To Be Argued By:
JOHN R. LOW-BEER
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APL-2019-00039
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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,

(*Caption continued on inside cover*)

BRIEF FOR PETITIONER-RESPONDENT AND INTERVENORS-PETITIONERS-RESPONDENTS

JOHN R. LOW-BEER
415 8th Street
Brooklyn, New York 11215
Telephone: (718) 744-5245
jlowbeer@yahoo.com

Attorney for Petitioner-Respondent Randy Peyton, on behalf of the Estate of Maggi Peyton and Intervenors-Petitioners-Respondents 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

December 24, 2019

—against—

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

Respondents-Appellants.

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PRELIMINARY STATEMENT

This is a proceeding brought pursuant to N.Y.C. Admin. Code § 25-207 to challenge a Resolution of the New York City Board of Standards and Appeals ("BSA") affirming the New York City Department of Buildings' ("DOB's") approval of a zoning diagram for a nursing home that the property's owner, Respondent-Appellant PWV Acquisition, LLC ("PWV") and the nursing home operator, Respondent-Appellant Jewish Home Lifecare, Inc. ("JHL"), had proposed to sandwich in amongst existing buildings in Park West Village, a towers-in-the-park development on Manhattan's upper west side. The nursing home was to fill a small parcel at 125 West 97th Street until recently occupied by trees and parking, located only 60 feet from the windows of two adjacent 16-story apartment buildings. It would plunge those buildings into gloom, depriving them of privacy, light and air.

The Supreme Court denied the petition and dismissed the proceeding. The Appellate Division, with one dissenting vote, reversed, and subsequently granted leave to appeal to this Court. The Appellate Division correctly held that the plain meaning of the Zoning Resolution controls and that no special deference is owed to an agency where as here the issue is one of law should be affirmed.

In their briefs in this Court, Respondents-Appellants ("Respondents") revealed that unrelated amendments to the Zoning Resolution enacted in 2016

prohibited construction of the proposed building, and the project is now dead. Petitioner-Respondent and Intervenors-Petitioners-Respondents ("Petitioners") therefore moved to dismiss this appeal as moot. By order entered October 29, 2019, this Court denied that motion.

What remains before this Court is an abstract question of law concerning the Zoning Resolution's open space requirements: When the Zoning Resolution defines "Open Space" as space that is "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot," can a private roof garden that is only accessible to and usable by the residents of one of four residential buildings on the zoning lot be counted as open space?

The obvious answer is: "No." As the Appellate Division held, the words of the definition are "clear and unambiguous." PWV's contention that open space can be walled off building-by-building is barred by this plain language. Its dissertation on the meaning of the indefinite article "a" in the phrase "a dwelling unit" is preposterous. There is not one word in the Zoning Resolution today that supports Respondents' distorted and convoluted reading. Moreover, the legislative history and context definitively negate it.

The BSA's Resolution challenged here ("2015 Resolution")[1] explicitly stated that it was considering only whether to give preclusive effect to its prior decision, in 2009, concerning 808 Columbus Avenue ("2009 Resolution"),[2] a luxury building on the same zoning lot. In that earlier decision, the BSA had not questioned the obvious meaning of the phrase "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot." Rather, it found ambiguity in the supposed fact that other provisions of the Zoning Resolution were allegedly inconsistent with the requirement of common accessibility. It was in reliance on those provisions, not the definition of "Open Space," that the 2009 Resolution adopted PWV's contention that open space did not have to be accessible to all residents, but could instead be allocated separately to each building on the zoning lot.

Whatever basis there may have been for the 2009 Resolution when it was decided – and there was none even then – its rationale was completely invalidated by the City Planning Commission in 2011, when it amended the provisions on which BSA had relied, eliminating the purported inconsistency. It is

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[1] *In re 125 West 97th Street, Manhattan*, BSA Cal. No. 320-14-A (Aug. 18, 2015) (A115-A125)

[2] *In re 808 Columbus Avenue*, BSA Cal. No. 149-08-A (Feb. 3, 2009) (A78-83).

no wonder, then, that the BSA's 2015 decision in this case contained no textual analysis whatsoever of the Zoning Resolution.

In addition to the blatant implausibility of PWV's textual argument, it must be rejected for another reason: an administrative agency's decision cannot be affirmed on a ground other than that articulated by the agency itself. Neither in 2009 nor in 2015 did BSA analyze the meaning of the words that define "Open Space" in ZR § 12-10.

Respondents' arguments concerning legislative history and intent fare no better than their textual argument. The history of the 1961 Zoning Resolution shows that it was written precisely to encourage towers-in-the park developments – buildings surrounded by common open space, just like Park West Village. The requirement that open space be "accessible to, and usable by" all residents of the zoning lot was central to this vision. Respondents' argument that "no provision of the Zoning Resolution ... 'requires that open space on a multi-building zoning lot be shared space that is commonly accessible to all occupants of a zoning lot,'" PWV Br. at 39 (quoting BSA 2009 Resolution), is not only negated by this plain language, but is also profoundly wrong when viewed in the context of what the 1961 Zoning Resolution was trying to do.

Respondents' policy arguments about the cataclysmic consequences that would flow from the Appellate Division's decision are newly invented on this

appeal and lack any evidentiary support in the record. As Comptroller Stringer pointed out in his 2008 testimony to the BSA, this case does raise an important issue. But it is Respondents' rewriting of the statute, not the statute as written, that would have negative consequences, including the loss of open space in towers-in-the-park developments such as Park West Village and an inequitable distribution of the remaining open space.

QUESTIONS PRESENTED

1. Is deference owed to the decision of the BSA where (1) the case presents a pure question of law; (2) the BSA violated the rule of strict and literal interpretation imposed on it by the Zoning Resolution; and (3) the BSA has taken contradictory positions on the issue before the Court?

The Appellate Division correctly held that no deference was owed where, as here, the case presents a pure question of law, and did not address the other points.

2. Where the Zoning Resolution defines "Open Space" as "that part of a zoning lot ... which is ... accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot," may a rooftop garden that is not accessible to or usable by persons occupying

apartments in three of the four buildings on the zoning lot be counted toward meeting the open space requirement of the zoning lot?

The Appellate Division correctly answered: No.

3. Should this Court should adopt an interpretation that is contrary to the plain language of the statute to resolve a policy problem as to which there is not even a shred of evidence that it exists?

The Appellate Division did not address this question.

4. In an Article 78 proceeding challenging the decision of an administrative agency, can the courts uphold the decision on grounds not articulated by that agency?

The Appellate Division did not address this question.

STATEMENT OF FACTS

A. The 1961 Zoning Resolution's Vision of Towers Surrounded by Common Open Space

The requirement that open space on a zoning lot be "accessible to, and usable by," all residents of the zoning lot is not a technicality. The 1961 Zoning Resolution specifically sought to encourage tower-in-the-park projects, tall buildings surrounded by common open space on a single zoning lot. As noted urban planning historian Hilary Ballon stated at the City Planning Department's 2011 conference celebrating the Zoning Resolution's 50th anniversary, the "vision of the

City [underlying the 1961 Zoning Resolution] was firmly anchored in the superblock solution, with free-standing towers surrounded by light, air and open space."[3]

A 1950 report commissioned by the City Planning Commission, titled "Plan for Rezoning the City of New York," laid the groundwork for the 1961 Zoning Resolution.[4] Its frontispiece showed Stuyvesant Town, Glen Oaks Village in Queens, and Lever House on Park Avenue, all buildings surrounded by common open space, which exemplified the core commitments to open space. The report proposed special rules, later incorporated into the 1961 Zoning Resolution, to encourage "large-scale developments."[5] In a section titled "Usable Open Space," it stated:

> A usable open space requirement is proposed in all Residence Districts except the highest building bulk district which is applicable only to limited sections in mid-town Manhattan.... When a number of families share open space, the amount of space needed by any family at any

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[3] N.Y.C. Dept. of City Planning, Zoning the City-2011, Conference held Nov. 15, 2011, presentation of H. Ballon, "The 1961 Zoning Resolution: Historical Context and Vision." Video available at https://www1.nyc.gov/site/planning/about/city-planning-history.page?tab=2. Prof. Ballon's presentation begins at approximately the 44th minute of the video (or, on the counter on the screen, at 1 hr.). *See also id.*, presentation of C. Willis, "The 1961 Zoning Resolution: Evolution in Response to Changing Conditions." Dr. Willis' presentation begins at 1 hr. and 2 min. (or, on the counter on the screen, at 1 hr. and 16 min.). Dr. Willis stated that open space and density "were the preoccupations of the 1961 zoning reformers, who thought that "open space is good and density is bad," for "the skyscrapers in commercial districts as ... for the superblock neighborhood housing projects."

[4] Harrison, Ballard & Allen, Plan for Rezoning the City of New York (1950) (https://www1.nyc.gov/site/planning/about/city-planning-history.page?tab=2).

[5] *Id.* at 71-74.

> given time can be provided ... out of pooled space, taking advantage of differing times of use.[6]

The tower-in-the-park vision, propounded especially by the famous 20th century modern architect Le Corbusier[7] and enthusiastically embraced by the drafters of the 1961 Zoning Resolution, was embodied in many complexes built on superblocks throughout New York City, including Park West Village. All of these complexes were built on single zoning lots with multiple buildings surrounded by common open space.

The City Planning Department's own website describes the Zoning Resolution as embodying the towers-in-the-park vision of multiple buildings surrounded by common open space on a single zoning lot:

> The bulk regulations ... introduced in 1961, encourage the development of buildings without height limits set back from the street and surrounded by open space. The building form is a product of the "tower-in-the-park" vision of urban planning popular in the 1950s.... [H]igher floor area ratios are allowed for tall buildings on lots where large areas of open space can be provided.[8]

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[6] *Id.* at 51-52. The report also quotes Mayor O'Dwyer's preview of the plan, in which he also emphasized light, air, and "usable open space ... in which small children and old folks can enjoy outdoor life away from the streets." *Id.* at 3.

[7] City Planning Department, City Planning History, at 4-5 (https://www1.nyc.gov/site/planning/about/city-planning-history.page?tab=2) (noting influence of Le Corbusier and the Zoning Resolution's emphasis on open space).

[8] N.Y.C. Dept. of City Planning, Residence Districts: Overview, Moderate- and Higher-Density Residence Districts (R6-R10)

The 1961 Zoning Resolution created new mechanisms for development that not only encouraged towers-in-the-park but also allowed more flexibility within the existing urban fabric. Whereas the 1916 Zoning Resolution had sought to regulate by prescribing the specifics of building height and setbacks, the 1961 Zoning Resolution sought to give architects flexibility while at the same time incentivizing the construction of towers surrounded by open space. It did this through the then-novel mechanisms of Floor Area Ratio ("FAR"), Open Space Ratio, Height Factor, and bonus FAR in exchange for more open space. [9]

Using these mechanisms, a developer could merge contiguous lots and transfer the development rights from existing lower buildings to a new, taller building on the merged zoning lot. The 1961 definition of "Zoning Lot" explicitly contemplated such mergers, providing that zoning lots could consist of "two or more contiguous lots of record, located within a single block," and that if land was "to be used, developed, or built upon as a unit under single ownership" or under a long-term lease, the owner could designate it as a zoning lot. ZR § 12-10 (1961).

Respondents' contention that "neither ZR §§ 12-10, 23-14, nor any other provision of the Zoning Resolution expressly concerns a condition involving

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(http://www1.nyc.gov/site/planning/zoning/districts-tools/residence-districts-r1-r10.page).

[9] These mechanisms are discussed by Prof. Ballon and Dr. Willis in their presentations cited above.

multiple buildings on a zoning lot, nor requires that open space on a multi-building zoning lot be shared space that is commonly accessible to all the occupants of a zoning lot" (A80) is refuted by the history and text of the 1961 Zoning Resolution. In fact, the 1961 Zoning Handbook described the Open Space Ratio as applying to single zoning lots with multiple buildings surrounded by open space:

> For buildings containing residential uses, the primary device assuring adequate open space is the Open Space Ratio. This fixes the open space required on a lot as a percentage of the total floor area of all buildings on the lot.[10]

The requirement that open space be common space was specifically intended to apply not only to individual buildings but also to tower-in-the-park developments, multiple buildings built on large zoning lots. Such open spaces were integral to the Zoning Resolution's original vision:

> "Open space" is that part of a zoning lot, including courts or yards, which: ... is accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot ...

These words have remained unchanged since 1961.

B. The 1977 Amendment Did Not Alter the 1961 Zoning Resolution's Vision of Common Open Space

The definition of "Zoning Lot" in the 1961 Zoning Resolution was written to encourage zoning lot mergers that would enable the transfer of unused

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[10] 1961 Zoning Handbook, at 16 (http://www1.nyc.gov/site/planning/about/city-planning-history.page?tab=2) (underlining added).

development rights from adjacent underdeveloped lots to a lot to be developed. As written in 1961, this provision required that all the lots in the merged zoning lot be under single ownership or leased to the single owner by a long-term lease. (A177-78).

In 1977, the Zoning Resolution was amended to broaden the definition of "Zoning Lot" to allow for the merger of lots that were under different ownership, even without a long-term lease. The City Planning Commission explained that the purpose of this amendment was to avoid problems that had arisen when leases were terminated by breach or bankruptcy of the lessee, or when development rights were sold without notice to parties who held property interests such as mortgages and liens that were superior to those of the lessee.[11]

The City concedes that this amendment "had nothing to do with open space." BSA Br. at 9. It in no way repealed or modified the requirement that open space by accessible to, and usable by, all residents of the zoning lot.

C. Park West Village

JHL's proposed building would have risen in Park West Village, a federally subsidized middle income urban renewal project on Manhattan's Upper

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[11] *See* A180-82 (CPC Report on 1977 amendment, July 13, 1977); A151-53 (Affirmation of PWV's attorney/expert Albert Fredericks); N. Marcus, *Air Rights in New York City*, 50 BROOKLYN L. REV. 867, 871-75 (1984) (explaining prolems that arose under pre-1977 definition of "Zoning Lot".

West Side. Located between Columbus and Amsterdam Avenues, and between 97th and 100th Streets, the superblock at issue here was developed with residential buildings set apart from one another and surrounded by trees, open space and off-street parking, as well as a church, a school, a public library, a health center, and a few small commercial buildings. The three original buildings on the zoning lot, each one 16 stories in height, were completed in 1958, according to a unified, comprehensive towers-in-the-park plan.[12]

Because the complex was built with federal financial assistance, it was subject to a 40-year deed restriction that forbade any additional construction on the site. That restriction expired in 2006. Respondent PWV acquired the three residential buildings on the eastern portion of the superblock – 784, 788, and 792 Columbus Avenue – concededly in anticipation of the expiration of the restriction, with the intent of monetizing the open space on the superblock. (A136).[13]

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[12] *See* "Housing Project Is Opened Uptown: Park West Village Hailed by Moses as First Three of 17 Buildings Is Completed" (N.Y. Times, Oct. 29, 1958, p. 32).

[13] Similar scenarios are being played out on other superblocks around the City. *See, e.g*, *Council of the City of N.Y. v. Dep't of City Planning*, 2019 NY Slip Op. 32332(U) (July 31, 2019) (blocking proposed construction of four towers in Two Bridges Large Scale Residential Development on Manhattan's lower east side); (*Committee for Envtl. Sound Dev. v. Amsterdam Ave. Redevelopment Assoc. LLC*, 2019 NY Slip Op 30621(U) (Mar. 14, 2019) (vacating BSA's approval of an infill building on a gerrymandered zoning lot in Lincoln Towers);

D. The Challenge to 808 Columbus Avenue and the BSA's 2009 Resolution Rejecting That Challenge

Initially, PWV developed a portion of the zoning lot fronting on Columbus Avenue. On June 12, 2007, it transferred that portion to 808 Columbus LLC, an entity it had created to own and construct a 29-story luxury apartment tower with two single-story attached wings containing stores. (A153). Although it created a separate tax lot for 808 Columbus, it did not create a separate zoning lot, because doing so would have drastically reduced the permissible size of any new building on that lot.

In 2008, a group of neighbors that did not include Petitioners challenged the issuance of a building permit for 808 Columbus on the same grounds as the present challenge: that its construction was unlawful because it would leave the zoning lot with insufficient open space. The crux of their argument was that whereas the Zoning Resolution required that open space be "accessible to and usable to all persons occupying a dwelling unit or a rooming unit on the zoning lot," DOB had counted as open space a rooftop garden that was accessible only to the residents of 808 Columbus, the proposed luxury building, and not to the middle-income tenants in the other buildings on the zoning lot.

First DOB and then BSA denied the challenge. In its 2009 Resolution, the BSA held that it sufficed that the residents of each building on the zoning lot had

access to the same amount of open space that they would have if their building were located on a separate zoning lot. (A78-A83). The challengers then filed an Article 78 proceeding, which they withdrew pursuant to a settlement. The building at 808 Columbus was subsequently completed.

The BSA's 2009 Resolution did not question the obvious meaning of the words "accessible to and usable by" all residents of the zoning lot as those words were used in the Zoning Resolution's definition of "Open Space." It did not rely in any way on that definition. Rather, it found ambiguity in the fact that two other sections of the Zoning Resolution, ZR §§ 23-14 and 23-142, stated that the open space requirements were to be determined on a building-by-building basis. Section § 23-14 read in relevant part as follows:

> In all districts, as indicated, ... for any building on a zoning lot, the minimum required open space or open space ratio shall not be less than set forth in this Section ....

Similarly, ZR § 23-142 provided in relevant part as follows:

> [I]n the districts indicated, the minimum required open space ratio and the maximum floor area ratio for any building on a zoning lot shall be as set forth in the following table ....

According to the BSA, these provisions conflicted with the requirement of ZR § 12-10 that open space be "accessible to and usable by" all residents of the zoning lot, and thereby created an ambiguity. Citing the contentions of PWV and DOB, the BSA stated that "ZR §§ 23-14 and 23-142 require open space with respect to a

building, rather than to the zoning lot as a whole, and therefore were satisfied by the Permit application which provides the required amount of open space to each building on the Zoning Lot." It was in reliance on these provisions, not on the definition of "Open Space," that the BSA concluded that the exclusive rooftop garden of 808 Columbus could be counted as open space.[14] (A80).

However, ZR §§ 23-14 and 23-142 did not in fact create any ambiguity whatsoever about <u>who could access or use the open space</u> on the zoning lot. Those sections were not about access or use. They were only about <u>how the required amount of open space was to be calculated</u>. Moreover, even with respect to the method of calculating the required amount of open space, it made absolutely no difference whether this was done building-by-building and the amounts were then summed for the zoning lot as a whole or whether the determination was done for the entire zoning lot from the outset: the result was the same either way.

E. The 2011 Amendments

Because the command of ZR § 12-10's definition of "Open Space" is clear, and even in 2009 did not conflict with ZR §§ 23-14 and 23-142, there was no

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[14] The BSA's 2009 Resolution is almost devoid of findings by the Board itself. Of the 32 paragraphs addressing the open space issue, only three are findings and conclusions of the Board. (A79-80). Therefore, the Board's *ratio decidendi* must be sought largely in its recitation of the contentions of DOB and PWV which it endorsed when it found in their favor.

ambiguity even in 2009. The BSA's 2099 Resolution in *808 Columbus Ave.* was wrongly decided.

But whatever validity the BSA's argument might have had in 2009 crumbled in the face of the 2011 Key Text Amendments ("2011 Amendments"). Those Amendments removed the only three words – "building on a" – that the BSA had pointed to as creating an alleged ambiguity.[15] By eliminating whatever seeming discrepancy there may have been between the definition of "Open Space" and the methodology for calculating the required amount of open space, the Amendments removed any rationale that might have existed to support the BSA's 2009 Resolution.

The 2011 Amendments comprised well over a thousand text changes that were summarized in two tables provided by the City Planning Department, totaling 190 pages.[16] The changes in ZR § 23-14 and ZR § 23-142 are listed in Table

[15] *See* A85-A91 for a redline showing changes in ZR §§ 23-14 and 23-142 made by the Key Text Clarification Amendment. For a redline showing all the changes made by the Amendment, *see* http://www1.nyc.gov/assets/planning/download/pdf/plans/key-terms/text_adopted_cc.pdf .

[16] The tables are available on the website of the City Planning Department. *See* http://www1.nyc.gov/assets/planning/download/pdf/plans/key-terms/table1_substantive_changes.pdf (listing substantive changes); http://www1.nyc.gov/assets/planning/download/pdf/plans/key-terms/table2_clarifications_modifications.pdf (listing clarifications and modifications).

2, titled "Clarifications and Modifications Consistent With Department of Buildings Practice." The change in § 23-14 was described as: "Clarification that requirements apply to zoning lot, not buildings." The change in § 23-142 was described as: "Clarification. ... Regulations made applicable to zoning lots instead of buildings." The descriptions of these changes as "clarifications" show that they did not change the required amount of open space, much less who could access and use that open space. Whether you add up the amounts required by each building, one by one, or you do the calculation from the beginning for the zoning lot as a whole, the end result is the same. After the 2011 Amendments, as before, open space had to be accessible to and usable by all residents. In other words, DOB and BSA were wrong in 2009, when they held that the building-by-building wording of the prior version had any effect at all on the substance of the open space requirement.

F. The JHL Nursing Home and the Increased Deficit of Open Space

After the 2011 Amendments were enacted, PWV proceeded with its further plans to monetize the open spaces between what had been designed as well-spaced residential towers. Because another residential building in Park West Village would concededly require additional open space on the zoning lot – open space that is lacking even under the most creative interpretation of the Zoning Resolution – PWV sought to make a deal to sell the parcel at issue for a community facility, which does not require additional open space.

In December 2011, PWV reached an agreement with JHL on a property swap. JHL operates a nursing home on a large site on West 106th Street that could be demolished and replaced with market rate housing. In exchange, PWV would give JHL the smaller parcel in Park West Village that is at issue here, and also pay JHL $35 million.[17]

JHL's nursing home would have risen straight up for 20 stories on open space previously used for tenant parking and planted with trees. It would have been only 60 feet from the windows of apartments of 784 Columbus and 788 Colombus, two of the original buildings that rise 16 stories tall to the east and to the north respectively, and 60 feet from PS 163, the elementary school to the west. Petitioners would have found themselves facing a towering wall, looking directly into the windows of the nursing home.

There is no dispute that if the private roof gardens of 808 Columbus cannot be counted as open space, the zoning lot is already non-compliant. According to DOB and the BSA, the required open space on the zoning lot is 230,108 square feet. The roof gardens take up 42,500 square feet. If that amount is subtracted from the existing amount, the zoning lot is already short by 32,307 square feet, even

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[17] *See* The Real Deal, Dec. 20, 2011, "Gluck, Chetrit Instrumental in Nursing Home Land Swap" (https://therealdeal.com/2011/12/20/laurence-gluck-of-stellar-management-and-joseph-chetrit-complete-upper-west-side-landsway-with-jewish-home-lifecare/).

without the new building. That building's footprint would have covered 20,036 square feet of lot area that is now open space. Although some of this amount – 10,431 square feet of garden space under a cantilever – would have counted as open space, that building would still have taken up an additional 9,605 square feet of open space. This is a 30 percent increase in noncompliance, and would have resulted in an open space amount that is 36 percent below what is required.

G. The Challenge to the JHL Nursing Home and the Decisions of DOB and the BSA

On December 4, 2013, some two years after the City Council's adoption of the 2011 Amendments, DOB approved JHL's Zoning Diagram. On August 22, 2014, Petitioners, fourteen residents and neighbors of Park West Village calling themselves "the Stakeholders of the Park West Village Neighborhood," wrote to the DOB Commissioner challenging that approval on the grounds, among others, that the proposed nursing home would violate the open space requirement of the Zoning Resolution.[18] (A60-A63).

[18] The current Petitioners are all the surviving members of the Stakeholders group, plus Randy Peyton on behalf of the estate of his mother Maggi Peyton, who was the sole petitioner in the Supreme Court. Following Maggie Peyton's death, Respondents moved to dismiss the appeal herein. Petitioners cross-moved to be permitted to intervene and/or be substituted. On April 6, 2017, the Appellate Division denied the motion and granted the cross-motion.

Petitioners argued that the BSA's prior decision that the roof garden of 808 Columbus qualified as open space had been based on the fact that ZR §§ 23-14 and 23-142 specified a building-by-building methodology in calculating the required amount of open space. Petitioners further argued that the 2011 Amendments had clarified that the law required the calculation to be done for the zoning lot as a whole, and not building by building, and thereby removed the sole textual basis for the BSA's ruling that the open space on the zoning lot did not have to be accessible to and usable by all residents of the zoning lot. Without counting the roof garden as open space, the zoning lot already lacked the required amount of open space, and the proposed building would further increase the non-compliance.

Without addressing the substance of Petitioners' letter, DOB rejected the challenge. DOB's response only stated conclusorily that the amount of open space to be provided "exceeds the minimum open space required for the zoning lot." (A64).

Maggi Peyton, to whom DOB's response had been directed, appealed to the BSA on behalf of Petitioners. (A46-A105). Without engaging in any new analysis, or indeed any analysis at all, of the zoning text, the BSA denied the appeal. It relied entirely on its decision in *808 Columbus*, stating that it would consider <u>only</u> whether the 2011 Amendments had changed the definition of open space. It concluded that "the definition of open space itself has not changed and ... the CPC

did not intend to change the open space requirement, subsequent to the 2009 Appeal, [and therefore] the Key Terms amendment does not dictate any change in the Board's or DOB's analysis since the prior appeal." (A124).

H. DOB and BSA's Prior Rulings That Open Space Must Be Accessible To, and Usable By, All Residents of a Zoning Lot

The BSA's 2009 and 2013 Resolutions and the DOB Determinations that they affirmed were the first and only times that those agencies adopted the position that the open space on a zoning lot could be walled off and allocated building-by-building. In other instances, both before and after, BSA and DOB have enforced the open space definition by requiring that open space be accessible to all residents.

Less than two months before it approved the 2009 Resolution, in a case that raised exactly the same issue as this one, the BSA affirmed a DOB Determination that held that the Zoning Resolution meant what it said: open space could only be counted toward meeting the required amount if it was accessible to all residents of the zoning lot. The complaint there was that DOB's approval for a proposed 16-story building wrongly assumed that the residents of that new building would have access to open space on the rooftops of two other buildings on the zoning lot. DOB's Determination recited:

> [Y]ou raise the issue that approval of the application for a 16-story building requires access to open space, but that the rooftops at 133

> North 8th Street, 115 Berry Street and 133-41 North 7th Street are not available to the residents of 144 N. 8th Street for open space. Based on the lack of access to the rooftops, you contend that the application fails to meet the open space requirements of the Zoning Resolution ....

In re 144 N. 8th Street, BSA Calendar No. 34-08-A, at 1 (Dec. 9, 2008).[19]

DOB's response was to issue a Stop Work Order that halted work beyond the 10th floor unless the applicant could show that the rooftop space would be accessible to all residents of the zoning lot, and further provided:

> If after all the court appeals are concluded the applicant can not guarantee access to the rooftops, the applicant may file a Post Approval Amendment to amend the plans to ten stories, a height that will not need access to the rooftops for purposes of compliance with the open space requirement, or the permit will be revoked.

Id. at 1. DOB further testifed at the BSA hearing in that case that "prior to the issuance of a certificate of occupancy, an inspector will verify that the open space is accessible to and usable by the occupants of the Building." *Id.* at 5. After reciting these facts, the BSA affirmed DOB's partial Stop Work Order.

Notwithstanding BSA's decision in *808 Columbus Ave.*, more than two years later DOB expressly conditioned its approvals of two open space applications for the nursing home in this case on JHL's satisfying the requirement of ZR § 12-10 that the spaces in question be accessible to and usable by all persons residing on the zoning lot at all times.

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[19] http://www1.nyc.gov/assets/bsa/downloads/pdf/decisions/34-08-A.pdf

In the first application, dated March 29, 2011, JHL sought approval of a roofed open space under the cantilever of the proposed nursing home. DOB gave its conditional approval as follows:

> The request to confirm that the proposed roofed "Open Space" conforms to the definition of open space as per section 12-10 ZR is hereby approved with the following conditions:
>
> 1. The entire open space including the covered roofed area that is used to the meet the requirements of ZR 12-10 "Open Space" shall be accessible and usable to all persons occupying the residential units on the zoning lot at all times; ...

(A95) (underlining added). Notably, the calculations supporting this application were done based on the square footage of the zoning lot as a whole, not the square footage allocated to the nearest building on the zoning lot. Had DOB followed the building-by-building allocation interpretation for which it advocates here, this application would have been rejected.[20]

[20] That is because, as then-Borough President Scott Stringer and his Director of Economic Development Brian Cook pointed out, the Zoning Resolution permits areas covered by roofs to be counted as open space only if they cover "less than 10 percent of the unroofed or uncovered area of the zoning lot." ZR § 12-10. To meet the open space requirement, JHL provided open space underneath the proposed building. DOB and BSA accepted JHL's calculation based on the entire zoning lot, showing that this open space was less than 10 percent of the uncovered open space. (A92-96, A124). However, if DOB had applied the building-by-building allocation methodology, using as its denominator the open space allocated to the immediately adjacent building, this covered open space would have far exceeded the 10 percent limit. (A69, A298-99).

In a second zoning application, on May 5, 2011, JHL sought approval for two other areas on the zoning lot to be counted as open space: a child's play area and a meditation garden. DOB approved this application subject to the following conditions:

> With respect to the applicant's proposal that the "child's play area" and "Meditation Garden" ... will be fenced and entry to these spaces will be controlled as every resident of the zoning lot will be provided with a card key to access these spaces, the applicant is correct that such arrangement does not violate the requirement that "open space" be "accessible to and usable by all persons occupying a dwelling unit on the zoning lot."

(A101) (underlining added).

PRIOR PROCEEDINGS AND THE DECISIONS BELOW

Maggie Peyton, a resident of Park West Village, commenced this proceeding pursuant to N.Y.C. Admin. Code § 25-207 by Petition dated November 16, 2011.

On July 26, 2016, the Supreme Court denied the Petition and dismissed the proceeding. While expressing doubt about Respondents' reading of the definition of "Open Space," it nevertheless erroneously concluded that the language of the Zoning Resolution was ambiguous, and that it would therefore defer to the BSA. (A27-A28).

Shortly after Petitioner Maggi Peyton filed her notice of appeal, she died. PWV then moved to dismiss the appeal. Petitioners, all but one of whom were

members of the original Stakeholders group that had brought the DOB challenge, [21] cross-moved to be permitted to intervene and/or for substitution. On April 6, 2017, the Appellate Division denied the motion and granted the cross-motion.

In October 2018, by a three-to-one decision, the Appellate Division reversed the Supreme Court. After detailing the history and substance of the 2009 and current disputes, the Court rejected Respondents' collateral estoppel argument, stating: "The instant petitioners are challenging the grant of a permit for a different building on the zoning lot, and rely on amendments to relevant provisions of the Zoning Resolution enacted subsequent to BSA's 2009 Resolution." (A400-01).

The Court then held that deference was not required "where, as here, "the question is one of pure statutory interpretation 'dependent only on accurate apprehension of legislative intent." (A407).

With regard to the merits, the Appellate Division found that the language of ZR §12-10 is "clear and unambiguous," and "unambiguously requires open space to be accessible to all residents of any residential building on the zoning lot, not only the building containing the open space in question." (A408). The Appellate Division further agreed with Petitioners that "the 2011 amendments removed the contextual basis upon which BSA relied when it determined that open

[21] The exception is Randy Peyton, Maggi Peyton's executor.

space does not have to be accessible to all residents of a zoning lot." (A405-06). Characterizing the 2011 Amendments as "dispositive," the Appellate Division wrote that the elimination of all references to the word "building" in describing how the required amount of open space was to be calculated "bolsters our finding that this language [defining "Open Space"] is clear and unambiguous." (A408).

The Appellate Division found no inconsistency between ZR § 12-10's requirement of common accessibility and its statement "that '[o]pen space *may* be provided on the roof of ... [a] building containing residences.'" (A409 [italics and brackets in original]). To be counted as open space, the roof space simply had to meet both requirements.

The Appellate Division also noted that over the course of over 30 years after the 1977 amendment that allowed the creation of multi-owner merged zoning lots, there had been no dispute concerning the definition of open space, and that the 2009 Resolution concerning 808 Columbus Avenue was the first time the BSA adopted the building-by-building methodology to calculate the required amount of open space. (A404).

PWV's contention that the Appellate Division's opinion "reflect[s] an unfortunate misunderstanding of the legal issues in this lawsuit," PWV Br. at 29, misrepresents the Appellate Division's opinion. The Appellate Division may have misspoken when it spoke of "open space ratio" rather than "open space

requirement," but that court nevertheless understood perfectly that by eliminating the building-by-building methodology for determining the open space requirement, the 2011 Amendments had knocked the legs out from under the *ratio decidendi* of the 2009 BSA Resolution. As that Court stated, "the issue is straightforward – whether under the 2011 amendments DOB and BSA can count 808 Columbus's exclusive roof garden's open space square footage of 42,500 in determining the zoning lot's requirement minimum open space." (A402).

Justice Tom, dissenting, echoed the arguments of Respondents. The dissent contains serious obvious inaccuracies. For example, it asserts that "the project would not disturb the amount of open space available to other residents on the zoning lot," and that "petitioners do not actually challenge whether the 2015 approved nursing home ... complies with the ZR." (A4). Of course, Petitioners do allege a zoning violation: construction of the nursing home would reduce the zoning lot's already insufficient open space, and thereby increase a noncompliance in violation of, *inter alia*, ZR § 54-31 (prohibiting creation of new non-compliance or increase in existing non-compliance).

Quoting BSA, the dissent also erroneously stated that the Zoning Resolution does not require that open space be common, shared space. (A423-24). This statement, repeated multiple times throughout the dissent, and in Respondents' papers, assumes the answer to the question at the heart of this case: whether the

Zoning Resolution's requirement that open space be "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot" means that this open space must be "shared space that is commonly accessible to all the occupants of the zoning lot." It is more than obvious that space that is accessible to all persons is shared common space. Similarly erroneous is the dissent's contention that "the ZR did not address open space requirements for zoning lots containing multiple buildings." (A429). As shown above, the requirement that open space be common was written precisely to advance the vision of multiple buildings surrounded by open space that was so central to the 1961 Zoning Resolution.

Following the Appellate Division's decision, Respondents moved in that court for reargument or leave to appeal to this Court. This motion was unusual in that it was supported by a plethora of new arguments and new facts that were not in the administrative or judicial record of this proceeding, submitted via the Affirmation of James P. Colgate, a partner at PWV's newly retained law firm, Bryan Cave Leightner Paisner LLP, and a former DOB Assistant Commissioner for Technical Affairs. These new arguments were based on Mr. Colgate's new "research as to building developments that relied upon the [allegedly] long-standing

interpretation of 'open space' that [the Appellate Division] has now overturned."[22] Mr. Colgate's "research" turned up three examples of existing developments, all on Staten Island and all single family home developments in which, strangely and unusually, all the homes were built on a single zoning lot. Petitioners countered by submitting an affirmation from a zoning expert, George M. Janes, who showed that Mr. Colgate's examples did not support his contentions; that as to two of the developments, the only reason they were built on single zoning lots was to circumvent the then existing zoning regulations; that two of the three were clearly illegal even under Respondents' interpretation of the open space provisions; and that the third was likely illegal as well.

On February 21, 2019, the Appellate Division granted Respondents' motion for leave to appeal. They perfected their appeals in May 2019.

In their briefs, Respondents revealed for the first time that unrelated amendments to the Zoning Resolution enacted in 2016 foreclosed construction of the proposed nursing home. In July, Petitioners moved to dismiss this appeal as moot. This Court denied that motion on October 29, 2019.

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[22] Mr. Colgate's Affirmation and Reply Affirmation are submitted to this Court in a Supplemental Appendix ("SA"), together with the Affirmation of George M. Janes in opposition to respondents' motion. The above quote is at SA9.

ARGUMENT

I.

THE DECISION OF THE BSA IS NOT ENTITLED TO DEFERENCE

A. Deference Is Not Required Where the Question Is One of Pure Statutory Interpretation

The Appellate Division correctly stated that although the BSA's decisions are entitled to deference "where the interpretation involves specialized 'knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom,' ... [w]here ... the question is one of pure statutory interpretation 'dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency.'" The question here falls into the latter category. Therefore, "courts are free to ascertain the proper interpretation from the statutory language and legislative intent." (A406-07) (citations omitted).

The Appellate Division's position finds abundant support in precedent. In *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98 (1997), this Court held that "a determination by the agency that 'runs counter to the clear wording of a statutory provision' is given little weight." *Id*. at 102-03 (quoting *Kurcsics v. Merchs. Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980)). *Raritan* is strikingly similar to this case. There, as here, the BSA "attempt[ed] to justify its reading [of the Zoning Resolution]

by ... referring this Court to the language of a former version of the regulation." *Id*. at 103. There, as here, BSA "insist[ed] that the amendment did not change the law[, and] argue[d] that it has always interpreted the resolution a particular way so, presumably, it should be allowed to continue to do so." *Id.* There, as here, BSA "ha[d] not consistently interpreted the statute in the same manner as it did here." *Id.* at 104. The Court's response to BSA's arguments in *Raritan* is equally applicable here: "Such evidence," the Court stated, "might be more compelling if the present text of the Zoning Resolution offered any support." *Id.* at 103-104.

Even in cases in which the courts have had to grapple with complex law, they have refused to defer where the question posed is a purely legal question. *See, e.g., Royal Bank & Tr. Co. v. Superintendent of Ins.*, 92 N.Y.2d 107, 124 (1998) (declining to defer even though the case involved a "unique, complicated set of circumstances" and the "intricate interplay" between a number of provisions); *Roberts v Tishman Speyer Props. L.P.*, 13 N.Y.3d 270, 285 (2009) (same); *RAM I LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 123 A.D.3d 102, 106 (1st Dep't 2014) (same); *Exxon Corp. v. BSA*, 128 A.D.2d 289, 296 (1st Dep't 1987) ("the ultimate responsibility of interpreting the law is with the court"); *Namro Holding Corp. v. New York*, 17 A.D.2d 431 (1st Dep't 1962), *aff'd*, 14 N.Y.2d 693 (1964) (same); *Skyhigh Murals-Colossal Media, Inc. v. BSA*, 2017 N.Y. Misc. LEXIS 159 (S. Ct. N.Y. Co. Jan. 13, 2017) (same).

Where a statute speaks as clearly as this one does, and without contradiction, there is no basis for deference to the administrative agency's supposedly "resaonable and practical interpretation." BSA Br. at 22.

B. Deference Is Not Required Where the BSA Violated Its Own Rule of Strict Literal Interpretation

Section 72-00 of the Zoning Resolution, titled "Powers of the Board of Standards and Appeals," gives BSA the power "to hear and decide appeals from and to review interpretations of this Resolution." Section 72-11, in turn, provides that on such appeals, BSA must "strictly apply[ ] and interpret[ ] the provisions of this Resolution."

Consonant with this instruction, the BSA has frequently stated, including in its 2009 Resolution, that "the Board is not permitted to construe the intent of the Zoning Resolution, but is limited to the 'four corners' of the statute." (A80); *see also In re 36 West 66th Street, Manhattan*, BSA Cal. Nos. 2019-89-A and 2019-94-A, at 6 (Sept. 17, 2019) ("the Board declines Appellants' invitation to delve further into the legislative history 'in strictly applying and interpreting the provisions of' the Special District's bulk-distribution regulations").

Yet the BSA's Resolution appealed from here does not point to a single word in the text of the Zoning Resolution that affirmatively supports its holding that a zoning lot can be divided up into multiple open spaces, each accessible only to the

residents of one or another building, and indeed, there is none. Because its interpretation violates its own rule of strict and literal interpretation, the BSA has forfeited any claim to deference.

C. Deference Is Not Required Where Both BSA and DOB Have Taken Contrary Positions on the Issue

It is a basic principle of administrative law that an agency's unexplained shift from its prior interpretation of a statute is arbitrary and capricious. *Richardson v. Comm'r of N.Y.C. Dep't of Soc. Servs.*, 88 N.Y.2d 35, 40 (1996) (quoting *Field Delivery Serv. v Roberts,* 66 NY2d 516, 520 (1985)); *see also Lyublinskiy v. Srinivasan*, 65 A.D.3d 1237, 1239 (2d Dept. 2009) (BSA determination that "neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts" is arbitrary and capricious); *Royal Bank & Trust Co.*, 92 N.Y.2d at 122 ("The Superintendent must adopt policies in a coherent and consistent manner with appropriate regard for those previously taken or must explain the reasons for variations among policies.").

It is striking to note, then, that during the same time frame as this dispute both BSA and DOB have taken positions on open space that were contrary to their positions here. Prior to addressing the issues of this zoning lot neither DOB nor BSA had ever taken the position that open space can be allocated and balkanized among multiple buildings on a zoning lot. Indeed, less than two months before the

BSA's 2009 Resolution in which it first adopted its position here, that agency took a contrary position, affirming DOB's Stop Work Order that required the developer to show that certain rooftop space would be accessible to all residents of the zoning lot. *See supra* at 21-22.

Even after the 2009 Resolution, and with respect to the very project in this case, DOB twice required that open space be accessible to and usable by all residents of the zoning lot, shifting its interpretation of the statute as necessary to accommodate PWV and JHL's project. *See supra* at 22-24. Additionally, in testimony before BSA in this case, Kurt Steinhouse, then Assistant General Counsel of DOB, clearly recognized the common access requirement:

> [A]s stated in *144 North 8th Street*, Zoning Resolution 12-10 requires that open space be useable and accessible by all persons occupying a dwelling unit or a rooming unit ... on the zoning lot as demonstrated in approved plans.

(A312).

Far from requiring deference, DOB and BSA's shifting positions "require reversal on the law as arbitrary." *Richardson v. Comm'r*, 88 N.Y.2d at 40

II.

THE ZONING RESOLUTION PLAINLY AND UNAMBIGUOUSLY REQUIRES THAT ALL OPEN SPACE BE ACCESSIBLE TO AND USABLE BY ALL RESIDENTS OF THE ZONING LOT

A. The Text of the Zoning Resolution Clearly and Unambiguously Prohibits the Balkanization of Open Space

This Court has stated over and over again that "when, as here, a statute is free from ambiguity and its sweep unburdened by qualification or exception, we must do no more and no less than apply the language as it is written." *Zaldin v. Concord Hotel*, 48 N.Y.2d 107, 113 (1979); *see also*, *e.g.*, *Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017) (same); *Simon v. Usher*, 17 N.Y.3d 625, 628 (2011) (same).

The meaning of the operative language here could not be more clear: "Open Space" is space that is accessible to and usable by all residents of a zoning lot. The precise words are as follows:

> "Open space" is 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 (hashtags indicate a defined term) (underlining added). These words have not changed since the Zoning Resolution was first enacted in 1961. They are written in plain English. They are unambiguous. There is nothing at all in the text

of the Zoning Resolution that contradicts this definition, or conflicts with it, or is even inconsistent with it.

BSA's 2009 Resolution adopted DOB's clearly erroneous statement that "the ZR does not specify that open space on a multiple building zoning lot must be shared space that is commonly accessible to all occupants of the zoning lot" (A78), and PWV's equally erroneous argument that "neither ZR §§ 12-10, 23-14, nor any other provision of the Zoning Resolution, expressly concerns a condition involving multiple buildings on a zoning lot, nor requires that open space on a multi-building zoning lot be shared space that is commonly accessible to all the occupants of a zoning lot" (A80). Respondents repeatedly reiterate these statements here.

However, the language of the provision at issue and the history of the Zoning Resolution flatly contradict them. To say that the open space must be "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot" is no different from saying that it must be common space, shared by all those persons. The definition need not use the precise words "common" and "shared" to make absolutely clear that the space must, in fact, be common and shared. A space accessible to all is a common space. No matter how many times Respondents say otherwise, these words are unequivocal. There can be no other interpretation.

B. Respondents' New-Found Plain Language Argument Should Be Rejected

"[I]t is ... a bedrock principle of administrative law that a "'court, in dealing with a determination ... which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency'."' *Nat'l Fuel Gas Distrib'n Corp. v. PSC*, 16 N.Y.3d 360, 368 (2011) (citations omitted); *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 593 (1982). The BSA, in the decision appealed from, did not make any argument based on the text of the Zoning Resolution; nor did it point to any specific language in the Zoning Resolution that gave rise to ambiguity. Respondents' re-write of the statute – presented for the first time on their motion for leave to appeal to this Court – is an attempt to rehabilitate the BSA's decision on a ground not mentioned by that agency, and as such it cannot be the basis for reversal of the Appellate Division's decision.

But "[t]he most glaring problem with [Respondents'] interpretation ... is that it is decidedly not what the statute says." *Samuelsen v. New York City Tr. Auth.*, 101 A.D.3d 537, 541 (1st Dept. 2012). Moreover, even if accepted, it would not help them.

After its loss in the Appellate Division, PWV retained new counsel, who first appeared on PWV's motion to the Appellate Division for leave to appeal.

Recognizing that Respondents' interpretation of the statute had a gaping hole, they went in search of a new textual argument. What they came up with was a disquisition on the meaning of the indefinite article "a" and a reading of the phrase "all persons occupying a dwelling unit or a rooming unit on the zoning lot" that is contrary to any English-speaker's understanding of the language.

PWV's argument is that "the phrase 'a dwelling unit ... on the zoning lot' may reasonably be construed as 'any number of dwelling units,' on the zoning lot or 'at least one dwelling unit' on the zoning lot." PWV Br. at 41. Substituting "any number of dwelling units" or "at least one dwelling unit" for "a dwelling unit," as PWV suggests, the statutory language reads:

> "Open space" is that part of a #zoning lot# ... which .... is accessible to and usable by all persons occupying <u>any number of</u> #dwelling unit<u>s</u># ... on the #zoning lot#.

or

> "Open space" is that part of a #zoning lot# ... which ... is accessible to and usable by all persons occupying <u>at least one</u> #dwelling unit# ... on the #zoning lot#.

In other words, access and use of the open space must be guaranteed not only to all persons who occupy a single dwelling unit on the zoning lot, but also to persons who occupy two or three or more dwelling units on the zoning lot – assuming there are any such persons. Surely, this is not what PWV has in mind.

The fact is that even after Respondents' alchemical transformation, the statutory language does not mean what Respondents say it means. Yes, as PWV says, "there are 'any number of dwelling units' and 'at least one dwelling unit' that have access to the open space accounted for in the DOB decision to approve the plan." PWV Br. at 41. However, the meaning of the phrase at issue turns on the words "all persons," not on the indefinite article "a." Even as re-written by PWV, that phrase requires that open space be accessible not only to those persons who live in 808 Columbus, but to "all persons who occupy any number of dwelling units" or "at least one dwelling unit" on the zoning lot – including the tenants in the other three buildings on the zoning lot.

In short, PWV's re-write doesn't get it where it needs to go. It is also inconsistent with the language and purpose of this provision: to require that open space on multi-building zoning lots be common, centralized space.

C. Respondents' Argument Concerning Courts, Yards and Roofs Fails

Respondents argue that the fact that courts, yards and roofs are defined as "Open Space" conflicts with that same definition's requirement that open space be accessible and usable by all residents of the zoning lot.

It does not. Respondents do not dispute that on zoning lots that have only one building, in order to count as "Open Space," such space must be accessible

to and usable by all residents of that building. If 808 Columbus were on its own zoning lot, its roof garden could count as open space, because it is accessible to all residents of the building. The Zoning Resolution was written to encourage the development of such commonly accessible and usable spaces.

Conversely, if the roof garden belonged to an individual penthouse, it could not be counted as "Open Space," because even under Respondents' interpretation, all residents of <u>at least one building</u> must have access to open space for it to count. Private back yards, accessible only to the occupants of the ground-floor dwelling unit of a multi-unit townhouse, would also not count as open space, even under Respondents' interpretation. As the Appellate Division stated, the fact that there are courts, yards and rooftops that cannot be counted toward the open space requirement does not make the law ambiguous. (A409).

D. Respondents' New Policy Argument Is Made Out of Whole Cloth

1. The Alleged Policy Problem Described

Lacking any argument based on the zoning text, Respondents argue over and over that the clear and unambiguous meaning of the words of the Zoning Resolution should be overridden because "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." BSA Br. at 25.[23]

According to Respondents, this policy problem exists as a result of a 1977 amendment to the Zoning Resolution. When the definition of "Open Space" was drafted in 1961, the Zoning Resolution did not allow for the merger of zoning lots with different owners absent a long-term lease. In 1977, because of issues about such leases that, as the City concedes, "had nothing to do with open space," the Zoning Resolution was amended to allow zoning lots consisting of tax lots with different owners. BSA Br. at 9; *see also* A152 (explaining the reason for the 1977 amendment). However, the Legislature made no change in the definition of "Open Space" – nor has it done so in the ensuing decades.

Respondents reason that this was an "omission [that] created an ambiguity in the Zoning Resolution," because there now exist merged zoning lots that have buildings with private open spaces, and it cannot be that those zoning lots are illegal. As BSA Chair Perlmutter put it, "where you've got a big zoning lot that's made up of lots and lots of unrelated tax lots, ... I'm not letting you into the backyard of my townhouse, just forget it, right. So how does that work?" (A297; *see also* A121). How that works, however, is not a question that was before the BSA. Indeed,

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[23] *See also id.* at 1, 2, 17, 22, 25, 32, 33, 41, 44-45

in its decision, it did not even mention this supposed problem. Nor has it ever come up in any case in the 42 years since 1977.

Respondents' suggestion that the requirement of common accessibility was repealed by implication must be rejected. "[I]t is well settled that '[r]epeal or modification of legislation by implication is not favored in the law,'... and that the doctrine will 'be resorted to only in the clearest of cases.' ... [M]odification of a statutory provision by later enactment will not generally be implied unless they are so inconsistent that both cannot be given effect." *NRDC v. N.Y.C. Dep't of Sanitation*, 83 N.Y.2d 215, 222-23 (1994); *see also, e.g., Town of Brookhaven v. N.Y. State Bd. of Equalization & Assessment*, 88 N.Y.2d 354, 361 (1996) (same); *Cimo v. State*, 306 N.Y. 143, 148-49 (1953) (same). That is not the case here.

2. The Ballooning Scope of the Alleged Policy Problem

Before the BSA, the Supreme Court, and the Appellate Division, Respondents themselves repeatedly presented the policy problem as a limited one that arose in "height-factor districts," residential districts R-6 through R-9 and their commercial equivalents, "in connection with zoning lots that are under multiple ownership and contain one or more existing residential buildings and would be developed with a newly constructed residential building that ... are ... purchasing unused floor area from the existing buildings." (A328 [testimony of PWV's attorney-expert Albert Fredericks]); *see also*, *e.g.*, statements by BSA Chair

Perlmutter discussing merged zoning lots (A285, A297); BSA 2015 Resolution (A121) ("JHL states that this situation arises most frequently in connection with merged zoning lots").

The R-6 through R-9 districts are higher density residential districts where zoning lots often do not use their maximum allowable floor area, and where zoning lot mergers can therefore permit much taller buildings than would otherwise be allowed. Also, in these districts the amount of allowed floor area increases with the proportion of the lot that is kept as common open space. This incentivizes the creation of common open space. (SA17). In contrast, in lower density residential districts there is little or no benefit to a developer from merging zoning lots.

After PWV retained new counsel, Respondents' estimation of the magnitude of the policy problem ballooned. On PWV's motion for leave to appeal, Mr. Colgate argued that the Appellate Division's decision would have cataclysmic consequences throughout much of the City. (SA3-4, SA5-9). According to Mr. Colgate, the decision affected not just R-6 through R-9 districts, but low-density districts as well – indeed, fully 32 zoning districts that "comprise almost the full range of the City's zoning districts that allow residential uses." (SA3-4).[24]

[24] Waxing ever more hyperbolic, Mr. Colgate claimed, citing *Parkview Assoc. v. City of New York*, 71 N.Y.2d 274 (1988), that the Appellate Division's decision would put buildings "at risk of adverse consequences, including a Court order requiring

Because the record lacked even a shred of evidence to support Respondents' new-found contention that the Appellate Division's reaffirmation of existing law will have negative consequences for most residential neighborhoods in the City, Mr. Colgate set about to remedy this deficit by doing "research as to building developments that relied upon the long-standing interpretation of 'open space' that [the Appellate Division] has now overturned." (SA9). This "research" turned up three examples. On examination, not one of the three supported Mr. Colgate's contentions.

All three examples were relatively recent single-family developments in Staten Island – about as far as one could get within New York City from the high-density residential district scenario that Respondents had previously cited as allegedly posing a problem. But there was a reason – and not a legitimate one – why these single-family developments were submitted to DOB as single zoning lots rather than having a separate zoning lot for each house: two of the three (504-514 Weser Avenue and 733-739 Leverett Avenue) were approved based on the developers' misrepresentations to DOB, and not on DOB's alleged "long-standing

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that all or portions of the building be demolished." (SA7). This is absurd scaremongering. *Parkview* was a unique case that involved bad faith on the part of the developer. *Id.* at 279, 282. No New York court has ever ordered the demolition of any building, much less an occupied building, for a zoning violation absent serious wrongdoing by the owner.

interpretation" that open space on a single zoning lot could be privatized. The developers had misrepresented to DOB that the open space would be accessible to all residents of the zoning lot, and these developments were approved on that basis, only to be subdivided later. They misrepresented because in each case one of the individual buildings did not have enough open space to be approved on its own zoning lot. (SA24-27). Even Respondents' interpretation requires that each house have enough open space so that it would be legal if it were on its own zoning lot – a condition that these developments did not meet. Therefore, they are illegal even under Respondents' interpretation. Mr. Colgate's reply affirmation conceded as much, as he had no rebuttal to these points. (SA55-57). Mr. Colgate's third Staten Island example, too, raised serious unresolved questions.

On the other hand, contrary to what Respondents now contend (BSA Br. at 35; PWV Br. at 43), these developments of single family homes would be perfectly legal if each of the houses in them had enough private space around it to comply with the Zoning Resolution. Each house could then be on its own lot. The common sense reading of the statute does not make such developments illegal.

3. Respondents' Interpretation Is New, Not "Long-Standing"

The record also negates Respondents' new assertion that the Appellate Division's decision overturned "DOB's long-standing interpretation." PWV Br. at 32, 34; *see also* SA3-4, SA7, SA9-10. The evidence shows that with the exception

of the BSA's 2009 and 2015 Resolutions and the DOB Determinations that they affirmed, both agencies have consistently held that open space must be "accessible to and usable by" all residents. *See supra* at __. This was even the position of DOB's counsel at the hearing in this case.

Furthermore, in its 2015 Resolution, the BSA itself stated that DOB and BSA only adopted the allocation theory in 2009: "[I]n the course of the 2009 Appeal, the Board and DOB concluded that in the case of a multi-building zoning lot, the open space definition could be read to allow some open space to be reserved for the residents of a single building ..." (A124).

In opposing the 2009 and 2015 appeals to the BSA, neither PWV nor DOB mentioned any prior precedent whatsoever to support their building-by-building allocation theory. There is absolutely no evidence to support Respondents' claim of a long-standing interpretation.

4. This Case Does Not Present the Supposed Policy Problem

This case, certainly, does not present the alleged policy problem that Respondents claim exists: it is not about whether private space can be made common, but rather about whether common space can be made private. Indeed, in the 42 years that the current definitions of "Open Space" and "Zoning Lot" have coexisted, there has not been one single case in which a private party has sought to protect its space from access by other residents. This Court should not reverse the

Appellate Division based on an interpretation of the Zoning Resolution that is contrary to its plain language to resolve a policy problem that does not present itself in this case and as to which there is not even a shred of evidence that it even exists.

This case demonstrates the value of the kind of open space for which the definition was written: tower-in-the park projects such as Park West Village. The benefits this open space has provided to residents, and their concern about its potential loss, shows the error of Respondents' policy argument that the open spaces on such zoning lots should be divided into small parcels, each accessible only to the residents of their own building. As a result of BSA's erroneous decision in *808 Columbus*, there already is an inequitable distribution of open space on this zoning lot, with residents of that luxury building having access to all of the open space on the zoning lot whereas the residents of the other buildings only have access to part of that space. BSA's decision here, which is much more egregiously erroneous, would deprive residents of additional open space and exacerbate that inequitable distribution.

PWV wants to have its cake and eat it too: it wants the additional floor area it can get from being on a large multi-building lot, but it does not want to provide the common open space. The City Administration, too, seeks to promote infill housing. Increased density is the new watchword. But although tower-in-the-park projects have become unfashionable, they are still loved by their residents, who,

as this case illustrates, fight tenaciously to preserve their open space.[25] But if the open space requirement of the Zoning Resolution conflicts with other goals, the benefits and harms of different rules should be weighed by the Legislature, not by this Court. *Raritan*, 91 N.Y.2d at 107 ("'[T]he courts are not free to legislate and if any unsought consequences result, *the Legislature is best suited to evaluate and resolve them*.'") (emphasis in original) (citation omitted).

III.

BSA'S 2009 RESOLUTION CANNOT SAVE ITS 2015 RESOLUTION

BSA's 2015 Resolution relied entirely on its 2009 Resolution in *808 Columbus*: "[T]he Board now considers only whether the Key Terms text amendment changed the language of the text such that it now reads as the Appellant argued in the 2009 Appeal, and whether the open space requirements are changed in such a way as to implicate the proposed construction of the Nursing Facility."

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[25] Opposition by the residents of NYCHA's Holmes Towers project on Manhattan's Upper East Side also recently scotched a plan for infill housing there. *See* Patch.com, "Residents, Pols Rip NYCHA for UES Private Development Project" (Jan. 31, 2019, updated Feb. 21, 2019) (https://patch.com/new-york/upper-east-side-nyc/residents-pols-rip-nycha-ues-private-development-project); Curbed New York, "NYCHA backtracks on 50-story Upper East Side infill tower" (June 17, 2019) (https://ny.curbed.com/2019/6/17/18682077/nycha-scraps-50-story-upper-east-side-holmes-infill-tower).

(A123). BSA concluded that the 2011 Amendments "do not dictate any change in the Board's or DOB's analysis since the prior appeal." (A124)

The BSA's reliance on its prior Resolution concerning 808 Columbus was misplaced, first, because the 2009 Resolution was itself wrongly decided; and second because even if that Resolution was correct when issued, it was invalidated when the only words it had relied on were deleted by the City Planning Commission's 2011 Amendments.

A. The BSA's 2009 Resolution Was Wrongly Decided

The only sections of the Zoning Resolution that the BSA relied on in sanctioning inclusion of the luxury roof garden of 808 Columbus as counting toward the open space requirement were ZR §§ 23-14 and 23-142, which described a building-by-building methodology. The BSA did so based on the repeated arguments of DOB and PWV that "the definition of open space must be read in the context of the calculation of open space set forth in ZR §§ 23-14 and 23-142, which require a minimum amount of open space with respect to 'any building' on a zoning lot, rather than to all buildings on a zoning lot," and that "ZR §§ 23-14 and 23-142 require open space with respect to a building, rather than to the zoning lot as a whole, and therefore were satisfied by the Permit application which provides the required amount of open space to each building on the Zoning Lot." (A79-80 [underlining

added]; *see also* A155 [letter from DOB Assistant General Counsel Lisa Orrantia to BSA, Jan. 13, 2008]).

Respondents argued below that ZR §§ 23-14 and 23-142 were irrelevant to the BSA's 2009 decision. This is utterly disingenuous. It was PWV and DOB that persuaded the BSA to rely on those sections in the first place. On the other hand, PWV and DOB never argued that ZR § 12-10's definition of "Open Space" affirmatively supported their interpretation – nor could they have, because it so clearly does not. At most, they argued that the definition did not <u>preclude</u> restricting access and use, that their interpretation was "consistent with" that definition, and that the Zoning Resolution did not "explicitly prohibit[ ]" it. (A79, A80) (underlining added). Nor did the 2009 Resolution even mention of the 1977 amendment or any policy problem arising with multi-owner zoning lots. The only sections of the Zoning Resolution that the BSA mentioned as supporting its interpretation were ZR §§ 23-14 and 23-142.

The 2009 Resolution was wrong in concluding that ZR §§ 23-14 and 23-142 were inconsistent with the definition of "Open Space" or that those provisions cast doubt in any way on the definition's requirement that open space be accessible to and usable by all residents of the zoning lot. The fact that the calculation was described as being building-by-building, and that each building was described as requiring a minimum amount of space, was not even relevant to the

total amount of open space required for the zoning lot, much less to the question of who could access that space. That this is so is evidenced by the City Planning Commission's explanation in its Table 2 that the change from a building-by-building calculation to a calculation for the zoning lot as a whole was only a "clarification," not a substantive change. Meanwhile, the accessibility requirement was always and unambiguously there, unchanged.

B. The 2015 Resolution Erred in Upholding the 2009 Precedent in the Face of the 2011 Amendments

The BSA erred by refusing even to consider whether there was anything in the current Zoning Resolution that could support its interpretation and by holding that the 2011 Amendments had not effectuated a change in the law that changed the outcome mandated by its 2009 Resolution.

The 2011 Amendments surgically removed the only three words from ZR §§ 23-14 and 23-142 that the BSA had relied on in in 2009: "building on a." Moreover, contrary to Respondents' contentions, it is not true that the City Planning Commission did not explain why it removed those words. In its Table 2 summarizing the changes made by the Amendments, City Planning Commission said that this was a "[c]larification that requirements apply to zoning lot, not buildings."[26] The Commission's amendment was a specific and explicit rejection of

[26] *See supra* n.16.

the *ratio decidendi* of BSA's 2009 decision that the open space could be walled off because the calculation required "a minimum amount of open space with respect to 'any building' on a zoning lot, rather than to all buildings on a zoning lot." (A79-80) (underlining added).

The City Planning Commission was not required or expected to provide a more detailed explanation for its deletion of the key words, particularly in the context of amendments that, as the summary tables show, comprised well over 1,000 textual changes. *Lunding v. Tax Appeals Tribunal*, 89 N.Y.2d 283, 291 (1996) (where the language of the statute is clear, silence in the legislative history will not invalidate the statute); *Auerbach v. Bd. of Educ.*, 86 N.Y.2d 198, 205 (1995) (no inference may be drawn from the legislative history's silence).

Contrary to yet another new contention of PWV, *see* PWV Br. at 12, 28, 47, the deleted words "building on a" were not reinserted by the 2016 amendments. The provisions BSA relied on in 2009, ZR §§ 23-14 and 23-142, were indeed recodified and amended in 2016 as PWV states, but the relevant portions were not changed. The provision from former ZR § 23-14 is now the first paragraph of current ZR § 23-15. The provision from former ZR § 23-142 is now the first paragraph of ZR § 23-151. The fact that the word "building" occurs elsewhere in these provisions is utterly irrelevant.

Respondents repeat over and over again the mantra that the 2011 Amendments did not change the definition of "Open Space" in ZR § 12-10. But this is totally unsurprising. The BSA's 2009 Resolution did not rest, and could not have rested, on that definition. The City Planning Commission had no reason to change it, because since 1961 it has clearly and unequivocally required that open space be accessible to and usable by all residents of the zoning lot, not just some. In contrast, the Commission's deletion of the only words that even conceivably supported Respondents' interpretation definitively forecloses that interpretation.

IV.

PRINCIPLES OF COLLATERAL ESTOPPEL AND RELIANCE ARE NOT APPLICABLE HERE

A. Collateral Estoppel Does Not Apply

Respondents' principal argument below, and JHL's principal argument here, is that Petitioners are collaterally estopped from challenging the BSA's decision. As the Appellate Division stated (A400), collateral estoppel requires identity of parties, or privity between former and present parties, and identity of issues.

None of these requirements are met here. Neither Maggi Peyton the original petitioner herein, nor any of the present Petitioners were involved in any

way in the prior litigation, nor were they in privity with the petitioners therein.[27] This proceeding is also governed by different law, is about a different building and seeks different relief.

B. Reliance Is a Bogus Issue

PWV claims that it has a reliance interest based on the 2009 Resolution. For multiple reasons, this is not the case. Contrary to PWV's incantation, repeated literally 50 times over, that the 2009 Resolution approved of "an open space plan for a large zoning lot in Manhattan," PWV Br. at 1, that Resolution only affirmed DOB's approval of a permit for construction of a specific proposed building – 808 Columbus Avenue – under DOB Application No. 120797888, and nothing more.[28]

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[27] JHL's only attempt to suggest privity is in its statement that Maggi Peyton was president of the Park West Village Tenants Association ("PWVTA"). However, that Association was not a party to the 2009 BSA proceeding or the subsequent Article 78. Moreover, Ms. Peyton brought this proceeding in her personal capacity and on behalf of the Stakeholders, not PWVTA. Notwithstanding the remark of the Appellate Division (A384), there is also nothing in the record to support JHL's suggestion, *see* JHL Br. at 10 n.3, that many of the Petitioners are members of the PWVTA. These vague insinuations find no support in the record.

Moreover, even if they were true, they could not support a finding of privity. Petitioners in this proceeding and the previous proceedings regarding 808 Columbus Avenue are united not by any legal relationship that would give rise to privity, but by a concern with a public issue that, as Comptroller Stringer said, has "wide-reaching policy implications for the way we regulate building form and preserve neighborhood character in New York City." (A73).

[28] The decretal paragraph of that Resolution recites:

> *Therefore it is Resolved*, that the instant appeal, seeking a reversal of the determination of the Manhattan Borough Commissioner, dated

The BSA does not approve "open space plans" in the abstract. As it states on its own website, it "can only act upon specific applications brought by landowners or interested parties who have received prior determinations from [the Department of Buildings or other specified agencies]. The Board cannot offer opinions or interpretations generally."[29]

Moreover, as the BSA noted, "the Owner states that the footprint of a community facility building at 125 West 97th Street, which was not designed at the time of the 2009 Appeal, was never necessary for the required open space." (A124). In other words, the fact that the zoning diagram before the BSA in 2009 showed a footprint for a possible community facility was completely irrelevant to BSA's decision to allow the rooftop gardens of 808 Columbus as open space.

Finally, even if the BSA had approved an "open space plan," PWV and JHL would not have been protected against subsequent changes in the law unless they had been granted a permit for the proposed nursing home and completed the foundation of that building. ZR § 11-331. That scenario is far from this case.

> November 10, 2014, to uphold the approval of DOB Application No. 120797888 is hereby denied.

(A125).

[29] https://www1.nyc.gov/site/bsa/about/about.page

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Appellate Division, annul the 2015 Resolution of the BSA, and revoke the DOB permit at issue here.

Dated: Brooklyn, New York
December 24, 2019

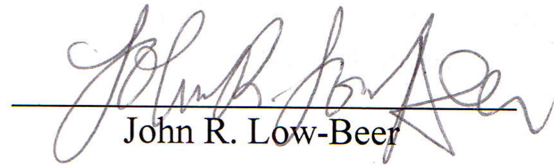
Respectfully submitted,

JOHN R. LOW-BEER
415 8th Street
Brooklyn, New York 11215
(718) 744-5245
jlowbeer@yahoo.com
Attorney for Petitioner-Respondent and Petitioners-Intervenors-Respondents

CERTIFICATE OF COMPLIANCE

The undersigned certifies that exclusive of the portions of the brief exempted by 22 N.Y.C.R.R. 500.13(c)(3), the brief contains 12,796 words.

Dated: December 24, 2019



John R. Low-Beer