APL-2019-00039

To be argued by:
JONATHAN POPOLOW
15 minutes requested

Court of Appeals
State of New York

In the Matter of the Application of

RANDY PEYTON, on behalf of
the Estate of MAGGI PEYTON,

Petitioner-Respondent,

and

HILLEL HOFFMAN, DEAN HEITNER, HELEN T. HOFFMAN, WINIFRED ARMSTRONG, EMILY MARGOLIS, EDWARD GARELICK, CATHERINE UNSINO, EILEEN SALZIG, JULIETTE LEAK, MARTIN ROSENBLATT, SANDRA CHEITEN, GERALD SIDER, and DEAN DACIAN,

Intervenors-Petitioners-Respondents,

(*caption continued on inside cover*)

REPLY BRIEF FOR APPELLANT NEW YORK CITY BOARD OF STANDARDS AND APPEALS

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January 30, 2020

(*continued caption*)

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

against

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, MARGERY PERLMUTTER, Chair, SUSAN M. HINKSON, Vice Chair, EILEEN MONTANEZ, and DARA OTTLEY-BROWN, each in her capacity as a Commissioner of Board of Standards and Appeals, JEWISH HOME LIFECARE, INC., and PWV ACQUISITION, LLC,

Respondents-Appellants.

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PRELIMINARY STATEMENT

Petitioners' brief is notable for its complete failure to even address, let alone rebut, core elements of the BSA's argument. As the BSA explained in its opening brief, the drafters of the 1961 Zoning Resolution considered but rejected language that would have unambiguously required that all open space on a multi-owner zoning lot be accessible to all residents on the lot even if they do not live in the building with the space in question. Specifically, the drafters rejected language requiring open space to be accessible to "all residents upon the zoning lot" and adopted language amenable to more than one interpretation: "all persons occupying a dwelling unit or a rooming unit on the zoning lot."

Petitioners act as though this change never occurred and that the drafters' choice had no consequence. Similarly, they ignore guidance issued by the City Planning Commission in connection with the enactment of the Resolution that speaks of open space being accessible to all residents of a building rather than an entire zoning lot. Petitioners also wave away—in most cases with no meaningful engagement—the multiple instances,

highlighted in our opening brief, where the Resolution provides that some spaces ordinarily accessible only to a subset of residents on a multi-building zoning lot—like rear yards and inner courts—would still qualify as open space.

Petitioners claim that the BSA cannot rely on its prior 2009 determination that the 808 Columbus roof gardens qualified as open space for various reasons. But none of the scattershot rationales they offer has any merit. The 2011 amendments to the Resolution did not, as the Appellate Division erroneously found, repudiate the basis for the BSA's 2009 determination. Nor was that 2009 determination inconsistent with the BSA's position in unrelated proceedings or contrary to judicial precedent.

The simple fact is that the definition of open space is far from clear, both on its face and as applied to the unforeseen problem of multi-owner zoning lots. Confronting such problems is the BSA's job, and well within its delegated authority. Here, the agency rationally applied the Zoning Resolution to accommodate the complex and competing demands of an ever-evolving city.

ARGUMENT

PEYTON FAILS TO REBUT THE BSA'S SHOWING THAT IT REASONABLY APPLIES THE ZONING RESOLUTION'S OPEN SPACE REQUIREMENT

A. The BSA's construction of the ambiguous definition of open space gives meaning to the array of relevant terms and comports with legislative intent and history.

Since its implementation, the 1961 Zoning Resolution has defined open space in pertinent part 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." ZR § 12-10 (emphasis omitted). As we explained in our opening brief, this statutory text does not unambiguously and inexorably require that all open space on a multi-owner zoning lot[1] be accessible to and usable by all residents on the lot even if

[1] We use the phrase "multi-owner zoning lot" as shorthand for a zoning lot that has multiple buildings under different ownership. When multiple buildings are held in common ownership—as with a unified building complex—the same practical problems about expanding access to open space are not presented. Petitioners ignore the difference (*see, e.g.*, Resp. Br. 10 (conflating the two when discussing the significance of historical materials from a time when there was no such thing as a multi-owner zoning lot)).

they do not live in the building containing the open space in question (BSA Br. 27-32). For one thing, the separately defined terms dwelling unit and rooming unit are focused on an individual building, not an entire zoning lot. *See* ZR § 12-10.[2] And to add even more complexity, the definitions of dwelling unit and rooming unit themselves refer to and incorporate other defined terms, as do the definitions of courts, yards, and zoning lot. *Id*.

Petitioners insist that this complicated, multi-layered definition plainly means that open space must be universally accessible to "all residents of a zoning lot" (Resp. Br. 35-36). But they ignore that the City Planning Commission, in enacting the 1961 Zoning Resolution, considered but rejected proposed text that would actually have unequivocally required that open space be accessible to "all residents upon the zoning lot."

As we detailed in our opening brief (BSA Br. 7-8), the definition of open space in the initial draft of the 1961 Zoning

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[2] As relevant here, a "'dwelling unit' contains at least one room in a residential building [or] residential portion of a building …." ZR § 12-10. "A 'rooming unit' consists of any 'living room,'… in a residential building or a residential portion of a building …." *Id*.

Resolution required that open space be accessible to "all residents upon the zoning lot," but that language was rejected and not included in the enacted version of the Resolution. Petitioners make no attempt—none whatsoever—to grapple with the legal significance of this choice. *See Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 587 (1998) (declining to find amendments retroactive where draft language clearly providing for retroactive application did "not appear in the enacted version"); *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 414-15, 420 (1996) (recognizing significance of changes in text between proposed and enacted versions of 1961 Zoning Resolution).

Petitioners also fail to address contemporaneous guidance issued by the City Planning Commission in connection with the introduction of the 1961 Zoning Resolution that cuts against their contention that ZR § 12-10 unambiguously requires that open space be universally accessible to all residents of a multi-owner zoning lot. *See Zoning Handbook, A Guide to the Zoning Resolution of The City of New York*, at 17 (CPC/DCP, 1961)

(explaining that adopted definition of "open space" requires that such space be "accessible to all residents of a building").

In the same vein, petitioners ignore the multiple examples highlighted by the BSA in our opening brief showing that the drafters of the 1961 Zoning Resolution intended that some spaces accessible only to a subset of residents on a multi-building zoning lot would still qualify as open space (BSA Br. 33-36). For example, the Resolution's definition of building includes "an attached townhouse separated by fire walls from abutting townhouses on a shared zoning lot" as well as detached single-family residences, more than one of which may be situated on the same zoning lot. ZR § 12-10. In each instance, the Resolution contemplates private open space accessible to and usable only by the occupants of the particular building with which such open space is associated.

Beyond that, the drafters of the 1961 Zoning Resolution explicitly included "courts" and "yards" within the definition of open space—broad terms that encompass areas ordinarily accessible only to a subset of people on a multi-owner block, such as a "rear yard" located on the back of a lot line and an "inner

court" "bounded by … building walls." ZR § 12-10 (definitions for "open space," "yard," "yard, rear," "court, "court, inner"). Petitioners perfunctorily claim that this does not conflict with their view that the Resolution requires "open space be accessible and usable by all residents of the zoning lot" (Resp. Br. 39), but make no effort to explain why, if the drafters intended to compel that open space be accessible to everyone on a multi-owner zoning lot, they would have explicitly included rear yards and interior courtyards within the definition of open space (Resp. Br. 39-40). Of course, the drafters could not possibly have so intended, because at the time they defined open space in 1961, there was no such thing as a multi-owner zoning lot (*see* BSA Br. 5-10).

Confronted with this unforeseen problem of application, the BSA reasonably permits some open space on a multi-owner zoning lot to be reserved for residents of one building, so long as the lot as a whole has the minimum amount of required open space, and residents of each building located on the lot have access to at least the amount of open space that would be required if each building were on a separate lot. This approach is a rational exercise of the

BSA's legislatively conferred discretion that should be upheld by this Court.[3] *See Pecoraro v. Bd. of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613 (2004) ("reviewing court should refrain from substituting its own for the reasoned judgment of the zoning board"); *Cowan v. Kern*, 41 N.Y.2d 591, 599 (1977) ("The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them").

B. The BSA's interpretation of the Resolution's open space definition is not precluded by judicial precedent, legislative amendments, or prior administrative determinations.

Petitioners, who in this action seek to relitigate the BSA's unchallenged 2009 resolution that the roof gardens at 808 Columbus qualify as open space (Resp. Br. 49-51), claim that the BSA's 2015 resolution upholding that prior resolution is precluded

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[3] Petitioners claim that the BSA violated ZR § 72-11 by interpreting the Zoning Resolution to address the problem we confront here (Resp. Br. 32). But that provision actually *empowers* the BSA to interpret the Zoning Resolution. That is, after all, why the BSA exists: to take the complex and general terms of the Zoning Resolution and bring them to bear on the innumerable problems of application that arise in an ever-evolving and staggeringly complex metropolis (*see* BSA Br. 3-5).

for a variety of reasons (Resp. Br. 30-35, 51-53). As we show below, none of their proffered reasons has any merit.

1. *Raritan* does not support petitioners' position.

In *Raritan Development Corp. v. Silva*, 91 N.Y.2d 98, 100-01 (1997), this Court found that the BSA's interpretation of a different provision of ZR § 12-10 was contrary to the plain meaning of that particular statutory language. Petitioners' reliance on *Raritan* (Resp. Br. 30-31), however, simply assumes, without any meaningful elaboration, that the BSA's interpretation here cannot be squared with the plain meaning of the Zoning Resolution's definition of open space.

But the assumption does not hold. As the BSA has shown (BSA Br. 27-32; *see also supra* 3-7), the statutory language at issue here is anything but plain and unequivocal—in general and as applied to the particular problem, unforeseen at the time of drafting, of multi-owner zoning lots. By contrast, in *Raritan*, where the appeal pivoted on whether habitable cellar space could be excluded from the calculation of a building's floor area, the

relevant text could not, as the Court observed, have been clearer. *See* 91 N.Y.2d at 103. The Zoning Resolution explicitly specified without qualification that "the floor area of a building shall not include … cellar space." ZR § 12-10 (definition of "floor area").

Additionally, in *Raritan*, the Court faulted the BSA for relying on outdated versions of the Zoning Resolution and Multiple Dwelling Law and, in the Court's view, ignoring amendments to both that undercut its interpretation at issue. *See* 91 N.Y.2d at 103-04. But that is not the case here. If anything, it is petitioners, not the BSA, who rely on a non-operative version of the open space definition. As previously discussed, language that would have much more clearly supported petitioners' and the Appellate Division's interpretation (*i.e.*, a requirement that open space be universally accessible to "all residents upon the zoning lot") was considered but rejected by the drafters of the 1961 Zoning Resolution (*supra* 4-5; *see also* BSA Br. 7-8, 30-32). And petitioners concede that the 2011 Amendments to the Zoning Resolution did not alter the relevant portions of the open space definition (*see* Resp. Br. 17 (amendments "did not change the

required amount of open space, much less who could access and use that open space"); *id.* at 53 (amendments did not change definition of open space)).

2. The 2011 amendments do not support petitioners' position.

There is little logic to petitioners' argument that the 2011 amendments to the Zoning Resolution precluded the BSA from upholding its 2009 resolution that the roof gardens at 808 Columbus qualified as open space (Resp. Br. 51-53). Petitioners concede that the 2011 amendments did not alter the pertinent parts of the Zoning Resolution's definition of open space, and that the definition has "remained unchanged since 1961" (*id.* at 10). And petitioners further concede that the 2011 amendments' replacement of "building" with "zoning lot" in provisions regarding the calculation of minimum required open space had no substantive effect since "the result was the same" whether it "was done building-by-building and the amounts were then summed for the zoning lot as a whole" or "the determination was done for the entire zoning lot at the outset" (*id.* at 15-17). Yet petitioners

nonetheless claim that these amendments somehow "effectuated a change in the law that changed the outcome mandated by [the BSA's] 2009 Resolution" (*id.* at 51).

This is more than simply wrong. As we explained in our opening brief, if anything the 2011 amendments support, rather than foreclose, the BSA's interpretation of the Zoning Resolution's open space requirements (*see* BSA Br. 36-40). In drafting and approving the 2011 amendments, the City Planning Commission's choice not to alter the existing language of the definition of open space suggests legislative approval of the BSA's 2009 construction of that definition (*id.* at 40). Petitioners have no meaningful response to this; they simply repeat their assertion that the statutory language of the open space definition is clear and unequivocal (Resp. Br. 53).

Petitioners also miss the mark when they complain that the BSA's 2015 resolution squarely focused on the effect of the 2011 amendments rather than revisit de novo its 2009 determination that the 808 Columbus roof gardens qualified as open space (Resp. Br. 51). The BSA had no cause to revisit that question, because it

had already been conclusively resolved in the prior proceeding. And there is no merit to petitioners' suggestion that the BSA's 2009 resolution did not interpret the Zoning Resolution's definition of open space (Resp. Br. 50). They concede that the threshold questions resolved in connection with the prior proceeding were whether the definition of open space "preclude[d] restricting access" and whether the chosen approach was "'consistent with' that definition" (*id.*). That is just another way of describing the same interpretive exercise that petitioners accuse the BSA of ignoring: what does the definition of open space mean?

Finally, petitioners' contention that the 2011 amendments eliminated the rationale for the BSA's 2009 resolution (Resp. Br. 3, 16, 26-27) also is incorrect. The building-by-building approach utilized by the DOB and the BSA refers not to the calculation of the amount of open space required for a zoning lot as a whole but rather to the allocation of that open space among the different buildings on a multi-owner zoning lot. While petitioners attempt to soft-pedal the First Department's misunderstanding of this key distinction as a mere "misstatement" (Resp. Br. 26), that court's

decision leaves no doubt that the majority fundamentally misconstrued the intent and effect of the 2011 amendments, erroneously viewing them as a dispositive change (*see* A408-09 ("we find that the 2011 amendments now preclude the use of the building-by-building methodology")).

3. The BSA's 2015 resolution is not contrary to its prior positions.

Contrary to petitioners' assertion (Resp. Br. 33-35), the BSA's 2015 resolution did not represent a shift from its prior interpretation of the Zoning Resolution's open space requirement. The BSA has never taken the position (urged by petitioners and erroneously endorsed by the Appellate Division) that the Zoning Resolution mandates that all open space on a multi-owner zoning lot must be accessible to and usable by all residents on the lot, even if they do not live in the building containing the open space in question. The result reached here is wholly consistent with the BSA's prior practice.

None of the supposed examples of inconsistent prior practice cited by petitioners support their position. In two instances,

petitioners impermissibly conflate the BSA with the agency whose decision it reviewed (Resp. Br. 22-24), ignoring that only the BSA's determinations are final and binding in this context. In any event, in both situations, the Department of Buildings (DOB) started with the proposal made by the developer and simply confirmed that an area covered with a roof, as well as a child's play area and a meditation garden, qualified as open space (A102-03). The third instance, 144 North 8th Street, considered access by residents of a mixed-use building under construction to the roofs of commercial buildings on the same zoning lot. The issue involved whether the DOB, as a condition of permitting the construction, should have required proof of a written easement in favor of residents of the new building. The BSA found that such an easement was not required because the building plans and zoning declaration were sufficient to establish compliance with the open space requirements. But there was no claim mirroring the issue here—that access to the existing roofs was not necessary because the

residents would have access to the minimum amount of required open space even if they did not have access to the roofs.[4]

* * *

The Zoning Resolution's definition of open space is far from clear and unambiguous, especially when considered in the increasingly prevalent context of multi-owner zoning lots. The drafters of the Resolution rejected language requiring open space to be accessible to "all residents upon the zoning lot"—the interpretation urged by petitioners and erroneously adopted by the Appellate Division. Instead, they adopted language amenable to more than one interpretation: "all persons occupying a dwelling unit or a rooming unit on the zoning lot."

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[4] Petitioners also falsely claim that the DOB's counsel, during proceedings in this case, cited the BSA's 144 North 8th Street resolution as recognizing that ZR § 12-10 required that an area on a multi-owner zoning lot had to be universally accessible to qualify as open space (Resp. Br. 34). This is simply not true. Indeed, counsel recognized the opposite (*see* A313 (noting that "caveat against double counting … would be meaningless if the Zoning Resolution did not permit allocation of open space"); *id.* (because zoning lot "allocates all persons occupying a dwelling unit or a rooming unit more than enough open space to meet the required open space ratio … an allocation of open space is consistent with the Zoning Resolution both before and after" the 2011 amendments)).

Petitioners do not even bother to address this critical change, let alone explain how "all persons occupying a dwelling unit or a rooming unit on the zoning lot" clearly and unambiguously means "all residents upon the zoning lot." The BSA's pragmatic interpretation of the Zoning Resolution's open space requirement is consistent with the Resolution's provision that some spaces ordinarily accessible only to a subset of residents on a multi-owner zoning lot—like rear yards and inner courts—still qualify as open space. As a rational exercise of the BSA's legislatively conferred discretion, the BSA's interpretation should be upheld by this Court.

CONCLUSION

This Court should reverse the Appellate Division's order and dismiss the petition.

Dated: New York, NY
January 30, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 3,178 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

JONATHAN POPOLOW