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.

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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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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.

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