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To be Argued by:
HENRY M. GREENBERG
(Time Requested: 30 Minutes)

Court of Appeals
of the
State of New York

In the Matter of the Application of
RANDY PEYTON, on behalf of the estate of MAGGI PEYTON,
Petitioner-Respondent,

– and –

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

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

– against –

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

BRIEF FOR RESPONDENT-APPELLANT JEWISH HOME LIFECARE, INC.

GREENBERG TRAURIG, LLP
Henry M. Greenberg, Esq.
Attorneys for Respondent-Respondent Jewish Home Lifecare, Inc.
54 State Street, 6th Floor
Albany, New York 12207
Tel.: (518) 689-1400
Fax: (518) 689-1499

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules of Practice of the New York Court of Appeals [22 NYCRR] § 500.1(f), Jewish Home Lifecare, Inc. ("JHL") (formerly known as "JHHA Corporation," doing business as "The New Jewish Home"), is a 501(c)(3) tax-exempt not-for profit organization. What follows are entities affiliated with JHL:

- 102 West 107th Street Corp.
- 156 West 106th Street Holding Corp.
- 2614 Kingsbridge Corp.
- Fund for the Aged Holding LLC
- Fund for the Aged, Inc.
- Geriatric Career Development Program, Inc.
- Harry and Jeanette Weinberg Gardens, Housing Development Fund Company, Inc.
- Harry and Jeanette Weinberg Riverdale House, Housing Development Fund Company, Inc.
- Jewish Home Lifecare, Care Management LLC
- Jewish Home Lifecare, Community Services
- Jewish Home Lifecare, Harry and Jeanette Weinberg Campus, Bronx
- Jewish Home Lifecare, Home Assistance Personnel, Inc.
- Jewish Home Lifecare, Manhattan
- Jewish Home Lifecare, Sarah Neuman Center, Westchester
- Jewish Home Lifecare, Spectrum Services, Inc.
- Jewish Home Lifecare, University Avenue Assisted Living, Inc.
- JHL Corporate Services, Inc.
- Kenneth Gladstone Building, Housing Development Fund Company, Inc.
- Kittay House, Jewish Home Lifecare, Inc.
- Lifecare Property Holding Corp.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases:

State Cases:

Statutes:

PRELIMINARY STATEMENT

This article 78 proceeding is a challenge under the Zoning Resolution of the City of New York ("Zoning Resolution" or "ZR") to the New York City Department of Building's ("DOB") decision to grant a building permit to Appellant-Respondent Jewish Home Lifecare, Inc. ("JHL") to construct a nursing home on land that is currently owned by PWV Acquisition, L.L.C. ("PWV Acquisition") and located at 125 W. 97th Street in Manhattan (the "Proposed Facility").[1] By reversing a judgment from Supreme Court that upheld a resolution of the New York City Board of Standards and Appeals' ("BSA"), which itself upheld a decision by DOB, the Appellate Division, First Department prohibited construction of the Proposed Facility and annulled JHL's building permit. The Appellate Division erred, however, by (1) declining to invoke the doctrine of collateral estoppel to preclude this lawsuit and (2) overturning BSA's and DOB's longstanding interpretation of the ZR's "open space" mandate.

The open space mandate requires that a certain amount of square footage on every residential zoning lot be accessible space that is open and unobstructed from

[1] Amendments to the Zoning Resolution enacted in 2016, among other things, changed certain bulk regulations applicable to the nursing home, requiring either design changes to the building presented in JHL's permit application submitted to DOB for the nursing home or a special permit. See ZR §§ 24-013(a), 23-155, 23-662, 74-903. JHL has determined that it no longer intends to proceed with the Proposed Facility, as originally designed, and is considering other options for a facility that would serve older adults at this site, but has not yet determined whether it would proceed to construct such a facility.

its lowest level to the sky — such as certain courts, yards, and rooftops. Notwithstanding various changes to the ZR over the past ten years, both DOB and BSA have consistently interpreted the ZR to allow certain areas reserved for the exclusive use of the residents of a single building on a multiple building zoning lot to be included in the zoning lot's open space calculation — especially where, as here, the separate buildings are controlled and operated by different owners. Petitioners disagree. They claim that to constitute "open space" under the ZR, such space must be accessible to the residents of all buildings situated on the same zoning lot.

In 2009, BSA finally and conclusively confirmed its interpretation of the ZR and applied it to the very same zoning lot at issue here, rejecting Petitioners' contention that the rooftop space at the residential building proposed to be built at 808 Columbus Avenue must be accessible to tenants and residents of the three other apartment buildings already situated on the same lot. After an article 78 proceeding challenging BSA's determination settled, and was thereafter dismissed with prejudice, the building at 808 Columbus Avenue was constructed as proposed.

Petitioners now seek to use the rooftop space at 808 Columbus Avenue as a weapon to halt the construction of any new building on the subject zoning lot, including the Proposed Facility. But this they cannot do.

It is undisputed that the Proposed Facility's design would neither require additional open space nor alter in any way the amount of minimum open space required on the lot. Further, petitioners make clear that they are not seeking to change the status of 808 Columbus Avenue, averring that that building is "grandfathered" under the ZR. Nevertheless, they seek to relitigate the rooftop space at 808 Columbus Avenue but — importantly — only for purposes of the Proposed Facility. Petitioners, however, cannot have it both ways. There is one zoning lot at issue with a single open space ratio requirement. Nowhere does the ZR allow for differing calculations of the zoning lot's open space ratio depending on the scenario, the circumstances presented, the building at issue, or the entity calculating the ratio. Put simply, the ZR's open space scheme necessitates that BSA's 2009 determination is dispositive of the issues presented in this proceeding.

The Appellate Division bent over backwards to make sense of petitioners' illogical position, straining credulity in declining to invoke the doctrine of collateral estoppel to bar petitioners' claims. While all but conceding that the traditional factors needed to invoke the doctrine are satisfied here, the Appellate Division relied on a confused understanding of the flexible nature of the doctrine and considerations inapplicable under the circumstances to disregard the preclusive effect of BSA's 2009 determination.

Moreover, while acknowledging that BSA — the ultimate administrative authority charged with enforcing the ZR — is comprised of experts in the fields of land use, zoning, and planning, the Appellate Division refused to afford these zoning experts' practical construction of the open space mandate the deference it is due under the law. Rejecting findings of ambiguity by DOB, BSA, and Supreme Court, the Appellate Division concluded that the ZR's definition of open space is somehow clear and unambiguous. On that basis, the Appellate Division, by a 3-1 vote, took it upon itself to reinterpret the ZR's open space mandate as requiring that all residents of all buildings on a zoning lot must be able to access all required open space on the zoning lot.

The Appellate Division's reasoning, however, cannot be squared with the bedrock principle of administrative law that interpretations of a statute by an agency charged with its administration are entitled to judicial deference and may not be set aside unless shown to be unreasonable or irrational. While a court is not bound by an agency's interpretation where the statutory language is clear and unambiguous, that narrow exception to the fundamental rule of deference is not implicated here. To be sure, the very existence of Justice Peter Tom's dissent — where he cogently analyzed the provisions of the ZR relied on by the Appellate Division and found them to be "ambiguous," "unclear and conflicting," "internally inconsistent," and

"susceptible to conflicting interpretations" — belies the foundation upon which the Appellate Division's decision is based.

Since issuance of the 2009 Resolution, residents and businesses have relied on DOB and BSA's interpretation of the open space mandate, acted accordingly, and had every reason to expect courts would give the 2009 Resolution the preclusive effect it requires or, at the very least, accord the City's zoning experts the deference they were due under bedrock principles of administrative law. The Appellate Division's decision shatters these expectations. Additionally, the Appellate Division's decision would reduce this Court's recent unanimous decision in *Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416 (2017), to dictum. There, this Court rejected attempts to annul the New York Department of Health's ("DOH") approval of the Proposed Facility pursuant to the State Environmental Quality Review Act, ECL Article 8 ("SEQRA"), noting that it is not the prerogative of the judiciary to substitute its judgment for that of other governmental entities and, ultimately, finding that DOH fully complied with all aspects of SEQRA. *Id.* at 424, 430.

Accordingly, the Appellate Division's order should be reversed.

QUESTIONS PRESENTED

1. Whether petitioners are precluded from relitigating issues of open space at 808 Columbus Avenue under the doctrine of collateral estoppel?

The Appellate Division erred by answering no.

2. Whether deference should be accorded to an interpretation of the ZR's open space provisions by DOB and BSA — the two administrative agencies entrusted with the responsibility of enforcing the ZR?

The Appellate Division erred by answering no.

STATEMENT OF THE CASE

A. Relevant Statutes

The Zoning Resolution regulates and establishes limits on land use and development, by requiring, among other things, open space in residential areas. "Open space" does not mean parkland or public space, but rather is a term of art defined in ZR § 12-10 as follows:

> [T]hat 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 (omitting "#" symbols).[2] However, § 12-10 explicitly provides that open space "may . . . include areas covered by roofs, the total area of which is less than

[2] Unless otherwise specified, all citations to sections of the ZR reference provisions of the ZR in effect at the time JHL submitted its building permit for the Proposed Facility. The ZR has been amended multiple times, including, as noted above, in 2016.

10 percent of the unroofed or uncovered area of a zoning lot, provided that such roofed area is not enclosed on more than one side, or on more than 10 percent of the perimeter of the roofed area, whichever is greater." Similarly, § 12-10 states that "open space may be provided on the roof of . . . [a] building containing residences" or, with some limitations, residential or nonresidential buildings.

The amount of open space required on a residential zoning lot is determined by the applicable "open space ratio" — a term of art defined in the ZR as "the number of square feet of open space on the zoning lot, expressed as a percentage of the floor area of that zoning lot." ZR § 12-10. Section 12-10 provides the following example of how an open space ratio is applied to determine the amount of open space required for a zoning lot:

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

Tables prescribing open space ratios for various types of zoning lots are set forth in ZR §§ 23-14 and 23-142. Section 23-14 establishes "for any zoning lot, the minimum required open space or open space ratio shall be not less than set forth in this Section." ZR § 23-14 (omitting "#" symbols). Likewise, § 23-142 states that "the minimum required open space" for any zoning lot in a residential district shall

be "as set forth in the following table" for zoning lots with the height factor indicated in the following table. ZR § 23-14 (omitting "#" symbols).

Notably, certain amendments to the Zoning Resolution, referred to by the New York City Planning Commission as the "Key Terms amendments," were enacted in 2011. (Appendix With Additional Papers to the Court of Appeals ("A") 17.) The Key Terms amendments do not modify, clarify, or otherwise address the definition of open space or what counts as open space." They do, however, confirm the generally accepted notion that the amount of required open space must be based on the size of the zoning lot as a whole. (A26.) Specifically, prior to the Key Terms amendments, ZR § 23-14 provided that, "for a building on a zoning lot, the minimum required open space or open space ratio shall not be less than set forth in this Section" (omitting "#" symbols). In contrast, the amended version states that, "for any zoning lot, the minimum required open space or open space ratio shall not be less than set forth in this Section" (omitting "#" symbols).

B. <u>The Proposed Facility</u>

JHL is a nonprofit that provides health care and other assistance for 10,000 older adult and disabled New Yorkers. (A385.) JHL currently operates in Manhattan a 514-bed nursing home comprised of outdated buildings. The instant proceeding arises from JHL's efforts to construct a new nursing home — the Proposed Facility — on land that is owned by PWV Acquisition. (A139-140.)

The zoning lot for the Proposed Facility is currently improved with four residential buildings. Three of the residential buildings are collectively called "Park West Village" and under common control. The fourth residential building — the 808 Columbus Avenue condominium building ("808 Columbus Avenue") — is under separate ownership and control. (A153, A384-385.)

C. The 808 Columbus Avenue Dispute

This proceeding seeks to collaterally attack a 2009 resolution from BSA (the "2009 Resolution") that conclusively and finally resolved a dispute first raised by one of the Petitioners, the Park West Village Tenants' Association ("PWVT"), with respect to 808 Columbus Avenue. (A384-385.) The PWVT challenged issuance of a building permit for 808 Columbus Avenue, arguing then (as now) that gardens on the roof of a one-story commercial extension of the otherwise residential building at 808 Columbus Avenue did not qualify as "open space" under the ZR because, while they are accessible to all residents of that building, they would not be accessible to the tenants and other residents of the three other Park West Village apartment buildings situated on the same zoning lot. (A386-387.) According to PWVT, all open space on this multi-building zoning lot must be accessible to all residents of all residential buildings on the zoning lot to qualify as open space under the ZR. (A386-387.)

The 2009 Resolution rejected these arguments, expounding that the rooftop gardens of 808 Columbus Avenue qualified as "open space" under the ZR because the tenants of each of the residential buildings on this zoning lot had access to an amount of open space that exceeded the minimum amount that would be required under the ZR if each building was located on its own separate zoning lot. (A124-125.) The only Article 78 proceeding that was commenced to challenge BSA's determination, *Bunten v. N.Y.C. Board of Standards and Appeals*, Index No. 102750/09 (Sup. Ct. N.Y. Co.), settled in July 2009 and was dismissed with prejudice thereafter. (A417.)

D. JHL Obtains a Permit to Construct the Proposed Facility

In November 2014, DOB's First Deputy Commissioner, who is a registered architect and zoning expert, issued JHL a permit to construct the Proposed Facility. (A115.) Notably, the Proposed Facility did not trigger a requirement to provide additional open space as defined by the ZR, and the question of whether the buildings on the zoning lot, as a whole, complied with the open space mandate did not depend on the Proposed Facility. (A124.) Nevertheless, Petitioner Maggi Peyton[3] appealed DOB's decision to BSA, contending that JHL failed to meet the open space

[3] Maggi Peyton, the original sole petitioner who brought the instant proceeding, died while the appeal in this case was pending. This Court permitted her son, Randy Peyton, to continue to maintain this proceeding on behalf of Ms. Peyton's estate. This Court also permitted additional petitioners, many of whom live in Park West Village and are members of the PWVTA, to intervene in this proceeding to prosecute the appeal. (A384.)

requirements under the ZR, as amended in 2011. (A115-125.) Petitioner Peyton reprised the very argument rejected as part of the 2009 Resolution — namely, that the rooftop gardens at 808 Columbus Avenue, which now exist, do not qualify as "open space," and that the Proposed Facility therefore would violate the ZR by diminishing the allegedly inadequate amount of qualifying open space already present on the zoning lot. (A118.) It is undisputed that the subject zoning lot requires a total of 230,108 square feet of open space. It is further undisputed that, with or without the Proposed Facility, the subject zoning lot contains more than enough square footage of open space but only if the rooftop garden at 808 Columbus Avenue is included in the calculation.

BSA, which is comprised of five zoning experts, held public hearings and considered testimony and written comments. (A18-19.) By resolution dated August 15, 2015, BSA denied Petitioner Peyton's appeal, finding that certain amendments to the ZR in 2011 did not change the open space requirements or otherwise affect the propriety of the 2009 Resolution, given that the definition of "open space" in ZR § 12-10 had not been amended. (A119.) BSA adhered to its earlier determination "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 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 under ZR § 23-142 if each building

were on separate zoning lots." (A124.) Thus, because the Proposed Facility did "not require additional open space," BSA concluded that the Proposed Facility did not "disturb[ ] the existing open space calculations for the entire site" or otherwise violate the open space requirements (the "2011 Resolution"). (A124, A420.)

E. Supreme Court's Decision

In response, Petitioner Peyton commenced this proceeding against BSA, JHL, and PWV Acquisition, seeking to annul the 2011 Resolution on the theory that the rooftop area of 808 Columbus Avenue should not qualify as open space for the purposes of the Proposed Project, and to revoke the permit for the Proposed Facility. (A12-29.)

By decision and order dated July 26, 2016, Supreme Court, New York County (Lobis, J.), held that the 2011 Resolution was rational and denied the petition and dismissed the proceeding. Without reaching the issue of preclusion, Supreme Court deferred to DOB's "practical construction" of the ZR because the open space provisions were ambiguous and open to different interpretations. Supreme Court explained:

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

> text amendments to ZR §§ 23-14 and 23-142 undercut BSA's reliance on the pre-2011 language of those sections to support its conclusion that open space can be allocated among individual buildings on a multi-building zoning lot, the 2011 amendments do not unambiguously alter the meaning or measurement of open space as interpreted by BSA.

(A26-27.)

F. The Appellate Division's 3-1 Decision

By a 3-1 vote, the Appellate Division, First Department, reversed and granted the petition to the extent of annulling the 2011 Resolution and JHL's permit. Through an opinion by Justice Jeffrey K. Oing, the majority of the Appellate Division declined to deem the petition a collateral attack on the 2009 Resolution. The Appellate Division further found the statutory definition of "open space" in ZR § 12-10 to be "clear and unambiguous," requiring that open space be "accessible and usable by all residents on a zoning lot," thus disqualifying the 808 Columbus rooftop gardens from being counted as open space. (A408.)

In dissent, Justice Tom explained that the petition improperly seeks to relitigate the issue of whether 808 Columbus Avenue complied with the ZR's open space requirement — something that was conclusively decided years ago as part of the 2009 Resolution. Nevertheless, Justice Tom went on to carefully analyze the provisions of the ZR relied on by the Appellate Division and found them to be "ambiguous," "unclear and conflicting," "internally inconsistent," and "susceptible to conflicting interpretations." (A430-435.) Thus, Justice Tom argued, deference

was owed to the City's zoning experts' "practical construction" of the open space mandate. (A431-432.) Justice Tom concluded that BSA rationally determined that the best practical interpretation when, as here, faced with multiple buildings under different ownership and control on a single zoning lot, "is to permit 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, and residents of each building on the lot have access to at least the amount of space that would be required if each building were on a separate lot." (A430.)

ARGUMENT

I. PETITIONERS ARE PRECLUDED FROM RELITIGATING ISSUES OF OPEN SPACE AT 808 COLUMBUS AVENUE UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

The Appellate Division's refusal to apply the doctrine of collateral estoppel to bar this article 78 proceeding evidences a misinterpretation of the doctrine with respect to administrative determinations, a fundamental misunderstanding of the ZR's open space scheme, and confusion surrounding the concept of lawful nonconforming use.

A. The 2009 Resolution has Preclusive Effect Under the Doctrine of Collateral Estoppel

As a threshold matter, the 2009 Resolution's determination is final and binding, and has preclusive effect under the doctrine of collateral estoppel. BSA determined back in 2009 that the open space requirement of Zoning Resolution § 23-

14 is not violated by reservation of the rooftop open space at 808 Columbus Avenue for the exclusive use of the residents of that building. (A77-83.) DOB had approved this reservation in issuing a permit authorizing the construction of 808 Columbus Avenue, and this determination was appealed to BSA by residents of Park West Village and a number of elected officials. In its February 3, 2009 decision on that appeal (A78-83), BSA upheld DOB's determination, concluding that "as each of the existing buildings is allocated an amount of open space that is in excess of that which would be required under the Zoning Resolution if they were located on separate zoning lots, it cannot be seen how those residents would be deprived of an equitable share of open space by the proposed building" (A80 (emphasis added).)

The only article 78 proceeding that was commenced to challenge BSA's determination, *Bunten v. N.Y.C. Board of Standards and Appeals*, Index No. 102750/09 (Sup. Ct. N.Y. Co.), settled in July 2009 and was soon thereafter dismissed with prejudice.

It is well settled that collateral estoppel, or issue preclusion, gives conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal. *See Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 500 (1984). Here, while

suggesting that these basic prerequisites would likely be satisfied, the Appellate Division, relying on this Court's decision in *Staatsburg Water Co. v. Staatsburg Fire District*, 72 N.Y.2d 147, 153 (1988), noted that even where such "formal requirements" are met a court is free to decline to apply collateral estoppel where additional considerations, such as "policy considerations" or "fairness to the parties," are present. (A400.)

Although the doctrine of collateral estoppel undeniably is applied more flexibly in the context of administrative decisions, such "flexibility" does not give a court carte blanche to relitigate any and all determinations of administrative agencies. The additional conditions noted by the Appellate Division are meant to provide courts with a framework to determine whether an agency's determination was quasi-judicial or, in other words, a dispositive ruling that had the effect of conclusively and finally disposing of a squarely defined controversy. In fact, in a separate decision — decided on the very same day as *Staatsburg* — this Court applied the additional conditions and held that the Public Service Commission's determination was quasi-judicial in nature because, unlike the determination at issue in *Staatsburg*, it was meant to conclusively and finally settle a squarely defined dispute. *Allied Chemical v. Biagara Mohawk Power Co.*, 72 N.Y.2d 271, 279 (1988), *cert. denied*, 488 U.S. 1005 (1989). Where an agency determination is found to be "a final decision, as opposed to merely an agency determination subject to

future modifications," any action that seeks to relitigate the issues already decided by the agency would violate the principle of collateral estoppel. *Burka v. N.Y.C. Transit Auth.*, 739 F. Supp. 814, 846 (S.D.N.Y. 1990) (citing *Allied Chemical*, 72 N.Y.S.2d at 276).

Here, the 2009 Resolution finally and conclusively determined that the roof space at 808 Columbus Avenue constituted "open space" under the ZR. Even petitioners acknowledge the finality of that determination, noting that the 42,500 square feet of open space at 808 Columbus Avenue is grandfathered under the ZR notwithstanding the 2011 amendments. (A401-402.) That said, apparent confusion concerning what the 2009 Resolution determined, and what the ZR requires, with respect to the open space at 808 Columbus Avenue appears to have led the Appellate Division to conclude that the 2009 Resolution is not quasi-judicial in nature because the issue of whether 808 Columbus Avenue's rooftop space qualifies as open space is a malleable one susceptible to differing conclusions based upon the circumstances presented. This cannot be the case.

As noted, notwithstanding the parties' contradictory interpretations of the 2011 amendments to the ZR (*see infra* at Part II), petitioners claim — and the Appellate Division agreed — that the 2009 Resolution works to "grandfather" the rooftop at 808 Columbus Avenue under the ZR's open space mandate. (A401.) Surely, as the Appellate Division explained, "Petitioners are not seeking to change

the status of [808 Columbus Avenue]." (*Id.*) In other words, even if petitioners are correct that the 2011 amendments to the ZR somehow changed the ZR's definition of open space, the rooftop at 808 Columbus Avenue continues to qualify as open space because such amendments can only apply prospectively, not retroactively. *See Hilton Hotels Corp. v. Comm'r of Fin.*, 219 A.D.2d 470, 477-78 (1st Dep't 1995) (no retroactive application where the petitioner could not have foreseen the change in the law); *Good Samaritan Hosp. v. Axelrod*, 150 A.D.2d 775, 777 (2d Dep't 1989), *lv. denied*, 75 N.Y.2d 703 (1990) ("administrative rules will not be construed to have retroactive effect unless their language requires this result") (internal quotation marks and citation omitted). Nevertheless, the Appellate Division declined to invoke the doctrine of collateral estoppel to preclude petitioners' claims, reasoning that the 2009 Resolution's determination and, as such, the open space at 808 Columbus Avenue, can somehow be reimagined now for the sole purpose of JHL's permit application. That makes no sense. If the 808 Columbus Avenue rooftop constitutes open space for the purpose of that building's compliance with the ZR open space mandate it cannot be deemed otherwise as to the JHL project which, as explained below, did not trigger additional open space requirements.

The amount of open space required on a residential zoning lot is determined by the applicable "open space ratio" — a term of art defined in the ZR as "the number of square feet of open space [on a particular] zoning lot, expressed as a percentage

of the floor area of that zoning lot." ZR § 12-10. Because it is not a residential building, the Proposed Facility does not increase the amount of open space that is required on the zoning lot. (A24.) Thus, the Proposed Facility does not change the open space ratio required for the subject zoning lot. In fact, as Justice Tom noted in his dissent, "the [Proposed Facility] will have no practical effect on the zoning lot's compliance with open space requirements, as it neither increases the overall amount of open space needed for the lot as a whole nor displaces existing open space needed to comply with the ZR." (A422.)

While petitioners accept that 808 Columbus Avenue is not violative of the ZR's open space mandate, even after passage of the 2011 amendments, it seeks to relitigate the 2009 Resolution's determination — but only in relation to the Proposed Facility. Nowhere, however, does the ZR allow for differing calculations of the zoning lot's open space ratio depending on the scenario, the circumstances presented, the building at issue, or the entity calculating the ratio. There is one zoning lot at issue with a single open space ratio requirement. 808 Columbus Avenue's rooftop is either open space for purposes of calculating the zoning lot's open space ratio or it is not. The Appellate Division's suggestion that the zoning lot's compliance with the ZR's open space mandate can be seen through two distinct and contradictory lenses — one in relation to the grandfathered status of 808

Columbus Avenue and another in relation to the Proposed Facility — finds no basis in the text of the ZR, the concept of open space generally, or logic.

B. The Appellate Division Relied on Irrelevant and Inapplicable Factors to Determine that the 2009 Resolution May be Relitigated

Highlighting the Appellate Division's error with respect to the preclusive effect of the 2009 Resolution is that court's reliance on what it views as a "substantial open space reduction" and the concept of nonconforming use as factors in favor of relitigating the open space at 808 Columbus Avenue. However, neither factor is relevant or applicable under the circumstances.

First, the Appellate Division's concern over the "substantial" open space reduction that would result from the Proposed Facility's design is misplaced. (A402.) JHL does not dispute that the Proposed Facility was designed to be 275 feet high, and use up to 20,036 square feet of open space. (A64.) As the Appellate Division noted, of that 20,036 square feet, 10,431 square feet would be an accessible roofed garden, resulting in a total net loss of open space in the amount of 9,605 square feet. (A420.) Whether this number can reasonably be considered "substantial" is not the point — if the open space at 808 Columbus Avenue is included in the open space calculation, the zoning lot would continue to satisfy the ZR's open space mandate with or without the Proposed Facility. The propriety of a reduction in open space (as long as it does not dip below the ZR's minimum open

space requirement) is not contemplated by the ZR, has not been addressed by the parties, and, accordingly, is outside the scope of this article 78 proceeding.

Further, contrary to the Appellate Division's implication, the concept of nonconforming use does not provide a basis upon which a court may decline to invoke the doctrine of collateral estoppel under the circumstances. The Appellate Division referenced *Matter of McDonald v. Zoning Bd. of Appeals of Town of Islip*, 31 A.D.3d 642 (2d Dep't 2006), for the proposition that "use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal nonconforming use, but the right to maintain a nonconforming use does not include the right to extend or enlarge that use[.]" (A402.) Although the Appellate Division did not expound on the concept of nonconforming use, the inclusion of this reference suggests that it agreed with petitioners' contention that construction of the Proposed Facility would terminate the nonconforming use of the open space at 808 Columbus Avenue by extending or expanding that space, thereby providing petitioners and the court an avenue to relitigate the issue of open space at 808 Columbus Avenue — at least with respect to the Proposed Facility. (A118 (noting petitioners' argument that "808 Columbus Avenue is insulated from any non-compliance because it is grandfathered, but a non-compliant condition cannot be expanded . . . .").)

A close examination of the policies animating the concept of nonconforming use reveals that reliance on it for purposes of avoiding the preclusive effect of the

2009 Resolution is misplaced. By way of background, the term "nonconforming use" is commonly defined to mean a use of land, building or premises that lawfully existed prior to the enactment of a zoning ordinance and that is maintained after the effective date of such ordinance, even though it does not comply with the use restrictions applicable to the area in which it is situated. *See Dalton v. Van Dien*, 72 Misc. 2d 287, 292, (1972). Unless certain factors are met, changes or amendments to zoning laws cannot be utilized to enjoin or make unlawful a nonconforming structure or use that existed when the zoning restriction became effective and has continued to exist since that time. *Id.*

Although zoning laws may not require the immediate cessation of otherwise lawful nonconforming uses, such uses may be terminated where there have been substantial physical changes which extend or prolong the life of the nonconforming use, extensive rebuilding after destruction, resumption of the use after discontinuance for a certain period, or expiration of a defined amortization period. *See, e.g.*, *Bobandal Realties, Inc. v. Worthington*, 21 A.D.2d 784, (2d Dep't 1964), *aff'd*, 15 N.Y.2d 788, (1965) (sustaining an ordinance requiring a variance for reconstruction of a nonconforming use partially destroyed by fire and which provided that a nonconforming structure damaged by fire could not be rebuilt in nonconforming form if the damage exceeded fifty percent of the volume of the structure).

Research has failed to reveal any decisions applying the concept of nonconforming use in the open space context. Even if this concept is applicable here, the Proposed Facility would not, as petitioners contend and the Appellate Division suggested, expand, and thereby terminate, the alleged nonconforming use of 808 Columbus Avenue's open space for any purpose. The question of whether a nonconforming use may be terminated focuses on the property and its use, not on tangential factors. *See Iazzetti v. Village of Tuxedo Park*, 145 Misc. 2d 78, 82 (N.Y. Sup. Ct. Orange Cty. 1989). To be sure, the Proposed Facility would not expand, enlarge, rebuild, or change in any way the open space at 808 Columbus Avenue and, in fact, will be in full compliance with the ZR's open space mandate if the open space at 808 Columbus Avenue is not terminated. (A401-402.)

Resolved to the fact that their open space arguments cannot halt the now fully constructed building at 808 Columbus Avenue, and with the Appellate Division's refusal to invoke the doctrine of collateral estoppel to preclude reexamination of these issues, petitioners are likely content to relitigate the open space at 808 Columbus Avenue each and every time construction of another building on the zoning lot is proposed. The concept of nonconforming use, however, cannot be manipulated to avoid the preclusive effect of the 2009 Resolution. Again, the open space at 808 Columbus Avenue cannot be two contradictory things at once — in this case, nonconforming for purposes of continuing that building's grandfathered status

and also terminated for purposes of the excluding that space from the open space calculation with respect to the Proposed Facility.

II. THE APPELLATE DIVISION ERRED IN REFUSING TO DEFER TO BSA'S PRACTICAL INTERPRETATION AND APPLICATION OF THE ZR'S OPEN SPACE REQUIREMENTS

Even assuming that petitioners can somehow escape the preclusive effect of the 2009 Resolution, their claims fail on the merits.

A. BSA Is an Expert Agency Whose Determination Is Entitled to Judicial Deference

It is a bedrock principle of administrative law that interpretations of a statute by an agency charged with its administration are entitled to judicial deference and may not be set aside unless shown to be unreasonable or irrational. *See N.Y.S. Ass'n of Life Underwriters, Inc. v. N.Y.S. Banking Dep't*, 83 N.Y.2d 353, 359-60 (1994) ("It is settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld.") (internal quotation marks and references omitted). Indeed, deference to an agency's interpretation of a statute it administers is appropriate even where the language at issue "does not unambiguously refute petitioner's interpretation." *Beekman Hill Assn. v. Chin*, 274 A.D.2d 161, 167 (1st Dep't 2000), *lv denied*, 95 N.Y.2d 767 (2000).

As even the Appellate Division acknowledged, BSA is made up of experts in land use and planning and, as such, its "interpretation of [the statute's] terms must

be given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute." (A403 (references omitted).) This Court has consistently noted the vital role BSA plays as the ultimate authority to enforce and interpret the Zoning Resolution and, indeed, has specifically applied the basic governing principle — *i.e.*, that statutory interpretations by the agency charged with its administration may not be set aside unless unreasonable or irrational — to determinations by expert agencies, such as BSA and DOB, charged with the administration of local zoning statutes. *See*, *e.g.*, *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418-19 (1996) ("BSA's interpretation of the [ZR's] terms 'must be given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute'").

B. The ZR's Open Space Provisions Are Ambiguous and Subject to Differing Interpretations

The gravamen of the Appellate Division's decision is that ZR § 12-10 has always clearly and unambiguously required open space to be accessible to all residents of any residential building on a subject zoning lot and that the Key Terms amendments simply "removed the contextual basis upon which BSA relied on when it determined that open space does not have to be accessible to all residents of a zoning lot." (A406.) As demonstrated by the very existence of Justice Tom's dissent, however, a reasonable interpretation of the relevant ZR provisions may also

fairly result in the conclusion that the Key Terms amendments did not eliminate the ambiguity inherent in the ZR's open space mandate. Since the ZR provisions are susceptible to multiple different interpretations, New York law is clear that BSA's interpretation is due deference. *Beekman*, 274 A.D.2d at 167.

Nowhere does the ZR expressly address the unique situation at issue in the proceeding — application of the ZR open space mandate to a single lot that contains multiple buildings under separate ownership and control, so that it is not realistic or practical to give occupants of every building access to every other parcel on the zoning lot. In fact, the history of the ZR signals clear ambiguity with regard to the definition of open space on multi-building zoning lots under separate ownership.

When the ZR was initially enacted in 1961, the drafters did not contemplate the possibility of a "zoning lot" that was comprised of multiple parcels with different owners. (A151.) Although the definition of "zoning lot" that took effect in 1961 provided that a "zoning lot may or may not coincide with a lot as shown on the official tax maps," the definition required that the entire zoning lot must be in "single ownership." (*Id.* (italics deleted).)

Therefore, as of the original 1961 effective date of the ZR, a "zoning lot," by definition, only could consist of land that was entirely under the control of a single owner or long-term lessee. (A151.) The drafters of the definition of "open space" on which the petition in this case relies thus predicated the provision's language on

the assumption that a single owner, capable of providing access to the entire zoning lot, would actually control the entire zoning lot.

In 1977, the ZR's definition of "zoning lot" was fundamentally changed by eliminating the requirement that in all cases a zoning lot be held in single 'ownership'," 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," with "such recording to be against each tax lot constituting a portion of the land covered by such declaration." (A151.) Nothing in the text of the 1977 amendment or the legislative history of the amendment indicates that any consideration was given to the effect of the amendment on the requirements for "open space" that appear elsewhere in the ZR. This omission created an ambiguity in the Zoning Resolution with regard to the definition of open space on multi-building zoning lots under separate ownership.

The Appellate Division erred in refusing to acknowledge this omission and the ambiguity it created in the ZR with regard to the definition of open space on multi-building zoning lots under separate ownership. (A403-404 n. 7.) The drafters did not contemplate the possibility that a "zoning lot" might consist of multiple parcels under different ownership and control, making it all but impossible to ensure

that all of the open space on the single zoning lot is accessible to the residents of all buildings on the zoning lot.

Contrary to the Appellate Division's contention (*id.*), BSA addressed the ambiguity caused by the 1977 amendment head-on by establishing an approach to the ZR's open space mandate by which open space to be reserved for the residents of a single building on a multi-building zoning lot will be allowed as long as (1) the total amount of open space required on the zoning lot is provided, and (2) the residents of each building on the zoning lot have access to an amount of open space that is equal to or greater than the amount that would be required if that building stood on a separate zoning lot. Nothing in the ZR expressly prohibits this practice.

Further, while the Key Terms amendments unquestionably clarified that the calculation of the amount of required open space must be based on the size of the zoning lot as a whole, they do nothing to clarify whether the rooftop space at 808 Columbus Avenue qualifies as "open space" under ZR § 12-10's definition of that term. (A26.) The prior version of Zoning Resolution § 23-14 was ambiguous as to whether the amount of required open space must be based on the size of the zoning lot as a whole, stating that "<u>for a building on a zoning lot</u>, the minimum required open space or open space ratio shall not be less than set forth in this Section" (emphasis added). In contrast, the amended version clarifies that, "<u>for any zoning</u>

lot, the minimum required open space or open space ratio shall not be less than set forth in this Section" (emphasis added).[4]

What the Key Terms amendments do not do, however, is modify, clarify, or otherwise address the definition of open space or what counts as open space in the ZR. (A26; A418-420.) As the Appellate Division conceded, the legislative history of the Key Terms amendments could easily be interpreted to indicate that in adopting the Key Terms amendments, there was no intent to alter the prior interpretation of the ZR's open space requirements. (A409 (stating that the "[t]he argument that the 2011 amendments' legislative history indicates that there was no intent to alter the use of the building-by-building ratio is arguably correct.") Indeed, the City Planning Commission's report contains an extensive discussion of the various items that the Key Terms amendments were intended to clarify or address (*see* A210-222), but is silent as to the ZR's open space requirements. Such silence indicates that there was no intention to make substantive changes to these provisions, let alone create an additional open space entitlement for residents of multiple-building zoning lots.

Here, the issue is not how much open space is required on the zoning lot, but rather, whether the rooftop space at 808 Columbus Avenue qualifies as "open space"

[4] Here, the calculation of how much open space is required on the subject zoning lot has always been calculated on the basis of the entire zoning lot — both in connection with DOB determination that BSA sustained in 2009, prior to the 2011 amendments, and the DOB determination that was sustained by BSA in 2015. (A26.)

under the definition in ZR § 12-10. As noted, the Key Terms amendments did not make any changes to the relevant language of the definition of "open space" in ZR § 12-10. That language was, and continues to be, the statutory basis for petitioners' claim that, on a multi-building zoning lot, all open space must be accessible to the residents of all buildings on that zoning lot. However, both before and after the Key Terms amendments, the definition of "open space" in ZR § 12-10 stated that "'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." To be clear, this very language was in the statute when BSA rendered its 2009 decision and was not changed by the Key Terms amendments.

Justice Tom's dissent echoes and expands on these points — demonstrating the ambiguous nature of ZR § 12-10's definition of open space. Justice Tom explained that the Appellate Division ignored the ambiguity evident when ZR §§ 12-10 is properly read in its entirety and in conjunction with the remainder of the ZR, choosing instead to focus almost entirely on the deletion of the term "building" from ZR § 23-14. (A428-431.) Indeed, a close reading of ZR § 12-10 demonstrates that the 2011 amendments left intact that open space requirements may be satisfied by rooftop space, *including roofs of community facilities and residential buildings*. (*Id.*) Moreover, ZR § 12-10 embraces yards and courts in its definition of open space,

including what is referred to as "inner courts" — defined elsewhere in the ZR as being bound by building walls or walls and lot lines. (*Id.*)

Justice Tom's dissent goes on to spell out the obvious: rooftops on residential buildings, as well as some yards and courts bound by buildings walls, are likely only accessible by residents of particular buildings on a lot — especially where, as here, the subject lot contains multiple buildings under different ownership and control. (A429.) Given the ambiguity presented by the plain language of ZR § 12-10, together with the history and context of the ZR mandate, Justice Tom properly concluded that "it is simply incorrect for the majority to state that the language under ZR § 12-10, which remains unchanged since 1961, unambiguously requires open space to be available to all residents of any residential building on the zoning lot[.]" (A433 (internal quotation marks omitted).)

In sum, the Key Terms amendments did not change the relevant statutory language in ZR § 12-10, meaning ZR § 12-10 continues to inject the very same ambiguity into the ZR open space mandate as was present when BSA issued its 2009 Resolution. Under these circumstances, BSA's interpretation of the relevant ZR provisions is due deference and cannot be said to be irrational or arbitrary and capricious.

C. The Appellate Division Misconstrued A "Narrow" Exception to The Rule That an Agency's Interpretations Are Entitled to Judicial Deference

The Appellate Division misapprehended this Court's decision in *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 102 (1997), and, in doing so, erred in refusing to accord BSA's interpretation of the ZR's open space mandate the deference it is due under the law.

In *Raritan*, this Court, by a divided vote, held that when a question "is one of pure legal interpretation of statutory terms, deference to BSA is not required." 91 N.Y.2d 98, 102 (1997); *compare id.* at 107-15 (Levine, J., dissenting) (voting to uphold challenged BSA decision even though it contravened ZR's plain language). *Raritan*'s progeny makes clear that it creates only a "narrow" exception tied to the specific facts presented in that case. *See, Matter of 151 Rte. 17M Assoc., LLC v. Zoning Bd. of Appeals of Vil. of Harriman*, 19 A.D.3d 422, 424 (2d Dep't 2005) ("a narrow but well recognized exception to this rule exists where 'the question is one of pure legal interpretation of statutory terms,' in which case deference to the zoning board is not required") (*quoting Raritan*, 91 N.Y.2d at 102). Thus, the exception presented in *Raritan* is rarely invoked to strike down decisions made by zoning agencies. *See, e.g., id.*; *see also Matter of Olson v. Scheyer*, 67 A.D.3d 914, 915 (2d Dep't 2009) (upholding local zoning board's interpretation of language in zoning ordinance). Indeed, as this Court has explained, "the

construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" and a reviewing court should "tread[] gently in second-guessing the experience and expertise of . . . agencies charged with administering statutes and regulations." *See Matter of Nat. Res. Defense Council, Inc. v. N.Y.S Dept. of Envtl. Conservation*, 25 N.Y.3d 373, 397 (2015).

Here, the narrow exception discussed in *Raritan* is not implicated. DOB and BSA are expert agencies tasked with the authority to enforce and interpret the Zoning Resolution. Additionally, various discrepancies and conflicts presented by the plain language and history of the complex and comprehensive zoning provisions at issue make clear that the ZR's open space requirement — and, specifically, it's definition of "open space" — is subject to differing interpretations. To be sure, the very existence of Justice Tom's dissent — where he cogently analyzed the provisions of the ZR relied on by the Appellate Division and found them to be "ambiguous," "unclear and conflicting," "internally inconsistent," and "susceptible to conflicting interpretations" — belies the Appellate Division's finding of clear unambiguity and, as such, its reliance on the exception discussed in *Raritan*.

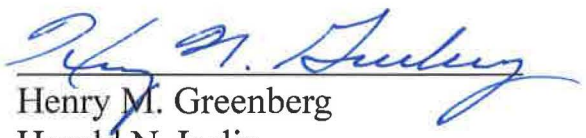
Accordingly, DOB's and BSA's interpretation of the ZR's open space mandate is owed judicial deference.

CONCLUSION

The decision and order of the Appellate Division, First Department, decided and entered on October 16, 2018, should be reversed and the certified question answered in the negative.

Dated: Albany, New York
May 24, 2019

GREENBERG TRAURIG, LLP

By: 

Henry M. Greenberg
Harold N. Iselin
Steven C. Russo
Kelly L. McNamee
54 State Street, 6th Floor
Albany, New York 12207
Tel: (518) 689-1400
Fax: (518) 689-1499
greenbergh@gtlaw.com

Attorneys for Appellant-Respondent Jewish Home Lifecare, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules of Practice of the New York Court of Appeals (22 NYCRR) § 500.13(c)(1), I hereby certify that the total word count for all printed text in the body of the brief is 8,018 words, excluding parts identified as common requirements by § 500.13(c)(3).

GREENBERG TRAURIG, LLP

Henry M. Greenberg
Attorney for Respondent-Respondent Jewish Home Lifecare, Manhattan