APL-2019-00039
New York County Clerk's Index No. 161972/15

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,

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,

BRIEF OF AMICUS CURIAE THE REAL ESTATE BOARD OF NEW YORK, INC. IN SUPPORT OF RESPONDENTS-APPELLANTS

Dated: July 25, 2019

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The Real Estate Board of New York, Inc. ("REBNY") submits this brief as *amicus curiae* in support of this appeal by the Respondent-Appellants PWV Acquisition, LLC ("PWV"), Jewish Home Lifecare, Manhattan ("JHL"), and the New York City Board of Standards and Appeals ("BSA"). REBNY is a not-for-profit trade association, whose members are involved in the real estate industry as property owners, developers, lenders, managers, architects, designers, appraisers, attorneys and brokers.

PRELIMINARY STATEMENT

This proceeding challenges an October 22, 2015 BSA resolution upholding the New York City Department of Buildings ("DOB")'s issuance of a permit to JHL for the construction of a nursing home facility on West 97th Street in Manhattan's Upper West Side. Petitioners-Respondents, residents of Park West Village, an apartment complex on the same zoning lot as the proposed facility, objected to further development on that zoning lot, claiming that the proposed development did not meet the open space requirements of the Zoning Resolution of the City of New York (the "ZR"). As described below, those provisions, which are applicable in numerous zoning districts in New York City, establish minimum requirements for open space in accordance with specified ratios between the floor area of the zoning lot and the amount of defined open space provided on a zoning lot. The specific issue presented is how the amount of open space is calculated on

a zoning lot with multiple owners and multiple developments and whether certain open spaces on the zoning lot that are open only to residents of a particular development on the zoning lot should be included in the calculation of the open space ratio.

In its resolution, BSA denied the Respondent-Petitioners claims and sustained the DOB's issuance of the building permit. (Appendix, hereinafter "A" 115, 123-125). BSA found that the proposed facility was in full compliance with the open space requirements of the ZR, specifically that the manner in which the DOB had calculated how much open space would be provided on the zoning lot was proper. DOB's calculation, which included open space in a development that was only available to residents of one development on the zoning lot, was consistent with long-standing BSA interpretations of the ZR, including a 2009 determination involving the very same zoning lot and the same open space whose inclusion was challenged by the Respondent- Petitioners. The BSA's determination was rational and consistent with the purpose of the BSA, as the authority charged with enforcing the ZR, to provide consistent and effective standards to proposed building projects in New York City.

Respondent-Petitioners then commenced this Article 78 Proceeding, seeking the annulment of the BSA resolution and alleging a violation of the ZR's "open space" requirements. The Supreme Court properly dismissed the petition, deferring

to the agency's rational determination based on its interpretation of the ZR open space requirements.

The Appellate Division, First Department, reversed. It created its own interpretation of the definition of open space and how it is calculated on zoning lots with multiple owners and/or developments, by excluding the open space on one portion of the zoning lot from the calculation of the open space ratio. In doing so, the Appellate Division totally ignored the BSA's expert analysis and abrogated the BSA's unique role as the agency responsible for interpreting the ZR. This holding was in complete derogation of decades of New York law prohibiting the courts from substituting their judgment for that of expert agencies, particularly in the area of land use and zoning.

The Appellate Division's Decision and Order represented a sea-change in the application of the ZR's open space requirements as interpreted by the BSA for many years. By creating its own interpretation of the open space provisions of the ZR, however, the Appellate Division not only departed from well-settled law, it also undermined the integrity and predictability of the BSA's determinations, and opened a floodgate of potential litigation and administrative hearings that would subject countless buildings in New York City to retroactive applications of impractical open space compliance standards.

REBNY members have a vital interest in the consistent and practical application of the ZR. In a city as densely populated as New York City, where proposed projects of any nature are invariably subject to challenges based upon alleged violations of the ZR's open space requirements, affirming the Appellate Division's novel and incorrect interpretation of the ZR would have widespread and detrimental consequences for developers, real estate owners, and residents. It would subject developments on shared zoning lots that were approved by the BSA to potential costly changes because they might now be found noncompliant with the ZR. It would also restrict the construction of new residential buildings on shared zoning lots, further limiting the availability of housing development in an already congested city. It would undermine real estate transactions, including the sale of development rights that relied on the BSA's longstanding interpretation and application of the ZR. Finally, it could force the untenable result that open spaces such as yards, play areas, or roof gardens that were built and intended for a community of building residents may now be required to be accessible to everyone on the zoning lot. Such an outcome would completely undermine the stability and practicality of the BSA's application of the ZR. This would introduce new costs and delays and hamper the real estate industry's ability to effectively plan and complete projects in the City.

Petitioner-Respondent and the intervening parties urge the Court to apply a forced interpretation of a narrow and anachronistic provision of the ZR open space regulations that would prevent the development of an adjacent parcel on the zoning lot they occupy, but which would also have far-reaching and negative consequences for New York City's residential real estate as a whole. The Appellate Division applied this myopic view of the ZR to overturn a longstanding BSA interpretation of a provision that has not changed in over 50 years. By this appeal, Respondents-Appellants and the supporting *amici* seek to reverse the Appellate Division's Decision and Order consistent with New York law, and restore stability and predictability to the administrative review of building proposals in residential zones.

For the foregoing reasons and for the reasons as set forth below, REBNY urges the Court to reverse the Appellate Division's order, and preserve expectations and practices of the real estate industry.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

REBNY is a non-profit corporation organized under New York law. It is a trade association whose more than 17,000 members consist of major office and residential property owners and builders, brokers and managers, banks, financial service companies, utilities, attorneys, architects, contractors and other individuals

and institutions professionally interested in New York City real estate. REBNY's members thus represent a major component of the City's economy.

REBNY is a leading advocate for the real estate profession of New York City. In that role, REBNY consistently works to promote policies that expand the City's economy, encourage the development of commercial and residential real property, enhance the City's appeal to investors as a business location and a place to live, and facilitate property management. REBNY regularly reviews proposed legislation related to the real estate industry, participates in lobbying efforts, and presents the views of the industry to public officials and the public.

REBNY has litigated issues of importance to the real estate industry. *See, e.g., Real Estate Board of New York, Inc. v. City of New York*, 157 A.D.2d 361 (1st Dep't 1990); and *Real Estate Board of New York, Inc. v. Council of the City of New York, et al.*, New York County Index No. 114459/2005 (Sup. Ct. N.Y. Co. April 11, 2007). REBNY has also submitted briefs as amicus curiae in other litigations. *See, e.g., Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219 (2007); *CitiNeighbors Coalition of Historic Carnegie Hall v. New York City Landmarks Preservation Commission*, 2 N.Y.2d 945 (1991); *9th & 10th St. L.L.C. v. Bd. of Standards & Appeals of City of New York,* 10 N.Y.3d 264 (2008). Some of these matters have involved the interpretation and application of the ZR, as does the case at bar. REBNY also submitted a brief as

amicus curiae in *Friends of P.S. 163, Inc. v. Jewish Home Lifecare*, 30 N.Y.3d 416 (2017), a related action involving the same proposed development.

Given its credentials as a recognized representative of the City's real estate industry as well as its unique role in the industry, REBNY hopes to be able to present to the Court arguments that might otherwise escape consideration. This appeal raises issues of utmost importance to the real estate industry because the decision by the Appellate Division, if affirmed by this Court, would allow courts to apply forced interpretations of complex and ambiguous zoning provisions over the practical determinations of the agencies with precisely the relevant expertise to apply them, thus removing the reliability and practicality of such determinations, on which the development community (and all compliant applicants) have come to rely.

STATEMENT OF THE CASE[1]

This case concerns the application of the open space requirements of the ZR to a building proposal on a multi-owner zoning lot. The ZR was enacted with the broad purpose to promote and protect public health, safety, and general welfare, in part by encouraging desirable residential areas. (*See* A15). In furtherance of this purpose, the ZR "require[s] the provision of open space in residential areas

[1] The complete facts relevant to this appeal are presented in the briefs of Respondents-Appellants PWV, JHL and BSA, and will not be restated at length here. *See generally* Brief for Respondent-Appellant PWV, dated May 23, 2019 (hereinafter "PWV Br."); Brief for Respondent-Appellant JHL, dated May 24, 2019 (hereinafter "JHL Br."); and Brief for Respondent-Appellant BSA, dated May 23, 2019 (hereinafter, "BSA Br.").

wherever practicable . . . in order to open up residential areas to light and air . . . to break the monotony of continuous building bulk, and thereby provide a more desirable environment for urban living in a congested metropolitan area." ZR § 21-00(d). The ZR sets forth the minimum amount of open space required in numerous residential zoning districts such as in the R7-2 zoning district at issue here (A115), by designating a specific open space ratio based on a calculation of the amount of residential floor area on the zoning lot. *See* ZR § 12-10.

The key issue in this proceeding is how to calculate the minimum required open space for a proposed building on a multi-building zoning lot with divided ownership. When the ZR definition of "open space" was enacted in 1961, zoning lots were by definition held only by a single owner. (A177-178). Since then, in 1977 the ZR was amended to permit divided ownership of multiple parcels or buildings on a single zoning lot. (*See* A180-181). That amendment did not alter the definition of "open space", which was and remains "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 (italics in original). The amendments to the definition of a zoning lot unintentionally complicated the calculation of open space requirements for a building on a zoning lot with divided ownership because the definition of open space did not contemplate the

accessibility or usability of one building's open space by occupants of a separately owned building on the same zoning lot.

The BSA has long adopted a building-by-building approach in determining whether a proposed building meets the open space requirements applicable to the zoning lot it occupies, based on its interpretation of the entire ZR. It applied this approach in a 2009 resolution regarding a residential building at 808 Columbus Avenue ("808 Columbus") on the same zoning lot at issue here (the "2009 Resolution", A78). The 808 Columbus building contains roof gardens that are accessible to the building's residents, but not the residents of other buildings on the zoning lot. (A78-80; 138). The BSA found that the 808 Columbus roof gardens complied with the ZR open space requirements, because "as each of the existing buildings [on the zoning lot] is allocated an amount of open space that is in excess of that which would be required under the [ZR] if they were located on separate zoning lots, it cannot be seen how those residents would be deprived of an equitable share of open space by the proposed building[.]" (A80). After a petition challenging the BSA's 2009 determination was discontinued, no further action was taken to appeal the decision with respect to 808 Columbus.

The ZR was amended in 2011 in part to clarify the applicability of the ZR consistent with DOB practice, including changes to the provisions on the minimum required open space and open space ratio. (*See* A88, 213-214; BSA Br. at pp. 13-

14). The 2011 amendments clarified that the minimum open space and open space ratio requirements applied to zoning lots, not to buildings. (*Id.*). The amendments did not alter the definition or accessibility requirements of open space under the ZR. (*See id.*; A27).

This proceeding challenges a 2015 resolution of the BSA with respect to the proposed construction by JHL of a nursing home facility on West 97th Street, on the same lot considered in the 2009 Resolution. Petitioner-Respondent Peyton (now deceased) who was a resident of the Park West Village complex which shares a zoning lot with the site of the proposed Project, commenced this proceeding, seeking the annulment of the BSA"s October 22, 2015 resolution (the "Resolution") upholding a building permit granted by the DOB in favor of JHL for the Project. (Verified Petition, A30). Petitioner-Respondent argued that the Resolution should be overturned and the permit revoked, on the grounds that DOB and BSA erroneously found that JHL satisfied the open space requirements of the ZR. (A41). They argued that because the Zoning Resolution was amended in 2011 to clarify that open space calculations are to be done for the zoning lot as a whole, the amendment removed the textual support for a building-by-building analysis, and that previously approved open space on 808 Columbus that is not accessible to all residents of the zoning lot could no longer be counted in the open space calculation for the zoning lot with respect to the proposed facility (*see* A34, 38-39).

The Supreme Court, in a decision entered August 9, 2016, correctly deferred to the BSA's and DOB's interpretation of the ZR. The Court found that in view of the whole statute, its legislative history and intent, the 2011 amendments to the ZR do not unambiguously alter the definition of "open space" in calculating the appropriate open space ratio for a development such that that the Resolution, which held to the DOB and BSA's long-standing interpretation of that term, could be deemed an arbitrary and capricious determination or contrary to law. (A26-28).

The Supreme Court providently reasoned that, while the 2011 ZR text amendments upon which the Petitioener-Respondents relied as the basis for a new interpretation of the definition of open space clarified that the amount of open space required for a particular development must be based on the zoning lot as a whole, they did not address, nor did they change the definition of what spaces count as open space and therefore provide no clear statutory basis for DOB or BSA to reconsider BSA's 2009 resolution interpreting the same "open space" definition to include the private rooftop space at 808 Columbus. (A26-27). Finally, the Court noted that the proposed facility would not disturb the existing open spaces or enlarge any alleged non-compliance on the zoning lot. (A29). By deferring to the expertise of the DOH and the BSA, the Court ensured that the "practical application" of the zoning regulations would remain consistent. (*See* A28-29).

The Appellate Division reversed the Supreme Court's order, erroneously holding that this proceeding presents an issue of pure statutory interpretation to which the courts need not defer. *See Peyton v. BSA*, 166 A.D.3d 120, 138 (1st Dep't 2018). It concurred with the Petitioners-Respondents the 2011 amendments were an "unmistakable rejection" of the BSA's building-by-building analysis for the calculation of open space, and held that the open space at 808 Columbus Avenue could not be included in the calculation of the amount of open space on the zoning lot because it was not available for use by all of the residents on the zoning lot. *Id.* at 138.

Oddly, the Appellate Division recognized that the legislative history of the 2011 ZR amendments *did* indicate that there was *no intent* to alter the use of a "building-by-building" methodology like the one applied by DOB and BSA in this matter, and in a multitude of prior matters. *Id.* at 137. Yet, the Appellate Division improperly ignored its own finding and improperly characterized the language as clearly and unambiguously rejecting the building-by-building approach to calculating available open space. In so doing, the Appellate Division failed to view the full context of the ZR's definitions of open space, which is palpably improper.

In a well-reasoned dissenting opinion, Justice Tom noted that the majority opinion failed to read the ZR as a whole and ignored key aspects of the definition

of open space. *Id.* at 138-152. Justice Tom observed that the Petitioners-Respondents essentially mounted a collateral attack on the 2009 determination that the 808 Columbus rooftop was properly included as open space for the purpose of calculating the open space ration applicable to the zoning lot and held that the relevant provisions of the ZR are ambiguous, just as they were in 2009. Even putting aside the doctrines of res judicata or collateral estoppel, the dissenting opinion correctly found BSA acted rationally in finding 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 [in 2009] require[d] a minimum amount of open space with respect to 'any building' on a zoning lot, rather than to all buildings on a zoning lot", that the open space at 808 Columbus was properly included in determining if the open space requirements were met, because doing so it did not deprive any zoning lot residents of their equitable shares of the lot's open space, and that in any event the 2011 amendments could only be applied prospectively because "a retroactive application of these changes could potentially cause havoc throughout the City as a multitude of challenges might be commenced against buildings that formerly complied with the pre-2011 ZR." *Id.* at 146. The BSA's reasoning, based on an ambiguous statute, should therefore have been afforded its due deference by the courts. *Id.* at 152.

PWV, BSA and JHL, by this appeal, seek reversal of the Appellate Division's finding that the BSA determination was not entitled to judicial deference.

ARGUMENT

POINT I

The Appellate Division Incorrectly Interpreted the ZR and Improperly Substituted its Judgment for the Judgment of the BSA

The BSA comprises five experts in land use and zoning, and is the "ultimate administrative authority charged with enforcing the [ZR]." *Toys R Us v. Silva*, 89 N.Y.2d 411, 418 (1996). It is therefore entitled to deference with respect to its resolutions interpreting the ZR, so long as its interpretation is neither irrational, unreasonable, nor inconsistent with the governing statute. *Id.*, at 418–19 (citing *Matter of Trump–Equitable Fifth Ave. Co. v. Gliedman,* 62 N.Y.2d 539, 545 (1984)); *See New York Botanical Garden v. Bd. of Standards & Appeals of City of New York*, 91 N.Y.2d 413, 419, (1998).

In the rare instance where the issue before the BSA is one of "pure legal interpretation of statutory terms", a court need not defer to the BSA's interpretation, but when the BSA applies "its special expertise in a particular field to interpret statutory language, [its] rational construction is entitled to deference. *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 102–03 (1997) (citations omitted). Only

where the agency's determination "runs counter to the clear wording of a statutory provision" is it given "little weight" by the courts. *Id.*

The principal issue on this appeal is whether the BSA's long-standing interpretation of the ZR provisions on what constitutes "open space" is in fact "counter to the clear wording" of the ZR, or, indeed, if the wording is even clear.

It is a fundamental axiom of statutory interpretation that the interpreting body "should attempt to effectuate the intent of the Legislature." *In re Shannon*, 25 N.Y.3d 345, 351 (2015) (citing *Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 583 (1998)). The clearest indicator of legislative intent and the starting point for any interpretation is the statutory text itself "giving effect to the plain meaning thereof", and "provisions of an integrated statutory scheme must be considered as a whole, with each component viewed in relation to the others." *Mancini v. Office of Children & Family Servs.*, 32 N.Y.3d 521, 525 (2018). Therefore, in order to determine how open space is to be calculated in the ZR, the BSA and the Court must review the plain text of each paragraph describing open space or the calculation of the open space ratios in the context of the ZR as a whole. *Id.* (interpreting the provisions of the Workers' Compensation Law for the purpose of calculating additional compensation "in the context of the workers' compensation benefit system"). Here, the Appellate Division has failed to consider the meaning of the ZR's provisions on open space in relation to each other and in

the context of the ZR's regulation of open space in residential zoning lots in general.

The purpose of the Zoning Resolution is to encourage "the development of desirable residential, commercial, and manufacturing areas with appropriate groupings of compatible and related uses and thus to promote and to protect public health, safety, and general welfare" *Toys R Us v. Silva*, 89 N.Y.2d 411 at 418. In order to give effect to every relevant provision on the calculation of open space in a manner that "comports with the policy underlying the [ZR]", the BSA must look to the legislative history and apply its expertise in building and land use, because the statute is not clear and unambiguous on its face. *Toys R. Us v.* Silva, 89 N.Y.2d 411 at 422; *Mancini v. Office of Children & Family Servs.*, 32 N.Y.3d 521 at 536. As the Respondents-Appellants' briefs demonstrate, the full definition of "open space", which has remained unchanged since its enactment in 1961 defines open space as "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot". However, it further provides that open space may be provided on the roof of "a building containing residences" (PWV Br. at p. 7) Thus, there is an ambiguity in the statute if the zoning lot can comprise multiple, separately owned buildings, which it could not when the ZR was enacted (*see* BSA Br. at p. 6), because a roof space plainly could not be accessible by residents from

other, separately owned buildings on the same zoning lot, but could nevertheless be an "open space" under the ZR's plain language.

The BSA's determination was both rational because it considered legislative history in interpreting an ambiguity in the ZR, and entitled to deference in the face of such rationality because it applied a practical interpretation of the ZR based on its expertise. *Toys R Us v. Silva*, 89 N.Y.2d 411, 423 (BSA's determination of a discontinued nonconforming use "must be confirmed if it has a rational basis and is supported by substantial evidence").

The BSA determination is the only practicable solution to the challenges and ambiguities created by changes to the ZR definition of a zoning lot in comparison to the open space provisions. The BSA gave effect to the clarifying amendments that the open space calculations apply to the zoning lot as a whole, while also giving effect to the longstanding application of the un-amended provisions that indicate it may maintain the allotment of an equitable share of open space for each building. It thereby applied a practical interpretation that preserved the privacy of the residents on the zoning lot, upheld consistency with its prior rulings, and maintained the status quo of the zoning lot's open space access. The Appellate Division therefore improperly substituted its own interpretation and judgment for that of the BSA, and its decision should be reversed. *Id.* ("[W]here substantial evidence exists, a reviewing court may not substitute its judgment for that of the

BSA—even if the court might have decided the matter differently); *Appelbaum v. Deutsch*, 66 N.Y.2d 975, 977 (1985) ("BSA's construction of the terms "non-profit institution" and "community facility" in the zoning resolution are rational, given the scope and purpose of the zoning resolution, and BSA's finding . . . is supported by substantial evidence"). *New York Botanical Garden v. Bd. of Standards & Appeals of City of New York*, 91 N.Y.2d 413, 419, (1998) ("[W]hen applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference").

POINT II

The Appellate Division's Decision Will Result in Costly and Untenable Restrictions on New York City Buildings and Developments that Relied on the BSA's Longstanding Application of the ZR

The Appellate Division's overturning of the BSA's longstanding interpretation and application of the term "open space" within the ZR, especially as applied retroactively to prior, unchallenged determinations, threatens to create an untenable precedent for the many buildings in New York City located on shared zoning lots. This is patently is inimical to the interests of REBNY and its members. The Appellate Division's order, if upheld, would have significant implications that would unduly constrict land owners, developers, architects, as well as impede the interests of the city in providing sufficient and affordable housing for a densely populated metropolis.

In the first place, the Appellate Division's order affects building permits issued for developments started or completed after February 2, 2011, which relied on the longstanding building-by-building analysis of the DOB for determining the amount of open space required under the ZR. There are currently 32 zoning districts in New York City that are subject to the open space provisions of the ZR, 14 of which require open space for any residential building unconditionally. These 32 districts cover a majority of the land in New York City that is zoned for residential use, ranging from the lowest to the highest density districts. Since the definition of a zoning lot was expanded to allow divided ownership, it has become more and more common for buildings under separate ownership to share a zoning lot in these districts subject to the ZR's open space requirements. (*See* A297).

The holding in the Appellate Division's order means that recently constructed residential buildings on these lots could now be deemed unlawful, potentially subjecting them to costly changes and the displacement of affected residents. *See, e.g., Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 282 (1988) (BSA had no discretion to do otherwise than partially revoke Parkview's permit which was invalid inasmuch as it authorized construction in violation of the ZR). If affirmed, the Appellate Division's order would place buildings constructed in the last 8 years that were approved based on the BSA's application of a building-by-building analysis of the open space requirements in violation of the

ZR, even if nothing else has changed on those lots. If, as was the case in this proceeding, the difference between compliance and a costly noncompliance determination hinges on whether open spaces on separately owned buildings on the same lot are accessible to every other occupant of that lot, which is unlikely for residential buildings, many recently constructed buildings are now violating the ZR and may be required to undergo significant renovations.

The restrictions created by this decision could also restrict the construction of new residential buildings on shared zoning lots. Because some the open spaces in zoning lots subject to open space requirements now, like 808 Columbus, inevitably fall short the standard put forth under the Appellate Division's interpretation, the floor area to open space ratio on new constructions must now be shifted away from more residential space, in favor of more open space shared with separately owned buildings on the same lot. If affirmed, the Appellate Division's decision would likewise impede the sale of real property or development rights on residential zoning lots that likewise relied on the BSA's open space calculation. Many buildings are constructed using floor area purchased from neighboring buildings that exceed their minimum open space ratio, either on the same lot, or as effected by merging the zoning lots. In fact, from 2003 to 2011, there were approximately 385 zoning lot mergers with associated development rights

transfers.[2] The Appellate Division's order would now render many of those transactions unlawful. Each of these effects only serves to restrict supply over the demand for residential space and diminish the production of much-needed affordable housing in New York City.

Finally, the Appellate Division's decision could lead to the untenable result that the private back yards, courtyards, or rooftops of buildings on shared zoning lots approved after 2011 must be required provide access to these spaces to residents of the other buildings on the lot. This undermines the reasonable expectations of residents of such buildings, who may now be required to share gardens, play areas, or other open spaces formerly shared only with other residents of their building with possibly several times as many residents of the zoning lot. Because the 32 zoning districts subject to the open space provisions cover a range of densities, this would affect not only residents of high rises with rooftop gardens, but also residents of town houses whose formerly private backyards would need to be opened to all of their neighbors on the same zoning lot. Clearly, many open spaces were not designed or intended to be used by the number of people who would now be required to have access under the Appellate Division's interpretation of the ZR, and the value and utility of such spaces would be severely diminished.

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[2] *See* The Furman Center for Real Estate and Urban Policy of New York University, BUYING SKY: THE MARKET FOR TRANSFERABLE DEVELOPMENT RIGHTS IN NEW YORK CITY (2013) (available at: https://furmancenter.org/research/publication/buying-sky-the-market-for-transferable-development-rights-in-new-york-city).

In view of the foregoing, the BSA's thoughtful and expert application of its practical interpretation of the ZR is absolutely necessary to maintain the stability of New York City's residential market. The BSA's longstanding interpretation of the open spaces provision of the ZR is accordingly additionally entitled to judicial deference because its knowledge and expertise in this are creates much-needed consistency and predictability in New York's real estate economy, on which innumerable participants in the real estate industry, as well as residents of New York City, are entitled to rely. If the Appellate Division's decision to unilaterally substitute its own interpretation of the ZR and overturn this longstanding application were to be upheld, this would have far-reaching and deleterious consequences to the many affected parties.

CONCLUSION

For all the foregoing reasons, REBNY respectfully requests that the Court reverse the October 16, 2018 Decision and Order of the Appellate Division, First Department.

Dated: New York, New York
July 25, 2019

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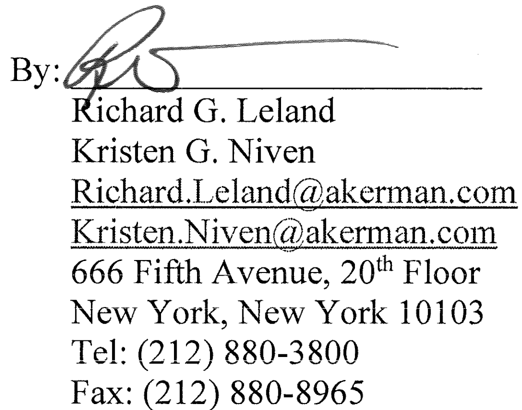

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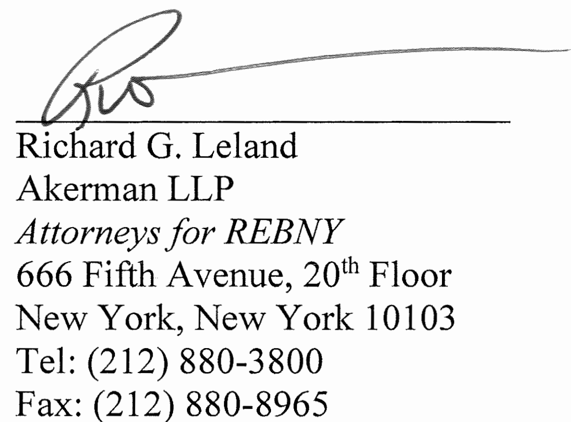

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