MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 24

X	INDEX NO. 22504/09
IN THE MATTER OF BK CORPORATION	MOTION SEQ. NO. 1
- against -	BY: AGATE, J.
MEENAKSHI SRINIVASAN, et al.	
X	MOTION DATE: January 5, 2010
	MOTION CAL NO. 3

In this hybrid Article 78 proceeding and action for declaratory judgment, petitioner BK Corporation seeks a judgment vacating the resolution of July 21, 2009 issued by respondent Board of Standards and Appeals of the City of New York (BSA) and its members, respondents Meenakshi Srinivasan, Christopher Collins, Dara Ottley-Brown, Eileen Montanez and Susan Hinkson, which denied petitioner's application for a variance at 32-12 23rd Street, Queens, New York; declaring that the BSA's application of the laws and regulations of the City and State of New York are unlawful and a violation of the New York State Constitution and City Charter and; directing the BSA to grant the variance application.

Petitioner BK Corporation is the owner of the premises located at 32-12 23rd Street, Queens, New York. The subject premises is one of five attached mixed-use newly constructed buildings located at 32-12 through 32-20, 23rd Street. The zoning lot consists of 9,594 square feet, located on the northeast corner of 23rd Street and 33rd Avenue, and are on individual tax lots. Each of the premises consists of a two-family residence on the second

and third floors, with a community use space one the first floor. The subject building is the furthest into the mid-block, and abuts an adjacent building.

The zoning lot had previously housed a one-story non-conforming automotive repair shop and storage garage, which was demolished by petitioner in June 2002, in anticipation of constructing five attached residential buildings, with no community use. The northern portion of 23rd Street was within a R5 zoning district until the City Planning Commission enacted a zoning change on January 24, 2001, which placed that portion of the block in the R6B zoning district. The southern portion of the block remains within the R5 zoning district. The subject building is within the R5 zoning district.

Petitioner's architect filed plans for the residential development with the Department of Building's (DOB) professional certification program, which enables an architect or engineer to obtain permits without an full DOB examination. Under the professional certification program, the architect or engineer certifies that he or she is complying with the Zoning Resolution, Building Code and other applicable laws, and the DOB accepts as true the statements contained in the application (1 RCNY § 21-01[b][4],[5]). Where the DOB performs an audit of the project which indicates non-compliance with the Zoning Resolution, Building Code, or other applicable laws, the architect or engineer agrees to take the necessary remedial action to obtain compliance. The owner is required to attest that it is aware of the application and the conditions upon which it is permitted and to agree to perform the required remedial measures (1 RCNY § 21-01[b][7],[8]).

It is undisputed that petitioner's architect's development proposal was based upon the erroneous assumption that the block on which the buildings were to be constructed was entirely within an R5 zoning district. The architect thus assumed that the "predominately built up area" (PBA) bulk provisions set forth in Zoning Resolution § 23-1419(c) applied, which allowed for a maximum floor area ratio of 1.65, rather than 1.25. However, as the zoning district had been changed to a R6B zoning district for the northern portion of the block, the PBA provisions did not apply.

The DOB did not perform a full review of the proposed project plans for the five building development at the time the plans were filed on September 20, 2002, and permits were issued on February 14, 2003. The DOB conducted an audit on February 25, 2004, at which time it discovered the architect's error, and issued a stop work order. However, by that time, the construction of the five buildings was complete or nearly complete. In order to meet the reduced residential floor area ratio, BK Corporation elected to eliminate one residential unit in each of the five buildings, and replace it with a medical office, a community facility use. BK Corporation thus was able to comply with the applicable floor area ratio requirements. This change, however, required that the subject building have two side yards in order to comply with Zoning Resolution § 24-35. Since the side wall of the northern most unit (the subject premises) abutted the adjacent premises, BK Corporation sought a variance which would eliminate the need for a side yard for the subject premises.

BK Corporation initially filed an application with the BSA for a variance on November 29, 2004, which it voluntarily withdrew on January 26, 2006. An application filed with the DOB for building permits was denied on September 29, 2006, as the subject building did not comply with Zoning Resolution § 24-35. On October 18, 2006, BK Corporation filed an new application with the BSA for a variance. Following required hearings, Queens Community Board No. 1 recommended that the variance application be approved with the stipulation that the first floor use be limited to a doctor's office.

In February 2007, the BSA requested that BK Corporation file a revised statement of facts and findings, and it complied in March 2007. In April 2007, the BSA informed BK Corporation that it should request a rehearing of the withdrawn 2004 application, and on August 4, 2007, the BSA voted to dismiss the 2006 application. BK Corporation thereafter commenced an Article 78 proceeding in this court, and on November 29, 2007, the parties entered into a stipulation of settlement and discontinuance whereby the 2006 application was remanded to the BSA for consideration.

On December 21, 2007 the BSA issued a notice of comments, requesting modification of the 2006 application materials based upon its review of those materials. BK Corporation submitted its response with supporting documents, and the members of the BSA conducted a site and neighborhood examination. Public hearings on the proposed variance were conducted on August 7, 2007, March 17, 2009, April 21, 2009, and June 9, 2009. Petitioner made additional submissions to the BSA on July 7, 2009.

On July 21, 2009 the BSA's members, respondents Meenakshi Srinivasan, Christopher Collins, Dara Ottley-Brown, Eileen Montanez and Susan Hinkson, unanimously denied BK Corporation's request for a variance in a written resolution. The BSA reviewed petitioner's application for an area variance under Zoning Resolution § 72-21, which requires it to make the following five specific findings: (a) because of "unique physical conditions" of the property, conforming uses would impose "practical difficulties or unnecessary hardship"; (b) also due to the unique physical conditions, conforming uses would not "enable the owner to realize a reasonable return" from the zoned property; (c) the proposed variances would "not alter the essential character of the neighborhood or district"; (d) the owner did not create the practical difficulties or unnecessary hardship; and (e) only the "minimum variance necessary to afford relief" is sought. The BSA found that BK Corporation had failed to establish subdivisions (a), (b) and (d), and detailed its reasons for rejecting each of the applicant's claims, as well as its reasons for rejecting the prior Board determinations and case law relied upon by the applicant.

As to subdivision (a), the BSA rejected BK Corporation's claim that unique physical conditions led to practical difficulties and unnecessary hardship in developing the subject lot in compliance with the side yard requirements. BK Corporation had cited the following as unique physical conditions: (1) the history of non-conforming use at the site, (2) that Zoning Resolution §§ 52-31 and 54-21 would have allowed a change in use of the former auto repair shop at the site to community facility use without regard to the side yard

condition and the proposed residences could have been constructed above the former auto repair building; (3) the conditions of adjacent development; (4) the water table and the proximity to a 100-year flood boundary line and; (5) environmental contamination on the site that cost approximately $56,000.00 to remediate.

BK Corporation also cited to three prior Board variance cases in support of its application, which the BSA distinguished and found to be irrelevant to the current application. The BSA described those prior determinations as involving: "(1) the establishment of a non-conforming physical culture establishment in the cellar of an existing mixed-use building, (2) the legalization of a one-story automotive repair shop on an irregular lot, and (3) the establishment of a physical culture establishment in portions of a residential building." The BSA noted that all three cases involved uses that were not permitted as of right in the subject zoning districts, and were concerned with the compatibility of the proposed use with an existing use. The BSA determined that as BK Corporation's proposed community facility use is as of right in the subject zoning district, its discussion of a non-conforming prior use was misplaced, and that the three prior determinations cited by the owner were not relevant. The BSA found that as the applicant sought an area variance in order to cure the side yard violation, its discussion of use variances was confused and erroneous.

As to the history of the site, the BSA found that the prior non-conforming status of the demolished auto repair building was not a unique physical condition that led to

hardship in complying with the applicable community facility side yard requirement. The BSA determined that "after demolition, the developer was left with a large vacant site upon which a complying development with required side yards could have been constructed as demonstrated in the multiple site plans provided with the applicant's feasibility study" and "the fact that the prior building could have been maintained, with residences constructed on top, is not a unique physical condition that leads to hardship; rather, it is merely a description of an alternative development proposal that would have avoided the predicament that led to the instant variance application."

The BSA also found that the applicant's assertions regarding the provisions of Zoning Resolution § 52-31 and Zoning Resolution § 54-31 to be irrelevant, as those provisions require that the non-conforming use and non-complying building remain. However, as the prior building occupied by the non-conforming use was demolished, the BSA found that all rights to the non-conforming use were lost, rendering the applicant's argument meaningless.

As regards the adjacent development, the BSA stated that BK Corporation had asserted that the adjacent commercial use is a unique condition and that only 15 residential uses within a 400-foot radius of the site are adjacent to commercial uses and that this condition contributes to hardship at the site. The BSA reiterated that the applicant was not seeking a use variance, but rather was seeking an area a variance to eliminate a side yard requirement, and that "the applicant had designed a building that, without the side yard, is

actually closer to the purportedly incompatible adjacent commercial use than it would be if the side yard were provided." The BSA stated that while the applicant had referred to the approval of the vertical enlargement of an adjacent building on the lot line as evidence of inconsistencies on the part of the DOB, its reference to *Matter of Charles A. Field Delivery Service, Inc. v Lillian Roberts* (66 NY2d 516 [1985]), was misplaced as the applicant had not provided evidence that the DOB's approval of the adjacent construction was based upon the same set of facts as the DOB's objection to the subject building. The BSA stated that the evidence submitted on the record suggested that the vertical enlargement of a pre-existing building for residential use was not factually similar to the development of the subject site. The BSA also noted that pursuant to *Field Delivery*, agencies could correct prior erroneous interpretations, and that "adjacency to lot line buildings is a common condition in New York City and thus not particularly unique, nor does it contribute to hardship; and...the Board is not convinced that there is any nexus between the applicant's request for a side waver and the presence of a commercial use with a lot line condition on the adjacent site."

As regards the water table and flood zone, Bk Corporation had stated that the water table is approximately 15 feet below grade and that the site is 150 feet from the boundary of a 100-year flood area, and argued that these conditions made the construction of sub-cellar prohibitive. The BSA stated that one of its members was an engineer and that the Board had reviewed the flood maps and found that "the site is approximately 150 feet from Zone X, which is described as an 'area of moderate or minimal hazard from the

principal source of flood in the area' and 500 feet from a 100-year flood zone AE," and that "none of the proffered building proposals include a sub-cellar, and, thus any reference to the inability to include such space is irrelevant to a hardship finding."

As regards the environmental remediation costs, the BSA stated that "the applicant represents that the following factors contributed to hardship at the site: (1) the Phase 1 Environmental Site Assessment Report, dated March 21, 1998 discloses a spill which caused seepage into the adjacent building's cellar, (2) due to contamination, the demolition of the prior building was required, and (3) underground storage tanks were required to be removed...and the applicant identified $41,000 in costs associated with the noted remediation." The BSA found that BK Corporation had not demonstrated that the site remediation had reached a level at which it was unique or contributed to a hardship at the site. The Board noted that the 1998 Phase I report concluded that no further action was required after the 1996 oil spill with seepage into the adjacent building, as the report stated that proper steps were taken and the spill was cleaned up, leaving no possibility of groundwater contamination. The Board further noted that a 2002 Phase I report stated that although the prior owner did not perform minor clean up or remove the underground service tanks, he did remove the tanks from service and that the test results showed very low concentration of semi-organic compound contamination, below EPA limits. The Board noted that the November 2002 letter from the Department of Environmental Conservation was a reminder to register any existing tanks and not evidence of sub-surface contamination at the

site. The BSA found that the evidence submitted by owner regarding the cost of remediation consisted of a checks totaling $41,000 payable to a wrecking company, and questioned whether these costs may have included the costs of excavation, tank removal, and ordinary construction demolition costs. The BSA stated that the applicant also claimed an additional $15,000 in remediation for a total of $56,000. The BSA distinguished a prior case relied upon by the owner, in which the remediation costs were incurred prior to filing for a variance totaled $340,000.00. The Board noted that entire amount of the $56,000 claimed by BK Corporation for remediation represented one percent of the total development cost of $4 million. The BSA also found that the owner's discussion of the prohibitive costs of remediation if the auto repair building remained was misplaced, since the applicant did not maintain the prior building. The BSA also found that the owner had failed to asset or establish that any of the alleged unique conditions have a nexus to the relief requested.

The BSA concluded that "the need for the side yard waiver really results from the erroneous assumption that the zoning lot was in a PBA, and that five residential buildings could therefore be developed without a community facility as of right using the 1.65 FAR [floor area ratio] that the PBA regulations permit," and that the applicant had "not shown that there are unique physical conditions present at the site that lead to unnecessary hardship or practical difficulties in complying with the applicable side yard requirements."

BK Corporation had also asserted its good faith reliance on the DOB's granting of a permit constituted a unique factor. The owner claimed that at the time it commenced its

development of the property, there was no way for its architect to know that the zoning district had changed on the north side of the block so that the PBA regulations did not apply to that site. BK Corporation claimed that Department of City Planning (DCP) did not provide proper notice to the professional filing community before the application for the permit was made. The BSA rejected this claim, as the zoning change was adopted by the City Planning Commission on January 24, 2001, approximately 1 ½ years before the permit was filed with the DOB. The BSA found that "the architect should be charged with constructive notice of both the zoning district in which the development site is located as well as adjacent zoning districts if a change in said district would have a substantive effect on the development proposal, especially where an architect uses the Professional Certification program, in which he or she is able to obtain a permit without a full DOB examination." The BSA further stated that the information regarding the zoning change on the subject block was readily available to the filing architect prior to the issuance of the plans approvals and the permits. The BSA noted that the architect could have contacted the DPC directly to confirm the zoning of the block; and that a revised zoning map 9a reflecting the zoning change was available on the DCP website as of February 1, 2001. Therefore, the BSA determined that any good faith reliance upon the DOB's permitting action was negated by a lack of due diligence. The BSA found the evidence of correspondence between the applicant's office and the DCP regarding delays in posting other revised zoning maps on the website was irrelevant.

The BSA also rejected the owner's argument that the DOB had any obligation to review the plan approvals and permits prior to the commencement of construction, as it is not required to audit all plans submitted under the professional certification program.

The BSA found that as to subdivision (b) of Zoning Resolution § 72-21, BK Corporation had failed to establish that due to the unique physical conditions, conforming uses would not enable the owner to realize a reasonable return from the zoned property. BK Corporation submitted a feasibility study to the BSA that included the following six schemes: as of right residential; the proposed residential/community facility; three alternative residential/community facility configurations; and one exclusive community facility. BK Corporation asserted that other that the proposed residential/community facility, none of the alternative proposals would result in a reasonable rate of return. The BSA found the applicant's analysis and conclusions were flawed, in that the different rates of return for the alternatives were negligible, and questioned the applicant's assumptions, including a 43 percent operating expense rate. The BSA stated that the industry standard for this type of development was an operating expense of 20 to 25 percent. The BSA determined that such a reduction in the operating expense rate resulted in a more reasonable rate of return, and that if the special expense associated with the purported environmental remediation was eliminated, there would not be any significant reduction in the rate of return. The BSA found that the applicant had not shown that the as of right scenarios were not viable, or that the remediation costs constrained the development of the property. The BSA further found

that the proposed alternatives that included community facility use, failed to reflect a change in the site value, which was based on residential use, and thus exceeded that which would be paid for the lower return community facility space. The BSA noted that the site is valued at higher income generating residential space, and thus a comparison to any of the community facility scenarios was flawed. The BSA therefore rejected the applicant's assertion that none of the alternatives are viable and that only the proposed use would result in a reasonable rate of return.

The BSA further found that the need to re-design the building now is not a hardship, in that the side yard waiver arises only because the development was constructed contrary to zoning, and therefore the need for a waiver is a self-created hardship. The Board thus found that the applicant had failed to establish that the practical difficulties or unnecessary hardship claimed as the basis of the variance were not and created by the property owner as required by subdivision (d) of Zoning Resolution § 72-21.

The BSA discussed and distinguished the case law submitted by BK Corporation and stated as follows:

> "...as regards the quantum of proof, BK Corporation cited to *Human Development Services v Zoning Board of Appeals of Port Chester*, 110 AD2d 135(1985) (quoting *Matter of National Merritt v Weist*, 41 NY2d 438 (1977) for the principle that the amount of proof necessary to satisfy variance findings varies with the degree of the requested waivers; and"
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> "...that both cases draw some distinction between a use variance and an area variance and deem the quantum of proof may be

lower in area variances as area variances do not involve the introduction of a non-conforming use to a site;"

and

"...however, the Board notes that neither case states that either a use or area variance could be granted absent evidence support each of the variance findings; and"

"...if the Board has determined that the applicant fails to make any one of the five required variance findings, pursuant to ZR § 72-21, then the applicant would not even achieve a minimal quantum of proof, even if a lesser standard were appropriate given that the proposal reflects a yard waiver, rather than a use change; and"

"...the Board notes that the applicant's potential loss associated with a demolition of the illegal construction if the relief is not granted is not to be weighed against the magnitude of relief sought; there is no exemption from making the five findings; and"

"the applicant cites to additional New York State cases, which address the differences between use and area variances; none of which suggest that the Board may grant a variance involving a side yard waiver without making each of the five required findings here;"

"... the Board notes that the applicant dedicates a considerable portion of the argument for the (a) finding to a discussion of about the prior non-conforming use at the site and cites prior Board cases regarding use variances, all of which are irrelevant; and"

"...the applicant cites to *Toys "R" Us v Silva*, 89 NY2d 411 (1996), for the principle that zoning supports the elimination of non-conforming uses;"

"...the Board reiterates that the Subject Building and Four Buildings are occupied by and are proposed to be occupied by

community facilities and residential uses, which are conforming uses in the subject zoning district and any discussion of eliminating a non-conforming use is misplaced;"

"...as to the creation of the hardship, the applicant cites to *Douglaston Civic Association v Klein*, 67 AD2d 54, 61 (2d Dep't. 1979), *aff'd* 51 NY2d 963 (1980) for a purported distinction between discovering a hardship in the course of developing a site and anticipating a hardship prior to purchasing a site; and"

"...the Board distinguishes *Douglaston* from the subject case because it involves the purchase of a site with a marsh condition that physically constrained development; the applicant fails to draw any meaningful connection between the hardship in *Douglaston* and the subject case of failing to perform due diligence as to zoning; and"

"... the Board notes that any financial hardship that the applicant claims would be incurred if demolition of the Subject Building were required is a direct result of the applicant failing to perform due diligence to ascertain the zoning prior to construction; it has nothing to do with any inherent condition of the site, as in *Douglaston*; and"

"...as to good faith reliance, the applicant interprets the case law too broadly, including *Jayne Estates v Raynor*, 22 NY2d 417 (1968) and *Ellentuck, et al. v Joseph B. Klein, et al.,* 51 AD2d 964 (2d Dep't 1976), with regard to when a hardship incurred by the reliance on a permit which is later invalidated is relevant to a variance finding; and"

"...the Board clarifies that the courts do no extend the good faith reliance principle to all property owners who build pursuant to a permit, which is subsequently invalidated; the courts have limited the applicability of good faith reliance to situations where property owners performed work pursuant to a series of governmental review and approvals, which were later reversed; and"

> "...the Board readily distinguishes the subject case which involves building plans approved through the Professional Certification program, which means that DOB did not audit or review the plans prior to the applicant's construction; and"
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> "...the Board notes, as described above, that any participant in the Professional Certification program is open to have plans audited at any time; and"
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> "... finally, it is clear that the applicant simply did not perform due diligence as to the zoning map of the subject site, which had changed two years prior to the commencement of construction; and"
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> "...the applicant's reliance on DOB's approval at 21-34 Broadway is misplaced in that it involved the vertical enlargement of a pre-existing lot line walls for a residential enlargement, which is not factually similar to the subject case involving new construction of a mixed-use residential/community facility building; and"
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> "...additional case law, including *Pantelidis v BSA*, 10 Misc3d 1077(A) at 8 (NY Supreme Ct 2005) (citing *Matter of Hoffman v Harris*, 17 NY2d 138, 144) *aff'd* 43 AD3d 314 (1st Dep't 2007) *aff'd* 10 NY3d 846(2008) requires evidence of reliance, which the applicant in the subject case cannot demonstrate;"

The BSA stated that here the owner participated in the professional certification program, but failed to perform due diligence as to the zoning map of the subject site, which had changed two years prior to the commencement of construction, and that when the DOB audited the plans it identified zoning non-compliance and had issued a stop work order. The Board determined that as BK Corporation had failed to meet the findings of subdivisions (a), (b) and (d) of ZR § 72-21, it declined to address the other subdivisions.

BK Corporation thereafter timely commenced the within proceeding, and alleges that respondent BSA's determination of July 21, 2009 is arbitrary and capricious, an abuse of discretion and contrary to law. Petitioner further asserts that the BSA's determination is contrary to the evidence submitted on the record and is not consistent with the text of Zoning Resolution § 72-71 as a whole, and therefore it is arbitrary and capricious and contrary to law. Finally, petitioner alleges that the BSA failed to follow relevant case law and failed to meaningfully distinguish its reasons doing so, and that the failure to follow the established case law is arbitrary and capricious.

Petitioner argues that its application sufficiently satisfied the quantum of proof required for a variance application, and that it met the standards required to establish uniqueness, financial hardship and that such hardship was not self-created, so as to warrant the granting of its application. It is further asserted that the BSA was required to strictly construe the applicable zoning regulation in its favor; that it should have applied a more lenient standard of proof as it sought an area variance and not a use variant; and that the BSA's determination with respect to the variance application was contrary to statutory and case law. Petitioner asserts that the evidence in the record establishes that the uniqueness requirement was satisfied; that the requirement of financial hardship was satisfied; and that the hardship was not self-created. Petitioner also asserts that it relied in good faith on the DOB permits and should be granted a variance.

It is noted that although the petition in its wherefore clause seeks a declaration that the BSA acted in violation of the State Constitution and City Charter, the petition is devoid of any allegations which support this demand for relief.

The BSA, in opposition, asserts that its determination was neither arbitrary nor capricious, nor an abuse of discretion and is supported by the evidence in the record and the law. It is asserted that there is substantial evidence in the record to support the Board's finding that the subject property does not have physically unique characteristics, that the petitioner had failed to establish that as of right alternatives for the site were not viable and did not provide a comparable rate of return to petitioner's proposed development; and that the hardship was not self-created.

The BSA, consists of experts in zoning and planning, and is the ultimate administrative authority charged with enforcing the New York City Zoning Resolution (*see Matter of Menachem Realty, Inc. v Srinivasan*, 60 AD3d 854[2009]; *Matter of Mainstreet Makeover 2, Inc. v Srinivasan*, 55 AD3d 910, [2008]). Judicial review of a determination by the BSA is limited to whether its determination was illegal, arbitrary, or an abuse of discretion, and whether it had a rational basis and is supported by evidence in the record (*see Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals*, 95 NY2d 437 [2000]; *see also Matter of Vomero v City of New York*, 13 NY3d 840 [2009]; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]).

Petitioner's claim that the BSA incorrectly stated and incorrectly applied the quantum of proof, is rejected. The BSA, in its determination, set forth the case law as to the quantum of proof, while recognizing that an applicant in New York City must still submit minimal evidence to support each of the five findings set forth in Zoning Resolution § 71-21. It is undisputed that the subject property does not have any unique physical conditions, as defined in ZR § 72-21(a). The requirement of "uniqueness," however, may be satisfied under a broad range of circumstances (*In Matter of Commco*, 109 AD2d 794 [1985], *app den* 65 NY2d 606, [uniqueness could be satisfied "by showing that the difficulty complained of relates to existing improvements on the land"]; *Matter of Douglaston Civic Ass'n*, 51 NY2d 963, 965 [1980] ["Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship"]; *Jayne Estates v Raynor*, 22 NY2d 417, 425 [1968] [holding a variance should be granted, even absent unique circumstances, if the landowner was proceeding in good faith, the variance had minimal impact and financial hardship was shown]).

Petitioner claim of uniqueness was based upon the historic use of the zoning lot for a non-conforming auto repair garage; adjacent commercial development; the water table and flood boundary; the environmental remediation costs; and its good faith reliance on the DOB permit. Petitioner has failed to establish that the BSA's determination regarding the history of the property is arbitrary and capricious, contrary to law, or is without support in the record. Here, petitioner demolished the prior existing structure, and therefore could

no longer rely upon its prior non-conforming use and any non-complying bulk parameters. The demolition resulted in a regularly shaped, open lot, and petitioner constructed a new set of buildings, whose uses were all permitted as of right. Petitioner's claim that the history of the non-conforming use of the property continued to be relevant, is untenable.

Petitioner has failed to establish that the BSA's determinations regarding the adjacent commercial development, and the water and flood boundary line are arbitrary and capricious, contrary to law, or without support in the record. Petitioner does not contest the BSA's determination that adjacency to a commercial building is not in itself unique. Rather, petitioner continues to argue that the adjacency to a mixed-use commercial building containing a ground floor pharmacy constitutes a hardship, and that the DOB's approval of the vertical enlargement of the adjacent building without a side yard, justifies granting its application for an area variance, waiving the side yard requirement.

As regards the 100-year flood boundary, petitioner does not dispute the BSA's factual determination that the subject premises was 500 feet from 100-year flood boundary line, and was 150 feet from a zone described as an "area of moderate or minimal hazard from the principal source of flood in the area." Rather, petitioner ignores these findings and simply reasserts the claims it made before the BSA.

In a proceeding pursuant to Article 78 seeking judicial review "a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (*Matter of Pell*

v Board of Educ., 34 NY2d 222, 232 [1974], quoting *Matter of Diocese of Rochester v Planning Bd. of Town of Brighton*, 1 NY2d 508, 520 [1956]; *Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 544 [1990]; *Matter of Jul-Bet Enters., LLC v Town Bd. of Town of Riverhead*, 43 AD3d 587 [2008]). Here, petitioner's claim that the BSA's determination is arbitrary and capricious is not substantiated. Rather, petitioner improperly seeks to have the court substitute its judgment for that of the BSA.

As regards the claimed costs of environmental remediation, contrary to petitioner's assertions, the BSA accepted the figure of $56,000.00, although it questioned whether all of the petitioner's costs were solely for remediation. However, the BSA found that as the sum of $56,000.00 only represented one percent of the applicant's total construction costs of $4 million dollars, it did not constitute evidence of uniqueness or undue hardship. Petitioner does not dispute this finding and, thus, has not demonstrated that the BSA determination regarding the environmental remediation costs was arbitrary and capricious, contrary to law, or without support in the record.

Petitioner's has failed to establish that the BSA's failure to adhere to prior agency determinations is arbitrary and capricious, contrary to law, or without support in the record. The BSA, in its determination, pointed out that the subject building's use was permitted as of right; that the owner was seeking an area variance, not a use variance; and that all three prior Board decisions submitted by the owner concerned uses that were not permitted as of right in their respective zoning districts. None of those prior Board decisions

involved area variances. The court thus finds that the Board properly explained its reasons for not following prior Board determinations that were essentially irrelevant to the owner's application. To the extent that petitioner, in its reply, makes reference to 45 determinations in which the BSA granted variances after construction was completed, none of these determinations will be considered here, as they were not submitted in the proceeding before the BSA (*see generally, Kelly v Safir*, 96 NY2d 32, 39 [2001]; *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

Finally, the BSA's determination that petitioner is not entitled to invoke a good-faith reliance on the DOB permit is neither arbitrary nor capricious, nor an abuse or discretion, nor without a basis in the law and the record. It is undisputed that the owner predicament's was caused by its architect's incorrect assumption that the entire parcel was in an R5 zoning district. Furthermore, petitioner's claim that the architect acted in good faith is not supported by the evidence in the record. The BSA explicitly rejected the owner's and the architect's claim that the zoning change, enacted two years prior to the commencement of construction could not have been ascertained at the time. Rather, the BSA determined that the subject zoning change was publically available and could have been ascertained had the architect exercised due diligence. Although petitioner continues to assert that its architect acted in good faith, it has failed to establish that the BSA's determination regarding the availability of the zoning change was in error. Furthermore, while petitioner asserts that the architect also relied upon the DOB's approval of the vertical extension of the adjacent

building, the evidence does not support this claim. The architect in an affidavit submitted to the BSA stated that the adjacent building was "permitted to vertically enlarge the abutting lot line wall for residences on the second floor" and that "throughout the construction of the Buildings I relied in good faith upon the previously permits, which were later deemed invalid, and significant expenditures were made in reliance on these permits." Therefore, while the architect states he was aware of the prior development of the adjacent property, he never stated that he relied on that development when he designed the subject building. In view of the fact that the architect filed his plans pursuant to the professional certification program, petitioner cannot establish the existence of good faith reliance upon the DOB permits, as the building plans were not fully reviewed by the DOB until the audit. Therefore, the issuance of the DOB permit and the subsequent stop work order does not constitute a unique factor under subdivision (a) of ZR § 71-21.

Petitioner, pursuant to subdivision (b) ZR § 71-21, was also required to establish that due to the unique physical conditions, conforming uses would not "enable the owner to realize a reasonable return" from the zoned property. Petitioner, however, has failed to establish that the BSA's determination as regards the lack of unique physical conditions should be vacated. Furthermore, contrary to petitioner's assertion, the evidence in the record supports the BSA's finding that the rates of return for all five proposed scenarios for development of the property ranged from .07 percent to .16 percent, which the BSA found to be a negligible difference. To the extent that the owner's financial analyst

stated in his report that "[i]nvestment objectives in typically similar projects would normally return between 12.5% and 18% annualized," he did not claim that the subject property could obtain such a rate of return under any scenario. Therefore, the BSA was not required to respond to, or comment, on this argument. In addition, petitioner's claim that the BSA improperly questioned the operating expense rate of 43% is without merit. Petitioner was given an opportunity to submit additional information to the BSA, on July 7, 2009, and had also submitted certain revised data prepared by its financial expert in December 2008. Petitioner was well aware of what was contained in all of its submissions and could have, on its own initiative, submitted updated information as regards its claimed operating expense rate prior to the BSA's determination. However, the BSA was not required to discuss this data with petitioner, or call for new data, prior to making a determination. The BSA's determination was based on the evidence submitted by petitioner, and was not arbitrary nor capricious, nor an abuse of discretion.

The court further finds that the BSA's determination that the practical difficulties or hardship claimed by petitioner as a grounds for a variance was self-created, is neither arbitrary nor capricious, nor an abuse of discretion, nor lacking support in the record and the law. Contrary to petitioner's claim, there is nothing inherent in the site that created the need for a variance. Petitioner, upon demolishing the prior structure was left with a large, regular shaped parcel, and could have developed residential units, or residential units with a community facility use, as of right, provided that it complied with the applicable

regulations. Petitioner's predicament was caused by its architect's failure to exercise due diligence and ascertain the proper zoning districts for the entire property prior to the commencement of construction.

In view of the foregoing, petitioner's request for a judgment vacating respondents' determination of July 21, 2009 is denied and the petition is dismissed. Petitioner's request for declaratory judgment is granted to the extent that the BSA's application of the law and regulations of the State and City of New York was lawful, and petitioner's request for an order directing the BSA to grant the subject area variance is denied.

Settle one judgment and order.

Dated: March 29, 2010

AUGUSTUS C. AGATE, J.S.C.