Date: August 21, 2019

Examiner's Name: Toni Matias

BSA Calendar #: 2019-89-A and 2019-94-A

Electronic Submission: ■ Email ☐ CD

Subject Property/
Address: 36 West 66th Street, Manhattan

Applicant Name: John Low-Beer on behalf of City Club of New York and Klein Slowick, PLLC on behalf of Landmark West!

Submitted by (Full Name): David Karnovsky, Fried, Frank, Harris, Shriver & Jacobson LLP on behalf of West 66th Sponsor LLC

A) The material I am submitting is for a case currently **IN HEARING,** scheduled for 9/10/19.
The reason I am submitting this material:

- ◉ Response to issues/questions raised by the Board at prior hearing
- ○ Response to request made by Examiner
- ○ Other: _____

Brief Description of submitted material: Letter on behalf of West 66th Sponsor LLC and exhibits

List of items that are being voided/superseded: _____

B) The material I am submitting is for a **PENDING** case. The reason I am submitting this material:

- ○ Response to BSA Notice of Comments
- ○ Response to request made by Examiner
- ○ Dismissal Warning Letter

Brief Description of submitted material: _____

List of items that are being voided/superseded: _____

MASTER CASE FILE INSTRUCTIONS

- ***Bind* one set of new materials in the master case file**
- ***Keep master case file in reverse chronological order* (all new materials on top)**
- ***Be sure to VOID any superseded materials (no stapling!)***
- ***Handwritten revisions to any material are unacceptable***

Fried, Frank, Harris, Shriver & Jacobson LLP

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August 21, 2019

Honorable Members of the Board
NYC Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007

Re: Cal. No. 2019-89-A; 2019-94-A
Premises: 36 West 66th Street

Dear Honorable Members of the Board:

On behalf of West 66th Sponsor LLC, the owner of the property at 36 West 66th Street, enclosed is one original and one copy of a letter statement and accompanying exhibits, responding to issues raised during the August 6, 2019 public hearing and in a reply statement submitted by the City Club of New York on August 1, 2019.

This submission is also being filed electronically by email.

Sincerely,

David Karnovsky

Enclosures

cc: Michael Zoltan, Assistant General Counsel, NYC Department of Buildings
John Low-Beer, Esq. (On Behalf of the City Club of New York)
Stuart A. Klein, Esq. (On Behalf of Landmark West!)
Susan Amron, General Counsel, NYC Department of City Planning
Ellen V. Lehman, Esq., Fried Frank Harris Shriver & Jacobson LLP

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August 21, 2019

Honorable Members of the Board
NYC Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007

Re: Cal. No. 2019-89-A; 2019-94-A
Premises: 36 West 66th Street

Dear Honorable Members of the Board:

The Appellants have raised two grounds for challenging the new building permit issued for the Project.

First, they are disappointed that new regulations that for the first time limit the floor-to-ceiling height of mechanical spaces were enacted by the City Council on May 29, 2019—after the Project lawfully vested under ZR Section 11-331 by having obtained a building permit and completed foundations in mid-April 2019. For that reason, Appellants now argue that the legislative change was not necessary, and that the Project's mechanical spaces were unlawful under the prior regulations. The Board has made it clear that it views that question to have been resolved in its 2017 decision regarding a site at 15 East 30th Street. See BSA Cal. No. 2016-4327-A (2017). That decision found that the Zoning Resolution did not regulate the floor-to-ceiling heights of mechanical spaces and led to the subsequent legislative action taken by the City Planning Commission (the "CPC") and the City Council in 2019. We agree with the Board for the reasons set forth in our initial papers.

Second, Appellants contend that the bulk distribution provisions of ZR Section 82-34 of the Special Lincoln Square District were misapplied by the Department of Buildings ("DOB"), arguing that the R8 portion of the zoning lot should have been excluded from the calculation. Appellants' argument disregards the plain, unambiguous language of the provision, and the structure of the Special District regulations and the Zoning Resolution as a whole. Appellants' real complaint, at bottom, is and remains the height of the mechanical spaces, which is entirely lawful.

A. ZR SECTION 82-34 APPLIES "WITHIN THE SPECIAL DISTRICT" AND NOT TO THE C4-7 PORTIONS OF THE SPECIAL DISTRICT ALONE

ZR Section 82-34 states:

> Within the Special District, at least 60 percent of the total floor area permitted on a zoning lot shall be within stories located partially or entirely below a height of 150 feet from curb level.

Appellants assert that this provision does not mean what it says. Instead, they argue that when the provision states that it applies "within the Special District," it really means that it applies in only "certain portions" of the Special District. Specifically, Appellant City Club most recently articulated its latest version of this position in its reply statement, arguing that the language should be read to mean "within the Special District *where applicable*." (Reply SOFL at 5.)[1] But the areas within the Special District to which Appellants say ZR Section 82-34 applies (the C4-7 portion of the zoning lot) and the areas of the Special District to which Appellants argue the regulation does not apply (the R8 portion of the zoning lot) are not identified anywhere in the regulation.

At bottom, Appellants are asking the Board to rewrite the statute—either to add language to the provision that excludes R8 zoning districts in the Special District from ZR Section 82-34, or that affirmatively confines ZR Section 82-34 to C4-7 zoning districts only. Appellant City Club flippantly asserts in its reply statement (without citation) that "implicit qualifications" of this kind "are routinely read into language all the time." (Reply SOFL at 22.) But the Special District does not operate on the basis of "implicit" exclusions or inclusions. Instead, the Special District regulations (like the rest of the Zoning Resolution) expressly define their scope of application. The regulations are detailed and tailored: In many instances, they apply to specified portions of the District only—to specified subdistricts of the Special District, to specific street frontages within the District, or to only certain underlying zoning districts mapped within the Special District. A list of examples of those regulations is attached as Exhibit A. Other Special District regulations apply "within the Special District" but include certain specifically identified exceptions. A list of examples of those regulations is attached as Exhibit B.

Accordingly, when the CPC wanted to apply a provision to a particular subdistrict, street frontage, or zoning district, it said so in the text of the regulation, and it did so often. And when the CPC wanted a rule to apply to the entire Special District with one or more limited exceptions, it also knew how to do that, and did so expressly in the text of the regulation.

The CPC did neither here. Unlike *all* of these provisions (see Exhibits A and B) that apply to only certain portions of the Special District, ZR Section 82-34 does not include *any* exceptions, and it plainly applies within the Special District irrespective of subdistrict, street frontage, zoning district, or any other limitation. Appellants' argument to the contrary is thus squarely at odds with the plain language and structure of the Special District regulations.

In its reply statement, Appellant City Club cites what they claim is a counterexample, ZR Section 82-22, which they say "does not state any locational limitations or exclusions, but it is not applicable in the R8 portion of the District." (Reply SOFL at 22–23.) But that section expressly cross-references and overrides the provisions of ZR Section 32-422, an underlying

[1] Citations to "Reply SOFL" refer to the Reply Statement of Facts and Law of the City Club of New York et al. submitted to the Board on August 1, 2019.

commercial district regulation relating to the location of floors occupied by commercial uses.[2] It does not need to state that it only applies in the C4-7 district or that it does not apply in an R8 district.

According to Appellant City Club's latest formulation that "within the Special District" really means "within the Special District *where applicable*," ZR Section 82-34 applies "where towers are allowed." (Id. at 5.) Appellant City Club advocates for this reading (which is itself inconsistent with the provision's plain language) based on its mistaken belief that towers cannot be built in the R8 district. But that assumption is also wrong. ZR Section 24-54 *permits* community facility towers to be built in R8 districts. (The text of ZR Section 24-54 is attached as Exhibit C hereto.) Attached as Exhibit D hereto are two illustrations of community facility towers that are permitted within the R8 portion of the zoning lot at issue. The first illustration shows that absent application of the 60% bulk distribution requirement imposed by ZR Section 82-34, a 470-foot, 30-story community facility tower could be built on the R8 portion of the zoning lot; the second illustration shows that application of the 60% bulk distribution requirements has the effect of reducing the size of development and would permit a 350-foot, 22-story community facility tower in that location.[3] Appellants' repeated statements that there is no conceivable purpose to applying ZR Section 82-34 in an R8 district is belied by these examples.

Grudgingly accepting the reality that towers are allowed in R8 districts, Appellant City Club then argues that ZR Section 82-34 should apply only when development takes place under tower regulations—such that development under standard height and setback regulations (such as on the portion of the Project Site[4] building located within the R8 district) is not subject to the calculation. (Reply SOFL at 23.) Of course, ZR Section 82-34 says nothing of the kind and draws no distinction between standard height and setback and tower development.[5]

As discussed at the August 6 public hearing, this is further demonstrated by the fact that ZR Section 82-34 and development under standard height and setback regulations are compatible and do not conflict with each other. In other words, ZR Section 82-34's application does not impede development under standard height and setback rules. Exhibit E attached hereto shows a standard height and setback building in the R8 district that rises to 85 feet and then lives within a 3.7:1 sky exposure plane. The diagram shows that the 60% within 150-foot requirement is met.

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[2] ZR Section 82-22 states: "The provisions of Section 32-422 (Location of floors occupied by commercial uses) shall not apply to any commercial use located in a portion of a mixed building that has separate direct access to the street and has no access within the building to the residential portion of the building at any story. In no event shall such commercial use be located directly over any dwelling units."

[3] The community facility tower is subject to a maximum tower coverage requirement of 40% pursuant to ZR Section 24-54(a). There is no minimum tower coverage requirement. This example further demonstrates that ZR Sections 82-34 and 82-36 do not apply to an identical set of zoning districts and are not necessarily linked, as Appellants claim. (See infra at 6.)

[4] The "Project Site" refers to the zoning lot comprised of Manhattan Block 1118, Lots 14, 45-48, and 52.

[5] In response to a follow-up question from the Chairperson at the August 6th public hearing, we note that the proposed community facility use is located in the cellar and on the ground floor of the Project only and there is no community facility use in the tower portion of the building. There is no tower in the R8 portion and therefore no portion of the zoning lot is subject to the regulations of ZR Section 24-54.

Any suggestion by Appellants that ZR Section 82-34 by definition can only apply to tower development is simply wrong.

B. DOB PROPERLY APPLIED THE SPLIT LOT RULES

Appellants also argue that DOB's calculation of the 60% of permitted floor area based on the zoning lot as a whole violates the split lot rules. (CC SOFL at 18.) In the absence of any language in ZR Section 82-34 limiting its application to the C4-7 portion of the Project Site, Appellants point to another provision altogether, ZR Section 82-36, as support for this argument. They suggest that that provision somehow changes the scope of ZR Section 82-34. (See Reply SOFL at 17.) That does not work either. ZR Section 82-36 governs how tower development rules under ZR Sections 33-45 and 35-65 apply within the Special District, subject to certain modifications specific to the Special District. ZR Sections 33-45 and 35-65 are commercial tower regulations that *necessarily* apply in the C4-7 district and not in an R8 district, and the same is therefore the case for ZR Section 82-36 itself. (The text of ZR Section 82-36 is attached as Exhibit F hereto).

Accordingly, the Project Site is thus clearly a split lot for purposes of ZR Section 82-36, and DOB correctly applied the split lot rules to its review of the Project Site's compliance with ZR Section 82-36. By contrast, nothing in ZR Section 82-34 sets forth a similar limitation restricting its applicability to a C4-7 district only, and there is also nothing in ZR Section 82-36 which, by cross reference or otherwise, provides that ZR Section 82-34 only applies to the C4-7 portion of a zoning lot. Accordingly, unlike in the case of ZR Section 82-36, the Project Site is not a split lot for purposes of ZR Section 82-34 and the 60% calculation under that provision must be applied across the entire zoning lot.

C. APPELLANTS' "EXPLANATORY NOTE" THEORY IS BASELESS

Appellants' next attempt to narrow the scope of ZR Section 82-34 reduces to its argument that the phrase "within the Special District" should be ignored as some sort of explanatory note that is intended only to highlight for the reader that ZR Section 82-34 differs in what Appellants characterize as "minor" respects from the rules set forth in ZR Section 23-651(a)(3), part of the Tower-on-a-Base regulations.[6] (CC SOFL at 11.) Under this theory, the Special District is either governed by, or operates as a "variation" of, the Tower-on-a-Base regulations set forth under ZR Section 23-651. (Reply SOFL at 7.) Of course, had the CPC wished this to be the case it could and would have said so. Indeed, the Zoning Resolution is replete with instances in which the CPC has stated that underlying zoning district regulations apply in a particular Special District subject to specified modifications or exceptions. A list of examples is attached as Exhibit G hereto.

[6] That is, Appellants contend that the four-word phrase "within the Special District" really means "[t]he general version [of the Bulk Packing rule in ZR Section 23-651(a)(3)] differs from the Special District version [in ZR Section 82-34] in that it is slightly less demanding, and also more complex: the required percentage of floor area below 150 feet [under ZR Section 23-651(a)(3)] starts at 55 percent and increases to 59.5 percent as tower lot coverage decreases from 40 percent to 31 percent." (CC SOFL at 19; LW! SOF at 12-13.)

Appellant City Club's only response to this glaring omission is to conjecture that the CPC concluded that drafting such a clear provision would have been too complicated, claiming that "it would have severely challenged the drafters, and resulted in an incomprehensible provision, had they tried to draft the Special District version as a modification of the general provision, as Extell suggests, because although the essence of the two provisions is the same, they differ in many of their particulars." (Reply SOFL at 16.) In fact, DCP did precisely what Appellants say would have "severely challenged the drafters" when it drafted and the CPC then adopted ZR Section 35-64 at the very same time as the 1993 amendments to the Special District regulations. ZR Section 35-64(a) expands the locations to which Tower-on-a-Base regulations apply beyond the R9 and R10 districts specified in ZR Section 23-651, providing that the Tower-on-a-Base regulations apply to specified commercial districts (not including a C4-7 district), subject to certain enumerated modifications. (The text of ZR Section 35-64 is attached as Exhibit H hereto.) By contrast, ZR Section 82-34 does nothing of the sort. It does not incorporate the provisions of that section by cross-reference, with or without modifications.

Appellants make this tortured argument because they hope that characterizing the phrase "within the Special District" as a mere explanatory notation that ZR Section 82-34 varies from Tower-on-a-Base regulations with respect to the percentage of floor area subject to bulk distribution will create the impression that ZR Section 82-34 otherwise operates identically to Tower-on-a-Base regulations. Appellants hope to use that misimpression to argue that it follows that the calculation of bulk distribution under ZR Section 82-34 excludes the R8 portion of a zoning lot in the same manner as would be the case under the Tower-on-a-Base regulations.

In fact, Tower-on-a-Base regulations and ZR Section 82-34 differ from each other in several ways, both large and small, and our initial papers detail many of these differences. (Owner SOFL at 14, Exhibit 21.)[7] One such difference, for example, is that Tower-on-a-Base regulations apply to zoning lots that have wide street frontage; ZR Section 82-34 has no such limitation. Appellants' attempt to eliminate the differences between the two provisions fails for all of the reasons we cite.

But the key difference between the Tower-on-a-Base regulations and ZR Sections 82-34 and 82-36 at issue here is structural. Under the Tower-on-a-Base regulations, both the minimum tower coverage requirements in ZR Section 23-651(a)(1) and the bulk packing requirement in ZR Section 23-651(a)(3) are subparts of the same provision, ZR Section 23-65, which applies *only* to tower development in R9 and R10 zoning districts. (The text of ZR Section 23-65 is attached as Exhibit I hereto.) Therefore, where a Tower-on-a-Base building is built on a zoning lot split between an R9 or R10 district and another district such as R8, the bulk packing calculation, *consistent with the express terms of ZR Section 23-65*, is based on the floor area of the portion of the zoning lot within the R9 or R10 district only. That is, as subparts of the same provision, which applies only to R9 and R10 district, they apply to the exact same zoning districts.

ZR Sections 82-34 and 82-36, on the other hand, are two separate provisions; they are not subparts of a single provision, nor do they cross-reference each other. One of those provisions

[7] Citations to "Owner SOFL" refer to the Statement submitted on behalf of West 66th Sponsor LLC on July 24, 2019.

(ZR Section 82-34 governing bulk distribution) applies to any zoning lot within the Special District, while the other (ZR Section 82-36 governing the calculation of tower coverage in towers built under commercial district regulations) applies *only* in the C4-7 district. Thus, in contrast to ZR Section 23-651(a)(1) and (a)(3), the Special District regulations at issue do *not* apply to identical sets of zoning districts. Therefore, where, as here, a tower is built within the Special District on a zoning lot split between a C4-7 district and an R8 district, the bulk distribution calculation is based on the floor area of the zoning lot as a whole, *consistent with the express terms of ZR Section 82-34*, while tower coverage is measured against the C4-7 portion of the zoning lot, *consistent with the express terms of ZR Section 82-36*.

Likely recognizing that their explanatory note theory is wholly implausible, Appellant City Club argues in its reply statement that the CPC "had no need to cross-reference the two versions of the Bulk Packing Rule, or to indicate in any way that they are essentially the same." (Reply SOFL at 15–16.) It is not that there was no need to point out that the two provisions are essentially the same; the fact of the matter is that Tower-on-a-Base regulations and ZR Section 82-34 are *not* the same. They are different and work differently. And the fact that the two provisions were adopted on the same day does not make them the same either. (See CC SOFL at 18-19; LW! SOF at 12.) Simply put, they are different provisions adopted under separate ULURP applications, with different terms and applicability.

D. RESORT TO THE LEGISLATIVE HISTORY IS INAPPROPRIATE AND IT DOES NOT IN ANY EVENT SUPPORT APPELLANT'S POSITION.

The Board has stated that resort to legislative history is unnecessary where the plain language of a zoning provision is clear and unambiguous. See BSA Cal. No. 136-08-A (2008); BSA Cal. No. 153-06-A (2007); see also Matter of Peyton v. New York City Bd. of Standards and Appeals, 86 N.Y.S.3d 439, 452 (1st Dep't 2018) ("When a statute's language is clear, resort to extrinsic evidence to glean the legislature's intent is not necessary.") That doctrine applies here, where the language of ZR Section 82-34 is clear and unambiguous. We nevertheless briefly address Appellants' analysis of the legislative history below.

Appellants argue that in considering the 1993 amendments—which added ZR Section 82-34—DCP identified for study six remaining development sites in the Special District. (CC SOFL at 19.) These were selected based on traditional soft-site criteria, i.e., sites containing (a) vacant land or a vacant building; (b) a commercial building at least 50 percent under allowable FAR; or (c) a residential building with less than four occupied units. Each of these sites was located entirely within a C4-7 district. (Exhibit J hereto at 7.) Appellants cite this as support for the proposition that ZR Section 82-34 must therefore apply only to property mapped C4-7.

In effect, Appellants are arguing that a zoning provision should be limited to apply only where the characteristics of a particular project site match those of soft sites that were studied in the amendment process. In other words, Appellants would have the Board read the opening phrase of ZR Section 82-34, "within the special district," to mean "for those sites within the special district with the characteristics which match those of the six potential sites identified and studied by the Commission in the preparation of this amendment." To state the position is to underscore its absurdity. The fact that the six soft sites did not include one located (whether

wholly or partially) within an R8 district is obviously *not* a basis for ignoring the plain language of the statute that was adopted.

In fact, the legislative history shows that both the CPC and various stakeholders understood that the new rule governing bulk distribution would apply on a district-wide basis. As discussed in the CPC Report, community organizations and local elected officials had proposed a *district-wide* 275-foot limit on building height. (Owner SOFL, Exhibit 17 at 12–13, 19.) The CPC stated that the proposed district-wide height limit was not "necessary" and rejected it in favor of the CPC's own proposal, which did not include fixed height limits. (Id. at 19.) The CPC would not have viewed and described these options as interchangeable had its proposal not also applied on a district-wide basis.

Appellants also misleadingly state that the CPC made "repeated invocation" in its Report that the district-wide application of its proposed regulations would produce buildings of "a specific height range and upper limit" from the mid-20 to the low-30 stories. (Reply SOFL at 14.) In truth, the CPC Report makes this observation just once—and only with regard to "the remaining development sites," i.e., the six soft sites analyzed at the Environmental Simulation Center. (Owner SOFL, Exhibit 17 at 19.) That is, the CPC states in its Report that its proposal "would produce building heights ranging from the mid-20 to the low-30 stories (including penthouse floors) *on the remaining development sites*." (Id. (emphasis added).)

Appellants truncate the quotation (see Reply SOFL at 13), moreover, in an attempt to create the impression that the CPC proposal promised with mathematical certainty that the district would be limited to buildings with stories ranging from the mid-20 to the low-30 stories. What the CPC in fact said in its Report was only that its proposed rules "should predictably regulate the heights of new development." (Owner SOFL, Exhibit 17 at 19.) Significantly, Community Board 7 and others strongly disagreed with this view, with the Community Board recommending against the 1993 text amendment and stating in its resolution that "City Planning's proposal to limit building height with 'packing the bulk' (requiring 60% of the bulk below 150 feet) has not been tested on actual buildings, and is therefore *unpredictable*." (Owner SOFL, Exhibit 22 at 3 (emphasis added).)

In short, this history shows that DCP (and various stakeholders) understood full well that the new bulk distribution rules would apply throughout the district in lieu of imposing a district-wide height limit. And the history further shows that while DCP conducted planning studies on six soft sites, it was a matter of dispute how the rules would play out on either those six soft sites or other locations in the Special District.

According to Appellants, however, the fact that the Project Site was not one of the studied soft sites and that application of ZR Section 82-34 to the Project Site produces a number of stories they view as inconsistent with the goals of the amendments can only mean that ZR Section 82-34 does not apply to the R8 portion:

> In 1993, the very small R8 portion [of the Site] was entirely developed with substantial residential buildings and the large and then relatively new building of the Jewish Guild for the Blind, so it

> is unlikely that the drafters would have considered that that portion of the Special District might be redeveloped, much less that it would be redeveloped with a tower.

(Reply SOFL at 16.) But the drafters are not clairvoyant, and the fact that development occurs at a location and in a form which may not have been anticipated by the drafters is *not* a basis for having this Board or a court rewrite the zoning which *was* drafted and adopted. As the Court of Appeals made clear in Raritan Development Corp v. Silva, "the courts are not free to legislate and if any unsought consequences result, *the Legislature is best suited to evaluate and resolve them*." 91 N.Y.2d 98, 107 (1997) (quoting Bender v. Jamaica Hosp., 40 N.Y.2d 560, 562 (1976)). (Owner SOFL, Appendix A.)

Unable to find support for their position in the language, structure or history of the Zoning Resolution, Appellants finally resort to the argument that application of the plain language of ZR Section 82-34 to the Project Site produces an "absurd" result, repeatedly stating that it results in an "increase" in the number of stories and building height. (See Reply SOFL at 21.) The question is: compared to what? If ZR Section 82-34 had not been enacted, the building could achieve 43 stories and a height of 839 feet; under ZR Section 82-34, the building achieves 39 stories and a height of 775 feet. (Exhibit K hereto.) Appellants do not dispute—nor can they—that under the DOB approval, the application of ZR Sections 82-34 and 82-36 operates to *reduce* building height and stories relative to what would otherwise occur in the absence of those provisions. This is obviously not an "absurd" result, as Appellants contend.

Instead, the so-called "increase" in stories and height Appellants complain of (Reply SOFL at 4) is Appellants' way of complaining about the difference between the height and number of stories that results from DOB's lawful approach in compliance with the language of 82-34 and the approach that Appellants would prefer.[8] Appellants' preferences do not constitute proper bases for this challenge.

E. CONCLUSION

Appellants ask the Board to forego the plain, unambiguous language of ZR Section 82-34 in favor of incoherent, wishful interpretations of the phrase "within the Special District." They cite legislative history that demonstrates at best that the potential results of applying the 60% bulk distribution calculation to the Project Site were not studied. And they do so despite indisputable evidence that ZR Section 82-34 does indeed serve to reduce building height in the R8 district by four stories. On this plainly improper basis, Appellants ask the Board to rule that a building with 39 stories is unlawful, while a building in the "low" thirty stories (a term that is

[8] We stated and demonstrated in our initial papers that this difference is six floors. (Owner SOFL at 19 and Exhibit 24.) Appellant City Club objects to this statement as "based on a hypothetical building on the C4-7 portion of Extell's zoning lot, not on the building that Extell is actually building" (Reply SOFL at 19), and argues that it would not be "practical for Extell to amend its plans to build the building described in Exhibit 24." (Id. at 20.) Exhibit 24 *necessarily* shows a "hypothetical" building; it is meant to illustrate a building that the Owner could build under Appellants' theory of how ZR Section 82-34 ought to work, in response to Appellants' argument that the difference between how they contend it ought to work and how DOB applied the provision is absurd. What course of action the Owner might have to take if this appeal is granted is irrelevant to the question of what could be built ab initio under Appellants' interpretation of ZR Section 82-34.

nowhere defined) is permitted. In effect, Appellants seek to create an absolute restriction upon the maximum number of stories allowed within the Special District where none exists. There is no justification for this result, and the DOB determination should be upheld.

Appellants' real complaint is that they are unwilling to accept the Project's tall mechanical spaces. Indeed, Appellants refer frequently to the overall height of the Project, conflating the two independent issues presented to the Board. The height attributable to the Project's mechanical spaces is significantly greater than the six-story difference that results from application of ZR Section 82-34 in accordance with its plain language and Appellants' preferred methodology. As the Board recognized in its prior decision in Cal. No. 2016-4327-A, and as underscored by the recent legislation addressing mechanical spaces, the Project's mechanical spaces are lawful under the regulations in effect prior to May 29, 2019, under which the project was vested.

Respectfully yours,

David Karnovsky

BSA Cal. No. 2019-89-A; BSA Cal. No. 2019-94-A
August 21, 2019 Letter Statement of West 66th Sponsor LLC
Index of Exhibits and Appendices

ZR § 82-31

"Within Subdistrict A, for any #building# in a C4-7 District, the maximum permitted #commercial floor area# shall be 100,000 square feet."

ZR § 82-11

"Any #development# located on a #zoning lot# with a #lot line# which coincides with either of the following #street lines# - the east side of Broadway between West 61st and West 65th Streets or the east side of Columbus Avenue between West 65th and West 66th Streets - may contain an #arcade# as defined in Section 12-10, except that: ..."

ZR § 82-32(b)

"On a #zoning lot# that is adjacent to the West 59th Street (Columbus Circle) or the West 66th Street subway station mezzanine, platform, concourse or connecting passageway..." CPC may grant a floor area bonus for public amenities.

ZR § 82-24

"... Within Subdistrict B, permitted #signs# facing upon West 65th Street shall not exceed a height of 40 feet above #curb level#, and permitted #signs# facing upon Broadway between West 65th Street and West 66th Street shall not exceed a height of 60 feet above #curb level#.

ZR § 82-35

"Within the Special District, all #buildings# shall be subject to the height and setback regulations of the underlying districts, except as set forth in [ZR Section 82-37(a)-(d) under certain conditions]."

ZR § 82-50

"The regulations of Article I, Chapter 3 (Comprehensive Off-street Parking and Loading Regulations in the Manhattan Core) and the applicable underlying district regulations of Article III, Chapter 6, relating to Off-street Loading regulations, shall apply in the Special Lincoln Square District except as otherwise provided in this Section. ..."

ZR § 24-54

Article II, Chapter 4 - Community Facility Tower Regulations

24-54 (3/22/16)

Tower Regulations

	R7-2	R8	R9	R10

†(a) In the districts indicated without a letter suffix, for *buildings* other than *Quality Housing buildings*, except as set forth in paragraph (b) of this Section, any portion or portions of *buildings* which in the aggregate occupy not more than 40 percent of the *lot area* of a *zoning lot* or, for *zoning lots* of less than 20,000 square feet, the percentage set forth in the table in this Section, may penetrate an established *sky exposure plane* in accordance with the provisions of this Section. (Such portion of a *building* that penetrates a *sky exposure plane* is hereinafter referred to as a tower.)

24-54 (3/22/16)
Tower Regulations

R7-2 R8 R9 R10

†(a) In the districts indicated without a letter suffix, for *buildings* other than *Quality Housing buildings*, except as set forth in paragraph (b) of this Section, any portion or portions of *buildings* which in the aggregate occupy not more than 40 percent of the *lot area* of a *zoning lot* or, for *zoning lots* of less than 20,000 square feet, the percentage set forth in the table in this Section, may penetrate an established *sky exposure plane* in accordance with the provisions of this Section. (Such portion of a *building* that penetrates a *sky exposure plane* is hereinafter referred to as a tower.)

LOT COVERAGE OF TOWERS ON SMALL ZONING LOTS

Area of *Zoning Lot* (in square feet)	Maximum Percent of *Lot Coverage*
10,500 or less	50
10,501 to 11,500	49
11,501 to 12,500	48
12,501 to 13,500	47
13,501 to 14,500	46
14,501 to 15,500	45
15,501 to 16,500	44
16,501 to 17,500	43
17,501 to 18,500	42
18,501 to 19,999	41

Buildings developed or *enlarged* with towers shall comply with either tower-on-a-base regulations or standard tower regulations as follows:

(1) Applicability of tower-on-a-base regulations

The tower-on-a-base regulations of Section 23-651 shall apply in R9 and R10 Districts to any such *building* that:

(i) is located on a *zoning lot* that fronts upon a *wide street* and is either within 125 feet from such *wide street* frontage along the short dimension of the *block* or within 100 feet from such *wide street* frontage along the long dimension of the *block*; and

(ii) contains more than 25 percent of its total *floor area* in *residential use*.

If a portion of such *building* is *developed* or *enlarged* as a *tower* the entire *zoning lot* shall comply with the provisions of Section 23-651.

(2) Applicability of standard tower regulations

(i) In R7-2 and R8 Districts, the standard tower regulations of Section 23-652 shall apply only to *buildings developed* or *enlarged* as towers, where such towers are comprised, at every level, of only *community facility uses*.

(ii) In R9 and R10 Districts, the standard tower regulations of Section 23-652 shall apply to any *building developed* or *enlarged* as a tower that does not meet the location and *floor area* criteria of paragraph (a)(1) of this Section.

(b) Inapplicability of tower regulations

R7-2	R8	R9	R10

In the districts indicated, the provisions of this Section shall not apply to any *development* or *enlargement* located wholly or partly in a *Residence District* that is within 100 feet of a *public park* with an area of one acre or more, or a *street line* opposite such a *public park*.

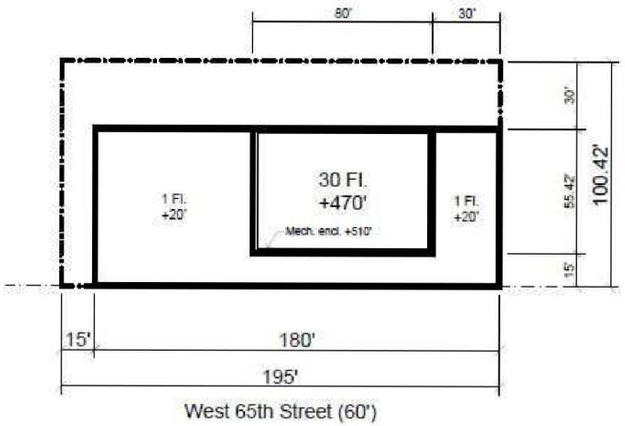
Exhibit C -- ZR Section 24-54

19 West 65th Street

Community Facility Tower Scheme Comparison - 470 FT versus 350 FT

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, do not apply.

Zone:
R8
Special Lincoln Square District



Lot Area:

R8, Lincoln Sq.	19,582 SF

Permitted Floor Area:

CF @ 6.5 FAR	127,282 SF

Proposed Floor Area:

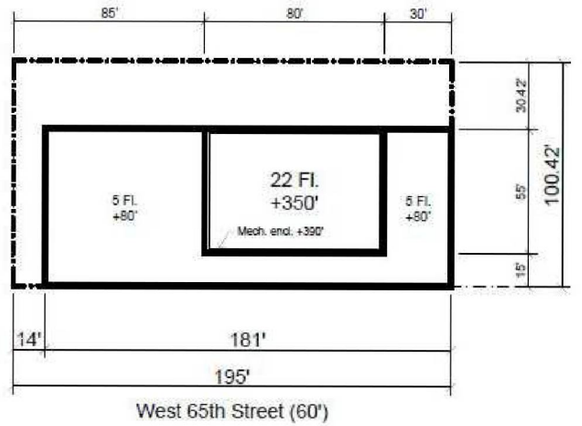
Below 150'	59,953 ZSF	39.25%
Above 150'	77,329 ZSF	60.75%
Total	127,282 ZSF	100.00%

Notes:

1. Assumes Lincoln Sq. bulk distribution requirements do not apply in R8 zones. ZR 82-34
2. CF tower no min., max. 41% or 8,028 SF (19,582 x 0.4), min. 15' tower setback. ZR 23-652, 24-54(a)(2)(i) & 82-35.
3. Lincoln Sq. tower coverage and setback regulations do not apply in R8 zones. ZR 82-36.
4. Maximum CF lot coverage 65% (12,728 SF). Sec. 24-11.
5. ZSF refers to zoning square feet. GSF (Gross Square Feet) refers to above-grade floor area, including mechanical and other deductions that are not zoning floor area.

Assumes Lincoln Sq. bulk distribution requirements, ZR 82-34, apply.

Zone:
R8
Special Lincoln Square District



Lot Area:

R8, Lincoln Sq.	19,582 SF

Permitted Floor Area:

CF @ 6.5 FAR	127,282 SF

Proposed Floor Area:

Below 150'	81,273 ZSF	63.85%
Above 150'	46,009 ZSF	36.15%
Total	127,282 ZSF	100.00%

Notes:

1. Assumes Lincoln Sq. bulk distribution requirements apply in R8 zones. ZR 82-34
2. CF tower no min., max. 41% or 8,028 SF (19,582 x 0.4), min. 15' tower setback. ZR 23-652, 24-54(a)(2)(i) & 82-35.
3. Lincoln Sq. tower coverage and setback regulations do not apply in R8 zones. ZR 82-36.
4. Maximum CF lot coverage 65% (12,728 SF). Sec. 24-11.
5. ZSF refers to zoning square feet. GSF (Gross Square Feet) refers to above-grade floor area, including mechanical and other deductions that are not zoning floor area.

Exhibit D -- Zoning Diagrams - Community Facility Towers (July 23, 2019)

Generic R8 Building

Residential Building Scheme

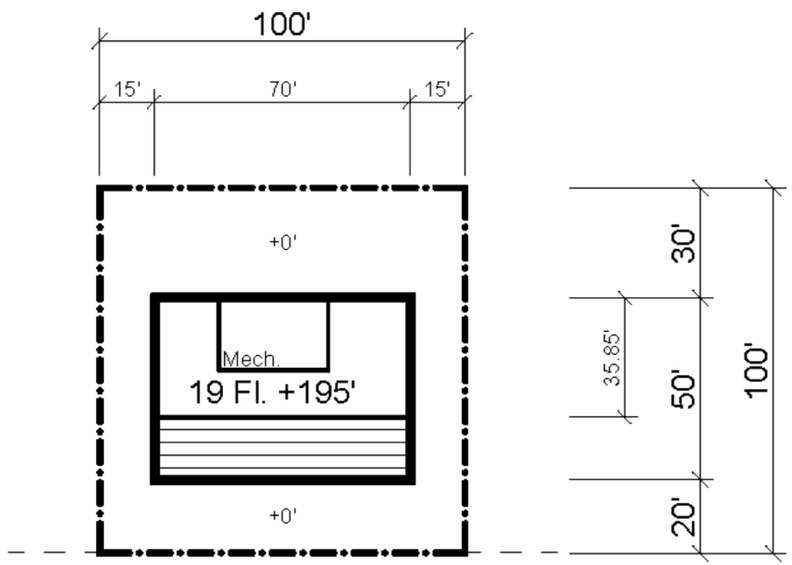
Lot Area: 10,000 SF

Permitted Floor Area:
6.02 FAR 60,200 SF

Proposed Floor Area:

Below 150'	49,400 ZSF	82.06%
Above 150'	10,280 ZSF	17.94%
Total	60,200 ZSF	100.00%

Gross Floor Area 64,000 GSF



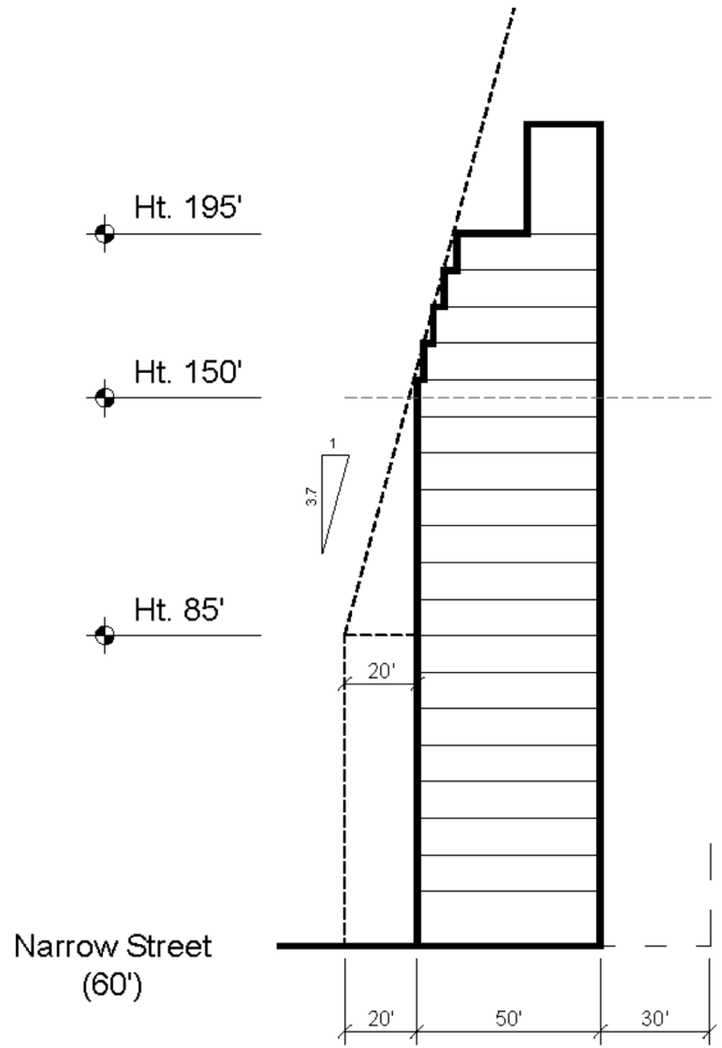


Exhibit E – Zoning Diagram - Standard Height and Setback Controls

R. 001884

ZR § 82-36

Article VIII, Chapter 2 - SLSD Special Tower Regulations

82-36 (3/22/16)

Special Tower Coverage and Setback Regulations

The requirements set forth in Sections 33-45 (Tower †Regulations) or 35-64 (Special Tower Regulations for Mixed Buildings) for any *building*, or portion thereof, that qualifies as a "tower" shall be modified as follows:

(a) At any level at or above a height of 85 feet above *curb level*, a tower shall occupy in the aggregate:

(1) not more than 40 percent of the *lot area* of a *zoning lot* or, for a *zoning lot* of less than 20,000 square feet, the percent set forth in Section 23-65 (Tower Regulations); and

(2) not less than 30 percent of the *lot area* of a *zoning lot*.

However, the highest four *stories* of the tower or 40 feet, whichever is less, may cover less than 30 percent of the *lot area* of a *zoning lot* if the gross area of each *story* does not exceed 80 percent of the gross area of the *story* directly below it.

(b) At all levels at or above a height of 85 feet from *curb level*, the minimum required setback of the *street wall* of a tower shall be at least 15 feet from the *street line* of Broadway or Columbus Avenue, and at least 20 feet on a *narrow street*.

(c) In Subdistrict A, the provisions of paragraph (a) of † Section 35-64, as modified by paragraphs (a) and (b) of this Section, shall apply to any *mixed building*.

For the purposes of determining the permitted tower coverage in Block 3, as indicated on the District Plan in Appendix A of this Chapter, that portion of a *zoning lot* located within 100 feet of the west *street line* of Central Park West shall be treated as if it were a separate *zoning lot* and the tower regulations shall not apply to such portion.

"*Within the Special District*"

NYC Zoning Resolution

ZR § 86-23

"#Buildings or other structures# ***within the Special District*** shall comply with the height and setback regulations of Section 35-65, except as modified by this Section."

ZR § 91-111

"[T]he #use# regulations for C5 Districts ***within the #Special Lower Manhattan District#*** are modified to permit the following #uses#: ..."

ZR § 97-30

"#Signs# for all #uses# ***within the #Special 125th Street District#*** shall be subject to the applicable #sign# requirements in Section 32-60, inclusive to the modifications of Sections 97-31 through 97-34, inclusive."

ZR § 98-422

"The provisions of Section 33-42 (Permitted Obstructions) shall apply to all #buildings or other structures# ***within the #Special West Chelsea District#***, except that dormers may penetrate a maximum base height in accordance with the provisions of paragraph (c)(1) of Section 23-621 (Permitted obstructions in certain districts)."

ZR § 35-64

Article III, Chapter 5 - Special Tower Regulations

†**35-64** (3/22/16)

Special Tower Regulations for Mixed Buildings

C1	C2	C4	C5	C6

In the districts indicated without a letter suffix, when a *mixed building* is subject to tower regulations, the *residential* tower regulations of paragraphs (a) and (b) or the *commercial* tower regulations of paragraph (c) of this Section shall apply to the entire *building*.

(a) In C1 or C2 Districts mapped within R9 or R10 Districts, or in C1-8, C1-9, C2-7 or C2-8 Districts, a *mixed building* that meets the location and *floor area* criteria of paragraph (a) of Section 23-65 (Tower Regulations) shall be governed by the provisions of Section 23-651 (Tower-on-a-base), except that the *building* base regulations of paragraph (b) of Section 23-651 shall be modified, as follows:

†**35-64** (3/22/16)

Special Tower Regulations for Mixed Buildings

C1	C2	C4	C5	C6

In the districts indicated without a letter suffix, when a *mixed building* is subject to tower regulations, the *residential* tower regulations of paragraphs (a) and (b) or the *commercial* tower regulations of paragraph (c) of this Section shall apply to the entire *building*.

(a) In C1 or C2 Districts mapped within R9 or R10 Districts, or in C1-8, C1-9, C2-7 or C2-8 Districts, a *mixed building* that meets the location and *floor area* criteria of paragraph (a) of Section 23-65 (Tower Regulations) shall be governed by the provisions of Section 23-651 (Tower-on-a-base), except that the *building* base regulations of paragraph (b) of Section 23-651 shall be modified, as follows:

(1) On a *wide street*, and on a *narrow street* within 30 feet of its intersection with a *wide street*, the entire width of the *street wall* of a base shall be located on the *street line*.

However, to allow for articulation of corners at the intersection of two *street lines*, the *street wall* may be located anywhere within an area bounded by the two *street lines* and a line connecting such *street lines* at points 15 feet from their intersection. Recesses, not to exceed three feet in depth from the *street line*, shall be permitted on the ground floor where required to provide access to the *building*.

(2) On a *narrow street* beyond 30 feet of its intersection with a *wide street*, the *street wall* of a base shall be located within eight feet of a *street line*.

(3) On a *wide street*, recesses above the ground floor are permitted at any level in the *street wall* of a base for *outer courts* or balconies. The aggregate width of such recesses shall not exceed 50 percent of the width of the entire *street wall* at any level.

However, not more than 30 percent of the aggregate width of such recesses shall exceed a depth of eight feet. Furthermore, no recesses shall be permitted below a height of 12 feet, within 20 feet of an adjacent *building*, or within 30 feet of the intersection of two *street lines*, except for corner articulation as provided for in paragraph (a)(1) of this Section.

(4) On a *narrow street*, recesses are permitted at any level in the *street wall* of a base for *outer courts* or balconies. The aggregate width of such recesses shall not exceed 50 percent of the width of the entire *street wall* at any level.

However, not more than 30 percent of the aggregate width of such recesses shall exceed a depth of eight feet. Furthermore, no recesses shall be permitted below a height of 12 feet within 20 feet of an adjacent *building*, or within 30 feet of the intersection of two *street lines*, except for corner articulation as provided for in paragraph (a)(1) of this Section.

(b) In C4-6, C5-1 or C6-3 Districts, the *residential* portion of a *mixed building* that in the aggregate occupies not more than 40 percent of the *lot area* of a *zoning lot* or, for *zoning lots* of less than 20,000 square feet, the percent set forth in Section 23-65, may be constructed in conformance with the provisions of Section 23-652 (Standard tower), provided the following conditions are met:

(1) at least 65 percent of the total allowable *floor area* on a *zoning lot* under the applicable district regulations is occupied by *residential uses*;

(2) all *uses* within such *mixed building* comply with the provisions of Section 32-42 (Location Within Buildings); and

(3) only the *residential* portion of such *mixed building* penetrates the *sky exposure plane* as set forth in Sections 33-432 or 33-442 (In other Commercial Districts).

(c) In C4-7, C5-2, C5-3, C5-4, C5-5, C6-4, C6-5, C6-6, C6-7, C6-8 or C6-9 Districts, the tower regulations applicable to any *mixed building* shall be the regulations set forth in Section 33-45.

However, in C4-7, C5-2, C5-4, C6-4, C6-5 or C6-8 Districts, when no more than two *stories* of a *mixed building* are occupied by non-*residential uses*, the tower regulations applicable to the *residential* portion of such *mixed building* may be governed by Section 23-652 or, for towers on small lots, the percentages set forth in Section 23-65.

All *uses* within such *mixed building* shall comply with the provisions of Section 32-42.

†

Exhibit H -- ZR Section 35-64

ZR §§ 23-65 & 23-651

Article II, Chapter 3 - Tower Regulations & Tower-on-a base Rules

†

23-65 (3/22/16)

Tower Regulations

R9 R10

†In the districts indicated, without a letter suffix, except for *Quality Housing buildings*, and except as set forth in paragraph (c) of this Section, any portion or portions of *buildings* which in the aggregate occupy not more than 40 percent of the *lot area* of a *zoning lot*, or for *zoning lots* of less than 20,000 square feet, the percentage set forth in the table below, may penetrate an established *sky exposure plane* in accordance with the provisions of this Section. Such portions of *buildings* that penetrate a *sky exposure plane* are hereinafter referred to as towers.

LOT COVERAGE OF TOWERS
ON SMALL ZONING LOTS

Area of *Zoning Lot* (in square feet)	Maximum Percent of *Lot Coverage*
10,500 or less	50
10,501 to 11,500	49
11,501 to 12,500	48
12,501 to 13,500	47
13,501 to 14,500	46
14,501 to 15,500	45
15,501 to 16,500	44
16,501 to 17,500	43
17,501 to 18,500	42
18,501 to 19,999	41

Buildings developed or *enlarged* with towers shall comply with either tower-on-a-base regulations or standard tower regulations, as follows:

(a) **Applicability of tower-on-a-base regulations**

The tower-on-a-base regulations of Section 23-651 shall apply to any such *building* that:

(1) contains more than 25 percent of its total *floor area* in *residential use*; and

(2) is located on a *zoning lot* that fronts upon a *wide street* and is either within 125 feet from such *wide street* frontage along the short dimension of the *block* or within 100 feet from such *wide street* frontage along the long dimension of the *block*.

If a portion of such *building* is *developed* or *enlarged* with a tower the entire *zoning lot* shall be subject to the provisions of Section 23-651 (Tower-on-a-base).

(b) **Applicability of standard tower regulations**

The standard tower regulations of Section 23-652 shall apply to any such *building* that does not meet the location and *floor area* criteria of paragraph (a) of this Section.

(c) **Inapplicability of tower regulations**

† The provisions of this Section shall not apply to any *building* located wholly or partly in a *Residence District*, that is within 100 feet of a *public park* with an area of one acre or more, or a *street line* opposite such a *public park*.

23-651 (3/22/16)

Tower-on-a-base

Any *development* or *enlargement* that meets the location and *floor area* criteria of paragraph (a) of Section 23-65 and includes a tower shall be constructed as a tower-on-a-base, in accordance with the regulations set forth in this Section. The height of all *buildings or other structures* shall be measured from the *base plane*.

(a) **Tower regulations**

(1) At any level above a *building* base (referred to hereinafter as a "base"), any portion or portions of a *building* (referred to hereinafter as a "tower") shall occupy in the aggregate:

(i) not more than 40 percent of the *lot area* of a *zoning lot* or, for a *zoning lot* of less than 20,000 square feet, the percentage set forth in the table in Section 23-65 (Tower Regulations); and

(ii) not less than 30 percent of the *lot area* of a *zoning lot*.

However, the highest four *stories* of the tower or 40 feet, whichever is less, may cover less than 30 percent of the *lot area* of a *zoning lot* if the gross area of each *story* does not exceed 80 percent of the gross area of that *story* directly below it.

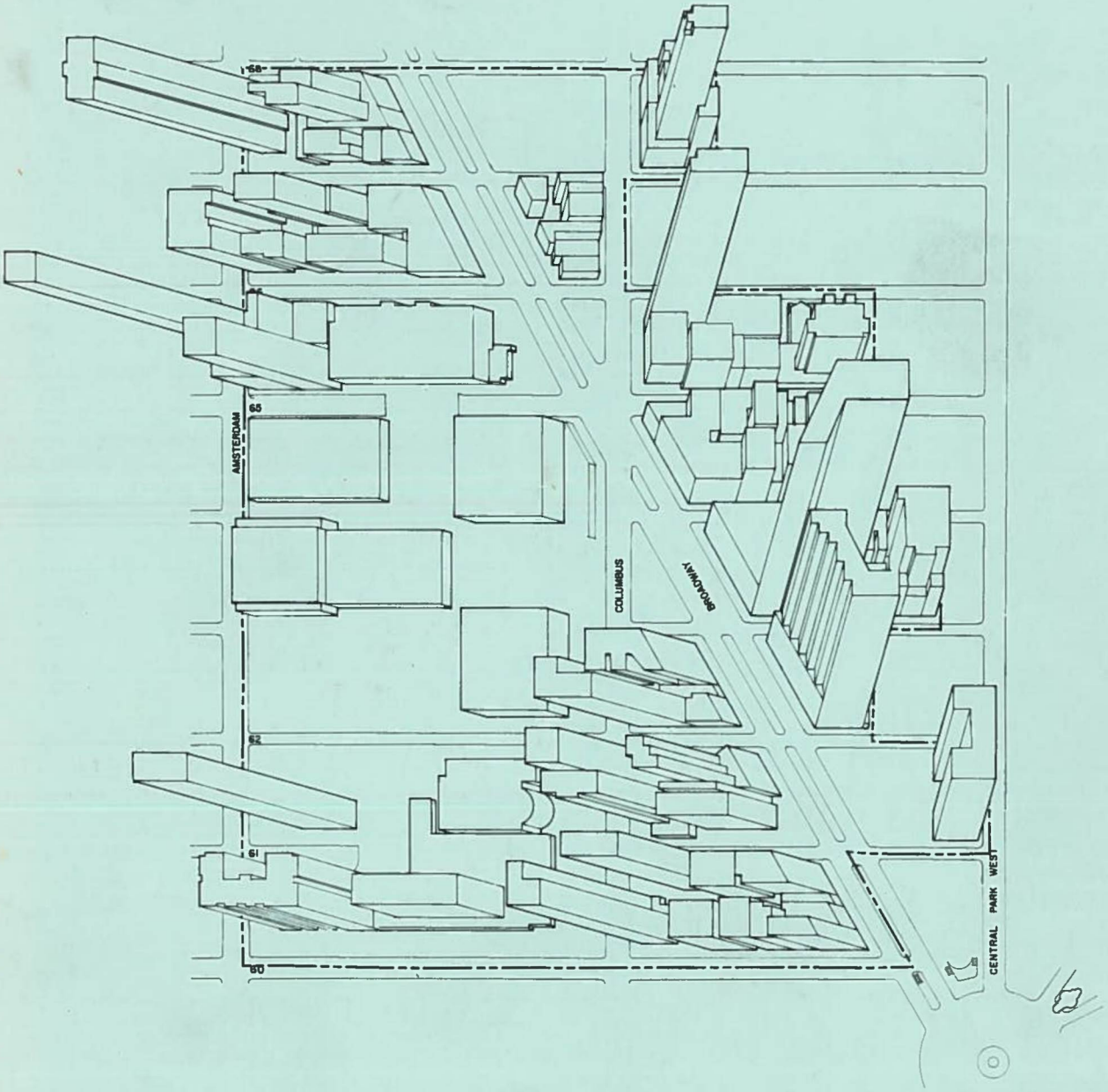
(2) † Any tower located above a base shall not be subject to the provisions of Section 23-64 (Basic Height and Setback Requirements).

(3) At least 55 percent of the total *floor area* permitted on the *zoning lot* shall be located in *stories* located either partially or entirely below a height of 150 feet.

When the *lot coverage* of the tower portion is less than 40 percent, the required 55 percent of the total *floor area* distribution, within a height of 150 feet, shall be increased in accordance with the following requirement:

Exhibit I -- ZR Section 23-65

SPECIAL LINCOLN SQUARE DISTRICT
ZONING REVIEW



Department of City Planning
New York City
1993

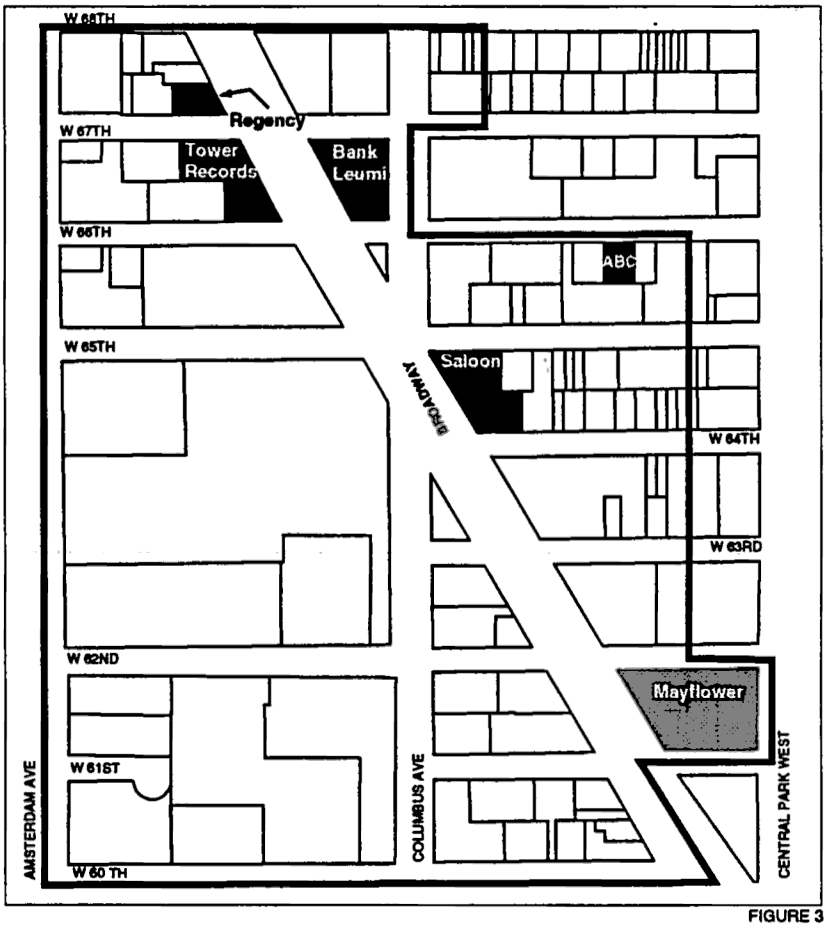


FIGURE 3

DEVELOPMENT SITES

C4-7

DEVELOPMENT SITES

There are six remaining development sites in the district (Figure 3). For the purposes of this study, a property is considered a development site if it is either vacant land or contains a vacant building; contains a commercial building which is at least 50 percent under allowable FAR; or is a residential building with less than four occupied units. The sites are:

1. **Bank Leumi**, a full-block site directly south of the Lincoln Square development between Broadway, Columbus Avenue, West 66th and West 67th streets;
2. **Tower Records/Penthouse Magazine building**, a five story commercial building on Broadway, just north of Lincoln Center between West 66th and West 67th streets;

3. **Regency Theater**, located at West 67th and Broadway;
4. **Saloon/Chemical Bank buildings**, a possible assemblage located on Broadway between West 64th and West 65th streets;
5. **Mayflower block**, a full-block site bounded by Broadway, Central Park West, West 61st and West 62nd streets, containing a vacant parcel facing Broadway and the Mayflower Hotel on Central Park West;
6. **ABC assemblage**, three low-rise structures located on the south side of West 66th Street, between Columbus Avenue and Central Park West.

LANDMARKS

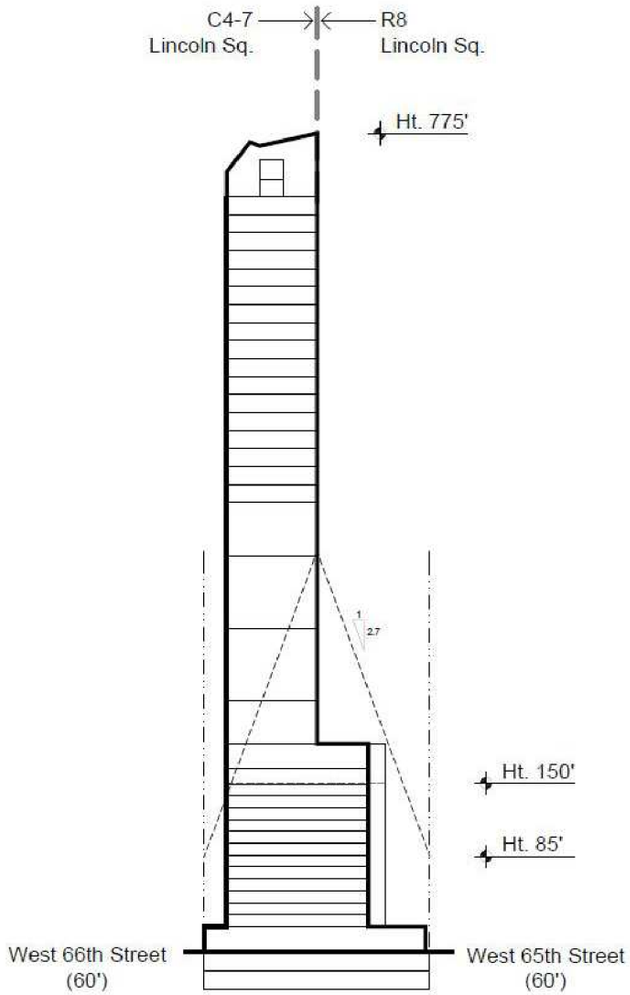
The special district contains three buildings designated as landmarks by the New York City Landmark Preservation Commission: the Sofia Warehouse; the First Battery Armory; and the Century Apartments. In addition, the southern portion of the Central Park West Historic District falls within the district. It should also be noted that the Lincoln Center complex, or its individual buildings, would be candidates for designation in the near future.

OTHER PLANNING INITIATIVES

Community Board 7 and Landmark West!, a community organization, are currently studying the special district in response to the Lincoln Square development and other issues that have been raised by recent developments in the district. This effort is to include recommendations regarding zoning, urban design and pedestrian conditions.

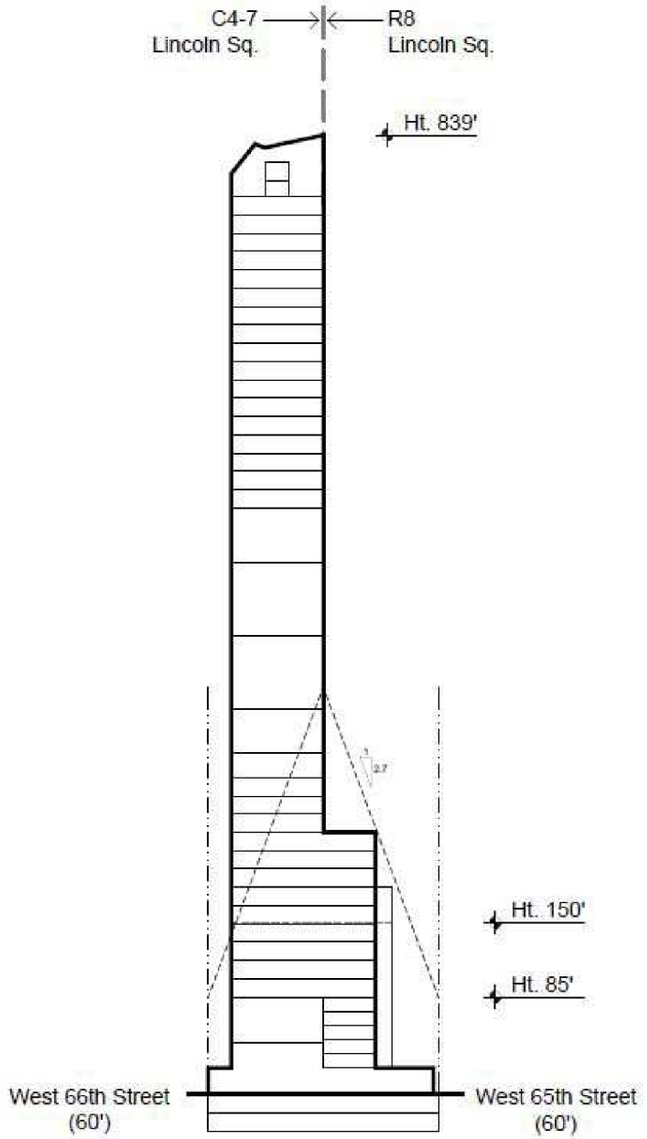
ZR 82-34 Applicability

Assumes SLSD bulk distribution requirements



IN BOTH ZONES

39-STORY-TALL TOWER



NO BULK PACKING RULE

43-STORY-TALL TOWER

R. 001892

Exhibit K -- Zoning Diagrams - Bulk Distribution Rules (July 23, 2019)

Positive
As of: August 21, 2019 12:40 AM Z

Matter of Peyton v New York City Bd. of Stds. & Appeals

Supreme Court of New York, Appellate Division, First Department

October 16, 2018, Decided ; October 16, 2018, Entered

161972/15, 5193

Reporter
166 A.D.3d 120 *; 86 N.Y.S.3d 439 **; 2018 N.Y. App. Div. LEXIS 6814 ***; 2018 NY Slip Op 06870 ****; 2018 WL 4999377

[**1]** In the Matter of Randy Peyton, Appellant, and Hillel Hoffman et al., Intervenors-Appellants, v New York City Board of Standards and Appeals et al., Respondents, et al., Respondents.

Prior History: Appeal from a judgment (denominated decision/order) of the Supreme Court, New York County (Joan B. Lobis, J.), entered August 9, 2016 in a proceeding pursuant to CPLR article 78. The judgment (1) denied the petition seeking to annul a resolution of respondent New York City Board of Standards and Appeals, dated August 18, 2015, which upheld a decision of the New York City Department of Buildings that granted a permit to respondent Jewish Home Lifecare, Inc. for the construction of a nursing home; and (2) dismissed the proceeding.

Matter of Peyton v New York City Bd. of Standards & Appeals, 2016 NY Slip Op 31504(U), reversed.

Matter of Peyton v New York City Bd. of Standards & Appeals, 2016 N.Y. Misc. LEXIS 2928 (N.Y. Sup. Ct., July 26, 2016)

Core Terms

open space, zoning, residents, buildings, square foot, ratio, amendments, requirements, roof, space, calculation, nursing home, building-by-building, multi-building, deference, usable, unambiguous, methodology, provisions, rooftop, roof garden, ambiguity, occupying, ownership, floor area, regulations, courts, parcel, dwelling unit, residential

Case Summary

Overview
HOLDINGS: [1]-The judgment upholding a decision of a city's department of buildings (DOB) granting a permit to respondent for the construction of a nursing home was reversed because the DOB's and board of board of standards and appeals' use of a building-by-building formula in calculating respondent's building's open space ration was contrary to the zoning resolution requiring the permit to be revoked.

Outcome
Judgment reversed; petition granted to extent of annulling the resolution and denying the permit.

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN1 **Collateral Estoppel**

The doctrine of collateral estoppel is a flexible one, and is applied more flexibly in the context of the determinations of administrative agencies. Two requirements must be met before the equitable doctrine of collateral estoppel may be invoked. First, there must be identity of parties, and identity of issues that were decided in the prior action and decisive of the present action. Second, there must have been a full and fair opportunity to contest the decision now said to be controlling. These formal prerequisites are merely a framework for a court to use in conducting a fundamental inquiry of whether litigation should be permitted in a particular case in light of what are often competing policy considerations, fairness to the parties, conservation of judicial resources, and the societal interests in consistent and accurate results.

Business & Corporate Compliance > ... > Real

Property Law > Zoning > Nonconforming Uses

HN2 **Nonconforming Uses**

A use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal nonconforming use, but the right to maintain a nonconforming use does not include the right to extend or enlarge that use.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

Real Property Law > Zoning > Judicial Review

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN3 **Deference to Agency Statutory Interpretation**

The basic principle of administrative law is that the interpretations of a statute by an agency charged with its implementation are entitled to judicial deference and may not be set aside unless shown to be unreasonable or irrational. Further, courts have consistently recognized the pivotal role of a city's board of standards and appeals (BSA's) review of a city's Department of Buildings' determinations. The BSA's interpretation of the zoning resolution's terms must be given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Real Property Law > Zoning > Judicial Review

Governments > Legislation > Interpretation

HN4 **Deference to Agency Statutory Interpretation**

An administrative agency's interpretation of a statute is typically entitled to deference. A city's board of standards and appeals interpretation of a zoning resolution's terms must be given great weight and judicial deference, particularly where the interpretation involves specialized knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, provided that the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute. Where, however, the question is one of pure statutory interpretation dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretative regulations are therefore to be accorded much less weight. In the latter case, courts are free to ascertain the proper interpretation from the statutory language and legislative intent.

Governments > Legislation > Interpretation

Governments > State & Territorial Governments > Legislatures

HN5 **Interpretation**

Legislative history should not be confused with legislative intent, as the two are not coextensive with each other. When a statute's language is clear, resort to extrinsic evidence to glean the legislature's intent is not necessary.

Headnotes/Summary

Headnotes

Administrative Law — Collateral Estoppel — Determination Granting Construction Permit

1. The doctrine of collateral estoppel did not apply to bar petitioners' CPLR article 78 proceeding challenging respondent New York City Board of Standards and Appeals' resolution upholding the New York City Department of Buildings' decision granting a permit for the construction of a nursing home on the ground that the building would violate New York City Zoning Resolution § 12-10's "open space" mandate for petitioners' multi-building zoning lot. Before the equitable doctrine of collateral estoppel may be invoked, there must be identity of parties and identity of issues that were decided in the prior action and decisive of the present action, and there must have been a full and fair

opportunity to contest the controlling decision. Petitioners' connections to a prior administrative proceeding challenging a 2009 resolution concerning another building on the same zoning lot and the similar legal theory raised therein did not justify invocation of the doctrine. Petitioners challenged the grant of a permit for a different building on the zoning lot, and relied on amendments to relevant provisions of the zoning resolution enacted subsequent to the 2009 resolution. Due to the importance of the facts and realities of the matter and the potential impact the appeal would have upon development in the City, the doctrine could not be used to preclude petitioners from litigating the matter.

Municipal Corporations — Zoning — Building Permit — Calculation of Open Space on Multiple-Building Zoning Lot

2. In petitioners' CPLR article 78 proceeding challenging respondent New York City Board of Standards and Appeals' resolution upholding the New York City Department of Buildings' (DOB) decision granting a permit for the construction of a nursing home on the multiple-building zoning lot where petitioners resided, respondent and DOB erred in calculating the lot's open space ratio using a building-by-building formula, thereby improperly including as open space one building's roof garden to which petitioners did not have access. The language in New York City Zoning Resolution (ZR) § 12-10 was clear and unambiguous, and had always defined "open space" as being "accessible to and usable by all persons" residing on the zoning lot. That language unambiguously required 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. Under ZR § 12-10, any rooftop space that was to be considered open space for the purposes of satisfying the open space requirement must have been accessible and usable by all residents on a zoning lot. Therefore, the 2011 amendments to several sections of the Zoning Resolution replacing the words "building" and "any buildings" with "zoning lot" and "all zoning lots" precluded the use of the building-by-building methodology. The absence of any legislative history concerning the amendments' elimination of "building," and replacing the term with "zoning lot," could not be deemed an acceptance of the building-by-building methodology, particularly where the new statutory language was clear and unambiguous.

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Judges: Dianne T. Renwick, J.P., Peter Tom, Troy K. Webber, Jeffrey K. Oing, JJ. All concur except Tom, J. who dissents in an Opinion. Renwick, J.P., Tom, Webber, Oing, JJ.

Opinion by: Jeffrey K. Oing

Opinion

[*122] [441] [***2]** Oing, J.

This appeal seeks to annul respondent New York City Board of Standards and Appeals' (BSA) resolution, which upheld the New York City Department of Buildings' (DOB) decision that granted a permit for the construction of a nursing home on the Upper West Side. At the heart of this dispute, which brings to light once again the unavoidable tension between urban development and quality of life in neighborhoods that make up the unique fabric of New York City, an already densely populated metropolis, is whether this construction would violate the "open space" mandate embodied in the New York City Zoning Resolution. Indeed, under the auspices of the Zoning Resolution, the City's residential districts are to be designed to promote and protect public health, safety and general welfare (ZR Preamble). The general goals include, **[**442]** among other things, protecting residential areas against congestion, requiring open space in residential areas, opening up residential areas

to light and air, providing open areas for rest and recreation, **[***3]** and breaking "the monotony of continuous building bulk" so as to provide a "more desirable environment for urban living in a congested metropolitan area" (ZR § 21-00 [d]). Striking a mutually acceptable balance between these conflicting interests of urban development and quality of life has never been easy, as evidenced by this dispute (*see also* **[*123]** *Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 68 NYS3d 382, 90 NE3d 1253 [2017]; *Chenkin v 808 Columbus LLC*, 570 F Supp 2d 510 [SD NY 2008], *affd* 368 Fed Appx 162 [2d Cir 2010], *cert denied* 562 US 1102, 131 S Ct 796, 178 L Ed 2d 545 [2010]; *Bunten v New York City Bd. of Stds. & Appeals*, Sup Ct, NY County, July 14, 2009, Gische, J., index No. 102750/2009; *Park W. Vil. Tenants Assn. v PWV Acquisition LLC*, Sup Ct, NY County, Dec. 8, 2006, Fried, J., index No. 603756/2006). The fact that the dispute involves opposition from neighborhood residents to the construction of a nonprofit nursing home, arguably an altruistic endeavor, only underscores and magnifies this tension.

Petitioner Maggi Peyton[1] and petitioners-intervenors are residents of Park West Village, located on the Upper West Side. Respondent BSA is an administrative board composed of five **[****2]** commissioners, including the individual respondents in this proceeding, with authority to, among other things, hear and determine appeals from decisions of DOB, which is the municipal agency responsible for enforcing the rules and regulations governing the construction **[***4]** and use of buildings in the City. Respondent Jewish Home Lifecare, Inc. (JHL) is a not-for-profit corporation and member of the Jewish Home Lifecare System. Respondent PWV Acquisition, LLC (Owner) owns the property that is the subject of the instant dispute.

Park West Village (PWV) is a complex located on a "superblock" and constructed on a zoning block that is bounded by Columbus and Amsterdam Avenues, and 97th and 100th Streets.[2] It was built in the 1950s and 1960s as part of a federally subsidized middle income urban renewal project, and includes residential buildings, a school, a church, a public library, a health center, and commercial buildings. The residential buildings are the original three 16-story buildings, located at 784, 788, 792 Columbus Avenue, and a more recently constructed residential and commercial building at 808 Columbus Avenue (808 Columbus). The zoning lot was subject to a 40-year deed restriction prohibiting construction on the site until 2006. The zoning lot area is 308,475 square feet, and **[*124]** its required minimum open space under the Zoning Resolution is 230,108 square feet (required minimum open space).[3] Owner acquired the zoning lot **[**443]** shortly before expiration **[***5]** of the deed restriction. To put this dispute in context, a brief discussion of the applicable Zoning Resolution and the 808 Columbus controversy is in order.

"Open space" under the Zoning Resolution has always been defined as: "that part of a #zoning lot#, including #courts# or #yards#, which is open and unobstructed from its lowest level to the sky and is accessible to and usable by all persons occupying a #dwelling unit# or a #rooming unit# on the #zoning lot#" (ZR § 12-10).[4] With respect to the definition of a zoning lot, the 1961 Zoning Resolution provided that, although a zoning lot "may or may not coincide with a lot as shown on the official tax maps," it must be in "single ownership," with that term being defined 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" (1961 ZR § 12-10). Thus, a zoning lot could only consist of land that was entirely under the control of a single owner or a long-term lease. Under the single owner situation, the assumption would be that a single owner, who controls the entire zoning lot, would be capable of providing open space access to the entire zoning lot. The 1961 Zoning **[***6]** Resolution did not contemplate the possibility that a zoning lot could consist of multiple parcels under different ownership and

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[1] Petitioner Maggi Peyton, the sole original party who commenced this proceeding, passed away on October 26, 2016, while this appeal was pending. By order, entered April 6, 2017, this Court permitted her son, Randy Peyton, to continue to maintain this proceeding on behalf of the estate of Maggi Peyton. By the same order, this Court also permitted additional petitioners, who are Park West Village residents and are members of the Park West Village Tenants Association, to intervene in this instant appeal.

[2] Park West Village also includes a second "superblock" that is bounded by 97th and 100th Streets, and Columbus Avenue and Central Park West. This superblock is not implicated in this appeal.

[3] With respect to the relevant open space square feet measurements, the record demonstrates that there are several discrepancies. The difference in all of the relevant measurements is de minimis and does not affect the resolution of the issues in this appeal.

[4] Hashtag indicates a defined term in the Zoning Resolution.

control, with each parcel subject to its own unique conditions governing open space access.

In 1977, the City Planning Commission (CPC) proposed fundamental changes, which **[****3]** were adopted, to the Zoning Resolution's definition of "zoning lot" by eliminating the requirement that a zoning lot be held in "single ownership." In its July 13, 1977 report, CPC noted that the "single ownership" requirement created "serious problems" with respect to unused development rights and to interested parties' legal rights, and, that the remedy was to replace the "single ownership" with a provision permitting multi-ownership and control on a single zoning lot to ensure protection of all parties with interests in multiple buildings on the zoning lot. Nearly 30 years later, this **[*125]** fundamental change to the "zoning lot" definition gave birth to the 808 Columbus dispute—namely, how to reconcile the "open space" definition (access to all) with a "zoning lot" that is improved with multiple buildings. Indeed, at the April 14, 2015 hearing concerning the JHL building, BSA's Chair, Margery **[***7]** Perlmutter, recognized 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. She highlighted this problem by offering the example of owners of townhouses on a multi-building zoning lot. Perlmutter opined that these multi-owners would, understandably, be reluctant to let residents of other buildings on the lot into their backyards ("[W]here you've got a big zoning lot . . .—that's made up of lots and lots of unrelated tax lots, all other kinds of buildings can't possibly—I'm not letting you into the backyard of my townhouse, just forget it, right"). Obviously, her comments appear to indicate that if compelled to provide access to all residents on a zoning lot owners would claim that it would be an intrusion on their property rights.

In June 2007, Owner, or its affiliate, obtained a permit from DOB to construct 808 Columbus, a 29-story apartment tower, with two single-story attached wings to accommodate commercial establishments. The permit, however, was challenged by **[**444]** PWV residents and neighbors. The challengers focused on the **[***8]** claim that "open space," as that term is defined in the Zoning Resolution, had to be "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot" (ZR § 12-10). The dispute arose because the roof garden at 808 Columbus, which would only be accessible to its residents, was included in the calculation of open space required under the Zoning Resolution. The open space for the roof garden totaled 42,500 square feet. The exclusive roof garden would have a 70-foot saltwater pool inlaid with mosaic tiles, a sundeck, and a lawn. Stating the obvious, the residents of 808 Columbus would have the benefit of the exclusive roof garden, and, additionally, have access to, and use and enjoyment of, the zoning lot's open space used by the PWV residents. On the other hand, PWV residents would merely have access to the general open space, but not be permitted to share in the use and enjoyment of the exclusive 808 Columbus roof garden. Without inclusion of the roof garden in the calculation, the required minimum open space would not be met, and the project **[*126]** would not receive a construction permit, effectively terminating the 808 Columbus project. Over strenuous opposition **[***9]** from residents, community leaders, and elected officials, DOB approved the inclusion of the roof garden in the open space calculation, and granted the permit needed to build 808 Columbus. BSA affirmed the decision to grant the permit by resolution dated February 3, 2009 (2009 Resolution).

In reaching its decision in the 2009 Resolution, BSA relied on and accepted DOB's assertion "that ZR §§ 23-14 and 23-142 require open space with respect to a *building*, rather than to the *zoning lot* as a whole, and therefore [is] satisfied by the Permit application which provides the required amount of open space to each building on the Zoning Lot" (emphasis added). In other words, DOB used, and BSA approved, a building-by-building methodology to calculate the open space ratio for 808 Columbus given that the "ZR § 12-10 definition of 'open space' 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*" (emphasis added). Indeed, in using this approach, DOB and BSA agreed with Owner's claim that "neither ZR §§ 12-10, 23-14, nor any other provision of the Zoning Resolution, expressly concerns a condition involving multiple **[****4]** buildings on a zoning **[***10]** lot, nor requires that open space on a multi-building zoning lot be shared space that is commonly accessible to all occupants of a zoning lot." In reaching its final determination, BSA noted,

> "[A]s each of the existing buildings is allocated an amount of open space that is in excess of that which would be required under the Zoning Resolution if they were located on separate zoning lots, it cannot be seen how those residents would be deprived of an equitable share of open space by the proposed building."

Based on the foregoing, BSA "agree[d] that the open space proposed for the subject site [of 240,331 square feet] does not violate the open space requirements of the Zoning Resolution," and found "that the proposed open space complies with the requirements of ZR §§ 23-142 and 12-10." The challengers commenced a CPLR article 78 proceeding, but ultimately settled the matter and construction of 808 Columbus proceeded to completion.

The construction of 808 Columbus did not put an end to the dispute. In February 2011, two years later, the New York City **[*127]** Council enacted CPC's proposed amendments to the Zoning Resolution. Among the amendments were significant **[**445]** changes to the following five sections of the Zoning Resolution **[***11]** involving open space calculations that have a direct bearing on the instant dispute: section 12-10, defining "open space ratio"; section 23-14, establishing the minimum required open space or open space ratio; section 23-141, prescribing the maximum required open space or open space ratio, the maximum lot coverage and the maximum floor area for nonprofit residences for the elderly in certain zoning districts; section 23-142, establishing the maximum required open space ratio, the maximum floor area ratio and corresponding height factor in certain zoning districts; and section 23-143, prescribing the minimum required open space ratio in certain zoning districts with certain associated height factors. In each of these amended sections of the Zoning Resolution, the City Council changed the language of these statutes by deleting the words "building" and "any buildings," and in their place substituted the words "zoning lot" and "all zoning lots."[5]

The open space dispute has resurfaced. Subsequent to the 2011 amendments, in late 2011, Owner sought to utilize the parcel of land that was formerly a parking lot (parking lot) used by the PWV residents, located at 125 West 97th Street on PWV's zoning lot. In furtherance of this effort, Owner **[***12]** executed an agreement with JHL to exchange the parking lot for JHL's parcel of land located on West 106th Street. This parcel, unlike **[*128]** the parking lot parcel of land, would be large enough for Owner to construct another luxury apartment building. In turn, JHL would receive $35 million and would build a 20-story nursing home building (JHL building) on the parking lot. JHL is not presently the title owner of the parking lot. Instead, it is party to an exchange agreement concerning the parking lot and its current West 106th Street property. The exchange agreement is conditioned on, among other things, JHL obtaining a permit from DOB for the JHL building.

The JHL building would be a state-of-the-art eldercare facility operated under an innovative model of long-term care called "The Green House" model. Unlike traditional nursing home settings, this model provides each resident with a personal living environment, stressing independence while at the same time allowing for enhanced interaction with staff. In that regard, The Green House model creates a series of small "homes" containing up to 12 elders and staff members, with each home organized to function independently, and staffed with a **[***13]** self-managed work team that would provide the full **[**446]** range of personal care and clinical services of a traditional nursing home. As the first Green House high-rise in a major metropolitan setting and the single largest eldercare capital project in the City, this facility seeks to address the needs of a rapidly aging population.

A brief discussion of the scope of the JHL building and its impact on the open space is in order. According to JHL's March 29, 2011 application, the zoning lot at that

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[5] For example, ZR § 12-10 defines the

" 'open space ratio' of a #zoning lot# [as] 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

#building 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#

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#)."

ZR §§ 23-14 and 23-142, which set forth the minimum requirement for open space, were amended to remove the words "building on a," leaving just the words "zoning lot." Thus, ZR § 23-14 was amended to provide "[i]n all districts, as indicated, . . . for any

#building# on a #zoning lot#, the minimum required #open space# or #open space ratio# shall not be less than set forth in this Section… ." And, ZR § 23-142 was amended to read: "[i]n the districts indicated, the minimum required #open space ratio# and the maximum #floor area ratio# for any

#building# on a #zoning lot# shall be as set forth in the following table for

#buildings# #zoning lots# with the #height factor# indicated in the table."

time contained 240,331 square feet of open space, which exceeded the required minimum open space of 230,108 for the zoning lot by 10,223 square feet. JHL proposed 230,726 square feet of open space for the zoning lot, arguably 618 square feet in excess of the required minimum open space of 230,108 square feet. The JHL building would be 275 feet high, and use up to 20,036 square feet of open space. Of this amount, 10,431 square feet would be an accessible roofed garden, which would appear to result in a net loss of open space in the amount of 9,605 square feet. In its March 29, 2011 DOB application, JHL indicated that the 9,605 square feet did not amount to an open space deficit when applied to the **[***14]** excess open space square footage of 10,223.[6] Perhaps recognizing the **[****5]** sensitive and controversial history of open space for this zoning lot, and anticipating a community **[*129]** outcry reminiscent of the 808 Columbus dispute, JHL's DOB application proposed that the JHL building's covered roof, a children's play area, and the Meditation Garden would be "accessible to and usable by all persons occupying a dwelling unit . . . on the zoning lot."

Go to table1

Go to table2

Go to table3

DOB approved JHL's first application for a roofed open space for the JHL building. It conditioned its approval as follows:

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

JHL's second zoning application sought approval of the children's play area and **[**447]** the Mediation **[***15]** Garden, areas on the zoning lot that would be considered as open space. DOB conditioned its approval as follows:

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

[*130] Petitioners, frustrated with what they perceived to be overdevelopment of PWV and the Upper West Side, objected to the permit for the JHL building, and argued, among other things, that the JHL building would violate the Zoning Resolution's open space mandate. Over their objections, on December 4, 2013, DOB granted JHL's permit application to construct the JHL building. Petitioners appealed DOB's decision to the BSA. After holding a public hearing, BSA found that the proposed construction met the requirements for open space under ZR §§ 12-10 and 23-14, and adopted a resolution on August 18, 2015, denying the appeal.

In affirming DOB's grant of the permit **[***16]** for the JHL building, BSA disagreed with petitioners "that constructing a community facility building that does not require open space affects the open space requirement on a site which also contains residential buildings (which do have an open space requirement) where, as here, the site contains the minimum open space required." In arriving at its determination, BSA referred to the 2009 Resolution, which used the building-by-building methodology, and stated that

> "the Board and the DOB concluded that in the case of a multi-building zoning lot, the open space definition could be read to allow some open space to be reserved for the **[****6]** residents of a single building as long as the residents of each building on the zoning lot have access to at least the amount of open space that would be required under ZR § 23-142 if each building were on separate zoning lots."

BSA concluded "that because the definition of open space itself has not changed and because the CPC did not intend to change the open space requirement, subsequent to the 2009 Appeal, [the 2011 amendments] do not dictate any change in the Board's or DOB's

[6] 618 square feet open space excess calculation:

analysis since the prior appeal." BSA pointed out that "the text was amended in 2011, **[***17]** after the 2009 Appeal and CPC had an opportunity to clarify an intent to restrict the open space."

Petitioner commenced the instant article 78 proceeding against BSA, JHL and Owner seeking to annul the 2015 Resolution and to revoke DOB's permit for the JHL building. Again, as they did in the challenge to 808 Columbus and the 2009 Resolution, petitioners contend that the 42,500 square feet roof garden at 808 Columbus can no longer be considered open space, and, as such, cannot be included when calculating the **[*131]** required open space for the zoning lot. They argue that even if the roof garden was arguably within the meaning of open space, and in compliance with ZR §§ 23-14 and 23-142 when 808 Columbus was constructed in 2009, the roof garden presently does not fall within the definition of open space. Petitioners assert that the 2011 amendments eliminated any claimed ambiguity in the interpretation of what constitutes open space under ZR §§ 23-14 and 23-142, and that pursuant to these amendments the 808 Columbus roof garden should not be included in determining the JHL building's open space ratio. Petitioners argue that **[**448]** without 808 Columbus's roof garden the JHL building's open space ratio of 230,726 square feet would **[***18]** fall below the required minimum open space ratio of 230,108 square feet. As a consequence, petitioners assert that DOB's permit for the JHL building must be revoked, which would put an end to the construction of the JHL building.

Supreme Court denied the petition and dismissed the proceeding (2016 NY Slip Op 31504[U] [2016]). In deciding in favor of respondents, Supreme Court noted that petitioners were not challenging the decision with respect to 808 Columbus and its open space ratio. As to whether 808 Columbus's open space should be included in calculating the JHL building's open space ratio, respondents put forth the argument that the open space definition of "accessible" and "usable" by all persons on the zoning lot could not be reconciled with the definition of "zoning lot," which contemplated multiple buildings on a single zoning lot, as in the present case. Thus, respondents argued that they were free to interpret and reconcile this ambiguity, and, accordingly, arrived at a methodology that employed a building-by-building analysis to calculate the open space ratio for a zoning lot containing multiple buildings. Supreme Court agreed and found that it could not say that "the open space provisions could not be subject **[***19]** to different interpretations" (2016 NY Slip Op 31504[U], *17). As such, it concluded that there was "enough ambiguity to defer to 'DOB's practical construction of the ordinance' " (*id.*). Nonetheless, in arriving at this conclusion, Supreme Court expressed serious reservations of respondents' building-by-building methodology, and was

> "not convinced that, as respondents assert, 'the goal of the Zoning Resolution's open space provisions … is to ensure that all persons residing in a residential building have access to an amount of open **[*132]** space that is commensurate with the size of the building and the square footage of the parcel on which it stands' " or "that the ZR intended to treat multi-building zoning lots differently than single-building zoning lots when considering open space requirements" (2016 NY Slip Op 31504[U], *16-17).

We now reverse.

Respondents raise the following threshold issues: statute of limitations and collateral estoppel. We reject respondents' argument that this proceeding is time-barred. The instant challenge was brought within four months after the 2015 Resolution became final and binding (*see* CPLR 217 [1]).

We also decline to apply the doctrine of collateral estoppel to bar this article 78 proceeding. ***HN1***[] The doctrine is a flexible one, and is applied more **[***20]** flexibly in the context of the determinations of administrative agencies (*Jeffreys v Griffin*, 1 NY3d 34, 40, 801 NE2d 404, 769 NYS2d 184 [2003]). Two requirements must be met before the equitable doctrine of collateral estoppel may be invoked. First, there must be identity of parties, and identity of issues that were decided in the prior action and decisive of the present action (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500, 467 NE2d 487, 478 NYS2d 823 [1984]). Second, there must have been a full and fair opportunity to contest the decision now said to be controlling (*id.* at 501). These formal prerequisites are merely a framework for a court to use in conducting a fundamental inquiry of whether litigation should be permitted in a particular case in light of what are often competing policy considerations, fairness to the parties, conservation of judicial resources, and the societal interests in consistent and accurate results (*Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 153, 527 NE2d 754, 531 NYS2d 876 [1988]).

[449] [1]** Notwithstanding some of petitioners' connections to the prior administrative proceeding concerning the 2009 Resolution and the similar legal theory raised in the prior proceeding concerning the same zoning lot, these similarities do not justify invocation of the collateral estoppel doctrine. The instant petitioners are challenging the grant of a permit for a different building on the zoning lot, and rely on amendments **[***21]** to relevant provisions of the Zoning Resolution enacted subsequent to BSA's 2009 Resolution, the prior final determination (*see Green v Santa Fe Indus.*, 70 NY2d 244, 253-254, 514 NE2d 105, 519 NYS2d 793 [1987]). Indeed, those were the central issues set forth in the 2015 Resolution, which BSA found in favor of Owner and JHL when it determined that 808 Columbus' open space allotment could be used in analyzing **[*133]** the open space for JHL. Recognizing the flexible and equitable nature of the doctrine, we cannot overlook the fact that due to the importance of the facts and realities of this matter, and the potential impact this appeal would have upon development in the City, the doctrine cannot be used to preclude petitioners from litigating the instant matter.

The parties do not dispute that 808 Columbus's open space of 42,500 square feet is grandfathered under the Zoning Resolution. Petitioners are not seeking to change the status of that building. There is also no dispute that including 808 Columbus's open space allotment in the JHL analysis would yield for the JHL building an open space figure of 230,726 square feet, 618 square feet above the required minimum open space of 230,108. In arriving at the open space allotment of 230,726 square feet, there would be a reduction **[***22]** of 9,605 square feet of open space from the excess open space of 10,223 square feet. In the end, although the JHL building's open space is above the required minimum open space by 618 square feet, there would nonetheless be a substantial open space reduction. There is also no dispute that if 808 Columbus's open space allotment of 42,500 square feet were removed from the JHL open space analysis the JHL building would not satisfy the required minimum open space, and would violate the Zoning Resolution. As such, the issue is straightforward—whether under the 2011 amendments DOB and BSA can count 808 Columbus's exclusive roof garden's open space square footage of 42,500 in determining the zoning lot's required minimum open space so as to permit the construction of the JHL building (*see Matter of McDonald v Zoning Bd. of Appeals of Town of Islip*, 31 AD3d 642, 819 NYS2d 533 [2d Dept 2006] ***HN2***[↑] ["A use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal nonconforming use, but the right to maintain a nonconforming use does not include the right to extend or enlarge that use"]).

HN3[↑] The basic principle of administrative law is that the interpretations of a statute by an agency charged with its implementation are entitled to judicial deference and **[***23]** may not be set aside unless shown to be unreasonable or irrational (*see Matter New York State Ass'n of Life Underwriters v New York State Banking Dep't*, 83 NY2d 353, 359-360, 632 NE2d 876, 610 NYS2d 470 [1994]). Further, as is relevant to this appeal, courts have consistently recognized the pivotal role of BSA's review of DOB determinations (*see* **[*134]** **[****7]** *Matter of Delafield 246 Corp. v Department of Bldgs. of City of N.Y.*, 218 AD2d 613, 614, 630 NYS2d 741 [1st Dept 1995]; *see also Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419, 676 NE2d 862, 654 NYS2d 100 [1996] ["the BSA's interpretation of the **[**450]** (Zoning Resolution's) terms must be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (internal quotation marks omitted)]). With this framework in mind, we review DOB's and BSA's decision to use a building-by-building approach in a multi-building zoning lot.

In the 2009 Resolution, BSA determined that the open space requirement of ZR §§ 12-10 and 23-14 were not violated by reserving 808 Columbus's roof garden for the exclusive use of its residents. BSA found that DOB's application of a building-by-building analysis in the open space ratio calculation was proper given its finding that there was an ambiguity between the definition of open space (ZR § 12-10), and the requirement of open space with respect to a multi-building zoning lot (ZR §§ 23-14 and 23-142).[7] Indeed, in the 2009 Resolution, **[***24]** BSA concluded that

> "as each of the existing buildings is allocated an

[7] In their arguments, respondents often make reference to multiple buildings under multiple ownership or control. This issue was the result of the 1977 fundamental change to the zoning lot definition. In this dispute and the 808 Columbus proceeding, DOB and BSA did not address the issue of ownership. Thus, any distinction that can be drawn between single owner zoning lot and multiple owner zoning lot is a distinction without a difference. DOB and BSA took the view that application of the building-by-building approach would be used in addressing multiple buildings on a single zoning lot.

> amount of open space that is in excess of that which would be required under the Zoning Resolution if they were located on separate zoning lots, it cannot be seen how those residents would be deprived of an equitable share of open space by the proposed building."

Thus, the 2009 Resolution utilized for the first time the building-by-building methodology in calculating the open space ratio for a zoning lot consisting of multiple buildings, nearly 30 years after the 1977 amendment to the zoning lot definition in which "open space" and "zoning lot" coexisted during that period without incident until the 808 Columbus dispute.[8]

In the present dispute, Owner and JHL repeatedly assert that a reading of the 2011 amendments demonstrates that the **[*135]** City Council did not eliminate the ambiguity between open space and a multi-building zoning lot when it removed the term "building" and replaced it with "zoning lot." Indeed, DOB and BSA agreed with Owner and JHL's statutory interpretation. By **[****8]** accepting this interpretation, DOB and BSA enabled themselves to continue to apply the building-by-building methodology to the JHL open space **[***25]** calculation so as to include the 808 Columbus open space square footage. As further support for their reading, respondents point to the absence of any legislative history addressing and criticizing DOB and BSA's finding that an ambiguity exists, particularly given the City Council's and CPC's awareness of the 2009 Resolution and its controversy. This conclusion does not end the inquiry. The question that remains is whether DOB and BSA properly interpreted the definition of open space within the context of a multi-building zoning lot under the 2011 amendments in calculating the zoning lot's required minimum open space so as to **[**451]** grant the construction permit for the JHL Building.

Petitioners claim that the 2011 amendments to ZR §§ 23-14 and 23-142 made clear that the open space calculation and determination are to be conducted based on the entire zoning lot as a whole, and not on a building-by-building basis.[9] Thus, petitioners contend the 2011 amendments removed the contextual basis upon which BSA relied on when it determined that open space does not have to be accessible to all residents of a zoning lot. As such, they argue that 808 Columbus's open space ratio of 42,500 square feet cannot be included **[***26]** in the JHL building's analysis of open space, and that without it the JHL building will not be in compliance with the open space ratio for the zoning lot. We agree.

HN4[] An administrative agency's interpretation of a statute is typically entitled to deference (*see Matter of Smith v Donovan*, 61 AD3d 505, 508-509, 878 NYS2d 675 [1st Dept 2009], *lv denied* 13 NY3d 712, 919 NE2d 719, 891 NYS2d 304 [2009] **[*136]**). BSA's interpretation of the Zoning Resolution's terms must be given great weight and judicial deference, particularly where the interpretation involves specialized "knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom," provided that the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute (*Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal, 5 NY3d 303*, 312, 835 NE2d 643, 801 NYS2d 783 [2005] [internal quotation marks omitted]; *see also Toys "R" Us v Silva*, 89 NY2d at 418-419). Where, however, the question is one of pure statutory interpretation "'dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretative regulations are therefore to be accorded much less weight' " (*KSLM-Columbus Apts., Inc.*, 5 NY3d at 312, quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459, 403 NE2d 159, 426 NYS2d 454 [1980]). In the latter case, "courts are free to ascertain the proper interpretation from the statutory language and legislative **[***27]** intent" (*Matter of Smith v Donovan*, 61 AD3d at 508-509 [internal quotation marks omitted]; *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102,

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[8] Petitioners' reliance on a DOB decision concerning 144 North Street in Brooklyn to suggest otherwise is unavailing. The issue there was whether DOB should have required a written easement agreement in favor of residents of a new building under construction on the same lot or whether DOB could rely on its examination of the building plans to satisfy itself that access would be provided. That determination did not consider the issue of whether on a multi-building zoning lot there are circumstances under which qualifying open space can be reserved for residents of only one building.

[9] Petitioners' challenge to the building-by-building methodology of open space as being inconsistent with the formula to calculate allowable amount of roofed open space (the 10% rule) is a claim not pleaded in the verified petition or argued before Supreme Court, and raised for the first time on appeal. As such, the argument is not reviewable (*see U.S. Bank Natl. Assn. v Beymer*, 161 AD3d 543, 77 NYS3d 380 [1st Dept 2018]).

689 NE2d 1373, 667 NYS2d 327 [1997] [deference to BSA is not required because the question is one of pure legal interpretation of statutory terms]). Clearly, resolution of this dispute as it concerns the 2011 amendments does not implicate DOB's and BSA's knowledge and understanding of operational practices or entail an evaluation of factual data and inferences to be drawn therefrom. The resolution is one of pure statutory reading and analysis. We are, therefore, not bound by DOB's and BSA's interpretation, nor are we required to give their interpretation deference.

[2] The language in ZR § 12-10 is "clear and unambiguous" (**[****9]** *Matter of Beekman Hill Assn. v Chin*, 274 AD2d 161, 167, 712 NYS2d 471 [1st Dept 2000], *lv denied* 95 NY2d 767, 742 NE2d 123, 719 NYS2d 647 [2000] **[**452]**). 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. To further bolster our finding that this language is clear and unambiguous, the 2011 amendments to ZR §§ 23-14 and 23-142 eliminated all references to "building" and replaced it **[***28]** with "zoning lot." **[*137]** Equally dispositive is the identical change in the definition of "open space ratio" in ZR § 12-10. Of course, the impracticality of allowing the residents of one building on a zoning lot to have access to, and use of, open space located on the rooftop of another building on the zoning lot is obvious. Yet, respondents' apparent contention concerning ZR § 12-10's open space requirement—that *any* rooftop that *may* be considered open space for the purposes of the open space requirement *shall* or *must* be considered open space irrespective of access—gives credence to the impracticality. That is not what ZR § 12-10 says.

ZR § 12-10 unambiguously provides that "#[o]pen space# *may* be provided on the roof of . . . a #building# containing #residences#" and that "[a]ll such roof areas used for #open space# shall meet the requirements set forth in this definition." Thus, any rooftop space that is to be considered open space for the purposes of satisfying the open space requirement under the Zoning Resolution must be accessible and usable by all residents on a zoning lot. Lest there be any doubt, we find that the 2011 amendments now preclude the use of the building-by-building methodology, which had been an exception **[***29]** to this clear statutory import.

The argument that the 2011 amendments' legislative history indicates that there was no intent to alter the use of the building-by-building methodology in calculating the open space ratio is arguably correct. To be sure, CPC's report concerning the 2011 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 Resolution and the 808 Columbus controversy. ***HN5***[⬆] Legislative history, however, should not be confused with legislative intent, as the two are not coextensive with each other (*see Sega v State of New York*, 60 NY2d 183, 190, 456 NE2d 1174, 469 NYS2d 51 [1983]). When a statute's language is clear, resort to extrinsic evidence to glean the legislature's intent is not necessary (*see New York State Bankers Ass'n v Albright*, 38 NY2d 430, 436, 343 NE2d 735, 381 NYS2d 17 [1975]; *see e.g. People v Graham*, 55 NY2d 144, 151, 432 NE2d 790, 447 NYS2d 918 [1982]).

The absence of any legislative history concerning the 2011 amendments' elimination of "building," and replacing the term with "zoning lot," cannot not be deemed an acceptance of the building-by-building methodology, particularly where the new statutory language is clear and unambiguous. That change **[*138]** was fundamental because it was an unmistakable rejection of the utilization of a building-by-building **[***30]** formula in calculating the open space ratio for a multiple building zoning lot. Inasmuch as the legislative intent is apparent and unambiguous from the noted amendatory language, there is no occasion to consider the import, if any, of the absence of any extrinsic evidence, i.e., legislative history. Thus, the 2009 Resolution's rationale that

> "in the case of a multi-building zoning lot, the open space definition could be read to **[**453]** allow some open space to be reserved for the residents of a single building as long as the residents of each building on the zoning lot have access to at least the amount of open space that would be required under ZR § 23-142 if each building were on separate zoning lots" is no longer sustainable.

We, therefore, hold that DOB and BSA's use of a building-by-building formula in calculating the JHL building's open space ratio to be contrary to the Zoning Resolution, and, as such, DOB's permit to JHL should be revoked.

166 A.D.3d 120, *138; 86 N.Y.S.3d 439, **453; 2018 N.Y. App. Div. LEXIS 6814, ***30; 2018 NY Slip Op 06870, ****9

Accordingly, the judgment (denominated decision/order) of the Supreme Court, New York County (Joan Lobis, J.), entered August 9, 2016, denying the petition seeking to annul a resolution of respondent New York City Board of Standards and Appeals, dated August 18, 2015, which upheld a decision of the New York City Department of Buildings that granted a permit to respondent Jewish Home Lifecare, Inc. for the construction of a nursing home, and dismissing the proceeding brought pursuant to CPLR article 78, should be reversed, on the law, without costs, and the petition granted to the extent of annulling the resolution and denying the permit.

Dissent by: Peter Tom

Dissent

TOM, J. (dissenting)

The 2015 resolution of the New York City Board of Standards and Appeals (BSA) to uphold a decision of nonparty New York City Department of Buildings (DOB) that granted respondent Jewish Home Lifecare (JHL) a permit to build a 20-story nursing home in the Upper Westside of Manhattan has a rational basis and was not arbitrary and capricious. Accordingly, I dissent.

This CPLR article 78 proceeding is another episode in the long running battle over a controversial project on Manhattan's Upper West Side. Specifically, whether JHL, a nonprofit corporation, may build its proposed nursing home on an area **[*139]** owned by respondent PWV Acquisition, LLC (the Owner) and formerly used as a parking lot for Park West Village (PWV) residents, located on the south **[***31]** side of a zoning lot consisting of a "superblock" bounded by West 100th Street on the north, West 97th Street on the south, Amsterdam Avenue on the west, and Columbus Avenue on the east. The zoning lot contains the PWV residential apartment buildings.

This proceeding was originally brought in 2015 by Maggi Peyton, a resident of PWV, in opposition to the nursing home project. She died on October 26, 2016 and by order entered April 6, 2017, this Court granted a cross motion to the extent of, inter alia, deeming her son, Randy Peyton, as petitioner; granting 13 other PWV residents leave to intervene; and amending the caption on this appeal to name Randy Peyton as petitioner and the others as intervenors-petitioners.

Also in 2015, separate article 78 proceedings were brought by various individuals and organizations to challenge the separate determination of the New York State Department of Health (DOH) to approve JHL's application to construct the nursing home, arguing that DOH failed to comply with the requirements of the State Environmental Quality Review Act (SEQRA). This Court denied the petitions and dismissed those separate proceedings (*see Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 146 AD3d 576, 46 NYS3d 540 [1st Dept 2017], *affd* 30 NY3d 416, 68 NYS3d 382, 90 NE3d 1253 [2017]).

Some background information is pertinent **[***32]** to this proceeding. In 2007, nonparty DOB issued a permit to the Owner or its affiliates to build a 20-story building at **[**454]** 808 Columbus Avenue in the zoning lot, with the ground floor containing commercial space including a Whole Foods Market, and the upper floor containing residential units. JHL's proposed nursing home would be built on the same zoning lot as 808 Columbus.

The office of the Manhattan Borough President submitted a written objection to the permit for 808 Columbus, claiming, among other things, that 808 Columbus would violate requirements under the Zoning Resolution (ZR) to provide sufficient "open space." DOB's Manhattan Borough Commissioner denied that objection, finding that "the ZR does not specify that open space on a multiple[-]building zoning lot must be shared space that is commonly accessible to all occupants of the zoning lot."

Some PWV residents and government officials appealed from DOB's approval of the permit, contending, among other things, that the proposed rooftop space on 808 Columbus would **[****11]** violate **[*140]** the requirement for "open space" under ZR § 12-10, since that space was accessible only to residents of 808 Columbus and not residents of other buildings on the zoning **[***33]** lot.

ZR § 12-10 defines "open space" as "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" (emphasis omitted). However, it explicitly provides:

> "Open space may, however, include areas covered by roofs, the total area of which is less than 10 percent of the unroofed or uncovered area of a

> zoning lot, provided that such roofed area is not enclosed on more than one side, or on more than 10 percent of the perimeter of the roofed area, whichever is greater" (*id.* [emphasis omitted]).

ZR § 12-10 allows open space to "be provided on the roof of" a "community facility building" or, with some limitations, a residential or non-residential building (*id.* [emphasis omitted]).

The "open space ratio" determines the minimum amount of open space that must exist on a zoning lot. The open space ratio is defined as "the number of square feet of open space on the zoning lot, expressed as a percentage of the floor area on that zoning lot" (*id.* [emphasis omitted]). ZR § 12-10 explains:

> "For example, if for a particular zoning lot an open space ratio of 20 **[***34]** 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" (*id.*).

As of 2009, ZR § 23-14 provided that "for any building on a zoning lot, the minimum required open space or open space ratio shall be not less than set forth in this Section" ([emphasis omitted]); ZR § 23-142 provided that "the minimum required open space ratio . . . for any building on a zoning lot" in the R7 District shall be as set forth in the statute.

On February 3, 2009, respondent BSA adopted a resolution that denied the appeal from DOB's approval of the permit for 808 Columbus. BSA upheld DOB's determination that 808 Columbus complied with the open space requirements, rejecting the argument that the open space on the building's rooftop **[*141]** was exclusively accessible to residents of 808 Columbus. BSA found that "the purported intent of the Zoning Resolution is not clearly stated," and noted that the definition of open space in ZR § 12-10 "does not specify that open space on a multiple building zoning lot must be common, centralized space that **[**455]** is shared **[***35]** by all occupants of the zoning lot."

BSA also relied on DOB's observation that 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."[1] Moreover, BSA agreed with DOB's argument that "the definition of open space must be **[****12]** read in the context of the calculation of open space set forth in ZR §§ 23-14 and 23-142, which require a minimum amount of open space with respect to 'any building' on a zoning lot, rather than to all buildings on a zoning lot."

BSA also concluded that the 808 Columbus proposal complied with the open space requirements, since "each of the existing buildings is allocated an amount of open space . . . in excess of that which would be required under the [ZR] if they were located on separate zoning lots," and the exclusive rooftop space at 808 Columbus accordingly did not deprive any zoning lot residents' of their right to "an equitable share of open space" merely because they lived in buildings on the same lot as 808 Columbus.

Another article 78 proceeding was brought in New York County Supreme Court by **[***36]** various officials and others, challenging the 2009 Resolution. However, that case settled in July 2009 and was dismissed with prejudice (*Bunten v Board of Stds. & Appeals of the City of N.Y., Sup Ct, NY County, Gische J.*, Index No. 102750/09). 808 Columbus building was subsequently built and completed.

On February 2, 2011, the City Planning Commission (CPC) amended the ZR. Some of the sections addressing the calculation of open space were amended so that references to a "building" or a "building on a zoning lot" were replaced with the term **[*142]** "zoning lot." In particular, § 23-14 was amended to provide, in general, that "for any *zoning lot*" (previously "building") "the minimum required open space or open space ratio shall be not less than set forth in this Section" [emphasis added], and ZR § 23-142 was amended to state that "the minimum required open space ratio . . . for any *zoning lot*" (previously "building") in the R7 District "shall be as set forth in the following table for zoning lots with the height factor

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[1] Significantly, as the majority recognizes, the 1961 ZR provided that a zoning lot could "only consist of land that was entirely under the control of a single owner or a long-term lease," and it assumed that "a single owner, who controls the entire zoning lot, would be capable of providing open space to the entire zoning lot." As the majority also concedes, the 1961 ZR did not "contemplate the possibility that a zoning lot could consist of multiple parcels under different ownership and control, with each parcel subject to its own unique conditions governing open space access."

indicated in the following table" ([emphasis added]). The specific examples of the "open space ratio" were amended to add the following underlined words and delete the struck-through words:

> "For **[***37]** example, if for a particular
>
> building *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
> 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."

The definition of "open space ratio" was not otherwise amended, nor was the definition of "open space" in ZR § 12-10.

In December 2013, DOB granted JHL's application for a permit to build the nursing **[**456]** home in the zoning lot. Significantly, at the time of the proposal, the zoning lot had an excess of open space of 10,223 square feet. While the proposal would reduce the amount of excess open space, it would still have approximately 618 square feet in excess of the minimum open space of 230,108 square feet. JHL's application specifically proposed that the covered roof on JHL's building, as well as a children's play area and Meditation Garden would be "accessible to and usable by all persons occupying a dwelling unit on the zoning lot." In fact, DOB conditioned its approval of the project with the requirement that the covered roof, **[***38]** play area and garden be accessible to all persons occupying residential units on the zoning lot at all times in compliance with the 2011 ZR amendments.

However, a written objection was submitted by the original petitioner, Maggi Peyton and others to the issuance of the permit. DOB's Deputy Commissioner found the objection untimely, but also rejected it on the merits by letter dated November 10, 2014. The original petitioner, among others, appealed from the approval, arguing that the 2011 amendments changed the open **[****13]** space requirements under the ZR, with which **[*143]** JHL failed to comply. She argued that because of the amendments open space now must be accessible to all residents of all buildings on the zoning lot in question. Since the rooftop of 808 Columbus, completed before the 2011 amendments, was not accessible to any of the Zoning Lot residents other than 808 Columbus residents, she contended that it no longer qualified as open space.

In April 2015, BSA received written comments and held a public hearing on the challenge to JHL's 2013 permit approval. PWV residents testified in support of petitioner, as did local and public officials, and others. In addition, three BSA members personally **[***39]** examined the nursing home site and the surrounding neighborhood.

On August 18, 2015, BSA adopted a Resolution denying petitioner's appeal. BSA found that the 2011 amendments did not amend the open space requirements or otherwise affect the propriety of the 2009 Resolution, given that the definition of "open space" in ZR § 12-10 had not been amended. Since petitioner "ha[d] not presented any new information that would require a different result than the 2009 [Resolution]," BSA adhered to its 2009 holding in 808 Columbus.

> "that in the case of a multi-building zoning lot, the open space definition could be read to allow some open space to be reserved for the residents of a single building as long as the residents of each building on the zoning lot have access to at least the amount of open space that would be required under ZR § 23-142 if each building were on separate zoning lots."

Therefore, considering that the nursing home "does not require additional open space," BSA found the nursing home did not "disturb[] the existing open space calculations for the entire site" or otherwise violate the open space requirements.

In particular, BSA found that the nursing home would consist of a total of 20,036 square **[***40]** feet, of which 10,431 square feet would count as open space—far more than the open space ratio required by the ZR—and the rooftop space at 808 Columbus deemed open space in the 2009 Resolution is 42,500 square feet. Critically, the open space provided by the nursing home plans would ensure that residents of the nursing home have access to more than the amount of space that would be required if the home were on its own lot, and the project would not disturb the open space available to other residents on the zoning **[*144]** lot. Further, the open space *required* for the zoning lot is 230,108 square feet and "the total **[**457]** open space provided by the lot," under BSA's findings in the 2009 and 2015 Resolutions, was 230,726 square feet, about 600 square feet more than the minimum requirement. Thus,

the open space requirements would not be met if the 42,500-square-foot rooftop space of 808 Columbus did not qualify as open space.

Petitioner brought this article 78 proceeding against BSA, JHL, and the Owner, seeking to annul the 2015 Resolution based on the ground that the rooftop area of 808 Columbus should now not qualify as open space, and to revoke the permit for the nursing home issued by DOB to **[***41]** JHL. Supreme Court concluded that it "cannot say that the open space provisions could not be subject to different interpretations," and that there was "enough ambiguity" in the open space provisions so that the court would "defer to DOB's practical construction of the ordinance."(2016 NY Slip Op 31504[U], *15-16, 17 [2016] [internal quotation marks omitted] [in particular, the court stated: "The key text amendments, while undisputedly clarifying that the amount of required open space must be based on the zoning lot as a whole, do not modify, clarify, or otherwise address the definition of open space or what counts as open space; and the court finds no basis in the 2011 amendments to revisit BSA's 2009 interpretation of open space or determination that 808 Columbus's rooftop space satisfies the open space requirements of the Zoning Resolution. Even if, as petitioner asserts, the key text amendments to ZR §§ 23-14 and 23-142 undercut BSA's reliance on the pre-2011 language of those sections to support its conclusion that open space can be allocated among individual buildings on a multi-building zoning lot, the 2011 amendments do not unambiguously alter the meaning or measurement of open space as interpreted by BSA."

The court thus found the BSA's 2015 Resolution to be rational **[***42]** and therefore denied the petition and dismissed the proceeding. I would affirm.

Initially, it must be noted that petitioners do not actually challenge whether the 2015 approved nursing home—the project at issue with the ZR. In fact, the nursing home will have no practical effect on the zoning lot's compliance with open space requirements, as it neither increases the overall amount of open space needed for the lot as a whole nor displaces existing open space needed to comply with the ZR. Indeed, half of the nursing home's square footage consists of **[*145]** open space, and the DOB conditioned its approval of the project on that open space being accessible to all residents of the zoning lot. Further, the zoning lot as a whole would still have in excess of the minimum open space required. Thus, the proposed nursing home project purported to be in issue in this proceeding is in full compliance with the 2011 ZR. Instead, in a bid to halt the nursing home project, petitioners are attempting to resurrect and collaterally attack the 2009 resolution determining that 808 Columbus complied with open space requirements. Such line of argument is not only belated but is also foreclosed by **[***43]** the settlement of the 2009 article 78 proceeding, which was then dismissed with prejudice more than six years earlier (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 499, 467 NE2d 487, 478 NYS2d 823 [1984]["the doctrines of res judicata and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies "]). The time to challenge that resolution has expired (*see* Administrative Code of City of NY § 25-207 [a]; 2 RCNY 1-12.7; *see also* CPLR 217 [1]). In other words, petitioners are bound by the 2009 Resolution and cannot now re-litigate whether 808 Columbus's roof complies **[**458]** with open space requirements in relation to the present proposed project. Nor should we permit them to challenge that earlier resolution, a challenge was completed and foreclosed, by raising it in this proceeding concerning an entirely different project which is in full compliance with the 2011 ZR.

Based on the ZR at the time of the 2009 Resolution, there was a rational basis to conclude that 808 Columbus complied with open space requirements. As 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 **[***44]** 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." BSA rationally found that "the definition of open space must be read in the context of the calculation of open space set forth in ZR §§ 23-14 and 23-142, which [in 2009] require[d] a minimum amount of open space with respect to 'any building' on a zoning lot, rather than to all buildings on a zoning lot."

It was also rational for BSA to find that the 808 Columbus proposal complied with the open space requirements, since **[*146]** "each of the existing buildings is allocated an amount of open space . . . in excess of that which would be required under the [ZR] if they were located on separate zoning lots," and the exclusive rooftop space at 808 Columbus accordingly

did not deprive any zoning lot residents of their right to "an equitable share of open space" merely because they lived in buildings on the same lot as 808 Columbus.

Moreover, to the extent the 2011 amendments changed the open space requirements, this could only apply prospectively as a retroactive application of these changes could potentially cause havoc throughout **[***45]** the City as a multitude of challenges might be commenced against buildings that formerly complied with the pre-2011 ZR. Therefore, even if 808 Columbus were deemed a noncompliant building, which it is not, such noncompliance would be deemed legal and may continue (see ZR §§ 52-11, 54-11, 54-31).

As the Court of Appeals held in *Glacial Aggregates LLC v Town of Yorkshire (14 NY3d 127*, 135, 924 NE2d 785, 897 NYS2d 677 [2010]), "[n]onconforming uses or structures, in existence when a zoning ordinance is **[****14]** enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance" [internal quotation marks omitted].

Even assuming arguendo that petitioners' argument is not precluded entirely, it fails on the merits.

It must be stated at the outset that the role of this Court in reviewing the determination of BSA is narrowly prescribed. Our review is simple and deferential. Specifically, where, as here, the relevant provisions of the ZR are ambiguous, and the BSA has rationally interpreted them, it is not for this Court to dictate a result other than the one reached by the very agency with the expertise in zoning, and which is tasked with resolving these concerns, in this complex city inhabited by many competing interests.

It is fundamental, **[***46]** as even the majority notes, that.

> "The BSA, comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution . . . Consequently, in questions relating to its expertise, the BSA's interpretation of the statute's terms must be given great **[**459]** weight and judicial deference, so long as the interpretation is neither **[*147]** irrational, unreasonable nor inconsistent with the governing statute'" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419, 676 NE2d 862, 654 NYS2d 100 [1996] [internal quotation marks omitted])

The proper standard of review is whether there is a rational basis for BSA's determination or the action complained of is arbitrary and capricious (*Matter of Peckham v Calogero, 12 NY3d 424*, 431, 911 NE2d 813, 883 NYS2d 751 [2009]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 313 NE2d 321, 356 NYS2d 833 [1974]). If we find that the determination is supported by a rational basis, we must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency (*Peckham*, 12 NY3d at 431). Further, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise (*id.*) unless the question is pure legal interpretation of statutory language that is unambiguous (*see Beekman Hill Ass'n v Chin*, 274 AD2d 161, 167, 712 NYS2d 471 [1st Dept 2000], *lv denied* 95 NY2d 767, 742 NE2d 123, 719 NYS2d 647 [2000]).

"[T]he primary task of statutory **[***47]** construction, as applied to the interpretation of the New York City Zoning Resolution and more specifically to the terms employed in section 12-10, is to give effect to the clear intent of the [legislative body]" (*Matter of Mason v Department of Bldgs. of City of N.Y.*, 307 AD2d 94, 100, 759 NYS2d 470 [1st Dept 2003], *lv denied* 1 NY3d 503, 807 NE2d 892, 775 NYS2d 779 [2003]). In construing the language of the ZR, although we need not "unquestioningly defer to the administrative agency," we will give "due consideration to [the agency's] practical construction of the ordinance" (*id.*).

The majority reaches its result by claiming that the relevant regulations are unambiguous. Specifically, the majority claims that the provisions at issue clearly disallow the use of the "building-by-building" methodology employed by respondents to calculate the open space ratio for a zoning lot containing multiple buildings[2]. In other words, the majority finds that the various provisions, as amended in 2011, clearly prevent the DOB from crediting roof space on 808 Columbus's roof as part of the total required open space for the zoning lot.

Contrary to petitioners' contention, and the position of the majority, the provisions of the Zoning Resolution at

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[2] This methodology merely entails ensuring that the residents of each building on the zoning lot have access to the open space they would be entitled to if each building were on its own zoning lot.

issue here **[*148]** are not clear and unambiguous. As set forth below, ZR §§ 12-10, 23-14, 23-142 must all be read in conjunction with each other, **[***48]** and each given effect. Petitioners' claim that roof space on a residential building no longer counts as open space is **[****15]** based on a reading of these regulations that ignores key aspects of the definition of open space and the provisions' silence on zoning lots containing multiple buildings. Hence, BSA's interpretation of an ambiguous regulatory scheme is owed both due consideration and deference, and because the open space provisions are subject to different interpretations, it cannot be said that the BSA's resolution was irrational or arbitrary and capricious.

As Supreme Court noted, the 2011 Amendments undoubtedly clarified that **[**460]** the amount of required open space must be based on the zoning lot as a whole (see ZR §§ 23-14, 23-142). However, the 2011 Amendments left untouched the definition of "open space" in ZR § 12-10, and thus did not alter the inclusion of roof space as open space. Nor did they clarify how to calculate the required open space for a zoning lot containing multiple buildings.

Both in 2009 when the challenge was made to the 808 Columbus building, and in 2015 when the challenge was made to JHL's nursing home, ZR § 12-10 defined open space as that part of zoning lot which is "open and unobstructed **[***49]** from its lowest level to the sky and is accessible to and usable by by all persons occupying a dwelling unit or a rooming unit on the zoning lot."

However, at all times the ZR left intact that open space may be provided on a roof, including the roof of a community facility building and a building containing residences. It is obvious but must be stated that roofs on residential buildings are only accessible to those who live within such building.

In addition, ZR § 12-10 also includes "yards" and "courts" within the definition of open space. In this regard, it is notable that "courts" include "inner courts," which are defined elsewhere in the section as being bounded by building walls, or walls and lot lines. Presumably, some of these yards and courts may also be accessible only by residents of particular buildings on the lot.

It is also quite significant that both in 2009 and after the 2011 amendments the ZR did not address open space requirements for zoning lots containing multiple buildings. Respondents, who possess specialized expertise in interpreting the ZR, **[*149]** state that the drafters of the ZR in 1961 did not contemplate zoning lots with multiple parcels with separate owners. They also state **[***50]** that the 2011 amendments did not address the effects of the changes on open space requirements for these situations.

In other words, the unclear and conflicting language in ZR § 12-10 and the related provisions would not be consequential when there is a single residential building on a zoning lot, as all residents would have access to shared spaces, including roofs, yards, courts and the like. However, where, as here, there are multiple buildings under different ownership and control on a single zoning lot, ZR § 12-10 does not provide one clear answer.

Accordingly, given the ambiguous language in the section, the BSA rationally determined that the best practical reading of ZR § 12-10 when faced with multiple buildings under different ownership and control on a single zoning lot is to permit some open space to be reserved for residents of a single building, so long as the zoning lot as a whole has the minimum amount of open space required, and residents of each building on the lot have access to at least the amount of space that would be required if each building were on a separate lot. Indeed, in these situations it would not be feasible to make all the open space on a zoning lot accessible to and usable **[***51]** by all residents of each building on the zoning lot. The interpretation by BSA gives effect to both the zoning lot based open space requirements under ZR §§ 23-14, 23-142, and to the inclusion of roofs, courts, and yards within the definition of open space under ZR § 12-10 (*see Matter of Shannon*, 25 NY3d 345, 351, 12 NYS3d 600, 34 NE3d 351 [2015] [statute "must be construed as a whole" and its "various sections must be considered together and with reference to each other"] (internal quotation marks and citations omitted]). Thus, it cannot be said that BSA's determination was irrational, **[**461]** and we should defer to the agency's practical construction of the ordinance (*see Mason*, 307 AD2d at 100-101).

Despite the clear ambiguity among the relevant regulations, and the requisite deference that should be afforded BSA's interpretation of them, the majority somehow ignores the discrepancies, conflicts and silence presented by the sections when read in conjunction with each other, and when each part is given meaning. Instead, the majority focuses only on the amended language which replaced the term "building" with **[*150]** "zoning lot" to conclude that on a multi-building zoning lot the open space ratio cannot be

calculated on a building-by-building basis.

In this regard, the majority agrees with petitioners that **[***52]** the 2011 amendments foreclosed a reading of these interconnected regulations that would permit some open space on a multi-building zoning lot to not be accessible to all residents of such a zoning lot. Accordingly, the majority concludes that the open space on 808 Columbus's roof cannot be included in the calculations of the minimum open space required for the zoning lot in connection with the present project because it is only accessible to the residents of 808 Columbus.

However, the majority's reading of these regulations as "clear and unambiguous" and their description of the task at hand as "pure statutory interpretation" with no need to give deference to BSA's knowledge and expertise is erroneous. Indeed, the majority concedes, as it must, the "impracticality of allowing the residents of one building on a zoning lot to have access to, and use of, open space located on the rooftop of another building on the zoning lot."

Yet, to support its forced reading of an ambiguous set of regulations, the majority focuses on the portion of ZR § 12-10 defining "open space" as being "accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot." Notably, although **[***53]** the City Planning Commission was aware of BSA's interpretation of open space in the 2009 Resolution, no changes were made to the definition of open space. In fact, the definition of open space was unchanged for more than five decades for zoning lots owned and controlled by a single owner. At the same time, the majority overlooks the conflicting portion of the same section, which was not amended in 2011, and which provides that open space may include areas covered by roofs. Thus, the majority reads one portion of the section to the exclusion of the other to reach its result.

The majority's reading of that portion of ZR § 12-10 (prior to the 2011 amendments) that requires open space to be accessible to and usable by all persons occupying a dwelling unit on a zoning lot disregards the history and context of the ZR at the time it was drafted in 1961. To reiterate, at that time a zoning lot was necessarily controlled by one owner who would provide the necessary open space, and the 1961 ZR never considered the possibility of a zoning lot made up of different parcels controlled by different ownership. Thus, it is simply incorrect for **[*151]** the majority to state that the language under ZR § 12-10, which remains **[***54]** unchanged since 1961, unambiguously requires open space to be available to "all residents of any residential building on the zoning lot, not only the building containing the open space in question."

The majority also finds that ZR § 12-10 unambiguously requires that any rooftop space must be accessible and usable by all residents on a zoning lot by referencing language in the section that states: "All such roof areas used for open space shall meet the requirements set forth in this **[**462]** definition." But, this does not and cannot be applied to the problem that faces us here, namely, multi-building zoning lots, in which residents of one building could not access the roof of a neighboring building on the same lot. Once again, even the majority can see the impracticality of such a requirement.

When read properly, it is clear that ZR § 12-10 both contains internal inconsistencies and is ambiguous when read in conjunction with ZR § 23-14 and 23-142. This is precisely why we must defer to the BSA's expertise and rational interpretation of these regulations.

It is also noted that as a community facility the nursing home was specifically permitted by ZR § 12-10 to provide open space on a roof, and was not required to provide any **[***55]** additional open space on the zoning lot, particularly since it would not disturb the overall open space on the **[****16]** lot, which was already determined by BSA to be in compliance with the ZR.

Respondents also point out that at the time of the 2011 Amendments CPC was presumed to be aware of BSA's 2009 Resolution interpreting the definition of open space in the cases of multiple buildings on one zoning lot (*see Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 158, 639 NE2d 1, 615 NYS2d 644 [1994][legislature is presumed to be familiar with agency decisional law]; 2 RCNY 1-06.4 [a][party appealing to BSA from an interpretation of the ZR must forward copies of application materials to the CPC's legal counsel]). Thus, the CPC's choice not to alter the language of ZR § 12-10 suggests legislative approval of the BSA's construction of open space (*Community Bd. 7*, 84 NY2d at 159).

The majority also sidesteps respondents' valid point about the legislative history. Instead, the majority insists that the statute is clear and unambiguous and that therefore it can glean the legislature's intent. Yet, the fact remains that the legislative history related to the 2011 amendments is relevant **[*152]** since the amendments did not alter the definition of "open space"

in ZR § 12-10, in particular the inclusion of roof space **[***56]** as open space, and did not provide how to calculate the required open space for a zoning lot containing multiple buildings. Thus, it is impossible to say that either the statutory language or the legislature's intent is clear and unambiguous.

Nor is there anything to support the majority's view that the legislature "unmistakabl[y] reject[ed]" the "utilization of a building-by-building formula in calculating the open space ratio for a multiple building zoning lot." Had the legislature desired to make such a straightforward rejection of the BSA's 2009 methodology it could have explicitly provided for that in the amended version of the regulations. Yet, it chose not to do so.

In sum, Supreme Court correctly found the provisions of the ZR are susceptible to conflicting interpretations, and properly deferred to the BSA's practical and rational interpretation of the definition of open space (*see Matter of Chin v New York City Bd. of Stds. & Appeals*, 97 AD3d 485, 487, 948 NYS2d 300 [1st Dept 2012], *lv denied* 19 N.Y.3d 815, 979 NE2d 815, 955 NYS2d 554 [2012]). I would therefore affirm Supreme Court's judgment.

Judgment (denominated decision/order), Supreme Court, New York County (Joan Lobis, J.), entered August 9, 2016, reversed, on the law, without costs, and the petition granted to the extent of annulling the resolution and denying the permit. **[***57]**

Opinion by Oing, J. All concur except Tom, J. who dissents in an Opinion.

Renwick, J.P., Tom, Webber, Oing, JJ.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

166 A.D.3d 120, *152; 86 N.Y.S.3d 439, **462; 2018 N.Y. App. Div. LEXIS 6814, ***57; 2018 NY Slip Op 06870, ****16

Table1 (Return to related document text)

2009 Resolution	
Zoning Lot:	240,331 sf
Required Minimum Open Space:	230,108 sf
Open Space Excess:	**10,223 sf**

Table1 (Return to related document text)

Table2 (Return to related document text)

2015 Resolution	
JHL building use of	
Parking Lot Open Space:	20,036 sf
Roofed Garden Open Space:	10,431 sf
Open Space Loss:	**9,605 sf**

Table2 (Return to related document text)

Table3 (Return to related document text)

Zoning Lot Open Space:	230,726 sf
Required Minimum Open Space:	230,108 sf
Open Space Excess—Open Space Loss	**=**
Remaining Open Space Excess	**618 sf**

Table3 (Return to related document text)

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