

FIELD GUIDE TO BEATING THE NEW YORK CITY BOARD OF STANDARDS AND APPEALS

The Trustees of the Congregation Shearith Israel (CSI) submitted Application 74-07-BZ to BSA in 2007 requesting zoning variances that would allow them to replace and expand a synagogue Annex. The 'New Building' also has 5 luxury residential condominiums above the Annex.

To demonstrate the need for variances (waivers), the Trustees submitted analyses showing that they could not obtain a reasonable financial return from the project without them. The inadequate return must be demonstrated as a necessary condition for granting a waiver. Since As of Right (without waivers) buildings could be built profitably, the Trustees resorted to tricks to prove the obvious truth to be false.

A sample below of the tricks used, constitute a handbook of how to beat New York City Board of Standards and Appeals procedures, rules, and regulations.

Mismatch income and expense items.

Show the development income produced by a part of the building but costs for the whole, then claim the development unprofitable.

An analysis [*4] provided by the Trustees uses income from classrooms rented out (5,136 sq.ft.)[*5] matched against expense of building the entire Annex (14,430 sq.ft.). The result is unprofitable, implying that the remainder of the Annex has no value to the Congregation. Separately, they declared the remaining part of the Annex "invaluable".

The BSA accepted this obviously false analysis.

*4. "Capitalized Value of Market Rate Community Facility", Freeman Frazier Associates letter, 24 Oct. 07, page 9

*5. Congregation Shearith Israel, "Statement in Support of Certain Variances from Provisions of the New York City Zoning Resolution", Revised 13 May 08.

Present absurd analysis.

The Revised As of Right CF/Residential Development analysis[*6] proposes that a developer pay \$14,816,000 for the right to build condos which he will sell for \$11,866,000. The development loses money, even if built for nothing with used Erector Set parts. The analysis is based on the irrational, false supposition that the value of undeveloped land (air rights) can be set without regard for the property's use. The supposition is expressly refuted in other parts of the application where the Annex portion of the New Building was valued at both \$40/sq.ft. and at \$157/sq.ft. depending on use of the space.

The BSA never challenged the false premise or inconsistencies. In particular, they accepted the idea a developer would pay for the right to lose money, and accepted the conclusion that this arrangement did not produce a reasonable return.

As another example, the Trustees' final Statement of May 13th identified two alternatives as As-of-Right, labeled AOR#1 and AOR#2, that they claimed could be built without zoning variances. Among other things, these 8-story alternatives obviously violated zoning height restrictions. In a meeting between CSA staff and Opposition representatives in late May 2008, staff was surprised when told the obvious--AOR#1 and AOR#2 required the same variances as the Trustees' primary proposal and were not As-of-Right. The staff had apparently not observed the obvious.

*6. Op.Cit.,p11

Ignore the law

Ignore any rule, guideline, regulation, or law that limits desired outcomes.

a) An application to BSA must include the amount of equity (applicant investment) injected in the project and include the Return on Investment percentage[*7]. None of the approximately 20 submissions by the Trustees over a year included either. They stated[*8] that it was usual for submissions to the the BSA to ignore the BSA application requirements.

b) BSA Chair has stated "...the Board is guided by a lot of case law..."[*9] and requested CSI to present case law citations in support of their view. None have been provided. but the claim was repeated in the agency's resolution dated 26 August 2008.

c) BSA BZ application instructions for condominium proposals require that "All construction estimates must be submitted by an architect, engineer, builder or contractor, other than owner or applicant and must be signed and sealed." CSI submitted estimates extracted from a non-qualifying entity that were neither signed nor sealed. Mr Freeman responded that the source was "involved" and "well regarded" and refused to submit qualifying estimates. Nice guys apparently finish first after all.

The instructions are not a mere bureaucratic requirement. They prevent an applicant from submitting arbitrary, self-serving estimates. By ignoring them, the BSA permits any applicant to always prove that a zoning waiver is required, because all As-of-Right buildings can be made unprofitable. This explains, in part, why about 95% of all waiver application are approved by the BSA.

*7. "Detailed instructions for Completing BZ Application", City of NewYork Board of Standards and Appeals, undated. See www.nyc.gov/html/bsa/

*8. Freeman letter, 13 May 08, p7

Use Phony Assumptions

For one option, the architect's drawing[*10] shows 9,638 sq.ft. gross, above-ground area for luxury condominiums. The economic analysis[*10], however, is based on an area of 7,594 sq.ft. gross, a figure appearing nowhere in the drawings, then discounts that figure to 5,318 sq.ft. sellable space, also an unsupported figure.

Selling condominiums occupying only 55% of the constructed area is as good a way as any to lose money, if that is the intent. BSA accepted the conclusion that this option was unprofitable.

*10. Platt Byard Dovell White architect's drawing AOR-2 dated 8.28.07 vs Freeman letter dated 24 Oct 07, p8 col.1

Create a virtual world.

Use theoretical, artificially-derived numbers or opinions rather than actual, readily available numbers to substantiate an argument.

a) The Trustees opined[*11] that the “high end” market value for Annex space was \$40/sq.ft per year. They continued to dig the hole deeper by stating that Annex area would have to rent for “in excess of \$87/sq.ft” to be feasible.

Their problem is that the same analysis showed “classroom area income” from just part of the Annex of \$441,000 for 2,818 sq.ft., a rate of \$156.85. To uncover the false claim, BSA would have had to use a calculator to do the long division. Neither academic credentials nor professional licenses are required.

*11. Freeman letter 24 Oct 07, p2

Create imaginary financial transactions.

The Trustees’ typical analysis[*12] includes a development project expense called “Acquisition Cost”. This is claimed to be a fee paid by the Developer, the Trustees in this case[*13], to the property owner, the Trustees in this case, for the right (permission), to construct luxury condominiums on property already owned by the Developer, the Trustees in this case. This imaginary payment burden reduces analyses of most alternative developments into unprofitability.

Most people will realize that this fee is paid by the Developer to the Developer. It is the equivalent of writing a check on a bank account, immediately depositing the check into the same account, then claiming the expense in a bill to a customer, the BSA submission in this case. If this were to actually be executed, it would be fraud. This fiction has not been questioned by the BSA, apparently considering it a usual real estate development transaction.

(See Wall Street Journal article, July 16, 2008, page D3, describing the criminal indictment of Rabbis Weisz and Zigelman for their involvement in a financial scheme that similarly involved phantom transactions in a charitable cause.)

*12. For example, Freeman letter, 13 May 08, p8.

*13. LPC Hearing Op.Cit.

Impede review of false claims.

To prevent critical examination, change labels frequently, and avoid cross references among text, analysis, and drawings. Confuse everyone. Make review so cumbersome that it is not done.

a) Isolate important financial analyses from the proposed structures as described in the architect's drawings. For example, the Trustees used several terms similar to "Revised As of Right CF/Residential Development"[*14] without reference to the several architectural drawings differently labeled "Scheme A".

A reader might assume, from the Community Facility (CF) mentioned in the title, that CSI was submitting an analysis showing that the CF construction would not provide sufficient return in this case. Actually, the analysis has nothing to do with the Community Facility. But neither cost, expense, nor mission-related area are included.

b) As another example, two non-qualifying building were falsely identified[*15] as As-of-Right. The analysis[*16] did not reference any drawings because there aren't any.

c) All Freeman/Frazier Schedule A analyses show a group of figures under the heading "Return on Investment". None show the developer's investment and consequently all ROI figures are incorrect. Freeman states that[*17] "project cost and total investment are synonymous. The reported Return on Investment (ROI) is not.

The Freeman submissions ignore the differences among project costs, investment, and equity. The developer portion of the investment (equity) is only one part of the project cost--the remaining costs are funded by a bank loan as Freeman makes clear in his Schedule B.

As an experienced analyst, Freeman surely understands these differences. To mix them up must be a deliberate misrepresentation of the facts.

*14. Freeman letter 21 Dec 07, p 11-12

*15. The Statement Op.Cit.

*16. The Statement Op.Cit.,p44

*17. Freeman letter 17 Jun 08

Avoid details.

Present work products as authoritative without any support. Two assumptions underlie this technique: real estate professionals are completely straight forward, and they have thoroughly vetted the underlying facts.

For example, the Trustees' representative presented a cover page with impressive logo[*18] and a single page result for development cost allocations without backup or other support. This smoothed the way to approvals without getting bogged down in questions of accuracy, responsibility, and methodology. BSA never noticed that only page 2 out of a 15-page report was presented. Upon forced review of the details, it was discovered that expenses of building the Annex proper were allocated to the luxury condominiums.

It is easier to defend the analysis itself rather than letting on that it is based on fabrications.

As a second example, other developments on other sites[*19] were used as a proxy for the value of the proposed condominium space. But facts critical to determining value such as intended use, area being built, and loss factors were not in “the available published information”[*20]. The Trustees’ analyst states “we have no idea what was in their gross, what was taken out”. That gross is what was used in the Trustees’ analysis, now admitted to have no basis.

*18. Construction cost estimates submitted by McQuilkin Assoc. Inc 4 Mar 08, et al.

*19. Freeman letter 13 May 08 et al

*20. Transcript, Op.Cit. p8.

Cite non-existent work as authority.

When the Trustees were asked by BSA to cite the source of a 19,755 sq.ft. figure (the basis for critical economic analysis), the BSA was told that “the basis for floor area assumptions has been detailed in previous submissions”. Previously, it had been made up, never identified as an area in the proposed New Building. But the fabrication seems to have been accepted as a source .

This technique has great potential. Say anything, then later quote it as an authoritative source. The BSA will accept it.

Pretend to correct errors.

When caught in a significant error, make a minor, irrelevant correction. People will think the problem has been resolved.

The Trustees’ application text[*21] falsely stated that two building configurations were As-of-Right. In response to a showing by the Opposition that this was nonsense, unrelated to financial analysis, and unsupported by architectural drawings, the Trustees responded with a ‘correction’, that referenced an analysis that changed a number or two but not the AoR allegation, and apologized. The next revision of the application contained the same inherent error[*22].

This is but one small example of BSA's developer support. They not only fail to expose false developer statements; they rely on them to grant waivers.

*21. Statement, Op.Cit. revised 13 May 08, p44.

*22. Statement, Op.Cit. revised 8 Jul 08, p44.

Cite inapplicable requirements.

The Americans with Disabilities Act (ADA) requires new buildings to have compliant elevators. This requirement was used by the Trustees to justify the New Building, because the current elevator could not be made to comply (incidentally, shown to be false). In fact, the ADA does not require compliance for improvements to existing structures.

Entities without expertise and without requiring authoritative references, such as the BSA, will typically accept such false requirements.

Play a Shell Game

During the 24 June 2008 BSA hearing[*23] the Trustees' managing representative from Friedman and Gottbaum stated "All [emphasis added] of our professionals with regard to this application are present and prepared to answer your questions...". That statement became part of the record.

BSA Commissioners immediately asked several questions concerning luxury condominium space. Responses were "I will check with the architect..." (two counts) and "we will review it with the architect" (two counts on that one, too). The architect, in all likelihood a professional, was not present even after having been alerted to "a few questions for you during our discussion yesterday" according the BSA Chair. All was one guy from Freeman/Frazier Associates who was unable to answer the most important questions.

The offered response "we will, if necessary, correct it", is conditional promise with a gap big enough to drop a New Building through.

*23. See transcript of "Public Hearing before the Board of Standards, and Appeals", 24 Jun 08, pp1-4

Bait and Switch

Present whatever material is necessary to obtain approval, then change it later to a plan that can and will actually be built.

The Trustees submitted at least six sets of drawings[*24] over a period of almost two years in support of Landmarks Preservation and BSA approval requests. As required, the drawings show the dimensions of every room, every story, and meticulously identify the size and location for every requested variance, for each of several Community Facility alternatives.

Similar detail was not provided for the condominiums (presumably) because the Trustees wanted to conceal the variances directly tied to the profit-making portion of the New Building that accounted for 90% of the variances[*32] by area.

Then, on June 24th, 2008, the Trustees' spokesman reclassified them as "very schematic, conceptual plans, so as they evolve... [and] By the time it gets to the Attorney General, it's met the standards, but we are not there yet". So, any variances granted now (square feet, height, and other metrics) will be based on economic analyses and drawings that will change to meet standards at a later time.

This sequence suggests a much more efficient appeals process. An applicant can provide vague conceptual plans drawn up by an artist without the expense of hiring an architect. Without details, the review process will require much less time and effort, particularly since the BSA has historically approved 96.5% of applications.[*25]

*24. Including PBDW drawing dates Aug 07, Oct 07, Dec 07, and Mar 08.

*25. City Limits Magazine, April 04.

*32. See Sugarman Memorandum of Law, 23 Sept 08, page 4, et al

Redesign Government

The Landmarks Preservation Commission's mission is to 'protect important physical elements of the City's history'[*26]. On June 24th, 2008, the Trustees' representative for the Congregation Shearith Israel has made an adjustment to the LPC charter saying that "Landmarks is the final word of this administration on important components under the City's police power to regulate"[*27]. The writer admits that this is not one of his "major substantive points to rebut here" which may explain why he did propose any uniform styles, colors, or badges.

The charter of the Board of Standards and Appeals was established "to provide 'relief' from the zoning code [where] regulations are unduly restrictive"[*28]. The Trustees' managing representative from Friedman and Gottbaum now expands their true role by telling board members that it "is your burden, also to work out the conflicts of protecting institutions who need to expand from a hostile community". At least this is consistent with the generally expanding social role of government, in this case to protect the weak New York real estate industry interests.

*26. Central Park West Skyline", Landmark West. 08

*27. Transcript page 49-52.

*28. LandMark West, Op.Cit.

Plead Amnesia

The Trustees' submission of June 17, 2008 states that an opponent "appears to introduce the [new] idea that CSI should be the developer of the project."

On November 26, 2002, the Trustees made their resolution public[*29]: "The Trustees of the Congregation have decided not to proceed with a developer for this application. We wanted to take control of the process." They continue, "we have interviewed architects and consultants" establishing themselves as the Developer.

The Trustees' subsequent advice[*30] that the opponent "needs to do a more careful reading of the previous submission." would seem to be a good way for the Trustees to avoid memory lapses.

According to Sugarman[*31], the Trustees' assertions are irrelevant because zoning laws and regulations apply to property owners, not developers.

*29. LPC Transcript, p18

*30. Freeman letter, 17 Jun 08, p3

*31. Sugarman Petition, 23 September 08.

EPILOGUE

On 29 August 2008 the NYC Board of Standards and Appeals granted all the requested waivers to zoning regulations for both the 'non-profit' Community House and the luxury condominiums. The grants were based in part on the claim that Congregation Shearith Israel could not obtain an adequate financial return on a building 'intended' as a non-profit synagogue annex.

The Trustees of a religious organization have reached their purely commercial goals using techniques that their clergy would decry as unethical.

Although the BSA is not required to identify dumb, misleading, or invalid submissions, as illustrated by the problematic issues identified above, their lack of public engagement leads applicants and opponents to believe that they can get away with anything. Because they do. The process makes New York City government appear corrupt.

While no determination has yet been made by the Federal, State, or City government that the commercial interests of Congregation Shearith Israel in this case qualify for recognition as non-profit, the Internal Revenue Service makes a clear distinction between activities directly related to an organization's mission and those for profit-making, and therefore taxable, activities.