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

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

REPLY AFFIRMATION OF ALAN D. SUGARMAN ON BEHALF OF THE KETTANEH PETITIONERS

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

1. I am the attorney for Nizam Peter Kettaneh and Howard Lepow, Movants and Intervening Petitioners (Kettaneh or the Kettaneh Petitioners.) This affirmation replies to the responses of the above Respondents and Landmark West filed on December 29, 2009, responding to Landmark West's October 23, 2009 Motion for Reargument (# 23-#28) and to Kettaneh's November 9, 2009 Motion to Intervene (#29-#31-1).[1]

[1] The following responses were filed December 29, 2009: Affirmation Of David Rosenberg In Opposition to Motion for Leave to Intervene on behalf of Landmark West Petitioners (#37); City Respondents' Memorandum of Law in Opposition to Petitioners' Motion to Reargue (#38), City Respondents' Memorandum of Law in Opposition to Proposed Petitioners-Intervenors' Motion to Intervene (#39), Respondent Congregation Shearith Israel's

I. Introduction

2. The Landmark West Motion to Reargue concerns issues fully raised in the Kettaneh Case, but either overlooked or misapprehended by the Court. Kettaneh's intervention is solely as to issues raised by Landmark West in its motion and in the responses thereto.[2] Kettaneh seeks to intervene for the purpose of protecting its interests were the Court to make further rulings that in effect modified the Kettaneh Decision or erroneous findings that Kettaneh had not raised issues that in fact had been raised in the Kettaneh Case.

3. As to the issues for which reargument is sought, the City and Congregation Respondents:

- do not respond to the assertions of Kettaneh and Landmark West as to the primary jurisdiction of the New York City Planning Commission in respect to providing relief from landmarking hardships;
- do not suggest any statutory authority for the consideration by the BSA of a landmarking hardship under Z.R. § 72-21(a);
- do not address the extensive case law requiring that the reasonable return analysis under § 72-21(b) consider the reasonable return that could be obtained from the entire property, and not just the bifurcated portion of the Congregation's as-of-right building with two luxury condominium floors; and,
- do not identify in the BSA administrative record even one scintilla of fact to show that changes were made in the building plans that related to the disappearance of the requirement of a 40-foot separation between the upper floor condominiums and the synagogue; the BSA nevertheless approved a project when the BSA knew that further variances were required.

Respondents have gone to great lengths to avoid even a discussion of these issues, and skirt, rather than respond, to Kettaneh's arguments.

Memorandum of Law in Opposition to Petitioners' Motion to Reargue (#40), and Affirmation of Courtney Devon Taylor In Opposition to the Post-Judgment Motion to Intervene on behalf of the Respondent Congregation (#41).

[2] There is one exception. The Kettaneh Case did not raise Landmark West's technical issue of whether the BSA had properly obtained jurisdiction of the appeal resulting from the absence of proper DOB signatures.

4. Striking similarities exists with the recent Columbia University eminent domain case where New York's real estate administrative agencies trampled on and over applicable law. *Matter of Kaur v New York State Urban Dev. Corp.*, __ A.D.3d __, ___ N.Y.S.d ___, 2009 NY Slip Op 08976 (1st Dept. 2009). In *Matter of Kaur*, the New York City Economic Development Corporation and the Empire State Development Corporation decided that private property needed to be condemned to make way for a large scale development by Columbia University, and then the City and State went on to manufacture "blight" findings needed to justify the condemnation - it was the cart before the horse. As the Appellate Division observed: "Having committed to allow Columbia to annex Manhattanville, the EDC and ESDC were compelled to engineer a public purpose for a quintessentially private development: eradication of blight." This Congregation's case is similar - first the Mayor of the City of New York appears to have given his "imprimatur" to the project and apparently directed that variances should be provided to politically connected Congregation Shearith Israel for luxury condominiums — then the BSA was given the job to make the findings required for a variance under the Zoning Resolution, after LPC balked at providing at hardship relief. In the words of the Respondent BSA Chair, this expectation placed the BSA in a "hard spot", for the BSA would have to engage in contortions of the law and fact so as to make the necessary findings. Yet, the BSA went ahead, and made findings that are equivalent to the "idiotic" and "preposterous" findings made by the City and State agencies in *Matter of Kaur*. As the EDC and ESDC did in *Matter of Kaur*, in this case the BSA ignored the findings of the local Community Board, relied upon the same consultant AKRF criticized by the Appellate Division in *Matter of Kaur*, refused to respond to FOIL requests as to improper ex parte meetings between the hearing officer Respondents and the applicant, engaged in result driven subjective interpretations of statutes, — ignored reasoned fact based qualified expert testimony submitted by opponents relying rather upon conclusory statement of counsel,

and ignored the clear language of statutes so as to arrive at the pre-determined results. There is one interesting difference with the instant proceeding — in *Matter of Kaur* the agencies had no rules to define the meaning of "blight" and other terms: here, the BSA had issued detailed guidelines as to the financial analysis for the § 72-21(b) finding, and then ignored the guidelines in a way to favor the applicant Congregation.

5. Notably, the City in its responses continues to refuse to address the issue of the dominant and exclusive role of the City Planning Commission in providing relief from landmarking hardships. There is an inherent conflict of interest presented by the Corporation Counsel's dual representation of the BSA and the City Planning Commission. The BSA, by claiming that it may provide variances based upon hardships arising out of landmarking, intrudes upon the powers statutorily reserved and granted only to the City Planning Commission. Nonetheless, in the Landmark West Case, the Corporation Counsel appears both on behalf of the BSA and the City Planning Commission, the latter of which has filed no affidavits. The Corporation Counsel is appointed by the Mayor and presumably would consult with the Mayor's Office in resolving the overreaching by BSA and the BSA arrogating to itself City Planning Commission powers, thereby disturbing the allocation of responsibilities in the Zoning Resolution.

6. But, the Mayor's Office is not the entity which is responsible for interpreting the City Charter and the Zoning Resolution: the responsible entities are the courts of the State of New York. Moreover, the City Planning Commission is an independent commission - the Commission has never taken action to approve relief for the landmarking hardships as sought by the Congregation. Nor has the City Planning Commission ever adopted any resolution ceding authority over landmarking hardships to the BSA (although any such action would be in violation of the City Charter.) Obviously uncomfortable with this conflict, the Corporation

Counsel is attempting to finesse this problem by just ignoring any references to City Planning Commission and hoping to avoid any statements that would in the future come back to haunt the City Planning Commission.[3]

II. Kettaneh Should be Permitted to Intervene

7. Landmark West now opposes Kettaneh's Intervention Motion, continuing to assert falsely that the reargument issues were not raised in the Kettaneh Case. This is all the more surprising since Kettaneh's Intervention Motion clearly identifies where Kettaneh had raised these issues .

8. It is apparent that when Landmark West incorporated the Kettaneh arguments into its June 21, 2009 Reply Memorandum,[4] Landmark West had not reviewed Kettaneh's moving and reply memoranda of law, and apparently still has not done so. Clearly, the issues raised in the reargument motion - save one - were all explicitly raised in the Kettaneh Case.

9. Respondents as well offer no compelling reasons why intervention should not be granted. That there are common issues of law and fact is self-evident; moreover the Court explicitly incorporated the Kettaneh Decision into the Landmark West Decision.[5] There are no issues of statute of limitations, since, Kettaneh has not raised new issues; the issues were all raised Kettaneh's initial September, 2008 Article 78 Petition within 30 days of the BSA decision.

10. Respondents contend that Kettaneh's Motion to Intervene is defective in that Kettaneh did not file a pleading. With its Motion to Intervene, Kettaneh did file a moving

---

[3] *See Messinger v. Giuliani*, N.Y.L.J., Sept. 2, 1997, No. 402236-1997 (Sup, Ct. N.Y. Co.).

[4] Landmark West's Memorandum of Law in Support of Their Second Amended Verified Petition, June 21, 2009, n.1 at 1; that memorandum was filed with Landmark West's reply, and the Respondents did not ask to respond thereto.

[5] The Court states in the Kettaneh Decision: "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."

affirmation, to which is attached a memorandum of law.[6] This is all that is necessary at this point in the proceeding. The parties hereto, as well as the Court have had full notice of everything filed in the Kettaneh Case — the Court recognized this by incorporating the Kettaneh Decision in the Landmark West Decision. Thus, this is a circumstance where Kettaneh, on its motion for intervention, had no need to refile all of its papers in this matter. *T&V Construction v. Pratti,* No. 21299-2006, 2009 NY Slip Op 30587(U) (Sup. Ct. Suffolk Co. 2009). The arguments which Kettaneh wishes to make as to the issues raised for reargument are described and discussed in full in its Motion to Intervene, together with the papers filed in the Kettaneh Case. *See Visnetin v. Superintendent*, 4 Misc.3d 1018(A), 798 N.Y.S.2d 349 (Sup. Ct. Putnam Co. 2004) ("The purpose of the pleading requirement is to demonstrate that the proposed intervenor has a real, direct and substantial interest in the outcome of the proceeding"). Should the Court so desire as a condition to intervention, Kettaneh will re-file the Kettaneh Case papers in the Landmark West docket.[7] *Nicholson v. Keyspan Corp*, 14 Misc.3d 1236(A), 836 N.Y.S.2d 501(Sup. Ct. Suffolk Co. 2007). Clearly, Kettaneh has a bona fide interest in the issues involved in this motion to reargue.

11. Moreover, intervention in an Article 78 proceedings is provided on a more liberal basis under CPLR § 7802(d) as explained by the Court of Appeals. *Greater New York Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716 (1998) ("Permission to intervene in an article 78 proceeding may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal"). Importantly, Kettaneh does not raises new claims and relates to the same events and the same proceedings at the administrative agency

[6] Attached as Ket. Ex. H to the Intervention Motion is Kettaneh's unfiled "Further Reply Memorandum in Support of Verified Petition." This memorandum addresses a number of points raised by Respondents in their responses to the reargument motion including the bifurcation issue and the attempt by the Congregation to rests its case on conclusory assertions of counsel.

[7] The City filed a 6500 page BSA administrative record in Kettaneh - it is not known whether the City filed a second duplicate set of the two boxes of record again in the Landmark West Case.

level and raised by Kettaneh within 30 days after the BSA decision. Under CPLR § 7802 (d), in an Article 78 proceeding, the Court may allow any interested person to intervene, and the Kettaneh Petitioners certainly are interested persons.

12. The prejudice to Kettaneh is acknowledged inadvertently by the City when it asserts that "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" (City Intervention Memorandum at 5.) If the Court were to make such a ruling on the reargument motion, no doubt the City and the Respondents would appeal to the Appellate Division. In that appeal, Kettaneh would not be an appellee.

13. Kettaneh has already been prejudiced because, in reaching the July 8, 2009 Kettaneh Decision, the Court appears to have been influenced by the May 21, 2009 arguments made by the Congregation and City in the Landmark West Case, as to which Kettaneh was unable to respond, since Kettaneh had been fully submitted. The Court refused to allow Kettaneh to file a supplemental memorandum responding to the Respondents briefs of May 21, 2009 in the Landmark West Case; the Court subsequently issued the Kettaneh Decision on July 8, 2009 — which was after the Landmark West case has been submitted to the Court on June 23, 2009.

14. These May 21, 2009 arguments of Respondents ignored the claim of usurpation by the BSA of the jurisdiction of the City Planning Commission (as distinguished form the Landmarks Preservation Commission) and failed to identify where any statute provided any jurisdiction for the BSA to use a landmarking hardship as physical condition under § 72-21 of the Zoning Resolution or elsewhere. The Respondents glossed over these significant issues, and the Court followed the lead of the Respondents, ignoring the arguments of Kettaneh. Similarly, the Court could have, and appears to have, relied up the false and misleading citations

to the record made by the Congregation in its May, 2009 filings in the Landmark West Case and seemed to accept as evidence mere conclusory assertions of the Congregation's counsel, as the Congregation had argued was appropriate.

III. The Bifurcation Issue

15. Regarding the particular matters as to which reargument was sought by Landmark West, one is the so-called bifurcation issue, an issue exhaustively discussed by the Kettaneh Petitioners.[8] The issue presented by Petitioners, and to be decided by the Court, is whether there is any basis in statute or precedent authorizing BSA to evaluate the return under Z.R. § 72-21(b) upon only a portion of the property. The Court neglected to address this issue in the Kettaneh and Landmark West Decisions or to address the extensive discussion of the precedents cited by Kettaneh. These precedents would have required consideration of a reasonable return analysis for the entire project, not just the bifurcated analysis of the two floor condominium portion, the analysis upon which the BSA based its decision. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978), *Northern Westchester Professional Park Associates v. Bedford*, 60 N.Y.2d 492, 503-504 (N.Y. 1983); Koff v. Flower Hill, 28 N.Y.2d 694 (1971); *Concerned Residents v. Zoning Bd. of Appeals*, 222 A.D.2d 773, 774-775 (3rd Dep't 1995); Spears v. Berle, 48 N.Y.2d 254, 263 (N.Y. 1979); *Citizens for Ghent. Inc. v. Zoning Board of Appeals of Town of Ghent*, 175 A.D.2d 528, 572 N.Y.S.2d 957 (3rd Dep't 1991) and *Concerned Residents of New Lebanon v. Zoning Board of Appeals of Town of New Lebanon*, 222 A.D.2d 773, 634 N.Y.S.2d 825 (3rd Dep't 1995). Taking its cue from the Respondents, who skirted, and continue to skirt, around these precedents by simply ignoring them, the Court in its decisions ignored the precedents and the related argument as to this most basic issue.

[8] Landmark West did not raise the bifurcation issue in its initial complaint nor it in its Second Amended Verified Petition of May 9, 2009. Landmark West first raised the bifurcation issue obliquely in its June 21, 2009 reply papers.

16. The Congregation, aware that these precedents demolish its position, rather than attempt to distinguish the precedents, attempts to fudge the issue by falsely claiming that "the BSA found that *the variance* was required to ensure that *the property* would produce a reasonable rate of return" (emphasis supplied).[9] If the Congregation means by the words *"the property"* the entire development site, then this assertion is a blatant falsehood; the BSA never made a finding as to the return on the entire property. This is evident by the fact that the Congregation is unable to provide a citation to anything in the administrative record in support of their assertion; the BSA Resolution only discusses the bifurcated analysis, similarly skirting the issue of the all as-of-right analysis.

17. As Kettaneh has described, the Congregation was initially forced by BSA staff to provide an analysis of an all-residential as-of-right building, which the Congregation described as the "Scheme C" Analysis (and also the "FAR 4.0" analysis); the Congregation last submitted a Scheme C analysis (flawed as it was) in December, 2007, but thereafter, with the collusion of the BSA, attempted to "disappear" the analysis, since a completed analysis of a true as-of-right building would have doomed the Congregation's application for variances for the condominiums.[10] It is not in dispute that the December 2007 financial analysis was not of an all-residential building, thereby understating the financial return to the Congregation. It is not in dispute that the land value in the December 2007 analysis was overstated, further understating the return to the Congregation. It is not in dispute that when City did adjust the land value in its responsive pleading to the Kettaneh Petition, the return to the Congregation exceeded the return

[9] The Congregation Reargument Memorandum at 7 asserts inaccurately and without substantiation:

> "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" (emphasis supplied).

[10] *See* Kettaneh's Further Reply Memorandum at 3 attached as Ket. Ex. H to Kettaneh's Intervention Motion, which discusses this issue at length.

which the Congregation and the Congregation's expert opined and agreed was reasonable. These matters were all discussed at the hearing and in the papers filed by the Kettaneh Petitioners, but were completely ignored by the Court in its decisions, and avoided as well by the Respondents in all of their filings.

IV. In Considering Landmarking Hardships as a Physical Condition, the BSA Usurped the Authority of the City Planning Commission and Exceeded the BSA's Statutory Powers Under § 72-21 of the Zoning Resolution

18. Respondents and the Court have conveniently "forgotten" to acknowledge that both Kettaneh and Landmark West asserted that the BSA, in considering landmarking as a hardship to substantiate a variance under Zoning Resolution § 72-21, had usurped the authority of not just the LPC, *but also of* the City Planning Commission.[11] Respondents conveniently ignore the usurpation of the City Planning Commission powers.[12] Kettaneh raised the issue of the City Planning Commission jurisdiction explicitly at the joint hearing. Without citing any statutory or case law basis, and in the face of multiple statutes assigning this authority principally to the City Planning Commission, Respondents and the Court have done nothing other than make up law conferring jurisdiction on LPC where none exists.

19. Moreover, Petitioners never asserted that the BSA cannot provide variances for landmarked buildings, as mischaracterized by Respondents. Of course the BSA can provide a variance for landmarked buildings — but, the BSA just cannot obliterate the careful landmarking laws by claiming that landmarking is a physical condition hardship under §

---

[11] *See* Kettaneh's Further Reply Memorandum attached as Ket. Ex. H to Kettaneh's Intervention Motion at 18.

[12] The City indeed cites to Kettaneh's argument on usurpation by the BSA when at 18 of the City Reargument Memorandum, it states: "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 35-8."

Kettaneh's Reply Memorandum at 36 states quite clearly: "The Zoning Regulation clearly removes the BSA from any role in deciding when a hardship from landmarking requires relief. The LPC has a role and the *City Planning Commission* has a role, but the BSA has absolutely no role."

72-21(a). Where a claim for relief from a hardship allegedly created by landmarking, the Zoning Resolution uniformly requires action by the City Planning Commission, and sometimes by LPC as well. The Congregation did not seek, and the BSA did not grant, a variance to a landmarked building. The variances herein were provided for the construction of an new building to be located on a vacant site created by demolishing the existing Community House building together with an existing vacant lot.[13] (For the purposes of the variance application, the development site thus should be considered a vacant lot.)

20. Aware of this lack of statutory authority, and despite the explicit findings by the BSA to the contrary, the Congregation in its response to the Reargument Motion lamely and inaccurately contends that the BSA did not consider landmarking as a hardship in finding a unique physical condition on the vacant site. Aware of its vulnerability on this issue, the Congregation argues, as discussed below, that the BSA had found other rationales for the physical condition hardship required for the § 72-21(a) finding for the condominium variances. Because this issue was raised by the Respondent Congregation in its Reargument response, it is necessary to once again address this issue.

V. There Is No Basis For The City's Contention That The Existence of a Landmarked Building on the Site Constituted a Unique Physical Condition That Created A Hardship Requiring Variances for the Upper Floor Condominiums

21. The City readily acknowledges that the landmarking was considered by the BSA and the Court as a physical condition under Z.R. § 72-21(a).[14] Without the landmarking hardship, there is nothing in the Record which provides a factual basis for the § 72-21(a) finding for the condominium variances. The Congregation tried to argue that access and circulation

[13] The Congregation never asserted that there would be any difficulty or undue expense in demolishing the existing Community House. Thus, the City's reliance on cases where use variances were based upon the excessive costs in demolishing or remodeling a building are inapposite.

[14] City Reargument Memorandum at 8.

hardships required variances for the Community House, but provides nothing, other than the landmarking hardship, to support the condominium variances.[15]

22. The Respondents' argument seems to be that landmarking creates a financial burden on the property owner and that the landmarking is a physical condition under § 72-21(a). Were one to accept the position of the Congregation and the City, where a property is located in a landmarked district, then the BSA is not required to make a finding under § 72-21(a) , since all landmarking imposes some financial impact upon the property owners, and the BSA has in its own arrogance decided to rewrites the Zoning Resolution so that landmarking is a physical condition cognizable under § 72-21(a).

23. The City is aware that it is on thin ice in arguing that landmarking is a physical condition under § 72-21(a). The City tries to bolster the absence of any statutory basis for the jurisdiction of § 72-21(a) to justify the BSA's assertion of jurisdiction by citing to inapposite case law. But, not one of the cases in any way relates to landmarked buildings. Nor does the City provide any argument as to how the landmarking creates a hardship that can be relieved only by variances for luxury condominiums. The City glosses over the causation requirement in § 72-21(a) and glosses over how the landmarked synagogue creates a hardship not resolved by an as-of-right building or how the hardship relates to the condominium variances. Most important, the fact that the Synagogue is landmarked is not a physical condition. So, the BSA has in effect removed from § 72-21(a) the requirement that the condition be physical and that it be causally related to the hardship and the variances.

[15] The Congregation is back again with the thoroughly debunked claims that the needs to provide access to the Sanctuary for the disabled and elderly was a hardship arising out of a unique physical condition so as to satisfy the § 72-21(a) finding for the upper floor luxury condominiums. Despite Kettaneh's repeated debunking of the claim, and in the face of the Congregation's own architects disagreement, the Congregation still claims its needs variances for a new building to resolve access and circulation problems, the Congregation persists with its false innuendos, if not untrue claims, that it required variances for the condominiums or even a new community center to resolve access for the "disabled and elderly congregants." Congregation Reargument Memorandum at 3-4.

24. What is worse is the unbridled discretion that the BSA has given itself as to handing out variances - clearly, the BSA cannot engage in subjective interpretations of § 72-21(a) in a way to provide variances to favored religious organizations. This type of loose statutory construction is what was firmly rejected by the First Department and the Court of Appeals in *Matter of Kaur* and another recent Court of Appeals decision rejecting efforts of New York City agencies to skirt real estate laws.[16] These courts rejected the interpretations of statutes by real estate administrative agencies that were not only unconstitutionally vague, but were not in accord with the plain words of the applicable statutes.[17] In *Matter of Kaur* the Appellate Division rejected the same type of "ad hoc and selective enforcement" and observed "One is compelled to guess what subjective factors will be employed in each claim of blight." The BSA has engaged in the same type of subjective "analysis" in its subjective analysis of physical condition.

25. What also is missing from the City and the BSA's contrived argument that the landmarked synagogue is a hardship is any explanation at all as to how the existence of landmarking of the Synagogue somehow creates the need for a variance for under § 72-21(a). If the argument is that the landmarking creates a financial burden on the Congregation, then other provisions of the Zoning Resolution, requiring action by the City Planning Commission and conditions on the landmarked site then come into play — not the self-serving subjective analysis of the BSA herein.

---

[16] *Roberts v Tishman Speyer Props., L.P.,* 13 N.Y.3d 270 (2009) (disregarding administrative agency's interpretation of statute which is improper and conflicts with the plain language of the statute). *See* Kettaneh's Further Reply Memorandum attached as Ket. Ex. H to Kettaneh's Intervention Motion at 33.

[17] In *Matter of Kaur*, the Appellate Division castigated the environmental "expert", AKRF, as having been "thoroughly compromised": "This search for distinct 'blight conditions' led to the *preposterous* summary of building and sidewalk defects compiled by AKRF." AKRF was the Congregation's environment consultant as well, and its report as to Shearith Israel was similarly preposterous and unprofessional.

VI. There is No Basis in the Record To Support the Unique Physical Condition Hardship Relating to the Condominium Variances

26. Absent the finding of a unique physical condition based upon the landmarking hardship, there is nothing left in the BSA administrative record or the BSA findings to support the (a) finding required as a condition precedent for the granting of a variance for the upper floor condominiums. The Congregation attempts to get around this issue in its response to the reargument motion by citing to A-005661 of the BSA'S Administrative Record, but ther Respondent's citation is not a citation to facts in the record. The Congregation's attorneys are merely citing to their own conclusory fact-free brief filed in the BSA proceeding. That attorney conclusory briefs cannot support a BSA finding is addressed in Kettaneh's Further Reply Memorandum attached as Ket. Ex. H to Kettaneh's Intervention Motion.[18]

27. Reliance on conclusory statements of counsel is the best that the Congregation can come up with as a basis for the unique physical condition finding under Z.R. § 72-21(a) for the upper floor condominium variances:

> 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 floor plans for community facility space

[18] Statement in Support of Certain Variances, Friedman & Gotbaum May 13, 2009. R 004533-004596. *See* excerpts from R-004533 attached hereto as Ket. Ex. K.

In citing to the conclusory briefs of its counsel as a factual basis for BSA findings, the Congregation is apparently relying upon its claim at 10-11 et. seq. of its May 21, 2009 Memorandum In Opposition to Petitioners' [Landmark West's] Article 78 Petition, asserting that argument of counsel could be used by the BSA as evidence to support findings. This argument is rebutted in Kettaneh's proposed Memorandum of Law, attached as Kettaneh Ex. H to its Intervention Motion. "The Congregation's New Table Of "Evidence" Fails To Identify Any Substantial Factual, Non-Conclusory Evidence" at 13 and "Conclusory Assertions Of The Congregation's Counsel Cannot Provide Substantial Evidence" at 16.

> required to meet [the Congregation's] on-site religious, educational and cultural programmatic needs. (A 004566) (emphasis supplied).[19]

These conclusory and indeed, oblique references by the Congregation to its own brief, are not evidence to support a BSA finding absent facts and reasoned conclusions. Nothing better reveals the Emperor's Clothing than the absence in the record of any unique physical condition requirement with a nexus to the condominium variances - at best, everything mentioned by the Congregation's attorney here related only to the community house variances.

28. Thus, the Congregation assertions do not even support its claims that there is a unique physical condition creating a hardship that require variances for the upper floor luxury condominiums – the Congregation commences its citation to its counsel's conclusory claims by asserting "The BSA also found that 'unique physical conditions' at the site warranted the variance." The Congregation conflates seven variances into a single variance, and at the same time conflates the community house lower floor variances with the condominium upper floor variances. Then, unable or unwilling to provide a citation to any BSA finding of unique physical condition for the condominium variance, the Congregation next inserts the long section from the BSA administrative record, failing to disclose that the citation is to conclusory assertions of counsel. [20]

29. The Congregation's counsel at the joint hearing basically admitted that the Congregation's factual support for the variance application was to utter the "magic words" required for the finding, so that the BSA can then rely upon the "magic words" to make the

---

[19] Congregation Reargument Memorandum at 8. *Id*. at 15 referring to the same weak conclusory statements of counsel.

[20] The disappearing Eighth Objection would clearly have prevented the construction of the upper floor condominiums due to the requirement of the 40-foot separation – suggesting the motive behind the mysterious disappearance. The Congregation would have had to argue that the zoning requirement for the 40-foot separation was a unique physical condition – the problem here is that the zoning requirement would afford any owner to contend that the zoning law itself was the unique physical condition, and thus the separation requirement could always be avoided.

finding require for the variance. This is the same type of superficial subjective analysis criticized by the Appellate Division in *Matter of Kaur* as to the subjective "blight" finding. In *Matter of Kaur*, at least there was a report submitted from a so-called consulting firm, AKRF, whose report was repudiated by the Appellate Division. Here, the Congregation seeks to base the key finding on the mere conclusory magic words of counsel, not even being able to persuade its environmental consultant - coincidentally also AKRF - to write another "preposterous" display of "idiocy", to adopt the language of the Appellate Division in *Matter of Kaur*.[21]

VII. There Is Nothing in The Record Showing Changes to Plans Relating to the Disappearing Eighth Variance

30. In its Motion for Reargument, Kettaneh argues that there is nothing in the BSA administrative record, other than conjecture, which shows that the plans filed by the Congregation on August 28, 2007 were revised so as to no longer require the variance described in the DOB's Eighth Objection.[22] Kettaneh Petitioners fully briefed this issue and discussed it at the March, 2009 hearing, challenging Respondents to identify the changes which obviated the need for the Eighth Objection.[23] The Court was in error in accepting the assertions of the Respondents that changes were made which obviated the Eighth Objection when there is

---

[21] Matter of Kaur:

> "This search for distinct "blight conditions" led to the *preposterous* summary of building and sidewalk defects compiled by AKRF, which was then accepted as a valid methodology and amplified by Earth Tech. Even a cursory examination of the study reveals the *idiocy* of considering things like unpainted block walls or loose awning supports as evidence of a blighted neighborhood" (emphasis supplied).

[22] *See* Landmark West Reargument Memorandum at 13:

> "CSI claimed that it filed an application with "Proposed Plans, dated August 28, 2007" with DOB for reconsideration of the 2005 DOB Notice of Objections and the 2007 DOB Notice of Objections omitted Objection No. 8 from the 2005 DOB Notice of Objections."
>
> "DOB issued the 2007 DOB Notice of Objections even though there is no indication that the "Proposed Plans" submitted with the reconsideration application were revised to comply with the noted provisions of the Zoning Resolution."

[23] Although Landmark West discusses the Eight Objection in their Reargument Motion, Landmark West did not raise this issue at all in it pre-decision filings, and apparently relies upon the discussion in Kettaneh's filings.

absolutely nothing in the record to support to the supposition that changes to the plans were made.

31. Nothing in the administrative record describes any changes made to the building plans between March, 2007 and August, 2007 that in any way related to the disappearance of the 40-foot separation Eighth Objection.[24] The Respondents in their responses to the reargument motion seem to believe that by asserting over and over again that changes were made in the plans, that "possibilities" may be converted into facts.[25] The best that the Congregation is able to do, after spending the last year combing the administrative record, is to cite to the observation by the BSA Chairman that "they *may* come back and revise their proposals" (emphasis supplied) as substantiation for the Congregation's baseless claim that the Congregation ever revised its plans in any manner relating to the Eight Objection. Attempting to create fact by repetition, the Congregation then — without supporting citation to the record — refers to "the Congregation's change in architectural plans." (*id.* at 10) and asserts without substantiation that "[t]he DOB's eighth objection (based on the Zoning Resolution's prohibition

---

[24] *See* the discussion at 27 of Kettaneh's Further Reply Memorandum, attached as Ket. Ex. H to Kettaneh's Intervention Motion.

[25] There is no support in the record for any of the assertions made by the Congregation in its Memorandum opposing Reargument at 7, 8 and 10:

> "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) "
>
> * * *
>
> "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)."
>
> * * *
>
> "Congregation's change in architectural plans deprived the BSA of jurisdiction"

on space between buildings) was obviated by a change in the Congregation's building design." (*id* at 5). For this proposition, the Congregation has no support in the record, and can cite only to A-000348, which is merely the August 24, 2007 DOB Notice of Objections, which just does not say what the Congregation claims it says. The Congregation is just inventing facts here. The DOB Notice of Objection is silent as to any changes in the building design, and makes no reference to any changes in drawings that would "obviate" the building separation. At the hearing of March 31, 2009, counsel for the Kettaneh Petitioners challenged the Congregation and the City to identify any building plan changes which "obviated" the Eighth Variance. The Congregation and the City have lost this challenge - they resort to invented facts not in the record.

32. In the BSA hearing transcript excerpts quoted by the Congregation in its memorandum opposing reargument, the BSA Chair blithely claims that if a variance were still needed, then the variance would need to be obtained. Yet the BSA was on notice as to the need for a variance responding to the Eighth Objection, since the requirement for a variance had been fully submitted to the BSA in the original variance application by the Congregation. Nonetheless, knowing that a variance was required for the 40-foot separation, the BSA chose to ignore the clear unequivocal requirements of the zoning laws.

33. That the BSA had jurisdiction to consider the Eighth Objection is clear, as shown by the City's response to Landmark West arguments as to how the BSA obtains jurisdiction for variance proceedings. The City at great length argues that there are different ways for the BSA to acquire jurisdiction over a matter. (City Intervention Memorandum at 12). The City argues that the requirement for specific objections by the DOB "was implemented administratively as a practical matter, not as a pre-requisite for jurisdiction." (*Id.* at n. 5 at 13). Clearly — after the BSA staff and the Congregation architects and the DOB and all others

concurred that a variance for the Eighth Objection was required, the BSA not only had jurisdiction to consider the Eighth Objection, but had an obligation to assure itself as to the reason for the disappearance of the objection. This is especially true because the Congregation and its architects were unwilling, if not unable, to articulate the reason the Eighth Objection fell by the wayside.

34. The City's position apparently is that the BSA has a new way to grant variances. If the BSA is unable to make the findings to support a variance to satisfy a zoning regulation, then the BSA signals the applicant and then turns a blind eye to the applicant "persuading" the DOB to "disappear" an objection, even though the BSA and its staff all know that the regulation is applicable, and a variance required. The silence from the BSA and the Congregation to explain the removal of this objection is a smoking gun.

VIII. Conclusion

35. The Kettaneh Petitioners are interested parties whose interests are affected by the Motion for Reargument and should be permitted to intervene for the reasons discussed above. The Court should consider Kettaneh's Further Reply Memorandum attached as Ket. Ex. H to Kettaneh's Intervention Motion. Because the bifurcated analysis was clearly improper, for that reason alone, the BSA decision should be reversed as to the condominium variances without the need for remand, for the simple reason that the record is clear that an all residential as-of-right building on the site would earn a reasonable rate of return and accordingly there is no evidence to support a finding under Z.R. § 72-21(b) as to the condominium variances. In any event, the BSA should be instructed not to consider landmarking as a factor in granting any variances and as a physical condition under § 72-21(a) and should be instructed to provide new findings as to finding (a) premised on actual non-conclusory and non-subjective facts in the record, distinguishing between conditions relating to the community house and the condominium

variances, and showing how any alleged hardships are causally related to each of the community house variances. As just one example, the BSA needs in its (a) finding to show how the landmarking of the Synagogue creates a hardship which requires that the Congregation be provided a setback variance on the front upper floors so as to accommodate larger condominiums and make more money for the Congregation, which variance creates a substantial hardship to Petitioner Lepow, in that this single variance results in the bricking up of windows in condominiums belonging to Lepow.

The Kettaneh Petitioners reserve all issues presented in the Kettaneh Case to be resolved in the pending appeal, including the issues addressed in its Motion for Intervention.

Exhibits:

Ket. Ex. K Cover page and pages 33 and 54, Statement in Support of Certain Variances, Friedman & Gotbaum, May 13, 2009. R-004533, R -004566, and R-004587.

Dated: January 21, 2010
New York, New York

Alan D. Sugarman

Attorney for Movant/Kettaneh Petitioners

Law Offices of Alan D. Sugarman
Suite 4
17 West 70th Street
New York, NY 10023
212-873-1371
sugarman@sugarlaw.com

To:

David Rosenberg Esq.
Marcus Rosenberg & Diamond LLP
Attorneys for Petitioners
488 Madison Avenue

Jeffrey Friedlander
First Assistant Corporation counsel of the
City of New York-
Christina L. Hoggan, Esq.

New York, New York 10022
(212) 755-7500

Louis M.. Solomon, Esq.
Claude M. Millman, Esq.
Proskauer Rose L.L.P.
1585 Broadway
New York, New York 10036
(212) 969-3000
Attorneys for Respondent Congregation Shearith Israel aka Trustees of Congregation Shearith Israel in the City of New York

Assistant Corporation Counsel
100 Church Street, Room 5-153
New York, New York 10007
(212) 788-0790
Attorneys for City Respondents

Kettaneh Exhibit K

STATEMENT IN SUPPORT

OF CERTAIN VARIANCES

FROM THE PROVISIONS OF

THE NEW YORK CITY ZONING RESOLUTION

Affected Premises:

CONGREGATION SHEARITH ISRAEL
6-10 West 70th Street/99-100 Central Park West
Block 1122 Lots 36 & 37
Manhattan

Friedman & Gotbaum LLP
568 Broadway, Suite 505
New York, NY 10012
(212) 925-4545

Revised May 13, 2008

the use or bulk provisions of the [zoning] resolution; and that the alleged practical difficulties or unnecessary hardships are not due to circumstances created generally by the strict Application of such provisions in the neighborhood or district in which the Zoning Lot is located. ZRCNY Sec. 72-21(a)

The unique physical conditions peculiar to and inherent in CSI'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 CSI'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) dimensions of the Zoning Lot that preclude the development of floorplans for community facility space required to meet CSI's on-site religious, educational and cultural programmatic needs. These physical and regulatory constraints are unique to this Zoning Lot. The strict application of the ZRCNY provisions raised as objections to the approval of the New Building will preclude CSI from developing the New Building or any substantially similar building and as such represents a practical difficulty in developing any feasible as-of-right New Building. Such strict compliance with the ZRCNY would therefore present a serious hardship in the furtherance of CSI's religious, educational and cultural mission.

For the programmatic reasons described above, none of CSI's religious, educational or cultural programmatic difficulties can be addressed through further development or alteration to the Synagogue on Lot 36 which contains 10,854 zsf or 67.7 percent of the Zoning Lot's total area, yet is developed with only 27,759.2 zsf, or 19.2 percent of the Zoning Lot's allowable 144,510.96 zsf of zoning floor area. That therefore leaves the footprint of Tax Lot 37, which measures 64 ft by 100.5 ft, (37.2 percent of the Zoning Lot's total area), currently improved with

that leaves the Synagogue untouched but requires that CSI utilize 42,406.35 sf (or 36 percent) of the 116,751.76 sf of unused floor area available to it on its Zoning Lot to redress these deficiencies. The successful deployment of that floor area resolves a complex matrix of Synagogue circulation issues, educational issues and administrative issues. Successful deployment includes the construction of 22,352.31 sf of new residential space, a small fraction of the available floor area intended to subsidize the endeavor. This successful deployment cannot occur without the approval of this Application.

On the basis of the foregoing statements, the Applicant respectfully requests that the Board make the requisite findings and grant the requested variances.

Respectfully submitted,

Shelly S. Friedman, Esq.
FRIEDMAN & GOTBAUM, LLP

Dated: New York, New York
May 13, 2008

2008 MAY 13 P 5:15
CAL. NO.

Revised May 13, 2008