SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 6
Justice

In the Matter of the Application of
MAGGI PEYTON,

Petitioner,

For an Order of Certiorari pursuant to New York City Administrative Code Ch. 2-Sec. 25-207,

- v -

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, MARGERY PERLMUTTER, CHAIR; SUSAN M. HINKSON, VICE-CHAIR; EILEEN MONTANEZ, AND DORA OTTLEY-BROWN, each in her capacity as a Commissioner of Board of Standards and Appeals; JEWISH HOME LIFECARE, INC., and PWV ACQUISITION, L.L.C.,

Respondents.

INDEX NO. 161972/2015

MOTION DATE

MOTION SEQ. 1

The following papers were read on this Article 78 petition.

	PAPERS NUMBERED
NYSCEF 1-51	
Notice of Petition/ Order to Show Cause – Affidavits – Exhibits	
Answering Affidavits – Exhibits	
Replying Affidavits	

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

Dated: July 27, 2016

JOAN B. LOBIS, *J.S.C.*

1. CHECK ONE: .....
2. CHECK AS APPROPRIATE:....MOTION IS
3. CHECK IF APPROPRIATE: .....

☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 6

In the Matter of the Application of
MAGGI PEYTON,
Petitioner,

Index No. 161972/15

For an Order of Certiorari pursuant to New York City Administrative Code Ch. 2-Sec. 25-207,

- against -

DECISION/ORDER

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, MARGERY PERLMUTTER, CHAIR; SUSAN M. HINKSON, VICE-CHAIR; EILEEN MONTANEZ, AND DORA OTTLEY-BROWN, each in her capacity as a Commissioner of Board of Standards and Appeals; JEWISH HOME LIFECARE, INC., and PWV ACQUISITION, L.L.C.,
Respondents.

LOBIS, JOAN, J.:

In this Article 78 proceeding, brought pursuant to Administrative Code of the City of New York § 25-207, petitioner Maggi Peyton (Peyton) challenges a determination and resolution of respondent New York City Board of Standards and Appeals (BSA), filed October 22, 2015 (Resolution or 2015 resolution), which upheld a decision of the New York City Department of Buildings (DOB), granting a building permit to respondent Jewish Home Lifecare, Inc. (JHL) for the construction of a twenty-story nursing home on West 97th Street in Manhattan. Petitioner seeks an order reversing BSA's resolution and annulling the building permit granted by DOB, on the grounds that BSA and DOB erroneously found that JHL satisfied the open space requirements of the Zoning Resolution of the City of New York (Zoning Resolution or ZR).

BACKGROUND

Petitioner Peyton is a resident of Park West Village (PWV), a complex of residential buildings located between 97th Street and 100th Street on the Upper West Side of Manhattan. The BSA is an administrative board composed of five commissioners, including the individual respondents in this proceeding, with authority to, among other things, hear and determine appeals from decisions of DOB, the municipal agency responsible for enforcing the rules and regulations governing the construction and use of buildings in New York City, including the Zoning Resolution. Respondent JHL is a not-for-profit corporation and member of the Jewish Home Lifecare System, which has proposed building a twenty-story nursing facility on property on West 97th Street formerly used as a parking lot for PWV residents (the proposed site), and owned by respondent PWV Acquisition, L.L.C. (PWVA or Owner) (collectively, with BSA and JHL, respondents). The proposed site is located on the south side of a "superblock" bounded by 100th Street on the north, 97th Street on the south, Columbus Avenue on the east, and Amsterdam Avenue on the west (the zoning lot). Three PWV buildings are located within the zoning lot, at 784 Columbus Avenue, 788 Columbus Avenue, and 792 Columbus Avenue.

Park West Village was developed in the late 1950s and early 1960s as part of an urban renewal and redevelopment plan, and includes seven residential buildings on two superblocks between 97th Street and 100th Street, from Central Park West to Amsterdam Avenue, divided by Columbus Avenue. Four PWV buildings, which were converted to condominiums in 1987 and 1991, are located on the block between Central Park West and Columbus Avenue; and three sixteen-story rental buildings are located on the block between Columbus Avenue and

Amsterdam Avenue. When PWV was developed, in order for the City of New York (City) to receive federal funding for the project, the City included in its agreement with the original developer a restrictive covenant prohibiting changes in land use or increases in density for forty years from completion of the project. The forty-year restriction on development expired in 2006.[1]

Sometime prior to, and in anticipation of, the expiration of the land use restrictions, PWVA acquired ownership of PWV, intending to develop additional buildings on the property. In 2006, PWVA or an affiliate applied for and was granted a permit to build a twenty-story mixed residential and commercial building on property along the west side of Columbus Avenue, known as 808 Columbus Avenue (808 Columbus). Several PWV residents and public officials appealed DOB's approval of the permit for 808 Columbus, arguing, in part, that the rooftop green space proposed by the developer did not satisfy the requirement for open space under ZR § 12-10, because the space was not accessible to and usable by all residents of all buildings on the zoning lot, but was reserved for the exclusive use of the residents of 808 Columbus. BSA denied the appeal, and, by resolution dated February 3, 2009 (2009 resolution), upheld DOB's issuance of a permit for the construction of 808 Columbus, finding that the building complied with the open space requirements of the Zoning Resolution.

The Zoning Resolution, adopted in 1916 as the first comprehensive zoning ordinance in the country, establishes zoning districts for the city, and regulates and establishes

1. [1]Citations to the Administrative Record, as submitted by BSA, are indicated as R __.

limits on land use and development, such as the height and bulk of buildings, the areas of open space, and the density of population. Courts have noted that "[t]he primary purpose of zoning is to insure the orderly rather than the haphazard development of a community, so as to promote the community 'health and the general welfare.'" Asian Americans for Equality v Koch, 128 A.D.2d 99, 113 (1st Dep't 1987), aff'd 72 N.Y.2d 121 (1988)(citation omitted); see ZR § 21-00; see also Toys "R" Us v Silva, 89 N.Y.2d 411, 418 (1996). As stated in ZR § 21-00 (d), residential districts were designed to, among other things,

> protect residential areas against congestion, . . . require the provision of open space in residential areas wherever practicable; and to encourage the provision of additional open space . . . in order to open up residential areas for rest and recreation, and to break the monotony of continuous building bulk, and thereby to provide a more desirable environment for urban living in a congested metropolitan area.

Zoning Resolution § 12-10 defines open space and open space ratio, and ZR §§ 23-14 and 23-142 set forth the minimum amount of open space required on zoning lots in the relevant zoning district, based on a calculation of the amount of residential floor area on the zoning lot. "Open space" is defined in ZR § 12-10, as

> that part of a zoning lot, including courts or yards, which is open and unobstructed from its lowest level to the sky and is accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot.

Under ZR § 12-10, open space may be provided on the roof of a community facility building, a residential building, or a non-residential building, under certain conditions, including that it "be directly accessible by a passageway from a building, or by a ramp . . . from a building, yard, court, or street, except that in R8 or R9 Districts such roof area need not be accessible to

occupants and is therefore exempt from this requirement."

The "open space ratio" of a zoning lot, which determines the amount of open space required on a residential zoning lot, is defined as "the number of square feet of open space on the zoning lot, expressed as a percentage of the floor area on that zoning lot." Along with the definition of open space ratio, ZR § 12-10 includes an example, which in 2009 stated:

> For example, if for a particular building an open space ratio of 20 is required, 20,000 square feet of floor area in the building would necessitate 4,000 square feet of open space on the zoning lot upon which the building stands; or, if 6,000 square feet of lot area were in open space, 30,000 square feet of floor area could be in the building on that zoning lot.

In 2009, ZR §§ 23-14 and 23-142, pertaining to open space and floor area regulations in R7 districts,[2] provided, respectively, that "for any building on a zoning lot, the minimum required open space or open space ratio shall not be less than set forth in this Section," and "the minimum required open space ratio . . . for any building on a zoning lot shall be as set forth in the following table for buildings with the height factor indicated in the table."

In the 2009 resolution, BSA upheld DOB's determination that 808 Columbus's proposed rooftop open space, although reserved for the exclusive use of residents of 808 Columbus, complied with the open space requirements of the Zoning Resolution, agreeing with DOB that "the ZR does not specify that open space on a multiple building zoning lot must be

[2]The current version of the Zoning Resolution, as amended in March 2016, sets forth open space and floor area regulations applicable to R7 districts in ZR §§ 23-15 and 23-151.

shared space that is commonly accessible to all occupants of the zoning lot," 2009 resolution, R 43, and that "the definition of open space must be read in the context of the calculation of open space set forth in ZR §§ 23-14 and 23-142, which require a minimum amount of open space with respect to 'any building' on a zoning lot, rather than to all buildings on a zoning lot." Id., R 44. Noting that "the purported intent of the Zoning Resolution is not clearly stated, and that the Board is not permitted to construe the intent of the Zoning Resolution, but is limited to the 'four corners' of the statute" (id., R 45), the BSA permitted open space on the zoning lot to be allocated among the 808 Columbus building and the other three PWV buildings on the zoning lot, and found that "as each of the existing buildings is allocated an amount of open space that is in excess of that which would be required under the Zoning Resolution if they were located on separate zoning lots," residents' access to "an equitable share of open space" meets the open space requirements of the ZR. Id. An Article 78 proceeding was commenced to challenge the BSA's 2009 determination, but was settled and discontinued in July 2009, and no further action was taken to appeal the 2009 resolution. See Bunten v N.Y. Bd. of Stds. & Appeals, Index No. 102750/09, (Sup. Ct. N.Y. County, July 7, 2009, Gische, J.).

In 2011, the Zoning Resolution was amended, chiefly to clarify key terms, including "development" and "building," and to clarify various regulations (key text amendments or 2011 amendments). See City Planning Commission Report, R 181. Several sections pertaining to the calculation of open space, including ZR §§ 23-14 and 23-142, were amended to the extent that, wherever "building" appeared, it was replaced with "zoning lot," making clear that the amount of required open space must be calculated based on the entire zoning lot, and not on a building by

building basis.[3] The definitions of open space and open space ratio in ZR § 12-10 were not changed, except that, in the example following the open space ratio definition, "building" was replaced by "zoning lot." The City Planning Commission Report, addressing the various amendments to the text in 2011, includes no comments or references to the changes in the open space provisions.

In November 2014, JHL's application for a building permit to begin construction of its nursing home was approved by DOB, over the objections of petitioner and other "Stakeholders of the Park West Village Neighborhood." Petitioner appealed DOB's decision to the BSA, on the grounds that JHL failed to meet the open space requirements under the Zoning Resolution, as amended in 2011. Petitioner argued, as she does in this proceeding, that the 2011 amendments to the Zoning Resolution changed how open space is calculated, and made clear that open space can only include space that is accessible to and usable by all residents of all buildings on a zoning lot, and cannot be allocated among buildings. Thus, petitioner contended, 808 Columbus's rooftop open space, which is not accessible to and usable by all residents of the zoning lot, could not be counted toward the open space requirement, and open space on the zoning lot was inadequate.

The BSA held public hearings and considered testimony and written comments

[3]As amended in 2011, ZR § 23-14 stated, in pertinent part, that "for any zoning lot, the minimum required open space or open space ration shall not be less than set forth in this Section." See Resolution, R 2.

regarding petitioner's challenge to the permit granted to JHL, and, by Resolution dated August 15, 2015, made a final determination denying petitioner's appeal. In the Resolution, BSA concluded that the key text amendments to the Zoning Resolution did not change the definition of open space, and did not intend to change the open space requirement or dictate any change in the prior 2009 analysis. The BSA thus determined that, because the 2009 resolution otherwise disposed of the issue of whether 808 Columbus's rooftop space satisfied the open space requirements, and petitioner presented no evidence requiring a different result, and because JHL's proposed nursing home does not require additional open space, JHL met the requirements for open space under the Zoning Resolution. Id. Petitioner then commenced this proceeding to challenge the BSA's determination, alleging that the ZR's open space requirement prohibits the construction of JHL's proposed nursing home, or any additional building, on the zoning lot.

STANDARD OF REVIEW

Generally, judicial review in an Article 78 proceeding is limited to whether the administrative determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803 (3); see Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009); Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." Peckham, 12 N.Y.3d at 431; see Pell, 34 N.Y.2d at 231. "If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency." Peckham, 12 N.Y.3d

at 431; see Terrace Ct., LLC v. New York State Div. of Hous. & Comm. Renewal, 18 N.Y.3d 446, 454 (2012).

A determination of the BSA, therefore, "'may not be set aside in the absence of illegality, arbitrariness or abuse of discretion,' and 'will be sustained if it has a rational basis and is supported by substantial evidence.'" Soho Alliance v. New York City Bd. of Stds. & Appeals, 95 N.Y.2d 437, 440 (2000) (citation omitted); see Kettaneh v. Board of Stds. & Appeals, 85 A.D.3d 620, 621 (1st Dep't 2011); Neighborhood in the Nineties, Inc. v. City of New York, 82 A.D.3d 602, 603 (1st Dep't 2011); see also Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613 (2004). Further, as the BSA's five commissioners include experts in land use and planning, and the BSA "is the ultimate administrative authority charged with enforcing the Zoning Resolution . . . [, its] interpretation of the statute's terms must be 'given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute.'" Toys "R" Us, 89 N.Y.2d at 418-419 (citations omitted); see New York Botanical Garden v. Board of Stds. & Appeals, 91 N.Y.2d 413, 419 (1998); Appelbaum v. Deutsch, 66 N.Y.2d 975, 977 (1985); Chelsea Bus. & Prop. Owners' Assn. v. City of New York, 107 A.D.3d 414, 415 (1st Dep't 2013).

When, however, "'the question is one of pure legal interpretation of statutory terms, deference to the BSA is not required,'" Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 102-103 (1997) (citation omitted), "unless such language is not altogether clear and unambiguous." Beekman Hill Assn. v. Chin, 274 A.D.2d 161, 167 (1st Dep't 2000) (internal quotation marks and citation

omitted); see Roberts v Tishman Speyer Props., L.P., 13 N.Y.3d 270, 285 (2009); New York Botanical Garden, 91 N.Y.2d at 418-419. "In such circumstances, the judiciary . . . is free to ascertain the proper interpretation from the statutory language and legislative intent." Matter of Gruber (New York City Dept. of Personnel), 89 N.Y.2d 225, 231-232 (1996).

"[T]he primary task of statutory construction, as applied to the interpretation of the New York City Zoning Resolution and more specifically to the terms employed in section 12-10, is to give effect to the clear intent of the [legislative body]." Mason v. Department of Bldgs. of City of N.Y., 307 A.D.2d 94, 100 (1st Dep't 2003). In construing the language of the Zoning Resolution, "although [courts] need not unquestioningly defer to the administrative agency, [they] will give due consideration to DOB's practical construction of the ordinance." Id. at 100-101 (citation omitted). Courts thus "will defer to an agency's construction where statutory language is 'special or technical and does not consist of common words of clear import,' or where it suffers from some 'fundamental ambiguity.'" Beekman Hill Assn., 274 A.D.2d at 167 (citations omitted); see Lee v. Chin, 1 Misc 3d 901(A), 781 N.Y.S.2d 625 (Sup. Ct. N.Y. County 2003). Courts "'are also guided in [their] analysis by the familiar principle that a statute . . . must be construed as a whole and that its various sections must be considered together and with reference to each other.'" Shannon v. Westchester County Dept. of Soc. Servs., 25 N.Y.3d 345, (2015) (citation omitted). Courts "should inquire into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history." Albany Law Sch. v. New York State Off. of Mental Retardation & Dev. Disabilities, 19 N.Y.3d 106, 120 (2012) (internal quotation marks and citation omitted).

DISCUSSION

Here, petitioner contends that the BSA's Resolution is not lawful, rational, or reasonable. She argues that the Resolution is "erroneous as a matter of law because it violated the basic principles of statutory construction," P Memo, at 21, by ignoring the plain meaning of ZR §§ 12-10, 23-14, and 23-142, relying on outdated language of the ZR, and failing to apply the ZR in effect at the time of JHL's application. Petitioner also argues that the 2015 resolution is inconsistent with the BSA's reasoning in the 2009 resolution, that it was bound by the "four corners" of ZR §§ 23-14 and 23-142. She further asserts that there was nothing rational or reasonable in determining to exclude residents of PWV from 808 Columbus's rooftop gardens when residents of 808 Columbus have access to all open space on the zoning lot.

Petitioner posits that the issue before the court is one of pure statutory interpretation, requiring no deference to the expertise of the BSA or DOB, and she argues, as she did in her appeal to the BSA, that

> [u]nder the Key Text Amendment, required open space cannot be allocated among buildings because the words "building" and "any building" were deleted from the relevant sections of the Zoning Resolution. Accordingly, space that is not usable or accessible to all of the residents of dwelling units on the zoning lot can no longer be counted as open space. The plain language of the Key Text Amendment requires that open space on the zoning lot must be usable and accessible by all, not just the residents of a single building.

P Memo, at 10. Thus, petitioner asserts, 808 Columbus's rooftop space cannot be included as open space under the amended ZR, and with the consequent reduction of open space on the zoning lot,

JHL cannot satisfy the requirements for a building permit.

Respondents contend that the 2011 amendments did not change the definition of open space and, with respect to JHL's proposed building, do not require a new analysis of the zoning lot's open space. The key text amendments, respondents assert, simply clarified that the total amount of open space on a zoning lot must be calculated based on the entire zoning lot, but did not address which areas count as open space or whether such open space can be allocated among individual buildings on a multi-building zoning lot. Thus, respondents claim, the BSA's 2009 determination that 808 Columbus's rooftop space qualified as open space remains valid, and the BSA's reliance in this case on the 2009 determination was rational and reasonable.

Further, respondents argue, as the ZR is silent as to the calculation of open space on a multi-building zoning lot, the BSA's determination, that open space on a multi-building zoning lot may include space reserved for residents of a single building, is entitled to deference. Respondents also argue that, as the meaning of open space was decided in the 2009 resolution, and the time to challenge the 2009 resolution has long passed, the 2009 resolution is dispositive here, and the principles of res judicata and collateral estoppel bar this proceeding. Moreover, respondents assert, because JHL's proposed nursing home, as a community facility, does not require additional open space to be created, the ZR open space requirement is satisfied by the existing open space.

Petitioner does not dispute that any appeal of the 2009 resolution would now be

untimely, and claims that she is not challenging that decision with respect to 808 Columbus, but is challenging the application of it to JHL's proposed building. The 2009 resolution, petitioner asserts, created an exception to the definition of open space, with respect to 808 Columbus only, which exception was obliterated by the 2011 text amendments. While not challenging 808 Columbus's right to rely on the 2009 resolution, and "not seeking to change the status of the 808 building," see Petitioner's Reply Memorandum of Law to JHL and PWVA (P Reply to JHL), at 13, petitioner asserts that JHL cannot be permitted to benefit from it. Petitioner also argues that she is not precluded by the 2009 determination because she was not a party to the prior proceeding, and this proceeding, involving a new building subject to new rules, is based on different facts and law.

The doctrine of res judicata "dictates, 'as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action.'" Syncora Guar. Inc. v. J.P. Morgan Sec. LLC, 110 A.D.3d 87, 93 (1st Dep't 2013) (citation omitted); see People of the State of New York v Applied Card Sys., Inc., 11 N.Y.3d 105, 122 (2008), cert. denied sub nom. Cross County Bank, Inc. v. New York, 555 U.S. 1136 (2009). "[T]he doctrines of res judicata and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies," Ryan v. New York Tel Co., 62 N.Y.2d 494, 499 (1984), "including municipal zoning boards." Waylonis v. Baum, 281 A.D.2d 636, 638 (2d Dep't 2001).

"Collateral estoppel is a corollary to the doctrine of res judicata; it permits in certain situations the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided." Gramatan Home Inv. Corp. v. Lopez, 46 N.Y.2d 481, 485 (1979) (citations omitted); see Ryan, 62 N.Y.2d at 500-501. "As the consequences of a determination that a party is collaterally estopped from litigating a particular issue are great, strict requirements for application of the doctrine must be satisfied." Gramatan Home Inv. Corp., 46 N.Y.2d at 485. "[I]t must be shown that the party against whom collateral estoppel is sought to be invoked had been afforded a full and fair opportunity to contest the [prior] decision . . . [and] there must be proof that the issue in the prior action is identical, and thus decisive, of that in issue in the current action." Id. (citation omitted).

Assuming arguendo that petitioner's challenge to the issuance of a permit to JHL under the 2011 Zoning Resolution is not precluded by the 2009 resolution pertaining to 808 Columbus, and notwithstanding her assertion that she is not seeking to overrule the 2009 resolution, petitioner's argument is essentially the same argument made by appellants in 2009, that 808 Columbus's rooftop space does not meet the definition of open space in ZR § 12-10 because it is not "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot." Although petitioner does not deny that the key text amendments did not change the definition of open space in ZR § 12-10, she claims that what differs in this case is that, to the extent that there was any ambiguity in the 2009 Zoning Resolution provisions pertaining to the meaning and calculation of open space, such ambiguity was eliminated by the 2011 amendments,

particularly the replacement of "building" with "zoning lot" in ZR §§ 23-14 and 23-142. With respect to JHL's proposed building, petitioner argues, it is now clear that 808 Columbus's rooftop space cannot be included in the calculation of open space on the zoning lot.

According to respondents, the calculation of open space on the zoning lot, in 2009 as well as in 2015, was based on the entire zoning lot. In any event, the parties agree that the minimum amount of open space required for the zoning lot is 230,108 square feet, as the BSA found. It also is not disputed that, including 808 Columbus's rooftop space, the zoning lot has 230,726 square feet of open space, more than the minimum amount required. Petitioner, however, disputing that 808 Columbus's rooftop space was provided to all residents of the zoning lot, claims that, when the amount of 808 Columbus's rooftop space[4] is excluded, the total amount of open space on the zoning lot is reduced to about 174,000 square feet, far less than the required amount.

The key text amendments, while undisputedly clarifying that the amount of required open space must be based on the zoning lot as a whole, do not modify, clarify, or otherwise address the definition of open space or what counts as open space; and the court finds no basis in the 2011 amendments to revisit BSA's 2009 interpretation of open space or determination that 808 Columbus's rooftop space satisfies the open space requirements of the Zoning Resolution. Even if, as petitioner asserts, the key text amendments to ZR §§ 23-14 and 23-

[4]Petitioner claims that the amount of 808 Columbus's rooftop space is approximately 56,000 square feet, while the Resolution found that the amount is about 42,000 square feet. The discrepancy in the parties' numbers is not material to their arguments.

142 undercut BSA's reliance on the pre-2011 language of those sections to support its conclusion that open space can be allocated among individual buildings on a multi-building zoning lot, the 2011 amendments do not unambiguously alter the meaning or measurement of open space as interpreted by BSA.

The Zoning Resolution does not address open space requirements for multiple-building zoning lots, and, respondents assert, the drafters of the Zoning Resolution did not contemplate zoning lots with multiple parcels with separate owners. Further, respondents argue, amendments to the definition of "zoning lot," to encompass merged lots and zoning lots with separately owned buildings, did not address the effect of the changes on open space requirements. Thus, respondents contend, the open space provisions, when considered as a whole and in light of the history of the ZR, are not clear, and require the practical and operational expertise of BSA and DOB; and DOB, therefore, properly developed a method of applying the open space requirements to multi-building zoning lots. In addition, respondents note, the definition of open space includes "yards" and "courts,"[5] and rooftops accessible from a building, which raise questions about the practical application of a requirement that all open space must be accessible to all residents.

The court is not convinced that, as respondents assert, "the goal of the Zoning

[5]A yard is defined as "that portion of a zoning lot extending open and unobstructed from the lowest level to the sky along the entire length of a lot line, and from the lot line for a depth or width set forth in the applicable district yard regulations." See ZR § 12-10. A court is described as an "outer court" or an "inner court," one definition of which is an open area bounded by building walls. Id.

Resolution's open space provisions . . . is to ensure that all persons residing in a residential building have access to an amount of open space that is commensurate with the size of the building and the square footage of the parcel on which it stands," Joint Memo, at 28, or that the ZR intended to treat multi-building zoning lots differently than single-building zoning lots when considering open space requirements. See generally Roberts, 13 N.Y.3d at 286. Nonetheless, the court cannot say that the open space provisions could not be subject to different interpretations, and concludes there is enough ambiguity to defer to "DOB's practical construction of the ordinance." Mason, 307 A.D.2d at 101; see Beekman Hill Assn., 274 A.D.2d at 175 (deference to agency's interpretation of statute it administers is appropriate although "language does not unambiguously refute petitioner's interpretation").

Finally, notwithstanding the above, even if petitioner's arguments were accepted, and 808 Columbus was deemed a non-compliant building, which the court is not finding, such non-compliance, as petitioner acknowledges, is legal and may continue, absent "the creation of additional non-compliances or increases in the degree of existing non-compliances." ZR § 51-00; see ZR §§ 54-11, 54-31 (non-complying building); ZR §§ 52-11, 52-31 (non-conforming uses);[6] see also Glacial Aggregates LLC v. Town of Yorkshire, 14 N.Y.3d 127, 135 (2010) (prior "'nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a

[6]As defined in ZR § 12-10, a "non-complying building" is any lawful building "which does not comply with any one or more of the applicable district bulk regulations;" and "[a] non-conforming use is any lawful use, whether of a building or other structure or of a zoning lot, which does not conform to any one or more of the applicable use regulations of the district in which it is located."

general rule, constitutionally protected and will be permitted to continue'" [citation omitted]; City of New York v. 330 Continental LLC, 60 A.D.3d 226, 234-235 (1st Dep't 2009) (prior non-conforming uses remain lawful under ZR's "grandfathering" provision).

Petitioner recognizes that 808 Columbus's purported non-compliance remains legal, but she argues that JHL's proposed building "would impermissibly create an additional degree of non-compliance on the zoning lot." P Memo, at 3. It is not disputed, however, that JHL's proposed building, as a community facility, which will be entirely occupied as a nursing home, is not required to provide any additional open space on the zoning lot; and there is no claim that JHL would not preserve the existing open space. JHL's proposed building would not, therefore, disturb the existing open space, and enlarge or increase 808 Columbus's alleged non-compliance, but would, at most, merely maintain it. See Golia v. Srinivasan, 95 A.D.3d 628, 631 (1st Dep't 2012); Mart v. Village of Port Jefferson Zoning Bd. of Appeals, 266 A.D.2d 548 (2d Dep't 1999); Lee, 1 Misc. 3d 901(A). Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied, and the proceeding is dismissed.

Dated: July 26, 2016 ENTER:

HON. JOAN LOBIS, J.S.C.