To be Argued by:
PHILIP E. KARMEL
(Time Requested: 30 Minutes)

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

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 PWV ACQUISITION, LLC

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Date of Completion: May 23, 2019

CORPORATE DISCLOSURE STATEMENT

PWV Acquisition LLC has the following affiliates, each of which is privately owned:

PWV Acquisition Owner LLC

PWV Mezz One LLC

PWV Mezz Two LLC

PWV Mezz Three LLC

PWV Mezz Four LLC

Stellar PWV LLC

CG Park West LLC

RER Park LLC

PWV Management LLC

Other affiliates through common ownership are the Chetrit Group and Stellar Management, each of which is privately owned.

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INTRODUCTION

This lawsuit concerns an open space plan for a large zoning lot in Manhattan. The zoning lot currently contains four residential buildings. Three of these buildings – collectively known as Park West Village – were constructed in the 1960s. The fourth building – a 29-story residential building with ground-floor retail uses, known as 808 Columbus Avenue – was constructed in 2009-2010 in reliance on and pursuant to a 2009 decision of the New York City Board of Standards and Appeals (the "BSA").

The 2009 BSA decision reviewed an open space plan for the zoning lot. The open space plan included and accounted for the Park West Village buildings, the proposed 808 Columbus Avenue building, and a future community facility building. The 2009 BSA decision determined that the open space plan complied with the "open space" requirements of the Zoning Resolution of the City of New York (the "Zoning Resolution").

In 2015, the BSA rejected a new challenge to the same open space plan. The 2015 BSA decision reviewed the open space plan in connection with the building permit application for the community facility building included in the open space plan the BSA had upheld in 2009.

A three-justice majority opinion of the Appellate Division overturned the 2015 BSA decision. The Appellate Division held that the BSA – when faced

with a new challenge to the open space plan BSA had approved in 2009 – should have reversed its 2009 decision and determined that the open space plan does not comply with the Zoning Resolution. The *ratio decidendi* of the Appellate Division decision is that certain language that has been in the Zoning Resolution's definition of "open space" since 1961 is "clear and unambiguous" and should be read as mandating that all open space on a multi-building zoning lot be accessible to every resident in every building on the zoning lot.

This Court should reverse, and hold that there was a rational basis for the 2015 BSA decision.

QUESTIONS PRESENTED

1. Whether the Zoning Resolution requires a rooftop area to be accessible to all person residing in each of the dwelling units on a multi-building zoning lot for that area to be deemed "open space," where the statutory definition of that term states that "open space" must be accessible to all persons occupying "a" dwelling unit on the zoning lot and allows a rooftop area to be "open space" if it is accessible from "a" building on the zoning lot?

The Appellate Division erred in holding that all residents in each of the dwelling units on a multi-building zoning lot must have access to a rooftop area for that area to qualify as "open space." This Court should reverse.

2. Whether the BSA may overturn a prior BSA decision approving an open space plan for a zoning lot, where the property owner has in good faith relied on that decision to construct a 29-story building and plan for construction of a community facility building on the zoning lot, where the New York City Charter prohibits BSA from overturning a prior BSA decision if such reversal would "prejudice the rights of any person who has in good faith acted thereon"?

The Appellate Division held that BSA, when faced with a new challenge to its prior decision approving the open space plan for the zoning lot, should have reversed its prior decision, notwithstanding the property owner's good faith reliance on that prior decision. This Court should reverse.

STATEMENT OF THE CASE

I. The Zoning Resolution of the City of New York

The City of New York enacted the Zoning Resolution in 1960, with an effective date of December 15, 1961. A150. The original statute is conventionally referred to as the "1961 Zoning Resolution."[1] Scores of amendments have occurred from time to time since its enactment.

The discussion below summarizes the relevant text of the 1961 Zoning Resolution and relevant portions of the 1977, 2011 and 2016 amendments.

[1] The text of the 1961 Zoning Resolution is available at: https://www1.nyc.gov/assets/planning/download/pdf/about/city-planning-history/zoning_maps_and_resolution_1961.pdf.

A. The 1961 definitions of "open space," "zoning lot" and "open space ratio."

1. Definition of "open space"

The 1961 Zoning Resolution defined "open space" as follows (emphasis added; italics omitted):

> "Open space" is that part of a zoning lot, including courts or yards, which:
> (a) Is open and unobstructed from its lowest level to the sky, except as provided below, and
> (b) Is accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot, and
> (c) Is not part of the roof of that portion of a building containing dwelling units or rooming units….
>
> The roof … of a portion of a mixed building used for other than residences … may be considered as open space if such roof area meets the requirements set forth in this definition, and:
>
> (a) Is not higher than 23 feet above curb level, provided that this restriction does not apply to the roof of a portion of a building used for other than residences, and
> (b) Is at least two and one-half feet below the sill level of all legally required windows opening on such roof area, and
> (c) Is directly accessible by a passageway from a building, or by a ramp … from a building, yard, court, or street … , and
> (d) Has no dimension less than 25 feet ….

2. Definition of "zoning lot"

The 1961 Zoning Resolution defined "zoning lot" as follows (italics omitted):

> A "zoning lot" is either:
>
> (a) A lot of record existing on the effective date of this resolution or any applicable subsequent amendment thereto, or
>
> (b) A tract of land, either unsubdivided or consisting of two or more contiguous lots of record, located within a single block, which, on the effective date of this resolution or any applicable subsequent amendment thereto, was in single ownership, or
>
> (c) A tract of land, located within a single block, which at the time of filing for a building permit … is designated by its owner or developer as a tract all of which is to be used, developed, or built upon as a unit under single ownership.
>
> A zoning lot therefore may or may not coincide with a lot as shown on the official tax maps of the city of New York, or on any recorded subdivision plat or deed.
>
> For the purposes of this definition, ownership of a zoning lot shall be deemed to include a lease of not less than 50 years duration, with an option to renew such lease so as to provide a total lease of not less than 75 years duration….

3. Definition of "open space ratio"

The 1961 Zoning Resolution regulated the square footage of required "open space" for residential development in certain zoning districts pursuant to a

specified "open space ratio." It defined "open space ratio" as follows (emphasis added; italics omitted):

> <u>The "open space ratio" of a zoning lot is the number of square feet of open space on the zoning lot, expressed as a percentage of the floor area on that zoning lot.</u> (For example, if for a particular building 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 upon which the building stands; or, if 6,000 square feet of lot area were in open space, 30,000 square feet of floor area could be in the building on that zoning lot.) ….

B. The 1977 amendment to the definition of "zoning lot."

In 1977, the City Planning Commission ("CPC") recommended an amendment to the definition of "zoning lot," which the Board of Estimate approved. A152. Under the amended definition, a "zoning lot" may be formed by owners of adjoining parcels by filing a declaration that a particular specified tract of land on a single block is a zoning lot. A181. This amendment facilitated the current practice in New York City of "assembling" several parcels of land under diverse ownership into one zoning lot for the purpose of transferring development rights from one parcel to another to allow for the use of unutilized development rights on the zoning lot. *Compare Newport Associates, Inc. v. Solow*, 30 N.Y.2d 263 (1972) (describing assemblage development under 1961 definition of "zoning lot") *with Macmillan, Inc. v. CF Lex Associates*, 56 N.Y.2d 386 (1982) (describing assemblage development under amended definition of "zoning lot").

C. The 2011 amendments to the Zoning Resolution.

In 2011, the CPC issued a report recommending amendments to the Zoning Resolution, which the City Council approved. A210-36; A192.[2] The 2011 amendments relevant to this appeal are summarized below.

1. Amended definition of "open space"

The 2011 (and current) definition of "open space" is as follows (emphasis added; "#" signs omitted):

> "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…..
>
> Open space may be provided on the roof of:
> (a) A community facility building;
> (b) A building containing residences, provided such roof area is not above that portion of such building that contains dwelling units or rooming units;
> (c) A non-residential building … provided such non-residential building abuts other buildings, any one of which contains residences.
>
> All such roof areas used for open space shall meet the requirements set forth in this definition and shall:
>
> (1) be not higher than 23 feet above curb level, except as provided in Section 24-164 (Location of open space for residential portion) … ;
> (2) be at least two and one-half feet below the sill level of all legally required windows opening on such roof area;

[2] The adopted text is available here: https://www1.nyc.gov/assets/planning/download/pdf/plans/key-terms/text_adopted_cc.pdf.

(3) be directly accessible by a passageway from a building, or by a ramp (with a grade of less than 10 percent) from a building, yard, court or street ... ; and

(4) have no dimension less than 25 feet ….

ZR § 12-10.

It is apparent that, when compared to the 1961 definition of "open space," the 2011 amendments did not change language relevant to the instant lawsuit. The 2011 amendment clarified language regarding the circumstances in which open space may be located on the roof of a building, but roof-top open space was allowed under the 1961 definition of "open space" and roof-top open space is still allowed today. Both the 1961 and 2011 definitions of "open space" state that if open space is to be located on a roof-top, it must "be directly accessible by a passageway from a building." The gravamen of petitioners' challenge to the open space plan at issue in this lawsuit is the language describing open space as "accessible to and usable by all persons occupying a dwelling unit … on the zoning lot." That language was in the 1961 Zoning Resolution and was not altered by the 2011 amendments.

2. Amended definition of "open space ratio"

The 2011 (and current) definition of "open space ratio" is as follows (emphasis added; "#" signs omitted):

> The "open space ratio" of a zoning lot is the number of square feet of open space on the zoning lot, expressed as a percentage of the floor area on that zoning lot. (For

> example, if 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.) ….

ZR § 12-10.

Thus, the basic definition of "open space ratio" – set forth in the first sentence of the definition – was not amended at all; both in 1961 and after 2011, the open space ratio is the ratio of the square feet of open space on the zoning lot and the square feet of residential floor area on the zoning lot. The only change to the text in the 2011 amendments was the deletion of one reference to a "building" in an example set forth in the parenthetical included in the definition.

3. The CPC Report on the 2011 Zoning Amendments

According to the CPC report on the 2011 amendments, their purpose was to clarify various definitions in the Zoning Resolution and to enact new regulations concerning other diverse topics. A211-A222. Notably absent from the long list of terms and topics mentioned in the CPC report were the changes made to the definition of "open space." *Id.* Thus, the trial court below correctly stated that the CPC report for the 2011 amendments "includes no comments or references to the changes in the open space provisions." A18.

The Department of City Planning ("DCP") has published a 57-page summary of substantive changes to the Zoning Resolution effected by the 2011 amendments.[3] It makes no mention of the changes made to "open space" rules.

The DCP also published a second, 133-page summary of the 2011 amendments, classifying certain amendments as "clarifications" and others as "modifications."[4] The document classifies the amended definitions of "open space" and "open space ratio" as "clarifications."[5]

D. The Zoning Resolution's open space requirements

In addition to defining various terms, as summarized above, the Zoning Resolution contains a table and related provisions specifying the numerical "open space ratio" applicable to a zoning lot, based on the zoning district designation governing the zoning lot (*e.g.*, R6 or R7) and the "height factor" of the residential buildings on the zoning lot.[6] *See* ZR §§ 23-10, 23-15 and 23-151.

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[3] https://www1.nyc.gov/assets/planning/download/pdf/plans/key-terms/table1_substantive_changes.pdf.

[4] https://www1.nyc.gov/assets/planning/download/pdf/plans/key-terms/table2_clarifications_modifications.pdf.

[5] *See supra* n.4 (table at p. 7).

[6] The height factor of a building is equal to the total floor area of the building (in square feet) divided by its lot coverage (in square feet). ZR § 23-10. For example, a simple five-story building covering the entirety of the zoning lot without setbacks would have a "height factor" of five. If there is more than one building on the zoning lot, then one calculates the height factor for the

Before the 2016 amendments discussed below, these requirements were codified in the former ZR § 23-14 and ZR § 23-142. After consulting the relevant table printed in the Zoning Resolution to look up the "open space ratio" applicable to a particular zoning lot, one can then calculate the minimum open space required on that zoning lot by multiplying the open space ratio by the residential floor area on the zoning lot. For example, if the open space ratio specified in the table printed in the Zoning Resolution is 25%, and there is a proposal to develop 100,000 sf of residential floor area on the zoning lot, then the zoning lot must have 25,000 sf of "open space."

The record contains, in a "strike-out" format, the text of the former ZR § 23-14 and ZR § 23-142 before and after the 2011 Zoning Amendments. *See* A88 (2011 amendment to former ZR § 23-14); A90-91 (2011 amendment to former ZR § 23-142). The 2011 amendments deleted references to "building" in each provision, making clear that: (i) the open space ratio applicable to the zoning lot is to be based on the height factor of all the residential buildings on the zoning lot; and (ii) the minimum open space on the zoning lot (which is calculated by multiplying the applicable open space ratio by the residential floor area on the zoning lot) is calculated on the basis of all residential floor area (as stated in the first sentence of the definition of "open space ratio," both as defined in 1961 and as

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buildings by summing their floor areas and dividing that number by the sum of their lot coverages. *Id.*

amended in 2011). *See supra* at 8-9. These statutory provisions do not specify which portions of the open space must be accessible to which residents on the zoning lot and therefore do not address the issue before the Court on this appeal.

In 2016, the City recodified and amended the former ZR § 23-14 as the current ZR §§ 23-10 and 23-15 with amended language, and the former ZR § 23-142 as the current ZR § 23-151 with amended language. A16 n.2.

As a result of the 2016 amendments, and notwithstanding the 2011 amendments to the former ZR §§ 23-14 and § 23-142, the Zoning Resolution today states that a "building" on the zoning lot requires open space – much as it did before the 2011 amendments. Thus, in language similar to the former ZR § 23-14 before the 2011 amendments (*see* A88), the Zoning Resolution today states as follows:

> In all districts, as indicated, the open space … provisions for a building or other structure shall be as set forth in this Section, inclusive…. Open space … regulations applicable to R6 through R10 Districts are set forth in Section 23-15.

ZR § 23-10 (emphasis added; "#" signs omitted). The text of ZR § 23-15 – which is applicable here because the proposed community facility building is located in an R7-2 zoning district (A78) – states as follows:

> [B]uildings containing residences may be developed or enlarged pursuant to the … open space regulations set forth in Section 23-151….

ZR § 23-15 (emphasis added). (This provision references Section 23-151 because that provision now contains the table that indicates the applicable "open space ratio" in certain zoning districts. *See* ZR § 23-151; A16 n.2.) Thus, the word "building" continues to be referenced in the Zoning Resolution provisions relating to open space requirements.[7]

II. Factual Background

A. The 7.1-Acre Zoning Lot

The zoning lot at issue in this proceeding is a Manhattan "superblock" formed in the early 1960s as part of an urban renewal plan. A13; A79.[8] It is bounded on the south by W. 97th Street, on the north by W. 100th Street, on the east by Columbus Avenue, and on the west by a mid-block line running from W. 97th Street to W. 100th Street. A111. The zoning lot is large: 308,475 square feet, or approximately 7.1 acres. A64; A115. Hereinafter, this zoning lot will be referred to as the "7.1-Acre Zoning Lot." PWV Acquisition LLC or its affiliate (collectively, "PWV") acquired the 7.1-Acre Zoning Lot more than 10 years ago

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[7] The 2016 amendments to the Zoning Resolution also changed certain bulk regulations applicable to the nursing home, requiring either design changes to the building presented in the permit application submitted to DOB or a special permit. *See* ZR §§ 24-013(a), 23-155, 23-662, 74-903.

[8] A "superblock" is a term that refers to an extra-large city block formed when one or more city streets that formerly ran across the area are closed, typically in connection with an urban renewal plan or public housing development.

with the objective of developing it with additional buildings in conformance with the Zoning Resolution. A136.

B. The Park West Village buildings on the 7.1-Acre Zoning Lot

The three Park West Village apartment buildings were built on the 7.1-Acre Zoning Lot in the 1960s. A113. The petitioners in this lawsuit are residents of Park West Village who oppose construction of the community facility building on the 7.1-Acre Zoning Lot.

C. The 808 Columbus Avenue building on the 7.1-Acre Zoning Lot

In 2009-2010, PWV constructed a fourth residential building (with ground-floor retail) on the eastern side of the 7.1-Acre Zoning Lot, fronting Columbus Avenue. A133. Its street address is 808 Columbus Avenue. The 29-story residential tower in the center of the building has, on each side, a one-story wing with retail uses fronting Columbus Avenue. The rooftops of these one-story retail portions of the building are landscaped terraces, referred to by petitioners as the "Rooftop Gardens." A52. The Rooftop Gardens at 808 Columbus Avenue collectively comprise an area of 42,500 square feet. A119. The Rooftop Gardens are accessible to all of the residents of 808 Columbus Avenue, but not to the residents of Park West Village. *Id.*

D. In 2008, the DOB reviewed and approved the open space plan for 808 Columbus Avenue and the future community facility building, determining that the plan complies with the Zoning Resolution.

In issuing the building permit for 808 Columbus Avenue, the Department of Buildings ("DOB") reviewed a letter submission from the architect and associated site plans. A107-111. The letter presented an open space plan for the 7.1-Acre Zoning Lot taking into account the planned construction of 808 Columbus Avenue and the future community facility building at issue in the instant lawsuit. A107-08. The plan assumed that the Rooftop Gardens at 808 Columbus Avenue are "open space." Under this assumption, the plan showed that, with the construction of 808 Columbus Avenue and the future community facility building, there would be sufficient open space on the 7.1-Acre Zoning Lot to satisfy the required minimum open space for the zoning lot as a whole based on the applicable open space ratio for the zoning lot. *Id.* In addition, the letter stated that the portion of the open space on the 7.1-Acre Zoning Lot that would be accessible to the residents of Park West Village would be not less than their proportionate share of the total open space on the 7.1-Acre Zoning Lot. *Id.*

The plans submitted to DOB with the architect's letter show five buildings on the 7.1-Acre Zoning Lot: the three Park West Village buildings, the proposed 808 Columbus Avenue building, and the future community facility building. A110-111. The site plan shows that with the construction of all five

buildings, there would be an estimated 1,022,603 sf of residential floor area on the 7.1-Acre Zoning Lot. A111 (calculated as 239,201 sf + 239,201 sf + 239,201 sf + 305,000 sf = 1,022,603 sf). The plans showed that, with the construction of 808 Columbus Avenue and the future community facility building, the "open space ratio" applicable to the 7.1-Acre Zoning Lot would be 22.5%. *Id.*[9] Accordingly, under those plans, the development must include not less than 230,085 sf of "open space" on the 7.1-Acre Zoning Lot (calculated as 22.5% of 1,022,603 sf). *Id.*[10] The site plans the architect submitted to DOB show that with the future construction of 808 Columbus Avenue and the community facility building, the total open space on the 7.1-Acre Zoning Lot would be 233,789 sf (under the assumption that the Rooftop Gardens qualify as "open space"). *Id.* Because the

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[9] The 7.1-Acre Zoning Lot is in a R7-2 zoning district, and the four residential buildings would have a "height factor" of 15. A79. (Only "residential" floor area is considered when applying the required open space ratio to calculate the minimum open space required on the zoning lot. *See* ZR § 23-15. Because a nursing home is "community facility" floor area, its floor area is not considered in calculating the open space ratio for the zoning lot.) Thus, under the building plans presented to DOB, the minimum required open space ratio for the 7.1-Acre Zoning Lot is 22.5%. A79; ZR § 23-151.

[10] The residential floor area numbers used in the architect's letter and its attached site plans were based on then-available estimates of the residential floor area in the Park West Village and 808 Columbus Avenue buildings. The estimates have been subsequently refined with more accurate numbers. With these refinements, there has been a small change in the calculated required minimum open space on the 7.1-Acre Zoning Lot based on the 22.5% open space ratio. The minor changes in the square footage numbers are not material to the legal issue before the Court.

233,789 sf of open space on the 7.1-Acre Zoning Lot exceeds the required minimum open space of 230,085 sf, the architect's plans demonstrated that the open space requirements for the 7.1-Acre Zoning Lot are satisfied, even after construction of 808 Columbus Avenue and the community facility building. *Id.*

In addition to meeting the open space requirements for the 7.1-Acre Zoning Lot considered as a whole, the site plan shows that the residents of the Park West Village buildings would have access to their proportionate share of open space, based on the residential floor area of each building as a proportion of the total residential floor area on the 7.1-Acre Zoning Lot. *Id.* These calculations assumed future construction of the community facility building with a 10,000 sf building footprint. *Id.*

On May 2, 2008, the DOB reviewed and approved the open space calculations for 808 Columbus Avenue and the future community facility building presented in the architect's letter and associated site plans. A79; A108 (handwritten approval of DOB Manhattan Borough Commissioner Christopher Santulli, P.E.).

E. In 2009, the BSA upheld DOB's open space determinations for 808 Columbus Avenue and the future community facility building.

In 2008, the Park West Village residents, represented by experienced land use counsel, appealed the DOB's open space determination to the Board of

Standards and Appeals. The BSA is an independent agency established pursuant to chapter 27 of the New York City Charter. Its five members are "experts in land use and planning." *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418 (1996).

The central argument that the Park West Village residents presented in their 2008 appeal to the BSA is the same argument they are advancing in the instant lawsuit: that the Rooftop Gardens at 808 Columbus Avenue cannot be counted as "open space" because they are not "usable and accessible to all residents of the Zoning Lot as [allegedly] required by the Zoning Resolution." A79.

In opposition to that argument, on January 13, 2009,[11] the DOB submitted a letter to the BSA stating as follows:

> Nor does the New Building Application fail to provide space that meets the ZR's "open space" definition, as the [Park West Village residents] claim. "Open space" is defined by ZR § 12-10 as part of a zoning lot that is "accessible to and usable by all persons occupying a *dwelling unit* … on the zoning lot." The New Building Application demonstrates that dwelling units in each building will have access to and use of areas on the lot identified as open space. The New Building Application's dedication of open space per building does not render space inaccessible or unusable by an occupant of a dwelling unit in a manner contrary to the definition.

A155-56.

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[11] The letter is mistakenly dated "January 13, 2008." A155.

To consider the arguments before it in the context of the multi-building 7.1-Acre Zoning Lot, the BSA held hearings on various dates in October, November and December 2008 and February 2009. A78. Four members of the BSA visited the 7.1-Acre Zoning Lot to understand the layout of Park West Village and the proposed future buildings. *Id.*

On February 3, 2009, the BSA, by unanimous resolution (5-0), upheld DOB's open space determination for 808 Columbus Avenue and the future community facility building. A78-83. The BSA held that DOB had properly determined that the Rooftop Gardens at 808 Columbus Avenue are "open space." A80. As support for that conclusion, the BSA noted that the total amount of open space on the 7.1-Acre Zoning Lot (counting the Rooftop Gardens as open space) would meet or exceed the minimum open space on the 7.1-Acre Zoning Lot required by the applicable open space ratio, and, as a result, the open space plan satisfies the open space requirements imposed by ZR §§ 23-142 and 12-10. A80. The BSA further held that nothing in the Zoning Resolution requires that all open space on a zoning lot containing multiple buildings be accessible to each resident of each building, provided that each building is allocated an equitable share of the open space on the zoning lot. *Id.* On this basis, the BSA held that the open space plan for 808 Columbus Avenue and the future community facility building "does

not violate the open space requirements of the Zoning Resolution" and "complies with the requirements of ZR §§ 23-142 and 12-10." *Id.*

F. Construction of the 808 Columbus Avenue building

In 2009, the Park West Village residents commenced an Article 78 proceeding to challenge the BSA's determination that the Rooftop Gardens at 808 Columbus Avenue qualify as "open space." A137; A139. They later discontinued the proceeding with prejudice before any decision of the court. *Id.*; A17.

As a result, the 808 Columbus Avenue building, with the Rooftop Gardens counted as "open space," was constructed in 2009-2010 on the basis of and in reliance on the DOB and BSA determinations described above.

G. The proposed community facility building

In 2011, PWV entered into an agreement with Jewish Home Lifecare, Inc. ("JHL") for JHL to build and operate a nursing home on the 7.1-Acre Zoning Lot. A153. The nursing home is proposed to be located on the site designated for the future community facility building shown in the open space plan that BSA approved in 2009. *Compare* A105 and A113 (site plans for the nursing home) *with* A111 (2006 site plan for 808 Columbus Avenue and the future community facility building).

Putting aside immaterial discrepancies in the estimated square footage of the four residential buildings (*see supra* at 16 n.10), the open space plan for the

nursing home is the same as the plan that BSA approved in its 2009 decision. According to the open space plan for the nursing home, the four residential buildings on the 7.1-Acre Zoning Lot have 1,022,701 sf of residential floor area, which, after application of the open space ratio of 22.5% (*see supra* at 16 n.9), results in the required minimum open space on the zoning lot being 230,108 sf (calculated as 22.5% of 1,022,701 sf). A113. Assuming that the Rooftop Gardens qualify as "open space," the open space plan for the nursing home shows the provision of 230,726 sf of open space on the 7.1-Acre Zoning Lot, which would be compliant, because it exceeds the required minimum of 230,108 sf of open space on the zoning lot. A113.

On December 14, 2013, the DOB approved the open space plan presented with the application for the building permit for the nursing home, *see* A140, but litigation has delayed construction of the facility. Those opposed to the nursing home challenged the determination of the State Health Department approving the facility. That challenge ultimately failed, *see Friends of P.S. 163, Inc. v. Jewish Home Lifecare*, 30 N.Y.3d 416 (2017), but it caused years of delay.

The litigation now before the Court challenges the open space plan presented with the building permit application for the facility. The legal issue of whether the Rooftop Gardens qualify as "open space" must be resolved prior to

construction of the nursing home or other community facility building on the 7.1-Acre Zoning Lot.

H. The Park West Village residents once again challenged the open space plan for the 7.1-Acre Zoning Lot, arguing once again before the DOB and BSA that the Rooftop Gardens at 808 Columbus Avenue do not qualify as "open space."

On August 22, 2014, the Park West Village residents asked DOB not to issue a building permit for the nursing home, raising the same issue they had raised in opposing the construction of 808 Columbus Avenue – that the Rooftop Gardens on that building should not be considered "open space," resulting in an open space deficiency on the 7.1-Acre Zoning Lot. A140.

On November 10, 2014, DOB's First Deputy Commissioner rejected their contention, explaining that because the Rooftop Gardens qualify as "open space," the open space plan submitted to DOB has sufficient open space to satisfy the Zoning Resolution's open space requirements. A115.

On December 8, 2014, the Park West Village residents appealed that determination to the BSA. Once again, the BSA received extensive written submissions from both sides. A141. It conducted a public hearing on April 14 and June 23, 2015. A116. Three of the BSA Commissioners also conducted a site visit. A116. On August 18, 2015, the BSA Commissioners voted unanimously to uphold DOB's approval of the open space plan for the nursing home. A141.

The BSA resolution setting forth its reasoning (A115-125) first noted that the open space plan for the nursing home is essentially the same open space plan that DOB had approved in 2006 for 808 Columbus Avenue. A117, A124. The BSA noted that as a result of the prior challenge to the open space plan for the 7.1-Acre Zoning Lot, the BSA had already determined, in 2009, that the Rooftop Gardens at 808 Columbus Avenue qualify as "open space" even though they are accessible only to the residents of 808 Columbus Avenue. A117, A123.

The BSA then noted that the 808 Columbus Avenue building had been constructed based on the BSA's 2009 decision and in conformance with the BSA's approval of the open space plan for the 7.1-Acre Zoning Lot. A123. The BSA further noted that the plan BSA had approved in 2009 had reserved the site of the nursing home for future development of a community facility building and therefore had not included that building's footprint as open space. A123.

The BSA further noted that the Zoning Resolution does not require open space for a nursing home or other community facility building. The open space requirements for the 7.1-Acre Zoning Lot are triggered by the four residential buildings (Park West Village and 808 Columbus Avenue). A124.

The BSA then examined the contention that the 2011 Zoning Amendments "changed how open space is to be calculated on the zoning lot." A118. The BSA rejected that contention as meritless. The BSA concluded that

"there has not been any evidence presented to support" the contention that the 2011 Zoning Amendments changed the text of the Zoning Resolution in a manner supporting the arguments that the Park West Village residents had made to the BSA before its 2009 decision. A124.

The BSA noted that "before and after" the 2011 Zoning Amendments, the ZR § 12-10 definition of "open space" states that it 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." A124. The BSA further held that it had already determined, in its 2009 decision, that that definition allowed open space on a multi-building zoning lot to be allocated among the buildings provided that each building's residents would have access to its proportionate share of the open space on the zoning lot. A124. The BSA concluded that because the 2011 Zoning Amendments did not amend the relevant language of the definition of "open space" and the City Planning Commission, in approving the 2011 Zoning Amendments, "did not intend to change the open space requirement," the 2011 Zoning Amendments did "not dictate any change in the Board's or DOB's analysis since the prior [2009] appeal." A124.

The BSA observed, in further support of its conclusion, that the City Planning Commission, had it been dissatisfied with the BSA's 2009 decision, could have – but did not – use the 2011 Zoning Amendments as an opportunity to

overturn that decision. A124. Finally, the BSA concluded that the 2011 Zoning Amendments "did not change the meaning of open space" and that the Park West Village residents seeking to overturn the DOB's approval of the open space plan had "not presented any new information that would require a different result than the 2009 Appeal." A125.

I. The Trial Court decision in this proceeding

On November 19, 2015, one of the Park West Village residents – later joined by others through a motion to intervene – filed an Article 78 petition challenging the 2015 BSA decision upholding the open space plan. A30.

On July 26, 2016, after full briefing and argument, the Supreme Court (Justice Joan B. Lobis) dismissed the Article 78 petition. A12-29. The Court's opinion reviewed the relevant facts, including the 2009 BSA decision upholding the open space plan for the 7.1-Acre Zoning Lot as providing an "'equitable share of open space'" for the residents of each of its four residential buildings. A17. The Court also quoted the relevant language from the definitions of "open space" and "open space ratio." A15-16. In discussing the definition of "open space," the Court correctly observed that the definition expressly allows "open space" to be located in certain circumstances on the roof of one of the buildings on the zoning lot, provided that the area to be counted as open space "'be directly accessible by a passageway from a building.'" A15 (quoting ZR § 12-10, emphasis added). The

Court then proceeded to discuss the 2011 and 2016 amendments to the Zoning Resolution, and observed that the City Planning Commission report discussing the 2011 amendments included no comments or references to the changes in the open space provisions. A18.

The Court then discussed the applicable standard of review of a BSA decision. A19-21. After summarizing the contentions of the parties (A22-24), the Court observed that the argument presented in the Article 78 petition is "essentially the same argument" that the Park West Village residents had made in seeking to overrule the 2009 BSA resolution in litigation that they had initiated and then abandoned before a ruling on the merits. A25. The Court then noted that all of the parties agreed that, in both the 2009 and 2015 BSA proceedings, the calculation of the required minimum open space on the 7.1-Acre Zoning Lot was properly based on the entire zoning lot and that, based on the building plans presented to DOB, the minimum amount of open space required on the zoning lot is 230,108 square feet. A26. The Court then held that the 2011 Zoning 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." A26. As a result, the Court found "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." A26.

The Court then observed that the definition of "open space" was ambiguous as applied to a multi-building zoning lot, because the definition includes "courts" (which may be surrounded on all sides by a building, making the area, as a practical matter, inaccessible to the residents of the other buildings on the zoning lot) and includes rooftops accessible from "a building." A27. The Court observed that these provisions "raise questions about the practical application of a [putative] requirement that all open space must be accessible to all residents." A27. Finding the relevant language of the Zoning Resolution to be ambiguous as applied to a multi-building zoning lot, the Court deferred to the DOB's "practical construction" of the statute, A28 (quoting *Mason v. DOB*, 307 A.D.2d 94, 100-01 (1st Dep't 2003)), and dismissed the petition. A29.

J. The Appellate Division decision in this proceeding

The Appellate Division reversed the trial court's decision, in a 3-1 decision. The majority opinion acknowledged that "in the context of a large zoning lot with multiple buildings under separate ownership, open space accessible and usable by residents of every building on such a zoning lot was not feasible or practicable." *Peyton v. BSA*, 166 A.D.3d 120, 125 (1st Dep't 2018). The majority nevertheless concluded that the definition of "open space" in ZR § 12-10 has since

1961 been "clear and unambiguous," leaving no room for interpretation or deference to the expertise of DOB or BSA. *Id.* at 136. The majority stated its *ratio decidendi* as follows:

> The language in ZR § 12-10 is "clear and unambiguous." ZR § 12-10 has always defined "open space" as being "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot" [emphasis added]. That language 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.

Id. (citation and "#" signs omitted, emphasis added by majority opinion).

The majority opinion stated that by omitting the word "building" in ZR §§ 23-14 and 23-142, the 2011 Zoning Amendments "further bolster our finding" that the definition of "open space" in ZR 23-10 is "clear and unambiguous." *Id.* The majority did not address the inclusion of the word "building" in ZR §§ 23-10 and 23-15, the statutory provisions that replaced ZR §§ 23-14 and 23-142 in 2016. The majority opinion acknowledged that the legislative history of the 2011 Zoning Amendments "makes no mention whatsoever of the Zoning Resolution's open space requirements and the proper methodology to be used under the circumstances we have here even though it had the benefit of the 2009 [BSA] Resolution and the 808 Columbus controversy." *Id.* at 137. But the majority opinion held that the legislative history of the 2011

Zoning Amendments was irrelevant because the statutory "language [of those amendments] is clear." *Id.*

The majority opinion concluded its discussion by stating that "DOB and BSA's use of a building-by-building formula in calculating the JHL building's open space ratio [is] … contrary to the Zoning Resolution, and, as such, DOB's permit to JHL should be revoked." *Id.* at 138. This statement appears to reflect an unfortunate misunderstanding of the legal issues in this lawsuit. No party to this lawsuit has ever suggested using a so-called "building-by-building formula" to calculate an "open space ratio" for the nursing home. To begin with, one does not "calculate" an "open space ratio"; the "open space ratio" applicable to a particular zoning lot is specified in a table printed in the Zoning Resolution, based on the height factor of the zoning lot's residential buildings and the zoning district in which the zoning lot is located. *See* ZR § 23-151 (table applicable to the 7.1-Acre Zoning Lot, which is located in an R7-2 district); *supra* at 16 n.9. Once the open space ratio for the zoning lot is identified from the table, one can then calculate the minimum open space required on the zoning lot by multiplying the open space ratio (expressed as a percentage) by the residential floor area on the zoning lot. *See supra* at 16, 21.

As required by the first sentence of the definition of "open space ratio," the open space ratio is based on all residential floor area on the zoning lot

and is used to calculate the minimum open space on the zoning lot. Based on the plans that have been presented to DOB, it is undisputed by all parties that – based on the height factor of the zoning lot's residential buildings and the R7-2 zoning – the open space ratio for the 7.1-Acre Zoning Lot is 22.5%. *See* A111 (use of 22.5% in the plans for 808 Columbus Avenue); A113 (use of 22.5% in the plans for the nursing home); A79 (discussion in 2009 BSA decision); *supra* at 16 n.9. According to the open space plan submitted to DOB, the 22.5% open space ratio results in a required minimum open space on the 7.1-Acre Zoning Lot of 230,108 square feet (calculated as 0.225 x 1,022,701 sf of residential floor area on the zoning lot). A113; A120. Petitioners do not contest this fact (A66), which is agreed to by all parties. Contrary to the majority opinion, the BSA never used a building-by-building formula to calculate an open space ratio for the nursing home.

The "building-by-building methodology" referenced in the majority opinion refers to whether the 230,726 sf of open space (A113) in the open space plan for the 7.1-Acre Zoning Lot has been equitably allocated among the four residential buildings on the zoning lot. No allocation need be made to the nursing home, which does not itself require any open space. A124; *supra* at 16 n.9.

The dissenting opinion of Justice Tom concluded that this lawsuit seeks to challenge a proposed community facility building – which does not itself require open space on the zoning lot – by challenging the open space plan that the

BSA had approved in 2009 with its decision determining that the Rooftop Gardens are "open space." 166 A.D.3d at 145. Justice Tom found that argument to be foreclosed by virtue of the dismissal with prejudice of the earlier litigation challenging the 2009 BSA decision. *Id.* Justice Tom would have further held the relevant language of the Zoning Resolution to be ambiguous, as applied to a multi-building zoning lot, because:

> [a]s the BSA stated, the definition of open space in ZR § 12-10 "does not specify that open space on a multiple building dwelling lot must be common, centralized space that is shared by all occupants of the zoning lot" and no provision of the ZR "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."

Id. (quoting the 2009 BSA determination at A78 and A80).

Justice Tom concluded that the definition of "open space" was ambiguous for the additional reason that it allows open space to be located on a roof, which cannot practicably be accessed by other buildings on the zoning lot, and in an interior "court" surrounded on all sides by a building, making the area inaccessible to other buildings on the zoning lot. *Id.* at 148.

K. The motions for leave to appeal to this Court

Notice of entry of the Appellate Division decision was served on November 6, 2018. On November 30, 2018, PWV filed its motion for leave to

appeal, and a motion for reconsideration. On December 5, 2018, JHL filed its motion for leave to appeal. On December 6, 2018, the City filed its motion for leave to appeal. In support of these motions, each party argued that the Appellate Division erred in holding the relevant language of the Zoning Resolution to be "clear and unambiguous."

The movants also argued that the Appellate Division decision would have far-reaching effects. The legal issue presented on this appeal is of widespread importance throughout New York City because 32 zoning districts in the City require open space for residential uses.[12] By overturning DOB's long-standing interpretation of the definition of "open space," the Appellate Division restricts what can be built in these 32 zoning districts, which collectively comprise a very substantial majority of the land in New York City zoned to allow residential use.

On December 17, 2018, petitioners served their opposition to the motions.

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[12] Fourteen zoning districts require open space for any residential building: R1-1, R1-2, R1-2A, R2, R2A, R3-1, R3-2, R4, R4B, R5, R5B, R5D, C3 and C4-1. *See* ZR § 23-14 *et seq*. An additional 18 zoning districts contain open space requirements unless the residential buildings on the zoning lot comply with certain "quality housing" requirements promulgated in 1984 or 1989, as applicable: R6, R7-1, R7-2, R8, R9, C4-2, C4-3, C1-6, C2-6, C4-4, C4-5, C1-7, C4-2F, C6-1, C6-2, C1-8, C2-7 and C6-3. *See* ZR § 23-15 *et seq*.

On February 21, 2019, the Appellate Division issued an Order denying the motion for reconsideration and granting the motion for leave to appeal. The Order stated as follows:

> It is … ordered that the motions … for leave to appeal to the Court of Appeals, are granted and this Court, pursuant to CPLR 5713, certifies that the following question of law decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:
>
> "Was the order of this Court, which reversed the order of the Supreme Court, New York County, properly made?"
>
> This Court further clarifies that its determination was made as a matter of law and not in the exercise of its discretion.

A379.

L. Recent discussions

Recently, JHL has stated that it does not plan to proceed with the nursing home project. If this is so, a nursing home operated by a different entity or a different type of community facility operated by JHL or another entity will be constructed at the community facility development site on the 7.1-Acre Zoning Lot. In either circumstance, PWV must obtain resolution of the legal issue as to whether the Rooftop Gardens are qualified "open space."

SUMMARY OF ARGUMENT

The Appellate Division majority held that no deference is owed to DOB or BSA with respect to their long-standing interpretation of the Zoning Resolution because its relevant language is "clear and ambiguous." The key language at issue has been in the Zoning Resolution since 1961. It defines "open space" as an area "accessible to and usable by all persons occupying a dwelling unit … on the zoning lot." The Appellate Division majority read the reference to "a dwelling unit" as meaning "all dwelling units" or "each dwelling unit," thereby requiring that an open space area be accessible to all persons residing on the zoning lot. But the language can reasonably be read in accordance with its plain meaning: that for an area to be open space, it must be accessible to all residents of "a dwelling unit" on the zoning lot. Under this reading, each area of the zoning lot to be counted as "open space" must be accessible to all residents of one or more of the dwelling units on the zoning lot.

Because the Zoning Resolution does not specify how much of the open space on the zoning lot each dwelling unit must have access to, the DOB and BSA have plugged that gap by requiring that the dwelling units in each residential building on the zoning lot must have access to at least that building's proportionate share of the total required open space on the zoning lot. It is evident that the Appellate Division misapprehended this approach, as its opinion incorrectly

characterized the DOB/BSA interpretation as requiring the calculation of an "open space ratio" for the proposed community facility building, which no party to this litigation has ever suggested would be appropriate.

The 2015 BSA decision challenged in this lawsuit should have been upheld because the open space plan for the zoning lot is consistent with the language of the Zoning Resolution and because the 2009 BSA decision had previously approved the open space plan. Petitioners' contention that the BSA, in 2015, should have repudiated its 2009 decision based on language that has been in the Zoning Resolution since 1961 is contrary to elementary principles of estoppel and a specific provision of the New York City Charter that prohibits the BSA from overturning an earlier decision where – as here – there has been reliance on that decision by the property owner.

ARGUMENT

I. A BSA determination may be overturned only if it lacks a rational basis.

This Court has held that "the BSA is comprised of experts in land use and planning" and "its interpretation of the Zoning Resolution is entitled to deference." *New York Botanical Garden v. BSA*, 91 N.Y.2d 413, 418-19 (1998). Thus, "its interpretation … will be upheld" unless it is "'irrational, unreasonable []or inconsistent with the governing statute.'" *Id.* at 419 (citation omitted). Although no deference is given to "purely legal determinations" not implicating

the agency's expertise, the BSA's "'rational construction'" of "'statutory language'" is "'entitled to deference'" when that interpretation involves "'applying its specialized expertise … to interpret statutory language.'" *Id.* (citation omitted).

Similarly, deference is owed to DOB's interpretation of the Zoning Resolution. This Court has held that "BSA and DOB are responsible for administering and enforcing the zoning resolution (New York City Charter §§ 643, 666[7]), and their interpretation must therefore be 'given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute.'" *Appelbaum v. Deutsch*, 66 N.Y.2d 975, 977-78 (1985) (citation omitted).

II. The Appellate Division erred in holding that the definition of "open space" is "clear and unambiguous."

The Appellate Division majority stated that it is not practicable to make roof-top open space accessible to all residents on a multi-building zoning lot, but that it was constrained to rule the way that it did because the Zoning Resolution's definition of "open space" is "clear and unambiguous." 166 A.D.3d at 136. This was legal error, because the definition is not clear. As explained below, the text reasonably can be read to have a meaning that is wholly different from the one upon which the Appellate Division majority rested its decision.

A. Legislative intent is the controlling principle of statutory interpretation.

This Court has held that "[i]n matters of statutory interpretation generally, and particularly here, legislative intent is the 'the great and controlling principle.'" *Sutka v. Conners*, 73 N.Y.2d 395, 403 (1989) (citation omitted). Because the "best evidence of legislative intent" is the "plain language of the statute," courts examine the language "first." *Kimmel v. State*, 29 N.Y.3d 386, 392 (2017) (citations and internal quotation marks omitted). Nevertheless, an "apparent lack of ambiguity" in the statutory language is "rarely, if ever, conclusive." *Sutka v. Conners*, 73 N.Y.2d at 403. This is so because "[g]enerally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history." *Id.* The Court has held that "[t]hese principles of statutory construction assume particular significance where … the Legislature has spoken to an issue simultaneously in separate laws … and has repeatedly adopted and amended pertinent provisions piecemeal throughout the decades." *Id.* at 403-404. In such circumstances, "no one clause isolated from its statutory setting" is "determinative of a lack of ambiguity or of legislative intent as to the issue presented." *Id.* at 404.

Further, if it is concluded that the statutory language is ambiguous, a zoning law must be construed narrowly to protect the rights of the property owner. "Since zoning regulations are in derogation of the common law, they must be

strictly construed … [such that a]ny ambiguity in the language used in such regulations must be resolved in favor of the property owner." *Allen v. Adami*, 39 N.Y.2d 275, 277 (1976).

It is respectfully submitted that the Appellate Division did not apply these principles to the case before it. It plucked one sentence from the definition of "open space," failed to realize its ambiguity, and discounted or ignored all contrary evidence of legislative intent. The *ratio decidendi* of the majority opinion is that ever since 1961, ZR § 12-10 has defined "open space" as being "'accessible to and usable by <u>all persons</u> occupying a dwelling unit or a rooming unit on the zoning lot.'" 166 A.D.3d at 136 (quoting ZR § 12-10 with majority opinion's emphasis; "#" signs omitted). Holding this language to be "clear and unambiguous" in requiring every person residing on the zoning lot to have access to any area qualifying as open space, *id.*, the majority opinion ignored contrary evidence of legislative intent appearing in the very same definition of the term. The same definition of "open space" allows open space to be located within an inner court of a building – an area that is not likely to be accessible to the residents of other buildings on the zoning lot. The majority opinion likewise overlooked the provision of the definition of "open space" that allows open space to be located on a rooftop if that area is accessible from <u>a</u> building on the zoning lot. *See* ZR § 23-10 (rooftop open space must "be directly accessible by a passageway from a

building"). Moreover, the Appellate Division majority did not consider the statutory context, in that it overlooked the practical effect of the 1977 change in the definition of "zoning lot," which encourages the assemblage among disparate property owners of different tax lots into one zoning lot, making it unlikely that an open area on one tax lot is accessible to the residents of buildings located on other tax lots within the zoning lot. A152; A297; A285. Finally, it ignored the BSA's accurate observation that no 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.

Each of these elements should have been considered in evaluating whether the Zoning Resolution requires "open space" to be accessible to all persons residing on a multi-building zoning lot.

B. The Appellate Division erred in concluding that the plain language of the definition of "open space" is "clear and unambiguous."

The majority articulated the basis for its ruling as follows:

> ZR § 12-10 has always defined "open space" as being "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot" [emphasis added]. That language 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.

166 A.D.3d at 136 (citation and "#" signs omitted, emphasis added by majority opinion).

The statutory language, however, is ambiguous. It requires that open space be accessible to "all persons occupying a dwelling unit … on the zoning lot." ZR § 12-10 ("#" marks omitted, emphasis added). In reaching its conclusion, the majority interpreted the statutory phrase "a dwelling unit on the zoning lot" to mean "all" or "each" dwelling unit on the zoning lot. It was legal error for the majority to hold that the plain language of the statute does not allow the definition of "open space" to be interpreted as it is written. The Appellate Division's interpretation of the statute may be plausible, but it is hardly the only way to read the statute. Another reading – and one that is in line with the text of the statute – is that to qualify as "open space," an area must be accessible to all residents of "a dwelling unit" on the zoning lot.

The statutory definition uses two distinct words: "all" and "a". The word "all" modifies "persons" – not "dwelling unit." It is the word "a" that modifies "dwelling unit." This distinction is important because "[w]hen different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended." *Albano v. Kirby*, 36 N.Y.2d 526, 530 (1975). Since "all" and "a" are different terms in the same sentence of the statute, it would be reasonable to assume that they have different meanings. Thus, it was

legal error for the majority to conflate the two words in interpreting the statutory phrase "a dwelling unit … on the zoning lot" as unambiguously meaning "all" dwelling units or "each" dwelling unit on the zoning lot.

In common usage, the word "a" is "a function word before singular nouns when the referent is unspecified <*a* man overboard>." *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster Inc. 1985) (definition of "a"). The court in *Cook v. Carmen S. Pariso, Inc.*, 287 A.D.2d 208 (4th Dep't 2001), observed that "the usual and ordinary meaning of 'a' is not 'one and only one,' but rather 'any number of' or 'at least one' – not 'one and no more,' but rather 'one or more.'" 287 A.D.2d at 213 (emphasis added, citations omitted)). Thus, the phrase "a dwelling unit … on the zoning lot" in the statutory definition of "open space" may reasonably be construed as "any number of dwelling units" on the zoning lot or "at least one dwelling unit" on the zoning lot.

Under this interpretation, DOB properly approved the open space plan for the community facility building, because it is undisputed that 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. In particular, it is undisputed that the square footage of the "open space" that DOB counted in approving the open space plan for the community facility building is accessible by the residents of all of the dwelling units at 808 Columbus Avenue, who have

access to the Rooftop Gardens and all of the other open space that DOB counted in approving the open space plan.

The Appellate Division majority did not read the definition of "open space" with the word "a" serving its common function. Instead of an interpretation that requires all residents of "a" dwelling unit to have access to an area qualifying as open space, it reads the common usage of that word out of the statute and substitutes different words in its place that require the residents of each dwelling unit to enjoy access. Such an interpretation – which in effect rewrites the statutory definition – is not the only rational interpetation.

The reasonableness of the interpretation of the statutory language described above – which interprets the word "a" in accordance with its common usage – is illustrated by Figure 1 below. That figure depicts several adjoining townhouse units on one zoning lot, each with its own private rear yard, in which the collective square footage of the private rear yards satisfies the required minimum open space for the zoning lot.

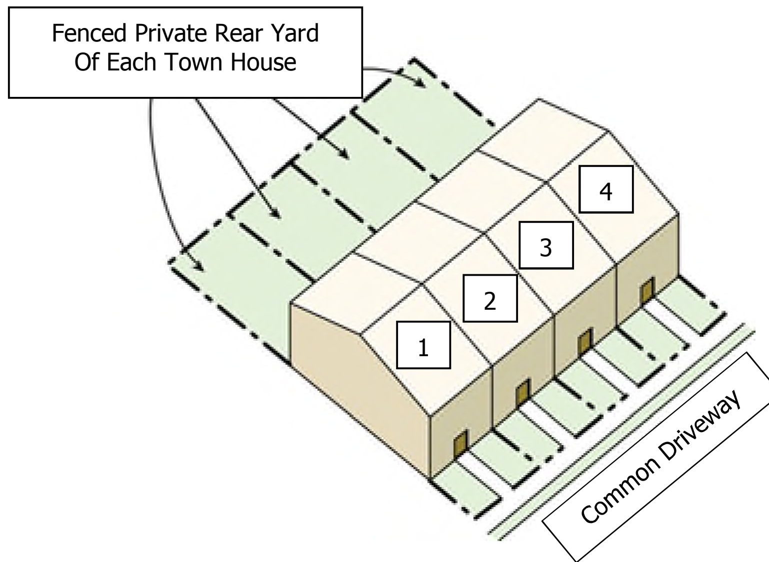

Figure 1: Hypothetical example of four town houses (1, 2, 3 and 4) on one zoning lot.

Under the Appellate Division's interpretation of the definition of "open space," the typology illustrated in Figure 1 is unlawful because, for example, the residents of Town House 2 do not have access to the rear yard of Town House 1, to which only the residents of Town House 1 have access. But the arrangement in Figure 1 is consistent in all respects with the plain meaning of the statutory language defining "open space." The private rear yard of Town House 1 is accessible to all persons occupying Town House 1 and therefore meets the statutory definition of open space because the rear yard is "accessible to and usable by all persons occupying a #dwelling unit# … on the #zoning lot#." ZR § 12-10 (definition of "open space", emphasis added). Similarly, the private rear yard of Town House 2 is accessible to all persons occupying Town House 2 and therefore meets the statutory definition of open space because it is "accessible to and usable by all persons occupying a #dwelling unit# … on the #zoning lot#." *Id.* And the

same is true for the private rear yards of Town House 3 and Town House 4. Thus, each rear yard complies in all respects with the statutory definition of "open space," and it would be consistent with the plain meaning of the statutory language to conclude that this typology complies with the Zoning Resolution's "open space" requirements.

Yet the Appellate Division declared this typology unlawful due to its erroneous holding that the "plain meaning" of the statutory text can only be read to require that the persons occupying each and every dwelling unit on the zoning lot have access to an area for that area to be open space. In coming to this conclusion, the Appellate Division majority overlooked an equally plausible "plain meaning" interpretation of the statutory definition of "open space," under which the open space plan for the nursing home complied with Zoning Resolution's requirements.

Petitioners have pointed out that a different provision of the Zoning Resolution, not cited by the Appellate Division, states that "words used in the singular number shall include the plural … unless the context clearly indicates the contrary." ZR § 12-01(d). This rule of interpretation, however, does not unambiguously imply that reference to "a dwelling unit … on the zoning lot" must mean every single dwelling unit on the zoning lot. The issue here is not "singular" versus "plural," but rather, whether the residents of each dwelling unit on the zoning lot must have access to an area for it to be "open space." Petitioners'

argument does not make the language at issue "clear and unambiguous." The Appellate Division's contrary holding was legal error.

III. The Appellate Division erred in holding the 2011 Zoning Amendments were an "unmistakable rejection of the utilization of a building-by-building formula in calculating the open space ratio."

The Appellate Division held that the 2011 Zoning Amendments were an "unmistakable rejection of the utilization of a building-by-building formula in calculating the open space ratio" and then relied on this conclusion to annul the BSA determination challenged in this proceeding. 166 A.D.3d at 138. This was legal error, for the reasons discussed below.

A. The Appellate Division erred in even considering whether the 2011 Zoning Amendments rejected a building-by-building calculation of the open space ratio because neither the building permit application nor BSA's decision presented or relied upon such a calculation.

The majority opinion reflects a misunderstanding of the legal issues in this lawsuit. *See supra* at 29. The building plans submitted to DOB in this matter do not calculate an open space ratio for each building on a building-by-building basis. Nor has any party ever suggested that an open space ratio be calculated for the community facility building. Because no party has ever suggested that such a methodology would be appropriate, there is no basis for any discussion as to whether the 2011 Zoning Amendments constituted a rejection of such a methodology.

All parties to this litigation agree that the open space ratio applies to the zoning lot as a whole; that was the case both before and after the 2011 Zoning Amendments. Here, it is undisputed by all parties that, based on the plans for the nursing home submitted to DOB, the open space ratio for the 7.1-Acre Zoning Lot is 22.5% requiring that there be 230,108 sf of "open space" on the 7.1-Acre Zoning Lot (calculated as 22.5% of 1,022,701 sf, which is the residential floor area of the four residential buildings on the zoning lot). A113; *see supra* at 21. There is, of course, a dispute as to whether the Rooftop Gardens are "open space," but that dispute has nothing to do with the applicable open space ratio specified in the Zoning Resolution.

B. The Appellate Division erred in ascribing any significance to the 2011 Amendments to the Zoning Resolution.

The majority opinion erred in attaching any significance – much less talismanic significance – to the 2011 Zoning Amendments. These amendments do not address the issue before the Court in this lawsuit. The 2011 Zoning Amendments eliminated the word "building" from three zoning provisions relating to the definition and specification of open space ratio. *See supra* at 8-9, 11-12. But this is irrelevant because, as noted above, all parties agree that – based on the building plans for 808 Columbus Avenue reviewed by BSA before its 2009 decision and the building plans for the nursing home reviewed by BSA before its 2015 decision – the correct open space ratio for the 7.1 Acre Zoning Lot is 22.5%.

See supra at 16 n.9, 30. Moreover, the word "building" was added back to these zoning provisions when they were re-codified and amended in 2016. *See supra* at 12-13. Since the word "building" is now in the very zoning provisions from which they were removed in 2011, and these provisions are themselves irrelevant to the open space issue that was before the Appellate Division, it is difficult to fathom how the 2011 Zoning Amendments played a significant role in the majority opinion's decision.

The 2011 Zoning Amendments did not make any material change to the definition of "open space" (*see supra* at 7-8) and did not address the issue of who must have access to an area of a multi-building zoning lot for the area to be "open space." *Supra* at 12. Accordingly, the 2011 Zoning Amendments are not material to the legal issues in this lawsuit, and it was legal error for the Appellate Division to hold that they constituted an "unmistakable rejection" of any legal contention relevant to this lawsuit.

The Appellate Division acknowledged that the legislative history of the 2011 Zoning Amendments does not mention "open space" and provides no support for the notion that the CPC and City Council – each of which approved the 2011 Zoning Amendments – intended to overturn the BSA's 2009 decision that the Rooftop Gardens are "open space." 166 A.D.3d at 137. Nevertheless, the Appellate Division held that the legislative history of the 2011 Zoning

Amendments was irrelevant because the language of the 2011 Zoning Amendments was "clear," making "resort to extrinsic evidence to glean the legislature's intent … not necessary." *Id.* This statement once again reflects the majority's evident confusion about the legal issues in this lawsuit. The 2011 Zoning Amendments indeed are crystal clear that the "open space ratio" for the zoning lot is multiplied by all residential floor area on the zoning lot to calculate the minimum open space required on the zoning lot, precluding the use of a "building-by-building" methodology that would apply a different open space ratio for each building. But this point is undisputed by the parties to this litigation. The only open space ratio shown in any of the plans for any of the buildings on the zoning lot is 22.5%, which has been applied to all residential floor area in all of the buildings on the zoning lot to calculate the minimum open space required on the zoning lot. *See* A111 (2006 plans); A113 (2011 plans).

The issue on which the 2011 Zoning Amendments are not clear is whether an area must be accessible to all persons on the zoning lot to be "open space." The 2011 Zoning Amendments do not address this issue at all; the relevance of their legislative history – which also does not address this issue – is to rebut the petitioners' strained contention that the 2011 amendments to the definition of "open space ratio" *sub silentio* changed the definition of "open space," when the legislative history of the 2011 Zoning Amendments establishes

that such a *sub silentio* change was not intended by either the City Planning Commission or City Council.

The majority opinion was correct in observing that legislative history ordinarily cannot be relied upon as an extrinsic aid to interpret clear statutory language, but it misapplied that principle to the 2011 Zoning Amendments, which do not contain clear statutory language addressing the issue that is actually in dispute in this litigation.

IV. There is a "rational basis" for the 2015 BSA Decision upholding DOB's approval of the open space plan for the community facility building.

The DOB's 2014 determination to approve the open space plan for the community facility building and the 2015 BSA decision upholding that determination are challenged on one ground only: that in its 2015 decision, the BSA should have repudiated its 2009 decision holding that the Rooftop Gardens are "open space." As demonstrated below, however, there was a rational basis for BSA's 2015 decision.

A. There is a rational basis for BSA's 2015 decision.

As explained above, the language of the Zoning Resolution does not unambiguously require a rooftop area of a multi-building zoning lot to be accessible to all persons residing in each dwelling unit on the zoning lot for the rooftop area to be considered "open space." *See supra* at 40-45. And because the Zoning Resolution is in derogation of the common law, "[a]ny ambiguity in the

language … must be resolved in favor of the property owner" seeking to develop its land. *Allen v. Adami*, 39 N.Y.2d at 277.

Here, it is undisputed that (i) with the Rooftop Gardens counted as "open space," there would be sufficient open space on the 7.1-Acre Zoning Lot to satisfy the total square footage of open space required by the applicable 22.5% open space ratio as applied to the zoning lot as a whole, even after construction of the nursing home or other community facility building (*supra* at 21); (ii) the BSA, in its 2009 decision, had already determined the Rooftop Gardens to be open space and 808 Columbus Avenue had already been constructed in reliance on that decision (*supra* at 19-20); (iii) the 2011 Zoning Amendments clarified the definition of "open space ratio" but did not materially change the definition of "open space" or otherwise address open space requirements (*supra* at 7-10); (iv) a community facility building would not increase the amount of open space required on the zoning lot (*supra* at 16 n.9, 23); (v) each resident of each of the existing dwelling units on the 7.1-Acre Zoning Lot will have access to some open space (*supra* at 19-20, 24); and (vi) the residents of Park West Village would have access to not less than their proportionate share of the total open space on the 7.1-Acre Zoning Lot (*supra* at 19-20, 24). Under these circumstances, common sense – and a rational interpretation of the Zoning Resolution – dictate that constuction of the community facility building should be allowed – as the DOB, the BSA, Justice

Lobis and Justice Tom all concluded. The BSA's decision cannot be deemed to be irrational, and should have been upheld by the Appellate Division.

B. A contrary BSA decision would have contravened principles of estoppel and section 666[8] of the New York City Charter.

The New York City Charter defines the limits of the BSA's jurisdiction. In particular, the Charter limits the jurisdiction of the BSA to overturn its own prior decisions. These jurisdictional constraints, which are intended to protect property rights and the reasonable expectations of a landowner who has relied upon a prior BSA determination, would have precluded BSA from repudiating its 2009 determination that the Rooftop Gardens are "open space." Since overturning its 2009 determination that the Rooftop Gardens are "open space" would have violated the Charter, the BSA decision upholding the open space plan for the nursing home cannot be challenged on the ground that the BSA should have done so.

Section 666[8] of the City Charter states that the BSA may review a prior BSA decision, but that "no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified."

In its 2009 decision, the BSA determined that the Rooftop Gardens at 808 Columbus Avenue would be "open space" and reviewed and approved an open space plan for the 7.1-Acre Zoning Lot that showed the three Park West Village buildings, the 808 Columbus Avenue building, and the future community facility

building. *Supra* at 18-20. It is undisputed that the Park West Village residents challenged that determination in a judicial proceeding, but then abandoned that proceeding, resulting in its dismissal with prejudice. *Supra* at 21. The Park West Village residents then appeared before the BSA to appeal DOB's re-approval of the same open space plan for the nursing home, raising the same argument that they had raised previously: that the Rooftop Gardens cannot be open space because they are not accessible to the residents of Park West Village. *Supra* at 22-23. It is hardly surprising – and certainly not unlawful – for the BSA to have rejected that argument, because accepting it would have required BSA to overturn its 2009 decision determining the Rooftop Gardens to be open space.

Nor can there be any question that overturning the 2009 decision would "prejudice the rights of … [a] person who has in good faith acted thereon." NYC Charter § 666[8]. It is undisputed that, in reliance upon and pursuant to the 2009 BSA decision, PWV built the 29-story 808 Columbus Avenue building. A133. This Court may take judicial notice that the cost of such construction exceeded one hundred million dollars. The development of 808 Columbus Avenue was premised upon the open space plan reviewed and approved by BSA in 2009, which identified the location of the future community facility building and excluded its footprint from the open space plan. *Supra* at 15-17. In reliance on and pursuant to the 2009 BSA decision, PWV has spent years planning the nursing

home building. Under such circumstances, the BSA would have violated section 666[8] of the City Charter if it had reversed its 2009 open space determination in its review of the DOB's 2014 determination approving the open space plan for the nursing home.

The only pretext the Park West Village residents have raised for re-opening the BSA's 2009 decision determining the Rooftop Gardens to be "open space" is the enactment of the 2011 Zoning Amendments. As demonstrated above, these statutory amendments did not materially change the definition of "open space." The 2011 Zoning Amendments *did* change the definition of "open space ratio" and the provisions that specify the minimum required open space ratio, but it is undisputed by all parties that the 22.5% open space ratio assumed in the plans for 808 Columbus Avenue remained the appropriate open space ratio to use even after the 2011 Zoning Amendments changed the definition of that term. Moreover, from the outset, the gravamen of petitioners' argument is the supposed plain meaning of the 1961 language ("accessible to … all persons occupying a dwelling unit … on the zoning lot") included in the definition of "open space." The BSA considered and rejected that argument in its 2009 decision. No basis has been proffered for re-opening that determination in light of the repose provision of the New York City Charter that protects a property owner who has in good faith relied on a BSA decision.

The Appellate Division held that estoppel should not preclude the petitioners in this lawsuit from re-opening their challenge to the BSA's 2009 decision that the Rooftop Gardens are "open space." 166 A.D.3d at 132. In reaching this conclusion, the Appellate Division characterized estoppel as a "flexible" and "equitable" doctrine. *Id.* But the equities here run in favor of PWV, the owner of the development site, which relied on the BSA's 2009 decision to build 808 Columbus Avenue and to plan the development of the community facility building challenged in this lawsuit. In light of BSA's careful consideration of the issue in its 2009 decision, the dismissal with prejudice of the challenge to the 2009 BSA decision, the intervening construction of the 808 Columbus Avenue building, and the New York City Charter limitation on BSA's jurisdiction to re-open a prior BSA determination, the Appellate Division should have deferred to BSA's decision not to re-open the definition of "open space" as defined in the 1961 Zoning Resolution. *See* A123 ("WHEREAS, in the 2009 Appeal, the Board agreed with DOB that the open space, which includes 42,500 sq. ft. of rooftop space, satisfied all relevant requirements … therefore, the Board considers the question of how to analyze open space as it relates to the three Park West Village buildings and the 808 Columbus Avenue building to be answered" and "now considers only whether the [2011 Zoning Amendments] … implicate the proposed construction of the Nursing Facility."); A338; A342-343.

By holding that the 1961 definition of "open space" contained language that BSA misinterpreted in its 2009 decision, and holding that on this basis the BSA should have overturned that decision when asked to do so in 2015, the Appellate Division obliterated the repose that the City Charter provides to a property owner who has relied on and followed a BSA decision.

CONCLUSION

The decision of the Appellate Division should be vacated and reversed so as to reinstate Justice Lobis' decision and order dismissing this proceeding with prejudice.

Dated: New York, New York
May 23, 2019

Respectfully submitted,

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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 13,206 words.

Dated: May 23, 2019

Philip E. Karmel