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.

REPLY BRIEF FOR RESPONDENT-APPELLANT PWV ACQUISITION, LLC

BRYAN CAVE LEIGHTON PAISNER LLP
Attorneys for Respondent-Appellant PWV Acquisition, LLC
1290 Avenue of the Americas
New York, New York 10104
Tel.: (212) 541-2000
Fax: (212) 541-4630

Date of Completion: January 30, 2020

TABLE OF CONTENTS

Page

I. The agencies' determination that the Rooftop Gardens are "open space" should be given great weight and judicial deference, because it is neither irrational, unreasonable nor inconsistent with the governing statute. 1

II. Petitioners err in arguing that the BSA/DOB determination below is inconsistent with other agency decisions. 4

III. The City Charter would have precluded the BSA from repudiating its 2009 decision holding that the Rooftop Gardens at 808 Columbus Avenue are "open space." 7

IV. The Petitioners' policy arguments do not provide a legal basis to overturn the BSA decision. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. Adami,
39 N.Y.2d 275 (1976) 10

Appelbaum v. Deutsch,
66 N.Y.2d 975 (1995) 1

New York Botanical Garden v. BSA,
91 N.Y.2d 413 (1998) 1

PWV Acquisition, Inc. ("PWV") respectfully submits this reply to the brief filed by the Petitioners-Respondents ("Petitioners").

I. The agencies' determination that the Rooftop Gardens are "open space" should be given great weight and judicial deference, because it is neither irrational, unreasonable nor inconsistent with the governing statute.

PWV has established that "great weight and judicial deference" is to be given to the DOB and BSA interpretations of the Zoning Resolution, provided those interpretations are neither irrational, unreasonable nor inconsistent with the governing statute. *See* PWV Br. at 35-36 (citing and quoting *New York Botanical Garden v. BSA*, 91 N.Y.2d 413, 418-19 (1998); *Appelbaum v. Deutsch*, 66 N.Y.2d 975, 977-78 (1995)). The Petitioners' brief does not cite, must less distinguish, these cases.

The Petitioners assert that no deference is warranted because the agencies did "not point to a single word in the text of the Zoning Resolution" that supports their interpretation. Pet. Br. at 32. Not true. The DOB held that the Zoning Resolution's definition of "open space" requires only that "open space be useable and accessible by all persons occupying a dwelling unit … on the zoning lot" and that "808 Columbus Avenue met the standard with drawings showing that the layout of the rooftop gardens could, indeed, be physically accessed by all persons occupying a dwelling unit … on a zoning lot." A312 (emphasis added); *see also* A313 (characterizing DOB's position as holding that the Zoning

Resolution "looks at whether there is access by a dwelling unit"). Similarly, the DOB held that:

> "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 (emphasis added).

Thus, the DOB determined that an area accessible to all persons occupying "a dwelling unit" on the zoning lot satisfies the accessibility element of the Zoning Resolution's definition of "open space." This interpretation of the operative language of the Zoning Resolution's definition of "open space" is rational and, indeed, consistent in all respects with the plain language of the statute, as PWV demonstrated in its opening brief. *See* PWV Br. at 40-44. The Petitioners assert that this interpretation is "preposterous" (Pet. Br. at 2), but they do not back up that assertion with a cogent analysis of the zoning text. The Petitioners do not address – must less rebut – PWV's simple illustration of the proper application of the statutory language to four adjoining town houses on a single zoning lot, each of which has a rear yard: as PWV has demonstrated, the plain language of the definition of "open space" would classify each rear yard as

"open space" even though the yard is accessible only to the residents of the adjoining town house, and not the residents of the other town houses on the zoning lot. PWV Br. at 43-44.

The Petitioners assert that PWV has presented a new argument on appeal. Pet. Br. at 37. Not so. PWV's contention that only the residents of "a dwelling unit" must have access to an area for it to meet the Zoning Resolution's accessibility requirements for "open space" (PWV Br. at 40-44) is the same argument that DOB made below in its submissions to the BSA. *See* A312-13 (quoted above) & A155-56 (quoted above). The BSA stated that it agreed with DOB's interpretation of the statute. A124-25. Contrary to Petitioners' assertions (Pet. Br. at 37), PWV's argument on appeal does not violate the principle that a court should not review an agency decision on grounds not invoked by the agency. The DOB invoked the same statutory argument that PWV is making on appeal, and the BSA agreed with the DOB's interpretation of the statute.

The Petitioners assert that the statutory language is "unambiguous," *see* Pet. Br. at 35, but if that were so, it would be difficult to fathom how the professionals at DOB, each member of the BSA, the trial court justice, and the dissenting justice below all read the language in a manner at variance from the Petitioners' preferred interpretation. The statutory language merely requires that "all persons" occupying "a dwelling unit" on the zoning lot have access to the open

space area. PWV Br. at 40-44. Had the City Council sought to impose the requirement that the Petitioners ask this Court to impose, the Zoning Resolution would state that to be "open space" an area must be accessible to all persons residing on the zoning lot. Quite obviously, this is not the language of the Zoning Resolution, and it was not irrational for the DOB and BSA to give effect to the actual language of the Zoning Resolution rather than the re-write Petitioners urge upon this Court.

II. Petitioners err in arguing that the BSA/DOB determination below is inconsistent with other agency decisions.

The Petitioners assert that in prior instances, the DOB or BSA made open space accessibility determinations that are inconsistent with their position with respect to the Rooftop Gardens at 808 Columbus Avenue at issue on appeal. *See* Pet. Br. at 21-24. The Petitioners' assertion is inaccurate.

The Petitioners' first example is a determination made with respect to 144 N. 8th Street in Brooklyn. *See* Pet. Br. at 21-22. In that case, there was only one residential building on the zoning lot (the "Proposed Building"), which was to have open space on the roofs of adjoining commercial buildings, which do not require open space. *See* PWV Br. at 9, 11-12 (explaining that non-residential buildings do not require open space and do not require access to open space).[1] Not

[1] It can be inferred that the other buildings on the zoning lot of the Proposed Building contained commercial uses because the Zoning Resolution

surprisingly, the BSA required that the roof-top "open space" on the adjoining commercial buildings be accessible to residents of the Proposed Building, *see* Pet. Br. at 22 (quoting the BSA decision) – because if the roof-top areas were not accessible to those residents, the areas would not be accessible to any residents on the zoning lot. All parties to this appeal agree that an area not accessible to any residential dwelling unit on the zoning lot cannot be considered "open space." In its decision as to 144 N. 8th Street, the BSA did not address the issue whether it would be permissible for some – but not all – of the residents on the zoning lot to have access to the roof-top open space on the commercial buildings. Accordingly, the BSA decision as to 144 N. 8th Street has no relevance to the issue on appeal here and is not inconsistent with the BSA's decision-making with respect to the Rooftop Gardens at 808 Columbus Avenue.

Petitioners' second and third examples are drawn from the approval process for proposed new open space features at the Park West Village superblock. The block quotation on page 23 of the Petitioners' brief (to be found on A96, not A95 as indicated) is from a DOB determination dated August 31, 2012 approving certain land as "open space" even though it would be under the roof of the proposed nursing home. The applicant proposed that this area be "open and unobstructed" and thus accessible to all residential dwelling units on the zoning lot.

---

prohibits locating "open space" over residential dwelling units. *See* PWV Br. at 7 (quoting definition of "open space").

A95. Not surprisingly, the DOB determination approving this area as "open space" conditioned that approval on the applicant complying with the conditions described in the applicant's submission to DOB describing the proposed open space as open to all. *See* A96. The DOB's approval of this open space as proposed by the applicant does not address whether DOB would have approved a different accessibility condition had the applicant proposed a different arrangement. Accordingly, the DOB's determination approving the applicant's proposed open space under the roof of the nursing home is not inconsistent with DOB's determination as to the Rooftop Gardens at 808 Columbus Avenue.

Similarly, the block quotation on page 24 of the Petitioners' brief states that the "child's play area" and "Meditation Garden" are to be open to all residents on the zoning lot (A101) because this is what the applicant proposed in its submissions to DOB. *See* A103, A95. The DOB condition of approval does not address whether DOB would have approved different accessibility conditions had they been proposed by the applicant. Accordingly, the DOB's approval as to the play area and Meditation Garden is not inconsistent with DOB's determination as to the Rooftop Gardens at 808 Columbus Avenue.

III. The City Charter would have precluded the BSA from repudiating its 2009 decision holding that the Rooftop Gardens at 808 Columbus Avenue are "open space."

PWV has demonstrated that section 666[8] of the City Charter would have precluded BSA from repudiating its 2009 decision holding the rooptop gardens to be "open space." *See* PWV Br. at 51-54. This is so because in good faith reliance on the 2009 BSA decision, PWV constructed the 808 Columbus Avenue building with the understanding that, as shown on the open space plan therefor, the superblock would contain sufficient open space to build a future community facility building in a portion of the open space on the zoning lot. *See* PWV Br. at 52-53. Thereafter, in further reliance on the 2009 BSA decision, PWV spent years planning the future construction of the community facility building. *Id.* Thus, PWV acted "in good faith reli[ance]" on the 2009 BSA decision, and the BSA would have violated PWV's rights under the City Charter had BSA repudiated the 2009 decision. PWV Br. at 53.

The Petitioners' response to this argument is to assert that PWV's claim to have relied on the 2009 BSA decision is a "Bogus Issue." Pet. Br. at 54. No explanation is provided as to why this is so. It is undisputed that in reliance upon the 2009 decision, PWV invested hundreds of millions of dollars in the construction of 808 Columbus Avenue. A123 ("the Board notes that 808 Columbus Avenue was completed pursuant to DOB's approval and the Board's

decision in the 2009 Appeal and the construction relied on a zoning analysis that included 42,500 sq. ft. of open space on a first-floor roof of the new building."). It would have violated the City Charter for the BSA to have credited Petitioners' contention that the "2009 Resolution was wrong." Pet. Br. at 50.

Thus, it was reasonable for BSA to take the position in 2015 that it would adhere to its 2009 resolution unless Petitioners could demonstrate that the 2011 zoning amendments changed the definition of "open space." A124-25. It is undisputed that the 2011 zoning amendments did not change the definition of "open space" and that there is no evidence that the City Council sought to change the definition of "open space" in enacting those amendments. *Id.*; PWV Br. at 7-10, 24-25, 26.

IV. The Petitioners' policy arguments do not provide a legal basis to overturn the BSA decision.

The Petitioners present a purported summary of the "towers-in-the-park" typology of architecture. *See* Pet. Br. at 6-10. The presentation establishes only that certain architectural theorists favor – and the Zoning Resolution itself requires – "open space" on certain zoning lots. The presentation does not establish that an area may be "open space" only if it is accessible to all residents who live on a zoning lot. In fact, as permitted by the Zoning Resolution (ZR § 25-64), the footprint of the community facility building site at issue here was for many years used as a surface parking lot that could only be used by tenants who had rented a

designated parking space in the lot; thus, each space was available only to that tenant, not all residents on the zoning lot. A80, A137. There is no "universal principle" that every square foot of "open space" must be accessible to all residents on the zoning lot, and a decision by this Court so holding would upset established land use practices throughout the City.

Moreover, even residents who do not have access to an "open space" area may benefit from the existence of that area because as noted by DOB below, "even without the physical means of gaining entry to the gardens, the residents' view of the sky continued to be unobstructed." A205 (citing the DOB testimony at A313). An area above a commercial building may be counted as "open space" only if it is not more than 23 feet above curb level. *See* PWV Br. at 7 (quoting definition of "open space"). This requirement caused the 808 Columbus Avenue building to be designed so that the retail portions of the building below the Rooftop Gardens are one-story in height, preserving light and air for the entire superblock. A110, A111.

Finally, the Petitioners describe the issue on appeal as an "abstract question of law." Pet. Br. at 2. To PWV, it is not abstract at all. The issue on appeal is whether the Rooftop Gardens at 808 Columbus Avenue are "open space" as the DOB and BSA have repeatedly determined. This issue is critical to PWV. Unless the City Council were to rezone the superblock so as to eliminate the "open

space" requirements, the Appellate Division decision below could effectively prevent any further development of the open areas of the superblock, to the very substantial detriment of PWV and to the detriment of those community members who would benefit from a new community facility building there. The Appellate Division decision below is in derogation of PWV's common law property rights to build on its private property and does not respect the canon that any ambiguity in the language of a zoning regulation must be resolved in the property owner's favor. *See* PWV Br. at 38 (quoting *Allen v. Adami*, 39 N.Y.2d 275, 277 (1976)).

CONCLUSION

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

Dated: New York, New York
January 28, 2020

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

By: 

Philip E. Karmel
1290 Avenue of the Americas
New York, New York 10104
Telephone: 212.541.2311
Email: pekarmel@bclplaw.com
Attorneys for Respondent-Appellant
PWV Acquisition LLC

CERTIFICATE OF COMPLIANCE

Exclusive of portions exempted by 22 N.Y.C.R.R. 500.13(c)(3), the reply brief contains 2,418 words.

Dated: January 28, 2020

Philip E. Karmel