent reliance upon case law interpreting zoning regulations which did not include the specific New York City requirement of "physical".
- The lower court erred as a matter of law in accepting the BSA's finding as to §72-21(a) insofar as the finding relied primarily on the existence of landmarked structures on the zoning site, when there is no authority under New York City's Zoning Resolution allowing the BSA to consider such factors in considering variances and where jurisdiction for providing relief for said hardships is exclusively assigned to the City Planning Commission pursuant to strict requirements when such relief is afforded, said requirements then having been ignored by the BSA. The decision below misconstrued the issue to be one of exhaustion of remedies alone, rather than the issue of whether the BSA had the power to do what it did.
- The lower court erred as matter of law in accepting the BSA's §72-21(a) finding for the condominiums in that the BSA clearly and improperly relied in part upon the programmatic needs of the Congregation as a hardship under §72-21(a) as to the luxury condominiums.
- The lower court erred as a matter of law in accepting the BSA's reliance upon a split zoning lot as a physical condition under §72-21(a): the lower court first having ignored the fact that such a situation is not a physical condition and that even the Zoning

Resolution authorizes relief for split lots only under specific conditions, conditions not met by the Congregation, and allowed the BSA to engage in circular reasoning of describing a zoning regulation as a physical condition.

- The lower court erred in accepting the BSA's deliberate disregard of the Zoning Resolution provision requiring a building separation on the upper floor, which provision would prevent construction of a tower condominium, even in the absence of the split lot, and the BSA's approval of a building knowing that it violated said specific prohibition in the Zoning Resolution, and in so doing the BSA's condoning and sanctioning questionable if not illegal and improper action by the Department of Buildings.

The lower court erred, as to its finding under §72-21(c) of the Zoning Resolution, in determining that the BSA's did not act arbitrarily and capriciously in deliberately failing to provide a rational basis for allowing legal lot line windows in apartments owned by Petitioner Lepow to be blocked by the luxury condominium allowed by the variances, when an as-of-right building would not block the windows and in failing to balance the economic harm done to said Petitioner as compared to the economic benefit to each and every member of the Congregation resulting from the economic benefit in allowing larger condominiums to be constructed.

The lower court erred, as to the BSA's finding under §72-21(e) finding of the Zoning Resolution as to the condominium variances. This section requires that the variance be the minimum variance. The lower court erred in not determining that the BSA acted arbitrarily and capriciously in deliberately failing to consider whether a courtyard modification would allow said windows not to be blocked or in failing to consider a condominium tower lesser in height, in that the return on investment

approved by the BSA substantially exceeded the return on investment which the Congregation stated was adequate and satisfactory.

The lower court erred, as to the §72-21(a) finding of the Zoning Resolution for the community house variances, in that there was no evidence at all to support a programmatic need for the 10 foot rear set- back variance for the fourth floor of the Community House, the Congregation having alleged that the fourth floor setback variance was to provide for larger classrooms, when the evidence conclusively showed that larger classrooms could be provided by simply moving a caretakers' apartment from the fourth floor to the fifth floor of the same building, but the Congregation did not wish to do so, asserting the unlawful legal privilege of both accommodating its programmatic needs and earning a reasonable economic return from the same property since the Congregation wished to develop a luxury condominium on the fifth floor.

The lower court erred in holding as proper and acceptable that the Chair and Vice-Chair of the BSA, knowing the identity of opponents to the project, conducted a lengthy formal secret private ex parte meeting with the Congregation and its lawyers, consultants and officers, and at the meeting reviewed the exact same building as approved by the Landmarks Preservation Commission and as would then be submitted to the BSA by the Congregation, and the BSA and the Chair and the Vice-Chair then having arrogantly refused to disclose what took place at said meeting.

The lower court erred in according deference to the determinations of the BSA despite the demonstrated repeated instances of the BSA deliberately ignoring relevant matters, refusing to collect relevant information from the applicant Congregation, and holding secret ex parte meetings with the applicant Congregation.

The lower court erred in accepting assertions by the Respondents that substantial evidence existed in the record in lieu of exact citations by the Respondents to supporting non-conclusory facts in the record.

9. RELATED ACTIONS OR PROCEEDINGS OR APPEALS

There are no additional appeals pending in this action. A related action is Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08, Supreme Court of the State of New York, County of New York, also before the Honorable Joan B. Lobis. In a decision dated August 4, 2009, the Court dismissed said proceeding; at page 2 of the Court's decision in the Landmark West decision, the Court incorporated by reference the July 10, 2009 decision being appealed herein.

Dated: August 27, 2009
New York, New York

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*In Related Matter:*
*Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08*

Kettaneh Exhibit B

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

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NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules

-against-

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents.

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Index No.

**Petitioners Kettaneh et al.**

**Revised Memorandum of Law In Support of Petition.**

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Revised January 2, 2009 -V.2

that the Congregation could not earn a reasonable return, and were provided with multiple do-over opportunities by the Board.

In its initial submission of April 2, 2007, the Congregation and Freeman Frazier, in order to arrive at the site value, used the standard method of estimating the site value, which is familiar to anyone who has bought or sold a home, cooperative apartment, or condominium. This is a method where the number of square feet in the piece of real estate is multiplied by a comparable value per square foot. Although there may be real estate expertise in arriving at the comparable value or determining the exact number of square feet, the basic methodology is familiar to all. When valuing raw land, one would multiply the comparable per square foot value by the number of square feet that can be built under applicable zoning regulations, or "development rights."

**A. The Feasibility Study — The §72-21(b) Finding**

*1. Zoning law provides no authority for a bifurcated feasibility study of only a portion of the property.*

Analysis of a reasonable return to the owner is intended to avoid an unconstitutional taking of property resulting from the arbitrary application of zoning laws. The issue presented is whether the zoning regime imposes a burden on the owner by making it not possible to earn a reasonable return from the property.

If the owner can profitably use his property under the strict application of the zoning laws, then the fact that the owner intends to reserve part of the site for non-income purposes, and is unable to earn a reasonable return on the remaining portion, is not a taking.

The Congregation suggests that even if it is shown that a reasonable return can be obtained by developing the entire development site, which is the Scheme C analysis, it

can demonstrate financial hardship if it cannot obtain a reasonable return from two floors of air rights consisting of the 5th and 6th floors of an AOR building. This is the scheme described as AOR — Scheme A, and the resulting development is referred to herein as the "Two-Floor Condominium" or the "Two-Floor AOR Condominium."

This is not the proper standard. First, §72-21(b) refers to development of the "zoning lot" and does not speak of earning a return from just a portion of the zoning lot. Second, case law provides that reasonable return is to be analyzed based upon the total property.

The problem presented is that an owner can easily pull out a part of its property that is not economic, and claim that, based upon its non-profitability, it needs a variance to create a profitable development. For example, in this project, the Congregation could have decided that it needed 70 feet of space for seven 10-foot floors of a Community House. But zoning allows 75 feet of height, so the owner could claim the 5-foot slice available was uneconomic and request a variance for several more floors so that the development would be "economic."

This approach of analyzing only a portion of the property is not accepted in the case law, most notably in the U.S. Supreme Court decision in *Penn Central*:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the "landmark site."

*Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (U.S. 1978)

New York state courts have followed the same approach. *See Northern Westchester Professional Park Associates v. Bedford*, 60 N.Y.2d 492, 503-504 (N.Y. 1983) ("An owner will not have sufficiently established his confiscation claim, therefore, if the adverse factors demonstrated affect but a part of the property but do not prevent a reasonable return from the tract as a whole."); *Koff v. Flower Hill*, 28 N.Y.2d 694 (N.Y. 1971) ("because there was no proof that financial returns on the whole tract would not permit recovery of the purchase price if the property were developed as permitted by the ordinance, there was no showing of confiscation"); *Concerned Residents v. Zoning Bd. of Appeals*, 222 A.D.2d 773, 774-775 (N.Y. App. Div. 3d Dep't 1995) ("The primary deficiency is that its analysis of the rate of return of the property as currently zoned is limited to its 8.2-acre leasehold rather than the 96.4 acres owned by Lebanon Valley ... Thus, given these deficiencies, we concur with Supreme Court's finding that the evidence before the ZBA did not support the granting of a use variance to KRM.").

*2. There is no taking because development of the entire site as an as-of-right scheme provides a reasonable return to the owner.*

As a preliminary issue, the Congregation could exercise its right to commercially develop the entirety of Lot 37 for condominiums and other permitted income producing uses. Hence, the Board asked for an all-residential as-of-right analysis, which is described as the AOR Scheme C/FAR 4 Scheme. The last analysis by the Congregation of this Scheme C was in the December 21, 2007 filing, and is shown as column 4 in the Freeman Frazier analysis. This analysis suffers from several fatal defects, including the following:

- The return is computed based upon return on total project cost, rather than return on equity.
- The analysis ignores the reasonable return to the owner resulting from the return on the original acquisition cost by the owner — and, in the analysis, the return to the owner would result from the "sale" of the development rights for $14,816,00 to the Congregation as well as the use of the property during its ownership, which would include rentals ($500,000 a year from Beit Rabban) and use.
- The use factor for this analysis is 62% as opposed to the normal 85% to 90%. Since the $500 per sq. ft. comparable value assumes ordinary use factors, the $500 should have been adjusted downward.
- Scheme C does not fully develop the property. It does not develop the 6400 sq. ft. sub-basement, which would have commercial value for a number of permitted uses, nor does it include the entire first floor for residential or professional office or other uses.

Additional submissions by opponents' consultants and other individuals demonstrate other defects in the analysis, and show that the property indeed would provide a reasonable return to an owner. Indeed, only an imperfect valuation process would have yielded a negative return — either through overvaluation of the land or the use of excessive construction and other costs, or both.

*3. For a religious entity, there is no taking since the Congregation can meet its programmatic needs within an as-of-right development.*

Zoning Resolution §72-21(b) does not require a showing that a reasonable return cannot be earned if the owner is a non-profit entity. For a religious entity, apparently a showing that programmatic needs cannot be met in an as-of-right structure was intended to substitute for this finding to show hardship that rises to the constitutional level that would result in a taking. The Congregation here argues for a unique proposition — although it is able to meet its programmatic needs within the lower floors of an as-of-right structure, it argues that should be able to earn a reasonable return on just a small portion of the property that it does not wish to use for programmatic needs. This distorts

Kettaneh Exhibit C

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

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| NIZAM PETER KETTANEH and HOWARD LEPOW, | : | |
| | : | Index No. 113227/08 |
| | : | (Justice Lobis) |
| Petitioners, | : | |
| | : | |
| For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules | : | |
| | : | |
| -against- | : | |
| | : | |
| BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, | | |
| Respondents. | | |

**Petitioners' Reply Memorandum of Law**
**In Support of Verified Petition.**

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March 23, 2009

Moreover, the failure of the BSA to consider use of the fifth and sixth floors of the as-of-right building to support programmatic needs is a sufficient reason to annul the lower floor community house variances. A six floor structure conforming as-of-right structure will allow the Congregation to meet all of it programmatic needs - the full lot coverage on the first floor resolves all the access and circulation needs of the Congregation.

The Congregation's view is that it is not prevented from moving ahead with obtaining demolition and construction permits from the DOB and commencing construction. The Petitioners are not aware of the intentions of the Congregation. Accordingly, Petitioners request that this proceeding move along without delay.[5]

**Variances Granted Improperly Below**

The variances for the proposed building allow approximately 14,204 additional square feet of area over that allowed by an as-of-right building — approximately 10% of the area relates to the Congregation's community space, and the other 90% to luxury condominiums. Because the Answers deny this basic fact, Petitioners have prepared a compilation exhibit at Pet. Ex. M-1 showing all eleven levels of the proposed building with the location of the variances highlighted.

**The BSA Has No Authority to Grant Variances Based upon Landmarking Hardships.**

Because the site is in a landmarked district and the Synagogue is an individual landmark, the Congregation first sought (in 2001) and obtained a certificate of appropriateness (in 2006) from the Landmarks Preservation Commission (LPC) for a building with reduced height, but only as to the appropriateness of the building for design reasons.

[5] New York City Administrative Code, Title 25, §25-207 provides: "f. Preferences. All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.". *See* P-159. DOB refuses to release to the public any information as to the Congregation's applications and permits without the permission of the Congregation, and the Congregation will not provide such permission (R-235, R-1626, P-1283, P-1286, P-1293).

The LPC did not pass upon (and had no authority to pass upon) zoning matters, issues of height and scale, and impact on the area such as shadows on the mid-block streets.[6]

The LPC in conjunction with the City Planning Commission may consider relief from hardships caused by landmarking under Z.R. 74-711 . Initially, in 2001, the Congregation had sought relief from the LPC under Z.R. 74-711 , but did not pursue such relief, withdrawing its request. Despite the improper inference drawn from the positions expressed by the BSA in its Answer, the BSA has no role at all in providing relief from landmark hardships; the BSA provides variances on appeal from denials of permits by the Department of Buildings for violations of the Zoning Regulations; if Respondents argue to the contrary that the BSA can grant relief from landmark hardships not provided by the LPC, then it would seem that the Congregation did not avail itself of its remedies from the LPC.

**SUMMARY OF SIGNIFICANT ISSUES**

First, Respondents in their Answer have now established that the Congregation can obtain a reasonable and adequate return from an as-of-right building. Accordingly, there is no basis whatsoever for the so-called Z.R. 72-21(b) finding for the condominium variances which must be annulled.

Second, Respondents have been unable to show any rationality at all in assigning a site area of 19,775 square feet (oddly derived from unused air rights over the adjoining Parsonage) as the site area for computing reasonable return for the two condominiums in the mixed use Scheme A conforming as-of-right building. The Congregation claims that having satisfied its programmatic needs in floors 1-4 of the mixed use building, it is entitled to earn a reasonable return from two condominiums on the remaining floors five and six. But, these two floors do not contain 19,775 square feet, but only 5,316 square feet. By using this bizarre approach, the Congregation inflated cost and thereby eliminated the return.

[6] Title 25, New York City Administrative Code, §25-307, states the factors considered by the LPC in issuing a certificate of appropriateness: "architectural features" and "aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color."

In their Answering Memoranda Respondents ignore, and apparently concede, the assertion by Petitioners that, under §72-21(b) and case law, a religious organization proposing a mixed-use building may not bifurcate its property — meeting its programmatic needs in one slice of the property,[17] and then claiming that it cannot earn a reasonable return as to the remaining portion.[18] See Pet. Memorandum of Law at page 74. *See* Northern Westchester Professional Park Associates v. Bedford, 60 N.Y.2d 492, 503-504 (N.Y. 1983); Koff v. Flower Hill, 28 N.Y.2d 694 (N.Y. 1971). Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (U.S. 1978) ("Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); also Spears v. Berle, 48 N.Y.2d 254, 263 (N.Y. 1979)("A petitioner who challenges land regulations must sustain a heavy burden of proof, demonstrating that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use.")

*1. The Nearly All Residential Building Earns a Rate of Return of At Least 6.7%*

The BSA has not only failed to require the Congregation to analyze a truly all-residential scheme, but opponents claimed, and the Petition stated, that the "not-really" all-residential scheme of December 2007 had not been updated to utilize a reduced site value computed by the Congregation in April 2007, which reduced site value would have boosted the rate of return in the Scheme C analysis. The BSA ignored opponents' request, and would not ask the Congregation to update Scheme C, and the Congregation did not volunteer. *See* BSA Answer to ¶ 292 of Petition, reproduced at Pet. Ex. N-1-A.

Yet the BSA did not completely ignore this assertion in its Answer. After all, it was the BSA itself that initially requested that the Congregation provide an all-residential analysis. The professional staff of BSA, after it received the initial application, asked the Congregation for a “reasonable return

[17] The Congregation admits in its Statement in Support that the lots were purchased specifically for development of the Community House; the proposed Community House without the variances responds to the needs of the Congregation. Pet. at 88.

[18] In this discussion, we ignore the 10% of variances for the Community House and assume for argument’s sake that the 2nd, 3rd, and 4th floor variances are proper.

the Congregation and the BSA in supporting their false assertion. The Zoning Resolution, as a generous accommodation to religious organizations, permits without any variances at all, an as-of-right community building to occupy not 70% but 100% of the entire lot up to 23 feet above street level. For the Congregation, all circulation and access issues are addressed on the first floor, except for a 100 square foot elevator shaft that is in the as-of-right part of the proposed building. It is for this reason that the distinguished architect for the Congregation was unwilling to misrepresent to the BSA that variances were needed to resolve access and circulation issues.

The Congregation's architect, in a specific statement in response to contentions by opponents on this specific issue, agreed that no variances were required to meet this programmatic need. The BSA and Congregation did not deign to discuss this probative and conclusive admission by its own expert.

In summary, analysis of the circumstances surrounding the false assertions by the BSA and the Congregation as to access and circulation are illustrative of the arbitrary and capricious and irrational conduct of the BSA in the BSA proceeding and its response to the Petition:

- A 6500-page record and 18 months of hearings do not establish that matters were considered by the BSA or found in the record.
- Representations and indications are not facts.
- The BSA accepting facts that conflict with reality is irrational.
- The BSA capriciously shaped the record by being careful not to ask the Congregation expert to explain the claimed relationship between the access and circulation and the variances.
- There must be a causal relationship between an alleged hardship such as access and circulation and the variances sought.

**G. The Proper Remedy for a Property Owner Seeking Relief from Hardships Created by the Landmark Law Is Under Z.R.§74-711 And The BSA Has No Role in Providing Relief For Such Hardships**

The BSA improperly used landmarking as a unique physical condition hardship to satisfy Z.R. §72-21(a). Not only is the alleged hardship resulting from landmarking not a physical condition under Z.R. §72-21(a), but Respondents were unable to show how this hardship, especially as to the revenue-

generating condominiums, arises out of the strict application of the zoning regulations as required in Z.R. §72-21(a). Thus, the variances as to the condominiums must be annulled for that reason, but another reason is that the BSA is not authorized to consider the hardship of landmarking.

The landmarking hardship alleged by the Respondents arises, not out of the strict application of the zoning regulations, but out of the regulation of the New York BSA landmark laws, which apply generally to the West Side blocks surrounding the Synagogue. The Zoning Regulation clearly removes the BSA from any role in deciding when a hardship from landmarking requires relief. The LPC has a role and the City Planning Commission has a role, but the BSA has absolutely no role.

BSA knew that what it was being asked to do, taking into account that the landmark status was improper — this was the "hard place" the Respondent Chair referred to at the first hearing:

> 510 So, we're put in this hard place.
> 511 Typically, when you have a situation that goes through Landmarks where you're
> 512 asking for height and setback waivers and they're not driven by hardship, there's another
> 513 venue and I know that you just mentioned 74-711. It - - maybe it was foreclosed to you.
> 514 That's unfortunate, but we're here looking at this case and it's just - - it's been very hard
> 515 for us to get our hands around this.

R-1749. The Congregation acknowledges that the LPC would not provide 74-711 relief to the Congregation, in its letter of June 17, 2008, R-4859 at R-4861: "Its request for Landmarks cooperation on a ZRCNY Sec. 74-711 special permit was denied, thus properly bringing this Application to the Board for relief." Of course, there is nothing at all proper about asking the BSA to do what the LPC would not do under §74-711, when the BSA has no authority under such provision.

The Congregation describes it decision to withdraw it §74-711 request at page 15 of its July 9, 2008, its last version of its Statement in Support (R-5129-5128) and outrageously claimed that having been turned down by the LPC for a §74-711 special permit, that the LPC "signaled" that its issuance of a Certificate of Appropriateness (COA) for a smaller building would meet the preservation purposes required. But, if this were so, first of all the LPC would indeed have approved a special permit under §74-711 - and it did not do so. All the LPC said in effect was - "here is your COA - go to the BSA and see if you meet their other standards, because we are not giving you a special permit." The

Congregation claimed that "that CSI took every available step to seek the administrative relief provided in the Zoning Resolution for seeking a special permit to modify the bulk regulations for which this variance Application now seeks waivers, thereby exhausting its administrative remedies prior to the filing of this Application." Of course, that is false - the Congregation did not take the "available step" of applying for the special permit.

The BSA Memorandum at 55 acknowledges that the BSA took the landmark status of the Synagogue into account in both the 90% upper floor condominium variances and the 10% lower floor community house variances.

> The Record before the BSA demonstrated that the hardship in developing the Zoning Lot with a complying building was not created by the Congregation, but originated from the landmarking of the Synagogue and the 1984 rezoning of the site.

Z.R. §74-711 is the exclusive remedy for a party to seek relief from a hardship created by the landmarking of the property. There is nothing in Z.R. §72-21 to suggest that landmarking is a "unique physical condition" under §72-21(a) or a hardship recognized thereunder. Z.R. §74-711 provides in part:

> **Landmark preservation in all districts**
>
> In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by the Landmarks Preservation Commission, the City Planning Commission may permit modification of the use and bulk regulations, except floor area ratio regulations.

Allowing a property owner to use landmarking as a hardship constituting a unique physical condition under §72-21 (a) not only flies in the face of the language of Z.R. §72-21 (a) but also renders Z.R. §74-711 meaningless.

The Congregation played the same double game with the landmark "hardship" as it did with the "access and accessibility" issue and the "money is needed for programmatic needs" issue. It peppered its submissions with references to these issues, hoping to influence the BSA incorrectly, but then claims that the issue was just provided for context and in passing.

The Congregation, knowing that Z.R. §74-711 is the exclusive remedy for landmark hardships, states at page 12-12 of its Congregation Memorandum at 12-13: "In any event, the Resolution does not suggest that the BSA, here, treated the landmarked status of the synagogue as a hardship."

But the Congregation is incorrect. The BSA did improperly take the landmark hardship into account in making the (a) finding. The problem with the BSA position is that whenever the LPC landmarks a district or building, then the BSA arrogates to itself the right to grant variances and otherwise ignore the requirements of §72-21(a).

Finally, the BSA fails completely to identify any facts that illustrated why the landmark status of the Synagogue or even the landmark status of the entire West Side district prevents the Congregation from developing the construction site. The BSA's logic merely is "the Synagogue was landmarked so it creates a hardship in developing the development site." Or is the Congregation claiming that it is the application of the landmarks laws on the development site that creates the hardship? The record is silent. Where is the explanation for this logic? How do the variances relate to this hardship? Where is the causation? How do the variances provide relief from the hardship?

### H. Landmarks Law Prevents the Congregation From Building a 17-Foot Wide Tower and the BSA May Not Grant Relief From This Limitation In This Matter

The split lot is a physical condition, according to Respondents, because the sliver law limitations of Z.R. §23-692 allegedly prevent the construction of a narrow 17-foot tower in the R10A portion of Lot 37.[44] See BSA Res. ¶94. Yet, it is the limitations of the landmarking law that prevent the construction of a sliver tower on Lot 37, not the sliver law, and not a result of the split zoning. Landmarks Preservation Commission made it clear that the maximum height it would allow on any part of Lot 37 was 95 feet in the R10A part of Lot 37. Alleged hardships imposed by application of the landmarks laws are not hardships caused by a physical condition, and, even if they are, they are not

[44] The Congregation's Architect, in a letter to the BSA dated March 28, 2008, stated that Section 23-692 is not applicable. R-4332, ¶ 2. This suggests perhaps that the sliver building is a ruse seized upon by the Congregation and the BSA to help contrive the split lot hardship claim.

hardships for which relief may be provided under Z.R. §72-21(a). For the reasons discussed elsewhere, hardships resulting from the landmark laws are not the basis for a variance under §72-21.

Lot 37 is 64 feet wide; the east portion of the 17 feet is in an R10A district, which permits building to the height of 185 feet. *See* Resolution ¶93. The R10A portion of the lot is the least restrictive portion of the lot. The rest of Lot 37 is in the more restrictive R8B district, which applies the contextual zoning limit of 75 feet. Under circumstances not applicable here, Z.R. §73-52 (*see* Resolution at ¶98) and Z.R. §77-00 provide relief from the split lot condition.

The Congregation is unable to satisfy the requirements of these provisions, but the BSA ignores this limitation. Both provisions restrict relief to where 50% or more of the lot is less restrictive; here the R10A portion is far less than 50% of the lot.[45] More importantly, however, is that for bulk variances, Z.R. §77-00's only relief is to realize the transfer of air rights from one part of the lot to another; it does not provide relief from height and setback requirements. This is one reason that Petitioners have stressed that this case does not involve the transfer of air rights. The Respondents do not disagree. Without such transfer, then, most of the BSA discussion in the resolution as to split lots as a hardship is irrelevant.

Although there is no need for the transfer of air rights from one part of the lot to another in this application, the BSA then states disingenuously in its decision:

> ¶99. WHEREAS, the applicant represents, however, that because of the constraints imposed by the contextual zoning requirements and the sliver law, the Synagogue can transfer only a small share of its zoning lot area across the R8B district boundary; and

Not only is there no need to "transfer a small share of its zoning lot area," but the dominant constraint here is the landmark restriction, not just the contextual zoning and the sliver law, so what the board is doing here is considering landmarking as the hardship for which relief is being granted and,

[45] §73-52 Modifications for Zoning Lots Divided by District Boundaries
Whenever a zoning lot existing in single ownership on December 15, 1961, or on the effective date of any applicable subsequent amendment to the zoning maps is divided by a boundary between two or more districts in which different uses are permitted, the Board of Standards and Appeals may permit a use which is a permitted use in the district in which more than 50 percent of the lot area of the zoning lot is located to extend not more than 25 feet into the remaining portion of the zoning lot, where such use is not a permitted use.

most importantly, relying upon a hardship not arising out of the strict application of the zoning laws. Since there is no need to transfer zoning lot area in this matter, then there is no "arising from" as it relates to this claimed hardship.

*1. The Eighth DOB Objection Requiring a 40-Foot Separation Between Upper Floors and the Synagogue Lot Would Have Prevented the Tall Sliver Building*

Another constraint against a tall building on the 17-foot wide R10A sliver that was ignored by the Board is Z.R. §23-711, which requires that there be a 40-foot separation between a residential building on a lot on the upper floors. With the initial application, the DOB had required a variance for this 40-foot separation, and the drawings submitted by the Congregation to the DOB and BSA "40 foot standard minimum distance between building" objection. The BSA staff agreed with the DOB and asked why the separation was not shown on the as-of-right drawings.[46] *See* Pet. N. 13 to ¶ 97.[47] The Congregation's architect agreed with the DOB as well. There was no indication at all that the DOB mistakenly applied Z.R. §23-711.

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[46] The BSA staff, in its first notice of objection of June 15, 2007, R-253 at R-256, specifically pointed out the need to meet this requirement:

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

[47] An opposition expert with extensive planning experience, Simon Bertrang, provided a cogent explanation of Z.R. §23-711 in a letter dated June 28, 2007, R-279 at R-281:

> BUILDING SEPARATION AND AS-OF-RIGHT DRAWINGS: ZR §23-711 requires a minimum distance between a residential building and any other building on the same zoning lot — in this case, with both buildings over 50' tall and with blank wall facing blank wall, the minimum distance is 40'. The As-of-Right drawings submitted by CSI in support of their BSA application are not as-of-right since the new building shown there would need a variance. Since As-of-Right drawings are a required part of any BSA submission, CSI's application is currently incomplete. A truly as-of-right building would either show the separation (40' minimum distance) or not include residential so that such a minimum distance was no longer required (a new community facility building would not trigger the requirement). Another way of avoiding the need for a 40' separation between the residential building on Lot 37 and the synagogue on Lot 36 would be to continue to treat them as separate zoning lots (i.e. not combine them in the way that CSI is proposing). Of course, as stated above, this would mean that their as-of-right FAR would be much lower: 5.59 instead of 8.36.

The Eighth Objection from DOB created a problem for the BSA — if the zoning resolution required a 40-foot separation in the upper floors, then the entire argument claiming that a split lot was a physical condition under 72-21(a) would not be a valid argument for the simple reason that even if all of Lot 37 was in the 10A zone, the Congregation still could not build a tall structure on the eastern 40 feet of the 64-foot wide lot.

The DOB eighth objection was curiously and mysteriously removed in August 2007, without any changes to plans and without any explanation or curiosity on the part of the BSA. The BSA Statement of Facts at ¶ 205 asserts that:

> "After revisions to the application by the Congregation, the Manhattan Borough Commissioner issued a second determination on the Congregation's application which eliminated one of the prior objections."

and again claims, incorrectly, at N. 7 to ¶ 230:

> 7 That the Congregation's initial application initially requested waivers related to Z.R. §23-711 (minimum distance between buildings), but then later withdrew its request for that variance after obtaining revised objections from DOB which, based upon revised plans, did not object to the distance between buildings at the site, is, contrary to petitioners' contentions [Petition, ¶ 97, fn. 13], of no moment. Indeed, this issue was addressed by the Board during the February 12, 2008 hearing where Chair Srinivasan and Vice-Chair Collins explained first that it is typical for an applicant to submit revised plans to DOB and receive updated objections which become the subject of the BSA's review, and second, that all that is being reviewed and acted upon by the Board are the requested zoning waivers, not the differences between the first and second sets of plans submitted to DOB [R. 3724-28].

However, there were no such revisions to the plans, and the Congregation's "direct[ing] the Court to the record" is not at all helpful in identifying that which is non-existent. In light of these denials and factual distortions, Petitioners in reply provide herewith a composite showing that there were no changes in the drawings between April 2007 and August 2007. Pet. Ex. N-8.[48]

The fact is that the DOB initially required the separation and the BSA staff agreed, but then the Congregation and BSA needed to conjure up a physical condition. So without any discernible changes in drawings and with no explanation, the Congregation was able to refile the same building and have the DOB remove the eighth objection, and the BSA asked no questions. These machinations allowed the Congregation to contrive the split lot as a physical condition — if the eighth objection were still in effect, the split lot argument would have been even more baseless. It is also curious, to say the least,

[48] The 40 foot separation objection was presented at the improper November 8, 2006 ex parte meeting, and based upon the check mark next to the relevant item 20, appears to have been discussed. Pet. Ex. Q-1, P-4261.

that the BSA in any proceeding would observe that an applicant was violating a provision of the zoning resolution not in the DOB objection, and be silent.

## I. The BSA's Findings Under Z.R. §72-21(c) and §72-21(e) as to the Blocked Windows Were Arbitrary and Capricious

Petitioner Lepow owns two apartments in the adjoining 18 West, which apartments have windows that would be blocked by the proposed building, but would not be blocked by an as-of-right building; thus, variances blocking the window run afoul of Z.R. §72-21(c), as is fully described in the Petition. Pet. at ¶¶ 8, 262-288. The BSA action as to the windows violated Z.R. §72-21(e) as well.

### *1. By Instructing the Congregation to Create a Courtyard to Relieve the Adverse Impact Upon Only Some Adjoining Property Owners with Lot Line Windows, Acted Arbitrarily and Capriciously*

The BSA instructed the Congregation to modify its building to create a courtyard in the rear to accommodate the rear side lot line windows in 18 West 70th Street, but acted arbitrarily and capriciously by not so instructing the Congregation to create a courtyard to accommodate the front side lot line windows. According to the Resolution and the BSA Answer at ¶319, the waivers of variance law to the Congregation resulting in the blocking of the lot line windows did not impair the appropriate use of the 18 West 70th Street cooperative apartment owners under Z.R. §72-21(c). The setback requirements in the zoning regulations would have protected these windows. The BSA dismissed the impairment of these cooperative apartments as being of "no moment."

The BSA provides no explanation of the distinction drawn between the nearly identical front and rear cooperative apartment. Even so, despite the BSA's "no moment" statement of dismissal of the concerns of the cooperative owners, BSA did in fact realize that there was an impairment under Z.R. §72-21(c). This section requires a BSA finding that the variance, if granted "will not substantially impair the use … of adjacent property."[49]

[49] The BSA falsely claims (BSA Answer ¶ 18) that Petitioners or other opponents asserted that the windows were legally required or that it had a legal right to not have the windows blocked under the building code or under general property rights and can provide no statement in the record that such assertion was ever made by other opponents.

Obviously, the BSA did recognize the impairment, otherwise it was acting upon an arbitrary whim in instructing the Congregation to create the rear courtyard. The BSA just does not have the power to order applicants to modify buildings on a whim. Zwitzer v. Zoning Board of Appeals of the Town of Canandaigua, 74 N.Y.2d 756 (1989).

This was a "compromise," but if the cooperative owners had no claim, then what was being "compromised"? BSA Answer at ¶319. Certainly, it was a compromise that in no way benefits owners of the front apartments.

*2. A Front Courtyard Not Blocking the Front Windows Would Have Still Permitted the Congregation to Earn a Reasonable Return -— Z.R.§72-21(e) — the Minimum Variance*

Ultimately, waiving the setback regulation in the front increases income to the Congregation, and thereby reduces the financial burdens borne by members of the Congregation - and the BSA should have expressly balanced the equities, but did not do so, especially where the proposed building so exceed a reasonable return to the Congregation. The BSA did not even make the required specific finding as to the front setback variance which results in the blocking of the windows - and improperly lumped all the condominium variances into one finding.

The BSA Answer at ¶292 crystallizes the fact that the rate of return approved by the BSA was nearly 11%, but that this is in excess of the return that the Congregation acknowledges as sufficient. The BSA's failure to require a courtyard for these windows was also in violation of Z.R.§72-21(e) which provides that a variance must be the minimum variance,, since the proposed/approved building earned a rate or return far in excess of the adequate reasonable return of 6.55%, and indeed was 67% in excess of the rate of return (6.55%) the Congregation itself deemed to be adequate. R-140, R-287.

Kettaneh Exhibit D

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**

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

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

By:_____
Pamela D. Evans

Date: June 19, 2009

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.

Kettaneh Exhibit E

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 6

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LANDMARK WEST, INC., 103 CENTRAL PARK WEST CORP., 18 OWNERS CORP., 91 CENTRAL PARK WEST CORP. AND THOMAS HANSEN,

Plaintiffs

- against -

THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS, NYC PLANNING COMMISSION, HON. ANDREW CUOMO, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK AND CONGREGATION SHEARITH ISRAEL,

Defendants

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Index No. 650354-2008

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NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioner

- against -

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, CHAIR, CHRISTOPHER COLLINS, VICE-CHAIR, AND CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents

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Index No. 113227-08

March 31, 2009
60 Centre Street
New York, New York 10007

Lester Isaacs - Official Court Reporter

B E F O R E: HON. JOAN B. LOBIS, Justice.

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Lester Isaacs, Official Court Reporter

BSA. So the landmark question as to them, as a defendant and properly so, we believe we raise the same issue.

THE COURT: If I understand it, in reviewing. I made a start review, I have not read everything. I have read mostly the papers in the Kettaneh, but not in the Landmark cases, I thought Landmark approved it.

MR. SUGARMAN: Landmark approved the project from the point of view of from the certificate appropriateness. They do not look at the Zoning Law. They are specifically prohibited from doing this. Landmark has a whole separate procedure of 74, 711 where they consider the hardship by the applicant. And the applicant has to show their financial hardship. They have to show that information and generally their encumbrances and other conditions put on the property, as part of that process, and then it's pursued. But the Department of City Planning, that's to get a waiver of the Zoning Laws, that the Board of Standards and Appeals is not involved in that process.

This applicant started off in 2001, that's when the case started, asking for 74 711 relief from Landmarks and for whatever reason they withdraw it

cite basically to BSA resolution. The BSA resolution was the magic words they rely upon magic words presented by counsel. For the BSA in their submission to the BSA counsel for the respondent -- I'm sorry -- that's not the factual standard. There are plenty of cases that show that even BSA cannot come in and utter these conclusory findings.

THE COURT: But if the record is there, they made findings, they maybe didn't articulate enough, is that a basis for me to reverse on 78 standards?

MR. SUGARMAN: They can't show you where it is in the record. They cannot show you if the record there is a change in the Department of Buildings plans. They cannot show that to you.

They cannot show you where assess of circulation is affected. And not cured by the conforming building. In fact there own architect agreed with us that's an as of right. During their access of circulation the building, I made big mistakes. And I didn't get to lead with my most important point.

THE COURT: You get to end with it.

MR. SUGARMAN: Your Honor, there are a lot of issues with their economic study, and some of them may fall within the discretion of the BSA. But you get to a certain point where you're beyond the realm

of reason. For example, the site value they use for the two floors of condominium, is beyond reason. And that clearly kills what is called the skim man out, in the scheme city. The idea is if you have this operation, and you come in and you want a variance based upon economic needs, you have to look at the entire building.

This is the so-called all residential building. The BSA asked them to do it. They provided it. It wasn't all residential. They, putting that aside, if you look in the answer this is in my reply. And I have excerpts here. I don't have a poster. But the City, the BSA never fixed the scheme C or residential analysis. They went back and they fixed it. They concluded that an all residential building would earn a six point 7 percent return.

Now, the question, your Honor, is that a reasonable return. If you read that decision over and over and over again, you will never see a reference to any greater return in the decision. Certainly not what is what is considered an adequate rate of return. They said six point 7 percent, so we went back into their record, their initial application and this here is an exhibit. R 140 in the record. It's their economic expert saying in

Kettaneh Exhibit F

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

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|---|---|---|
| NIZAM PETER KETTANEH and HOWARD LEPOW, | : | |
| Petitioners, | : | Index No. 113227/08 (LOBIS) |
| For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules | : | NOTICE OF MOTION |
| -against- | : | |
| BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair of said Board, CHRISTOPHER COLLINS, Vice Chair of said Board, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, Respondents. | : | |

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PLEASE TAKE NOTICE that, upon the annexed Affirmation of Alan D. Sugarman dated June 16, 2009 and upon all prior pleadings and proceedings herein Nizam Peter Kettaneh and Howard Lepow shall move this Court in the Motion Submission Part (Room 130) of the New York County Courthouse, 60 Centre Street, New York, New York 1007, on June 26, 2009 at 9:30 A. M. for an Order providing permission to the Petitioners to file a further Reply in the pending proceeding, as required by Rule 13(b) of the Local Rules of the Court, and for such other relief as may be appropriate

Dated: June 16, 2009
New York, New York

Alan D. Sugarman

Attorney for Petitioners

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To:

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Attorneys for Respondent Congregation
Shearith Israel aka Trustees of
Congregation Shearith Israel in the City of
New York

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

| | | |
|---|---|---|
| NIZAM PETER KETTANEH and HOWARD LEPOW, | : | |
| Petitioners, | : | Index No. 113227/08 (LOBIS) |
| For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules | : | |
| -against- | : | AFFIRMATION OF ALAN D. SUGARAMN |
| BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair of said Board, CHRISTOPHER COLLINS, Vice Chair of said Board, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, Respondents. | : | |

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

1. I am counsel for the Petitioners Nizam Peter Kettaneh and Howard Lepow and submit this affirmation in support of their motion to file a further Reply in the within proceeding. The Local Rules of the Honorable Joan B. Lobis provide that the court will not accept supplemental papers after submission or argument of the application, without authorization by the court. Similarly, Rule 13(c) of the Local Rules of the Supreme Court of Manhattan requires the "express permission in advance" by the court. Because Petitioners wish to provide a supplemental memorandum to respond to new papers filed by the Respondents, Petitioners hereby request permission to file such a memorandum

2. Unique circumstances have arisen because the Respondents herein have in essence served papers which are in the nature of a sur-reply, but in a related case in which the Petitioners are nor parties.

3. Petitioners Kettaneh and Lepow seek to further reply to the Answering Memoranda of Law served on or about May 26, 2009 by the Respondents BSA and Congregation in the related action, Landmark West! v. City of New York Board of Standards and Appeals, Index No. 650354-08.[1] The Landmark West action was filed initially as a plenary action; the respondents therein moved to dismiss, asserting that the case should have been filed as an Article 78 proceeding.

4. A joint hearing for the instant proceeding and the Landmark West action was held on March 31, 2009. Prior to the hearing, the Kettaneh proceeding had been fully briefed; the Respondents had served their answering papers February 9, 2009 and the Kettaneh Petitioners had served their reply March 23, 2009.

5. Subsequent to the hearing, the Court ordered the Landmark West action be converted to an Article 78 proceeding. Respondents therein (which include the Respondents BSA and Congregation) served answering papers on or about May 26, 2009. The Kettaneh Petitioners were provided with courtesy copies by the Respondents. Landmark West is expected submit their Reply papers on or about June 19, 2009.

6. At the hearing of March 31, 2009, counsel for the Congregation asked the Court for permission to provide a sur-reply, including providing references to the record. Hearing Tr. at 36 and 43.[2] The Congregation's counsel had argued that the BSA Resolution and Record were replete with the necessary substantial evidence to support the "magic words" (to use the Congregation's terminology) required for the Z.R. §72-21 findings. Hearing Tr. at 36. The Court did not allow the filing of a sur-reply. Notwithstanding, in many respects the Congregation's and BSA's answers to the Landmark West amended petition are in effect a sur-reply to Petitioners' last pleading in Kettaneh; the Congregation has sought to include exactly the material which at the hearing the Court had not allowed

[1] The Answering Memoranda in the Landmark West case are referred to herein as the "New Memoranda."

[2] The Transcript of the March 31, 2009 hearing before this Court is cited as "Hearing TR."

the Congregation to supply. The Respondents added further arguments and new case citations as to issues previously briefed in the instant proceeding.[3]

7. In addition to the new legal argument, Petitioners are of the view that Respondents have materially mischaracterized the Record and the BSA Resolution, in both subtle and not so subtle ways.

8. As one example, the Congregation mischaracterizes the Record and the BSA Resolution to make it appear that the BSA had made a finding that the all-residential as-of-right scheme, using the revised site value, would earn neither a profit nor or a reasonable return. This is not so and relates to a critical error made by the BSA in not requiring the Congregation to complete the Scheme C analysis. The Record is conclusive that the an all-residential as-of-right building would earn a reasonable return - in its New Memorandum, the Congregation has attempted to obscure the clarity of the Record in that respect.

9. As another example, the Respondents has reasserted falsely that the Eighth Objection was omitted from the DOB because of a changes in plans submitted to the DOB. Another example is

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

New arguments by the Congregation address these issues: nine new precedents (pp. ii-iv); misleading citations to supporting evidence in record (p. 1); false assertions re obsolete building and incorrect citations to Record (p. 3); unsupported assertions that sliver law and floor plates and underdevelopment are physical conditions (p. 3); assertion that the condominiums are to defray costs of community facility (p. 4); discussion of development rights (p. 4); discussion of substantial evidence (p.9); nature of the proceedings and whether quasi-judicial (pp. 9-10); reliance on hearsay sufficient to support substantial evidence (p. 10); reliance on unsworn conclusory statements of counsel (p.10); rational basis of agency decision (pp. 11, 13); that hearsay from applicant may only be opposed by conclusive evidence from opponents (p.12); jurisdiction of BSA to consider zoning regulations requiring waiver absent formal action by the DOB (p.14); deference to BSA interpretation of statute (pp. 14-15); asserted evidentiary support (pp.16-18); conflating evidentiary support for programmatic and non-programmatic variances (pp. 14-19); deferring to religious organization for non programmatic variances (p. 19); improper use of fact that Synagogue is landmarked as a unique physical condition (p. 20-22); false assertions at to irregular shape of land (p. 21); false assertion that BSA Resolution consists largely of factual findings (p. 22); false claims as to BSA factual findings as to physical hardships (p. 22); incorrect assertions that non-profits need not satisfy finding (b) for revenue generating condominiums (p. 23); unsupported assertions as to rational basis of reasonable return analysis (pp. 25-26); false assertion that BSA requested analysis of a single as of right building scheme (p. 26); false assertion that BSA found that "any" as of right building would result in "substantial loss." (n. 3, p. 27); and, incomplete discussion of whether BSA provided a minimum variance ignoring allowance of excessive return (pp. 28-29).

the Respondents obscuring the dominant role exercised by the City Planning Department as to relief from landmarking hardships, to the exclusion of a role by the BSA.

11. Because the two proceeding are so similar, due process requires that Petitioners herein be afforded an opportunity to respond to the new material submitted to the Court by Respondents in the parallel action. Otherwise, the Petitioners' will not have had an opportunity to respond to the new "answers" of the Respondents.

12. Petitioners have completed their proposed further reply memorandum and will be able to file the memorandum forthwith, without delaying the proceeding.

13. Attached as Exhibit 1 are excerpted pages from the transcript of the March 31, 2009 hearing.

Dated: June 16, 2009
New York, New York

Alan D. Sugarman

Attorney for Petitioners

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 6

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LANDMARK WEST, INC., 103 CENTRAL PARK WEST CORP., 18 OWNERS CORP., 91 CENTRAL PARK WEST CORP. AND THOMAS HANSEN,

Plaintiffs

- against -

THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS, NYC PLANNING COMMISSION, HON. ANDREW CUOMO, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK AND CONGREGATION SHEARITH ISRAEL,

Defendants

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Index No. 650354-2008

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioner

- against -

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, CHAIR, CHRISTOPHER COLLINS, VICE-CHAIR, AND CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Index No. 113227-08

March 31, 2009
60 Centre Street
New York, New York 10007

Lester Isaacs - Official Court Reporter

problem where the congregation would have cute back on its programs. BSA does look at this. They did an extensive review, in terms they would have to cut back the number of children that could be provided service. The number of classrooms. The classroom side, therefore, the number of students, that they could have in that building. They wouldn't be able to cut on what was planned. In terms of the financial hardship that was looked at, I will go over it, unless you don't want me to --

THE COURT: Not on this stage. I need an analysis on what I have to do, at least on the 78 to the declaratory judgment, that's brought out over what I do need to review on an agency finding, anything.

MR. MILLMAN: Yes, your Honor. I believe your Honor that the analysis in particular on the Article 78 though I think ultimately, it's the same analysis, that was asserted, is what one does, one looks at the five findings, which is maximum, would have to be made. One says you look at the BSA decision. You see the magic words in each of the five. Then after that, you go to the 6,000, 7,000 page record and look to see whether there is some, something, someone is uttering those words in testimony or submission to

Proceedings

THE COURT: At this point you have given me a lot more to look at.

MR. MILLMAN: Your Honor, would it be helpful regarding the issue of page numbers? And in the record, we could provide your Honor with very simple one page or two page identifying the findings.

THE COURT: Are they in the papers?

MR. MILLMAN: I'm not sure.

THE COURT: We have two problems. The Attorney General, the lack of the Attorney General's presence and to convert the landmark to a 78, what procedures do I have to follow to do that.

Thank you very much.

Very interesting argument.

* * *

C E R T I F I C A T E

I, Lester Isaacs, an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

Lester Isaacs, S.C.R.
Official Court Reporter.

Kettaneh Exhibit G

7/9/09



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

PRESENT: HON. JOAN B. LOBIS PART 6
*Justice*

KETTANEH, NIZAM PETER

Petitioner,

- v -

BOARD OF STANDARDS & APPEALS

Respondents.

INDEX NO. 113227/08
MOTION DATE 6/26/09
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 7, were read on this motion for leave to file a further reply.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion / Order to Show Cause – Affidavits – Exhibits | 1-3 |
| Answering Affidavits – Exhibits | 4-6, 7 |
| Replying Affidavits | |

Cross-Motion: [ ] Yes [ X ] No

Upon the foregoing papers, it is ordered that this motion by petitioners for permission to file a further reply in the pending proceeding is denied.

Oral argument was held in the underlying Article 78 proceeding on March 31, 2009. This motion is subjudice. Petitioners submitted a voluminous set of papers in support of the proceeding, including thousands of pages of exhibits; the memoranda of law in support and in reply, alone, total over 150 pages. The papers to which petitioners now seek to respond were submitted by respondents in another case. It is wholly inappropriate for petitioners to seek to reply to those papers, which are not being considered by the court in this underlying application. No further submissions are necessary. A decision is forthcoming.

The motion is denied. This constitutes the decision and order of the court.



Dated: 7/8/09

JOAN B. LOBIS, J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Kettaneh Exhibit H

Draft of Unfiled Further Reply

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

---

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

-against-

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents.

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Index No. 113227/08
(Justice Lobis)

See Page 18 for Discussion of BSA Landmark Jurisdiction

**Petitioners' Further Reply Memorandum of Law In Support of Verified Petition.**

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Attorney for Petitioners
June __, 2009

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CASES

STATUTES

**PETITIONERS' FURTHER REPLY MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PETITION**

Petitioners Kettaneh and Lepow further reply to the Answering Memoranda of Law served on or about May 26, 2009 by the Respondents BSA and Congregation in the related action, Landmark West! v. City of New York Board of Standards and Appeals, Index No. 650354-08.[1] The Landmark West action was filed initially as a plenary action; the respondents therein moved to dismiss, asserting that the case should have been filed as an Article 78 proceeding.

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At the hearing of March 31, 2009, counsel for the Congregation asked the Court for permission to provide a sur-reply, including providing references to the record. Hearing Tr. at 36 and 43.[2] The Congregation's counsel had argued that the BSA Resolution and Record were replete with the necessary substantial evidence to support the "magic words" (to use the Congregation's terminology) required for the Z.R. §72-21 findings. Hearing Tr. at 36. The Court did not allow the filing of a sur-reply.

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Notwithstanding, in many respects the Congregation's and BSA's answers to the Landmark West amended petition are little more than a sur-reply to Petitioners' last pleading in Kettaneh; the Congregation has sought to include exactly the material which at the hearing the Court had not allowed the Congregation to supply. The Respondents added further arguments and new case citations as to issues previously briefed in the instant proceeding.[3]

Because the two proceeding are so similar, due process requires that Petitioners herein be afforded an opportunity to respond to the new material submitted to the Court by Respondents in the parallel action.

This further reply will be confined to addressing the new legal argument and assertions made by the Congregation and City in their New Answering Memoranda.

---

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## I. Zoning Resolution Provisions

For the convenience of the Court, following is a list of certain relevant provisions from the Zoning Resolution, which are discussed herein.

| | |
|---|---|
| Z.R. §72-21 | Variances |
| Z.R. §72-21(a) | Unique Physical Conditions |
| Z.R. §72-21(b) | Reasonable Return |
| Z.R. §72-21(c) | Essential Character of Neighborhood |
| Z.R. §72-21(d) | Not Self Created Hardship |
| Z.R. §72-21(e) | Minimum Variance |
| Z.R. §73-52 | Modifications for Zoning Lots Divided by District Boundaries (authority given to BSA to do so by Special Permits as to Use, but not as to Height and Setback) |
| Z.R. §73-711 | Building Separation ("Eighth Objection") |
| Z.R. §23-692 | "Sliver Law"<br>Height limitations for narrow buildings or enlargements |
| Z.R. §74-79, Z.R. §74-791, Z.R. §74-792 | Transfer of Development Rights from Landmark Sites |
| Z.R. §74-793 | Transfer instruments and notice of restrictions - Landmark Sites |
| Z.R. §74-711 | Landmark Preservation |
| Z.R. §74-712 | Developments in Historic Districts |
| Z.R. §74-721(d) | Height and setback and yard regulations - Landmark Sites |
| Z.R. §74-852 | Development of Lots Divided - Height and Setback Wide Streets ("Split Lots") |
| Z.R. §77-28; Z.R. §77-29 | Zoning Lots Divided by District Boundaries ("Split Lots") |

## II. The Record Shows Conclusively that an All Residential As-of-Right Building Would Earn a Reasonable Return - And That There is No Basis for the BSA's Implicit Finding that 10.93% Was The Minimum Reasonable Return for the Project

If the Congregation is able to earn a reasonable return from an as-of-right development, a variance cannot be granted for the construction of the condominium component of the proposed project (which accounts for 90% of the variance area at issue in the proceeding.) Z.R.§ 72-21(a). The Record is conclusive that the Congregation can earn such a reasonable return. *See* e.g. Petitioners' Reply Memorandum at 8-11. Where

it is conclusively shown that the BSA made incorrect findings, Respondents acknowledge that BSA findings should be vacated. Congregation's New Memorandum at 12.

That the Record is conclusive that a reasonable return may be earned by an as-of-right building on the development site can be seen from the following table, which summarizes the result of return on investment computations supplied by the Congregation and its experts or by the BSA:

| | |
|---|---|
| Return on Investment for the Shearith Israel Project As Approved by the BSA in August, 2008. See BSA Answer, ¶292. | 10.93% |
| Return on Investment for Shearith Israel Project Deemed by Freeman Frazier to be Acceptable - i.e., a reasonable return. R-140. | 6.55% |
| Return on Investment for the Shearith Israel Scheme C "Not Really" All Residential Project as Computed by Freeman Frazier, with site value prior to revision. December 21, 2007. R-1977, | 3.63% |
| Return on Investment for the Shearith Israel Scheme C "Not Really" All Residential Project Based on Freeman Frazier analysis with revised site value as supplied by the BSA in its Verified Answer at ¶292. | 7.70% |
| Return on Investment for Condominium Project Found by BSA and Freeman and Associates to be acceptable in William Israel, *infra.* | 4.35% |
| Note: The investment returns above do not include the return inherent in the $12,347,000 acquisition site "payment" to the Congregation. The above returns are computed on a "return on investment" basis, not on the much higher "return on equity" basis.[4] | |

A. The Congregation Mischaracterizes Both Resolution ¶138 and R-001977

[4] The Congregation's initial Economic Analysis Report at R-00133, states that that the target assessed value of the development site land is $2,002,500, as contrasted with the revised site value of $12,347,000.

In its New Memorandum, the Congregation once again has again attempted to mislead as to the reasonable return analysis under §72-21(b). The Congregation at footnote 3 on page 27 asserts falsely:

> "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.) (Emphasis added)"

B. BSA Resolution ¶138 Refers to A Single As-of-Right Analysis - Scheme A, Ignoring Scheme C

The first assertion by the Congregation is completely false, has no factual basis in the Record, is not supported by the cited R-1997, and completely misrepresents the cited ¶138 of the BSA Resolution. The Resolution at ¶138 is not all encompassing as claimed by the Congregation:

> WHEREAS, the applicant also submitted **a** revised analysis of **the** as-of-right **building** using the revised estimated value of the property; this analysis showed that **the** revised as-of-right **alternative** would result in substantial loss; (Emphasis added)

Not only did the BSA not make a factual finding in this paragraph other than to state what the Congregation claimed in its submission, but also the BSA clearly referenced only a single as-of-right alternative analysis, presumably the Congregation's Scheme A "two-floor condominium" analysis.

C. The Citation to R-001977 Refers to Scheme C As of December, 2007, Prior to the Site Value Revision: Said Scheme Was Profitable

As described in great detail in the Petition, however, the BSA had also required the Congregation to provide an analysis of another "all-residential" as-of-right scheme, "Scheme C", and the Congregation's Record citation to R-001977 is to the December 21, 2007 Freeman Frazier Feasibility Study respecting Scheme C, but a study prepared prior to the preparation of the revised site value mentioned in the Resolution ¶138. Here, in R-001977, Freeman Frazier concludes that Scheme C would earn a profit of $2,894,000 (R-

001980)(directly contradicting the Congregation's mischaracterization) and a Return on Investment of 3.63% (R-001977):

> As shown in Schedule A, the development of the All Residential Development would provide an Annualized Return on Total Investment of 3.63%. This is below the level necessary to justify an investment.

D. After the Site Value Was Revised, Its Rate of Return Was 7.7%, In Excess of a Reasonable Return

Yet the December 21, 2007 analysis acquisition site value was later revised, as the BSA has conclusively acknowledged. In fact, ¶138 of the Resolution just quoted above mentions the revision of the "estimated site value." According to the BSA's Answer at ¶292, if the revised value were used for the Scheme C analysis, then the Annualized Return on Total Investment would be 7.7%, rather than 3.63%. The BSA admission is conclusive. Thus, the Congregation misrepresents by citing to the R-1977, because the analysis there was completed prior to the revision downward of the acquisition costs later in the BSA proceeding.

In earlier expert opinions in the proceeding, the Congregation's feasibility expert/economist Jack Freeman of Freeman Frazier opined conclusively and without equivocation at R-140 that a reasonable return of 6.55% was an "acceptable return for this project.[5]" Thus, the Record is conclusive that the Congregation would earn a return in excess of that its own financial expert considered reasonable and acceptable for the project. Indeed, the 7.7% return is earned by the Congregation even ignoring just two of the glaring errors in the Scheme C computation - (i) not taking into account the profit in the $12,347,000 return that the Congregation as the owner would earn, and (ii) the fact that the "all-residential" scheme was indeed not an all residential scheme. Correcting

[5] The Congregation also falsely suggests that there were multiple economic "experts" - indeed, there was one, Jack Freeman, who frequently prepares feasibility analyses for BSA variance applications. R-002008.

these errors would significantly increase the Congregation's return beyond the 7.7% already admitted by the BSA.

E. The BSA In Another Case Accepted 4.35% As A Reasonable Return For A Condominium Project

Ironically, the reasonableness of a 7.7% return is illustrated by a case cited for the first time by the Congregation in its New Memorandum at 27, William Israel's Farm Co-op v. Board of Standards and Appeals, 22 Misc. 3d 1105(A), No. 110133/2004 (Sup. Ct. N.Y. Co. Nov. 15, 2004). In that case, the expert therein was also Jack Freeman of Freeman Frazier.[6] Based on the expert opinion of Mr. Freeman, the BSA in William Israel's found that a return of 4.35% was sufficient for the development (a condominium development). As stated by the Supreme Court in its decision:

> A supplemental analysis of the modified plan for which the BSA finally granted the variance indicated the rate of return on that plan would be 4.35%. (R. 725).

F. The 10.93% Return For The Project As Approved by the BSA Far Exceeds a Reasonable Return, And The Variances Approved Were Not the Minimum Variances Under §72-21(e)

That a return of 4.35% in William Israel's was found to be reasonable, is contrasted with the 10.93% return for the condominiums to the Congregation Shearith Israel as approved by the BSA, and is not significantly higher than even the uncorrected 3.63% return in Freeman Frazier's December 21, 2007 computation. The 10.9% numerical value of the return to Shearith Israel and approved by the BSA was not stated by the BSA in the text of its Resolution and is excessive when compared to the return in William Israel's, as well as to the return of 6.55% which Mr. Freeman found to be reasonable. See ¶ 292 of the BSA Answer to the Kettaneh Petition. Indeed, there is no

[6] Mr. Freeman's expert opinion is available in the Court files as well as on-line at Westlaw as an additional document associated with the decision. Economic Analysis Report, 25 Bond Street, Freeman/Frazier Associates, December 4, 2003, Re Tri-Beach Holdings, 2003 WL 25547597.

discussion of what is a reasonable return anywhere in the BSA Resolution or anywhere in the Record, except in that the opinion of the Congregation's expert, Mr. Freeman, 6.55% was a sufficient return.

What the BSA did not explain is why it allowed a return of 10.93% that so far exceeds the reasonable return deemed sufficient by the Congregation's expert and so far in excess of returns allowed in other BSA matters. This is proof that the BSA finding that the approved variances were the minimum variances was incorrect and conflicted with undisputed conclusive evidence. Clearly, the variance approved is not the minimum variance required under Z.R. §72-21(e).

G. The Record is Devoid of Any Rationale Justifying the BSA's Implicit Finding that 10.93% Was the Minimum Return Reasonable

It is also clear that the BSA failed to discuss at all one of the most relevant issues - the acceptable return - and indeed ignored the Congregation's expert opinion on the issue. Thus, there is nothing in the Record to substantiate the implicit BSA finding that 10.93% was a reasonable return.

H. The Congregation Then Completely Misrepresented Both ¶138 and R-001977

It is hardly surprising that a prime piece of real estate consisting of three brownstone lots on West 70th Street, of regular shape and excellent ground conditions, and 100 feet from Central Park West and a subway stop would earn a reasonable return - in fact, any contrary conclusion would call into question the objectivity and competence of the analysis. The BSA, in not requiring the Congregation to revise the Scheme C analysis during the proceedings, was intentionally blinding itself to the facts, and demonstrating that it was not engaged in a good faith deliberative process.

**III. There Is No Substantial Evidence of Any Obsolescence That Would Provide a Basis for A Variance**

The New Memoranda offer new assertions that obsolescence can be a physical condition that would support a finding under Z.R. §72-21(a), asserting a physical condition thereunder can be a physical condition of the property itself or building on the property. Congregation's New Memorandum at 3, 20, and 21.

Even if a physical condition is shown to exist, it must be both unique and arise out the strict application of the zoning regulation.

A. Merely Identifying An Alleged Obsolete Feature On A Site is Insufficient To Establish a Qualifying §72-21(a) Physical Condition

Respondents assume, incorrectly, that merely identifying an obsolete condition on the zoning site or development site satisfies the requirements of Z.R. §72-21(a). Such an assumption is not the result of rational, logical, and deductive thinking, and, thus, is an example of the type of irrationality, which is a ground for overturning an administrative agency determination.

If an asserted obsolescence hardship can be resolved by an as-of-right building, then it is irrelevant to a §72.21(a) finding. Further, BSA precedent (supported by logical thinking) is clear that if an obsolete building is to be demolished, then it cannot support the (a) finding.

In an obvious response to Petitioners' objection at the March 31, 2009, hearing to the vagueness of the Congregation's claims as to obsolescence and the lack of citation to the record, the Congregation's New Memorandum provide a table at page 18 purporting to identify those parts of the record which allegedly substantiate the five findings. *See* analysis below. After a careful review of the Congregation's citations to the Record in its new table, and in particular the testimony of Congregation officers and its architect, it is

apparent that the Congregation's claim as found in the Record is that the obsolete configurations within the Existing Community House create substantial access and circulation issues to and from the landmarked Sanctuary.

B. The Congregation's Assertions of Obsolescence Are Merely Another Expression of the Access and Circulation Hardships Caused by the Existing Community House

It is also apparent that the Congregation's claim of obsolescence is in fact just another way of expressing its asserted access and circulation hardship. Petitioners have conclusively demonstrated that the access and circulation hardships are fully resolved by an as-of-right building, and thus it cannot be said that this hardship (even if characterized as obsolescence) arises out of the strict application of the zoning law, and therefore any (a) finding, based even in part upon this hardship, fails the requirements of the statute.

As discussed in Petitioners' previous submissions (*see, e.g.,* Petitioners' Memorandum in Support, January 2, 2009, at 22), the Congregation's expert architect conclusively testified to the contrary - he testified that an as-of-right building fully resolves all access issues. The Congregation and BSA are unable to present any evidence that contradicts the Congregation's expert.

That the Congregation considers the access and circulation to be the heart of is obsolescence claim is clear from the Congregation's assertions in is New Memorandum at 20:

> Among other things, the BSA found that access routes through the buildings on the site are obsolete … (See BSA Res. ¶¶ 41, 46, 60, 61, 71, 72, 74, 88, 94, and 110.)

This assertion is not supported by the cited paragraphs in the resolution: ¶¶ 41 and 72, (which with ¶¶ 60, 61, 72, and 74 concern only the Community House variance) refer to "representations" by the Congregation for a need for a variance request due to

"physical obsolescence and poorly configured floor plates of the existing Community House which constrain circulation and interfere with its religious programming."

C. The Cited Obsolescence is Within the Existing Community House - And It Is To Be Demolished And Be Replaced by an As-of-Right Community Building That Fully Eliminates the Hardship

The Resolution at ¶41 refers to the existing" Community House.' There are no findings, and no references to multiple "**buildings"**. None of the other cited Resolution paragraphs make the statement that "access routes through the site are obsolete" as the Congregation falsely claims. The BSA statements refer only to access and circulation involving the to–be-demolished, Existing Community House building. Similarly, at p. 3 the Congregation falsely cites to the Record claiming that at R. 4542-46 states that there are "partially-obsolete structures" - yet the cited pages are once again the conclusory assertions of Attorney Friedman in his May 13, 2008 version of his Statement in Support, and provides no substantial evidence as to "partially obsolete structures."

But, it is of no matter, since the obsolescence claim is just another way of expressing the access and circulation hardship.

D. The BSA Has Held That A Building to Be Demolished Cannot Support The Unique Physical Condition Requirement of §72-21(a)

In other BSA cases, the BSA has rationally explained the relevance of the obsolescence of a building to a claimed hardship in order to support a variance. Where an obsolete building is to be demolished, it cannot support the (a) finding as to unique physical condition. This issue arose in 460 Union Street, BSA No. 75-02-BZ (N.Y.C. Bd. of Standards and Appeals, February 3, 2004).[7]

[7] BSA Resolutions are available at New York Law School's "New York City Law." http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library.

This New York Law School site describes the BSA as follows:

> WHEREAS, the Board notes that the proposed application contemplates the demolition of the existing building, thus obviating any claim of uniqueness on that basis;

This is of course the rational approach to the consideration of obsolescence in the (a) finding concerning physical condition - if the building is being demolished, then it is not a factor as explained in 460 Union Street. (*See also* discussion of Homes for the Homeless case at pages 42-43 of Petitioners' Memorandum in Support, January 2, 2009).

E. Although The BSA Has Held That An Obsolete Structure That Cannot be Demolished Will Support a §72-21(a) Condition, That Situation Does Not Exist In This Proceeding

Another circumstance where the BSA has considered obsolescence is if a building on part of a site is very expensive to demolish. The claim then is that it may in some way be obsolete and may justify a variance on another part of the site, or even a use variance for the existing building. Williams Israel, *supra,* cited by the Congregation, is not helpful to the Respondents on this point on the issue of whether excessive demolition costs could constitute a unique physical condition:

> Secondly, the BSA found that demolition of the garage could likewise not occur without great expense, due to structural features.

The construction estimates provided by the Congregation show conclusively that demolition of the existing community house would cost only $100,000, almost pocket change on a project of this size. Petitioners' Reply Memorandum at 29. Demolition of an obsolete building that is impractical or very expensive does not exist in this case. Only an excess of irrational fuzzy thinking can suggest that there is any obsolescence that can be the basis of a "unique physical condition" finding.

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> "The Board is a quasi-judicial body, which means that it 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 person who has not first sought a proper permit or approval from an enforcement agency."

Thus, the factor of obsolete access and circulation in the Existing Building is completely irrelevant to the Shearith Israel variance requests.

## IV. The Congregation's New Table of "Evidence" Fails To Identify Any Substantial Factual, Non-Conclusory Evidence

At page 18 of its New Memorandum, the Congregation supplied a table of references in the Record that it claimed supported the BSA findings. The Congregation had offered to supply such a table to the Court at the March 31, 2009 hearing. But the Court refused the Congregation's offer.

Close inspection shows that the Congregation once again erroneously confuses conclusory assertions by counsel with substantial evidence. The table also conflates the community house variances (10% of the variance area) with the condominium variances (90% of the variance area). Indeed, the chart conflates all 7 variances into one. It is absolutely clear that Z.R. §72-21 requires, for each variance, a separate finding for each of the five factors, and thus 35 ultimate findings are required to be made by the BSA. By dispensing with the rigor required by §72-21, the BSA and the Congregation are able to gloss over the discrepancies and inconsistencies in their analysis, and avoid providing specific substantiation for specific paragraphs of the Resolution.

### A. Congregation's New Citations Purporting to Support BSA Z.R. §72-21(a) Finding

The following table is based upon the Congregation's new table showing the substantial evidence the Congregation claims support the BSA "findings" under Z.R. §72-21(a) as found in ¶¶ 37-132 of the Resolution.

| **BSA Description of Documents** | **Entire Document** | **Citation by Congregation As Support for ¶¶ 37-132** | **Author or Witness** |
|---|---|---|---|
| Applicant Statement In Support (submitted with April 1, 2007 letter) | R-00019-48 | R-00039-43 | Attorney Friedman |
| Economic Analysis Report (submitted with April 1, 2007 letter) | R-00133-61 | R-000139 | Jack Freeman |
| Applicant Statement In Support, revised September 7, 2007 (submitted with September 10, 2007 letter) | R-00312-47 | R-000319, 37-42 | Attorney Friedman |
| Transcript of BSA Public Hearing held on November 27, 2007 | R-001726-1813 | R-001733-35 | Architect Dovell - re access |
| | | R-001739-1740 | Congregation - Kay - need for classrooms |
| | | R-001744-45 | Congregation-Nathan - access |
| | | R-0001751 | Attorney Friedman |
| Statement in Support (with exhibits), revised May 13, 2008 (submitted with May 13, 2008 letter) | R-004533-96 | R-004565-4576 | Attorney Friedman |
| Letter from Shelly S. Friedman (on behalf of Applicant) to BSA Chair Meenakshi Srinivasan, dated May 13, 2008, in response to comments | R-004859-62 | R-004859-4861 | Attorney Friedman |
| Statement in Support, revised July 8, 2008 (submitted with July 8, 2008 letter) | R-005114-69 | R-005147-5157 | Attorney Friedman |
| Closing Statement in Response to Opposition of Certain Variances, dated August 12, 2008 (submitted with August 12 letter) | R-005752-66 | R-005763 | Attorney Friedman |

Four of the citations are to various versions of Attorney Friedman's Statements in Support - of April 1, 2007 (R-39-48), September 7, 2007 (R-0319, R-3337-342), May 13, 2008 (R-04565-76), and July 8, 2008 (R-5147-5157), and supplemented by yet two other argumentative briefs from Attorney Friedman, a letter from Attorney Friedman on May 13, 2008 asking that the hearing be closed, and a closing statement from Attorney Friedman (R-005763) - *i.e.* brief in support.[8]

[8] The cited page, R-005763, is a manifestly incorrect legal argument asserting that the BSA can ask for no proof of programmatic need under §72-21(a), but must accept instead the arguments and posturing of counsel: "Requiring proof of programmatic need is not permitted." Even if this were true, there is nothing in Attorney Friedman's argument showing how this would pertain to the §72-21(a) finding for the condominium variances.

B. The Claimed Substantial Evidence Consists Almost Entirely of Conclusory Claims and Briefs of Counsel

In other words, in order to stretch for evidence to support the BSA findings, the Congregation in its New Memorandum relies primarily on four different versions of the Attorney Friedman Statement in Support, as buttressed by two other briefs by Attorney Friedman.[9]

The cited Dovell, Kay, and Nathan's testimony relates only to the need for classrooms and the need to resolve the accessibility issues caused by the existing community house. There are no statements as to any obsolete conditions in the Sanctuary, no claim that an as-of-right building would not resolve the access problems, and no reference by these fact and expert witnesses as to the other alleged conditions for the (a) finding (or indeed any other findings).

Finally, the Congregation cites to statements of its financial expert economist, Mr. Freeman, but not for issues within his competence, but for conclusory assertions outside of his competence as to the unique conditions - hardly substantial evidence.

**C.** The Respondents Fail to Provide Citations to Evidence To Support the BSA Findings

There is no citation to the facts that support the inherent assertion that the access hardship arises out of the strict application of the zoning regulations, (unlikely, since the issues are resolved by an as-of-right building). There is no citation to the page allegedly stating the rent being paid currently by the school or the rent being paid by the private

[9] In considering the submissions of Attorney Friedman, it is not possible to distinguish between his conclusory and argumentative assertions and statements of facts without the ever-present spin, distortions, and mischaracterizations. *See* "Summary of Flaws Preventing Reasoned Analysis of Applicant's Request for Variances," Dated June 10, 2008, Submitted by Opponent Kate Wood (R-004790-R-004800).

individual renting the Parsonage. [10] There is no citation to any part of a feasibility study where the actual rent being paid by the school is used in the feasibility analysis. There is no citation to the explanation as to why the caretakers' apartment must be on the fourth floor. There is no citation as to the BSA's balancing of the equities of the 18 West 70th Street owners having legal windows bricked up as compared to the equities to the members of the Congregation having reduced financial obligations. There is no citation to the BSA having computed the construction costs per square foot of the various condominium schemes. There is no citation to any explanation of how the construction costs were allocated. There is no citation to any discussion of how and why and on what basis the BSA determines what is reasonable return. There is no citation to any single fact showing how the plans were allegedly revised when submitted the second time to the DOB.

**V. Conclusory Assertions of the Congregation's Counsel Cannot Provide Substantial Evidence**

Assertions by the Congregation's counsel, whether made in this proceeding or made below in the BSA proceeding, cannot provide the substantial evidence required to support findings by the BSA. The analysis of the Congregation's New Memorandum table at page 18 shows that the Congregation relies almost entirely upon conclusory or argumentative assertions from their counsel. There is an absence of substantial evidence where an agency decision is based upon conclusory evidence and there was no factual basis. Meyer v. Bd. of Trs. of the N.Y. City Fire Dep't, 90 N.Y.2d 139, 147-148 (1997).

[10] Whenever the Congregation claims that the construction of the condominiums is needed to fund the community house component, then the Congregation has made a claim of financial hardship and also raised the question as to the revenue being generated by the School, the Toddler "Day School", the Banquet Hall, and, indeed, even the rental of the Parsonage as a private residence. See, for example, Congregation New Memorandum at 4, stating the need for the condominiums "to defray roughly six million of the much-larger project cost."

At the March 31, 2009 hearing, the Congregation argued that conclusory, unsupported assertions of Attorney Friedman, counsel for the Congregation, and submitted to the BSA could provide the substantial evidence to support the "magic words" used in the BSA findings, even where the assertions are contradicted by conclusive evidence and statements from the Congregation's consultants/experts.

The Congregation's New Memorandum provides numerous citations to precedent in its attempts to bolster this assertion. The Congregation asserts at pages 10-11 of its New Memorandum that "Thus, the BSA may properly rely upon the unsworn statements of counsel appearing before it to support its findings." For authority it cites to several cases which are wholly inapposite: Hirsch v. Corbiseiro, 155 A.D. 2d 325 (1st Dep't 1989); p. 11 *citing* Millennium Custom Homes, Inc. v. Young, 58 A.D.3d 740 (2d Dep't 2009); Hampton Management v. Division of Housing and Community Renewal, 255 A.D.2d 261, 261 (1st Dep't 1998); Hart v. Holtzman, 215 A.D.2d 175 (1st Dep't 1995); and RHS Realty Co. v. Conciliation and Appeals Bd. of City of New York, 101 A.D.2d 756(1st Dept' 1984). These cases provide no precedents for the proposition that Attorney Friedman's unsupported conclusory claims can provide the substantial evidence required to support the required findings. Both Hampton and Hart concerned an isolated factual assertion made in letter by counsel for the concerned governmental agencies. RHS Realty, Hirsch, and Millenium stand only for the proposition that in an administrative hearing an agency may accept unsworn testimony. These cases cited by the Congregation in no way support the proposition that the conclusory unsupported legal briefs and argument of counsel for the Congregation can constitute substantial evidence, or even can be all the evidence.

The issue, though, as to the submissions of Attorney Friedman is not just hearsay but that the statements are entirely conclusory and do not include or cite the underlying facts or cite to the source of the claims. An example is the factual context of the Eight Objection. Attorney Friedman may claim expansively that changes were made to the submissions to DOB - that is a conclusory statement. A factual statement would be to identify with some specificity the changes made. This was not provided. Further, when Attorney Friedman asserts that he is repeating a conclusion of another, it is not merely hearsay, but it is hearsay of a conclusory assertion by a third person.[11] Thus, if Attorney Friedman asserts that the someone else claimed there were changes made to the plans, then we have not only hearsay, but hearsay of conclusory claims.

**VI. The BSA Improperly Utilized Landmark Status as a Hardship to Support A Variance**

The BSA and Congregation in their New Memorandum have twisted themselves in knots as to fact that the BSA used landmark status as a hardship to justify a variance, as urged on by the Congregation. It is apparent that under the BSA and Congregation's interpretation of "hardship" under Z.R. § 72-21 (a), Z.R. §74-711 would have no meaning, since the BSA could provide all of the relief provided under §74-711, with none of the restrictions and protections provided therein.[12] Astonishingly, the BSA allowed "use" of the landmark status of the Sanctuary and Parsonage, and imposed no restrictions

[11] Here the Petitioners were prevented from questioning those to whom assertions are attributed, thus, increasing the lack of reliability of hearsay or repeated statements of other person, and the BSA refused even to ask specific questions proposed by opponents. Thus even many hearsay "exceptions" are inapplicable.

[12] See Statement of Attorney Friedman and LPC Hearing of February 23, 2003, p. 35, R-02712. "74-711 [original corrected] has been used by this Commission many times in the past, in some cases simply to remove air rights from over the landmark, so it can be no longer be developed."

at all on further development of the landmarked properties and without receiving any commitment to maintain the properties, as contemplated by §74-711.

A. When the Congregation Asserts that the Existence of The Synagogue on the Zoning Lot Is A Hardship, It Is Invoking the Landmark Status of the Synagogue

In its New Memorandum, as support for the BSA findings related to the hardships Z.R. § 72-21 on the site to justify the unique physical condition requirement, the Congregation points to the existence of the landmark Synagogue on the zoning site as a hardship. Yet, the Congregation (at page 22) seems to argue that landmarking was not utilized by the BSA:

> 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 Congregation in its table of supporting evidence for Z.R. §72-21(a) cites R-1751, from the statement of Attorney Friedman at the November 27, 2007 BSA hearing. Attorney Friedman is clear that the hardship is landmarking:

> 545 But this one is relatively simple. Because of the Landmarks status of this building,
> 546 we can't change this building. We don't want to change this building.
> 547 If it wasn't landmarked, the stewardship of this synagogue is such they wouldn't
> 548 change the building.
> 549 But, the fact of the matter is that for all of the floor area on this zoning lot, we are
> 550 sequestered from using all but a very small percentage of the footprint and even that has
> 551 to give rise to the fact that the community house has to cover the lower portions of that
> 552 footprint.
> 553 That boxes into, we believe, a justifiable recognized hardship and we need to
> 554 present that to you financially and we're prepared to do that today or hear your comments
> 555 on that and come back and prove it to you and convince you in further submissions.

The only plausible, common sense interpretation of this statement (as well as the entire Record) is that the Congregation is arguing that because the Sanctuary is landmarked, this landmarking is a hardship that supports a variance for both the community space and the condominiums, and, that it need not be subjected to the conditions that would be imposed had it obtained relief under Z.R. §74-711. [The Congregation never presented evidence

as to the financial hardship created by the landmarking, and, indeed never opened up its finances, never stated the actual rent it received from the Parsonage or the tenant school.]

The BSA in its resolution directly addresses the landmarked Synagogue at ¶¶107, 108, 112, 120 and 122, and indirectly in other paragraphs. The BSA so much as admits that it is using the landmark hardship under Z.R. §72-21 in ¶120 (quoted below).

Moreover, the BSA does not explain why it is that it feels it has jurisdiction to "transfer" available development right form a landmark building in a §72-21 variance proceeding, and, even to transfer development rights so as to have the effect of superseding height and setback requirements. Clearly, the BSA is just making up law as it goes along, providing to itself discretion that is clearly not allowed by other provisions of the zoning regulations.

It was shown conclusively in our prior submissions that the Congregation cooked the numbers upwards for site value of the two floor condominium "Scheme A" proposal by using unused development rights over the Parsonage to value land right in the separate development site.

Clearly, only landmarking issues prevent development of the Parsonage. Among other things, development of the Parsonage site would block light into the Sanctuary through the south side Tiffany windows and would require the removal of the intricate and architectural eaves in the Sanctuary which project over the Parsonage. See Petitioner's Reply Memorandum at 16 quoting the Congregation's architect that additional floors would block the historic lead windows. Respectfully, the statements of the Congregation's architects should take precedence over the conclusory, non-fact based assertions of the BSA and the Congregation's counsel.

Of course, the only conceivable "impact of the Synagogue" on the development lot arises out of its landmark status - otherwise it could be demolished or otherwise altered.

B. The City Planning Commission has the Primary Role in Modifying Zoning Regulations For Hardships Arising from Landmarking

The City and Congregation's New Memoranda address Z.R. §74-711, but are silent as to the regulatory structure that assigns a dominant role to the City Planning Commission in providing relief from landmarking hardships. In its resolution, the BSA in ¶120 states, without citing the other Zoning Resolution provisions:

> WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of available development rights from a landmark building within the lot on which it is located or to an adjacent lot,

It is true that the Zoning Resolution includes several provisions concerning the transfer of development rights from landmark buildings and other provisions providing for modifications due to hardships from landmarking. But, none of those provisions vest the authority to do so in the hands of the BSA - requiring instead the action of both the City Planning Commission and in some regulations, of the LPC as well. Below are some Zoning Resolution provisions explicitly assigning a role to the City Planning Commission for the modification of regulations for landmark hardships. None of these provide a role to the BSA.

| | |
|---|---|
| Z.R. §42-142 | Modification by authorization of the City Planning Commission of use regulations in M1-5A and M1-5B Districts |
| Z.R. §74-711 | Landmark preservation in all districts |
| Z.R. §74-712 | Developments in Historic Districts |
| Z.R. §74-721 | Height and setback and yard regulations |
| Z.R. §74-79 | Transfer of Development Rights from Landmark Sites |
| Z.R. §74-791 | Requirements for application |
| Z.R. §74-792 | Conditions and limitations |
| Z.R. §74-793 | Transfer instruments and notice of restrictions |
| Z.R. §81-254 | Special permit for height and setback modifications |
| Z.R. §81-266 | Special permit for height and setback modifications |

| | |
|---|---|
| Z.R. §81-277 | Special permit for height and setback modifications |
| Z.R. §81-63 | Transfer of Development Rights from Landmark Sites |
| Z.R. §81-631 | Requirements for application |
| Z.R. §81-633 | Transfer instruments and notice of restrictions |
| Z.R. §81-634 | Transfer of development rights by certification |
| Z.R. §81-635 | Transfer of development rights by special permit |
| Z.R. §81-741 | General provisions |
| Z.R. §99-08 | Authorization to Waive Midblock Transition Portion Heights Limitation |

The BSA's statement then is disingenuous. Not only does the BSA have no role whatsoever in transferring rights from a landmark building or site or providing landmarking hardships, but the City Council in adopting the Zoning Resolution repeatedly assigned jurisdiction for landmarking hardships to the City Planning Commission. The BSA "interpretation" of the statute is nothing more than a usurping of power; nor may the City Planning Commission cede its authority and attempt to duck uncomfortable actions.

Moreover, the BSA's just ignores completely the spirit and underlying policy of requirements such as Z.R. §74-792 which require restrictions on the landmarked property from which the rights are transferred:

> (d) In any and all districts, the transfer once completed shall irrevocably reduce the amount of floor area that can be developed upon the lot occupied by a landmark by the amount of floor area transferred. In the event that the landmark's designation is removed or if the landmark building is destroyed, or if for any reason the landmark building is enlarged or the landmark lot is redeveloped, the lot occupied by a landmark can only be developed up to the amount of permitted floor area as reduced by the transfer.

The BSA completely ignored the principles behind these requirements - thus, it permits development rights over the Parsonage to be used to establish the (b) finding, but imposed no restrictions of record on the Parsonage to prevent use of those same development right - true double-dipping. Not only has the BSA has clearly usurped a role that is not its own, it then poorly performed that role.

The Congregation now claims that it had exhausted its remedies under Z.R. §74-711 citing to the R-5129-30 (pages 15 and 16 from the Statement submitted by the Congregation's counsel on July 8, 2008). These two pages are perfect examples of the type of unsourced conclusory assertions of the counsel for the Congregation who claims without any corroboration at all: "In returning to the LPC with the smaller New Building, CSI indicated its willingness to seek the variance requested in this Application." This is pure argument and conjecture to suggest that the LPC was authorizing or directing the BSA to grant a variance bases upon the landmarked status.

The basic problem confronted by the Congregation is that the LPC did not consider there to be any hardship. Indeed, at the cited page R-005129 Counsel quotes LPC Commissioner Gratz, a former member of the Congregation, who had presided over the restoration of another NYC historic synagogue. Commissioner Gratz, incidentally, voted “No” (R-002492) for the final LPC Certificate of Appropriateness, noting among other things in her statement that the Congregation's new building would add to the "already generous space the synagogue enjoys." R-002489-90. (Translation -"no hardship.")

The Respondents, though, misconstrue the objection of the Petitioners as to the relevance of the landmarking and Z.R. §74-711 of the Zoning Resolution.[13] It is not disputed by the Congregation that the Congregation withdrew its application to the Landmark Preservation Commission for hardship relief under Z.R. §74-711 and did not exhaust all of its administrative remedies. Had the Congregation not withdrawn its Z.R. §74-711 application to the LPC, and the LPC and/or City Planning had denied the application, what reason is there for believing that the Congregation would then have

[13] Petitioner's Verified Reply mistakenly cited to §74-41 rather than §74-711 at pages 5 and 6 and similarly in its Reply Memorandum of Law at page 3.

been able to nonetheless seek the same relief from the BSA based on the same landmarking, alleging that the landmarking is a physical condition under Z.R. §72-21(a)?

The Petitioners' objection to the BSA action does not just rely on this failure to exhaust administrative remedies - the impropriety of the BSA action was to consider landmarking as a physical condition and hardship under Z.R. §72-21 to justify the granting of a variance. There is nothing in the statute to provide authority to the BSA to consider landmarking in determining hardships and physical condition - and, since this a purely a statutory issue, the Court should give no deference whatsoever to the BSA's view.

Thus, the last section of the City's brief is an attempt to divert attention - by claiming that the issue is exhaustion of remedies, and ignoring the issue of the improper use of landmarking as a hardship under Z.R. §72-21; the Corporation Counsel apparently wished to avoid confronting an uncomfortable admission by the City Planning Commission and the Landmark Preservation Commission, concurring that the BSA could use landmarking as a hardship under Z.R. §72-211: to do so would not only be inconsistent with the regulatory regime established by the Zoning Resolution, but would establish precedent which would no doubt later haunt the City Planning Commission.

So, the City's position is to adopt the fiction that the BSA did not utilize landmarking as a hardship and assert that the issue presented by the opposition was a mere technical issue of exhaustion of remedies. City New Memorandum at 54-55. The City's position also further distorts the issue by citing a number of cases that have nothing at all to do with the paramount issue of whether the BSA is authorized to consider the impact of landmarking as a hardship and or physical condition required to s support granting a variance. Any such holding is difficult to discern in E. 91St Neighbors

to Pres. Landmarks, Inc. v. N.Y. City Bd. of Stds. and Appeals, 294 A.D.2d 126 (1st Dep't. 2002) cited by the City - indeed, the decision has no discussion at all of landmarks, except for the name of one of the parties. Similarly, the other cases cited by the City for this proposition do not even mention the Board of Standards and Appeals and its jurisdiction under Z.R. §72-21: 67 Vestry Tenants Ass's v. Raab, 172 Misc. 2d 214 (Sup. Ct. N.Y. Co. 1997); Mattone v. N.Y. City Landmarks Pres. Comm'n, 5 Misc. 3d 1013A (Sup. Ct., N.Y. Co., 2004); Stahl York Ave. Co. LLC v. City of New York, 240 N.Y.L.J. 63 2008, No. 107666/2007 (Sup. Ct. N.Y. Co. 2008). These cases have no bearing on the issue of whether the BSA can circumvent protections of the landmark law by issuing variances based upon alleged landmark hardships. And, notwithstanding the City's citations, Z.R. §74-711 clearly involves City Planning and LPC, but does not involve BSA, which is evident from the words of that provision.

The Congregation's position is to claim that landmarking was not used as a factor (p. 22), but then to claim that even so, that Z.R. §74-711 is not an exclusive remedy. Congregation New Memorandum at 28. It is not so much that Z.R. §74-711 is an exclusive remedy, but that nothing authorizes the BSA to engage in hardship relief with none of the very specific protections required under Z.R. §74-711 - and without the participation of LPC and City Planning.

**VII. The Sliver Law and Split Lots Are Always Hardships to Any Affected Property and Can Form No Basis For a Hardship Claim Under §72-21(a)**

The BSA has trod on very thin ice in seeming to accept the argument that the application of the "sliver law" (Z.R. §23-692) is a hardship, or that split lots are physical hardships.

In all situations, the restrictions of the sliver law will be viewed by an owner as an undue burden. This is not at all unique. For example, the BSA seems to accept the fact

that development of the Parsonage is limited by the sliver law, and thus is a unique physical condition creating a hardship that justifies a variance.[14] But as every brownstone lot in the city will be subject to the sliver law in limiting the height of tall buildings on the narrow lots, this is basically a claim that any zoning regulation an owner does not like is a unique physical condition and a hardship so that the owner should receive a variance, the result being able to disregard any zoning regulation. It seems under the BSA's logic that any zoning regulation can be construed to be a unique physical condition. Thus, the BSA has rendered Z.R. §72-21(a) meaningless.

Similarly, split/divided lots are not a rarity. The Zoning Resolution has specific provisions for addressing the hardships of split lots and determining whether the less burdensome zoning in split lot can be applied to the entire lot and describes the circumstance where an owner should receive relief from the divided lot. Z.R. §77-00 to §77-40. So, what is exactly "unique" about the circumstances in which the Congregation found itself?

Z.R. §73--52, Modifications for Zoning Lots Divided by District Boundaries, authorizes the BSA to provide relief from a split lot as to height and setbacks, but only pursuant to an entirely different procedure, the "special permit" proceeding, not the variance proceeding. The Zoning Resolution, by requiring a special permit, implicitly is considering variance proceedings not to be available as the avenue of relief for split lots. But under the BSA's expansive approach, Z.R. §73-52 is irrelevant, since BSA has arrogated to itself the right to consider split lots as physical conditions, and provide variances, disregarding the specific limitations of Z.R. §73-52.

[14] The BSA accepted the conclusory claims of Attorney Friedman, ignoring the factual testimony of the Congregation's Architect who pointed to the fact that a development on the Parsonage site would block up the leaded stained glass windows - designed by Louis Tiffany - on the south wall of the Sanctuary.

The Congregation does not satisfy Z.R. §73-52. Thus, the Congregation is in the position of every other owner of land that does not meet the requirements to apply the less burdensome zoning will claim a hardship. What the BSA has done here is by fiat to say is that any owner of a split lot which does not satisfy Z.R. §73-52, nonetheless has met requirement of a physical condition hardship in a Z.R. §72-21 proceeding, and the BSA will grant an easy variance without making the owner go through the process of a special permit.

There is nothing "unique" about the Congregation claiming to suffer a hardship because of the impact of the split lot or the sliver law. In any event, the actual reason the Congregation cannot build a tall residential building on the development site is the overriding provisions of requiring a building separation - i.e., the Eighth Objection.

Indeed, had the Congregation decided to not have the Eighth Objection removed, using the false reasoning applied by the BSA, the building separation requirement of Z.R. §73-711 of the Zoning Resolution could also be characterized, improperly, as a "unique physical condition." Using this aberrant reasoning, there is virtually no restriction in the zoning regulation that could not be construed as being a "unique physical condition" and thus, the BSA approach assures the wholesale granting of variances by the BSA, subject only to the unrestrained discretion of the BSA, making it vulnerable to those with political influence seeking preferences for favored applicants and uses.

**VIII. There is No Evidence that the Congregation Modified its Plans In Any Way Pertaining to the DOB Eighth Objection Concerning Building Separation.**

The BSA has asserted that a formal Notice of Objection from the DOB is not required in order for the BSA to acquire jurisdiction as to granting a variance for a violation of the Zoning Resolution. BSA New Memorandum, n. 7 at 16. If that is so, then the BSA had complete jurisdiction to consider the applicability of Z.R. §23-711 to

the Congregation's proposed project. Certainly, the BSA was aware that the project required an additional variance as to §23-711 - yet, it approved the Congregation's project, intentionally blinding itself as to the impact of Z.R. §23-711.

No matter how many conclusory assertions are made by the Congregation and the BSA, the fact is that no revisions of the plans relating to the building separation were made between the initial March, 2007 plans and the plans submitted to the DOB in August, 2007. The DOB's initial letter of objection contained the so-called Eighth Objection, which would have required a variance in that the zoning resolution was clear that a 40-foot separation zone was required between the Synagogue and the Proposed Building on the upper floors. Z.R. §23-711. Thus, even apart from the sliver law requirement that would have prevented a tall residential building on the development site, the overriding restriction upon the development site was the building separation requirement. Z.R. §23-711 was discussed in memoranda by BSA staff, and there seemed to be no question as to the need for a variance as to this objection.

Petitioners assert that there were no changes made in the plans when refiled in August 2007 that in any way concerned the Eighth Objection and submitted an exhibit to this Court showing no changes. At the March 31, 2009, hearing, Petitioners made the assertion that changes had not been made and challenged the Respondents to show exactly where there were changes - on the large poster sized exhibit. Instead, the City and Congregation are back, with the City reasserting the following in footnote 8 on page 16: "Indeed, as reflected by the Record, after submitting its variance application, to the BSA in April 2007, the Congregation submitted revised plans to DOB. " Yet, the City and the Congregation are still unable to show where in the record there is any evidence to

show that the plans were revised in any way relating to the Eighth Objection. The fact that the Congregation could have revised the plans is not relevant - they did not.[15]

The BSA Commissioners assert they are experts on the Zoning Resolution and for months after the initial filing accepted the validity of the need for a building separation. The Congregation with its zoning expert consultants agreed as to the application of §73-711. In its initial Statement in Support of March 30, 2007, at R-00043 (and cited by the Congregation in the New Memorandum at 18), the Congregation itself fully accepted the applicability of Z.R. §23-711:

> Building Separation. (Objection 8) ZRCNY Sec. 23-711 imposes a 40 ft separation between the facing walls of the Synagogue and New Building. Inasmuch as the Synagogue and the New Building are connected for the full height of the Synagogue, there is no separation between the two buildings, thus generating the objection. Given the remaining depth of the zoning lot beyond the Synagogue's footprint is only 64 ft, providing a complying 40 ft setback for the height of the Synagogue's sloped roof would leave a developable footprint of 24 ft, which is wholly impractical.

Yet, even as experts on zoning, the BSA is unable to explain how the Zoning Resolution law suddenly changed in August, 2007 so as to no longer require a building separation that everyone previously had acknowledged was required by Z.R. §73-52. So, one is left with the uncomfortable conclusion that the BSA is more than willing to approve projects when it is fully aware that the project is not in compliance with the Zoning Resolution. It would seem that the BSA did not want to acknowledge the need for this waiver - for then the whole hand-waving bogus argument that a split lot is a physical condition justifying a variance could not be used to support a flimsy claim that a physical condition existed.

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[15] The City in its New Memorandum at footnote 8, page 16, asserts again that the Congregation submitted "revised" plans "as reflected in the Record", but, like the Congregation, the City remains unable, even after the pointed comments by Petitioners' counsel at the March 31, 2009, hearing, to identify the basis for this assertion in the "Record" that any changes that in any way impacted on §23-711.

## IX. The Development Site is a Regularly Shaped Rectangle, Suffering From No Unique Physical Condition

Another example of the attempt by Counsel to convert assertions into fact is the attempt to deny the simple fact that the development site is a perfect rectangle, 64 feet by 100 feet, and highly developable - and the fact that the development site suffers from no unique physical conditions. Basically, the City and the Congregation just misrepresent the Record. The Congregation completely invented a fact that appears nowhere in the record:

> 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.)

Congregation's New Memorandum, Page 21. Once again, the Congregation can only cite to another version of the conclusory Statement in Support submitted by Attorney Friedman, a statement replete with overstatements, mischaracterizations, false statements, and unsupported assertions. There is not one reference at all in the cited pages to an "L-shaped" lot, and, indeed, the Congregation itself conclusively admitted in its Verified Answer that the development lot was a regularly shaped lot. Congregation Verified Answer at ¶31. So, here we have an instance of the Congregation citing to the "Record", which consists of Attorney Friedman's argumentative brief - and, then upon inspection of the cited 11 pages, there is not even a reference to "L-shaped" lot.

Similarly, the Congregation in its New Memorandum at Page 20 attempts to bootstrap itself again and falsely claims that the BSA found that the site is "small" and "irregularly shaped":

> Among other things, the BSA found … 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.)

This is a complete invention by the Congregation!! Not one of the cited Paragraphs states at all that the site is "irregular" and nothing states that the development site itself is

"small", only that the development site represents a "small part" of the larger Congregation site.[16] Clearly, the Congregation was responding to the Petitioners' showing that precedents as to finding (a) invariably show the existence of a "physical condition" such as the "swampy nature of the property in Douglaston Civic Assoc. v. Galvin, 36 N.Y.2d 1 (1974) and Douglaston Civic Association v. Klein, 51 N.Y.2d 963 (1980). Petitioners' Reply Memorandum at 25. The Congregation's response here is just to claim the Record says that which it does not say.

The Congregation would take the position that "exaggerations" like this provided by their Counsel before the BSA and in the Article 78 proceeding should be considered substantial evidence. But, of course, these exaggerations are mere assertions of counsel and are not to be considered substantial evidence, whether submitted to the BSA or the Court herein. In any event, the physical dimensions of the site in no way can be described as a "unique physical condition."

**X. The Congregation's Claim that 72-21(b) Is Not Applicable When a Non-Profit is Engaged in a For-Profit Condominium Development Is Violative of Zoning Law Policy**

New York City's Zoning Resolution Z.R. §72-21 is based upon New York case law relating to due process and the taking of property as a result of government land use regulation. New York City has legislated its own stricter standards - it requires that a hardship showing for both use and bulk (height and setback) variances have "unique physical conditions", where there is no such requirement in other New York jurisdictions. The specific language of Z.R. §72-21(b) requiring a reasonable return is not found in

[16] The development site at 64' x 100' is 6400 square feet. Lots 36 and 37 combined are 17,286 square feet. *See,* R-004673, Proposed Site Plan Drawings, Zoning Calculations for Single Zoning Lot, Item 2, Lot Area Thus, the development site is 27% of the entire Zoning Lot, hardly a "small part." The BSA could not make a finding that the lot was too small to develop, but so as to throw sand at a court, rather used this characterization that could, and was, so easily mischaracterized.

other New York statutory provisions, but the requirement that a "dollars and cents" analysis of reasonable return is embedded in a multitude of New York State cases. The dollars and cents requirement is not applied to variances, which have a purpose of allowing non-profit religious organizations to meet their programmatic needs; yet the organization must still show a hardship resulting from the zoning regulation. Some New York State cases impose a higher burden on programmatic uses that are earning income for the organization, though not altogether denying variances where income is being produced.

The argument by the Congregation that Z.R. §72-21(b) allows all non-profits to escape the burden of showing a hardship when the non-profit elects to pursue a pure income generating development is at odds with general New York State variance law. E.g., New York State Town Law Section 26. See P-00176.

Were the court to accept the arguments of the Congregation that Z.R. §72-21(b) is to be strictly construed, the impact would be the near death of zoning regulation in New York City. Any developer could create a non-profit to engage in development or arrange for a non-profit to front for the developer, and then claim exemption from this most important part of the zoning regime. After all, there is no requirement in Z.R. §72-21(b) that the non-profit be a charitable, educational, or religious organization. The non-profit does not even have to be tax exempt. Already, a great proportion of the real estate in Manhattan in owned by non-profits - some using the real estate for a charitable mission and some using the real estate as a pure investment. Many developers in New York City have indeed taken on non-profits as fronts for development and many non-profits are not distinguishable from for-profit organizations.

To provide such an advantage to non-profits would be a violation of the due process rights of all other property owners. For example, Petitioner Kettaneh would very much like to add floors to his brownstone across the street or at the least to add an extension in the back yard for an elevator which would add value to the top floors of his building. In the end, it is the members of the Respondent Congregation who receive the financial benefit from the condominium variances, in the form of reduced membership dues and support for building construction.

**XI. Interpretations of the Meaning of a Statute Are Not Wholly Within the Purview of the BSA**

The Congregation cites to a new case at page 15 of its New Memorandum for the proposition that the courts are bound to defer to the interpretation of the BSA as to statutory matters (see page 15). Yet, the statutory interpretations of the BSA, where irrational and unreasonable, and inconsistent with the statute, are not to be accorded deference as the Congregation, acknowledges. *See,* Soho Community Council, *infra*. Moreover, New York law is clear that deference to an agency "is not required where the question is one of pure legal interpretation." Teachers Insurance and Annuity Assoc. v. City of New York, 82 N.Y. 2d 35, 48 (1993) (finding that the Court need not give deference to the New York City Landmarks Preservation Commission in interpreting the terms "customarily open or accessible to the public" which the Court of Appeals found to be "pure legal interpretation.') *See also* J & M Harriman Holding Corp. v. Zoning Board of Appeals, __ A.D.3d __, 2009 NY Slip Op. 3731, 2009 WL 1238520 (2nd Dep't, May 5, 2009)[17]

[17] Nor is the BSA infallible. when interpreting the Zoning Resolution. The BSA is even willing to assert patently incorrect statutory interpretations before the Supreme Court and Appellate Division, until confronted by the Court of Appeals. In a recent case, only when forced to justify its improper statutory interpretation to the Court of Appeals, did the BSA finally acknowledge to the Court of Appeals that it had

**XII. Legal Issues Presented**

In addition to ascertaining whether the BSA Resolution is supported by substantial evidence, is rational, and is neither arbitrary nor capricious, certain legal questions are raised as to the legality of the BSA actions that show the BSA is in violation of law.

The refusal of the BSA to ask the Congregation to identify exactly how an as-of-right building would not resolve the access issues demonstrates convincingly the intentional blindness by the BSA and that the BSA was not "genuinely engaged in reasoned decision making." Gulf States Utilities Co. v. Federal Power Commission, 518 F.2d 450, 458-59 (D.C. Cir. 1975) cited by the Congregation's New Memorandum at 12. Presumably, the Congregation cites to a federal law case, because federal administrative law parallels New York State law in the use of the concepts of arbitrary and capricious and substantial evidence in the review of agency decisions.

Respondents assume that if there is substantial evidence to support the BSA decision, then that is the end of the review exercise, but, that it not an accurate statement. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290 (1974) ("though an agency's finding may be supported by substantial evidence [citation omitted], it may nonetheless reflect arbitrary and capricious action.")

The U.S. Supreme Court has provided this explanation as to some of the elements of arbitrary and capricious action by an agency in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983):

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of

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-through three levels of proceedings -improperly construed a statute, and the BSA conceded that its determination must be vacated. Matter of GRA V, LLC v. Srinivasan, __ N.Y.3d __ (New York Court of Appeals, June 4, 2009).

> the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

In SoHo Community Council v. New York State Liquor Authority, 173 Misc. 2d 632, 639 (Sup. Ct. N.Y. Co. 1997), the court described the ways in which the agency had acted in an arbitrary and capricious manner, citing with approval the seminal United States Supreme Court case, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) and made clear that the role of the New York State Court: "In an article 78 proceeding, the reviewing court does not act as a rubber stamp, but, rather, exercises a genuine judicial function and does not confirm a determination simply because it was rendered by an administrative agency." *Id.* at 635. *See also*, Fields v. New York City Campaign Finance Board, 2009 N.Y. Misc. LEXIS 79, Index. No.104389/2008 (Sup. Ct. N.Y. Co. January 13, 2009) (finding agency action to be arbitrary and capricious and an abuse of discretion.)

New York State law applies the same standards of Motor Vehicle Mfrs. and other federal cases. The BSA manifestly did not attempt to consider all the facts, and, indeed, deliberately foreclosed consideration of relevant facts and issues. Brady v. City of New York, 22 N.Y.2d 601, 606 (1968) ("It is precisely because of the severe limitations on the availability of judicial review of determinations made by bodies such as the pension board that such bodies must make a careful and painstaking assessment of all the available evidence."). Rosenkrantz v. Dept. of Corrections, 131 A.D.2d 389 (1st Dep't 1987).

For example, the BSA failed to set forth is reasoning for departing from using as a basis for determining the financial return it found to be reasonable in William Israel's.

*See* Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973).

The BSA cannot depart from its formal written guidelines without formally changing the guidelines -" it must either follow[s] or consciously change its rules." Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 41 (1st Cir. 1989) (Breyer, J.). The BSA distinction that its Guidelines were not a rule or regulation because not formally adopted was rejected in Allied Manor Road LLC v. Grub, 2005 N.Y. Misc. LEXIS 3440; 233 N.Y.L.J. 75 (Civil Ct., Richmond Co. 2005).

In denying that it should have exercised its powers to conduct a quasi-judicial proceeding, the BSA is undermining its assertion that the standard of substantial evidence applies. "The hearing is nonadjudicatory, quasi-legislative in nature. It is not designed to produce a record that is to be the basis of agency action -- the basic requirement for substantial-evidence review." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). United States v. Mead Corporation, 533 U.S. 218, 229 (2001). Indeed, the Congregation (at its New Memorandum, p. 9-10) cited language from Matter of Halperin v. City of New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005); Halperin supports the concept that the existence of substantial evidence alone is insufficient to support a BSA hearing, if conducted in a non quasi-judicial manner. Deference by a court to an agency factual determination as to substantial evidence is greater where there a quasi-judicial proceeding is in actuality conducted. By definition, the absence of substantial evidence to support findings is arbitrary and capricious and an abuse of discretion. So, the fact that there is substantial evidence that is all hearsay is of no help to the Respondents. (Congregation New Memorandum at 10).

Legal issues presented to the Court herein, based upon these principles, include:

- May the BSA consider landmarking as a unique physical condition hardship to support a variance under Z.R. §72-21(a) with no support in the language of the Zoning Resolution?
- May the BSA allow landmarking to support variances under Z.R. §72-21 that waive the height and setback restrictions?
- May the BSA allow landmarking to support variances under Z.R. §72-21 without imposing restrictions upon the landmarked properties as required by other more specific zoning resolution provisions, such as §74-711?
- In a mixed use programmatic-condominium/income generating development by a religious non-profit organization, may the development satisfy §72-21(b) as to the income generating condominium portion, if the record shows that the an all-residential development would generate a reasonable return?
- Is the religious organization entitled to both satisfy its programmatic needs and earn a profit on another slice of the property?
- May the BSA find that it has approved the minimum variance under §72-21( e), when the record shows that the financial return is far in excess of the financial return which the applicant has agreed is a sufficient rate of return, and where the BSA engaged in no discussion of its standards of what is a reasonable return, much less a rational discussion?
- Can the BSA consider as hardships under the §72-21(a) finding a hardship that is fully resolved by a building that conforms with the zoning resolution?

- May the BSA consider the obsolescence of a building to be demolished in a proposed development as a unique physical condition hardship under 72-711(a)?
- May the BSA in considering variances, ignore the more restrictive New York City Law, and rely upon New York Stated case law interpreting statutes that do not have the same requirements of the need to establish a unique physical condition under §72-21(a)?
- May the BSA consider a divided/split lot as a unique physical condition hardship under §72-21(a) when the zoning resolution at §73-52, §77-28, and §77-29 strictly defines the circumstances under which zoning relief may be provided as to height and setbacks?
- In the analysis of reasonable return, can BSA ignore clear case law and its own written guidelines that require that the original acquisition cost of the property be considered?
- Can the BSA grant a variance when the Record is conclusive that there are other material violations of the Zoning Resolution as to which the BSA was aware and chose to ignore without any deliberative explanation?
- Should a court accord deference to an administrative determinations where the Record conclusively shows deliberate blindness by the administrative body to salient facts and issues, demonstrating that it was not "genuinely engaged in reasoned decision making". *See* Gulf States Utilities Co., *supra?*
- Should a court accord the same deference to administrative determinations conducted as a result of quasi-judicial proceedings presided over by

independent hearing examiners and conducted in accordance with generally accepted administrative hearing procedures, as to determinations from an agency such as the BSA. which at least in this case did not?

- Where the BSA makes an ultimate findings based upon non-specified "other factors" or other non-specific "facts", should the finding be rejected and the matter remanded to the BSA to define the other factors?
- Where the BSA makes an ultimate finding upon multiple factors and one or more of the factors is found to have been considered improperly or to lack substantial evidence, should not the matter be remanded to the BSA to reconsider whether it would make the ultimate findings on proper factors?

Dated: June __, 2009
New York, New York

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Ket. Ex. H

Kettaneh Exhibit I

Kettaneh Exhibit J

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

----------x

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

Plaintiffs, Index No. 650354/08

- against -

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

Defendants.

----------x

**CITY RESPONDENTS' MEMORANDUM OF LAW**

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PAULA VAN METER,
CHRISTINA L. HOGGAN
of counsel.

Indeed, the BSA made specific findings with regard to each of the Zoning Resolution §72-21 criteria.

**POINT II**

**THE CONGREGATION WAS NOT REQUIRED TO APPLY TO THE LANDMARKS PRESERVATION COMMISSION FOR A Z.R. §74-711 SPECIAL PERMIT PRIOR TO APPLYING TO THE BSA FOR A VARIANCE.**

Petitioners argue that the BSA improperly considered the Congregation's variance application because CSI did not exhaust its administrative remedies prior to applying to BSA for a variance. Specifically, Petitioners argue that the Congregation was required to apply to the Landmarks Preservation Commission for a Zoning Resolution §74-711 special permit before it could apply to the BSA for a variance. Petitioners are incorrect.

First, Petitioners misapply the law surrounding exhaustion of administrative remedies. Under the theory of exhaustion, a party is required to exhaust their available administrative remedies before seeking relief from the Courts. See Young Men's Christian Assn, supra at 375 (citations omitted) (holding "[t]he doctrine of exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals, rather than to the courts, and . . . to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts"; Abreu v. New York City Police Dep't, 182 A.D.2d 414 (1st Dep't 1992) (finding "[i]t is well settled that a person aggrieved by an administrative determination must exhaust all available administrative remedies before maintaining a judicial challenge")(citations omitted). Since BSA is not a Court, but rather an administrative agency itself, the law is inapplicable. Second, there is no legal requirement that a party seek a Zoning Resolution §74-711 special permit before seeking a variance from BSA. Rather, a BSA variance

and Landmarks Preservation Commission special permit are two separate forms of administrative remedies available to parties. A party may, at its choice, seek a Zoning Resolution §74-711 special permit from Landmarks Preservation Commission, or seek a variance from BSA pursuant to Zoning Resolution §72-21(a). The only pre-requisite the Congregation had to satisfy in order to seek a variance was to apply for, and obtain a Certificate of Appropriateness from the Landmarks Preservation Commission. Here, the Congregation obtained the requisite Certificate of Appropriateness [R. 350]. Thus, Petitioners' argument fails.

**CONCLUSION**

For all the above reasons, as well as those set forth in the verified answer, the determination of the BSA should be upheld and the Petition dismissed.

Dated: Brooklyn, New York
May 21, 2009

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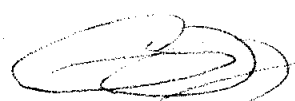
By: 

Christina L. Hoggan
Assistant Corporation Counsel

Kettaneh Exhibit J

**NYC Department of Buildings**

## Job Overview



**Premises: 6 WEST 70 STREET MANHATTAN** **BIN: 1028510 Block: 1122 Lot: 37**

**To start overview at new date, select Month: Day: Year:**

Show All BIS Job Types | Show All Filings | APPLY

| FILE DATE | JOB # | DOC # | JOB TYPE | JOB STATUS | STATUS DATE | LIC # | APPLICANT | IN AUDIT | ZONING APPROVAL |
|---|---|---|---|---|---|---|---|---|---|
| 08/23/2000 | 102749279 | 01 | A2 | R PERMIT-ENTIRE | 09/12/2000 | 0432271 PE | Aconsky | | NOT APPLICABLE |
| | Voluntary Interior Fire Alarm And Smoke Detection For Area,<br>Work on Floor(s): CEL,001,002,003 | | | | | | | | |
| 08/03/2001 | 102960547 | 01 | A3 | R PERMIT-ENTIRE | 08/10/2001 | 0042545 PE | Blinn | | NOT APPLICABLE |
| | Erect 100' of 12' high Heavy Duty Sidewalk Shed 300 psf<br>Work on Floor(s): 1 | | | | | | | | |
| 08/22/2001 | 102988233 | 01 | A3 | R PERMIT-ENTIRE | 08/27/2001 | 0042545 PE | Blinn | | NOT APPLICABLE |
| | Erect scaffolding during facade restoration.<br>Work on Floor(s): 1, 4 | | | | | | | | |
| 09/16/2003 | 103564741 | 01 | A2 | J P/E DISAPPROVED | 09/19/2003 | 0432271 PE | ACONSKY | | NOT APPLICABLE |
| | installation of fog water fire protection system as per plans ( MEA 68-02<br>Work on Floor(s): BAS,ATT | | | | | | | | |
| 03/08/2005 | 104053088 | 01 | A3 | R PERMIT-ENTIRE | 03/09/2005 | OT | GALLICHI | | NOT APPLICABLE |
| | INSTALLATION OF SCAFFOLDING 35 LONG X 60 HIGH DURING FACADE REPAIR. NO CH<br>Work on Floor(s): 001 | | | | | | | | |
| 08/23/2005 | 104203265 | 01 | A1 | R PERMIT-ENTIRE | 08/24/2005 | 0010466 RA | CIARDULL | | NOT APPLICABLE |
| | PROPOSED MINOR INTERIOR DEMOLITON/PARTIAL INTERIOR WALL AND CEILING TILE<br>Work on Floor(s): BAS 001 thru 003 | | | | | | | | |
| 10/07/2005 | 104250481 | 01 | NB | J P/E DISAPPROVED | 11/10/2005 | 0014775 RA | WHITE | | NOT |



Ket. Ex. J

APPLICABLE

Work on Floor(s): SUC,CEL,BUL,ROF 001 thru 010

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 05/09/2006 | **104427666** | 01 | A2 | R PERMIT-ENTIRE | 02/16/2007 | 0010466 RA | CIARDULL | NOT APPLICABLE |

PROPOSED INSTALLATION OF ONE TEMPORARYCLASSROOM UNIT ( TRAILER ) IN AD
Work on Floor(s): 001,002

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 06/30/2006 | **104427666** | 02 | A2 | R PERMIT-ENTIRE | 12/26/2006 | 0010466 PE | CIARDULL | NOT APPLICABLE |

SUBSEQUENT FILING OF FENCE WORK TYPE &PLUMBING WORKT YPE TO INDICATE P
Work on Floor(s): 1, 2

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 02/05/2007 | **104427666** | 03 | A2 | P APPROVED | 02/14/2007 | 0010466 PE | CIARDULL | NOT APPLICABLE |

POST APPROVAL AMENDMENT FOR 02
Work on Floor(s): 1, 2

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INDEX NO. 650354/08 (LOBIS)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MANHATTAN

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

NOTICE OF MOTION FOR LEAVE TO INTERVENE
BY MOVANTS NIZAM PETER KATTANAH AND HOWARD LEPOW
WITH AFFIRMATION OF ALAN D. SUGARMAN, ESQ.
AND EXHIBITS

Law Offices Of
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Suite 4
New York, NY 10023
212-873-1371

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Attorneys for Petitioners

Signature (rule 130-1.1-a)

_____
Alan D. Sugarman
November 9, 2009

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I affirm that I am counsel for Movants and the within was served by e-mail upon counsel for Petitioners and Respondents on November 9. 2009 with hard copy to follow by Federal Express for delivery on November 10, 2009.

_____
Alan D. Sugarman
November ___, 2009