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,	:	
- 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,	:	AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE
Respondents.	:	

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

1. I am a member of Marcus Rosenberg & Diamond LLP, attorneys for Petitioners Landmark West!, 91 Central Park West Corporation and Thomas Hansen (together, "Petitioners").

2. I submit this affirmation in opposition to the motion by petitioners (the "*Kettaneh* Petitioners") in the proceeding encaptioned Peter Nizam Kettaneh, *et al. v.* Board of Standards and Appeals of the City of New York, *et al.*, Index No. 113227/08 (the "*Kettaneh* Proceeding") for leave to intervene in this proceeding, specifically on the present motion by Petitioners for leave to reargue.

3. The motion papers served by the *Kettaneh* Petitioners effectively constitute an attempt to reargue the order dismissing the *Kettaneh* Proceeding. Such relief was not sought by the *Kettaneh* Petitioners and is time-barred now. CPLR 2221(d)(3).

4. The *Kettaneh* Petitioners also could have sought intervention or consolidation when the two proceedings were being briefed, but chose not to do so. Their belated attempt to "piggy back" on Petitioners' motion should be rejected.

5. Nor can the *Kettaneh* Petitioners show any prejudice, since they have noticed an appeal from this Court's judgment dismissing the *Kettaneh* Proceeding.

6. While the *Kettaneh* Petitioners claim that I misstated whether they had raised certain claims, it could not have affected their proceeding because the *Kettaneh* Proceeding was dismissed before the Court even considered the motion to dismiss this case.

Moreover, were there any misstatements, it would not have been intentional but due solely to the prolix nature of the papers submitted by the *Kettaneh* Petitioners.

7. Even had such claims been raised by the *Kettaneh* Petitioners, they were not addressed by the Court and, hopefully, will be addressed on this motion.

8. For the foregoing reasons, the motion by the *Kettaneh* Petitioners to intervene in the instant action should be denied.

Dated: New York, New York
December 23, 2009

David Rosenberg

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

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CITY RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION TO REARGUE

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December 29, 2009

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Of Counsel

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

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CITY RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION TO REARGUE

Respondents, Board of Standards and Appeals of the City of New York ("BSA"), and the New York City Planning Commission ("City Planning Commission") (collectively "City Respondents"), submit this memorandum of law in opposition of Petitioners' Motion To Reargue the Decision of the Court upholding BSA's August 26, 2008 determination to grant lot coverage, rear yard, height and setback variances to respondent Congregation Shearith Israel ("the Congregation"). As discussed herein, Petitioners have failed to raise any matter of law or fact overlooked or misapprehended by the Court, and accordingly, their motion should be denied.

STATUTORY FRAMEWORK

CPLR Rule 2221 sets forth the procedure and requirements of, *inter alia*, a motion to reargue. It provides, in pertinent part:

Rule 2221. Motion affecting prior order

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order....

....

(d) A motion for leave to reargue:

....

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

This proceeding concerns an application by the Congregation, a not-for-profit religious institution, to demolish the community house that presently occupies a portion of its property and replace it with a nine-story (including penthouse) and cellar mixed-use community facility/residential building that does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear setback applicable in the residential zoning districts in which the property is located ("the proposed building") [R.1-2 (¶¶ 1-3, 24, 27)].

The Congregation submitted its development application to DOB and, on or about March 27, 2007, DOB's Manhattan Borough Commissioner denied the Congregation's development application, citing eight objections. 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. DOB's second

determination, which was issued on August 27, 2007, became the basis for the Congregation's variance application before the BSA [R. 1 (¶ 1)].

Congregation Shearith Israel's Application for a Variance

On or about April 1, 2007, the Congregation submitted an application to the BSA for waivers of zoning regulations for lot coverage and rear yard to develop a community facility that could accommodate its religious mission, and waivers of zoning regulations pertaining to base height, total height, front setback and rear setback to accommodate a market rate residential development that could generate a reasonable financial return [R. 2 (¶ 30)]. The application was designated by the BSA as Calendar Number 74-07-BZ [R. 1].

In support of its application, the Congregation submitted various documents to the BSA, which included, inter alia, a zoning analysis, a statement in support, an economic analysis, drawings and photographs [R. 15-183]. In its statement in support, the Congregation set forth evidence to establish that it met the five required findings of New York City Zoning Resolution ("Zoning Resolution" or "Z.R.") §72-21 [R. 19-48].

BSA's Review of Congregation Shearith Israel's Variance Application

After due notice by publication and mailing, a public hearing on Calendar Number 74-07-BZ was held by the BSA on November 27, 2007, February 12, 2008, April 15, 2008, and June 14, 2008 [R. 1 (¶ 14)].

On August 26, 2008, after conducting an environmental review in accordance with State Environmental Quality Review Act ("SEQRA") and City Environmental Quality Review ("CEQR") which found that the Congregation's proposed development would not have a significant adverse impact on the environment, considering all the submissions and testimony before it, and visiting the site and surrounding area, the BSA met and adopted Resolution 74-07-BZ granting the variance by a vote of five to zero [R. 1-14, 5784-95].

Procedural History

By Amended Summons and Complaint dated September 29, 2008, Petitioners commenced the instant action seeking an order vacating BSA Resolution 74-07-BZ.

On December 5, 2008, City Respondents moved to dismiss the Complaint on the grounds that Petitioners improperly commenced the instant matter as a plenary action rather than as a CPLR Article 78 proceeding.

On the same date, the Congregation moved to dismiss the Complaint on the grounds that Petitioners: 1) failed to file their Amended Complaint in accordance with CPLR §304; and 2) improperly filed a plenary lawsuit instead of an Article 78 proceeding.

By Affirmation and Memorandum of Law dated January 9, 2009, Petitioners opposed Respondents' motions.

On January 26, 2009, Respondents served Petitioners with Reply Memorandums of Law.

By Decision dated April 17, 2009, the Court denied Respondents' motions and converted Petitioners' plenary action to an Article 78 proceeding.

On or about May 12, 2009, Petitioners served Respondents with a Second Amended Verified Petition.

On or about May 22, 2009, Respondents served Petitioners with Verified Answers and Memorandums of Law in opposition to the Second Amended Verified Petition.

On or about June 21, 2009, Petitioners served Respondents with a Verified Response to the Statement of Material Facts of the City Respondents, a Memorandum of Law in Support of their Second Amended Verified Petition, and the Affidavit of Kate Wood.

By Decision dated August 4, 2009, this Court upheld BSA's August 26, 2008 Resolution. Specifically, the Court, having addressed the facts in the case, and the parties' arguments, found, in relevant part, that

> [this] proceeding was assigned to this Part as related to a previously-commenced Article 78 proceeding, Kettaneh v. Board of Standards and Appeals, Index No. 113227/08 ("Kettaneh"), which was also brought to challenge the BSA Resolution. Both matters were heard together at oral argument on March 31, 2009....
>
> At the March 31 oral argument, the court questioned counsel for petitioners as to the difference between the instant proceeding and the Kettaneh proceeding. Petitioners' counsel articulated two specific claims—essentially, that the BSA lacked jurisdiction and otherwise proceeded illegally—that were not raised by petitioners in Kettaneh. First, petitioners argued that the application that was presented to the BSA was not properly "passed on" by the Department of Buildings ("DOB"), in that the rejection was not issued by the commissioner or deputy commissioner, or the borough supervisor or borough commissioner, as required by the New York City Charter. Rather, petitioners assert, the document was signed by an individual in a Civil Service position, who is not authorized to sign-off on an application. Put another way, counsel argue that the "ticket" to get to the BSA was invalid. Second, petitioners argued that the plans that were presented and rejected by the DOB were not the same as the plans that were presented to the BSA. Counsel for petitioners then stated on the record that "I think the rest of the issues are probably encompassed in [Kettaneh's] petition," to which counsel for the BSA agreed.
>
> Therefore, except as to these two arguments, the parties agree that all of the other issues are essentially encompassed in the Kettaneh case. In a thirty-three (33) page decision, order and judgment dated July 10, 2009, this court denied the request to annul and vacate the BSA's determination and dismissed the petition in Kettaneh. The Kettaneh decision is specifically incorporated by reference herein; the factual recitations and determinations shall not be repeated, but are incorporated as if more fully set forth herein. Only those facts that are expressly required for the additional issues raised by petitioners will be set forth below.
>
> ....

Claim that the BSA Lacked Jurisdiction

[P]etitioners assert that the BSA lacked jurisdiction to entertain the Congregation's application because the plans were not approved properly, in that the plans were no[t] "passed on" by the DOB in the matter required by the City Charter. To invoke the BSA's jurisdiction, petitioners assert, the application must be an appeal from a determination of the DOB Commissioner or Manhattan Borough Superintendent. Petitioners cite to §666(6)(a) of the City Charter, which they assert, sets forth the jurisdiction of the BSA. Section 666(6)(a) provides that the BSA has the power

> [t]o hear and decide appeals from and review, (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five, or a not-for-profit corporation acting on behalf of the department of buildings pursuant to section 27-228.6 of the code....

But, as the BSA itself pointed out in a footnote to the BSA Resolution, the BSA has jurisdiction pursuant to §668 of the Charter. The footnote sets forth that:

> an attorney representing local residents, claims that a purported failure by the... DOB Commissioner or the Manhattan Borough Commissioner to sign the above-referenced objections, as allegedly required by Section 666 of the... Charter, divests the Board of jurisdiction to hear the instant application. However, the jurisdiction of the Board to hear an application for variances from zoning regulations, such as the instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner.

Section 668 sets forth the procedure for variances and special permits. This section is referenced in §665 of the Charter, which provides that the BSA has the power "[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to section six hundred sixty-eight."

An agency's construction of a statute or regulation it administers, "if not unreasonable or irrational, is entitled to deference." Matter of Salvati v. Eimicke, 72 N.Y.2d 784, 791 (1988), rearg. Denied, 73 N.Y.2d 995 (1989). The BSA's interpretation that it has jurisdiction under §668 is rational and will not be disturbed. Given the interplay in the Charter between the different ways for the BSA to acquire jurisdiction over a matter, it is appropriate to defer to the agency's interpretation. "[W]here the statutory language suffers from 'fundamental ambiguity'..., or 'the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices'..., courts routinely defer to the agency's construction of a statute it administers." New York City Council v. City of New York, 4 A.D.3d 85, 97 (1st Dep't 2004) (internal citations omitted). The BSA's interpretation that a review under §668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner is entitled to deference and will not be disturbed.

The Change in the Plans Renders the Application Flawed

Petitioners argue that the plans that were presented to and rejected by the DOB were not the same as the plans that were presented to the BSA, which, they contend, defeats the BSA's jurisdiction. As set forth in the Kettaneh decision, the Congregation submitted its application to the DOB, and on or about March 27, 2007, the DOB denied the application, citing eight objections. After the application was revised, the DOB issued a second determination, which eliminated one of the prior eight objections. The DOB's second determination, issued on or about August 27, 2007, was the basis for the variance application. This chronology is also set forth in the first footnote in the BSA Resolution.

Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB, the footnote in the BSA Resolution reflects that the revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight objections. There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the Kettaneh decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the Kettaneh decision notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over

time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required finding under Z.R. §72-21.

The Decision in Kettaneh v. Board of Standards and Appeals of the City of New York, Index No. 113227/08, which was incorporated into the Landmark Decision, set forth in relevant part,

> "[w]hile religious institutions are not exempt from local zoning laws, 'greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made.' Halperin, supra, at 773, citations omitted.[8]
>
> ....
>
> **The First Finding- Unique Physical Conditions**
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> Under §72-21(a), there must be a finding that the property at issue has "unique physical conditions" which create practical difficulties or unnecessary hardship in complying strictly with the permissible zoning provisions, and that such practical difficulties are not the result of the general condition of the neighborhood....
>
> ....
>
> "Unique physical conditions' may include the idiosyncratic configuration of the lot (Soho Alliance, supra) or unique characteristics of the building itself." UOB Realty (USA) Ltd. V Chin, 291 A.D.2d 248, 249 (1st Dep't 2002). A unique consideration here is that a large portion of the lot is occupied by

[8] Of course, where the proposed use is solely or primarily for religious purposes, flexibility and greater deference must be accorded. Here, the variance is sought for a mixed use building. "Affiliation with or supervision by religious organization does not, *per se*, transform institutions into religious ones. 'It is the proposed use of the land, not the religious nature of the organization, which must control.' Yeshiva & Mesivta Toras Chaim v. Rose, 136A.D.2d 710, 711 (2d Dep't 1988), quoting Bright Horizon House v. Zoning Bd. Of Appeals of Town of Henrietta, 121 Misc. 2d 703, 709 (Sup. Ct. Monroe Co. 1983). The record reflects that the BSA gave the Congregation deference with respect to the variance request for the community facility, but did not accord the Congregation deference to the extent that it was seeking a variance for the revenue-generating, residential portion of the Project.

the landmark Synagogue; the BSA noted that the limitations on development on the Synagogue portion of the lot result in that portion being underdeveloped. Because of the landmark status, the Synagogue is permitted to use only 28,274 square feet for an as-of-right development, although it has approximately 116,752 square feet developable floor area. The unique physical conditions, the BSA concluded, "when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations," which satisfied the requirement of subdivision (a) of the zoning regulations. This finding is sufficient to support the BSA's determination that the Property is unique.

....

Other Arguments Raised By Petitioners

....

[P]etitioners contend that prior to seeking a variance from BSA, the Congregation was required to submit an application to the LPC for a special permit under Zoning Resolution §74-711, and that its failure to do so precludes its application to the BSA for a variance.... As the BSA points out in its papers, there is no legal requirement that a party seek a special permit from the LPC. A party may elect to seek either a special permit or a variance. The only requirement that the Congregation had to fulfill was to apply for a Certificate of Appropriateness, which the Congregation did. Therefore, the Congregation fulfilled the prerequisite before applying to the BSA for a variance.

By Notice of Motion, Affirmation, and Memorandum of Law dated October 23, 2009, Petitioners moved to reargue the Petition.

ARGUMENT

POINT I

PETITIONERS' MOTION SHOULD BE DENIED AS IT MERELY REITERATES THE CLAIMS ALREADY DECIDED BY THIS COURT.

"A motion to reargue must be denied in the absence of any showing that the court overlooked or misapprehended any relevant fact or misapplied controlling law." Delgrosso v.

1325 Ltd. P'ship, 306 A.D.2d 241 (2d Dep't 2003) (citations omitted). See also William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 27 (1st Dep't 1992) (citation omitted); 300 West Realty Co. v. City of New York, 99 A.D.2d 708 (1st Dep't 1984); Foley v. Roche, 68 A.D.2d 558, 567, 418 N.Y.S.2d 588 (1st Dep't 1979); Calo v. Wal-Mart Stores, Inc., 305 A.D.2d 351 (2d Dep't 2003).

A motion to reargue may not be "used as a means by which an unsuccessful party may reargue questions that have been already decided." Garrick-Aug Assoc. Store Leasing, Inc. v. Shefa Land Corp., N.Y.L.J., Oct. 18, 2002, pg. 28, col. 4 (Sup. Ct. N.Y. County) (J. Miller). Here, Petitioners seek to "argue once again, the very same issues disposed of in the prior motion." O'Donnell v. Arrow Electronics, Inc., N.Y.L.J., March 20, 2001, p. 22, col. 6 (Sup. Ct. Suffolk County) (J. Costello). Such an attempt by Petitioners to utilize the motion to reargue in an inappropriate manner should not be countenanced by this Court.

However, to the extent the Court considers Petitioners' arguments, they are without merit.

POINT II

THE BSA HAD JURISDICTION TO REVIEW THE CONGREGATION'S VARIANCE APPLICATION PURSUANT TO CITY CHARTER §§666(5) AND 668.

Petitioners, in an effort to vacate this Court's Decision, assert that BSA's authority to hear variance applications stems from New York City Charter ("City Charter") §666(6)(a), which permits the BSA to review certain DOB final agency determinations. Petitioners' Memorandum of Law in Support of their Motion to Reargue ("Petitioner's Reargument Memo") at p. 7. Based on this incorrect belief, Petitioners argue that the Court improperly found that the BSA had jurisdiction pursuant to City Charter §668. To this end,

Petitioners assert that City Charter §668 "merely sets forth the procedures to be followed after an application properly is before the BSA [and] does not, either expressly or by implication, set forth the jurisdictional predicate for BSA review." Petitioner's Reargument Memo at p. 11. Petitioners' argument is incorrect.

As noted by this Court, there are "different ways for the BSA to acquire jurisdiction over a matter." Landmark Decision at p. 5. Here, the Court correctly found that the BSA had jurisdiction pursuant to City Charter §§668 and 666(5). Specifically, the Court stated that, "Section 668 sets forth the procedure for variances and special permits. This section is referenced in § [666(5)][1] of the Charter, which provides that the BSA has the power '[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to section six hundred sixty-eight'." Landmark Decision at p. 4. The Court's finding is not only supported by the clear language of City Charter §§668 and 666(5), but also by case law. Indeed, as set forth in City Respondents' Memorandum of Law in Opposition to the Petition ("City Respondents' Memo"), various Courts have found that BSA's jurisdiction to hear applications for variances from zoning regulations is conferred by City Charter §§666(5) and 668. See Galin v. Board of Estimate, 52 N.Y.2d 869 (1982) (finding the BSA has jurisdiction to issue variances pursuant to City Charter §§666(5)[2] and 668); William Israel's Farm Coop. v. Board of Stds. & Appeals, 22 Misc. 1105A (N.Y. Sup. Ct., November 15, 2004) (finding the BSA has jurisdiction over applications for variances to the zoning resolution

[1] The Court, while citing the language of City Charter §666(5), inadvertently cited to City Charter §665, instead of City Charter §666(5).

[2] At the time the Galin decision was written the relevant provision was codified at Charter §666(6). The provision was subsequently renumbered as 666(5) effective July 1, 1991.

pursuant to City Charter § 666(5)) appeal dismissed as moot, 25 A.D.3d 517 (1st Dep't 2006); Highpoint Enterprises, Inc. v. Board of Estimate, 67 A.D.2d 914, 916 (2d Dep't 1979) (finding BSA has jurisdiction to grant variances pursuant to City Charter §666(5)[3]).[4] Accordingly, Petitioners' argument fails.[5]

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[3] At the time the Highpoint Enterprises decision was written the relevant provision was codified at Charter §666(6). The provision was subsequently renumbered as 666(5) effective July 1, 1991.

[4] While Petitioners cite to two cases in support of their argument, i.e., Mamaroneck Commodore, Inc. v. Bayly, 260 N.Y. 528 (1932) and Von Elm v. Zoning Bd. Of App., 258 A.D. 989 (2d Dep't 1940), nothing in the cited cases demonstrate that the Court misapplied controlling law. Petitioners' Reargument Memo at p. 11. Contrary to Petitioners' argument, the Court of Appeals in Mamaroneck Commodore, Inc, did not hold that "a board of appeals (such as BSA) has no authority to hear an application for a variance in the first instance... [and] may only do so on appeal from a designated agency officer." Id. Rather, the Court of Appeals affirmed the lower court's ruling that the Village of Mamaroneck Board of Appeals did not have jurisdiction to hear a variance application because it did not comply with Village Law §179-b, which prescribed the Board's jurisdiction. Similarly, in Von Elm, the Second Department held that the Village of Hempstead Board of Appeals did not have jurisdiction to hear a variance application because it also failed to comply with the requirements set forth in Village Law § 179-b. These cases are inapplicable to the instant proceeding as the BSA was not required to comply with Village Law §179-b since its jurisdiction stems from the City Charter, not the Village Law.

[5] To the extent Petitioners continue to argue that BSA's website proves that BSA's jurisdiction stems from City Charter §666(6)(a), their argument fails. Petitioners' Reargument Memo at p. 9. As noted by Petitioners, BSA's website provides that "the Board can only act upon specific applications brought by... parties who have received prior determination from one of the enforcement agencies noted above. The Board cannot offer opinions or interpretations generally and it cannot front a variance or a special permit to any property owner who has not first sought a proper permit or approval from an enforcement agency," However, as set forth in City Respondents' answering papers, and ignored by Petitioners, the BSA requirement that variance applicants submit Notices of Objections from DOB, i.e., they first apply for a permit through the regular procedure, was implemented administratively as a practical matter, not as a pre-requisite for jurisdiction. Indeed, by requiring variance applicants to submit Notices of Objections from DOB, the BSA is able to determine whether an applicant actually requires a variance, thereby enabling it to eliminate variance applications based on supposition. City Respondents' Memo at n. 8.

Moreover, Petitioners' argument that that BSA lacked jurisdiction under City Charter §666(6)(a) because "CSI's variance application to BSA was premised upon an application for a new building and plans which were not reviewed by DOB and not rejected by the DOB," fails as a matter of law. Petitioners' Reargument Memo at p. 16. Pursuant to City Charter §666(6)(a), the BSA has jurisdiction to hear appeals of certain DOB final agency determinations. However, since, as forth above, BSA's jurisdiction to hear variance applications stems from City Charter §§668 and 666(5), not City Charter §666(6)(a), the BSA was not required to comply with the requirements of City Charter §666(6)(a). Further, as properly held by the Court, and not addressed by Petitioners, BSA's "interpretation that a review under §668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner is entitled to deference and [should] not be disturbed." Landmark Decision at p. 5. Thus, as Petitioners have failed to provide any basis to disturb the Court's findings and, in fact, have merely reiterated the arguments set forth in their Petition and decided by this Court, the Court should uphold its Decision.[6]

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[6] Notably, Petitioners also fail to provide any basis to disturb the Court's finding that the revisions to the Congregation's application were proper and part of the natural progression of a BSA variance application. As set forth by the Court,

> [a]lthough the plan submitted to the BSA was not identical to the first plan submitted to the DOB, the footnote in the BSA Resolution reflects that the revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight objections. There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the Kettaneh decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the Kettaneh decision

Continued...

POINT III

THE COURT ADDRESSED AND REJECTED PETITIONERS' ARGUMENT THAT THE BSA GRANTED IMPROPER DEFERENCE TO THE CONGREGATION.

Petitioners assert that the BSA did not offer a basis for, nor did the Court rule on, the issue of whether the BSA could consider the "revenue generating residential portion of the proposed development separately from the community facility portion," i.e., grant the Congregation deference as to the community facility thereby subjecting it to different standards than the proposed residential development. Petitioners' Reargument Memo at p. 20. Petitioners are incorrect. Both City Respondents and the Court addressed this issue.

As set forth in City Respondents' Memo,

> the BSA properly concluded that, to the extent the Congregation was seeking variances to develop a community facility, it was entitled to significant deference under the laws of the State of New York [R. 2-3 (¶ 31), citing, Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968)]. This determination was rational and reasonable as it was based on decisions of the Court of Appeals, i.e., Westchester Reform Temple, supra, Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986), and Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975), and Zoning Resolution §72-21(b) which provides that a not-for-profit institution is generally exempted from having to establish that the property for which a variance is sought could not otherwise achieve a reasonable financial return. [R. 2-3 (¶ 31, ¶ 45), R. 11 (¶ 165)]

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notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required finding under Z.R. §72-21. Landmark Decision at p. 6.

> The BSA properly did not extend this deference to the revenue-generating residential portion of the site because it is not connected to the mission and program of the Synagogue. As found by the BSA, under New York State law, a not-for-profit organization which seeks land use approvals for a commercial or revenue-generating use is not entitled to the deference that must be afforded to such an organization when it seeks to develop a project that is in furtherance of its mission [R. 3 (¶ 34), citing, Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); Foster v. Saylor, 85 A.D.2d 876 (4th Dept. 1981) and Roman Cath. Dioc. of Rockville Ctr. v. Vill. of Old Westbury, 170 Misc.2d 314 (1996)].
>
> Thus, the Board properly subjected the Congregation's application to the standard of review required under Zoning Resolution §72-21 for the discrete community facility, and residential development uses, respectively, and evaluated whether the proposed residential development met all the findings required by Zoning Resolution §72-21, notwithstanding its sponsorship by a religious institution [R. 3 (¶¶ 33, 35, 36)]. City Respondents' Memo at 20.

Further, the Court found that the BSA's actions were proper. Specifically, the Court found "'[w]hile religious institutions are not exempt from local zoning laws, 'greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made.' Halperin, supra, at 773, citations omitted." Kettaneh Decision at p. 16. Additionally, the Court found that,

> [o]f course, where the proposed use is solely or primarily for religious purposes, flexibility and greater deference must be accorded. Here, the variance is sought for a mixed use building. "Affiliation with or supervision by religious organization does not, *per se*, transform institutions into religious ones. 'It is the proposed use of the land, not the religious nature of the organization, which must control.' Yeshiva & Mesivta Toras Chaim v. Rose, 136A.D.2d 710, 711 (2d Dep't 1988), quoting Bright Horizon House v. Zoning Bd. Of Appeals of Town of Henrietta, 121 Misc. 2d 703, 709 (Sup. Ct. Monroe Co. 1983). The record reflects that the BSA gave the Congregation deference with respect to the variance request for the community facility, but did not accord the Congregation deference to the extent that it was seeking a variance for the revenue-generating, residential portion of the Project. Id. at n. 8.

To the extent Petitioners assert that the BSA's bi-furcation of the Congregation's application was improper since the BSA departed from its prior determination in Yeshiva Imrei Chaim Viznitz, Calendar No. 290-05-BZ, Petitioners' misrepresent the BSA's findings in that matter. Petitioners' Reargument Memo at p. 21.

In Yeshiva, a non-for profit religious institution sought a use variance to legalize a catering establishment. Yeshiva Imrei Chaim Viznitz, Calendar No. 290-05-BZ Resolution annexed hereto in Appendix. In doing so, the applicant conceded that it was not seeking to the variances for the purposes of its religious school or Synagogue, but rather, to legalize the catering facility which, in turn, would generate funds for the school or Synagogue. Id. The BSA denied the application, finding that generating income was not a legitimate programmatic need for the purposes of satisfying Z.R. §72-21(a).[7] Id. In the instant proceeding, the BSA did not deviate from its decision in Yeshiva. Specifically, the BSA found that the revenue-generating residential portion of the site, which the Congregation sought to develop, in part, to generate funds to advance its religious mission and programs was not a legitimate programmatic need [R. 3 (¶¶ 34-36)]. Thus, since the BSA did not act in contravention of its past findings, Petitioners' argument fails and this Court should adhere to its prior findings.

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[7] Zoning Resolution §72-21(a) requires a showing that the subject property has "unique physical conditions" which create practical difficulties or unnecessary hardship in complying strictly with the permissible zoning provisions and that such practical difficulties are not due to the general conditions of the neighborhood. As set forth in City Respondents' Memo, programmatic needs constitute an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations" [R. 5 (¶ 64), citing, Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)]; and Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971)]. City Respondents' Memo at p. 24. Under New York State law, an applicant seeking to advance its programmatic needs is entitled to substantial deference. Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968); Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); Foster v. Saylor, 85 A.D.2d 876 (4th Dept. 1981); and Roman Cath. Dioc. of Rockville Ctr. v. Vill. of Old Westbury, 170 Misc.2d 314 (1996).

POINT IV

THE COURT ADDRESSED AND REJECTED PETITIONERS' ARGUMENT THAT THE BSA USURPED THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION'S AUTHORITY TO GRANT VARIANCES FOR PROPERTIES CONTAINING LANDMARKED BUILDINGS.

Petitioners argue that the Court failed to rule on their argument that the BSA usurped the New York City Landmarks Preservation Commission's ("LPC's") authority to grant variances for landmarked buildings. Specifically, Petitioners argue that the Court confused their argument, i.e., that pursuant to Z.R. §74-711, the LPC has sole jurisdiction to grant variances for landmarked buildings and that the BSA, by finding that the landmarked synagogue constituted a "unique physical condition," for the purposes of Z.R. §72-21(a), usurped LPC's authority, with Kettaneh's argument that the Congregation was required to exhaust its administrative remedies by applying to the LPC for a §74-711 special permit before it could apply to the BSA for a variance under Z.R. §72-21. Petitioners are incorrect. The Court clearly rejected Petitioners' argument.

As an initial matter, it should be noted that contrary to Petitioners' argument, the Petitioners in Kettaneh also argued that the BSA usurped LPC's authority by finding that the landmarked synagogue constituted a "unique physical condition" for the purposes of Z.R. §72-21(a). See Kettaneh Petitioners' Reply Memorandum of Law in Support of Verified Petition at pp. 35-8. In rejecting this argument, the Court considered whether an entity, whose property contains a landmarked building, is required to seek a Z.R. §74-711 special permit from the LPC ,or whether the entity can seek a BSA variance pursuant to Z.R. §72-21. Kettaneh Decision at p. 29. The Court found that "there is no legal requirement that a party seek a special permit from LPC. A party may elect to seek either a special permit or a variance." Id.

In reviewing whether the BSA rationally found that the landmarked Synagogue constituted a "unique physical condition" under Z.R. §72-21(a), the Court found that,

> "[u]nique physical conditions' may include the idiosyncratic configuration of the lot (Soho Alliance, supra) or unique characteristics of the building itself." UOB Realty (USA) Ltd. V Chin, 291 A.D.2d 248, 249 (1st Dep't 2002). A unique consideration here is that a large portion of the lot is occupied by the landmark Synagogue; the BSA noted that the limitations on development on the Synagogue portion of the lot result in that portion being underdeveloped. Because of the landmark status, the Synagogue is permitted to use only 28,274 square feet for an as-of-right development, although it has approximately 116, 752 square feet developable floor area. The unique physical conditions, the BSA concluded, "when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations," which satisfied the requirement of subdivision (a) of the zoning regulations. This finding is sufficient to support the BSA's determination that the Property is unique. Kettaneh Decision p. 19.

Thus, as the Court clearly held that an entity, whose property contains a landmarked building, may seek a BSA variance pursuant to Z.R. §72-21 and that the landmarked building could be considered a "unique physical condition" pursuant to Z.R. §72-21(a), Petitioners' argument fails.

Notably, the Court's finding that the landmarked Synagogue constituted a "unique physical condition" was proper and supported by case law. As set forth in City Respondents' Memo, the BSA in determining whether a unique physical condition exists may evaluate the existing building on that lot. Fuhst v. Foley, 45 N.Y.2d 441, 445 (1978) (finding that a practical difficulty presented by a building, rather than the zoning lot on which it rests, satisfies the (a) finding for uniqueness). City Respondents' Memo at p. 22-23. Indeed, while many cases examine the unique characteristics of the land itself, Courts have repeatedly found that zoning boards may consider and rely upon the uniqueness of a structure on the land, including its physical obsolescence, to satisfy the uniqueness requirement. Fiore v. Zoning Board of Appeals,

21 N.Y.2d 393, 395 (1968) (finding of uniqueness examined the structure on the zoning lot); UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248 (1st Dep't 2002) (rejecting "petitioners' contention that the requirement of 'unique physical conditions' in New York City Zoning Resolution § 72-21 (a) refers only to land and not buildings"); West Broadway Associates v. Board of Estimate, 72 AD2d 505 (1st Dep't 1979), leave to appeal denied, 49 N.Y.2d 702 (1980) (reinstating a variance and sustaining the BSA's uniqueness finding based on the unique qualities of the building, not the zoning lot); 97 Columbia Heights Housing Corp. v. Board of Estimate, 111 AD2d 1078 (1st Dep't 1985), aff'd, 67 NY2d 725 (1986) (reinstating a variance and finding that the uniqueness requirement was satisfied by the demolition of a building, resulting in increased costs); Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dep't 1985) (finding that "[t]he requirement that the hardship be due to unique circumstances may be met by showing that the difficulty complained of relates to existing improvements on the land which are obsolete or deteriorated"); Dwyer v. Polsinello, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (finding of unique circumstances based on the obsolete building on the zoning lot). That the building happens to be a landmarked building does not alter the BSA's authority to consider the presence of the building or from considering a variance application for a lot containing a landmarked building. See e.g. E. 91st St. Neighbors to Pres. Landmarks, Inc. v. N.Y. City Bd of Stds and Appeals, 294 A.D.2d 126 (1st Dep't 2002) (upholding BSA's granting of a variance for construction on a lot containing landmarked buildings). Thus, as Petitioners have failed to provide a basis to disturb the Court's ruling, and merely repeat the arguments advanced in their Petition and decided by this Court, the Court should uphold its prior finding.

CONCLUSION

For all the above reasons, the Court should deny Petitioners' Motion to Reargue and uphold its August 4, 2009 Decision.

Dated: New York, New York
December 29, 2009

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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

Petitioners,

- against -

Index No. 650354/08

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.

----------x

CITY RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PROPOSED PETITIONERS-INTERVENORS' MOTION TO INTERVENE

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CITY RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PROPOSED PETITIONERS-INTERVENORS' MOTION TO INTERVENE

PRELIMINARY STATEMENT

Respondents, Board of Standards and Appeals of the City of New York ("BSA"), and the New York City Planning Commission ("City Planning Commission") (collectively "City Respondents"), submit this memorandum of law in opposition to proposed petitioners-intervenors' ("Kettaneh Petitioners") Motion to Intervene pursuant to Civil Practice Law and Rules ("CPLR") §§1012(a)(2) and 1013.

This motion stems out of Kettaneh Petitioners' desire to litigate not only their own Article 78 proceeding, Kettaneh v. Board of Standards and Appeals, Index No. 113227/08 ("Kettaneh"), but Petitioners' Article 78 proceeding as well. Kettaneh Petitioners, who were

previously denied the right to argue Petitioners' case for them,[1] seek once again, to improperly insert themselves into this proceeding. This attempt should be denied.

On or about September 29, 2008, Kettaneh Petitioners commenced Kettaneh seeking to challenge the BSA's August 26, 2008 determination to grant lot coverage, rear yard, height and setback variances to respondent Congregation Shearith Israel ("the Congregation"). Shortly thereafter, on or about October 2, 2009, Petitioners, asserting claims not set forth in Kettaneh, commenced the instant proceeding seeking to challenge the same determination. While the matters were heard together at oral argument on March 31, 2009, they were never joined and separate submissions were made in both matters.

By Decision dated July 10, 2009, this Court, in a thirty-three page Decision, denied the Petition in Kettaneh. Subsequently, by Decision dated August 4, 2009, this Court denied Petitioners' Second Amended Petition. The August 4, 2009 Decision addressed the distinct arguments raised by Petitioners in the instant proceeding, and incorporated the Kettaneh July 10, 2009 Decision as to the remaining issues raised by Petitioners since they were encompassed in the Kettaneh matter.

By Notice of Motion, Affirmation, and Memorandum of Law dated October 23, 2009, Petitioners moved to reargue their Second Amended Petition. Kettaneh Petitioners, who

[1] Kettaneh Petitioners, in an effort to reply to Respondents' answering papers in the instant proceeding, sought leave to submit a 39 page Further Reply in Kettaneh. This Court denied Kettaneh Petitioners' motion, setting forth that it was "wholly inappropriate for [the Kettaneh] petitioners to seek to reply to those papers, which are not being considered by the court in this underlying application." Notably, in addition to seeking leave to intervene, Kettaneh Petitioners seek leave to submit the Further Reply previously rejected by this Court.

are time-barred from making their own Motion to Reargue[2], now seek to litigate Petitioners' timely motion to reargue for them. As set forth herein, Kettaneh Petitioner's Motion to Intervene should be denied as they have failed to establish that they are entitled to intervene under either provision of the CPLR.

STATUTORY FRAMEWORK

CPLR § 1012 provides, in pertinent part, as follows:

> **(a) Intervention as of right.** Upon timely motion, any person shall be permitted to intervene in any action:
>
> ....
>
> 2. When the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment;

CPLR § 1013 provides that a party may intervene in a proceeding by permission of the Court "when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."

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[2] Pursuant to CPLR Rule 2221(d)(3), a motion to reargue must be brought "within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." In Kettaneh, a copy of the Court's July 10, 2009 Decision and written notice of its entry were served by mail on July 29, 2009. Pursuant to CPLR Rule 2103(2), service was complete five (5) days later on August 3, 2009. Accordingly, the Kettaneh Petitioners were required to make a motion to reargue within the following thirty (30) days, i.e., by September 2, 2009.

ARGUMENT

INTERVENTION SHOULD BE DENIED AS KETTANEH PETITIONERS HAVE FAILED TO ESTABLISH THAT THEY ARE ENTITLED TO SUCH RELIEF.

Kettaneh Petitioners seek to intervene pursuant to CPLR §1012(a)(2) (intervention as of right) and CPLR §1013 (permissive intervention). Pursuant to CPLR §1012(a)(2), to intervene as of right, movants must demonstrate that "the representation of their interest by the parties is or may be inadequate" and that the movants "may be bound by the judgment." CPLR §1013 provides for permissive intervention upon a timely motion "when the person's claim or defense and the main action have a common question of law of fact."

Under liberal construction rules, it is of little practical significance whether movants frame their motion under CPLR §§1012 or 1013. Sieger v. Sieger, 297 AD2d 33, 36 (2d Dep't 2002). While these provisions are to be liberally construed, intervention "is not to be granted indiscriminately and without regard to the statute." In the Matter of Spagenberg, 41 Misc.2d 584, 587 (Sup. Ct., N.Y. Co. 1963). See also Quality Aggregates, Inc. v. Century Concrete Corp., 213 A.D.2d 919, 920 (3d Dep't 1995).

In deciding whether intervention is appropriate the court may "properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as to the degree to which the proposed intervention will delay and unduly complicate the litigation." Pier v. Bd. of Assessment Review, 209 A.D.2d 788, 789 (3d Dep't 1994); Osman v. Sternberg, 168 A.D.2d 490 (2d Dep't 1990); 2 Weinstein, Korn & Miller, NY Civ. Prac. ¶ 1012.05. A motion to intervene is properly denied where the movant fails to offer relevant evidence proving that the movant has a real and substantial interest in the outcome of the litigation. See, e.g., Matter of Kronberg, 95 A.D.2d

714, 716 (1st Dep't 1983); Wapnick v. Wapnick, 295 A.D.2d 422 (2d Dep't 2002); St. Joseph's Hosp. Health Ctr. v. Department of Health, 224 A.D.2d 1008 (4th Dep't 1996); Matter of Clinton v. Summers, 144 A.D.2d 145, 147 (3rd Dep't 1988).

Here, intervention is not warranted because the Kettaneh Petitioners utterly fail to establish that they will suffer any harm if their motion is denied. This is not surprising since Kettaneh Petitioners do not face any real harm. Indeed, since the Court has already denied their Petition, thus upholding the BSA's August 26, 2009 determination, if the Court were to deny Petitioners' Motion to Reargue, i.e., continue to uphold the BSA's August 26, 2009 determination, Kettaneh Petitioners' position will remain the same. However, were the Court to grant Petitioners' Motion to Reargue, the Kettaneh Petitioners will be benefited as the BSA's August 26, 2009 determination will be annulled. Moreover, to the extent Kettaneh Petitioners argue that they could potentially be harmed if the Court were to alter its Decision in the instant proceeding, Petitioners' argument is meritless since, as fully set forth in City Respondents' Memorandum of Law in Opposition to Petitioners' Motion to Reargue in the instant proceeding ("City Respondents' Opposition to Petitioners' Motion to Reargue"), and incorporated herein by reference, there is no basis upon which to disturb the Court's prior findings.

In addition to failing to establish that they face any harm it their motion is denied, Kettaneh Petitioners have also failed to set forth with any specificity why Petitioners are unable to adequately represent their interests. In fact, save one argument, Kettaneh Petitioners agree with the arguments asserted by Petitioners.[3] As to bifurcation issue, Kettaneh Petitioners

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[3] In their Motion to Reargue, Petitioners advance four arguments: 1) two arguments regarding BSA's jurisdiction under the New York City Charter; 2) an argument regarding whether the BSA could consider the "revenue generating residential portion of the proposed development separately from the community facility portion," i.e., whether the BSA could grant the

Continued...

arguably assert that Petitioners fail to adequately represent their interest, Kettaneh Petitioners' argument fails in this regard since, as set forth below, they are barred from raising it since Petitioners never asserted the argument in the instant proceeding. Infra 9.

Moreover, keeping in mind that an intervenor becomes a party for all purposes (see, Matter of Greater New York Health Care Facilities Assn. v DeBuono, 91 N.Y.2d 716 (1998)), joining Kettaneh Petitioners to the instant matter this late in the proceeding will only complicate it. Were the Court to permit Kettaneh Petitioners to intervene, it would in essence give Kettaneh Petitioners leave to reargue not only the Decision in the instant proceeding, but also the Kettaneh July 10, 2009 Decision. Notably, Kettaneh Petitioners seek to take full advantage of this fact, and seek leave to re-argue issues not raised by Petitioners in their Motion to Reargue.[4] Additionally, as both Petitioners and Kettaneh Petitioners have commenced

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Congregation deference solely as to the community facility thereby subjecting it to different standards than the proposed residential development (the "birfurcation issue") (see Petitioners' Motion to Reargue at p. 20); and 3) an argument regarding whether the BSA usurped the New York City Landmarks Preservation Commission's ("LPC's") authority to grant variances for lots containing landmarked buildings. Kettaneh Petitioners do not dispute Petitioners' arguments as to BSA's jurisdiction under the New York City Charter or to grant variances for lots containing landmarked buildings, and, in fact, concur with the arguments set forth by Petitioners. Kettaneh Petitioners' Affirmation in Support of Notice of Motion for Leave to Intervene ("Kettaneh Petitioners' Motion to Intervene") at pp. 2-5, 8.

[4] While not raised by Petitioners, the Kettaneh Petitioners seek to reargue: 1) bifurcation arguments raised solely in Kettaneh; 2) various arguments as to whether the BSA properly found that the Congregation could not earn a reasonable return based on an as-of right development; 3) whether the BSA properly relied upon the Congregation's programmatic needs in evaluating the condominium variances sought by the Congregation; 4) whether an obsolete building, which is to be demolished, can constitute a "unique physical condition" for the purposes of satisfying New York City Zoning Resolution ("Z.R.") §72-21(a); 5) various arguments as to the Evidence Table submitted by the Congregation in its Answer in the instant proceeding; 6) whether the BSA properly concluded that the "sliver law" (Z.R. §23-692) and the split lot conditions effecting the subject property constituted a hardship under Z.R. §72-21(a); 7) whether the subject property suffered from a "unique physical condition" since it is rectangular in shape; 8) whether Z.R. 72-21(b) applies to a not-for profit entity seeking to develop a for profit condominium development;

Continued...

appeals, if the Kettaneh Petitioners become parties to this proceeding, they will have the right to appeal this Court's Decision to uphold BSA's August 26, 2008 determination in two separate proceedings.

Kettaneh Petitioners' motion should also be denied as they have failed to establish that their intervention would serve a useful purpose. Kettaneh Petitioners first argue that they should be permitted to intervene because Petitioners incorrectly stated that the Kettaneh Petitioners, in Kettaneh, did not argue that the BSA usurped LPC's authority over landmarked buildings considering the synagogue's landmark designation a "unique physical condition" for the purposes of satisfying under Z.R. 72-21(a). Kettaneh Petitioners' Motion to Intervene at pp. 2-5. While Kettaneh Petitioners are correct that they also argued that the BSA usurped the LPC's authority, such does not warrant permitting intervention. Indeed, permitting Kettaneh Petitioners to intervene for the purposes of asserting the same argument as already raised by Petitioners serves no useful purpose, and would merely delay the hearing of Petitioners' Motion to Reargue.[5]

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and 9) various arguments as to whether BSA's determination was supported by substantial evidence. See Kettaneh Petitioners' Motion to Intervene at p. 9 and the attached Further Reply.

[5] Notably, permitting Kettaneh Petitioners to intervene to assert the same argument raised by Petitioners would also serve no purpose since, as more fully addressed in City Respondents' Opposition to Petitioners' Motion to Reargue, the argument is without merit. City Respondents' Opposition to Petitioners' Motion to Reargue at pp. 18-20. Indeed, contrary to both Petitioners' and Kettaneh Petitioners' argument, the Court addressed and rejected their argument regarding whether the BSA usurped LPC's authority. To this end, the Court found that an entity, whose property contains a landmarked building, may seek a BSA variance pursuant to Z.R. §72-21 or a LPC §74-711 special permit. Kettaneh July 10, 2009 Decision at p. 29. The Court further held that where a party seeks a BSA variance pursuant to Z.R. §72-21, the BSA may consider the landmarked building as a "unique physical condition" pursuant to Z.R. §72-21(a). Id. at p. 19. Accordingly, as Kettaneh Petitioners' argument is of no moment, permitting them to intervene would serve no useful purpose.

Kettaneh Petitioners next argue that they should be permitted to intervene because Petitioners incorrectly stated that, in Kettaneh, the Kettaneh Petitioners did not argue that the BSA improperly bifurcated the Congregation's application and that "adverse to the interest of the Kettaneh Parties, the Landmark West rearguements fall short of providing a complete argument on the bifurcation issue." Kettaneh Petitioners' Motion to Intervene at p. 5. Kettaneh Petitioners then go on to expound on the arguments they advanced in Kettaneh as to why BSA's bifurcation of the Congregation's application was improper. Kettaneh Petitioners' argument fails as matter of law since a proposed intervenor is not permitted to raise issues that are not before the Court in the main action. See East Side Car Wash, Inc. v. K.R.K. Capitol, Inc., 102 A.D.2d 157, 160 (1st Dep't 1984); St. Joseph's Hosp. Health Ctr. v. Department of Health, 224 A.D.2d 1008, 1009 (4th Dep't 1996). Regardless, even if the Court found that the Kettaneh Petitioners could properly raise their argument, their motion should still be denied since permitting them to intervene in the instant proceeding to assert arguments not previously raised would serve no useful purpose. Rather, it would permit Kettaneh Petitioners to back-door a Motion to Reargue which they could not bring in Kettaneh, and unnecessarily complicate the instant proceeding by bringing superfluous issues before the Court.

Lastly, Kettaneh Petitioners address Petitioners' jurisdictional claims. In doing so, Kettaneh Petitioners fail to provide any basis upon which intervention would be proper. Kettaneh Petitioners' Motion to Intervene at p. 8. Rather, Kettaneh Petitioners merely "concur with" Petitioners' arguments "that the August 24, 2007 DOB Notice of Objection[] was insufficient to provide jurisdiction to the BSA." Id. Thus, as Kettaneh Petitioners merely concur

with Petitioners' jurisdictional claims, permitting them to intervene to do so would serve no useful purpose.[6]

CONCLUSION

For the foregoing reasons, City Respondents respectfully request that the Court deny Kettaneh Petitioners' Motion to Intervene.

Dated: New York, New York
December 29, 2009

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[6] Notably, Kettaneh's motion should also be dismissed since they failed to submit a proposed pleading as required by CPLR §1014. Lamberti v. Metropolitan Transp. Authority, 170 A.D.2d 224 (1st Dep't 1991); Zehnder v. State, 266 A.D.2d 224 (2d Dep't 1999); Farfan v. Rivera, 33 A.D.3d 755 (2d Dep't 2006).

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

LANDMARK WEST! INC, 91 CENTRAL PARK WEST CORPORATION AND THOMAS HANSEN, Petitioners, For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules -against- CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel, Respondents.	Index No. 650354/08 (Lobis, J.)

RESPONDENT CONGREGATION SHEARITH ISRAEL'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION TO REARGUE

INTRODUCTION

Respondent Congregation Shearith Israel (the "Congregation") respectfully submits this memorandum of law in opposition of the motion, filed by Petitioners Landmark West! Inc., 91 Central Park West Corporation and Thomas Hansen (the "Petitioners"), to reargue this Court's August 4, 2009 decision upholding variances that the Board of Standards and Appeals (the "BSA") granted to the Congregation on August 26, 2008. *See Landmark West! Inc v. City of New York Board of Standards & Appeals*, Index No. 650354/08, (Sup. Ct., N.Y. Co. Aug. 4, 2009) (attached as Exhibit A to Petitioners' motion to reargue) (the "Landmark West!

Decision"). Petitioners – who are simultaneously pursuing an appeal of this Court's decision to the First Department – have not raised any "matters of fact or law . . . overlooked or misapprehended" by this Court. *See* CPLR 2221(b)(2). Petitioners' motion to reargue should be denied.

Consistent with their original allegations, Petitioners have focused on "errors" purportedly committed by the Department of Buildings ("DOB"), which is not even a party to this suit. Petitioners assert that the BSA lacked jurisdiction to grant the Congregation a variance because (i) the denial of the Congregation's application for a DOB building permit was purportedly signed by the wrong DOB official (Pet. Mem. at 7), and (ii) the architectural plans upon which the BSA acted were allegedly different from the plans that led to the DOB's denial of the Congregation's building permit (Pet. Mem. at 18).

We show below that these issues were raised before and specifically considered by this Court. *See* Argument, Point A. We also show that they lack merit. *See* Argument, Point B.

Petitioners' position also defies common sense. As the BSA recognized (*see* A 003725-27),[1] it does not matter whether the DOB reviewed the "right" plans or whether the DOB official reviewing them was the "right" DOB employee to do so. The DOB ***rejected*** the Congregation's application for a building permit based on its belief that the Congregation needed a variance. Petitioners do not claim that this DOB determination was wrong; Petitioners ***themselves*** maintain that the Congregation could not pursue the plans that were indisputably before the BSA without a variance. Petitioners' effort to misuse the administrative process to derail the Congregation's project should garner no sympathy.

Petitioners' other arguments (Pet. Mem. at 18-24) are equally unpersuasive:

[1] "A" refers to the administrative record filed in this action by the BSA.

While Petitioners contend that there was "[n]o statutory" support for the BSA's decision to analyze the Congregation's proposed structure as a "mixed purpose" project (*id.* 19-20), this argument does not favor ***Petitioners***. As the Congregation pointed out in its submission on the merits, Section 72-21 of the Zoning Resolution required the BSA to grant the Congregation a variance ***without regard*** to whether an as-of-right alternative would have been able to secure a reasonable return. See N.Y.C. Z.R. § 72-21(b). Here, the BSA imposed a ***tougher*** standard on the Congregation. Given that the Congregation succeeded in meeting that higher standard, it is irrelevant whether this extra hurdle was "unprecedented."

Finally, Petitioners' rehash of its contention that the BSA usurped the authority of the New York City Landmarks Preservation Commission (the "LPC") warrants no reconsideration. Nothing in Section 74-711 of the Zoning Resolution (which Petitioners erroneously claim creates some type of "exclusive" jurisdiction, *see* Pet. Mem. at 23) limits the BSA's authority to find "unique physical conditions" in accordance with its statutory authority under Section 72-21. Second, contrary to Petitioners' assertion, the Congregation never based its claim that it was hampered by "unique physical conditions" on the ground that its "synagogue was a landmarked structure and that the entire property was in a historic district (Pet. Mem. at 22). (*See* A 004566 (setting forth the Congregation's actual position before the BSA)).

Petitioners' effort to relitigate these issues should be rejected. Their motion should be denied.

FACTUAL BACKGROUND

A. The Congregation's Eight-Year Effort To Secure the Land-Use Approvals

In 2002 – almost eight years ago – the Congregation began seeking New York City government land-use approvals to address major deficiencies in the facilities that it has been using since 1896. (*See* A 000131). A key aspect of its plan was to make the landmark Spanish

& Portuguese Synagogue, located at the corner of West 70th Street and Central Park West in Manhattan for over two centuries, accessible to disabled and elderly congregants.

For roughly three years, the Congregation worked with the LPC to develop a suitable plan. (*See* A 000131). The LPC's review of certain aspects the proposal was needed because the site that the Congregation planned to use at 10 West 70th Street is within a historic district.

On October 28, 2005, while the process before the LPC was underway, the Congregation applied to the DOB for a building permit. (*See* A 000018) That application remained pending while the Congregation continued to work with the LPC.

On March 14, 2006, the LPC unanimously approved the Congregation's request for a Certificate of Appropriateness. (A 000030) As one of the Commissioners explained, the Congregation's proposed building was seen as "a very positive addition" to the historic district "that will stand on its own as a landmark." (*id.*)

Nevertheless – as the Congregation knew from the outset – the proposal also required a variance from New York City's Zoning Resolution ("ZR"). Thus, as expected, on March 27, 2007, the DOB Manhattan Borough Commissioner (the "Boro Commissioner") denied the Congregation's application for a building permit. (*id.*) The Boro Commissioner raised eight "objections" (*id.*), *i.e.*, identified eight respects in which the BSA would need to authorize deviations from the Zoning Resolution if the Congregation were to proceed as planned. Under the City's process, this meant that the Congregation would now have to secure a variance from the BSA, which would, hopefully, overcome any DOB objections to the issuance of a building permit.

On April 1, 2007, just four days after the DOB Boro Commissioner denied the building permit, the Congregation applied to the BSA for a variance. (A 000015) Among other things,

the Congregation submitted the Boro Commissioner's building permit denial and architectural drawings of the structure that the Congregation hoped to build. (A 000015, 000018, 000085-103)

Instead of addressing the merits, Petitioners, on May 25, 2007, wrote to the BSA, claiming that the Congregation's application for a variance was "beyond BSA's subject matter jurisdiction." (A 000240) At that point, Petitioners' "jurisdictional" argument was based on their erroneous contention that the plans submitted to the BSA on April 1, 2007 were different from the plans that the Boro Commissioner had when he denied the Congregation's application for a building permit. (A 000238-40).

This false issue was resolved during the proceedings before the BSA. On June 15, 2007, the BSA asked the Congregation to "provide evidence that the DOB issued their current objections based on the current proposal before the BSA." (A 000257) The matter, however, was swiftly mooted. The DOB's eighth objection (based on the Zoning Resolution's prohibition on space between buildings) was obviated by a change in the Congregation's building design. On August 28, 2007, upon being alerted to this change, the Boro Commissioner dropped the eighth objection and issued a new building permit denial (with seven objections). (A 000348) On September 10, 2007, the Congregation responded to the BSA's request for "evidence that the DOB issued their current objections based on the current proposal before the BSA" (*see* A 000308, A000310) by submitting, among other things, (i) the revised plans, dated August 28, 2007, that the Congregation had submitted to the DOB (A 000403-20), and (ii) the Boro Commissioner's revised building-permit denial (with just seven objections), dated that same day (A 000348). Petitioners filed an untimely administrative appeal of the Boro Commissioner's August 28, 2007 decision (A 002511-12) but never followed-up with an Article 78 proceeding.

The BSA, reasonably, accepted the Congregation's documentation and proceeded to consider the merits of the Congregation's application for a variance. (*See* A 000512).

Petitioners continued their search for a technicality, to no avail. They submitted Freedom of Information Law requests to DOB, and even brought suit on one of them. (*See, e.g.,* A 002522, A 002543, A 004135)

Among other things, Petitioners tried to manufacture a lame conspiracy theory based on a false and unsupported allegation that the signatory above the "Boro Commissioner" line on the March 27, 2007 and August 28, 2007 DOB permit denials was not the Boro Commissioner or the DOB Commissioner's designee. (*See* A 002510-11). Petitioners argued that the "Boro Commissioner" signatures on the March 27 and August 28 DOB permit denials were "the same apparent signatures" (A 002511) and that, while the signatures were "difficult to decipher," they did not "appear to be" the signature of an authorized official (A 002510). On March 25, 2008, Petitioners informed the BSA that, on February 13, 2008, they had submitted a Freedom of Information Law request to the DOB for "[d]ocuments identifying the name and title of the person whose signature appears as 'Examiner' and 'Boro Commissioner' on the March 27 and August 28 DOB permit denials. (A 004136). Petitioners did not provide the BSA with the DOB's response. They contended, however, that a document purportedly received from the DOB, which identifies "Kenneth Fladen" as a DOB "Borough Superintendent" (A 004146), somehow proved that the person who signed the March 27 and August 28 DOB permit denials was not authorized to do so (A 004136-37).

The BSA did not find Petitioners' various allegations about the DOB process persuasive. The BSA Vice Chair described Petitioners' position as "bogus," lacking in "any legal basis," and based on imagined "demons." (A 003726) The Vice Chair concluded: "We have an objection

sheet from the Department of Buildings that's based on a review of the same drawings that are in our files." (A 003725) In response to Petitioners' complaint that the Congregation had changed its plans, the BSA Chair said "It doesn't matter" (A 003727) and added "I don't see what the issue is" (A 003725). She explained: "[W]e've seen this many times, people will go to the Buildings Department with a set of plans. They may have an initial set of objections. They may come back and revise their proposal. They may get a different set of objections." (A 003725) The Chair added that the Congregation was only "requesting a waiver" with respect to the seven objections, and could ultimately be unable to build if the withdrawal of the eighth objection was erroneous: "If there's another objection that they did not identify for the Board, there's no waiver to that[.]" (*Id.*) The Vice Chair concurred: "[I]f there's another objection, then [the Congregation will] have to come and get another variance." (A 003727)

On August 26, 2008, the BSA issued a resolution granting the Congregation a variance. The BSA rejected each of the arguments raised by Petitioners here.

In a footnote, the BSA dispensed with Petitioners' claim that the March 27 and August 28 DOB permit denials were signed by an unauthorized official. *See* BSA Resolution at 1 n.2 (attached as Exhibit C to Petitioners' motion to reargue). The BSA held that the issue was irrelevant because the Charter lists many different ways in which the BSA can acquire jurisdiction to grant a variance. The BSA concluded that it could do so even if the DOB's permit denial happened to be signed by the wrong DOB employee.

While the Congregation had argued that should not be required to prove that an as-of-right alternative would be unable to produce a reasonable return, the BSA elicited such proof from the Congregation. Based on this evidence, the BSA found that the variance was required to ensure that the property would produce a reasonable rate of return.

The BSA also found that "unique physical conditions" at the site warranted the variance. Contrary to Petitioners' assertion, this finding was not based on the fact that the Congregation's synagogue was "landmarked" or that the site was in a "historic district." The Congregation summarized the conditions as follows:

> The unique physical conditions peculiar to and inherent in [the Congregation's] Zoning Lot include: (1) the presence of a unique, noncomplying, specialized building of significant cultural and religious importance occupying two-thirds of the footprint of the Zoning Lot, the disturbance or alteration of which would undermine [the Congregation's] religious mission; (2) a development site on the remaining one-third of the Zoning Lot whose feasible development is hampered by the presence of a zoning district boundary and requirements to align its streetwall and east elevation with the existing Synagogue building; and (3) the dimensions of the Zoning Lot that preclude the development of floorplans for community facility space required to meet [the Congregation's] on-site religious, educational and cultural programmatic needs.

(A 004566).

B. <u>The Procedural History of this Action</u>

Shortly after the BSA granted the Congregation its variance, Petitioners filed a complaint demanding a declaratory judgment to invalidate the BSA variance. Around the same time, other opponents of the project (the "Kettaneh Petitioners") filed an Article 78 proceeding (the "Kettaneh Action) to invalidate the same BSA resolution. The two actions were deemed related and assigned to this Court.

On March 31, 2009, the Court heard oral argument in both actions. Counsel informed the Court that the only issues that were raised in this suit but not in the Kettaneh Action pertained to the BSA' jurisdiction. *See* 3/1/09 Transcript at 6-7 ("we believe they raise the same issue") (attached as Exhibit E to Petitioners' motion to reargue). Petitioners did not dispute this.

On April 17, 2009, the Court issued a decision converting the complaint in this action into an Article 78 petition. On May 26, 2009, Respondents submitted answers and memoranda of law. On June 19, 2009, Petitioners served reply papers.

On July 10, 2009, this Court dismissed the Kettaneh Action on the merits. *See Kettaneh v. Board of Standards & Appeals*, Index No. 113227/08, (Sup. Ct., N.Y. Co. July 10, 2009) (attached as Exhibit D to Petitioners' motion to reargue) (the "Kettaneh Decision").

On August 4, 2009, this Court likewise issued a decision rejecting Petitioners' contentions on the merits. *See* Landmark West! Decision. In its decision, the Court incorporated the Kettaneh Decision into its opinion by reference. *See* Landmark West! Decision at 3. The Court also addressed the allegations that were unique to this action.

Petitioners in this action and the petitioners in the Kettaneh Action appealed this Court's decisions. Those appeals are pending. Petitioners filed this motion on October 23, 2009. On November 9, 2009, the petitioners in the Kettaneh Action moved to intervene in this action.

ARGUMENT

THE MOTION TO REARGUE SHOULD BE DENIED

A. Petitioners Have Raised No Matter Overlooked Or Misapprehended By The Court

Petitioners have not raised "matters of fact or law . . . overlooked or misapprehended" by this Court, the *sine quo non* of a motion to reargue. *See* CPLR 2221(b)(2). Instead, Petitioners have rehashed the same arguments that this Court considered and rejected in its Landmark West! Decision. Petitioners' motion can be denied on that basis alone, without any further consideration of the merits.

The purpose of reargument is to afford a party the opportunity to show that a court has misapplied a controlling principle of law or misunderstood relevant facts. *See Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979), *appeal denied*, 56 N.Y.2d 507 (1982). A motion for

reargument may not serve as a vehicle to rehash the same arguments that a court has already considered and rejected. *See New York Cent. R.R. Co v. Banton Corp.*, 110 N.Y.S.2d 64, 66 (1st Dep't 1952) ("A motion for reargument is not just a repetitious application by a disappointed lawyer, who feels he ought to have as much further reconsideration as he chooses."); *see also Fosdick v. Town of Hempstead*, 126 N.Y. 651 (1891) (denying motion to reargue issues already decided by the court); *accord Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 (1st Dep't 1984).

Petitioners have not identified any gap in this Court's analysis of Petitioners' challenge to the BSA resolution. Even if Petitioners could do so, that would not entitle them to reargue. A court need not address every point raised by counsel in its decision. *See In re Estate of Ancell*, 191 Misc. 2d 252, 253 (Sup. Ct., Westchester Co. 2002); *see also* CPLR 2219. Moreover, the Court, here, ***did*** address all of Petitioners' arguments. *See* Landmark West! Decision (incorporating the Kettaneh Decision and rejecting Petitioners' allegations that purported defects in the DOB Boro Commissioner's permit denial and the Congregation's change in architectural plans deprived the BSA of jurisdiction). The Court's detailed discussion of the issues demonstrates that the Court read the parties' briefs in this action and carefully deliberated over all of Petitioners' arguments.

In short, Petitioners' unhappiness with the result is no basis for reargument. The Court should deny the motion on that ground.

B. <u>This Court Properly Dismissed Petitioners' Action</u>

In any event, this Court properly dismissed this action. Petitioners failed to make the requisite showing that the BSA's decision was arbitrary, capricious, illegal, or an abuse of

discretion. *See* Kettaneh Decision at 15; *see also Soho Alliance v. New York City Bd. of Standards & Appeals*, 264 A.D.2d 59, 62-63 (1st Dep't 2000), *aff'd*, 95 N.Y.2d 437 (2000).

As this Court observed in the Kettaneh Action, New York courts give special deference to the determination of local zoning boards. *See* Kettaneh Decision at 15. Further, courts must make every effort to accommodate a religious use of real property. *See Halperin v. City of New Rochelle*, 24 A.D.3d 768, 773 (2d Dep't 2005), *appeal dismissed*, 7 N.Y.3d 708 (2006).

On reargument, Petitioners have not even attempted to show that the BSA lacked a rational basis to make each of the "five findings" that the BSA may invoke when issuing a variance under the Zoning Resolution. Indeed, this Court correctly found the BSA's findings well-supported by the record:

> The "(a) finding" – The BSA had a rational basis to find that the Congregation's property lot has unique physical conditions, when considered in the aggregate in light of the Congregation's programmatic needs, Kettaneh Decision at 6-19.
>
> The "(b) finding" – The BSA rationally found that the Congregation is a not-for-profit corporation (such that a "(b) finding" need not be made) and that, in any event, the Congregation would be denied a reasonable return in the absence of a variance, Kettaneh Decision at 19-25.
>
> The "(c) finding" – The BSA rationally decided to grant the variance despite claims that four lot-line windows would be blocked and assertions that there might be some incremental shadow impacts, Kettaneh Decision, at 25-27;
>
> The "(d) finding" – There was no support in the record for any claim that the hardships faced by the Congregation were self-imposed, Kettaneh Decision, at 27-28; and,
>
> The "(e) finding" – The BSA reasonably found that the modifications to the Congregation's proposal, which reduced the variance for the rear yard setback, was the minimum required to afford relief, Kettaneh Decision, at 28.

Instead of addressing the merits, Petitioners argue here that (1) the BSA lacked jurisdiction to grant a variance; (2) the BSA applied an "unprecedented" standard in making its "(b) finding"; and (3) the BSA usurped the LPC's jurisdiction. These contentions are meritless.

1. The BSA Had Jurisdiction Over The Variance

Petitioners' attack on the BSA's jurisdiction is premised on their claims that the DOB building-permit denials were signed by the "wrong" DOB official (Pet. Mem. at 7) and that that official reviewed the "wrong" architectural plans (*id.* at 18). As this Court held in its Landmark West! Decision, the BSA acted well within its discretion in construing the Charter as vesting it with jurisdiction to grant variances without regard to these erroneous contentions. *See* Landmark West! Decision at 5. The BSA, as held by the Court (Landmark West! Decision at 4-5), had jurisdiction pursuant to City Charter Sections 668 and 666(5) and thus was not required to comply with the requirements of Section 666(6)(a), the provision relied on by Petitioners. Nevertheless, there are numerous ***additional*** grounds on which this Court may reject Petitioners' "jurisdiction" challenge.

First, Petitioners' own assertions on page seven of their brief are sufficient to vest the BSA with jurisdiction. There, they assert that "the 2005 and 2007 DOB Notices of Objections were issued by Kenneth Fladen, a 'provisional Administrative ***Borough Superintendent***'" and that the BSA is vested with authority "'[t]o hear and decide appeals from and review . . . any . . . decision or determination of the commissioner of buildings or ***any borough superintendent*** of buildings acting under a written delegation of power from the commissioner of buildings.'" (Pet. Mem. at 7 (citing Petitioners' Exhibit J and City Charter § 666(6)(a)) (emphasis added). Thus, if, as Petitioners assert, Mr. Fladen signed the notices of objections, and if, as Petitioners assert, Mr. Fladen was a "borough superintendent," the BSA clearly had the authority to "hear and decide appeals" from his determination. Since Section 666(6)(a) does not require the signature of a "borough commissioner" and does not divest the BSA of jurisdiction where architectural plans submitted to the DOB are amended upon appeal to the BSA, Petitioners' assertions that

Mr. Fladen was not a "borough commissioner" and that the plans that he reviewed were subsequently amended are misplaced.

Second, Petitioners' factual assertions about the process before DOB are not supported by the administrative record. For example: (1) The March 27, 2007 and August 28, 2007 DOB permit denials are both stamped "Boro Commissioner . . . Denied." (A 000018, A 000348) The BSA could reasonably have inferred that these permit denials were either signed by the Boro Commissioner or another authorized employee. The document that Petitioners claim to have received as a response to a Freedom of Information Law request (A 004146) is nothing more than Mr. Fladen's appointment letter. It states nothing about his role, if any, in this matter. It does not compel the conclusion that the permit denials were unauthorized. (2) The record also shows that BSA reviewed the same plans that were before the DOB. In response to the BSA's request that the Congregation "provide evidence that the DOB issued their current objections based on the current proposal before the BSA" (A 000257), the Congregation submitted plans, dated August 28, 2007, that were before the DOB (A 000403-20) and DOB's revised permit denial, signed that same day (A 000348). The DOB was not required to adopt Petitioners' speculations about what plans the DOB reviewed.

Third, at most, Petitioners' complaints about the DOB process bear on the DOB's decision to ***deny*** the Congregation a building permit. Petitioners did not file an Article 78 challenge to overturn the DOB denial nor did they name the DOB in this suit. Petitioners cannot challenge the DOB permit denials in this suit.

Fourth, Petitioners are not claiming that the DOB permit denials were erroneous. Indeed, Petitioners' position is that the DOB – regardless of the official or architectural plans involved – ***correctly*** concluded that the Congregation's plan would require a variance. It would

make absolutely no sense to deprive the BSA of jurisdiction to grant a variance in such circumstances.

2. The BSA's "Mixed Purpose" Analysis Does Not Aid Petitioners

Petitioners' contention that the BSA did something unprecedented when it required the Congregation – a not-for-profit organization – to meet the "reasonable return" test with respect to certain aspects of the project (Pet. Mem. at 19-20) could not be more curious. To the extent that the BSA strayed from the strict language of Section 72-21 of the Zoning Resolution in granting the Congregation a variance, its deviation only made it ***harder*** for the Congregation to get a variance, not easier.

As this Court has already explained, Section 72-21(b) of the Zoning Resolution states that "'this finding [concerning reasonable return] ***shall not be required*** for the granting of a variance to a non-profit organization.'" Kettaneh Decision at 20 (quoting N.Y.C. Z.R. § 72-21(b)) (emphasis added). In this case, however, the BSA concluded that "the exemption from this requirement did not apply when a non-profit was seeking variances for a total or partial for profit building," *i.e.*, a mixed purpose development. Kettaneh Decision at 20. The Congregation respectfully disagrees with the BSA's decision to stray from the clear language of Section 72-21(b). Nevertheless, in light of the BSA's decision to ***grant*** the Congregation a variance, the BSA's decision to impose a ***heavier burden*** on the Congregation than is permitted by statute is harmless. Petitioners, certainly, have no cause to complain. As this Court noted, "the BSA specifically requested that the Congregation submit reasonable return analysis" – even though it was undisputed that the Congregation was a "non-profit organization" within the meaning of Section 72-21(b). The BSA's imposition of a tougher standard on the Congregation cannot possibly warrant Article 78 relief in Petitioners' favor.

3. The BSA Did Not Usurp The LPC's Jurisdiction

Finally, Petitioners' claim that the BSA usurped the LPC's authority under Section 74-711 of the Zoning Resolution (Pet. Mem. at 23) is plainly meritless. ***First***, contrary to Petitioners' assertion, Section 74-711 does not vest the LPC with "exclusive" jurisdiction. Section 74-711 does not use the term "exclusive" and does not imply that any power that it vests in the LPC is to divest the BSA of corresponding authority. Certainly, nothing in that provision purports to cut back on the BSA's authority under Section 72-21 of the Zoning Resolution to designate aspects of zoning lots as "unique physical conditions" under the Zoning Resolution. ***Second***, in any event, the BSA did not invoke the landmarked status of the synagogue or the historic-district status of the remaining property to find "unique physical conditions" at the Congregation's property.[2] Indeed, the Congregation would have suffered from "unique physical conditions" even in the absence of any historic preservation law. The Congregation made the requisite showing by showing that (1) development is hampered by the zoning district boundary on the property and the need to align the streetwall and east elevation with the existing Synagogue building; (2) the dimensions of the lot are insufficient to meeting the Congregation's on-site religious, educational and cultural programmatic needs; and (3) the Synagogue consumes a large part of the property and cannot be altered because it is of significant cultural and religious importance to the Congregation. (A 004566) Petitioners' claim that the BSA usurped the LPC's authority is meritless.

[2] Petitioners try to change the BSA's reference to the "location of the landmark Synagogue" into a reliance by the BSA on the City's landmarks preservation law, rather than on the importance of the landmark structure to the Congregation's mission. *See* p. 10 of the BSA Resolution, attached as Exh. C to Petitioners' Motion to Reargue.

CONCLUSION

For the reasons stated above, this Court should deny Petitioners' motion for leave to reargue.

Dated: New York, New York
December 29, 2009

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

LANDMARK WEST! INC, 91 CENTRAL PARK WEST CORPORATION AND THOMAS HANSEN, Petitioners, For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules -against- CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel, Respondents.	Index No. 650354/08 (Lobis, J.) **AFFIRMATION OF COURTNEY DEVON TAYLOR IN OPPOSITION TO THE POST-JUDGMENT MOTION TO INTERVENE**

COURTNEY DEVON TAYLOR, an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under the penalties of perjury:

Introduction

1. I am associated with Proskauer Rose LLP, counsel to Respondent "Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel in the City of New York" (the "Congregation"). I am submitting this affirmation to set forth the Congregation's opposition to the post-judgment motion to intervene (dated November 9, 2009) filed by the petitioners in the separate action entitled *Kettaneh v. Board of Standards & Appeals*, Index No. 113227/08 (Sup. Ct., N.Y. Co.) (Lobis, J.) (the "*Kettaneh* Parties"). The *Kettaneh* Parties should not be allowed to intervene in this action (the "Landmark West! Action").

2. The *Kettaneh* Parties claim that they should be allowed to intervene here, now that this Landmark West! Action has been dismissed, on the theory that appeals from this action and from the *Kettaneh* Parties' separate, unsuccessful suit might be "joined and heard together" by the First Department and that, if this Court issues another decision (on the motion for reargument that the petitioners in this Landmark West! Action have filed), that decision – allegedly based on an "incomplete argument" in this case – "could be prejudicial" to the *Kettaneh* Parties' appeal. *See* Affirmation of Alan D. Sugarman, dated November 9, 2009, ¶ 2.

3. The Court should not allow the *Kettaneh* Parties to intervene at this late stage. First, the *Kettaneh* Parties' motion to intervene is untimely to say the least. Second, the *Kettaneh* Parties' participation in this action is unnecessary. The arguments in this case have been anything but "incomplete." "Exhaustive" would probably be a conservative description. Moreover, nothing that this Court might do in this action could prejudice the *Kettaneh* Parties in their appeal of the adverse judgment in the Kettaneh Action. Third, the *Kettaneh* Parties have not submitted a proposed pleading with their motion. Their motion can be denied on that ground alone.

Background

4. In September 2008, the *Kettaneh* Parties filed their own Article 78 proceeding entitled *Kettaneh v. Board of Standards & Appeals*, Index No. 113227/08 (Sup. Ct., N.Y. Co) (Lobis, J.) (the "Kettaneh Action") to set aside a resolution of the Board of Standards and Appeals (the "BSA") that granted the Congregation a variance. Around the same time, the petitioners in this action, other opponents of the Congregation's project, filed their own action (then styled as a plenary suit) to invalidate the same BSA resolution (the "Landmark West! Action"). The two actions were deemed related and assigned to this Court. They were not consolidated.

5. The *Kettaneh* Parties took no steps with respect to this Landmark West! Action. They did not seek to intervene here; they did not seek to have the actions consolidated; they did not seek to have this Landmark West! Action stayed; and they did not assist in Respondents' efforts to have it dismissed. Presumably, at the time, the *Kettaneh* Parties viewed it as strategically beneficial for opponents of the BSA resolution to pursue challenges in two different suits (one plenary; one Article 78).

6. In a decision dated July 10, 2009 (the "Kettaneh Decision"), this Court dismissed the Kettaneh Action on the merits. In a decision dated August 4, 2009 (the "Landmark West! Decision"), this Court likewise dismissed the Landmark West! Action. The dismissals in both actions were entered as final judgments.

7. The *Kettaneh* Parties appealed from the adverse judgment in the Kettaneh Action and the petitioners in this suit appealed from the adverse judgment in this Landmark West! Action. The appeals from the separate judgments filed in the separate actions are now pending.

8. While their appeal was pending, the petitioners in this Landmark West! Action filed a motion for leave to reargue the Landmark West! Decision. Shortly thereafter, the *Kettaneh* Parties moved to intervene in this Landmark West! Action.

ARGUMENT

9. The Court should deny the *Kettaneh* Parties' motion to intervene. The *Kettaneh* Parties have not (and cannot) satisfy any of the elements of CPLR § 1012, which states that "upon timely motion, any person shall be permitted to intervene in any action . . . . when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." CPLR § 1012. Similarly, the *Kettaneh* Parties cannot meet the standards of CPLR § 1013 (referenced only in the *Kettaneh* Parties' notice of motion), which

allows courts to grant jurisdiction where such intervention will not unduly delay the action or prejudice the rights of the opposing party. *See* CPLR § 1013.

10. **First**, the *Kettaneh* Parties' motion to intervene is so untimely that intervention at this late point would substantially prejudice the Congregation. *See* CPLR § 1012 (requiring that application for intervention be made by a "timely motion"). The Congregation has an interest in proceeding with its project without the cloud of litigation. A post-judgment intervention would undermine that interest, which the Legislature sought to protect by enacting a ***30-day*** statue of limitations on challenging zoning variances. *See* N.Y.C. Admin. Code § 25-207[a]; *see also Soc'y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991) (recognizing that challenges by special interest groups or pressure groups can generate interminable delay and interference with projects). It would be inappropriate to allow the *Kettaneh* Parties to intervene and further complicate this action now. *See Town of Crown Point v. Cummings*, 300 A.D.2d 873, 874 (3d Dept 2002) (denying a post-decision motion to intervene in an article 78 proceeding).

11. The *Kettaneh* Parties do not (and cannot) claim that they were unaware of this action. Indeed, they offer no excuse for their strategic decision to wait more than a year before seeking to intervene. *See Rectory Realty Assoc. v. Town of Southampton*, 151 A.D.2d 737 (2d Dept 1989) (denying motion to intervene in a zoning dispute where movants did not attempt to intervene until more than a year after they became aware of the action). The *Kettaneh* Parties have been aware of this Landmark West! Action since its inception. Having intentionally filed a separate action, and having intentionally kept the actions separate, the *Kettaneh* Parties cannot now complain that they should be permitted to intervene in the very lawsuit that they have eschewed.

12. **Second**, the *Kettaneh* Parties have not (and cannot) show that the petitioners in this Landmark West! Action have litigated this action in an "inadequate" manner ***and*** that the *Kettaneh* Parties "may be bound by the judgment." *See* CPLR § 1012. While the Court decided against the Landmark West! petitioners (as well as the *Kettaneh* Parties), the Landmark West! petitioners have litigated aggressively. The briefing in both actions has been extensive. In any event, the *Kettaneh* Parties' cannot demonstrate that their claims will be affected – let alone determined – by any decision in this Landmark West! Action. This Court has treated the cases separately. The *Kettaneh* Parties in the Kettaneh Action have been able to file their own petition, submit their own briefs, make their own arguments, and pursue their own appeal. The *Kettaneh* Parties do not need to be in the Landmark West! Action as well.

13. **Third**, even if intervention at this point made sense, it would be appropriate for the Court to deny such relief on this record. *See* CPLR § 1014; *Lamberti v. Metro. Transp. Auth.*, 170 A.D.2d 224 (1st Dept 1991); *Farfan v. Rivera*, 33 A.D.3d 755 (2d Dept 2006); *Zehnder v. State*, 266 A.D.2d 224 (2d Dept 1999). The *Kettaneh* Parties have not submitted a proposed pleading with their motion. The Court can deny the motion on that ground alone.

Conclusion

14. For the reasons stated above, this Court should deny the *Kettaneh* Parties post-judgment motion to intervene.

Courtney Devon Taylor

COURTNEY DEVON TAYLOR

Dated: December 29, 2009