Matter of Upper W. Side Neighbors Assn. v City of New York
2019 NY Slip Op 30622(U)
March 12, 2019
Supreme Court, New York County
Docket Number: 154194/2017
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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In the Matter of the Application of UPPER WEST SIDE NEIGHBORS ASSOCIATION, 91 CENTRAL PARK WEST CORPORATION, 18 IN ACTION, and LUCAS GEIGER, MARC DANIEL, and JOHN COLLINS,

Petitioners,

Index No.: 154194/2017

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

CITY OF NEW YORK, NEW YORK CITY BOARD OF STANDARDS AND APPEALS, MARGERY PERLMUTTER (CHAIR), CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF THE CONGREGATION SHEARITH ISRAEL IN THE CITY OF N.Y. a/k/a THE SPANISH SYNAGOGUE, "John and Jane Does" 1-10, and XYZ Corp./LLC/LLP 1-10,

Respondents.

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In the Matter of the Application of NIZAM P. KETTANEH

Petitioner,

Index No. 154240/2017

For a Judgment Pursuant to Articles 78 of the Civil Practice Law and Rules,

- against -

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CONGREGATION SHEARITH ISRAEL,

Respondents.

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Hon. James E. d'Auguste:

Three motions in two Article 78 petitions, under Index Nos. 154240/17 (the Kettaneh Petition, motion sequence number 001) and 154194/217 (the Upper West Side Petition, motion sequence numbers 001 and 003), are consolidated for disposition.

By its respective motion sequence number 001, each set of petitioners moves to annul, vacate, or reverse a determination by respondent Board of Standards and Appeals (BSA), which permits respondent Congregation Shearith Israel a/k/a the Trustees of the Congregation Shearith Israel in the City of N.Y. a/k/a the Spanish Synagogue (CSI) to construct a building. By motion sequence 003, petitioners in the Upper West Side Petition seek leave to conduct discovery.

CSI's synagogue, with the connected parsonage, is on Central Park West in Manhattan. Next to the synagogue/parsonage is an empty lot where CSI wants to build and where it used to operate a community house. In 2007, CSI sought a variance/waiver from BSA, seeking to demolish the community house and erect a new building on the lot. CSI needed a variance because the plan for its new building violated several provisions of the New York City Zoning Resolution (ZR). The lot at issue straddles two zoning districts, one of which has much stricter zoning requirements. As a result, the boundary constrained as-of-right development (a development that does not need a variance) by imposing different height and setback standards for different parts of the same lot. CSI's application for the variance stated that the ZR violations were necessary, as otherwise there was no way that CSI could construct a building that would facilitate its mission as a house of worship, center of Jewish education and culture, and provider of community programming. No structure that comported with the ZR could feasibly address those needs. In August 2008, BSA issued a resolution approving the variance (2008 Resolution) and the plans for the proposed new building (the BSA approved plan). The 2008 Resolution

noted that religious and educational institutions were entitled to significant deference pertaining to zoning waivers and were "able to rely upon programmatic needs in support of the subject variance application" (2008 Resolution, at 2-3).

According to the BSA approved plan, a new nine-story building would be erected on the lot next to the synagogue.

> "As approved, the proposed building includes mechanical space and a multi-function room on the sub-cellar level, with 360-person capacity for a banquet hall for various life cycle events; a cellar level with separate dairy and meat kitchens and childcare space. The first floor consists of the synagogue lobby, small synagogue, rabbi's office, and library and archive space; the second floor contains toddler classrooms; the third floor contains Hebrew School classrooms and [a tenant Hebrew school]; and, the fourth floor consists of a caretaker's apartment and adult education classrooms"

(*Kettaneh v Board of Stds. and Appeals of the City of N.Y.*, 2009 NY Slip Op 31548[U] [Sup Ct, NY County 2009], *affd* 85 AD3d 620 [1st Dept 2011], *lv denied in part, dismissed in part* 18 NY3d 919 [2012]).

Floors five through nine would be home to luxury residential condominiums, which would be sold to pay for construction. The synagogue in the to be built building would connect to the synagogue in the old building. The parties refer to this aspect of the BSA approved plan as the small synagogue expansion.

The BSA approved plan called for 15 classrooms in the new building. According to the plan, there was no room on the first floor for the 15 classrooms, so they would be on the second, third, and fourth floors. The 15 classrooms were designated for CSI's toddler, child, and adult education programs, and for a Hebrew school which, in 2008, was a lessee in the community house. CSI's application represented that the 15 classrooms could not fit on the second, third,

and fourth floors unless the 30 foot minimum rear yard setback rule (ZR § 24-36) was waived. CSI wanted a variance allowing a 20 foot rear yard for the second through fourth floors, claiming that a 30 foot rear yard setback would render the proposed building too narrow to accommodate all of the classrooms. CSI claimed that the narrowness of the property required that the classrooms be stacked with their length running north and south, thus generating the noncomplying rear yard condition on the second, third, and fourth floors. Without the rear yard waiver, the classrooms would be very small, and CSI's existing community space (space for religion, education, and life cycle events) was already significantly overcrowded.

The 2008 Resolution granted the rear yard variance and variances pertaining to the base height and total height of the proposed building, the front setback, and the interior lot coverage. Petitioners' argument for vacating the 2017 Resolution focuses on the rear yard variance, which CSI claimed was needed to accommodate the 15 classrooms on the second, third, and fourth floors. Throughout the application process, CSI claimed that the 15 classrooms were indispensable to its religious mission. Petitioners contend that CSI's claim is false and that the space allegedly reserved for classrooms is actually for offices, which will be rented. Petitioners contend that CSI's programmatic needs pertaining to its religious mission were the main reasons for BSA's grant of the variances but, as CSI does not intend to use the new building for its programs, the variances should be withdrawn. Petitioner Kettaneh claims that CSI intends to rent the banquet room in the sub-cellar for outside events, unconnected to CSI members or its mission.

Under the BSA approved plan, substantial construction of the building had to be completed by August 27, 2012, within four years after the variance was granted, pursuant to ZR

Section 72-23, which also provides that litigation stays the time within which to compete construction. Neighboring property owners, including Kettaneh, brought an Article 78 proceeding against BSA and CSI. The litigation ended in CSI's favor (*see Kettaneh,* 85 AD3d 620), after which, petitioners allege, CSI was free to begin construction in February 2012. The community house on the lot intended for the new building was demolished in May 2015, but construction never began. The time for CSI to complete substantial construction expired on January 22, 2016.

In 2013 and 2015, CSI filed separate sets of building plans with the New York City Department of Buildings (DOB) (respectively, the 2013 DOB plans and the 2015 DOB plans). Both sets of plans differed from the BSA approved plan. BSA states that neither of these plans was considered in making the determination which petitioners challenge in this proceeding. However, petitioners claim that a comparison of the DOB plans with the BSA approved plan and with the determination now being challenged provides evidence of CSI's true intentions. In addition, the determination being challenged discusses the DOB plans. Hence, the DOB plans are discussed here.

In the 2013 DOB plans, the small synagogue expansion was eliminated and several of the 15 classrooms were replaced with offices. The 2013 DOB plans were submitted the same year that the Hebrew school in the community house discontinued its lease. The application which resulted in the BSA approved plan had represented that, even without the tenant Hebrew school, CSI needed the variances in order to accommodate the synagogue's programmatic needs. Yet, according to petitioners, once the tenant left, CSI began replacing classrooms with office space. According to petitioners, this shows that all 15 classrooms were not needed, since, apparently,

the tenant's departure left CSI enough space for its education programs. The 2015 DOB Plans replaced all of the classrooms with office space, proving, according to petitioners, that CSI did not need variances for religious and educational purposes.

DOB refused approval for the 2013 DOB plans, but initially approved the 2015 DOB plans and issued construction permits. Various organizations filed zoning challenges to the 2015 DOB Plans, arguing that CSI had illegally altered the BSA approved plans. DOB remanded CSI's application to the BSA noting that there was a "'question of the validity of the BSA variance on the grounds that the underpinning for the 'programmatic need' argument has changed ... interior layouts have very substantially changed throughout all floors of the proposed building'" (Kettaneh petition, ¶ 37, quoting DOB decision). In 2015, DOB revoked the permits

In 2015, CSI petitioned the New York Attorney General (the AG) and this court for permission to mortgage property in order to obtain a construction loan, pursuant to Not-for-Profit Corporation Law Section 511. CSI's petition was granted (*In the Matter of the Application of Congregation Shearith Israel,* Sup Ct, NY County 2016, March 18, 2016, Sattler, J., index No. 152151/16). Attached to CSI's petition was a 2015 Financial Appraisal (2015 Appraisal), in which the spaces previously designated for the 15 classrooms were identified as medical offices. This was done, according to petitioners, so that the AG and the court would conclude that the proposed building's rental revenue would generate sufficient income to justify granting permission for the loan. Petitioners state that the 2015 Appraisal shows that CSI had no intention of using the proposed building for religious and educational purposes.

BSA rules and standards - ZR Section 72-21 lists five criteria which BSA must find before granting a new variance: (a) that the building site contains unique physical conditions

which create difficulties in complying with the ZR; (b) that because of such physical conditions there is no reasonable possibility that the development of the lot in conformity with the ZR will bring a reasonable return, so that a variance is necessary to enable the owner to realize a reasonable return; (c) that the variance will not alter the essential character of the neighborhood; (d) that the owner of the site did not create the difficulties for which it seeks a variance; and (e) that the variance is the minimum necessary to afford relief. In granting the 2008 variance, BSA found that CSI satisfied these criteria.

Applications for new variances and applications for major amendments to previously granted variances are heard on the Zoning Calendar (BZ) (2 RCNY § 1-05.1 [a], [d]). Applications for minor amendments may be heard on the Special Order Calendar (SOC); if BSA determines that the sought amendments are major, it may request that the application be filed on the BZ (2 RCNY § 1-05.1 [e]). An application for a minor amendment is generally approved "on a less rigorous showing than would have been required had the application before it been for an entirely new variance" (*Matter of E. 91st St. Neighbors to Preserve Landmarks v New York City Bd. of Stds. & Appeals,* 294 AD2d 126, 127 [1st Dept 2002]; *Westwater v New York City Bd. of Stds. & Appeals,* 2013 NY Slip Op 32515[U], *16-17 [Sup Ct, NY County 2013]). Unlike applications on the BZ (2 RCNY § 1-05.6), applications on SOC need not be circulated to affected property owners (2 RCNY § 1-07.6).

An application for an extension of time to complete substantial construction filed less than two years after the expiration of time may be filed on SOC provided that the applicant requests a waiver (2 RCNY § 1-07.3 [c] [2]).

The 2016 Application and the 2017 Resolution - In 2016, less than two years after the

time for substantial completion expired, CSI submitted the 2016 application (the 2016 Application). The 2016 Application requested: 1) approval of an extension of time to complete substantial construction; 2) approval of the modification of the BSA approved plan; and 3) waiver of BSA rules to allow the application to be filed on SOC. As stated above, minor changes to a previously approved plan may be heard on SOC. CSI claimed, and the BSA ultimately found, that the BSA approved plan had to be amended due to changes in the NYC Building Code (Building Code) and the finalization of the placement of structural elements and mechanical equipment in the proposed building. The BSA approved plan had not included a final placement for those aspects of the building. BSA also found that the plan amendments were minor. The amended plan included the 15 classrooms. In the 2017 Resolution, BSA granted CSI's 2016 application.

Standards for deciding Article 78 petitions - Municipal zoning boards have wide discretion in considering applications for variances, and judicial review is limited to determining whether the board's action was illegal, arbitrary, or an abuse of discretion (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]). A determination by a zoning board should be upheld if it has a rational basis and is supported by substantial evidence (*id.* at 308). In examining the substantial evidence, the court inquires only whether the record contains sufficient evidence to support the rationality of the Board's determination (*Matter of Sasso v Osgood,* 86 NY2d 374, 385 n 2 [1995]). The court does not weigh the evidence de novo and substitute its judgment for that of the body under review; rather, the court decides if the challenged action can be supported on any reasonable basis (*Matter of Clancy-Cullen Stor. Co., Inc. v. Board of the Elections in City of N.Y.*, 98 AD2d 635, 636 [1st Dept 1983]). "It matters not whether, in close cases, a court

would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them" (*Matter of Cowan v Kern,* 41 NY2d 591, 599 [1977]).

Petitioners' objections - Petitioners challenge the 2017 Resolution, claiming that the amendments to the BSA approved plan are evidence of CSI's real intention to operate commercial enterprises on the site. For instance, the amended building plan eliminated the small synagogue expansion and enlarged the kosher kitchens in the cellar, allegedly to accommodate revenue generating enterprises. Also, petitioners point to the DOB Building plans, which replaced the classrooms with offices.

Petitioners contend that the 2017 Resolution granting CSI's 2016 application was irrational, arbitrary, and capricious. Allegedly, BSA violated its own rules and principles of law, including the doctrines of judicial estoppel and unclean hands, ignored evidence that CSI engaged in a fraud upon BSA, DOB, the AG, and this court, and was biased in favor of real estate developers. Allegedly, the changes to the BSA approved plan were major, not minor, so that CSI should not have been allowed to proceed on SOC, CSI should have been made to submit a new financial appraisal of its modifications to the BSA approved plan (CSI submitted one with the application for the 2008 variance), and CSI should have been made to explain its delay in proceeding with construction.

Amendments to the BSA Approved Plan - According to petitioners, CSI's 2016 Application should have been placed on the BZ, where it would have been subjected to analysis under ZR Section 72-21, since the modifications to the BSA approved plan were not minor, but major and pervasive, requiring a reconfiguration of the entire building. Petitioners argue that the

modifications were major in that the new plan eliminates the educational mission, and that said mission was the reason that BSA approved CSI's BSA approved plan in 2008. Petitioners contend that CSI fraudulently misrepresented the nature of the modifications and that, by being heard on SOC, CSI's 2016 Application escaped a thorough reassessment by BSA.

A minor modification to a variance is one that will not change any of the conditions of the original variance and where construction of the new building will not create any new noncompliance (*Fisher v New York City Bd. of Stds. & Appeals,* 71 AD3d 487, 487 [1st Dept 2010]; *Westwater,* 2013 NY Slip Op 32515[U], *16-17). The 2017 Resolution found that the modifications in the new building plan did not affect the variances in the BSA approved plan, as the new plan did not require additional variances or increase the scope of the earlier variances. CSI states that none of the 2008 variances were changed and that all the 2016 amendments to the BSA approved plan were to the inside of the building, while the 2008 variances touched on the outside of the building. CSI states that the educational and religious missions have not changed.

The Upper West Side Petition presents a table comparing the BSA approved plan and CSI's modifications to that plan (Upper West Side Petition, ¶ 145). The table lists 98 changes to the BSA approved plan, summarized as follows. The underground envelope of the proposed modified building expands beyond the footprint in the BSA approved plan by including new vault space beneath the sidewalk, requiring a new and complex excavation, new perimeter footings, and a re-engineering of the entire structure of the proposed building. Stairs, egress corridors, and elevators on every floor are relocated. Mechanicals on every floor are relocated and the space allocated to mechanicals increased by 300%. Eliminated elements include the small synagogue expansion on the first floor, and the second floor roof terrace, which is replaced

with "dog houses" (a doghouse is a rooftop enclosure protecting electrical, HVAC, or other mechanical system) creating noise, ventilation and other potentially adverse impacts that were never previously proposed, evaluated or considered. Layouts on every floor are reconfigured.

The 2017 Resolution gives some examples of the changes. The Building Code no longer permits scissor stairs, so they were replaced on the first through fourth floors, and interior partitions had to be shifted to accommodate the larger footprint of new stairs (2017 Resolution at 2, right col). The Building Code required that fire-rated glass be installed between the existing building and the proposed building. The installation would have caused the proposed building to project into the lot where the old synagogue was, in violation of DOB rules. CSI opted to pull back the eastern wall of the seventh and eighth floors of the proposed building in order to provide the fire-rated separation (*id.*, left col).

CSI's 2016 Application explained that the BSA approved plan did not identify the location of all mechanical equipment and did not include the dimensions of the rooftop bulkhead. These elements, including louvers and exhausts, were in the amended plan. During the public hearing on the 2016 Application, the BSA chair noted that new BSA applications are usually at the schematic stage because the project is developed during the application process. The chair stated that the end plan is usually different from the initial plan, which does not lay out the mechanicals, so the applicant does not know how much space to put aside for them and, often, the mechanical aspects get bigger. BSA requested that CSI provide more information on the mechanical equipment, which it did.

Concerning the small synagogue expansion, petitioners state as follows. Previously CSI represented the small synagogue expansion as so essential to its programmatic needs that no

classrooms could be included on the first floor. Since the 15 classrooms had to be on the second through fourth floors, CSI had to have a variance for the rear yard. Since the small synagogue expansion was eliminated, CSI no longer needs the variance.

The 2016 Application stated that connecting the old synagogue to the synagogue in the proposed building would have required removing historic stained glass in the former. BSA noted that the congregation was not comfortable violating the sanctity of the existing small synagogue and damaging its historic character (2017 Resolution at 2, right col). The place allotted for the small synagogue expansion in the BSA approved plan was given over to air handling mechanicals in the amended plan. CSI explained that there was not enough room for those mechanicals on the upper floors because they would intrude into program space for which CSI had been granted a setback variance, or they would have to be added to the space already taken up by the mechanical equipment for the second, third, and fourth floors.

The 2017 Resolution stated that the elimination of the small synagogue had no effect on the programmatic needs previously presented to BSA and did not affect any of the space for which zoning waivers were granted. During the 2016 Application process, BSA expressly questioned how the loss of synagogue space would affect CSI, and CSI responded that additional rows of chairs would be added to the synagogue and that larger services could be relocated to the main sanctuary. Petitioners contend that if folding chairs could satisfy the need for a bigger synagogue, there was never any need for the small synagogue expansion.

Concerning the 15 classrooms, petitioners argue that if CSI genuinely needed them, it would not have replaced them with offices in the plans submitted to the DOB. The 2017 Resolution stated that the DOB plans were not under consideration. However, it went on to state

that, although the 2015 DOB plans did not conform to the BSA approved plan, CSI has "since identified solutions to the design issues that led to creation of the [DOB] Plans and the 2016 plans fully meet the Applicant's programmatic needs as presented" in the BSA approved plan (2017 Resolution at 3, left col). In response to BSA's question why classrooms in the BSA approved plans were labeled as offices in the DOB plans, CSI said that "office" referred to the size of the rooms, which were smaller than conventional classrooms, rather than their use (*id.*). CSI "submitted a programmatic analysis of how [it] intends to utilize the community facility portion of the Proposed Building ," which showed each classroom's activity in detail, by the hour and day of the week (*id.*, ¶ 36). BSA found that CSI satisfactorily demonstrated retention of its programmatic mission.

Petitioners argue that since the departure of the Hebrew School frees up room, CSI does not need 15 new classrooms. During the 2016 application process, CSI pointed out that the 2008 variance was not conditioned on the tenancy of the Hebrew School and BSA noted the following. "WHEREAS, the Board notes that the applicant has provided supportive evidence showing that, even without the Beit Rabban school, the floor area as well as the waivers to lot coverage and rear yard would be necessary to accommodate the Synagogue's programmatic needs . . . ." (2008 Resolution at 5, left column).

Concerning the cellars, the sub-cellar was amended to add vault space, an elevator machine room, columns, a room with sinks, a set of stairs, and an audio visual equipment room. The cellar was amended so that the space allocated to mechanical elements and the meat and dairy kitchens more than doubled, one of two women's rooms was eliminated, and the babysitting room was eliminated. CSI's 2016 Application states that cellars' and sub-cellar's

uses remained the same and that the changes were needed to relocate and/or consolidate stairs, ducts, and building utility systems such as the boiler room, electrical service, etc.

Petitioner Kettaneh claims that the changes to the cellar and sub-cellar indicate that the banquet room was intended for commercial uses and that CSI will rent the banquet hall to a single catering or event business, "for there seems to be no practical way for CSI to manage dual kitchens and manage large events without hiring an outside firm, who of course would wish to rent the space repeatedly" (Kettaneh petition, ¶ 176). The traffic brought about by this space will have a substantial negative impact on the community, and there is no enforceable way to prevent improper use of this space, even if use is "restricted to members, who might even be 'members for a day' or distant relatives" (*id.*, ¶ 181).

The 2008 Resolution stated that the sub-cellar of the proposed building would have a multi-function room with a 360-person capacity for the hosting of life cycle events and weddings, and for room for mechanicals (2008 Resolution, at 3, right column). BSA subjected CSI's application to the review standard required under ZR Section 72-21 for community facility and residential development uses, and determined that CSI made the required showing (*id.*, at 3, left col, at 10, left col). BSA was satisfied that CSI demonstrated that significant traffic or other negative impacts would not result from events in the sub-cellar and noted that most events would be held on Saturday, when traffic was low in the area (*id.*, at 10, left col).

The 2017 Resolution does not discuss the cellars, but the subject was raised during the public hearing on the 2016 application. CSI stated that the kitchen was for the synagogue and not for third party rentals (BSA 2224). BSA chair stated that the "'banquet facility' is called a 'multi-purpose room' which is common for religious institutions of all kinds that are used for

various life change functions. She noted that it was depicted in the 2008 Plans in the sub-cellar and continues to be in the [amended] plans'" (Kettaneh petition, NYSCEF no. 53, BSA answer).

Although CSI stated that all the modifications were to the inside of the building, there was a change to the height of the building. The 2008 Resolution granted a variance allowing a maximum height of 113.70 feet to the proposed building. ZR Section 23-663 limits the height to 75 feet. Kettaneh complains that the amended plan adds five feet to the building, which brings it to 118.8 feet, in violation of the 2008 variance.

The BSA approved plan did not specify a height for the bulkhead on the roof. CSI's 2016 Application states that the height increase is due to that bulkhead, which is "approximately five feet higher over a portion of the roof," and that the bulkhead is a "permitted obstruction" on the rooftop (BSA 514, 588, 616). ZR Section 23-62 appears to be the relevant rule. BSA stated that the larger bulkhead was necessary to accommodate the elevator overrun and an emergency generator and other mechanical elements (2017 Resolution at 2, right col).

Petitioners' claim that BSA irrationally waived BSA Rules and granted CSI an extension of time to substantially complete construction based upon misrepresentations by CSI - Petitioners state that CSI failed to provide BSA with a satisfactory explanation for needing an extension of time to complete construction, instead presenting false or inadequate reasons for the delay.

Petitioners claim that the project was delayed because CSI was indecisive about whether to proceed with construction at all, the extent to which loans rather than outside investment monies should be used, and whether the luxury condominiums should be sold, rented, or used as parsonage. Petitioners state that BSA, instead of conducting a reasoned discussion, accepted

CSI's vague and unsupported excuses at face value, and disregarded substantial evidence that the delay was CSI's own fault. Petitioners say that CSI's alleged obstacles to starting construction occurred in late 2014 or early 2015 and, had CSI begun construction on the proposed building in 2012 using the BSA approved plan, it would not have encountered such obstacles. BSA should have inquired into why CSI, despite having the BSA approved plan in hand, prepared the DOB plans. These other plans were substantially different from the BSA approved plan and demonstrate CSI's blatant attempt to eliminate the supposedly indispensable 15 classrooms. Allowing CSI to start construction nearly 12 years after the date of the 2008 variance was irrational and unreasonable.

CSI's 2016 Application states as follows. In 2012, after the litigation ended, CSI resumed work with an architect and assembled a team to deal with structural engineering, mechanicals, plumbing, electricals, lighting, design, and other elements. In 2012-2013, CSI put out requests for other services and developed a plan for the DOB. In 2014, CSI developed construction drawings and a financing plan. CSI hired an owner's representative to work with the architecture and engineering team, and a real estate advisory firm to consult on financing. CSI made an agreement with a development partner and an equity investor. The owner's representative became ill and died in late 2014. The development partner and the equity investor split up in early 2015. CSI sought replacements for these persons and was able to resume development of the project in mid-2015. In early 2015, CSI surveyed adjacent buildings and installed vibration monitors therein. In May 2015, the building on the lot was demolished. In August 2015, the Landmarks Preservation Commission approved the design of the proposed building. In March 2016, the loan documents were approved by the court and the AG.

The 2017 Resolution states that CSI "diligently retained consultants" to assist in obtaining financing, extensions of approvals, and "developing an approvable set of plans for the [DOB], but faced unanticipated setbacks beyond their control and did not obtain a building permit until August 2015" (2017 Resolution). CSI "submitted sufficient evidence into the record regarding their actions, and the setbacks they experienced . . . to warrant a grant of the requested extension . . ." (*id.*). BSA did not find CSI's reasons for delay unreasonable.

Petitioners' claim that BSA disregarded evidence that the passage of time from 2008 until the time of 2016 application changed the underlying economic assumptions upon which the 2008 variance was based - Not-for-profit institutions such as CSI are "generally exempted from having to establish that the property for which a variance is sought could not otherwise achieve a reasonable financial return" pursuant to ZR Section 72-21 (b) (2008 Resolution, at 3, left col). However, since CSI's building was a mixed-use project in which approximately 50% of floor area would be devoted to revenue-generating residential use unconnected to its mission, CSI was required to submit a "financial feasability study evaluating the ability of the Synagogue to realize a reasonable financial return from as-of-right residential development of the site . . ." (*id.* at 8, right col). CSI submitted a study related to financial returns generated by the condominiums, which BSA deemed satisfactory. BSA found that an as-of-right building would result in substantial loss and would not provide a reasonable return (*id.* at 9, right col, at 10, left col; *see Kettaneh,* 2009 NY Slip Op 31548[U]).

The 2016 Application showed amendments to the residential floors, including the replacement of open stairs with enclosed stairs, an additional set of doors accessing the patio, the addition of mechanicals and columns, an increase in elevator lobby size, and buttressing of walls.

CSI represented that these changes reflected changes in the Building Code. BSA found that the revisions to the residential floors did not warrant updated financial studies (2017 Resolution at 4, left col). If BSA determined that amendments to a plan were major rather than minor, BSA could request a financial analysis; in this case it was not necessary (*id.* at 5, left col).

Petitioners say that changed economic circumstances from 2008 to 2016 call for a reconsideration of the financial aspect of the project. They say that the differences between CSI's 2008 financial projections and the 2015 Appraisal show that a new analysis is needed.

Petitioners point out the differences between the financial appraisal for the 2008 variance and the 2015 Appraisal.

Projected Costs	2008 Analysis	2015 Appraisal
Acquisition Cost	$12,347,000	$ 3,220,000
Construction Costs	$13,720,000	$40,014,693
Projected net sales for condominiums	$34,210,000	$61,300,000

Petitioners claim that the 2015 Appraisal understated the value of the condominiums and overestimated the construction costs, and that the modifications to the building are going to be very costly, for instance, creating vault space under the sidewalk so CSI should be required to address this in a new analysis. They also claim that, according to the 2015 Appraisal, "CSI not only would have the funds to pay for the construction (the $40,014,693), but further, would reap a windfall one-year return of $18,065,307 or 41.8% - three times the amount projected in 2008" (Upper West Side Petition memorandum of law at 23, NYSCEF 61). Allegedly, "CSI proposed to vastly over-build the Proposed Building to include more Luxury Condos than would be necessary to pay for the community facility space and provide for a tidy return on investment" (*id.* at 23-24).

Petitioners cite to a case in which BSA granted an applicant's request to amend the original variance. BSA "note[d] that the applicant provided revised financials, reflecting the new conditions and that the requested amendment does not have a significant impact on the minimum return" (*Matter of 217 W. 147th St.*, BSA Resolution No. 135-05-BZ, Apr. 18, 2007; Upper West Side Petition, exhibit 18, NYSCEF 59). Petitioners state that BSA acted irrationally by not requiring CSI to submit revised financials. BSA replies that the decision does not state that BSA requested revised financials, only that the applicant submitted them.

Petitioners do not show that BSA acted irrationally. They do not show that BSA had a rule or habit of requiring revised financials when plans were amended or that the matter is not a discretionary one, which is what BSA states. The fact of different findings in itself does not mean that BSA was arbitrary (*see Matter of Harris v Zoning Bd. of Appeals of Town of Carmel*, 137 AD3d 1130, 1132 [2d Dept 2016]).

Petitioners' claim that BSA irrationally granted CSI's 2016 Application despite obvious misrepresentations and deception in applications to the DOB, the AG, and this court - Petitioners claim that when CSI filed the DOB plans, which were materially different from the BSA Approved Plan, CSI did not tell DOB that it was required to build strictly in conformance with the BSA approved plan. Allegedly, CSI falsely stated the reasons for the differences between the DOB plans and the BSA approved plan. CSI asserted that it intentionally replaced classrooms with offices to address changes in the Building Code. CSI's architect said that he labeled the classrooms as offices because of their smaller than usual size. Still later, the architect said that reclassification of the classrooms as offices was unintentional and the product of a labeling error. Petitioners claim that BSA ignored these inconsistencies.

Responding to the claim that the DOB did not know about the differences in the plans, the 2017 Resolution states that the DOB rejected the 2015 DOB Plans because they were different from the BSA approved plan (2017 Resolution at 4, left col). BSA was satisfied that the amended plan evidenced CSI's intent to use the community facility portion of the new building for its mission (*id.* at 3, left col). Petitioners' claims that CSI would use the community facility parts as commercial outlets were dismissed as speculative, extraneous to the relief requested, and unsupported by the record (*id.* at 3, right col).

Petitioners state that the 2015 Appraisal, submitted to the court and the AG, calculated the value of the proposed building based upon the false premise that the first four floors would be used as revenue generating medical offices. This claim is discussed below in the section concerning judicial estoppel.

Petitioners' claim that BSA committed an error of law by not applying the doctrine of judicial estoppel - The doctrine of judicial estoppel "precludes a party who assumes a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (*Gale P. Elston, P.C. v Dubois,* 18 AD3d 301, 303 [1st Dept 2005] [internal quotation marks and citation omitted]). To invoke the doctrine, the prior inconsistent statement must have been adopted by the court in some manner (*see D & L Holdings v Goldman Co.,* 287 AD2d 65, 71–72 [1st Dept 2001]; *Matter of 67 Vestry Tenants Assn. v Raab,* 172 Misc 2d 214, 219 [Sup Ct, NY County 1997]).

The parties disagree regarding whether the doctrine applies to BSA proceedings. Assuming that it does apply, the doctrine does not have a preclusive effect in this case.

Petitioners state that CSI relied upon the 2015 Appraisal when making its successful loan petition to this court and to the AG. The 2015 Appraisal calculated the value of the proposed building based upon the premise that the classrooms would be used as revenue generating medical offices instead of classrooms. Petitioners contend that CSI made these misrepresentations for the purpose of convincing this Court and the AG that the rental revenue from such office use - as opposed to classroom use - would enable CSI to pay back the construction loan. Petitioners argue that CSI should have been estopped from representing that it would use the new building for education during the 2016 Application process and that CSI should be estopped from making the same representation in this Article 78 case.

The 2015 Appraisal states that the proposed building

> "will contain community facility units on floors one through four, therefore, we have researched comparable community facility condominium unit sales to estimate a sell-out value for the first four floors of the building. We have considered the highest and best use of the subject property community facility condominium units is for medical office. Therefore, we have researched sales of similar medical condominium units in the subject's Upper West Side submarket and surrounding areas"

(Upper West Side Petition, 2015 Appraisal at 103, NYSCEF 6).

The 2015 Appraisal submitted with the loan petition states that four floors are for community facility uses. It cannot be concluded from the above quote that the Appraisal definitively indicates that the classrooms will be replaced with medical offices. The reference to medical offices appears to be for the sake of determining the highest value of the community facility units. Even if that was not the case, the loan petition itself states that the proposed building will provide six floors of space (counting the cellars) for community purposes. Given that the loan petition and the 2016 Application state that the first four or first six floors will be

used for CSI's mission, the court cannot find that CSI has set forth a contrary position in any proceeding. Also, the decision allowing CSI to procure a loan does not indicate that the court adopted the position that the proposed building would contain medical offices.

Petitioners' claim that BSA is biased - The Upper West Side petition alleges that BSA is a biased administrative body, issuing decisions and determinations in favor of real estate developers at an alarming rate (Upper West Side petition, ¶ 5). BSA "systematically grants approximately 97% of the applications for zoning variances requested (Citizens Union of the City of New York, Testimony to the NYC Council on Bills Pertaining to the BSA, April 27, 2012, Exh. 2)" (*id.*). Outcomes are obtained through political influence at the instance of lobbying firms, such as Capalino & Associates (Capalino), CSI's lobbyists for the 2016 and 2007 Applications. The petition further alleges that BSA Chair Perlmutter was a registered lobbyist before being appointed to BSA in 2014. As a lobbyist, she worked on projects with Capalino and CSI's lawyers, Fried Frank Harris Shriver & Jacobson (Fried Frank). Of the projects considered by BSA where Perlmutter was listed as a lobbyist, approximately 30% of the time she worked with Capalino or with Fried Frank. Perlmutter presided over CSI's BSA proceedings and voted in favor of the 2016 Application. Her prior associations with Capalino and CSI's lawyers influenced how she voted, depriving petitioners of their right to a neutral and unbiased decision making process.

Petitioners also state that, at the January 10, 2017 hearing, the BSA announced that BSA Vice Chair Hinkson was recused. By that time, she had already participated in the October 2016 public hearing. Hinkson retired from BSA about February 19, 2017 and began working for Capalino as executive vice president about July 2017. Allegedly, Hinkson's recusal, retirement

from BSA, and subsequent employment at Capalino constituted a conflict of interest and bias by a BSA commissioner in favor of CSI.

BSA responds that none of Perlmutter's lobbying work with Fried Frank or Capalino was related to CSI's applications. BSA responds that, even though the 2017 Resolution states that Hinkson recused herself from voting on the application, at the time of the vote she had already retired from BSA and was not present at the vote and did not vote on the application. Regarding the claim about the percentage of variances granted by BSA, BSA states that petitioners do not take into account that applications are winnowed down during a pre-application process as a result of which many potential applicants elect not to file applications. Those who do file have already been subjected to examination and are prepared for the application process. Thus, BSA explains the high percentage of applications granted.

Petitioners do not provide any non-conclusory statement of bias or impropriety or proof that the outcome in this case flowed from bias. Petitioners do not sufficiently allege that either Perlmutter or Hinkson stood to gain any financial or other proprietary benefit from approving CSI's application that would mandate annulling the 2017 Resolution (*see Matter of Eadie v Town Bd. of Town of N. Greenbush*, 47 AD3d 1021, 1024 [3d Dept 2008]). A zoning board determination does not need to be annulled simply because a member was employed by a firm that had business with one of the parties (*Matter of Schupak v Zoning Bd. of Appeals of Town of Marbletown*, 31 AD3d 1018, 1020-21 [3d Dept 2006]).

Petitioners complain that they were not able to rebut CSI's response to their response to CSI's presentation. Petitioners made statements at two hearings and submitted numerous letters and other statements to BSA. They do not make a case that BSA's rules limiting rebuttals are

unfair. The court believes that petitioners had ample opportunity to present their viewpoint to BSA.

CSI's claim that petitioners lack standing - A court can act only when the rights of the party requesting relief are affected, when that party has or will have "an injury in fact--an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus. v County of Suffolk,* 77 NY2d 761, 772 [1991]). CSI wrongly argues that, while petitioners live near the proposed building, they cannot show an injury or adverse effect from the amendments to the inside of the building. However, as petitioners claim that the inside changes will cause more traffic and noise in the area, they have standing to bring this case.

The petitions must be dismissed - The court finds that BSA complied with the law and procedures to which it is bound and did not act capriciously or arbitrarily. The court has no jurisdiction to consider the wisdom or advisability of the final variance or to consider whether BSA should have, or this court would have, reached a different conclusion on the merits of CSI's 2016 application or weighed petitioners' objections on the merits of the application differently.

A decision of an administrative agency which neither adheres to its own precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious (*Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 516-517 [1985]). The court should be able to identify the reasons supporting an administrative decision, and valid reasons can show that the decision is not arbitrary or capricious (*Chevere v City of New York,* 31 Misc 3d 337, 346 [Sup Ct, Richmond County 2010]). BSA gives multiple detailed reasons for its approval of the 2016 Application and petitioners do not show lack of adherence to precedent or lack of reasonableness.

Accordingly, it is hereby

ORDERED and ADJUDGED that both petitions are denied and the proceedings are dismissed, with costs and disbursements to respondents; and it is further

ORDERED that motion sequence number 001 under Index No. 154194/17 is denied, and motion sequence numbers 001 and 003 under Index No. 154240/2017 are denied.

This constitutes the decision, order and judgment of this Court.

Dated: March 12, 2019

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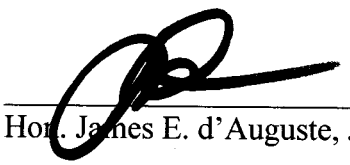

Hon. James E. d'Auguste, J.S.C.