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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.

REPLY BRIEF FOR RESPONDENT-APPELLANT JEWISH HOME LIFECARE, INC.

GREENBERG TRAURIG, LLP
Henry M. Greenberg, Esq.
Attorneys for Respondent-Appellant 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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PRELIMINARY STATEMENT

Petitioners seek to collaterally attack the 2009 Resolution[1] — which conclusively and unambiguously determined that the rooftop gardens of 808 Columbus Avenue qualify as "open space" under the ZR — but only to the extent doing so would be beneficial to their cause. Petitioners do not quibble with the fact that the Proposed Facility's design would itself neither require additional open space nor alter in any way the amount of minimum open space required on the zoning lot. In fact, Petitioners make clear they are not seeking to change the status of 808 Columbus Avenue, averring that the open space at 808 Columbus Avenue is "grandfathered" under the ZR. Nevertheless, in asking this Court to relitigate the 2009 Resolution, Petitioners have fallen into a logical fallacy that would require the application of two disparate open space calculations to one zoning lot at the very same time — one that counts the rooftop space at 808 Columbus Avenue as open space, so as not to disturb the status of 808 Columbus Avenue, and another that refuses to recognize the exact same rooftop space as open space, but only with respect to the propriety of the Proposed Project's permit.

Petitioners' position is not only specious but also cannot be squared with applicable doctrines of preclusion. Indeed, the very purpose of the collateral

[1] Capitalized terms used herein shall have the meaning ascribed to them in the Brief for Respondent-Appellant Jewish Home Lifecare, Inc., dated May 24, 2019.

estoppel doctrine is to create consistency of judgments and predictability in implementing the results of a final resolution. Petitioners' exceptionally narrow interpretation of the doctrine would do the opposite and, specifically, would allow a string of residents of the same zoning lot a first, second, or even third bite at the apple whenever, and however, it suits their identical interests.

Further, Petitioners' arguments on the merits are grounded in a serious misapprehension of this Court's decision in *Raritan Dev. Corp. v. Silva,* 91 N.Y.2d 98 (1997). Contrary to Petitioners' expansive view of *Raritan*, that decision is not determinative here. While *Raritan* undeniably provides an exception to the general rule that interpretations of a statute by an agency charged with its administration are entitled to judicial deference where the question is one of pure legal interpretation of unambiguous statutory language, its progeny underscores the importance of applying the exception narrowly to only the most clear-cut cases. The language at issue in this case falls well short of the level of clarity in *Raritan* and, as such, does not qualify for use of the exception articulated therein.

Accordingly, for the reasons set forth herein and in Respondents' opening brief, the Appellate Division's order should be reversed.

ARGUMENT

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

The 2009 Resolution's determination 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 is final and binding, and has preclusive effect under the doctrine of collateral estoppel. (A77-83.) Petitioners and the Appellate Division conceded the finality of this determination, agreeing that the 42,500 square feet of open space at 808 Columbus Avenue is grandfathered as open space under the ZR, notwithstanding the 2011 amendments, but also contend that relitigation of this very same issue is somehow not precluded. (A401-402.) As detailed in JHL's opening brief, Petitioners cannot have it both ways. They cannot avoid the havoc that would come with the retroactive application of their (albeit, incorrect) interpretation of the 2011 amendments to the rooftop space at 808 Columbus Avenue and, at the same time, refuse to count the very same rooftop space as open space for purposes of the Proposed Facility — which itself will have no practical effect on the zoning lot's compliance with the ZR's open space mandate, 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. The brazenness of this double standard is highlighted by Petitioners'

brief in which they write off the preclusive effect of the 2009 Resolution with five conclusory sentences, one footnote, and no legal authority to support their position. (Resp. Brief, 53-54.)

Rather than grapple with the illogical and inconsistent nature of their position, Petitioners halfheartedly argue that the doctrine of collateral estoppel is inapplicable here because the Petitioners are not in privity with the parties to the 2009 BSA proceeding. (Resp. Brief, 53-54.) Contrary to Petitioners' contention, however, a finding of privity does not require parties to be "united . . . by [a] legal relationship." (Resp. Brief, 54, n. 27.) The rule in New York "eschews strict reliance on formal representative relationships in favor of a more flexible consideration of whether all of the facts and circumstances of the party's and nonparty's actual relationship, their mutuality of interests and the manner in which the nonparty's interests were represented in the prior litigation establishes" privity. *Slocum ex rel Nathan "A" v. Joseph "B"*, 183 A.D.2d 102, 104, (3d Dep't 1992); *see also Juan C. v. Cortines*, 89 N.Y.2d 659, 667-668 (1997) (noting that "the term privity does not have a technical and well-defined meaning" and further that "all the circumstances must be considered from which one may infer whether or not there was participation

amounting to a sharing in control of the litigation") (internal quotations and citation omitted).

Because Petitioners cannot dispute the overwhelming connections and overlap between the parties to this appeal and the Park West Village Tenants' Association ("PWVTA"),[2] they instead insist that such relationships cannot be used to establish privity because the PWVTA was not a named party to the 2009 BSA proceeding. (Resp. Brief, 54, n. 27.) This misses the point. As this Court has explained, privity, within the context of collateral estoppel, "is an amorphous concept not easy of application," and can be applied to a host of formal and informal relationships, including "those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are

[2] The original named petitioner to this appeal, now deceased, was the President of the PWVTA. Her son has been substituted for the purpose of prosecuting this appeal on behalf of her estate. The other petitioners represent additional overlaps with the PWVTA and the Park West Village tenants who brought the 2009 appeal to the BSA. For example, Hillel Hoffman, a current petitioner who appeared as counsel before the BSA in this case (A49, 55), is an officer of a tenant organization that brought both the appeal that the BSA decided in 2009 and the article 78 proceeding that challenged the BSA's decision on that appeal but then was discontinued (A149-A150). In addition, Winifred Armstrong, a named petitioner in this proceeding, serves on the board of the Park West Neighborhood History Group — now known as the Bloomingdale Neighborhood History Group — an additional petitioner before the BSA.

represented by a party to the action, and [those who are] co-parties to a prior action." *Cortines*, 89 N.Y.2d at 667-68 (internal quotations and citations omitted).

The PWVTA has been leading the fight against new development at Park West Village since 2006. Specifically, the record establishes that the PWVTA actively participated in, supported, and even solicited financial contributions for the 2009 BSA proceeding and appeal. (A149-150, A169-173.) In short, although not a named party to the 2009 BSA proceeding, it cannot reasonably be argued that the PWVTA's interests, on behalf of its members, were not represented in the 2009 BSA proceeding. It is well-understood that privity extends to members of a homeowners association, union, or partnership where, as here, the association's interests, on behalf of its members, were represented in the previous proceeding. *See Greens at Half Hollow Home Owners Ass'n, Inc. v. Greens Golf Club, LLC*, 39 Misc. 3d 1242(A) (N.Y. Sup. Ct. Suffolk Cty. 2013) (holding that the interests of the owners of residential units were represented in prior action brought by a homeowners association on behalf of its members); *see also Weisz v. Levitt*, 59 A.D.2d 1002, 1003 (3d Dep't 1977) (finding union member was barred from maintaining action where his interests were adequately protected in first action by union); *Buechel v. Bain*, 275

A.D.2d 65, 67 (1st Dep't 2000) (explaining that privity extends to partners comprising law firm that is party to subject contract).

Moreover, acceptance of Petitioners' position would go against the very purpose of the collateral estoppel doctrine, which is to create consistency of judgments and predictability in implementing the results of a final resolution. *See Schwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65, 69 (1969) (establishing "the sound principle that, where it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one" in order to create a "prompt and nonrepetitious judicial system") (internal quotations and citations omitted); *see also Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001) ("The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result.") Petitioners should not be allowed to resurrect — in perpetuity — the very same dispute regarding the rooftop space at

808 Columbus Avenue every time a new development on the zoning lot is proposed, simply by searching for a new neighbor to be named as a petitioner in their case.

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

Petitioners' arguments on the merits of their claims are based on a fundamental misinterpretation and misapplication of this Court's decision in *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98 (1997) and, thus, should be rejected out of hand.

Raritan involved a determination from the BSA that interpreted "cellar space" in ZR § 12-10, which provides that the "floor area of a building shall not include . . . cellar space," to be limited to only habitable cellar space. Finding the BSA's administrative construction conflicted with the "plain statutory language," which "could not be clearer," this Court, by a divided vote, articulated an exception to the general rule that administrative determinations must be afforded deference. *Raritan*, 91 N.Y.2d at 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, however, 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).

Here, as detailed in JHL's opening brief, the ZR provisions at issue are susceptible to multiple different interpretations and, as such, the exception articulated in *Raritan* cannot apply. *Beekman Hill Ass'n. v. Chin*, 274 A.D.2d 161, 167 (1st Dep't 2000), *lv denied*, 95 N.Y.2d 767 (2000). As noted by Justice Tom in his dissent, the plain language and history of the complex and comprehensive zoning provisions at issue present a number of discrepancies and conflicts and, importantly, make clear that the ZR's open space requirement — and, specifically, its definition of "open space" — is subject to differing interpretations. (A428-430.) Put simply, the language at issue in this case "falls well short of the level of clarity in [*Raritan*]." *Beekman Hill Ass'n*, 274 A.D.2d at 167 (declining to apply the narrow exception articulated in *Raritan* and affording the BSA's interpretation of ZR provisions deference where the plain statutory language was susceptible 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" (A430-A435) — belies a finding of clear

unambiguity and, as such, application of the exception discussed in *Raritan*. Accordingly, the BSA's determination should be afforded 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
January 31, 2020

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 Respondent-Appellant 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 2,127 words, excluding parts identified as common requirements by § 500.13(c)(3).

GREENBERG TRAURIG, LLP

Kelly L. McNamee
Attorney for Respondent-Appellant Jewish Home Lifecare, Manhattan