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 PROPOSED PETITIONERS-INTERVENORS' MOTION TO INTERVENE**

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**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

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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;

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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).