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COURT OF APPEALS

STATE OF NEW YORK

RANDY PEYTON, ON BEHALF OF THE ESTATE
OF MAGGI PEYTON,

Respondent,

-against-

NO. 88

NEW YORK CITY BOARD OF STANDARDS AND
APPEALS, ET AL.,

Appellants.

20 Eagle Street
Albany, New York
November 18, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 88, Matter of Peyton
3 v. New York City Board of Standards and Appeals.

4 Counsel?

5 MR. POPOLOW: Good afternoon, Your Honor.
6 Jonathan Popolow for Appellant, Board of Standards and
7 Appeals.

8 CHIEF JUDGE DIFIORE: Counsel, we're having
9 difficulty all around, not just with you, sir, hearing
10 through the masks. So if you could try to keep your voice
11 up? Thank you.

12 MR. POPOLOW: Certainly, Your Honor. Good
13 afternoon, Your Honors. Jonathan Popolow for Appellant
14 Board of Standards and Appeals. I'd like to reserve three
15 minutes for rebuttal.

16 CHIEF JUDGE DIFIORE: Three?

17 MR. POPOLOW: Yes.

18 CHIEF JUDGE DIFIORE: Yes, sir. You may proceed

19 - - -

20 MR. POPOLOW: Shall I proceed with my argument?

21 CHIEF JUDGE DIFIORE: Yes, sir.

22 MR. POPOLOW: The Appellate Division's decision
23 should be reversed. Rather than deferring to the BSA's
24 practical application of the Zoning Resolution's open space
25 requirements, it imposed a restriction not found in the



1 text of the resolution.

2 JUDGE STEIN: Counsel, could - - - could I just
3 clarify exactly what the question before us is? And
4 particularly - - - given the way that the Board seemed to
5 limit the issue reviewed in its 2015 decision to whether
6 the 2011 amendments changed the language of the text in any
7 way, so as that it would be different from how it was
8 previously interpreted, or whether it resolved any
9 ambiguity.

10 Am I correct in that that's really the limited
11 question before us, whether the 2011 amendments changed
12 anything?

13 MR. POPOLOW: Well, certainly that was the basis
14 for the BSA's 2015 resolution, that the - - -

15 JUDGE STEIN: And - - - and aren't we limited to
16 the - - - the basis that the agency gave for its
17 determination?

18 MR. POPOLOW: In a sense, yes. I mean, I think
19 that it - - - it's in a way, up to the court, how broadly
20 you want to dig. But I think that the - - - and certainly
21 I'm - - - I can speak definitely to the point that the 2011
22 amendments did not alter the relevant provisions of the
23 Zoning Resolution in a way that would have compelled a
24 different result in 2015.

25 If anything, the fact that the City Planning



1 Commission kept intact - - - you know, was aware of the - -
2 - of the BSA's interpretation of the open space requirement
3 in 2009 and did not - - - did not do anything to that
4 particular definition in 2011 supports the notion that - -
5 - that the 2011 amendments were not intended to change
6 that.

7 JUDGE FEINMAN: So if one were to see this as a
8 question of pure statutory interpretation - - - I'm not
9 saying I see it that way - - - but if one were to see it,
10 how does the agency come to have any expertise that we
11 should be looking at or giving deference to?

12 MR. POPOLOW: Well, I think you - - - you have
13 the situation where the - - - the operative text is not
14 clear and unambiguous. It doesn't inexorably require that
15 open space be universally accessible to every resident in
16 the building.

17 JUDGE FEINMAN: Well, I'm just going to remind
18 you what the chief said, the acoustics are such with the
19 masks - - -

20 MR. POPOLOW: Certainly.

21 JUDGE FEINMAN: - - - and everything, that I need
22 you to just keep your voice up.

23 MR. POPOLOW: Certainly, Your Honor.

24 The - - - nothing in the text requires that open
25 space be universally accessible to every resident on a



1 zoning lot, even if they don't - - - even if they do not
2 live in the building containing the open space in question.

3 And given the sort of inherent ambiguity there,
4 the question becomes - - -

5 JUDGE FAHEY: What is - - - what is the
6 ambiguity? I'm a little confused by that.

7 MR. POPOLOW: The ambiguity is it doesn't - - -
8 there's two points. The - - - the definition itself, on
9 its face, doesn't specify that. It could be read in a
10 variety of ways. And it also didn't anticipate - - -

11 JUDGE FAHEY: Well, what are - - - point me to
12 the ambiguity that you're relying on.

13 MR. POPOLOW: The ambiguity is in the meaning of
14 "when all persons occupying a dwelling unit or a rooming
15 unit on a zoning lot" means.

16 JUDGE FAHEY: And the ambiguity is what?

17 MR. POPOLOW: The ambiguity is that could be read
18 - - - the First Department read that as unambiguously
19 requiring that every resident on the zoning lot - - - that
20 it be accessible to and usable by every resident on the
21 zoning lot, where perhaps, you know, "all persons occupying
22 every dwelling unit or a rooming unit."

23 The other end of the - - -

24 JUDGE STEIN: But it says "a" - - - it says "a
25 person" - - - or "a", right, it doesn't say "every".



1 MR. POPOLOW: Correct, Your Honor.

2 JUDGE STEIN: All right. So taken literally,
3 what would "a" mean in that context?

4 MR. POPOLOW: I think taken most narrowly and
5 literally, it would mean at least one dwelling unit.

6 JUDGE STEIN: So but - - - but that - - - that
7 doesn't make - - - that's not logical, is it, that that's
8 what they meant, right?

9 MR. POPOLOW: No, so I mean, I think the BSA has
10 interpreted it in a - - - in a sort of more practical
11 manner to - - - and what they believe is a more equitable
12 manner - - - to allow some open space on a zoning lot to be
13 reserved for residents of - - - of only one building, as
14 long as the residents of every building have at least the
15 minimum amount of open space that they would be entitled
16 to, if their building were on its own zoning lot.

17 JUDGE STEIN: But - - - but is that - - - is that
18 word part of the ambiguity? And - - - and are you also
19 looking at it in the context of when the law was amended to
20 allow for multi-building owners?

21 MR. POPOLOW: Correct. It created a - - -
22 certainly a problem of - - - of application that wasn't
23 anticipated in 1961.

24 JUDGE FAHEY: I see the problem in application.
25 I'm - - - I'm - - - and I - - - I'm struggling here with an



1 ambiguity in the statute that would allow us to reach the
2 underlying issue of - - - of how much deference we should
3 give you.

4 MR. POPOLOW: Right. I - - - I think the
5 ambiguity is, in a sense, it's sort of the - - - the
6 negative of the fact that it's not clear and ambiguous
7 (sic). It doesn't clearly and ambiguously (sic) say all
8 residents on the zoning lot, so it's a question of how do
9 you interpret the language of occupying a dwelling unit or
10 a rooming unit on the zoning lot.

11 JUDGE GARCIA: Counsel, assume, just for purposes
12 of my question, and putting aside Judge Stein's first
13 question on what's the - - - if there's really a narrow
14 issue before us. But assume it's clear, and assume it was
15 misapplied in the case of 808 Columbus, right? What would
16 the effect of the prior determination, even assuming it
17 misapplied the rule, be on this application?

18 Is there - - - is - - - would your argument be
19 that in some way you can't reargue the square foot total
20 for purposes of the new application? Or do you concede
21 that that has to be done each time, independently?

22 MR. POPOLOW: Well, the - - - there's no dispute
23 in this case, Your Honor, as to the actual total square
24 footage. It's a question of whether the roof gardens on
25 top of 80 - - - at 808 - - -



1 JUDGE GARCIA: Right. And in the prior decision
2 they included that 42,000-odd square feet, right?

3 MR. POPOLOW: Right.

4 JUDGE GARCIA: To - - - for 808 Columbus.

5 MR. POPOLOW: Correct.

6 JUDGE GARCIA: So now you come in - - - there's a
7 new building. They come in again. That determination has
8 been made. In my hypothetical, assume it was clearly
9 erroneous, it was a misapplication of a clear rule, what
10 would the effect of the prior determination be on this
11 application?

12 MR. POPOLOW: It might still be binding. I guess
13 what I'm struggling with is the - - - the sort of "clearly
14 wrong", when there's been - - -

15 JUDGE GARCIA: Assume it for my - - -

16 MR. POPOLOW: - - - assuming - - -

17 JUDGE GARCIA: - - - for purposes of my question.
18 I know you're not conceding it. But assume it just for
19 purposes of this question.

20 MR. POPOLOW: That if - - - for - - - assuming
21 for purposes of argument that the 2011 amendments did
22 clearly change - - -

23 JUDGE GARCIA: No.

24 MR. POPOLOW: No?

25 JUDGE GARCIA: That at the time they made the



1 determination it was wrong. They just misapplied the rule.
2 It was clear, they'd made a mistake.

3 MR. POPOLOW: They might not be - - - I mean,
4 there are site-specific issues here, that there's a - - -
5 you know, there might be a reliance issue for the - - - for
6 the persons who made plans based on that.

7 I think certainly if they were applying it in a
8 different arena or something, they would obviously have to
9 apply the correct interpretation.

10 JUDGE WILSON: Well, let me see if I can put a
11 point on it a little bit differently. Suppose you have a
12 zoning lot that is out of compliance with the open space
13 requirements, and somebody wants to erect a structure on it
14 that is exempt from the open space requirements. Do you
15 have a policy about that?

16 MR. POPOLOW: Not that I'm aware of, Your Honor.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 Counsel?

19 MR. KARMEL: Philip Karmel on behalf of the land
20 owner, PWV Acquisition. May it please the court, let's
21 start off with the question - - -

22 CHIEF JUDGE DIFIORE: Mr. Karmel, excuse me for
23 interrupting. Would you like rebuttal time, sir?

24 MR. KARMEL: No, thank you.

25 Let's - - - let's start off with the question of



1 what is the - - - what was the rationale of the BSA, and
2 therefore what's the legal issue before the court?

3 I think you have to look at the 2015 BSA decision
4 in the context of its 2009 BS - - - BSA decision. In 2015,
5 they said in 2009 we determined that these rooftop gardens
6 were open space. In 2015, they said there's no reason to
7 reexamine it - - - reexamine our earlier 2009 decision.

8 So when looking at the rationale of the agency, I
9 think it would be fair to look at the rationale that it
10 articulated in both 2009 and 2015. In both determinations
11 they held the same thing, which is that these rooftop
12 gardens are open space.

13 In terms of the issue of ambiguity, is there an
14 ambiguity in the statutory language, the answer is yes. If
15 you look at the provision that the challengers are relying
16 on in isolation, it is ambiguous, and I'll explain why.
17 But it's more ambiguous if you look at it in the context of
18 other provisions in the Zoning Resolution that also apply
19 to an - - - to open space.

20 If you look at the provision in isolation, it's
21 ambiguous because the word "all" modifies "resident". It
22 does not modify the word "dwelling unit". What modifies
23 "dwelling unit" is "a dwelling unit".

24 And you will have many circumstances where there
25 are adjoining buildings, each with a rear yard, and the



1 rear yard will be counted as open space if that area is
2 accessible to the residents of the building for which it is
3 the rear yard. I think I have a diagram of that in my
4 brief.

5 So open space, to - - - to - - - for an area to
6 be open space, it has to be accessible to residents of a
7 dwelling unit; it does not need to be accessible to the
8 residents of all the dwelling units - - -

9 JUDGE GARCIA: So that would mean, under that
10 reading, that as long as it's accessible to one apartment,
11 one apartment has a roof garden, that counts as open space?

12 MR. KARMELE: That - - -

13 JUDGE GARCIA: Because it's a dwelling.

14 MR. KARMELE: That is correct, Your Honor. That -
15 - - that is a - - -

16 JUDGE GARCIA: Wouldn't that just be an absurd
17 reading that isn't really creating any ambiguity? Because
18 could they possibly have meant that, that it's open to one
19 apartment? I have a garden on my apartment, and that
20 counts as open - - - I have a 42,000-foot roof area on my
21 apartment, and that counts as open space to the entire lot.

22 MR. KARMELE: That is a literally correct reading
23 of the statutory language. It does not say "all dwelling
24 units", it says "a dwelling unit".

25 JUDGE GARCIA: It says "a dwelling unit" on the



1 property - - - on the zoning lot, right? It says - - - it
2 says, "is accessible to and usable by all persons occupying
3 a dwelling unit or a rooming unit on the zoning lot."

4 So your reading would be any one of - - - unit on
5 the zoning lot as opposed to a unit that exists on the
6 zoning lot and has people in it, they have to have access.
7 Which seems to be the clear meaning there.

8 MR. KARMEL: One or more dwelling units would be
9 sufficient. That's an ambiguity in the provision in
10 isolation. But I - - - that's not the way - - -

11 JUDGE STEIN: So are you saying - - - are - - -
12 I'm sorry, yeah. Maybe I'm interrupting you prematurely.
13 You're not saying that's the way you read it. You're
14 saying but that creates an ambiguity? Is - - -

15 MR. KARMEL: That is an ambiguity.

16 JUDGE STEIN: Okay.

17 MR. KARMEL: And but that - - - this court does
18 not read statutes by just looking at one phrase in
19 isolation, out of context from the rest of the statute.

20 If we look at other provisions of the Zoning
21 Resolution, it creates a further ambiguity. For example,
22 we can have open space in an inner court which would not be
23 accessible to other buildings on the zoning lot.

24 JUDGE GARCIA: Why not?

25 MR. KARMEL: Well, because you'd have to travel



1 through someone else's residential building - - -

2 JUDGE GARCIA: Right.

3 MR. KARMELE: - - - to get to it. Which - - -

4 JUDGE GARCIA: But even in this building that you
5 want to build here, you have space on the roof where, I
6 think it's accessible to everyone on the zoning lot, isn't
7 it?

8 MR. KARMELE: No, there's no space on the roof.
9 The - - - that's a very confusing aspect of the record,
10 Your Honor. The - - - what they talked about - - - what
11 they talk about in this record as roofed open space is
12 actually open space underneath a portion of the nursing
13 home building. So there's a roof above - - -

14 JUDGE GARCIA: But the point being, I think, that
15 the - - -

16 MR. KARMELE: - - - the building. It is a ground
17 level.

18 JUDGE GARCIA: If you have a courtyard, you have
19 to have access. If you have a roof, you have to have
20 access. It just depends on how you make the access. You
21 can allow public access, it just wouldn't be a usual thing
22 you would expect.

23 But if it was required under the zoning laws, you
24 could have access to an inner courtyard, you could have
25 access to a roof by a different entrance. I mean, it



1 doesn't create an impossibility. I - - - I'm even unclear
2 how it creates an ambiguity.

3 MR. KARMELO: It's suggestive. But let - - - but
4 there's more, Your Honor. Let's look at the one provision
5 of the Zoning Resolution that actually talks about
6 accessibility for rooftop open space. It's part of the
7 definition of "open space", and it says that where there's
8 rooftop space, it must be directly accessible by a
9 passageway from a building. It doesn't say "from all the
10 buildings on the zoning lot."

11 And there are other practical considerations
12 here. I - - - I think that this is a good example where -
13 - -

14 JUDGE RIVERA: So if it says "a building", does
15 that - - - does that - - - what meaning does that have that
16 it's "a building" as opposed to "the building"?

17 MR. KARMELO: A building on the zoning lot. It
18 doesn't require access from all the buildings on the zoning
19 lot.

20 I think if we look at - - -

21 JUDGE WILSON: Well, it says "a building, yard,
22 court, street." Right? I mean, isn't the fair reading of
23 that to mean that people have to be able to get to it, not
24 which people have to be able to get to it?

25 MR. KARMELO: It must be direct - - - this is the



1 statutory language. "It must be directly accessible by a
2 passageway from a building."

3 JUDGE WILSON: Or a yard or a court or the
4 street. That's the statutory language.

5 MR. KARMELE: Not in the portion of the statute
6 that I'm relying upon. What I'm relying upon is - - -

7 JUDGE WILSON: ZR 12-10 little (c) I think.

8 MR. KARMELE: It's (c) (3). It says - - - this is
9 the portion that talks about rooftop open space.

10 JUDGE WILSON: Um-hum.

11 MR. KARMELE: I think - - - Margery Perlmutter is
12 the chair of the Board of Standards and Appeals. She is a
13 very experienced zoning lawyer, and she's also a registered
14 architect. She's an expert in New York City zoning.

15 And I think something she said at page 285 of the
16 appellate record is - - - is quite relevant. She noted
17 that there are many zoning lot mergers throughout New York
18 City where it would be impossible for the residents of each
19 building to have access to the rear yards behind the other
20 buildings on the zoning lot.

21 This is a totally impractical interpretation of
22 the Zoning Resolution. And Chair Perlmutter - - - Perlmutter
23 recognized it as such. And it - - - it's not specifically
24 required by the Zoning Resolution. There's no provision in
25 the Zoning Resolution that addresses accessibility



1 requirements for a zoning lot on which there are multiple
2 buildings.

3 It's sim - - - it's simply not addressed. It's a
4 gap in the language of the Zoning Resolution, and it's the
5 type of gap that the Board of Standards and Appeals was
6 created to address with its expertise.

7 JUDGE GARCIA: But I'd like to go back to one
8 thing Judge Stein was asking that you don't interpret this
9 statute - - - this law to mean one apartment having access
10 to the open space would be enough.

11 MR. KARMELE: Your Honor, that's what I argued in
12 my brief. Frankly, that's not what the Department of
13 Buildings has - - - has held. The Department of Buildings
14 requires that if there's open space associated with a
15 building, that all dwelling units within that building must
16 have access to that open space.

17 JUDGE GARCIA: And that, to me, seems like answer
18 C. Like it seems like this provision could be read A or B.
19 You say, yes, it could be read B as well. Isn't it that
20 the agency then has to pick A or B? How can they pick C?
21 Because C is a reading that you don't read that naturally.

22 There are two - - - let's assume there are two
23 ways you could read this statute. Wouldn't we defer to the
24 agency as to answer A or answer B, because of their
25 expertise? Why would we defer to them to answer C?



1 They're just kind of making that up, then. It's not in the
2 statute. There's nothing about this particular building in
3 the statute.

4 So you have to have more than one apartment and
5 it has to be the building, but it doesn't have to be all?
6 Why would we defer to that interpretation?

7 MR. KARMELE: Well, there's a gap, and that's how
8 the Department of Buildings filled the gap.

9 I think that if - - - if there's an ambiguity,
10 the - - - it must resolved in favor of the property owner.
11 That's very clear, because zoning is in derogation of the
12 common law.

13 So if there's an ambiguity, it should be
14 interpreted in my client's favor. And what the Department
15 of Buildings has done has said, well, that would be a
16 little bit ungenerous. So they've kind of added some
17 additional requirements.

18 The - - - whether those additional requirements,
19 that it be accessible to all dwelling units within a
20 building, are in fact a permissible construction, is
21 actually not an issue joined by this case, because no one's
22 arguing that the rooftop open space on 808 Columbus Avenue
23 doesn't need to be accessible to all residents of 808
24 Columbus Avenue. That's simply an issue for a future case.

25 Here, the BSA interpretation allowing the - - -



1 the rooftop open space on 808 Columbus Avenue is consistent
2 with a literal reading of the statutory language. There's
3 a gap in the statute that the BSA filled in. And it's
4 totally permissible.

5 Another example would be parking. Parking lots -
6 - - service parking lot counts as open space. In fact - -
7 -

8 JUDGE GARCIA: Counsel, I'm sorry. I see your
9 red light is on.

10 And Chief Judge, if I may?

11 CHIEF JUDGE DIFIORE: Please.

12 JUDGE GARCIA: I - - - could - - - would you
13 answer the - - - the hypothetical question, if you remember
14 it, that I asked your counsel about what if this - - - just
15 assume - - - again, I know you dispute this - - - but
16 assume this was an error, the 42,000 square feet
17 determination. What effect would that have on this
18 application?

19 MR. KARMELE: I would argue, Your Honor, that the
20 2009 BSA determination cannot be collaterally attacked in
21 this proceeding challenging the 2015 BSA determination.

22 And I would give you two rationales for that
23 position. The first is what the provision of the New York
24 City Charter that I've cited - - - subdivision 8 of section
25 666 of the Charter, which places limits on BSA



1 reconsideration of earlier BSA determinations where there's
2 been adverse reliance.

3 The second would be a case of this court called
4 EFS Ventures. EFS Ventures was a decision involving a site
5 plan that was approved by a planning board, then several
6 years later someone went back and said they wanted to
7 change the site plan. And the planning board, the second
8 time around, said you know what we did the first time? We
9 don't really think it was very smart, because it lacked
10 access to Fire Department vehicles.

11 And this Court of Appeals said that earlier
12 planning board decision is - - - cannot be collaterally
13 attacked in a subsequent proceeding. Any - - - the - - -
14 the statute of limitations has run. The thing has been
15 built. And it is unfair to go back and re-examine the
16 earlier administrative agency decision.

17 So I - - - I don't think they can challenge the
18 2009 BSA determination in this case. That should be
19 accepted as bedrock. And the only issue, as the BSA framed
20 it in its 2015 decision, is whether the 2011 key amendments
21 changed anything. And it's very clear from the briefs that
22 they did not.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. KARMELE: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel?



1 MR. LOW-BEER: May it please the court, my name
2 is John Low-Beer for petitioners-respondents. I'd like to
3 make three main points. First, the plain language clearly
4 negates appellants' argument. Second - - - and the - - -
5 and its history, and the history and purpose as well as the
6 plain language of the 1961 Zoning Resolution negate their
7 arguments.

8 Second, the subsequent history, and in particular
9 the 1977 amendment, doesn't help them at all. It did not
10 first introduce multi-owner zoning lots. They've existed
11 for some time before that. And it did not make common
12 access untenable. Their historical account is not
13 accurate.

14 Third, there is no problem with multi-owner
15 zoning lots. And with all due respect to Margery
16 Perlmutter, this is a manufactured problem. And in all the
17 years since 1961, this has - - - no one has ever asserted
18 that - - - there's never been an issue about people trying
19 to get into somebody else's private back yard - - -

20 JUDGE STEIN: But so there's one other issue that
21 I would like you to also address, and that is how, if at
22 all, the 2011 amendments changed the definition of open
23 space in the Zoning Resolution.

24 MR. LOW-BEER: I'll be - - - okay. Well, let me
25 - - - let me start out with that, then.



1 JUDGE STEIN: Thank you.

2 MR. LOW-BEER: So - - - so in our papers, we
3 contended that the 2011 amendments were important because
4 in its 2009 decision, the BSA relied only on two
5 provisions: Section 23-14 and 23-142 - - -

6 JUDGE STEIN: But what if I disagree with you
7 that that's all they relied on, and - - - and we're looking
8 at it today with - - - with a clear - - - you know, a
9 different lens, and that is, as we look at those
10 amendments, can you tell me how they changed the definition
11 - - -

12 MR. LOW-BEER: Well, they - - -

13 JUDGE STEIN: - - - of open space?

14 MR. LOW-BEER: - - - they did not - - - they did
15 not change the definition of open space. But I would
16 contend that the BSA - - - neither in 2009 nor in 2015, did
17 the BSA ever refer to or rely on the definition of open
18 space, nor could it have, for the reasons that many members
19 of this court have already articulated.

20 JUDGE STEIN: Well, let me ask - - -

21 MR. LOW-BEER: But - - -

22 JUDGE STEIN: - - - let me ask you another
23 question. As I look at the - - - the two sections that
24 we're talking about that were amended in 2011, they talk
25 about how you calculate - - -



1 MR. LOW-BEER: Absolute - - -

2 JUDGE STEIN: - - - certain things, right?

3 MR. LOW-BEER: Yes.

4 JUDGE STEIN: They don't talk at all about
5 accessibility.

6 MR. LOW-BEER: That's right.

7 JUDGE STEIN: And so I think the question that
8 we're really focused on here is who - - - to whom does it
9 have to be accessible? So how do those amendments inform
10 us or change in any way - - - whether the 2009 reading was
11 correct or incorrect, how - - - how does that - - - how do
12 those amendments change a determination as to
13 accessibility?

14 MR. LOW-BEER: Well, I would contend that the two
15 thing - - - I mean, appellants say that the 2011 amendments
16 are irrelevant. So fine, they're irrelevant. Let's - - -
17 let's - - - I can - - - you know, for argument - - - for
18 purposes of this argument I can agree with that.

19 So - - - so let's then look, what is it in the -
20 - -

21 JUDGE STEIN: But if that's true, then aren't we
22 relitigating a determination that's already been made?

23 MR. LOW-BEER: No. No, we're not, because that -
24 - - that determination was only based on the - - - on those
25 two provisions that were amended. It didn't cite the open



1 space definition in - - - in its support, nor could it
2 have, because there's nothing in that definition other than
3 a clear requirement that the - - - the open space must be
4 accessible to all persons who occupy - - - who are resident
5 on the - - - on the zoning lot.

6 So what they did was they said, well, okay,
7 that's what it says in the definition, but then in the part
8 where it says how you calculate the open space, you can do
9 that building-by-building; you have to do it building-by-
10 building.

11 So because - - - so they said, well, since the
12 method of calculation seems to be at odds with the access
13 requirement, we're going to say that it only has to be
14 accessible to the occupants of one building in order to be
15 considered open space.

16 So they did not rely on the thing that was
17 unchanged, they only relied on the thing that was changed.
18 They were wrong then, and they're - - - they're wrong now.

19 JUDGE GARCIA: So assuming they were wrong then,
20 what effect would that have on this determination? Let's
21 assume they were wrong. You - - - there was a challenge to
22 that determination. It's finished. It's over.

23 MR. LOW-BEER: Well - - -

24 JUDGE GARCIA: Now you come in and you want to
25 build - - - you know, they want to build a different



1 building and they want to use the numbers that were
2 generated by that prior decision in terms of open space.
3 Why should you be able to go back and revisit that earlier
4 decision?

5 MR. LOW-BEER: Because - - - because there's no
6 collateral estoppel here for three different reasons.
7 First, there's no - - -

8 JUDGE FEINMAN: Well, aren't you the same
9 petitioners, essentially - - -

10 MR. LOW-BEER: I'm sorry?

11 JUDGE FEINMAN: - - - from the prior proceeding?

12 MR. LOW-BEER: I'm sorry?

13 JUDGE GARCIA: Judge Feinman's asking you are you
14 the same petitioner?

15 JUDGE FEINMAN: I'm asking aren't you essentially
16 the same petitioners who brought the previous proceeding?

17 MR. LOW-BEER: No, no. First of all, there is
18 absolutely no connection, or anyway, only the most tenuous
19 - - - I mean, I think one of the petitioners was an officer
20 of the Park West Village Tenant's Association, which wasn't
21 even a petitioner in the first proceeding. And he was only
22 an officer after that proceeding had concluded.

23 So and Maggi Peyton, who was the original
24 petitioner, was I believe, involved in that too. But they
25 were not petitioners. So first of all, there's no privity.



1 But secondly, leaving aside priv - - - privity,
2 even if you could argue privity, this is a different
3 building, and the law has changed in material - - - very
4 material respects, because the only basis that the BSA
5 cited for its ruling in 2009 were the two provisions that
6 were amended.

7 JUDGE GARCIA: I'm saying assume that 2009 was
8 wrong, so it doesn't matter if the law has changed or it
9 hasn't changed, so just assume it was - - - they made a
10 mistake.

11 But each time the owner on this lot wants to
12 build you can go in and - - - with a measure and measure
13 the square feet of things that have already been determined
14 and challenge the calculations?

15 MR. LOW-BEER: Each - - -

16 JUDGE GARCIA: On any basis. You can say, no it
17 isn't 130,000 square feet, really; it's 120-, because we
18 measured. And I bring in my measurements. And the square
19 footage that you already measured and counted as open space
20 for the prior application is different now.

21 MR. LOW-BEER: Well, that's not this case, Your
22 Honor. I don't know - - -

23 JUDGE GARCIA: No, I know it's not this case.
24 But - - -

25 MR. LOW-BEER: Yeah.



1 JUDGE GARCIA: - - - it's my question. So could
2 you do that?

3 MR. LOW-BEER: Could you challenge the square
4 footage - - -

5 JUDGE GARCIA: Yeah.

6 MR. LOW-BEER: - - - if they had gotten it wrong?
7 I - - - I'm not sure about that. I'd have to think about
8 that more.

9 JUDGE GARCIA: Because isn't there kind of a
10 policy reason not to be able to do that? Like that you can
11 come in, you can drop a challenge, you know, that - - -
12 that thing is already done. There's reliance in terms of,
13 okay, now we're going to come in with a new application, we
14 want to build this. No, we're going to go back to square
15 one and we're going to re-measure everything, and the
16 numbers may come out differently this time.

17 MR. LOW-BEER: Well - - - well, I - - - I believe
18 so. I believe you could challenge that again.

19 JUDGE FEINMAN: So basically there's no finality?

20 MR. LOW-BEER: I'm sorry? I mean, it's not the
21 same parties. And - - - and it's not the same building.
22 These - - - these petitioners may have a different interest
23 from the - - -

24 JUDGE STEIN: So - - - so what if - - - so what
25 if somebody had moved out of the - - - you know, the other



1 buildings. There's just a new resident. Right? It's the
2 same - - - it's the same building or - - - or unit of which
3 people had challenged the last time, but there's a new
4 tenant or there's a new owner of one of the units, right?

5 So anytime there's a change in who's living
6 there, that person can bring a new petition and a new
7 challenge to anything that was found previously by a board?

8 MR. LOW-BEER: To a different - - - to a
9 different building?

10 JUDGE STEIN: Well, no. So you've got several
11 buildings on this lot.

12 MR. LOW-BEER: Right.

13 JUDGE STEIN: Okay? And in 2009, certain
14 residents of other buildings - - - not the one that was
15 just built or - - - at that time, but - - - and now there's
16 a new building proposed to be built. But the people
17 already living on the lot, okay?

18 And there are several - - - there are a number of
19 different units in those buildings, right? And so I guess
20 I'm just sort of following up on Judge Garcia's question.
21 Are you saying that anytime somebody moves out of one of
22 those units and somebody else moves in and buys it from
23 them, then that person can go back to the board and say I
24 think you made a mistake when you approved this last week
25 or last year or - - - or ten years ago?



1 MR. LOW-BEER: Well, you - - - you can't go back
2 and challenge what was done on 808 Columbus. We're not
3 doing that. Because that building is built. It's
4 grandfathered, regardless.

5 So whatever facts were found there would be - - -
6 presumably would be res judicata. But there wouldn't - - -
7 I mean, and there would be a precedential effect. But
8 there wouldn't be collateral estoppel, if it was a
9 different person - - - in this case the people may not - -
10 - are not living - - - you know, they may - - - the people
11 who are the petitioners here, I don't know, but maybe - - -
12 they may not have been affected at all by 808 Columbus,
13 because this is a very large zoning lot. So they may live
14 a lot closer to the new building proposed than to 808
15 Columbus. So - - -

16 JUDGE STEIN: So but what you're saying is - - -
17 is that a determination is made that that space at 808
18 constitutes open space. But it only constitutes open space
19 for certain people, not others?

20 MR. LOW-BEER: No, no, the - - - so the determine
21 - - - the determination that was made, what the BSA did in
22 that insta - - - in that case, was it approved an applic -
23 - - a particular applicat - - - it was - - - it was an
24 appeal from the grant of a building permit.

25 So what the - - - what the BSA did there was it



1 denied the appeal for that particular building, and that
2 allowed that building to be built.

3 Now, if somebody else comes along and says I want
4 to build a different building, I mean, you know, we're - -
5 we're very far from the facts of this case, here, but - - -
6 but you know, I - - - if they challenged the cal - - - the
7 - - - the how many open - - - you know, whether they had
8 measured correctly the number of square footage of open
9 space, yeah, I think they could do that.

10 They might have a heavy burden. It might be a
11 tough row to hoe, but - - - but I think they could do that.

12 JUDGE WILSON: Let me ask you the question that I
13 asked Mr. Popolow earlier.

14 MR. LOW-BEER: Yeah.

15 JUDGE WILSON: Suppose, for the purposes of this
16 argument that the zoning law is out of compliance with the
17 open space requirement. Okay? The - - - the decision - -
18 - prior decision was wrong. Let's assume that.

19 The building they're proposing to build doesn't
20 require any additional open space. So why can't they build
21 that?

22 MR. LOW-BEER: It does require additional open
23 space. It doesn't - - - so it doesn't add to the open
24 space requirement, but the footprint of the building
25 further reduces the amount of open space on the lot.



1 That's why they're putting this open space underneath the
2 building, because - - - you know, but it - - - but that - -
3 - that gives - - - that mitigates their - - -

4 JUDGE GARCIA: They're still 10,000 feet short,
5 right?

6 MR. LOW-BEER: Yeah, they're still 10,000 feet
7 short.

8 JUDGE GARCIA: What if they weren't?

9 MR. LOW-BEER: Right.

10 JUDGE GARCIA: What if it was neutral? What if
11 the building was space-neutral, so it takes up 20,000, but
12 they have 20,000 fully accessible rooftop open space?
13 Would that change your answer?

14 MR. LOW-BEER: If it didn't add at all to the - -
15 -

16 JUDGE GARCIA: Just totally neutral.

17 MR. LOW-BEER: Yeah, if it - - - it did not add
18 to the noncompliance, maybe they could build it then. I -
19 - - I mean, I - - -

20 JUDGE GARCIA: But doesn't that undermine the - -
21 -

22 MR. LOW-BEER: - - - I mean, I don't know.
23 Again, it's not this case, and I don't - - - but - - -

24 JUDGE GARCIA: But then it seems like you'd still
25 be in in - - - under your theory, why wouldn't the answer



1 be - - - still be in noncompliance, because it isn't
2 building-by-building, right, it's how much open space is on
3 the lot when you put the building there?

4 MR. LOW-BEER: I'm sorry, I - - - what?

5 JUDGE GARCIA: That's not a good way to explain
6 it, sorry. It - - - so if you put in a 20,000 foot - - -
7 square-foot building, and the open space it's taking up,
8 it's compensating for in that building. So it builds a
9 20,000-foot open spaced garden on the top, fully
10 accessible.

11 So it doesn't need to borrow, right, from the - -
12 - wouldn't it still - - - the lot - - - the lot would not
13 be in compliance.

14 So on the theory this is a new application, why
15 couldn't you challenge the 42,000-foot prior decision?

16 MR. LOW-BEER: Well, actually, that might come up
17 in the next case, because I don't know if you looked at
18 their proposal that's attached to their letter that they
19 submitted a few weeks ago, saying, oh, now, it's not only
20 moot because they're not going to build this building, but
21 now they found another way to circumvent the statute and it
22 might raise that very question.

23 But we haven't really gotten to that yet. But -
24 - - but I think - - - I mean, the question before the court
25 here is whether they can count the open space of 808



1 Columbus.

2 So if you're hypothesizing a building that
3 doesn't require them to count the open space of 808
4 Columbus in order to be built, then yes, I guess they could
5 build it - - -

6 JUDGE GARCIA: But you still - - - the problem I
7 have with that is you'd still need the 42,000 square feet
8 on that new application to cover the entire lot, unless I'm
9 misunderstanding something here.

10 Isn't it - - - it's not building-by-building,
11 right? So I build a building on this lot - - - the lot, it
12 still needs to be in compliance?

13 MR. LOW-BEER: The lot is still out-of-
14 compliance, but it wouldn't be more out-of-compliance than
15 it already is, so - - -

16 JUDGE GARCIA: I see.

17 MR. LOW-BEER: - - - you know, arguably - - - I
18 mean, I don't know. Again, I - - - this is the next case.
19 I'm not want - - - don't want to concede the next case that
20 they're going to - - - that's going to happen when they
21 propose their new proposal.

22 But if I may, I'd - - I'd like to make a couple
23 of points that actually I kind of - - - that maybe are not
24 - - - I didn't have room to explain in my brief.

25 But the 1977 amendment didn't change anything. I



1 mean, I don't know if this is how - - - but what the 1977
2 amendment did, is it changed the way - - - when - - - when
3 zoning lots are merged, it changed the way these
4 arrangements are formalized. But even long before - - -
5 even before the 1961 Zoning Resolution, there were
6 arrangements so that multi-owner zoning lots could exist.

7 And in fact, the Empire State Building was built
8 pursuant to one such arrangement, whereby there were lease
9 arrangements - - - they were called development rights
10 leases. So if you had a low building nearby or an - - - or
11 an empty lot, you could - - - you could lease it to
12 somebody who wanted to build a tall building next door,
13 through a development rights lease.

14 And the problem with that was that these leases
15 were sometimes terminated leaving unclear who had the
16 development rights: was it the lessor or the lessee? And
17 there's a case called Newports - - - Newport Associates v.
18 Solow, which I think appellants cited - - - it's at 30
19 N.Y.2d 263 - - - which talks about this issue. It's a 1972
20 case.

21 So the 1977 amendment now being cited to justify
22 what we would call overbuilding, was enacted precisely to
23 protect - - - this is a quote from the City Planning
24 Commission's 1977 report - - - that it "was enacted to
25 protect the City's interests in avoiding overbuilding," as



1 well as to clarify the rights of all involved.

2 So instead of linking buildings in a merged
3 zoning lot through development rights leases, the amendment
4 required that such lots would be created by a recorded
5 declaration. So it changed the way these arrangements were
6 formalized, but it didn't - - - it wasn't that when - - -
7 when in 1961, when the drafters wrote that a zone - - - an
8 open space had to be accessible to and usable by all
9 persons occupying a dwelling unit or rooming unit on the
10 zoning lot, they were well aware that - - - that zoning
11 lots could be merged through leases or other arrangements.

12 And there - - - there - - - so - - - so there is
13 absolutely no evidence in the record that this has ever
14 created a problem - - - the problem that Board Chair
15 Perlmutter indicated, nor is there a gap about multi-
16 building zoning - - - zoning lots.

17 In fact, to the contrary. This provision was
18 written precisely to encourage and to apply to multi-
19 building zoning lots.

20 There's a nice quote, which I have here
21 somewhere, in the City's Zoning Handbook. It says the 1961
22 Zoning Resolution, "favored and idealized configuration of
23 tall buildings set in large amounts of open space, the
24 tower in a park vision. This model was shaped to fit large
25 urban renewal projects in which older buildings were razed,



1 streets were demapped, and blocks were consolidated to
2 produce super-blocks, such as Park West Village." That's
3 on page 63.

4 So you know, that - - - that - - - that vision is
5 totally negated by appellants' interpretation of this
6 language. And to say that there's nothing in the Zoning
7 Resolution that affirmatively requires common access, I
8 mean, you can say that until you're blue in the face, but
9 the very provision that's at the heart of this case
10 requires common access. If it's accessible to all persons,
11 that means common access.

12 Now - - -

13 CHIEF JUDGE DIFIORE: Thank you, counsel. Thank
14 you.

15 Counsel?

16 MR. POPOLOW: Thank you, Your Honor. I mean,
17 there are numerous provisions in the Zoning Resolution that
18 don't contemplate access to everybody on the zoning lot. I
19 mean, it specifically included yards, which includes rear
20 yards, which are the type of - - - of space that one would
21 not normally think would be accessible to persons other
22 than the persons living in the building that has the rear
23 yard.

24 It specifically included inner courts.

25 JUDGE STEIN: Counsel could - - - would you



1 address the argument that you - - - that the - - - the 2009
2 determination was based solely on Sections 23-14 and
3 23-142?

4 MR. POPOLOW: I don't think that's quite correct,
5 Your Honor. I think that there were references in the
6 Department of Buildings' determination that this complied
7 with the - - - the requirement that it be accessible to the
8 - - - you know, the occupants of a dwelling unit or a
9 rooming unit. And the BSA adopted this.

10 But I don't - - - I don't think you can say it's
11 - - - it's limited just to that. And I think that there -
12 - - there is a - - - sort of a structural principle in the
13 Zoning Resolution that open space is - - - is tied to the
14 floor area of residential buildings. I mean, it can be
15 provided in different permutations, but ultimately, the - -
16 - the requirement for open space, I mean, the calculation
17 comes from the floor area in the residential buildings on
18 the zoning lot.

19 So there's - - - this - - - this notion that
20 there - - - it has - - - it is connected to a residential
21 building. I mean, the BSA is not pulling this out of
22 nowhere.

23 And I think what they're trying to do is, you
24 know, what they're there for. And then you have a Zoning
25 Resolution that, you know, cannot anticipate everything



1 that's going to happen in the future. And the BSA is
2 trying to forge, you know, practical solutions to, you
3 know, difficult situations and unforeseen situations, and
4 that we shouldn't tie their hands unless there's an
5 explicit restriction in the Zoning Resolution. And here
6 that restriction is not explicit.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Randy Peyton, on behalf of the Estate of Maggi Peyton v. New York City Board of Standards and Appeals, et al., No. 88 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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