

1 MEETING OF: August 26, 2008
2 CALENDAR NO.: 74-07-BZ
3 PREMISES: 6-10 West 70th` Street, 99-100 Central Park West,Manhattan,
4 Block 1122, Lots 36 & 37
5

6 ACTION OF THE BOARD: Application granted on condition.
7

8 THE VOTE TO GRANT: Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson, Commissioner
9 Montanez and Commissioner Ottley-Brown 5
10 Negative: 0
11

12 **THE RESOLUTION:**
13

14 WHEREAS, the decision of the Manhattan Borough Commissioner, dated August 28, 2007,' acting on Department
15 of Buildings Application No. 104250481, reads, in pertinent part:
16

- 17 1. "Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is
18 contrary to Section 24-11/77-24. Proposed interior portion lot coverage is 0.80;
- 19 2. Proposed rear yard in R8B does not comply. 20'.00 provided instead of 30.00' contrary to Section 24-36;
- 20 3. Proposed rear yard in RIOA interior portion does not comply. 20.-' provided instead of 30.00' contrary to
21 Section 24-36;
- 22 4. Proposed initial setback in R8B does not comply- 12.00' provided instead of 15.00' contrary to Section
23 24-36;
- 24 5. Proposed base height in R8B does not comply... contrary to Section 23 633;
- 25 6. Proposed maximum building height in R8B does not comply--- contrary to 23-' 66;
- 26 7. Proposed rear setback in an R8B does not comply. 6.67' provided instead of 10.00' contrary to Section 23-
27 633," and
28

29 WHEREAS, this is an application under ZR § 72-21, to permit, on a site partially within an R8B district and
30 partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed
31 construction of a nine-story and cellar mixed-use community facility/ residential building that does not comply with
32 zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear yard
33 setback contrary to ZR § § 24-11, 77-24, 24-36, 23-66, and 23-633; and
34

35 WHEREAS, this application is brought on behalf of Congregation Sheatith Israel, a not- for-profit religious
36 institution (the "Synagogue"); and
37

38 WHEREAS, a public hearing was held on this application on November 27, 2007, after due notice by publication in
39 the City Record, with continued hearings on February 12, 2008, April 15, 2008 and June 24, 2008, and then to
40 decision on August 26, 2008; and
41

42 WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-
43 Chair Collins, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and
44

45 WHEREAS, Community Board 7, Manhattan, recommends disapproval of this application; and
46

47 WHEREAS, a number of members of the Synagogue testified in support of the application; and
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49 FOOTNOTE 1: The referenced August 28, 2007 decision supersedes a March 27, 2007 decision by the Department of Buildings
50 which included eight objections, one of which was eliminated alter the applicant modified the plans-
51

52 FOOTNOTE 2: A letter dated January 28, 2008 to Chair Srinivasan from David Rosenberg, an attorney representing local
53 residents, claims that a purported failure by the Department of Buildings ("DOB") Commissioner or the Manhattan Borough
54 Commissioner to sign the above-referenced August 28, 2007 objections, as allegedly required by Section 666 of the New York
55 City Charter (the "Charter"), divests the Board of jurisdiction to hear the instant application. However, the jurisdiction of the
56 Board to hear an application for variances flour zoning regulations, such as the instant application, is conferred by Charter Section
57 668, which does not require a letter of focal determination executed by the DOB Commissioner or by an authorized DOB borough
58 commissioner.
59
60

60 WHEREAS, a representative of New York State Senator Thomas K. Duane testified at hearing in opposition to the
61 application; and
62

63 WHEREAS, a representative of New York State Assembly Member Richard N. Gottfried testified at hearing in
64 opposition to the application; and
65

66 WHEREAS, a number of area residents testified in opposition to the application; and
67

68 WHEREAS, additionally, Landmark West! and a group of neighbors represented by counsel testified at hearing and
69 made submissions into the record in opposition to the application (the "Opposition"); the arguments made by the
70 Opposition related to the required findings for a variance, and are addressed below; and
71

72 WHEREAS, the subject zoning lot on which the Synagogue is located consists of Lots 36 and 37 within Block 1122
73 (the "site"); and
74

75 WHEREAS, the site has a total lot area of 17,286 square feet, with 172 feet of frontage along the south side of West
76 70th Street, and 100.5 feet of frontage on Central Park West; and
77

78 WHEREAS, the portion of the site that extends 125 feet west of Central Park West is located in an R10A zoning
79 district; the remainder of the site is located within an R8B district; and
80

81 WHEREAS, the site is also located within the Upper West Side/ Central Park West Historic District; and
82

83 WHEREAS, Tax Lot 36 is occupied by the Synagogue, with a height of 75'-0", and a connected four-story parsonage
84 house located at 99-100 Central Park West, with a total floor area of 27,760 sq. ft.; and
85

86 WHEREAS, Tax Lot 37 is occupied in part by a four-story Synagogue community house with 11,079 sq. ft. of floor
87 area located at 6-10 West 70th Street (comprising approximately 40 percent of the tax lot area); the remainder of Lot
88 37 is vacant (comprising approximately 60 percent of the tax lot area) (the "Community House"); and
89

90 WHEREAS, the Community House is proposed to be demolished; and
91

92 WHEREAS, the applicant represents that Tax Lot 36 and Tax Lot 37 together constitute a single zoning lot under ZR
93 § 12-10, as they have been in common ownership since 1965 (the "Zoning Lot"); and
94

95 WHEREAS, Tax Lot 37 is divided by a zoning district boundary, pursuant to 1984 zoning reap and text amendments
96 to the Zoning Resolution that relocated the former R8IR10 district boundary line to a depth of 47 feet within the lot;
97 and
98

99 WHEREAS, the applicant further represents that the formation of the Zoning Lot predates the relocation of the
100 zoning district boundary, and that development on the site is therefore entitled to utilize the zoning floor area
101 averaging methodology provided for in ZR § 77-211, thereby allowing the zoning floor area to be distributed over
102 the entire Zoning Lot; and
103

104 WHEREAS, the applicant states that as 73 percent of the site is within an R10A zoning district, which permits an
105 FAR of 10.0, and 27 percent of the site is within an R8B zoning district, which permits an FAR of 4.0, the averaging
106 methodology allows for an overall site FAR of 8.36 and a maximum permitted zoning floor area of 144,511 sq. ft.;
107 and
108

109 WHEREAS, the applicant states that the site is currently built to an FAR of 2.25 and a floor area of 38,838 sq. ft.;
110 and
111

112 WHEREAS, the applicant proposes a nine-story and cellar mixed-use building with community facility (Use Group
113 3) uses on two cellar levels and the lower four stories, and residential (Use Group 2) uses on five stories including a
114 penthouse (the "proposed building"), which will be built on Tax Lot 37; and
115

115 WHEREAS, the applicant states that the community facility uses include: Synagogue lobby and reception space, a
116 toddler program:, adult education and Hebrew school classes, a caretaker's unit, and a Jewish day school; the upper
117 five stories are proposed to be occupied by five market-rate residential condominium units; and
118

119 WHEREAS, the proposed building will have a total floor area of 42,406 sq. ft., comprising 20,054 sq. ft. of
120 community facility floor area and 22,352 sq. ft of residential floor area; and
121

122 WHEREAS, the proposed building will have a base height along West 7e Street of 95'-1" (60 feet is the maximum
123 permitted in an R8B zoning district); with a front setback of 12'-0" (a 15'- 0" setback is the minimum required in an
124 R8B zoning district); a total height of 105'-1 0" (75'-0" is the maximum permitted in an R8B zone), a rear yard of
125 20'-0" for the second through fourth floors (30"-0" is the minimum required); a rear setback of 6'-8" (10'-0" is
126 required in an R8B zone), and an interior lot coverage of 80 percent (70 percent is the maximum permitted lot
127 coverage); and
128

129 WHEREAS, the Synagogue initially proposed a nine-story building with a total floor area of 42,961 sq. ft., a
130 residential floor area of 22,966 sq. R, and no court above the fifth floor (the "original proposed building"), and
131

132 WHEREAS, the Synagogue modified the proposal to provide a complying court at the north rear above the fifth
133 floor, thereby reducing the floor plates of the sixth, seventh and eighth floors of the building by approximately 556
134 sq. ft. and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in
135 the variance of the rear yard setback by 25 percent and a reduction in the residential floor area to 22,352 sq. ft.; and
136

137 WHEREAS, the Synagogue is seeking waivers of zoning regulations for lot coverage and rear yard to develop a
138 community facility that can accommodate its religious mission, and is seeking waivers of zoning regulations
139 pertaining to base height, total height, front setback, and rear setback to accommodate a market rate residential
140 development that can generate a reasonable financial return; and
141

142 WHEREAS, as a religious and educational institution, the Synagogue is entitled to significant deference under the
143 laws of the State of New York pertaining to proposed changes in zoning and is able to rely upon programmatic needs
144 in support of the subject variance application *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488 (1968)); and
145

146 WHEREAS, under ZR § 72-21(b), a not-for-profit institution is generally exempted from having to establish that the
147 property for which a variance is sought could not otherwise achieve a reasonable financial return; and
148

149 WHEREAS, however, the instant application is for a mixed-use project in which approximately 50 percent of the
150 proposed floor area will be devoted to a revenue-generating residential use which is not connected to the mission and
151 program of the Synagogue; and
152

153 WHEREAS, under New York State law, a not-for-profit organization which seeks land use approvals for a
154 commercial or revenue-generating use is not entitled to the deference that must be accorded to such an organization
155 when it seeks to develop a project that is in furtherance of its mission is *Little Joseph Realty v. Babylon*, 41 N.Y.2d
156 738 (1977); *Foster v. Saylor*, 85 A.D.2d 876 (4d' Dep't 1981) and *Roman Cath. Dioc. of Rockville Ctr v. Vill. Of Old*
157 *Westbury*, 170 Misc.2d 314 (1996); and
158

159 WHEREAS, consequently, prior Board decisions regarding applications for projects sponsored by not-for-profit
160 religious or educational institutions which have included commercial or revenue-generating uses have included
161 analysis of the hardship, financial return, and minimum variance findings under ZR § 72-21 (see BSA Cal. No. 315-
162 02-0Z, applicant Touro College; BSA Cal. No. 179-03-BZ, applicant Torah Studies, Inc.; BSA Cal. No. 349-05-BZ,
163 Church of the Resurrection; and BSA Cal. No. 194-03-BZ, applicant B'nos Menachem School); and
164

165 WHEREAS, therefore, as discussed in greater detail below, the Board subjected this application to the standard of
166 review required under ZR § 72-21 for the discrete community facility and residential development uses,
167 respectively, and evaluated whether the proposed residential development met all the findings required by ZR § 72-
168 21, notwithstanding its
169

169 sponsorship by a religious institution; and

170

171 **ZR § 72-21 (a) - Unique Physical Conditions Finding**

172

173 WHEREAS, under § 72-21 (a) of the Zoning Resolution, the Board must find that there are unique physical
174 conditions inherent to the Zoning Lot which create practical difficulties or unnecessary hardship in strictly
175 complying with the zoning requirements (the "(a) finding"); and
176 Community Facility Use

177

178 WHEREAS, the zoning district regulations limit lot coverage to 80 percent and require a rear yard of 30'-0"; and

179

180 WHEREAS, the proposed building will have the following program: (1) a multi-function room on the sub-cellar
181 level with a capacity of 360 persons for the hosting of life cycle events and weddings and mechanical space; (2)
182 dairy and meat kitchens, babysitting and storage space on the cellar level; (3) a synagogue lobby, rabbi's office and
183 archive space on the first floor; (4) toddler classrooms on the second floor; (5) classrooms for the Synagogue's
184 Hebrew School and Beit Rabban day school on the third floor; and (6) a caretaker's apartment and classrooms for
185 adult education on the fourth floor; and

186

187 WHEREAS, the first floor will have 5,624 sq. ft. of community facility floor area, the second and third floor will
188 each have 4,826.5 sq. ft. of community facility floor area, and the fourth floor will have 4,777 sq. ft. of community
189 facility floor area, for a total of 20,054 sq. ft. of community facility floor area; and

190

191 WHEREAS, the applicant represents that the variance request is necessitated by the programmatic needs of the
192 Synagogue, and by the physical obsolescence and poorly configured floor plates of the existing Community House
193 which constrain circulation and interfere with its religious programming; and

194

195 WHEREAS, the applicant represents that the programmatic needs and mission of the Synagogue include an
196 expansion of its lobby and ancillary space, an expanded toddler program expected to serve approximately 60
197 children, classroom space for 35 to 50 afternoon and weekend students in the Synagogue's Hebrew school and a
198 projected 40 to 50 students in the Synagogue's adult education program, a residence for an onsite caretaker to ensure
199 that the Synagogue's extensive collection of antiquities is protected against electrical, plumbing or heating
200 malfunctions, and shared classrooms that will also accommodate the Beit Rabban day school; and

201

202 WHEREAS, the applicant states that the proposed building will also permit the growth of new religious, pastoral and
203 educational programs to accommodate a congregation which has grown from 300 families to 550 families; and

204

205 WHEREAS, to accommodate these programmatic needs, the Synagogue is seeking lot coverage and rear yard
206 waivers to provide four floors of community facility use in the proposed building; and

207

208 WHEREAS, the Board acknowledges that the Synagogue, as a religious institution, is entitled to substantial
209 deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs
210 in support of the subject variance application (see *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583 (1986)); and

211

212 WHEREAS, however, in addition to its programmatic needs, the applicant also represents that the following site
213 conditions create an unnecessary hardship in developing the site in compliance with applicable regulations as to lot
214 coverage and yards- if the required 30'-0" rear yard and lot coverage were provided, the floor area of the community
215 facility would be reduced by approximately 1,500 sq. ft.; and

216

217 WHEREAS, the applicant states that the required floor area cannot be accommodated within the as-of-right lot
218 coverage and yard parameters and allow for efficient floor plates that will accommodate the Synagogue's
219 programmatic needs, thus necessitating the requested waivers of these provisions; and

220

220 WHEREAS, the applicant represents that a complying building would necessitate a reduction in the size of three
221 classrooms per floor, affecting nine proposed classrooms which would consequently be too narrow to accommodate
222 the proposed students; the resultant floor plates would be small and inefficient with a significant portion of both
223 space and floor area allocated toward circulation space, egress, and exits; and
224

225 WHEREAS, the applicant further states that the reduction in classroom floor area would consequently reduce the
226 toddler program by approximately 14 children and reduce the size of the Synagogue's Hebrew School, Adult
227 Education program and other programs and activities; and
228

229 WHEREAS, the applicant represents that the requested yard and lot coverage waivers would enable the Synagogue
230 to develop the site with a building with viable floor plates and adequate space for its needs; and
231

232 WHEREAS, the Opposition has argued that the Synagogue cannot satisfy the (a) finding based solely on its
233 programmatic need and must still demonstrate that the site is burdened by a unique physical hardship in order to
234 qualify for a variance; and
235

236 WHEREAS, notwithstanding that the applicant has asserted that the site is also burdened with a physical hardship
237 that constrains an as-of-right development, discussed below, the Board notes that the Opposition ignores 50 years of
238 unwavering New York jurisprudence holding that zoning boards must accord religious institutions a presumption of
239 moral, spiritual and educational benefit in evaluations of applications for zoning variances (see e.g.; Diocese of
240 Rochester v. Planning Bd., 1 N.Y.2d 508 (1956) (zoning board cannot wholly deny permit to build church in
241 residential district; because such institutions further the morals and welfare of the community, zoning board must
242 instead seek to accommodate their needs); see also Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968); and
243 Islamic Soc. of Westchester v. Foley, 96 A.D. 2d 536 (2d Dep't 1983)), and therefore need not demonstrate that the
244 site is also encumbered by a physical hardship; and
245

246 WHEREAS, in support of its proposition that a religious institution must establish a physical hardship, the
247 Opposition cites to decisions in Yeshiva & Mesivta Toras Chaim v. Rose (137 A.D.2d 710 (2d Dep't 1988)) and
248 Bright Horizon House, Inc v Zng. Bd of Appeals of Henrietta (121 Misc.2d 703 (Sup. Ct. 1983)); and
249

250 WHEREAS, both decisions uphold the denial of variance applications based on findings that the contested proposals
251 constituted neither religious uses, nor were they ancillary or accessory uses to a religious institution in which the
252 principal use was as a house of worship, and are therefore irrelevant to the instant case; and
253

254 WHEREAS, the Board finds that the proposed Synagogue lobby space, expanded toddler program, Hebrew school
255 and adult education program, caretaker's apartment, and accommodation of Beit Rabban day school constitute
256 religious uses in furtherance of the Synagogue's program and mission; and
257

258 WHEREAS, the Opposition contends that the Synagogue's programmatic needs are too speculative to serve as the
259 basis for an (a) finding; and
260

261 WHEREAS, in response to a request by the Board to document demand for the proposed programmatic floor area,
262 the applicant submitted a detailed analysis of the program needs of the Synagogue on a space-by-space and time-
263 allocated basis which confirms that the daily simultaneous use of the overwhelming majority of the spaces requires
264 the proposed floor area and layout and associated waivers; and
265

266 WHEREAS, the Opposition argues, nonetheless, that the Synagogue's programmatic needs could be accommodated
267 within an as-of-right building, or within existing buildings on the Synagogue's campus and that the proposed
268 variances for the community facility use are unmerited and should consequently be denied; and
269

270 WHEREAS, specifically, the Opposition has contended that the Synagogue's programmatic needs could be
271 accommodated within the existing parsonage house; and
272

272 WHEREAS, the applicant represents that the narrow width of the parsonage house, at approximately 24'-0", would
273 make it subject to the "sliver" limitations of ZR § 23-692 which limit the height of its development and, after
274 deducting for the share of the footprint that would be dedicated to elevator and stairs, would generate little floor area;
275 and
276

277 WHEREAS, the applicant further represents that development of the parsonage house would not address the
278 circulation deficiencies of the synagogue and would block several dozen windows on the north elevation of 91
279 Central Park West; and
280

281 WHEREAS, the Board notes that where a nonprofit organization has established the need to place its program in a
282 particular location, it is not appropriate for a zoning board to second-guess that decision see *Guggenheim Neighbors*
283 *v. Bd. of Estimate*, June 10, 1988, N.Y. Sup. Ct., Index No. 29290/87), see also *Jewish Recons. Syn. of No. Shore v.*
284 *Roslyn Harbor*, 38 N.Y.2d 283
285 (1975)); and
286

287 WHEREAS, furthermore, a zoning board may not wholly reject a request by a religious institution, but must instead
288 seek to accommodate the planned religious use without causing the institution to incur excessive additional costs
289 *Islamic Soc. of Westchester v. Foley*. 96 A.D.2d 536 (2d Dep't 1983); and
290

291 WHEREAS, religious institutions are entitled to locate on their property facilities for other uses that are reasonably
292 associated with their overall purposes and a day care center/ preschool has been found to constitute such a use see
293 *Uni. Univ. Church v. Shorten*, 63 Misc.2d 978,982 (Sup. Ct. 1970)); and
294

295 WHEREAS, in submissions to the Board, the Opposition argues that the Beit Rabban school does not constitute a
296 programmatic need entitled to deference as a religious use because it is not operated for or by the Synagogue; and
297

298 WHEREAS, however, it is well-established under New York law that religious use is not limited to houses of
299 worship, but is defined as conduct with a 'religious purpose;' the operation of an educational facility on the property
300 of a religious institution is construed to be a religious activity and a valid extension of the religious institution for
301 zoning purposes, even if the school is operated by a separate corporate entity (*Slevin v. Long Isl. Jew. Med Ctr.*, 66
302 Misc.2d 3,12, 317 (Sup. Ct. 1971)); and
303

304 WHEREAS, the applicant further states that the siting of the Beit Rabban school on the premises helps the
305 Synagogue to attract congregants and thereby enlarge its congregation, which the courts have also found to constitute
306 a religious activity see *Community Synagogue v. Bates*, 1 N.Y.2d 445, 448 (1958)), in which the Count of Appeals
307 stated, "[t]o limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the
308 church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation"); and
309

310 WHEREAS, the Board notes that the applicant has provided supportive evidence showing that, even without the Beit
311 Rabban school, the floor area as well as the waivers to lot coverage and rear yard would be necessary to
312 accommodate the Synagogue's programmatic needs; and
313

314 WHEREAS, the applicant represents that the variance request is necessitated not only by its programmatic needs, but
315 also by physical conditions on the subject site - namely - the need to retain and preserve the existing landmarked
316 Synagogue and by the obsolescence of the existing Community House; and
317

318 WHEREAS, the applicant states that as-of-right development of the site is constrained by the existence of the
319 landmarked Synagogue building which occupies 63 percent of the Zoning Lot footprint; and
320

321 WHEREAS, the applicant represents that because so much of its property is occupied by a building that cannot be
322 disturbed, a relatively small portion of the site is available for development - largely limited to the westernmost
323 portion of the Zoning Lot; and
324

325 WHEREAS, the applicant further represents that the physical obsolescence and poorly configured floorplates of the
326 existing Community House constrain circulation and interfere with its religious programming and compromise the
327 Synagogue's religious and educational mission,
328

328 and that these limitations cannot be addressed through interior alterations; and

329
330 WHEREAS, the applicant states that the proposed building will provide new horizontal and vertical circulation
331 systems to provide barrier-free access to its sanctuaries and ancillary facilities; and

332
333 WHEREAS, based upon the above, the Board finds that the aforementioned physical conditions, when considered in
334 conjunction with the programmatic needs of Synagogue, create unnecessary hardship and practical difficulty in
335 developing the site in compliance with the applicable zoning regulations; and

336
337 WHEREAS, the Opposition argues that uniqueness is limited to the physical conditions of the Zoning Lot and that
338 the obsolescence of an existing building or other building constraints therefore cannot fulfill the requirements of the
339 (a) finding, while citing no support for such a proposition; and

340
341 WHEREAS, to the contrary, New York courts have found that unique physical conditions under Section 72-21(a) of
342 the Zoning Resolution can refer to buildings as well as land (see *Guggenheim Neighbors v. Board of Estimate*, June
343 10, 1988, N.Y. Sup. Ct. Index No. 29290/87; see also *Homes for the Homeless v. BSA*, 7123/2004, N.Y.L.J. citing
344 *UOB Realty (USA) Ltd_ v. Chin*, 291 A.D.2d 248 (1a Dep't 2002;); and, further, obsolescence of a building is well-
345 established as a basis for a finding of uniqueness (see *Matter of Commco, Inc. v. Amelkin*, 109 A.D.2d 794, 796 (2d
346 Dep't 1985), and *Polsinello v. Dwyer*, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (condition creating hardship was land
347 improved with a now obsolete structure)); and

348
349 WHEREAS, in submissions to the Board, the Opposition has also contended that the Synagogue had failed to
350 establish a financial need for the project as a whole; and

351
352 WHEREAS, the Board notes that to be entitled to a variance, a religious or educational institution must establish that
353 existing zoning requirements impair its ability to meet its programmatic needs; neither New York State law, nor ZR
354 § 72-21, require a showing of financial need as a precondition to the granting of a variance to such an organization;
355 and

356
357 WHEREAS, the applicant proposed the need to generate revenue for its mission as a programmatic need, New York
358 law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit
359 organization, notwithstanding an intent to use the revenue to support a school or worship space; and

360
361 WHEREAS, further, in previous decisions, the Board has rejected the notion that revenue generation could satisfy
362 the (a) finding for a variance application by a not-for-profit organization (see *BSA Cal. No. 72-05-BZ*, denial of use
363 variance permitting operation by a religious institution of a catering facility in a residential district) and, therefore,
364 requested that the applicant forgo
365 such a justification in its submissions; and

366
367 WHEREAS, however, in numerous prior instances the Board has found that unique physical conditions, when
368 considered in the aggregate and in conjunction with the programmatic needs of a not-for-profit organization, can
369 create practical difficulties and unnecessary hardship in developing a site in strict conformity with the current zoning
370 see *L.g.*, *BSA Cal. No. 145-07- BZ*, approving variance of lot coverage requirements to permit development of a
371 medical facility; *BSA Cal. No. 209-07-BZ*, approving bulk variance to permit enlargement of a school for disabled
372 children; and *215-07-BZ*, approving bulk variance to permit enlargement of a YMCA); and

373
374 **Residential Use**

375
376 WHEREAS, the building is proposed for a portion of the Zoning Lot comprised of Lot 37, with a lot area of
377 approximately 6,400 sq. ft. (the "development site"); and

378
379 WHEREAS, proposed residential portion of the building is configured as follows: (1) mechanical space and
380 accessory storage on the cellar level; (2) elevators and a small lobby on the first floor; (2) core building space on the
381 second, third and fourth floors; and (3) a condominium unit on each of the fifth through eighth, and ninth (penthouse)
382 floors, for a total of five units; and
383

383 WHEREAS, the first floor is proposed to have approximately 1,018 sq. ft. of residential floor area, the second
384 through fourth floors will each have 325 sq. ft. of residential floor area, the fifth floor will have 4,512 sq. ft. of
385 residential floor area, the sixth through eighth floors will each have approximately 4,347 sq. ft. of residential floor
386 area and the ninth (penthouse) floor will have approximately 2,756 sq. ft., for a total residential floor area of
387 approximately 22,352 sq. ft.; and
388

389 WHEREAS, the applicant represents that compliance with the zoning requirements for base height, building height,
390 and front and rear setback would allow a residential floor area of approximately 9,638 sq. ft.; and
391

392 WHEREAS, the applicant states that the following unique physical conditions create practical difficulties and
393 unnecessary hardship in developing the subject site in compliance with underlying district regulations- (1) the
394 development site's location on a Zoning Lot that is divided by a zoning district boundary; (2) the existence and
395 dominance of a landmarked synagogue on the footprint of the Zoning Lot; and (3) the limitations on development
396 imposed by the site's contextual zoning district regulations; and
397

398 WHEREAS, as to the development site's location on a zoning lot that is divided by a zoning district boundary, the
399 applicant states that the development site is split between an eastern portion, comprising approximately 73 percent of
400 the Zoning Lot, which is located within an R1OA zoning district, and a western portion, comprising approximately
401 27 percent of the Zoning Lot, which is located in an R8B zoning district; and
402

403 WHEREAS, applicant represents that the division of the development site by a zoning district boundary constrains
404 an as-of-right development by imposing different height limitations on the two respective portions of the lot; and
405

406 WHEREAS, in the R1OA portion of the Zoning Lot, a total height of 185'-0" and maximum base height of 125'-0"
407 are permitted; and
408

409 WHEREAS, in the R8B portion of the development site, a building is limited to a total height of 75'-0" and a
410 maximum base height of 60'-0" with a setback of 15'-0"; and
411

412 WHEREAS, the applicant further represents that the requirements of the R8B district also limit the size of floor
413 plates of a residential development; and
414

415 WHEREAS, in the R8B portion of the development site, a setback of 15'-0" is required at the 60 ft. maximum base
416 height, and a 10'-0" rear setback is required; the applicant represents that a complying development would therefore
417 be forced to set back from the street line at the mid- point between the fifth and sixth floors; and
418

419 WHEREAS, in the R14A portion of the development site, a 15'-0" setback is not required below the maximum base
420 height of 125'-0", and a total height of 185'-0" is permitted, which would otherwise permit construction of a 16-story
421 residential tower on the development site; and
422

423 WHEREAS, the applicant is constrained from building to the height that would otherwise be permitted as-of-right on
424 the development site by the "sliver law" provisions of ZR § 23-692, which operate to limit the maximum base height
425 of the building to 60'-0" because the frontage of the site within the R1OA zoning district is less than 45 feet; and
426

427 WHEREAS, a diagram provided by the applicant indicates that less than two full stories of residential floor area
428 would be permitted above a four-story community facility, if the R8B zoning district front and rear setbacks and
429 height limitations were applied to the development site; and
430

431 WHEREAS, the Board notes that several Zoning Resolution provisions recognize the constraints created by zoning
432 district boundaries where different regulations apply to portions of the same zoning lot; and
433

434 WHEREAS, specifically, the Board notes that the provisions of ZR § 77-00, permitting the transfer of zoning lot
435 floor area over a zoning district boundary for zoning lots created prior
436

436 to their division by a zoning district boundary, recognize that there is a hardship to a property owner whose property
437 becomes burdened by a district boundary which imposes differing requirements to portions of the same zoning lot;
438 and
439
440 WHEREAS, the Board further notes that that the special permit provisions of ZR § 73- 52 allow the extension of a
441 district boundary line after a finding by the Board that relief is required from hardship created by the location of the
442 district boundary line; and
443
444 WHEREAS, the applicant represents, however, that because of the constraints imposed by the contextual zoning
445 requirements and the sliver law, the Synagogue can transfer only a small share of its zoning lot area across the R8B
446 district boundary; and
447
448 WHEREAS, the applicant further represents that the site is unique in being the only underdeveloped site overlapping
449 the RIOA/R8B district boundary line within a 20-block area to the north and south of the subject site; and
450
451 WHEREAS, the applicant further represents that 17 other residential zoning lots overlap the RIOAJ R8B district
452 boundary line between West 65" Street and West 86th Street, but that none were characterized by a similar amount
453 of surplus development rights; and
454
455 WHEREAS, the applicant states that all the properties within the 22-block study area bisected by the district
456 boundary line are developed to an FAR exceeding 10.0, while the subject Zoning Lot is developed to an FAR of
457 2.25; and
458
459 WHEREAS, the Opposition argues that the presence of a zoning district boundary within a lot is not a "unique
460 physical condition" under the language of ZR § 72-21 and represents that four other properties are characterized by
461 the some RI OA/ R8B zoning district boundary division within the area bounded by Central Park West and
462 Columbus Avenue and 59th Street and 110" Street owned by religious or nonprofit institutions, identified as: (i)
463 First Church of Christ Scientist, located at Central Park West at West 68th Street; (ii) Universalist Church of New
464 York, located at Central Park West at West 760 Street; (iii) New York Historical Society, located at Central Park
465 West at West 770' Street; and (iv) American Museum of Natural History, located at Central Park West at West 77"
466 Street to West 81\$ Street; and
467
468 WHEREAS, the Board notes that it has recognized that the location of zoning district boundary, in combination with
469 other factors such as the size and shape of a lot and the presence of buildings on the site, may create an unnecessary
470 hardship in realizing the development potential otherwise permitted by the zoning regulations (see BSA Cal. No.
471 358-05-BZ, applicant WR Group 434 Port Richmond Avenue, LLC; BSA Cal. No. 388-04-BZ, applicant DRD
472 Development, Inc.; BSA Cal. No. 291-03-BZ, applicant 6202 & 6217 Realty Company; and 208- 03 BZ, applicant
473 Shell Road, LLC); and
474
475 WHEREAS, the Board further notes that the incidence of four sites within a 51-block area sharing the same "unique
476 conditions" as the subject site would not, in and of itself, be sufficient to defeat a finding of uniqueness; and
477
478 WHEREAS, under New York law, a finding of uniqueness does not require that a given parcel be the only property
479 so burdened by the condition(s) giving rise to the hardship, only that the condition is not so generally applicable as to
480 dictate that the grant of a variance to all similarly situated properties would effect a material change in the district's
481 zoning (see *Douglaston Civ. Assn. v. Klein*, 51 N.Y.2d 963, 965 (1980)); and
482
483 WHEREAS, as to the impact of the landmarked Congregation Shearith Israel synagogue building on the ability to
484 develop an as-of-right development on the same zoning lot, the applicant states that the landmarked synagogue
485 occupies nearly 63 percent of the Zoning Lot footprint; and
486
487 WHEREAS, the applicant further states that because so much of the Zoning Lot is occupied by a building that cannot
488 be disturbed, only a relatively small portion of the site is available for development; and
489
490 WHEREAS, the applicant represents that only the area occupied by the parsonage house, located directly to the south
491 of the Synagogue on Tax Lot 36, and the development site are available for development; and
492

492 WHEREAS, the applicant represents that the narrow width of the parsonage house makes its development infeasible;
493 and

494
495 WHEREAS, the applicant states that the area of development site, at approximately 6,400 sq. ft., constitutes only 37
496 percent of Zoning Lot area of the site; and

497
498 WHEREAS, the Board notes that the site is significantly underdeveloped and that the location of the landmark
499 Synagogue limits the developable portion of the site to the development site; and

500
501 WHEREAS, as to the limitations on development imposed by the site's location within the R8B contextual zoning
502 district, the applicant represents the district's height limits and setback requirements, and the limitations imposed by
503 ZR § 23-692, result in an inability to use the Synagogue's substantial surplus development rights; and

504
505 WHEREAS, the applicant represents that, as a result of these constraints, the Synagogue would be permitted to use a
506 total of 28,274 sq. ft. for an as-of right development, although it has approximately 116,752 sq. ft. in developable
507 floor area; and

508
509 WHEREAS, the Synagogue further represents that, after development of the proposed building the Zoning Lot
510 would be built to a floor area of 70,166 sq. ft. and an FAR of 4.36, although development of 144,511 sq. ft. of floor
511 area and an FAR of 8.36 would be permitted as- of-right, and that approximately 74,345 sq. ft. of floor area will
512 remain unused; and

513
514 WHEREAS, the Opposition contends that the inability of the Synagogue to use its development rights is not a
515 hardship under ZR § 72-21 because a religious institution lacks the protected property interest in the monetization of
516 its air rights that a private owner might have, citing Matter of Soc. for Ethical Cult_ v. Svatt. 51 N.Y.2d 449 (1980);
517 and

518
519 WHEREAS, the Opposition further contends that the inability of the Synagogue to use its development rights is not a
520 hardship because there is no fixed entitlement to use air rights contrary to the bulk limitation of a zoning district;
521 and

522
523 WHEREAS, the Board notes that Spatt concerns whether the landmark designation of a religious property imposes
524 an unconstitutional taking or an interference with the free exercise of religion, and is inapplicable to a case in which
525 a religious institution merely seeks the same entitlement to develop its property possessed by any other private
526 owner; and

527
528 WHEREAS, furthermore, Spatt does not stand for the proposition that government land use regulation may impose a
529 greater burden on a religious institution than on a private owner; indeed, the court noted that the Ethical Culture
530 Society, like any similarly situated owner, retained the right to generate a reasonable return from its property by the
531 transfer of its excess development rights (see 51 N.Y.2d at 455, FN1); and

532
533 WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or
534 transfer of available development rights from a landmark building within the lot on which it is located or to an
535 adjacent lot, and

536
537 WHEREAS, the Board further notes that while a nonprofit organization is entitled to no special deference for a
538 development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to
539 develop its property than would be imposed on a private owner; and

540
541 WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate and
542 in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing
543 the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR §
544 72-21(a); and

545
546 **ZR § 72_21(b) -- Financial Return Finding**

547
548 WHEREAS, under ZR § 72-21 (b), the Board must establish that the physical conditions of the site preclude any
549 reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable
550 return, and that the grant of a variance is therefore necessary to realize a reasonable return (the "(b) finding"), unless
551 the applicant is a nonprofit organization, in

552

552 which case the (b) finding is not required for the granting of a variance; and

553

554 **Community Facility Use**

555

556 WHEREAS, the applicant represents that it need not address the (b) finding since it is a not-for-profit religious
557 institution and the community facility use will be in furtherance of its not-for-profit mission; and

558

559 **Residential Development**

560

561 WHEREAS, under New York State law, a not-for-profit organization which seeks land use approvals for a
562 commercial or revenue-generating use is not entitled to the deference that must be accorded to such an organization
563 when it seeks to develop a project that is in furtherance of its mission see *Little Joseph Realty v. Babylon*, 41 N.Y.2d
564 738 (1977); (municipal agency was required to make the variance findings because proposed use would be operated
565 solely by and for the benefit of a private entrepreneur); *Foster v. Savior*. 85 A.D.2d 876 (4a, Dep't 1981) (variance
566 upheld permitting office and limited industrial use of former school building after district established inability to
567 develop for a conforming use or otherwise realize a financial return on the property as zoned); and *Cath. Dioc. of*
568 *Rockville Ctr v. Vill. Of Old Westbury*, 170 Misc.2d 314 (1996) (cemetery to be operated by church was found to
569 constitute a commercial use)); and

570

571 WHEREAS, the residential development was not proposed to meet its programmatic needs, the Board therefore
572 directed the applicant to perform a financial feasibility study evaluating the ability of the Synagogue to realize a
573 reasonable financial return from as-of-right residential development of the site, despite the fact that it is a not-for-
574 profit religious institution; and

575

576 WHEREAS, the applicant initially submitted a feasibility study that analyzed: (1) an as-of-right community
577 facility/residential building within an R8B envelope (the "as-of-right building"); (2) an as-of-right residential
578 building with 4.0 FAR; (3) the original proposed building; and (4) a lesser variance community facility/residential
579 building; and

580

581 WHEREAS, at hearing, the Board questioned why the analysis included the community facility floor area and asked
582 the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community
583 facility from the site value and to evaluate an as-of-right development; and

584

585 WHEREAS, in response, the applicant revised the financial analysis to analyze: (1) the as-of-right building; (2) the
586 as-of-right residential building with 4.0 FAR; (3) the original proposed building; (4) the lesser variance community
587 facility/residential building; and (5) an as-of-right community facility/residential tower building, using the modified
588 the site value; and

589

590 WHEREAS, the feasibility study indicated that the as-of-right scenarios and lesser variance community
591 facility/residential building, would not result in a reasonable financial return and that, of the five scenarios only the
592 original proposed building would result in a reasonable return; and

593

594 WHEREAS, it was subsequently determined that a tower configuration in the RIOA portion of the zoning Lot was
595 contrary to ZR § 73-692 (the "sliver law") and therefore that the as-of-right community facility/residential tower
596 building could not represent an as-of-right development; the Board then questioned the basis for the previous
597 valuation of the development rights and requested that the applicant recalculate the site value using only R8 and R8B
598 sales; and

599

600 WHEREAS, the Board also requested the applicant to evaluate the feasibility of providing a complying court to the
601 rear above the fifth floor of the original proposed building; and

602

603 WHEREAS, applicant subsequently analyzed the financial feasibility of: (i) the proposed building (the original
604 proposed building with a complying court); (ii) an eight-story building with a complying court (the "eight-story
605 building"); and (iii) a seven-story building with penthouse and complying court (the "seven-story building"), using
606 the revised site value; the modified analysis concluded that of the three scenarios, only the proposed building was
607 feasible; and

608

609 WHEREAS, at hearing, the Board raised questions as to the how the space attributable to the building's rear terraces
610 had been treated in the financial feasibility analysis; and

611

611 WHEREAS, in a written response, the applicant stated that the rear terraces on the fifth and sixth floors had not
612 originally been considered as accessible open spaces and were therefore not included in the sales price as sellable
613 terrace areas of the appertaining units; the applicant provided an alternative analysis considering the rear terraces as
614 sellable outdoor terrace area and revised the sales prices of the two units accordingly; and
615

616 WHEREAS, at hearing, the Board also asked the applicant to explain the calculation of the ratio of sellable floor area
617 gross square footage (the "efficiency ratio") for each of the following scenarios: the proposed building, the eight-
618 story building, the seven-story building, and the as-of- right building, and
619

620 WHEREAS, in a subsequent submission, the applicant provided a chart identifying the efficiency ratios for each
621 respective scenario, and explained that the architects had calculated the sellable area for each by determining the
622 overall area of the building and then subtracting the exterior walls, the lobby, the elevator core and stairs, hallways,
623 elevator overrun and terraces from each respective scenario; and
624

625 WHEREAS, the applicant also submitted a revised analysis of the as-of right building using the revised estimated
626 value of the property; this analysis showed that the revised as-of-right alternative would result in substantial loss; and
627

628 WHEREAS, in a submission, the Opposition questioned the use of comparable sales prices based on property values
629 established for the period of mid-2006 to mid-2007, rather than using more recent comparable sales prices, and
630 questioned the adjustments made by the applicant to those sales prices; and
631

632 WHEREAS, in a written response, the applicant pointed out that, to allow for comparison of earlier to later analyses,
633 it is BSA practice to establish sales comparables from the initial feasibility analysis to serve as the baseline, and then
634 to adjust those sales prices in subsequent revisions to reflect intervening changes in the market; the applicant also
635 stated that sales prices indicated for units on higher floors reflected the premium price units generated by such units
636 compared to the average sales price for comparable units on lower floors; and
637

638 WHEREAS, the Opposition also questioned the choice of methodology used by the applicant, which calculated the
639 financial return based on profits, contending that it should have been based instead on the projected return on equity,
640 and further contended that the applicant's treatment of the property acquisition costs distorted the analysis; and
641

642 WHEREAS, in response to the questions raised by the Opposition concerning the methodology used to calculate the
643 rate of return, the applicant states that it used a return on profit model which considered the profit or loss from net
644 sales proceeds less the total project development cast on an unleveraged basis, rather than evaluating the project's
645 return on equity on a leveraged basis; and
646

647 WHEREAS, the applicant further stated that a return on equity methodology is characteristically used for income
648 producing residential or commercial rental projects, whereas the calculation of a rate of return based on profits is
649 typically used on an unleveraged basis for condominium or home sale analyses and would therefore be more
650 appropriate for a residential project, such as that proposed by the subject application; and
651

652 WHEREAS, the Board notes that a return on profit model which evaluates profit or loss on an unleveraged basis is
653 the customary model used to evaluate the feasibility of market-rate residential condominium developments; and
654

655 WHEREAS, the Opposition also raised concerns as to the omission of the income from the Beit Rabban school
656 from the feasibility study; and
657

658 WHEREAS, in response to concerns raised by the Opposition as to why the feasibility study omitted the income
659 from the Beit Rabban school, a submission by the applicant states that the projected market rent for community
660 facility use was provided to the Board in an earlier submission and that the cost of development far exceeded the
661 potential rental income from the community facility portion of the development; and
662

662 WHEREAS, further, the Board notes that it requested that costs, value and revenue attributable to the community
663 facility be eliminated from the financial feasibility analysis to allow a clearer depiction of the feasibility of the
664 proposed residential development and of lesser variance and as-of-right alternatives; and
665

666 WHEREAS, based upon its review of the applicant's submissions, the Board has determined that because of the
667 subject site's unique physical conditions, there is no reasonable possibility that development in strict compliance with
668 applicable zoning requirements would provide a reasonable return; and
669

670 **ZR § 72-21 (c) - Neighborhood Character Finding**

671
672 WHEREAS, as pertains to the (c) finding under ZR § 72-21, the Board is required to find that the grant of the
673 variance will not alter the essential neighborhood character, impair the use or development of adjacent property, or
674 be detrimental to the public welfare; and
675

676 WHEREAS, because the variances sought to permit the community facility use differ from the variances sought to
677 permit the proposed residential use, the potential affects on neighborhood character of each respective set of
678 proposed variances are discussed separately below; and
679

680 **Community Facility Use**

681
682 WHEREAS, the applicant represents that the proposed rear yard and lot coverage variances permitting the
683 community facility use will not negatively affect the character of the neighborhood, nor affect adjacent uses; and
684

685 WHEREAS, the applicant states that the proposed waivers would allow the community facility to encroach into the
686 rear yard by ten feet, to a height of approximately 49 feet; and
687

688 WHEREAS, the applicant states that, as a community facility, the Synagogue would be permitted to build to the rear
689 lot line up to a height of 23 feet; and
690

691 WHEREAS, the applicant represents that the affect of the encroachment into the rear yard is partly offset by the
692 depths of the yards of the adjacent buildings to its rear, and
693

694 WHEREAS, the Board conducted an environmental review of the proposed action and found that it would not have
695 significant adverse impacts on the surrounding neighborhood; and
696

697 WHEREAS, the Opposition disputes the findings of the Environmental Assessment Statement ("EAS") and contends
698 that the expanded toddler program, and the life cycle events and weddings held in the multi-purpose room of the
699 lower cellar level of the proposed community facility would produce significant adverse traffic, solid waste, and
700 noise impacts; and
701

702 WHEREAS, the Board notes that the additional traffic and noise created by the expanded toddler program - which is
703 projected to grow from 20 children to 60 children daily - falls below the CEQR threshold for potential environmental
704 impacts; and
705

706 WHEREAS, the Board further notes that the waivers of lot coverage and rear yard requirements are requested to
707 meet the Synagogue's need for additional classroom space and that the sub-cellar multi-purpose room represents an
708 as-of right use; and
709

710 WHEREAS, the applicant states that the proposed multi-function room would result in an estimated 22 to 30 life
711 cycle events and weddings over and above those currently held; and
712

713 WHEREAS, with respect to traffic, the applicant states that life cycle events would generate no additional traffic
714 impacts because they are held on the Sabbath and, as Congregation Shearith Israel is an Orthodox synagogue,
715 members and guests would not drive or ride to these events in motor vehicles; and
716

717 WHEREAS, the applicant further states that significant traffic impacts are not expected from the increased number
718 of weddings, because they are generally held on weekends during off-peak periods when traffic is typically lighter,
719 or from the expanded toddler program, which is not expected to result in a substantial number of new vehicle trips
720 during the peak hours; and
721

721 WHEREAS, with respect to solid waste, the EAS estimated the solid waste attributable to the entirety of the
722 proposed building, including the occupants of the residential portion and the students in the school, and
723 conservatively assumed full occupancy of the multi-function room (at 360 persons); and
724

725 WHEREAS, the estimates of solid waste generation found that the amount of projected additional waste represented
726 a small amount, relative to the amount of solid waste collected weekly on a given route by the Department of
727 Sanitation, and would not affect the City's ability to provide trash collection services; and
728

729 WHEREAS, the Synagogue states that trash from multi-purpose room events will be stored within a refrigerated area
730 within the proposed building and, if necessary, will be removed by a private carter on the morning following each
731 event; and
732

733 WHEREAS, at the Board's direction, the applicant submitted revised plans showing the cellar location of the
734 refrigerated trash storage area; and
735

736 WHEREAS, with respect to noise, as the multi-purpose room is proposed for the sub- cellar of the proposed
737 building, even at maximum capacity it is not expected to cause significant noise impacts; and
738

739 WHEREAS, as held in *Westchester Reform Temple v. Brown* (22 N.Y.2d 488 (1968)), a religious institution's
740 application is entitled to deference unless significant adverse effects upon the health, safety, or welfare of the
741 community are documented see also *Jewish Recons. Syn. of No. Shore v. Roslyn Harbor*, 38 N.Y.2d 283 (1975));
742 and
743

744 WHEREAS, the Opposition has raised general concerns about disruption to the character of the surrounding
745 neighborhood, but has presented no evidence to the Board supporting the alleged traffic, solid waste and noise
746 impacts of the proposed community facility; and
747

748 WHEREAS, the detrimental effects alleged by the Opposition largely concern the purported impact of events held in
749 the multi-purpose room which, as noted above; is permitted as-of-right; and
750

751 **Residential Use**
752

753 WHEREAS, the applicant represents that the proposed variances to height and setback permitting the residential use
754 will not negatively affect the character of the neighborhood, nor affect adjacent uses; and
755

756 WHEREAS, the applicant states that the proposed base height waiver and front setback waivers of the R8B zoning
757 requirements allow the building to rise to a height of approximately 94'- 10" along the West 70`x' Street street line,
758 before setting back by 12'-0"; and
759

760 WHEREAS, the applicant further states that the R8B zoning regulations limit the base height to 60 feet, at which
761 point the building must set back by a minimum of 15'-0"; and
762

763 WHEREAS, the applicant states that the proposed waiver of maximum building height will allow a total height of
764 approximately 105'-10", instead of the maximum building height of 75'-0" permitted in an R8B district; and
765

766 WHEREAS, the applicant also seeks a rear setback of 6'-8", instead of the 10'-0" rear setback required in an R8B
767 district; and
768

769 WHEREAS, the applicant represents that the front and rear setbacks are required because the enlargement would rise
770 upward and extend from the existing front and rear walls; and
771

772 WHEREAS, the applicant represents that the proposed base height, wall height and front and rear setbacks are
773 compatible with neighborhood character; and
774

775 WHEREAS, the applicant states that a Certificate of Appropriateness approving the design for the proposed building
776 was issued by the Landmarks Preservation Commission on March 14, 2006; and
777

777 WHEREAS, the Opposition raised issues at hearing concerning the scale of the proposed building and its
778 compatibility to the neighborhood context; and
779
780 WHEREAS, the applicant represents that the proposed bulk and height of the building is consistent with the height
781 and bulk of neighboring buildings, and that the subject site is flanked by a nine-story building at 18 West 70th
782 Street which has a base height of approximately 95 ft. with no setback, and an FAR of 7.23; and
783
784 WHEREAS, the applicant further represents that the building located at 101 Central Park West, directly to its north,
785 has a height of 15 stories and an FAR of 13.92; and that the building located directly to its south, at 91 Central Park
786 West, has a height of 13 stories and an FAR of 13.03; and
787
788 WHEREAS, the Board notes that, at nine stories in height, the building would be comparable in size to the adjacent
789 nine-story building located at 18 West 70' Street, while remaining shorter than the 15-story and 13-story buildings
790 located within 60 feet of the site; and
791
792 WHEREAS, the Opposition also contends that the proposed nine-story building disrupts the mid-block character of
793 West 70th Street and thereby diminishes the visual distinction between the low-rise mid-block area and the higher
794 scale along Central Park West; and
795
796 WHEREAS, the applicant submitted a streetscape of West 70th Street indicating that the street wall of the subject
797 building matches that of the adjacent building at 18 West 70th Street and that no disruption to the midblock character
798 is created by the proposed building; and
799
800 WHEREAS, the Opposition also contends that approval of the proposed height waiver will create a precedent for the
801 construction of more mid-block high-rise buildings; and
802
803 WHEREAS, as discussed above, the Opposition has identified four sites within a 51- block area bounded by Central
804 Park West and Columbus Avenue, and 59th Street and 110th Street that purportedly could seek variances permitting
805 midblock buildings which do not comply with the requirements of the R8B zoning district; and
806
807 WHEREAS, an analysis submitted by the applicant in response found that none of the four sites identified by the
808 Opposition shared the same potential for mid-block development as the subject site; and
809
810 WHEREAS, the Opposition argues that the proposed building will significantly diminish the accessibility to light
811 and air of its adjacent buildings; and
812
813 WHEREAS, the Opposition contended specifically that the proposed building abuts the easterly wall and court of the
814 building located at 18 West 70th Street, thereby eliminating natural light and views from seven eastern facing
815 apartments which would not be blocked by an as-of- right building; and
816
817 WHEREAS, the Opposition further argues that the proposed building will cut off natural lighting to apartments in
818 the building located at 91 Central Park West and diminish light to apartments in the rear of the building located at 9
819 West 69th Street, and that the consequentially diminished light and views will reduce the market values of the
820 affected apartments; and
821
822 WHEREAS, in response the applicant noted that lot line windows cannot be used to satisfy light and air requirements
823 and, therefore, rooms which depend solely on lot line windows for light and air were necessarily created illegally and
824 the occupants lack a legally protected right to their maintenance; and
825
826 WHEREAS, the applicant further notes that an owner of real property also has no protected right in a view; and
827
828 WHEREAS, nonetheless, the Board directed the applicant to provide a fully compliant outer court to the sixth
829 through eighth floors of the building, thereby retaining three more lot line windows than originally proposed; and
830
831 WHEREAS, the applicant submitted revised plans in response showing a compliant outer court; and
832
833
834

834 WHEREAS, the Opposition asserts that the proposed building would cast shadows on the midblock of West 70th
835 Street; and

836
837 WHEREAS, CEQR regulations provide that an adverse shadow impact is considered to occur when the shadow from
838 a proposed project falls upon a publicly accessible open space, a historic landscape, or other historic resource, if the
839 features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature
840 and adversely affects its uses or threatens the survival of important vegetation, and that shadows on streets and
841 sidewalks or on other buildings are not considered significant under CEQR; and

842
843 WHEREAS, a submission by the applicant states that that no publicly accessible open space or historic resources are
844 located in the raid-block area of West 70th Street; thus any incremental shadows in this area would not constitute a
845 significant impact on the surrounding community; and

846
847 WHEREAS, a shadow study submitted by the applicant compared the shadows cast by the existing building to those
848 cast by the proposed new building to identify incremental shadows that would be cast by the new building that are
849 not cast presently; and

850
851 WHEREAS, the EAS analyzed the potential shadow impacts on publicly accessible open space and historic
852 resources and found that no significant impacts would occur; and

853
854 WHEREAS, the applicant evaluated shadows cast over the course of a full year, with particular attention to
855 December 21, when shadows are longest, March 21 and September 21 (vernal and autumnal equinoxes) and June 21,
856 when shadows are shortest, disregarding the shadows cast by existing buildings, and found that the proposed
857 building casts few incremental shadows, and those that are cast are insignificant in size; and

858
859 WHEREAS, specifically, the shadow study of the EAS found that the building would cast a small incremental
860 shadow on Central Park in the late afternoon in the spring and summer that would fall onto a grassy area and path
861 where no benches or other recreational equipment are present; and

862
863 WHEREAS, based upon the above, the Board finds that neither the proposed community facility use, nor the
864 proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or
865 development of adjacent properties, or be detrimental to the public welfare; and

866
867 **ZR § 72-21 (d) - Self Created Hardship Finding**

868
869 WHEREAS, as pertains to the (d) finding under ZR § 72-21, the Board is required to find that the practical
870 difficulties or unnecessary hardship burdening the site have not been created by the owner or by a predecessor in
871 title; and

872
873 WHEREAS, the applicant states that the unnecessary hardship encountered by compliance with the zoning
874 regulations is inherent to the site's unique physical conditions: (1) the existence and dominance of a landmarked
875 synagogue on the footprint of the Zoning Lot, (2) the site's location on a zoning lot that is divided by a zoning district
876 boundary; and (3) the limitations on development imposed by the site's contextual zoning district; and

877
878 WHEREAS, the applicant further states that these conditions originate with the landmarking of its Synagogue
879 building and with the 1984 rezoning of the site; and

880
881 WHEREAS, based on the above, the Board therefore finds that the hardship herein was not created by the owner or
882 by a predecessor in title; and

883
884 **ZR § 72-21 (e) - Minimum Variance Finding**

885
886 WHEREAS, as pertains to the (e) finding under ZR § 72-21, the Board is required to find that the variance sought is
887 the minimum necessary to afford relief; and

888
889 WHEREAS, the original proposed building of the Synagogue had no rear court above the fifth floor, and

890

890 WHEREAS, in response to concerns raised by the residents of the adjacent building, the Board directed the applicant
891 to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining access to
892 light and air of three additional lot line windows; and
893
894 WHEREAS, the applicant modified the proposal to provide a complying court at the north rear above the fifth floor,
895 thereby reducing the floor plates of the sixth, seventh and eighth floors of the building by approximately 556 sq. ft.
896 and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in the
897 variance of the rear yard setback of 25 percent; and
898
899 WHEREAS, during the hearing process, the Board also directed the applicant to assess the feasibility of several
900 lesser variance scenarios; and
901
902 WHEREAS, financial analyses submitted by the applicant established that none of these alternatives yielded a
903 reasonable financial return; and
904
905 WHEREAS, however, the Opposition argues that the minimum variance finding is no variance because the building
906 could be developed as a smaller as-of-right mixed-use community facility/ residential building that achieved its
907 programmatic mission, improved the circulation of its worship space and produced some residential units; and
908
909 WHEREAS, the Synagogue has fully established its programmatic need for the proposed building and the nexus of
910 the proposed uses with its religious mission; and
911
912 WHEREAS, the Board notes again that a zoning board must accommodate a proposal by a religious or educational
913 institution for a project in furtherance of its mission, unless the proposed project is shown to have significant and
914 measurable detrimental impacts on surrounding residents See *Westchester Ref. Temple v. Brown*, 22 N.Y.2d 488
915 (1968); *Islamic Soc. of Westchester v. Foley*, 96 A.D. 2d 536 (2d Dep't 1983); and *Jewish Recons. Synagogue of No.*
916 *Shore v. Roslyn Harbor*, 38 N.Y.2d 283 (1975)); and
917
918 WHEREAS, the Opposition has not established such impacts; and
919
920 WHEREAS, the Opposition may have raised other issues that are not specifically addressed herein, the Board has
921 determined that all cognizable issues with respect to the required variance findings or CEQR review are addressed by
922 the record; and
923
924 WHEREAS, the Board finds that the requested lot coverage and rear yard waivers are the minimum necessary to
925 allow the applicant to fulfill its programmatic needs and that the front setback, rear setback, base height and building
926 height waivers are the minimum necessary to allow it to achieve a reasonable financial return; and
927
928 WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made
929 under ZR § 72-21; and
930
931 WHEREAS, the project is classified as a Type I action pursuant to 6NYCRR, Part 617; and
932
933 WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant
934 information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 07BSA071M
935 dated May 13, 2008; and
936
937 WHEREAS, the EAS documents that the project as proposed would not have significant adverse impacts on Land
938 Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space;
939 Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources;
940 Waterfront Revitalization Program; Infrastructure; Solid Waste and Sanitation Services; Energy; Traffic and Parking;
941 Transit and Pedestrians; Air Quality; Noise; and Public Health; and
942
943 WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the
944 environment.
945
946 *Therefore it is Resolved* that the Board of Standards and Appeals issues a Negative

947 Declaration with conditions as stipulated below, prepared in accordance with Article 8 of the New York State
948 Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality
949 Review and Executive Order No. 91 of 1977, as amended, and makes the required findings under ZR § 72 21, to
950 permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/
951 Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community
952 facility/ residential building that does not comply with zoning parameters for lot coverage, rear yard, base height,
953 building height, front setback and rear setback contrary to ZR § § 24-11, 77-24,24-36,23- 66, and 23 633; on
954 condition that any and all work shall substantially conform to drawings as they apply to the objections above noted,
955 filed with this application marked "Received May 13, 2008" - nineteen (19) sheets and "Received July 8, 2008" - one
956 (1) sheet; and *on further condition*.

957
958 THAT the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community
959 facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft; a base height of 95'-1"; with a front
960 setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-S"; and an interior lot coverage
961 of 0.80; and

962
963 THAT the applicant shall obtain an updated Certificate of Appropriateness from the Landmarks Preservation
964 Commission prior to any building permit being issued by the Department of Buildings;

965
966 THAT refuse generated by the Synagogue shall be stored in a refrigerated vault within the building, as shown on the
967 BSA-approved plans;

968
969 THAT this approval is limited to the relief granted by the Board, in response to specifically cited and filed
970 DOB/other jurisdiction objection(s) only;

971
972 THAT the approved plans shall be considered approved only for the portions related to the specific relief granted;

973
974 THAT substantial construction be completed in accordance with ZR § 72-23;

975
976 THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning
977 Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of
978 plan(s)/configuration(s) not related to the relief granted.

979
980 **Adopted by the Board of Standards and Appeals, August 26, 2008.**