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*)

BRIEF FOR APPELLANT NEW YORK CITY BOARD OF STANDARDS AND APPEALS

ZACHARY W. CARTER

Corporation Counsel
of the City of New York
Attorney for Appellant BSA
100 Church Street
New York, New York 10007
Tel: 212-356-4084 or -0817
Fax: 212-356-2509
jpopolow@law.nyc.gov

RICHARD DEARING
DEVIN SLACK
JONATHAN POPOLOW
of Counsel

May 23, 2019

Reproduced on Recycled Paper

(*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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

QUESTION PRESENTED 3

STATEMENT OF THE CASE 3

A. The BSA's role in applying New York City's Zoning Resolution to a metropolis in motion 3

B. The open space requirement and the unexpected problem that would later emerge with the advent of multi-owner zoning lots 5

1. The definition of open space in a world where no zoning lot was divided between different owners..... 6

2. The 1977 revision to the definition of "zoning lot," creating a context-specific problem in applying the open space requirement 8

C. The BSA's 2009 resolution that roof gardens at 808 Columbus Avenue—a building on a large zoning lot divided between different owners—qualify as open space 10

D. The 2011 amendments to the Zoning Resolution that left intact the definition of open space, and the BSA's application of the term to multi-owner zoning lots 13

E. The BSA's 2015 resolution that the zoning lot included sufficient open space based on its prior determination about 808 Columbus Avenue 16

TABLE OF CONTENTS (cont'd)

Page

F. This Article 78 proceeding 18

1. Supreme Court's decision rejecting petitioners' challenge to the BSA's 2015 resolution 18

2. The Appellate Division's split decision reversing and annulling the BSA's resolution 20

JURISDICTIONAL STATEMENT 22

ARGUMENT 23

THE BSA REASONABLY APPLIES THE ZONING RESOLUTION'S OPEN SPACE REQUIREMENT IN THE CONTEXT OF ZONING LOTS UNDER DIVIDED OWNERSHIP 23

A. The BSA's application of the open space definition to multi-owner lots, informed by its expertise, is entitled to deference. 23

1. The Zoning Resolution does not speak unambiguously to access and use of open space on multi-owner zoning lots. 27

2. The BSA's application of the open space definition in the context of multi-owner zoning lots comports with legislative intent and history. 32

B. The 2011 amendments support, rather than undermine, the BSA's approach. 36

C. The BSA's interpretation advances the Zoning Resolution's goals of promoting stable residential development and meeting the City's housing needs. 41

TABLE OF CONTENTS (cont'd)

Page

CONCLUSION 46

CERTIFICATE OF COMPLIANCE 47

TABLE OF AUTHORITIES

Page(s)

Cases

Appelbaum v. Deutsch,
66 N.Y.2d 975 (1985) 23

Cmty. Bd. 7 v. Schaffer,
84 N.Y.2d 148 (1994) 39, 40

Cowan v. Kern,
41 N.Y.2d 591 (1977) 45

Doctors Council v. New York City Employees' Ret. Sys.,
71 N.Y.2d 669 (1988) 27, 44

Frishman v. Schmidt,
61 N.Y.2d 823 (1984) 24

Macmillan, Inc. v. CF Lex Assocs.,
91 N.Y.2d 386 (1982) 30, 31

Majewski v. Broadalbin-Perth Cent. Sch. Dist.,
91 N.Y.2d 577 (1998) 30, 31

McGowan v. Mayor of New York,
53 N.Y.2d 86 (1981) 30

N.Y. Botanical Garden v. Bd. of Standards & Appeals,
91 N.Y.2d 413 (1998) 4, 23, 24

Pecoraro v. Bd. of Appeals of Town of Hempstead,
2 N.Y.3d 608 (2004) 45

People ex rel. Sheldon v. Board of Appeals,
234 N.Y. 484 (1923) 4

Towers Mgmt. Corp. v. Thatcher,
271 N.Y. 94 (1936) 4

TABLE OF AUTHORITIES (cont'd)

Page(s)

Toys "R" Us v. Silva,
89 N.Y.2d 411 (1996) 4, 5, 31

Statutes

CPLR 5602(a)(1)(i) 22

N.Y. Stat. § 75 40

N.Y.C. Charter § 659 4

N.Y.C. Charter § 662 4

N.Y.C. Charter § 666 4

N.Y.C. Zoning Resolution § 12-01 29

N.Y.C. Zoning Resolution § 12-10 .... *passim*

N.Y.C. Zoning Resolution § 21-00 .... 5, 42

N.Y.C. Zoning Resolution §§ 23-14 *et seq*. 5, 42

N.Y.C. Zoning Resolution §§ 23-15 *et seq*. 5, 42

N.Y.C. Zoning Resolution §§ 72-01 *et seq*. 4

N.Y.C. Zoning Resolution (1916) § 1(bb) 34

Regulations

2 RCNY § 1-06.4(a) 15, 39

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

2 N.Y. Zoning Law & Prac. § 27:07 3

https://perma.cc/5CBZ-GSJA 42

https://perma.cc/TC2C-B2BR 14, 38

https://perma.cc/WB4U-9GQS 14, 38

City Planning Commission Report and Resolution
No. CP-15820 (October 18, 1960) 6

City Record, December 21, 1959, Proposed
Comprehensive Amendment of the Zoning
Resolution of the City of New York 8

*Rezoning New York City, A Guide to the Proposed
Comprehensive Amendment of the Zoning Resolution
of the City of New York* (CPC, 1959) 8

Voorhees Walker Smith & Smith, *Zoning New York: A
Proposal for a Zoning Resolution for the City of New
York* (1958) 7

*Zoning Handbook, A Guide to the Zoning Resolution of
The City of New York* (CPC/DCP, 1961) 8, 36

PRELIMINARY STATEMENT

The New York City Board of Standards and Appeals (BSA) has rationally determined that, in the particular, recurring context of New York City zoning lots with multiple residential buildings that are owned by different entities, certain spaces in or around a building need not be accessible to residents of all of the other buildings on the zoning lot to qualify as “open space” within the meaning of New York City’s Zoning Resolution. This Court should reverse the decision of the Appellate Division, First Department, overruling the BSA’s expert judgment on this issue.

The concept of open space includes interior courtyards, rear years, and rooftop gardens. It would be unusual to require one residential building to open those kinds of spaces to residents of different buildings under different ownership. Nor was the First Department correct to conclude that the statutory text inexorably requires that impractical result. The statute’s drafters in fact rejected a proposal that would have more clearly pointed to the First Department’s construction, and guidance from the time of enactment supports the BSA’s understanding of the text.

Perhaps more fundamentally, the First Department's overly mechanical reading ignores that the Zoning Resolution must accommodate the complex and ever-changing demands of a cityscape of staggering size and diversity. When the current definition of open space was enacted in 1961, every zoning lot had to be held in single ownership. That is no longer true: indeed, multi-owner zoning lots have become increasingly common. Nothing suggests that the Zoning Resolution's drafters contemplated the bizarre approach to assessing open space on multi-owner lots that the First Department held to be mandated.

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. The Court should confirm the BSA's approach because it is a rational—indeed, pragmatic—application of its experience and expertise on zoning matters in New York City and is not inconsistent with the Zoning Resolution.

QUESTION PRESENTED

Did the majority below err in failing to defer to the expert zoning authority's judgment that, for a multi-building zoning lot, an area counts towards open space requirements if it can be accessed and used by residents of a building on the lot—not necessarily all buildings—where the Zoning Resolution does not speak directly to that special situation and there are sound legal, practical, and equitable reasons for this context-specific approach?

STATEMENT OF THE CASE

A. The BSA's role in applying New York City's Zoning Resolution to a metropolis in motion

New York City created the nation's first modern zoning law—a blueprint for the City's development—in 1916. *See* 2 N.Y. Zoning Law & Prac. § 27:07. From the beginning, the drafters of the law, which is known as the Zoning Resolution, knew that they could not anticipate every circumstance that might arise as the complex and evolving metropolis grew around them. *Id*. Their solution was to create the Board of Standards and Appeals (BSA)—composed of five independent commissioners with expertise in architecture, urban planning, and engineering and

decades of collective experience in land use issues. The BSA is charged with reviewing determinations by the City's Department of Buildings (DOB) and granting relief on a case-by-case basis in harmony with the law's general purpose. *See* N.Y.C. Charter §§ 659, 662, 666(6)(a); *Towers Mgmt. Corp. v. Thatcher,* 271 N.Y. 94, 97 (1936); *People ex rel. Sheldon v. Board of Appeals*, 234 N.Y. 484, 493 (1923).

An integral part of the City's system for regulating land use and development, the BSA is the "ultimate administrative authority charged with enforcing the [City's] Zoning Resolution." *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418 (1996) (citing N.Y.C. Charter §§ 659, 666); *see also* Zoning Resolution ("ZR") §§ 72-01 *et seq*. This Court "has frequently recognized that the BSA is comprised of experts in land use and planning, and that its interpretation of the Zoning Resolution is entitled to deference." *N.Y. Botanical Garden v. Bd. of Standards & Appeals*, 91 N.Y.2d 413, 418-19 (1998). In light of its specialized expertise, and the difficulty inherent in bringing complex zoning regulations to bear on a living, breathing, and ever-evolving city of over eight million

people, the BSA's interpretation of the Zoning Resolution "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 418-19 (cleaned up).[1]

B. The open space requirement and the unexpected problem that would later emerge with the advent of multi-owner zoning lots

In furtherance of the general goals of promoting and protecting public health, safety, and general welfare, the Zoning Resolution "require[s] the provision of open space in residential areas wherever practicable … in order to open up residential areas to light and air, to provide open 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." ZR § 21-00(d). Zoning lots in higher-density residential zoning districts must have a minimum amount of open space. *See* ZR §§ 23-14 *et seq.*, 23-15 *et seq.*

[1] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations.

When the definition of open space in the Zoning Resolution took on its current form, the drafters of the Zoning Resolution had no occasion to consider how the concept—and in particular, its access and use conditions—might apply to a zoning lot with divided ownership. At the time, the concept of divided ownership was unheard of because every zoning lot in New York City had to be held in "single ownership" (Appendix ("A") 177-78). But a new problem of application emerged more than a decade and a half later, when the concept of a zoning lot was redefined to allow for divided ownership, with multiple parcels and buildings under different ownership and control, with each one subject to unique access and use conditions. We explain these developments below.

1. The definition of open space in a world where no zoning lot was divided between different owners

The definition of open space still in place was introduced as part of a broad revision of the City's zoning laws that led to adoption of the 1961 Zoning Resolution, which continues to form the backbone of zoning in New York City today. *See generally* City Planning Commission Report and Resolution No. CP-15820

(October 18, 1960). A term of art, "open space" is defined 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.[2]

An earlier version of the definition, proposed in a report by a special planning staff of architects, would have required that qualifying open space be "accessible to all residents upon the zoning lot." Voorhees Walker Smith & Smith, *Zoning New York: A Proposal for a Zoning Resolution for the City of New York*, at iii, 34 (1958). The City Planning Commission did not adopt that proposal, however: most significantly, it replaced "all residents upon the zoning lot" with the different phrase "all persons occupying a dwelling unit or a rooming unit on the zoning lot." City Record, December 21, 1959, Proposed Comprehensive Amendment of the Zoning Resolution of the City of New York, at 6. In contemporaneous guidance, the City Planning Commission

---

[2] All words defined by the Zoning Resolution are italicized in the print version or surrounded by pound signs (#) in the online version.

explained that open space "must be accessible to all building occupants." *Rezoning New York City, A Guide to the Proposed Comprehensive Amendment of the Zoning Resolution of the City of New York*, at 26 (CPC, 1959); *see also 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").

2. The 1977 revision to the definition of "zoning lot," creating a context-specific problem in applying the open space requirement

As previously noted, when the 1961 Zoning Resolution was enacted, its definition of "zoning lot" required that the entire lot be in "single ownership" (A177-78). That changed in 1977, when the definition of "zoning lot" was amended to allow, for the first time, divided ownership. The City Planning Commission report accompanying and approving the amendment described it as a response to problems that had arisen in certain circumstances involving transfer of unused development rights between adjacent

parcels, without interested parties' receipt of appropriate notice or opportunity to object (A180-81).

The 1977 amendment, among other things, eliminated the requirement that a zoning lot be held in single ownership in all cases and replaced it with a provision by which "a single zoning lot can be created from adjacent, differently held parcels through the filing and recording of a declaration of single zoning lot status executed by all parties having a defined interest in the parcels in question" (A181). Transfers of unused development rights could then occur between parcels on the newly created multi-owner zoning lot. *See*, *e.g.*, *Macmillan, Inc. v. CF Lex Assocs.*, 56 N.Y.2d 386, 390-91 (1982).

Because the Planning Commission's focus in the amendment was on the definition of "zoning lot," and because the reasons for the amendment had nothing to do with open space, it did not revisit how the concept of open space—and its access and use conditions specifically—would apply in the new special context of a zoning lot comprised of multiple parcels with different owners (A183-86). While the precise number of zoning lots in the City

comprising multiple parcels with different owners is not readily calculable, the BSA has noted, based on the applications it has reviewed, that this situation has arisen with increasing frequency in the past decade (A285, 297).

C. The BSA's 2009 resolution that roof gardens at 808 Columbus Avenue—a building on a large zoning lot divided between different owners—qualify as open space

Around the same time that the prevalence of multi-owner zoning lots began to increase, a dispute arose regarding open space on the multi-owner zoning lot at issue in this case. In 2006, appellant PWV Acquisition, LLC (PWVA), or an affiliate, obtained a permit from the DOB to build a 29-story primarily residential building, known as 808 Columbus Avenue, with a one-story extension containing a Whole Foods and other commercial space (A14, 138). The building site is located on a large zoning lot that also contains three 16-story residential buildings located at 784, 788, and 792 Columbus Avenue, collectively known as Park West Village (A13-14, 79, 117).

The 808 Columbus Avenue building is under separate ownership and control from the three Park West Village buildings (A153). Gardens on the roof of the one-story extension at 808 Columbus Avenue are accessible to that building's residents but not to residents of the three Park West Village buildings (A138).

Several Park West Village residents challenged the DOB's approval of the permit for 808 Columbus Avenue and, when that challenge was unsuccessful, appealed to the BSA (A14). As relevant here, they argued that the developer did not satisfy the Zoning Resolution's open space requirements because the roof gardens at 808 Columbus Avenue were not accessible to and usable by all residents of all buildings on the zoning lot (*id.*).

In 2009, the BSA denied the appeal, finding, in pertinent part, that the proposed construction of 808 Columbus Avenue complied with the open space requirements of the Zoning Resolution (A78-80). The BSA observed that none of the Resolution's open space provisions expressly required that all open space on a multi-building zoning lot be shared space commonly accessible to all occupants of the zoning lot regardless of the

particular building in which they lived (A80). Similarly, nothing in the Zoning Resolution explicitly prohibited an allocation of required open space among several buildings (*id.*).

Recognizing that the Zoning Resolution was amenable to interpretation, the BSA reasoned that because each of the three Park West Village buildings on the zoning lot was "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 of those buildings would not be deprived of an equitable share of open space, even though they would not have access to the roof gardens at 808 Columbus Avenue (A80). In the end, the BSA found that the proposed open space for 808 Columbus Avenue complied with the requirements of the Zoning Resolution (*id.*).

The Park West Village residents then commenced an Article 78 proceeding challenging the BSA's 2009 resolution (A17, 139, 150, 168). The proceeding was settled and discontinued with prejudice before any decision was rendered (A139, 237-46). No further action was taken to appeal or challenge the BSA's 2009

determination that the roof gardens at 808 Columbus Avenue qualified as open space under the Zoning Resolution (A17). *See Bunten v. N.Y. Bd. of Stds. & Appeals*, Index No. 102750/09 (Sup. Ct. N.Y. County July 7, 2009).

D. The 2011 amendments to the Zoning Resolution that left intact the definition of open space, and the BSA's application of the term to multi-owner zoning lots

In 2011, the Zoning Resolution was amended, primarily to change the definition of the key terms "development" and "building" (A213). In addition to new definitions for those terms, additional text modifications were made to "clarify the applicability of regulations, resolve potentially conflicting regulations, and change regulations so that their initial intent is restored, or revise outdated language" (A213-14).

The reasons for each of the 2011 amendments' hundreds of changes are summarized in two tables available on the Department of City Planning's website. One table lists amendments that were understood to change substantive law, while a second lists clarifications and modifications consistent

with DOB practice. *Compare* https://perma.cc/WB4U-9GQS (listing substantive changes) *with* https://perma.cc/TC2C-B2BR (listing clarifications) (both captured on May 16, 2019).

This second category of non-substantive amendments included changes to provisions concerning minimum required open space, open space ratio, maximum lot coverage and maximum floor area ratio, clarifying that those requirements applied to zoning lots, not buildings. *See* https://perma.cc/TC2C-B2BR at 1, 16. For example, before the 2011 amendments, section 23-14 of the Zoning Resolution provided that "for any building on a zoning lot" the minimum required open space shall not be less, and maximum lot coverage shall not exceed, the applicable ratios set forth therein (A88). The amendment replaced "for any building on a zoning lot" with "zoning lot" (A88). In subsection 23-142, which at the time set forth the minimum required open space ratio and maximum floor area ratio for the relevant residential districts, the phrase "for a building with a height factor" was replaced with "for a zoning lot with a height factor" (A90).

The 2011 amendments were, however, entirely silent as to, and did not alter, the Zoning Resolution's definition of what constitutes open space and to whom it must be accessible to qualify as such (A86). Consistent with that silence, the 27-page report the City Planning Commission prepared in connection with the amendments likewise makes no mention of the Zoning Resolution's open space accessibility requirements (A210-36).

The City Planning Commission, which drafted and approved the 2011 amendments, was presumably aware of how the BSA understood open space to work on multi-owner zoning lots, as had been formally embodied in its 2009 resolution. *See* 2 RCNY § 1-06.4(a) (party appealing to the BSA from an interpretation of the Zoning Resolution is required to forward copies of application materials to the Planning Commission's legal counsel). Though the Planning Commission could have repudiated that understanding, it did not do so.

E. The BSA's 2015 resolution that the zoning lot included sufficient open space based on its prior determination about 808 Columbus Avenue

In November 2014, appellant Jewish Home Lifecare, Inc. (JHL) obtained a permit from the DOB to construct a nursing care facility on a parcel of land—at the time, a paved parking lot—on the same zoning lot encompassing the 808 Columbus Avenue building and the three Park West Village buildings (A64-65). Maggi Peyton, then the president of the Park West Village tenants association, challenged the DOB's decision (A47-57). She did not take issue with the DOB's finding that the minimum total amount of open space required for the zoning lot was 230,108 square feet (A51). Instead, she solely challenged the inclusion of the square footage of 808 Columbus's roof gardens as part of the 230,726 square feet of open space provided for in JHL's plans (A50-57).

In 2015, following written submissions, two public hearings, and site examinations conducted by three BSA members, the BSA unanimously denied the appeal and upheld the DOB's approval of JHL's permit (A115-25). In reaching its decision, the BSA highlighted that its prior 2009 determination had resolved the

issue of whether the roof gardens at 808 Columbus Avenue qualified as open space under the Zoning Resolution (A123). Specifically, the BSA reiterated its 2009 finding, undisturbed by the discontinued Article 78 challenge, that in the context of a multi-building zoning lot, the Zoning Resolution's definition of open space "could be read to allow some open space to be reserved for the residents of a single building as long as the residents of each building on the zoning lot have access to at least the amount of open space that would be required … if each building were on separate zoning lots" (A123-24). In the context of a large zoning lot with buildings under separate ownership or control, it often is neither feasible nor practical to mandate that all open space be made accessible to all residents of all buildings on the lot (A297).

The BSA rejected the argument that the intervening 2011 amendments to the Resolution precluded this interpretation, noting that the definition of open space remained the same after those amendments (A124). The BSA emphasized that because the Resolution was amended two years after its 2009 determination, the City Planning Commission could have restricted the BSA's

prior interpretation of the open space definition as applied to this situation, but chose not to do so (A124).

F. This Article 78 proceeding

Ms. Peyton commenced this proceeding, seeking to set aside the BSA's 2015 resolution (A30-44). Ms. Peyton died in October 2016—after this appeal was noticed but before it was perfected. By order dated April 7, 2017, the Appellate Division permitted her son, Randy Peyton, to maintain the proceeding on behalf of her estate, with other Park West Village stakeholders.

1. Supreme Court's decision rejecting petitioners' challenge to the BSA's 2015 resolution

Supreme Court, New York County (Lobis, J.) denied the petition and dismissed the proceeding (A11-29). The court noted that petitioners' challenge to the issuance of the permit for the proposed nursing care facility hinged upon the same issue resolved by the BSA in its 2009 determination—*i.e.*, whether the roof gardens at 808 Columbus Avenue met the Zoning Resolution's

definition of open space—but declined to decide whether that prior determination precluded petitioners' current challenge (A25).

Assuming the question remained live, the court reasoned that while the 2011 amendments clarified "that the amount of required open space must be based on the zoning lot as a whole," they did not "modify, clarify, or otherwise address the definition of open space or what counts as open space" (A26). Accordingly, the court found "no basis in the 2011 amendments to revisit BSA's 2009 interpretation of open space or its determination that 808 Columbus's rooftop space satisfies the open space requirements" (A26). The court found that the 2011 amendments did not "unambiguously alter the meaning or measurement of open space as interpreted by BSA" (A27).

Noting that the Zoning Resolution did not explicitly address open space requirements for multi-building zoning lots, the court further found that the open space provisions could be subject to different interpretations (A27-28). Given this ambiguity, and the BSA's expertise in zoning matters, the court deferred to the BSA's

interpretation of how the Zoning Resolution's definition of open space applies in this situation (A27-28).

2. The Appellate Division's split decision reversing and annulling the BSA's resolution

In a split 3-1 decision, the Appellate Division, First Department, reversed, granting the petition to the extent of annulling the BSA's 2015 resolution and denying the permit to construct the nursing facility (A383-411). As a threshold matter, the majority found that the Park West Village petitioners were not collaterally estopped or time-barred from challenging the BSA's determination that the 808 Columbus roof gardens qualified as open space even though that issue had previously been resolved in the 2009 proceeding (A399-401). The majority recognized that the 2009 and 2015 challenges involved connected petitioners asserting the same issue, but declined to bar petitioners' belated collateral attack on BSA's earlier determination "due to the importance of the facts and the realities of this matter, and the potential impact this appeal would have upon development in the City" (A401).

Turning to the merits, the majority reasoned that the Zoning Resolution's definition of open space was clear and unambiguous, concluding that "accessible to and usable by all persons occupying a *dwelling unit* or a *rooming unit* on the *zoning lot*" was susceptible to only one meaning—that all open space on a multi-building zoning lot "must be accessible to and usable by all residents on a zoning lot" even if they did not live in "the building containing the open space in question" (A408-09). The majority further held that, by replacing the phrase "any building on a zoning lot" with "any zoning lot" in sections 23-14 and 23-142 of the Zoning Resolution, the 2011 amendments repudiated the building-by-building approach utilized by the DOB and the BSA in the context of multi-building zoning lots (A409-11).

Dissenting, Justice Tom would have affirmed (A412-36). He noted that the majority's reading of the portion of ZR § 12-10 that required open space to be accessible to and usable by all persons occupying a dwelling unit on a zoning lot disregarded that the 1961 Zoning Resolution was drafted at a time "when a zoning lot was necessarily controlled by one owner" and "never considered

the possibility of a zoning lot made up of different parcels controlled by different ownership" (A433). He also noted that the 2011 Amendments "left untouched the definition of 'open space'" and did not "clarify how to calculate the required open space for a zoning lot containing multiple buildings" (A428). In his view, because the definition of "open space" contained internal inconsistencies and was ambiguous when read in conjunction with ZR §§ 23-14 and 23-142, the court should have deferred to the BSA's knowledge and expertise and not substituted its own judgment for the BSA's reasonable and practical interpretation of the Zoning Resolution's open space requirement (A428-34).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal because this proceeding originated in Supreme Court, and the Appellate Division's October 16, 2018 order finally determined the proceeding (A381-436). *See* CPLR 5602(a)(1)(i). The Appellate Division granted leave to appeal on February 21, 2019 (A378-79).

ARGUMENT

THE BSA REASONABLY APPLIES THE ZONING RESOLUTION'S OPEN SPACE REQUIREMENT IN THE CONTEXT OF ZONING LOTS UNDER DIVIDED OWNERSHIP

A. The BSA's application of the open space definition to multi-owner lots, informed by its expertise, is entitled to deference.

This Court "has frequently recognized that the BSA is comprised of experts in land use and planning, and that its interpretation of the Zoning Resolution is entitled to deference." *N.Y. Botanical Garden v. Bd. of Standards & Appeals*, 91 N.Y.2d 413, 418-19 (1998). The "BSA and DOB are responsible for administering and enforcing the zoning resolution, and their interpretation must therefore be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute." *Appelbaum v. Deutsch*, 66 N.Y.2d 975, 977 (1985) (cleaned up).

Zoning ordinances, particularly ones regulating large and dynamic cities such as New York, set out broad principles at one moment in time to govern a constantly evolving world of nearly infinite complexity for the future. But perfect prediction and

comprehensive coverage are impossible aspirations. That is why zoning authorities, such as the BSA, play a special role in taking these sweeping documents and bringing them to bear on innumerable circumstances, including those that were not, and could not have been, contemplated by the drafters. *See Frishman v. Schmidt*, 61 N.Y.2d 823, 825 (1984).

This Court recognized as much in *N.Y. Botanical Garden*, when, citing separation of powers concerns, it declined to judicially enact "a new restriction on accessory uses not found in the Zoning Resolution." 91 N.Y.2d at 422. Instead, the Court deferred to the BSA's application of the Zoning Resolution's definition of accessory use to the specific facts at hand. *Id.* at 422-23. As the Court put it, the "BSA is the body designated to make this determination, and courts may intervene only if its determination is arbitrary or capricious." *Id.* at 423; *see also Frishman*, 61 N.Y.2d at 825 ("Under a zoning ordinance which authorizes interpretation of its requirements by the board of appeals, specific application of a term of the ordinance to a

particular property is, therefore, governed by the board's interpretation, unless unreasonable or irrational.") (cleaned up).

The current dispute over the BSA's application of the definition of "open space" to the roof gardens at 808 Columbus is in significant part a consequence of the fact that the open space definition was drafted at a time when the Zoning Resolution required that a zoning lot be held in single ownership, and has never been amended to address subsequent changes to the Resolution that now permit a zoning lot to consist of multiple parcels with different owners. In the increasingly common context of a large zoning lot with multiple buildings under separate ownership or control (A285, 297), it simply is not feasible or practicable to make all the open space on the zoning lot accessible to and usable by the residents of every building on the zoning lot.

Some open space may be located in backyards, interior courtyards, other enclosed spaces, or, as in this case, on a rooftop not located directly above a building's dwelling or rooming units. *See* ZR § 12-10 (portion of "open space" definition describing additional requirements for open space located on a rooftop). It is

not realistic to expect the residents of every building on large zoning lots to have access to every open space in other buildings in which they do not live and which may be under separate ownership or control. Interpreting the open space definition to require universal access to building-specific open spaces would require the owners of those buildings to address a variety of unanticipated safety, security and liability issues inherent in allowing access to non-residents. And there is little doubt that some building owners would, if compelled to provide access to non-residents, argue that it was an intrusion on their property rights.

Here, the Appellate Division majority acknowledged that the 1961 Zoning Resolution "did not contemplate the possibility that a zoning lot could consist of multiple parcels under different ownership and control, with each parcel subject to its own unique conditions governing open space access" (A387). But it failed to heed this Court's admonition that statutory language should not be "literally or mechanically applied when, due to significantly changed circumstances, such application would cause an anachronistic or absurd result contrary to the contextual purpose

of the enactment." *Doctors Council v. New York City Employees' Ret. Sys.*, 71 N.Y.2d 669, 675 (1988). That admonition is only more relevant where a court is reviewing the application of a statute by an expert body that has been charged with determining how to apply general language to a complex and changing array of real-world needs across a staggeringly diverse cityscape and has acquired a body of experience in doing so over decades.[3]

1. The Zoning Resolution does not speak unambiguously to access and use of open space on multi-owner zoning lots.

Even on its face, and without considering difficult questions of real-world application, the Zoning Resolution's definition of "open space" is far from unambiguous on relevant points. Since

---

[3] The BSA does not press in this Court the collateral estoppel and related preclusion arguments that it raised below. This is because it agrees that the Appellate Division majority's interpretation of the Zoning Resolution's open space requirement has broad and significant ramifications that go far beyond this particular case (*see* A401 (majority noting potential impact on development in the City); A424-25 (dissent noting that retroactive application "could potentially cause havoc throughout the City")). The BSA thus respectfully submits that it is in the public interest for this Court to determine whether the majority is correct that the Zoning Resolution unambiguously and categorically requires that all open space on a multi-building 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.

1961, the 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. The terms dwelling unit and rooming unit, in turn, refer to rooms in a residential building or the residential part of a building, but not to rooms on a zoning lot. *Id*. 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*.

Despite the complexity, the concept of open space—including its access and use conditions—can often be applied with relative ease. But where a zoning lot contains multiple buildings under divided ownership, applying the Zoning Resolution's language is far from simple. Indeed, applied to this context, the definition of open space is susceptible to multiple competing interpretations.

Construed most literally, open space need only be accessible to and usable by the occupants of at least one dwelling unit or

rooming unit on the zoning lot. The relevant language requires open space to be accessible to and usable by "all persons occupying *a* dwelling unit or *a* rooming unit on the zoning lot." ZR § 12-10 (emphasis altered). At the other extreme is the interpretation urged by petitioners and adopted by the Appellate Division—that open space must be accessible to and usable by "all residents of any residential building on the zoning lot, not only the building containing the open space in question" (A408). In effect, this interpretation construes the statutory language "all persons occupying a dwelling unit or a rooming unit on the zoning lot" to mean occupants of *every* dwelling unit (or rooming unit) on the zoning lot. This is one possible interpretation, but hardly what the statutory text unambiguously states.

To be sure, the Zoning Resolution contains the standard rule of construction that words used in the singular number shall include the plural. ZR § 12-01(d). But it is one thing to say that we generally read the singular to include the plural. It is another thing entirely to suggest that a key drafting choice made when defining open space—the use of the fully encompassing "all"

coupled with the plural "residents," counterpoised against the singular "a dwelling unit" or "a rooming unit"—should be treated as meaningless. "Such disregard of chosen language … flies in the face of the fundamental statutory construction principles that an enacting body will be presumed to have inserted every provision for some useful purpose." *McGowan v. Mayor of New York*, 53 N.Y.2d 86, 95 (1981) (cleaned up).

Further evidencing that the drafters did not intend to compel open space to be accessible to all residents of a zoning lot no matter what, the drafters rejected language that would have far more clearly expressed such an intent. The definition of open space in the initial draft of the 1961 Zoning Resolution required that open space be accessible to "all residents upon the *zoning lot*," but that language was rejected, in favor of language amenable to more than one interpretation: "all persons occupying a *dwelling unit* or a *rooming unit* on the *zoning lot*."

Courts "may examine changes made in proposed legislation to determine intent." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 587 (1998) (cleaned up). In *Majewski*, for

instance, this Court declined to construe amendments to the Workers' Compensation Law as retroactively applicable in part because an initial draft included language that would clearly provide for retroactive application, but that language did "not appear in the enacted version." 91 N.Y.2d at 587.

Even more directly on point, in *Toys "R" Us* the Court specifically recognized the significance of changes in text between the proposed zoning ordinance submitted by the Voorhees firm to the City Planning Commission in 1958 and the enacted version of the 1961 Zoning Resolution. In holding that the Zoning Resolution required only substantial, rather than complete, discontinuation of nonconforming activity to forfeit a nonconforming use, the Court found it telling that "the drafters of section 52-61 rejected a proposed termination provision that omitted the qualifying language 'substantially all.'" 89 N.Y.2d at 414-15, 420 n.1.

Because the City Planning Commission rejected proposed text requiring that open space be accessible to "all residents upon the zoning lot," the enacted version of the 1961 Zoning Resolution should not be read, as the Appellate Division majority erroneously

did, to unambiguously require open space to be accessible to "all residents on a zoning lot" (A408-09). At a minimum there are multiple ways to construe the open space definition in the special context of multi-owner zoning lots, and there are multiple reasons to doubt the Appellate Division's proffered construction.

2. The BSA's application of the open space definition in the context of multi-owner zoning lots comports with legislative intent and history.

In addition to overstating the supposed clarity of the statutory text, the Appellate Division majority too readily dismissed significant practical reasons suggesting that the Zoning Resolution's drafters would not have intended to require, categorically, that all residents on a multi-owner zoning lot must have access to courtyards, rear yards, and rooftop gardens in order for those areas to count as open space.

By contrast, the BSA has forged a reasonable approach based on the recognition that it is neither feasible nor practical to mandate that all privately-owned open space be made accessible to all residents of other separate buildings. Under the BSA's

understanding, some open space may be reserved for residents of one building so long as (i) the zoning lot as a whole contains at least the minimum amount of open space required by the Zoning Resolution, and (ii) the residents of each building on the zoning lot have access to at least the amount of open space that would be required if each building were on its own separate lot. As we explain below, this interpretation is consistent with the legislative intent and history, and honors the BSA's role to interpret the Zoning Resolution to address novel circumstances that could not possibly have been contemplated by the drafters.

There is ample evidence that the City Planning Commission did not have the intention of compelling open space to be accessible to and usable by all residents of a multi-owner zoning lot. If anything, history points to the opposite intention. Indeed, while the rise of multi-owner zoning lots in recent years has put a fine point on questions about how to apply the definition in particular circumstances, the rigidly mechanical approach endorsed by the First Department would have created practical difficulties in some applications all along. After all, when the

Planning Commission first adopted an open space requirement in 1950, it specified that open space includes "rear yards," 1916 ZR § 1(bb), and no one would ordinarily expect a backyard to be accessible to all residents on a large multi-building block. And when the definition of open space took on its current form in the 1961 Zoning Resolution, the drafters carried forward the premise that spaces that are traditionally accessible to a subset of residents on large blocks still qualify as open space.

For example, the 1961 Zoning Resolution's original definition of "building" included both "a row of garden apartments with individual entrances" and "a series of row homes." ZR § 12-10 (original definition of building). The Zoning Resolution's current definition of building no longer includes the same language but does include "an *attached* townhouse separated by *fire walls* from *abutting* townhouses on a shared *zoning lot*." ZR § 12-10. The original as well as the amended definition of building also includes detached single-family residences, more than one of which may be situated on the same zoning lot. *Id.*

In these instances, the Zoning Resolution contemplates private open space accessible to and usable only by the occupants of the particular residence or townhouse with which such open space is associated. Were it otherwise, this common type of development—zoning lots containing adjoining townhouse units or multiple single-family residences each with its own private outdoor space—would not be permitted as-of-right under the Zoning Resolution.

Beyond that, the drafters of the 1961 Zoning Resolution explicitly included "courts" and "yards" within the definition of open space—broad terms that encompass a "rear yard" that is located on the back of a lot line and an "inner court" that is "bounded by … building walls." ZR § 12-10 (definitions for "open space," "yard," "yard, rear," "court, "court, inner"). If the drafters intended to restrict open space to areas ordinarily understood to be accessible to anyone on a large block, then they would have deployed the narrower terms "front yard" or "outer court." *See id.* They certainly would not have advised the public that open space

must be "accessible to all residents of *a* building." *Zoning Handbook*, at 17 (emphasis added).

B. The 2011 amendments support, rather than undermine, the BSA's approach.

The majority also fundamentally misconstrued the intent and effect of the 2011 amendments to the Zoning Resolution. Those amendments did not, as the majority erroneously held, unmistakably reject "the utilization of a building-by-building formula in calculating the open space ratio for a multiple building lot" (A410). Open space ratio has always, both before and after the 2011 amendments, been 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*" (*see* A86 (showing pre- and post-amendment versions of open space ratio definition)). Nor is the applicable minimum open space ratio for a particular zoning lot, as the majority appears to have misunderstood, calculated by the DOB or the BSA. Rather, it is predetermined by the Zoning Resolution based on height factor and the zoning district in which the lot is located (*see* A90-91).

The calculation of the minimum amount of open space required for the zoning lot, which is not at issue here,[4] is a function of multiplying the applicable open space ratio by the total residential floor area on the zoning lot. The building-by-building approach utilized by the DOB and the BSA, however, refers to the allocation of the open space required for the zoning lot as a whole among the different buildings on a multi-building zoning lot (*see*, *e.g.*, A113 (diagram illustrating open space allocation for zoning lot on which 808 Columbus and Park West Village buildings are located)).

The 2011 amendment's replacement of "building" with "zoning lot" in sections 23-14 and 23-142 of the Zoning Resolution is hardly the dispositive change the majority claims (A408). The reasons for each of the 2011 amendments' hundreds of changes are summarized in two tables available on the Department of City Planning's website. One table lists amendments that were

---

[4] Petitioners do not dispute, and indeed have stipulated, that the DOB correctly calculated the total minimum amount of open space required for the zoning lot (A51).

understood to change substantive law; the other lists changes that were understood to merely clarify existing law in accordance with prior interpretation by the DOB. *Compare* https://perma.cc/WB4U-9GQS (listing substantive changes) *with* https://perma.cc/TC2C-B2BR (listing clarifications) (both captured on May 16, 2019). As these tables make clear, the replacement of “building” with “zoning lot” in sections 23-14 and 23-142 that the majority considered a repudiation of the DOB’s and the BSA’s interpretation of the Zoning Resolution’s open space requirement was in fact understood by the City Planning Commission not as a substantive change in the law, but rather as consistent with prior practice. *See* https://perma.cc/TC2C-B2BR at 1, 16.

If anything, the 2011 amendments undercut the majority’s interpretation. As petitioners have admitted, the pertinent part of the Zoning Resolution’s definition of open space has remained substantively unchanged since 1961 (App. Div. Br. for Petitioners-Appellants 13). The 2011 amendments did revise the overall definition of open space for clarity. *See* https://perma.cc/TC2C-B2BR, at 7. For example, the layout and structure changed (*see*

A85-86 (showing pre- and post- amendment versions of open space definition)). But the amendments left the pertinent substantive language intact, and offered no guidance as to how the amount of open space required for a zoning lot could be allocated among the buildings on the lot. Consistent with the 2011 amendments' silence on the point, the 27-page report the City Planning Commission prepared in connection with the amendments likewise makes no mention of the Zoning Resolution's open space accessibility requirements (A210-36).

Moreover, when the City Planning Commission drafted and approved the 2011 amendments to the Zoning Resolution, it was presumed to be aware of the BSA's understanding—as reflected in the 2009 resolution—that the Zoning Resolution permits some open space to be reserved for residents of one building so long as the residents of each building on the zoning lot have access to at least the amount of open space that would be required if each building were on separate zoning lots. *See Cmty. Bd. 7 v. Schaffer*, 84 N.Y.2d 148, 158 (1994) (legislature is presumed to be familiar with existing decisional law including agency opinions); 2 RCNY

§ 1-06.4(a) (party appealing to the BSA from an interpretation of the Zoning Resolution is required to forward copies of application materials to the Planning Commission's legal counsel).

The Planning Commission's choice "not to alter the existing language" of the definition of open space when the Zoning Resolution was amended in 2011 "suggests legislative approval" of the BSA's 2009 construction of that definition. *Schaffer*, 84 N.Y.2d at 159 (citing *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 70 N.Y.2d 151, 157 (1987)); *see also* N.Y. Stat. § 75 (McKinney) ("[T]he fact that no change in wording is made creates a presumption that no change in meaning is intended"). Tellingly, the Planning Commission could have, but chose not to, amend the definition to unambiguously state that open space is that part of a zoning lot accessible to and usable by all residents of any building on the zoning lot, irrespective of ownership and control. At a minimum, even if this inaction is not an affirmative endorsement of the BSA's 2009 construction, it most certainly is not, as the majority erroneously found, a repudiation of it.

C. The BSA's interpretation advances the Zoning Resolution's goals of promoting stable residential development and meeting the City's housing needs.

As we have shown, neither the definition of open space nor any other provision of the Zoning Resolution compels an understanding that open space located on any part of a multi-building zoning lot must be accessible to all residents of all the other buildings on the lot, even if it is practically accessible only by private corridors or pathways, and even if the residents of the other buildings have independent access to ample open space. The text of the Zoning Resolution does not unambiguously demand that impractical result, leaving room for the BSA to reasonably conclude that the definition permits some open space to be reserved for residents of a single building so long as the zoning lot as a whole has the minimum amount of open space required by the Zoning Resolution, and residents of each building on the zoning lot have access to at least the amount of open space that would be required if each building were on a separate zoning lot.

And unlike the majority's interpretation below, the BSA's context-specific application of the open space definition advances

the Zoning Resolution's goals of promoting stable residential development and meeting the City's housing needs. The Zoning Resolution's statement of legislative intent identifies meeting "the housing needs of the City's present and expected future population" and promoting the "stability of residential development" as specific purposes of residential districts. ZR §§ 21-00(a), 21-00(h).

While this case may be about one project, the Court's ruling here will govern 32 zoning districts, covering roughly half of the land area in the City, that require open space for residential uses.[5] There currently are over 7,000 active construction permits in the City covering around 125,000 proposed dwelling units.[6] Jeopardizing even a modest fraction of that residential development over a changed interpretation of the Zoning Resolution's open space requirements could have serious

---

[5] Fourteen zoning districts (R1-1, R1-2, R1-2A, R2, R2A, R3-1, R3-2, R4, R4B, R5, R5D, C3, and C4-1) require open space for any residential building. *See* ZR § 23-14 *et seq*. An additional 18 districts (R6, R7-1, R7-2, R8, R9, C4-2, C4-3, C1-6, C2-6, C4-4, C4-5, C1-7, C4-2F, C6-1, C6-2, C1-8, C2-7, and C6-3) require open space unless the residential buildings on the zoning lot comply with certain "quality housing" requirements. *See* ZR § 23-15 *et seq*.

[6] *See* https://perma.cc/5CBZ-GSJA (captured May 10, 2019).

ramifications across a city and region already beset by acute housing shortages, especially of affordable housing. And, as noted, the prevalence of multi-owner zoning lots has increased over the last decade-plus.

The majority explicitly recognized the "potential impact" that its interpretation of the Zoning Resolution's open space requirement "would have upon development in the City" (A401). Indeed, the majority's interpretation may deter future residential developments, including those with affordable units; limit the number of residential units in developments that do go forward, constraining the housing stock; and complicate efforts to expand or renovate existing residences. For example, throughout the 32 zoning districts that require open space, new buildings can no longer be built on shared zoning lots with excess developable floor area if the new building would cause the amount of universally accessible open space of the zoning lot to fall below the minimum amount of open space for the zoning lot—even if the residents of the other buildings would still have access to at least the amount

of open space that would be required if each building were on its own separate zoning lot.

* * *

To summarize: The Zoning Resolution's definition of open space is susceptible to conflicting interpretations when mapped onto the situation of a multi-owner zoning lot. The Appellate Division majority's erroneous construction is not clearly compelled by the unambiguous statutory text, runs counter to legislative intent and history, and ignores real-world difficulties caused by applying an unnecessarily rigid, and often infeasible, standard to a situation never contemplated by the definition's drafters. The majority's flawed approach confirms the wisdom of this Court's warning against overly mechanical applications of statutory language in an evolving world and legal landscape. *See Doctors Council*, 71 N.Y.2d at 675.

On the other hand, the BSA's interpretation of the Zoning Resolution's open space requirements, informed by the practical reality of the increasing prevalence of multi-parcel zoning lots with some measure of non-universally-accessible open space, is

particularly reasonable. This interpretation was a rational exercise of the BSA's legislatively conferred discretion and should be upheld by this Court. *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").

CONCLUSION

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

Dated: New York, NY
May 23, 2019

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Appellant BSA

By: ______________________
JONATHAN POPOLOW
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-4084
jpopolow@law.nyc.gov

RICHARD DEARING
DEVIN SLACK
JONATHAN POPOLOW
of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 8,052 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