SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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THE COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, THE MUNICIPAL ART SOCIETY OF NEW YORK,

Plaintiffs-Petitioners,

- v -

AMSTERDAM AVENUE REDEVELOPMENT ASSOCIATES LLC, ACP AMSTERDAM III LLC,

Defendants-Respondents.

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INDEX NO. 153819/2018

MOTION DATE January 17, 2019

MOTION SEQ. NO. 001 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 79, 80, 81, 82

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this Article 78 proceeding under motion sequence number 002, petitioners-plaintiffs the Committee for Environmentally Sound Development (CESD) and the Municipal Arts Society of New York (MASNY and CESD together, Petitioners) seek a judgment vacating the September 7, 2018 resolution (Resolution) issued by respondent-defendant New York City Board of Standards and Appeals (BSA) (NYSCEF Doc. No. 88). The Resolution affirmed the decision of respondent-defendant New York City Department of Buildings (DOB) to issue building permit

number 122887224-01-NB, dated September 27, 2017 (Permit), authorizing respondent-defendant Amsterdam Avenue Redevelopment Associates LLC (Developer) to construct (Project) a 55-story tower (New Building) at 200 Amsterdam Avenue, in the County, City and State of New York (Development Site), and denied Petitioners' challenge to issuance of the Permit.

Petitioners assert that BSA erred in the Resolution by upholding the validity of the Permit. Petitioners argue that the Permit is invalid because the 39-sided "zoning lot" Developer assembled from partial tax lots is not a proper "zoning lot" within the meaning of Section 12-10 (d) of the New York City Zoning Resolution (ZR), as it is comprised of several partial tax lots and so is neither "unsubdivided" nor "consist[s] of two or more lots or record," as required by the ZR.

Developer opposes the petition and maintains that its Permit is valid. It asserts that the Permit was properly granted under the DOB's historical interpretation of the ZR Section 12-10 (d). Developer relies on the Departmental Memorandum of Acting Commissioner Irving Minkin, dated May 18, 1978 (Minkin Memo) (NYSCEF Doc. No. 75). In a summary of amendments to the definition of "zoning lot" under the ZR, the Minkin Memo provides, among other things, that "a single zoning lot [] may consist of one or more tax lots *or parts of tax lots*" (*id.*) (emphasis in original).

Background

CESD and MASNY are New York nonprofit corporations, which maintain their respective principal places of business in New York County (complaint, filed April 25, 2018, ¶¶ 15, 17) (NYSCEF Doc. No. 2). Developer is a Delaware limited liability company which maintains its principal place of business in New York City (*id.*, ¶ 20).

DOB is an agency of the City of New York which has been granted authority under the New York City Charter (City Charter) to, among other things, enforce the ZR (verified answer of BSA and DOB, filed December 18, 2018 [City Respondents' Answer], ¶ 16) (NYSCEF Doc. No. 113). BSA is an independent, five-member body authorized under the City Charter to review the decisions of the Commissioner of the DOB (*id.*, ¶15).

Relevant Zoning Resolution and Statutes

Pursuant to Section 28-101.1 of the Administrative Code, the "New York city construction codes" consist of New York City's plumbing code, building code, mechanical code and fuel gas code (collectively, the Construction Code). The Construction Code became effective on July 1, 2008.

Section 28-105.1 of the Construction Code states that:

> "It shall be unlawful to construct, enlarge, alter, repair, move, demolish, remove or change the use or occupancy of any building or structure in the city, or to erect, install, alter, repair or use or operate any sign or service equipment in or in connection therewith, or to erect, install, alter, repair, remove, convert or replace any gas, mechanical, plumbing or fire suppression system in or in connection therewith or to cause any such work to be done unless and until a written permit shall have been issued by the commissioner in accordance with the requirements of this code, subject to such exceptions and as may be provided in section 28-105.4."

Section 28-105.5 of the Construction Code sets forth the procedure for applying for a DOB permit. It provides:

> "All applications for permits shall be submitted on forms furnished by the department. Applications shall include all information required by this code, other applicable law or the rules of the department. The applicant shall list any portions of the design that have been approved for deferred submittal in accordance with section 28-104.2.6. The application shall set forth an inspection program for the job. An application for a permit shall be submitted no later than 12 months after the approval of all required construction documents (other than documents approved for deferred submittal)."

The New York City Zoning Resolution

Section 12-10 of the ZR defines a "zoning lot"[1] as:

"either:

(a) a lot of record existing on December 15, 1961 or any applicable subsequent amendment thereto;

(b) a tract of land, either unsubdivided or consisting of two or more contiguous lots of record, located within a single *block*, which, on December 15, 1961 or any applicable subsequent amendment thereto, was in single ownership;

(c) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single *block*, which at the time of filing for a building permit (or, if no building permit is required, at the time of the filing for a certificate of occupancy) is under single fee ownership and with respect to which each party having any interest therein is a party in interest (as defined herein); or

(d) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single *block*, which at the time of filing for a building permit (or, if no building permit is required, at the time of filing for a certificate of occupancy) is declared to be a tract of land to be treated as one *zoning lot* for the purpose of this Resolution. Such declaration shall be made in one written Declaration of Restrictions covering all of such tract of land or in separate written Declarations of Restrictions covering parts of such tract of land and which in the aggregate cover the entire tract of land comprising the *zoning lot*. Any Declaration of Restrictions or Declarations of Restrictions which individually or collectively cover a tract of land are referred to herein as 'Declarations'. Each Declaration shall be executed by each party in interest (as defined herein) in the portion of such tract of land covered by such Declaration (excepting any such party as shall have waived its right to execute such Declaration in a written instrument executed by such party in recordable form and recorded at or prior to the recording of the Declaration). Each Declaration and waiver of right to execute a Declaration shall be recorded in the Conveyances Section of the Office of the City Register or, if applicable, the County Clerk's Office of the county in which such tract of land is located, against each lot of record constituting a portion of the land covered by such Declaration."

ZR Section 12-10 further states that:

"A *zoning lot*, therefore, may or may not coincide with a lot as shown on the official tax map of the City of New York, or on any recorded subdivision plat or

[1] Italicized words in the ZR's original text identify defined terms.

deed . . ..

(f) For purposes of the provisions of paragraph (d) hereof:

(1) prior to issuing a building permit or a certificate of occupancy, as the case may be, the Department of Buildings shall be furnished with a certificate issued to the applicant therefor by a title insurance company licensed to do business in the State of New York showing that each party in interest (excepting those parties waiving their respective rights to join therein, as set forth in this definition) has executed the Declaration and that the same as well as each such waiver, have been duly recorded; except that where the City of New York is a fee owner, such certificate may be issued by the New York City Law Department;

(2) the Buildings Department, in issuing a building permit for construction of a *building or other structure* on the *zoning lot* declared pursuant to paragraph (d) above or, if no building permit is required, in issuing a certificate of occupancy for such *building or other structure*, shall accept an application for same from and, if all conditions for issuance of same are fulfilled, shall issue same to any party to the Declaration;

(3) by their execution and recording of a Declaration, the parties to the Declaration, and all parties who have waived their respective rights to execute such Declaration, shall be deemed to have agreed that no breach by any party to the Declaration, or any agreement ancillary thereto, shall have any effect on the treatment of the tract of land covered by the Declaration as one *zoning lot* for purposes of this Resolution and such tract of land shall be treated as one *zoning lot* unless such *zoning lot* is subdivided in accordance with the provisions of this Resolution; and

(4) a 'party in interest' in the portion of the tract of land covered by a Declaration shall include only (W) the fee owner or owners thereof, (X) the holder of any enforceable recorded interest in all or part thereof which would be superior to the Declaration and which could result in such holder obtaining possession of any portion of such tract of land, (Y) the holder of any enforceable recorded interest in all or part thereof which would be adversely affected by the Declaration, and (Z) the holder of any unrecorded interest in all or part thereof which would be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the portion of the tract of land covered by the Declaration.

A *zoning lot* may be subdivided into two or more *zoning lots*, provided that all resulting *zoning lots* and all *buildings* thereon shall comply with all of the applicable provisions of this Resolution. If such *zoning lot*, however, is occupied

by a *non-complying building*, such *zoning lot* may be subdivided provided such subdivision does not create a new *non-compliance* or increase the degree of *non-compliance* of such *building*.

Where ownership of a *zoning lot* or portion thereof was effected prior to the effective date of this amendment, as evidenced by an attorney's affidavit, any *development, enlargement* or alteration on such *zoning lot* may be based upon such prior effected ownership as then defined in the *zoning lot* definition of Section 12-10. Such prior leasehold agreements shall be duly recorded prior to August 1, 1978.

Prior to the issuance of any permit for a *development* or *enlargement* pursuant to this Resolution a complete metes and bounds of the *zoning lot*, the tax lot number, the block number and the ownership of the *zoning lot* as set forth in paragraphs (a), (b), (c) and (d) herein shall be recorded by the applicant in the Conveyances Section of the Office of the City Register (or, if applicable, the County Clerk's Office) of the county in which the said *zoning lot* is located. The *zoning lot* definition in effect prior to the effective date of this amendment shall continue to apply to Board of Standards and Appeals approvals in effect at the effective date hereof . . .."

ZR Section 72-11 provides, in pertinent part:

"The Board of Standards and Appeals shall hear and decide appeals from or may, on its own initiative, review any rule or regulation, order, requirement, decision or determination of the Commissioner of Buildings, of any duly authorized officer of the Department of Buildings, or of the Commissioner of any agency which, under the provisions of the New York City Charter, has jurisdiction over the *use* of land or over the *use* or *bulk* of *buildings or other structures*, subject to the requirements of this Resolution.

On such an appeal or review, the Board may reverse, affirm, in whole or in part, or modify, such rule, regulation, order, requirement, decision or determination and may make such rule, regulation, order, requirement, decision or determination as in its opinion should have been made in the premises in strictly applying and interpreting the provisions of this Resolution, and for such purposes the Board shall have the power of the officer from whose ruling the appeal or review is taken."

Pursuant to City Charter Section 659, BSA is an independent body, consisting of five Commissioners, three of whom are experts in building construction, land use, and planning with at least ten years of experience in their respective fields.

Administrative Code Section 28-103.4 governs the procedure by which a party may appeal a determination by DOB. It states, in pertinent part:

> "An appeal from any decision or interpretation of the superintendent or commissioner may be taken to the board of standards and appeals pursuant to the procedures of the board. . .."

Under City Charter Section 666, the BSA is also empowered to hear and decide appeals from decisions made by the Commissioner of Buildings (*see also* City Charter § 649).

City Charter Section 666 (6) provides, in pertinent part:

> "§ 666. Jurisdiction.
>
> The board shall have the power. . .
> 6. To hear and decide appeals from and review, (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of section six hundred forty-two or section six hundred forty-five of this charter. . .."

Background

On September 27, 2016, Developer was issued the Permit under New Building Application No. 122887224 for a 55-story residential and community-facility building on the 110,794 square-foot Development Site, situated within a block bounded by Amsterdam Avenue, West 66th Street, West End Avenue and West 70th Street (Block) (Resolution at 1).

The Block initially included a large zoning lot containing the present-day Lincoln Towers condominium buildings (Original Lincoln Towers Zoning Lot). In April 1977, the Original Lincoln Towers Zoning Lot was subdivided into two zoning lots. One of the newly formed zoning lots consists of the portions of Tax Lots 1, 30, 70, and 80, together with the entirety of Tax Lot 90 and contains the present-day Lincoln Towers condominium buildings (Current Lincoln Towers Zoning Lot) (City Respondents' Answer, ¶ 96).

The other newly formed zoning lot (Subject Zoning Lot) consisted of portions of Tax Lots 1, 30, 70, and 80, together with the entirety of Tax Lots 10, 12, and 65. In 2007, Tax Lots 133 and 134 were merged into the Subject Zoning Lot (*id.* ¶ 97).

On or about December 21, 2005, Tax Lots 1, 30, 70, and 80 were established as condominium lots. Tax Lot 1 became Condominium Lot 7501. Tax Lot 30 became Condominium Lot 7505. Tax Lot 70 became Condominium Lot 7502, and Tax Lot 80 became Condominium Lot 7503 (*id.* ¶ 98).

In 2007, Tax Lots 133 and 134 were merged into the Subject Zoning Lot. As a result, at that point, the Subject Zoning Lot consisted of portions of Condominium Lot 7501 (formerly Tax Lot 1), Condominium Lot 7505 (formerly Tax Lot 30), Condominium Lot 7502 (formerly Tax Lot 70), and Condominium Lot 7503 (formerly Tax Lot 80), together with the entirety of Lots 10, 12, 18, 65, 133, and 134[2] (*id.* ¶ 99).

On or about October 10, 2012, Tax Lot 65 was established as Condominium Lot 7506. Accordingly, in October 2012, the Subject Zoning Lot consisted of portions of Condominium Lot 7501 (formerly Tax Lot 1), Condominium Lot 7505 (formerly Tax Lot 30), Condominium Lot 7502 (formerly Tax Lot 70), and Condominium Lot 7503 (formerly Tax Lot 80), together with the entirety of Condominium Lot 7506 (formerly Tax Lot 65) and Tax Lots 10, 12, 18, 65, 133, and 134 (*id.* ¶ 100).

On June 18, 2015, the Subject Zoning Lot was again subdivided with the result that Tax Lots 10, 12, 18, and portions of Condominium Lots 7501 (formerly Tax Lot 1) and 7505 (formerly Tax Lot 30) were subdivided out of the Subject Zoning Lot (*id.* ¶ 101).

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[2] Around this time, Tax Lot 12 was reapportioned into Tax Lots 12 and 18.

Pursuant to the 2015 subdivision, the Subject Zoning Lot became the zoning lot for the proposed development (Development Site). Specifically, the Development Site consists of all of Tax Lots 133 and 134, Condominium Lot 7506 (formerly Tax Lot 65), and portions of Condominium Lot 7501 (formerly Tax Lot 1), Condominium Lot 7505 (formerly Tax Lot 30),[3] Condominium Lot 7502 (formerly Tax Lot 70), and Condominium Lot 7503 (formerly Tax Lot 80)[4] (*id.* ¶ 102).

Zoning Challenge

On May 9, 2017, after reviewing whether the Project satisfied the open space requirement in the ZR, DOB approved the proposed zoning diagram (*id.* ¶ 103).

On May 15, 2017, pursuant to DOB's Zoning Challenge procedure under Section 101-15 of the Rules of the City of New York, CESD appealed the decision to DOB's Manhattan Borough Commissioner, challenging DOB's conclusion that the proposed zoning lot met the requirements of the ZR. In support of its appeal, CESD submitted a statement by George Janes co-signed by Manhattan Borough President Gale Brewer, City Council Member Helen Rosenthal, and Landmark West! (*id.* ¶ 104).

On July 10, 2017, the Borough Commissioner issued a notice of objections and intent to revoke the Permit. In the response, DOB noted that "the Department ha[d] issued a notice of objections and an intent to revoke to verify the open space ratio and that the zoning lot was

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[3] Although portions of Condominium Lots 7501 (formerly Tax Lot 1) and 7505 (formerly Tax Lot 30) were subdivided out of the Subject Zoning Lot, smaller portions of the Condominium Lots still remain as part of the Subject Zoning Lot post-subdivision.

[4] The only change to the Development Site since the June 18, 2015 formation is the reassignment of Tax Lots 133 and 134 into a single Tax Lot 133 and a tax lot subdivision reapportioning Tax Lot 133 to create Tax Lot 9133 (an air rights parcel) above Tax Lot 133 (the fee parcel at grade).

properly formed." The Department's response also denied the Appellant's challenge concerning the mechanical space towards the top of the building ((*id.* ¶ 105).

On September 18, 2017, the Owner submitted additional information addressing the objections (*id.* ¶ 106).

On September 18, 2017, DOB lifted the notice to revoke (*id.* ¶ 107).

On September 27, 2017, DOB issued the Permit for the New Building (*id.* ¶ 108).

On October 12, 2017, petitioner MAS objected to the Project in a letter to DOB Commissioner Rick Chandler (*id.* ¶ 109).

On October 25, 2017, petitioner CESD appealed to BSA under ZR Section 72-21 for an interpretation of the ZR and Section 666(6)(a) of the City Charter (Appeal), alleging, among other things, errors pertaining to whether the Development Site complies with the ZR's definition of "zoning lot" (*id.* ¶ 110). Specifically, CESD challenged the Permit by claiming that the putative zoning lot, made up of parts of several tax lots, was not valid under ZR Section 12-10 (d) [CESD's October 25, 2017 Appeal to BSA [NYSCEF Doc. No. 67], at 3-11).

BSA issued a Notice of Comments on December 8, 2017 (City Respondents' Answer, ¶ 111).

By application dated January 9, 2018 (stamped by BSA on January 11, 2018), CESD submitted a Revised Statement of Facts (*id.* ¶ 112).

On March 7, 2018, co-respondent Developer submitted a memorandum to BSA in response to the Appeal (*id.* ¶ 113).

On March 9, 2018, Michael Zoltan, Esq., Assistant General Counsel of DOB, submitted a letter to BSA in response to the Appeal (Zoltan letter) (*id.* ¶ 114).

In the Zoltan letter, at 5-6, DOB stated that it agrees with Petitioners' construction of "zoning lot" under the ZR:

> "Due to a need for clarification of the requirements for forming zoning lots, [DOB] began the process of writing a Department Bulletin[5] to clarify the proper procedures and forms required to create and verify the proper formation of a zoning lot. In the context of the subject appeal, the Minkin Memo's incorrect interpretation that the ZR permitted zoning lots to consist of portions of tax lots in addition to complete tax lots came to light.
>
> As explained by Appellants, there is strong evidence that the ZR did not intend to allow zoning lots to consist of partial tax lots."

On March 27, 2018, CESD submitted a reply to Developer's Memorandum (*id.* ¶ 115).

Vice-Chair Chanda and Commissioner Ottley-Brown performed inspections of the Development Site and surrounding neighborhood (*id.* ¶ 116).

BSA held a public hearing on the Appeal on March 27, 2018, after due notice by publication in *The City Record*, which hearing continued on June 5, 2018 (*id.* ¶ 117).

At the hearing, CESD, Developer and DOB presented their respective positions and responded to questions from BSA. BSA also heard presentations by various groups and individuals, in support and in opposition to the Appeal (*id.* ¶ 118).

Mr. Zoltan expanded on DOB's reasoning in rejecting the Minkin Memo during his testimony at the March 27, 2018 public hearing, at which he stated:

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[5] Under its February 2018 Draft Bulletin, at 3 (NYSCEF Doc. No. 68), DOB proposed amending ZR Section 12-10 (d)'s definition of "zoning lot," to abandon the definition in the Minkin Memo and to replace it with the following:

> "*A 12-10 (d) zoning lot is a tract of land that consists of one tax lot or two or more tax lots (not parts of tax lots)* that are contiguous for a minimum of ten linear feet, and located within a block and declared by all 'parties in interest' (other than those that previously recorded a waiver of their rights) to be a 'zoning lot' in a recorded Zoning Lot Declaration of Restrictions"

(emphasis in original).

> "Today, based on much of evidence [sic] cited by the Appellant [CESD], the Department agreed that the correct interpretation of the 'zoning lot' definition does not permit the zoning lots to consist of parts of tax lots for multiple reasons. For zoning lots [formed] pursuant to subsection D, which is the case today, the zoning lot can consist of un-subdivided tracts of land within a block. By virtue of creating a zoning lot within an un-subdivided tract of land, they are necessarily subdividing the tract of lands. *Therefore, it's illogical to accept. . . the developer's argument that, after the creation of the zoning lot, they're still un-subdivided.*"

(BSA Record on Appeal – Vol II [March 27, 2019 transcript at 61:1 to 61:8] [NYSCEF Doc. No. 118] [emphasis added]).

Mr. Zoltan continued, explaining DOB's analysis, stating:

> "This brings us back to the Department's interpretation going forward and how it relates to this permit. As noted by the Board yesterday, the city is not estopped in correcting [its] errors. In fact, the Department relies on this no estoppel principle when it revokes [a] permit due to a mistake. We request that the Board affirm the Department's current interpretation of the Minkin Memo, although not unreasonable, is incorrect. However, the Department also asks the Board to affirm the subject permit because it relied on a 40-year longstanding determination from the highest ranking official in the Department in over 30 years of Department determinations relying on this interpretation for the subject zoning lot.
>
> Additionally, although the Department feels. . . the new interpretation that zoning lots cannot consist of parts of tax lots is correct it has been issued in an official capacity and the Minkin Memo has yet to be rescinded. For all these reason[s] and as set forth in the Department's written submission, the Department requests that the permit be affirmed along with this interpretation of 'zoning lot'"

(*id.* [March 27, 2018 transcript at 61:14 to 62:4]).

Community Board 7, Manhattan, submitted testimony in support of the Appeal, stating that the New Building is inappropriate and out of context with the surrounding neighborhood, that no rational person could view the Development Site as a single lot and that a significant portion of the open space claimed is unavailable to the public (*id.* ¶ 119).

New York State Assembly Member Richard N. Gottfried and State Senator Brad Hoylman submitted testimony in support of the Appeal, stating that the Project fails to comply

with the "zoning lot" definition because it is not comprised of whole tax lots and fails to comply with applicable "open space" regulations and that these compliance failures are abuses of zoning regulations that render the New Building contextually out of scale (*id.* ¶ 120).

New York State Assembly Member Linda B. Rosenthal, State Senator Brad Hoylman and Comptroller Scott M. Stringer submitted testimony in support of the Appeal, stating that creative interpretations of the ZR slowly chip away at the quality of life and character of the City's residential areas (*id.* ¶ 121).

A majority of the New York City Council submitted testimony in support of the Appeal, stating that divorcing zoning lots from the tax lots on a block makes ensuring compliance with the ZR dramatically more difficult and that having zoning lot lines coincide with tax lot lines promotes clarity and transparency (*id.* ¶ 122).

New York City Comptroller Scott M. Stringer submitted testimony in support of the Appeal, stating that Developer creatively interpreted the City's zoning regulations to create a tower on the Upper West Side by merging various tax lots to create one zoning lot and by claiming the neighboring property's open space as its own. Mr. Stringer stated further that the City must do more to prevent the construction of inappropriately sited towers throughout the City and ensure that all development complies with the intent and letter of the law (*id.* ¶ 123).

Manhattan Borough President Gale A. Brewer submitted testimony in support of the Appeal, stating that interpreting the ZR in such a way as to allow for the New Building is a mistake, makes for bad public policy and goes against the spirit and intent of the ZR (*id.* ¶ 124).

New York City Council Member Helen Rosenthal submitted testimony in support of the Appeal, stating that the Development Site runs counter to the most logical interpretation of the text of the ZR in an unprecedented manner, that divorcing zoning lots from tax lot lines would

make ensuring compliance with the ZR dramatically more difficult and that the Development Site inappropriately counts inaccessible and unusable area as open space (*id.* ¶ 125).

Petitioner-plaintiff MASNY submitted testimony in support of the Appeal, stating that the Development Site does not comply with the "zoning lot" definition because it contains two entire tax lots and small portions of four other tax lots (*id.* ¶ 126).

Landmark West! submitted testimony in support of the Appeal, stating that the Permit is invalid because allowing the merger of portions of tax lots in order to take advantage of certain development rights relating to the merged lots is erroneous (*id.* ¶ 127).

The Sierra Club New York City Group submitted testimony in support of the Appeal, stating that the Development Site does not comply with applicable "open space" requirements (*id.* ¶ 128).

The West 68th Street Block Association Inc. submitted testimony in support of the Appeal, stating that the New Building will have negative impacts on light, air, infrastructure and other quality-of-life necessities in the community (*id.* ¶ 129).

West End Preservation Society submitted testimony in support of the Appeal, stating that the Development Site does not comply with the "zoning lot" definition because it consists of portions of tax lots (*id.* ¶ 130).

George Janes, a planner, submitted testimony in support of the Appeal, stating that zoning lots are composed of one or more tax lots and that there is insufficient data on zoning lots (*id.* ¶ 131).

The American Institute of Architects New York Chapter submitted testimony in opposition to the Appeal, stating that professionals that work on buildings, such as architects,

need predictable zoning rules in order to design and program buildings and that as-of-right zoning affords architects and their clients that predictability (*id.* ¶ 132).

The Real Estate Board of New York submitted testimony in opposition to the Appeal, stating that the City's as-of-right framework embodied in the ZR is meant to encourage predictability in an industry where financing needs predictability, especially when market conditions can be unpredictable, that the Permit was only granted after an exhaustive DOB review, including a rigorous audit, and that the Appeal is based on a faulty interpretation of the ZR (*id.* ¶ 133).

The New York Building Congress submitted testimony in opposition to the Appeal, stating that granting the Appeal would be unprecedented and clearly stifle current and future investment, that the process for reviewing and approving the Permit was transparent and consistent with the City's procedures and that two other buildings have been permitted to be built as-of-right on the same lot: 170 Amsterdam Avenue and 180 Amsterdam Avenue (*id.* ¶ 134).

Vishaan Chakrabarti, a practicing architect and planner, submitted testimony in opposition to this Appeal, stating that the ZR regulates the real estate industry in accordance with the City's public and planning policies, that the key to its success has been the ability it gives owners and builders to proceed with as-of-right development, that the Department of City Planning invests substantial resources in evaluating and updating the ZR both to reflect its evolving planning goals for the City and to correct errors and inconsistencies in the text and that City Planning takes action to legislatively clarify or amend the text when it disagrees with an interpretation (*id.* ¶ 135).

PNC Real Estate submitted testimony in opposition to the Appeal, stating that zoning lot mergers have been considered "as of right" actions and that ensuring that the decisions of city government not be reversed is important to the lending and investment communities. (*id.* ¶ 136).

Association for a Better New York submitted testimony in opposition to the Appeal, stating that upholding the Permit ensures a measure of predictability and confidence in the issuance of as-of-right building permits and that there is a consistent history of allowing partial zoning lot mergers (*id.* ¶ 137).

BSA also received letters and heard testimony from neighbors, organizations and concerned members of the public, in support of and in opposition to the Appeal (*id.* ¶ 138).

170 West End Avenue Condominium (Condominium), a residential condominium located on the subject block outside the bounds of the Development Site, stated that it took no position with respect to issues presented in the Appeal insofar as they did not implicate the Condominium's accessory parking and that 26 off-street parking spaces located behind the New Building are lawful and permitted under the ZR (*id.* ¶ 139).

On July 17, 2018, following its review of the record, consideration of the positions presented by CESD and MASNY, as appellants, and by DOB and Developer, in opposition to the Appeal, and the one board member of BSA who voted to grant the Appeal, BSA denied the Appeal by a vote of three in favor of denying the Appeal, one in favor of granting the Appeal, and one commissioner recused (*see* Resolution at 28).

Petitioners filed their petition on this application on October 9, 2018 (*see* notice of petition [NYSCEF Doc No 56]). In addition to their request that the Resolution be nullified and vacated, Petitioners seek, among other things, orders directing DOB to revoke the Permit and directing Developer to halt all unlawful construction at the Development Site (*id.*).

Discussion

New York courts recognize that "BSA is comprised of experts in land use and planning, and that its interpretation of the Zoning Resolution is entitled to deference. So long as its interpretation is neither irrational, unreasonable nor inconsistent with the governing statute, it will be upheld" (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 418-19 [1998] [citation and internal quotation marks omitted]; *see also Matter of Sasso v Osgood,* 86 NY2d 374, 384 [1995] [zoning board's determination should be sustained if "rational and not arbitrary and capricious"]).

"Of course, this principle does not apply to purely legal determinations; where the question is one of pure legal interpretation of statutory terms, deference to the BSA is not required" (*Matter of New York Botanical Garden*, 91 NY2d at 419, quoting *Matter of Toys "R" Us v Silva,* 89 NY2d 411, 419 [1996]; *Matter of Peyton v New York City Bd. of Stds. & Appeals*, 166 AD3d 120, 136 [1st Dept 2018]). As no specialist's expertise is needed in this case, BSA's construction is not entitled to deference (*Matter of Peyton*, 166 AD3d at 136).

The Resolution is unreasonable because it does not address the merits of the Appeal and it ignores DOB's determination that the Minkin Memo's interpretation of "zoning lot" is in error, thereby leaving the central issue raised on Appeal regarding the Permit's validity unresolved. Furthermore, the Resolution appears to be inconsistent with the governing statute, ZR Section 12-10 (d), insofar as it adheres to an interpretation of that statute which DOB, its sister City agency, has determined to be wrong.

Persuaded by the evidence and arguments CESD presented on Appeal, DOB now agrees with Petitioners and, disavowing the Minkin Memo, has affirmatively stated that a "zoning lot"

within the meaning of ZR Section 12-10 cannot consist of partial tax lots (Zoltan letter at 5-6), like the Subject Zoning Lot.

DOB publicly stated that the Minkin Memo was incorrect at the time of the Appeal but chose not to act on its Draft Bulletin, stating it would hold it in abeyance until the end of this action, to avoid acting in a manner it believed would be arbitrary and capricious (*id.*, at 8-9). DOB, however, gives no indication that there is any likelihood that its Draft Bulletin will not be adopted.

BSA's construction of the ZR underscores the unreasonableness of the Resolution. BSA ignores CESD's arguments as to whether the Subject Zoning Lot is "unsubdivided" under the ZR. BSA instead asserts that, because Developer's "Zoning Lot Declaration declares, in satisfaction of paragraph (d) of the 'zoning lot' definition, that the Development Site is treated as one zoning lot for the purposes of the Zoning Resolution" (Resolution at 22), it necessarily follows that:

> "as a single land assemblage aggregated for the purpose of developing the New Building in compliance with the Zoning Resolution, the Development Site is itself – for the purposes of the Zoning Resolution – 'unsubdivided land'"

(*id.* at 26). In other words, BSA found that the Subject Zoning Lot is "unsubdivided," within the meaning of the ZR, simply because Developer has declared it to be so.

This interpretation renders the term "unsubdivided" superfluous, and thus runs afoul of elementary rules of statutory construction. The text of a statute is the clearest indicator of legislative intent and "unambiguous language [should be construed] to give effect to its plain meaning" (*Mestecky v City of New York*, 30 NY3d 239, 243 [2017], *rearg denied,* 30 NY3d 1098 [2018], quoting *Matter of DaimlerChrysler Corp. v Spitzer,* 7 NY3d 653, 660 [2006]). "'[M]eaning and effect should be given to every word of a statute' and [] an interpretation that

renders words or clauses superfluous should be rejected" (*Mestecky*, 30 NY3d at 243, quoting *Leader v Maroney, Ponzini & Spencer,* 97 NY2d 95, 104 [2001]). BSA's Resolution must therefore be vacated.

The decision to adhere to the ZR's "historical interpretation" and affirm the Permit, merely because the Minkin Memo has not been rescinded or superseded (Resolution, at 12 n 4), also appears to be in error.

From their conduct, it appears BSA and DOB believe that it would be proper to delay correction of the Minkin Memo's "zoning lot" definition until after this action is resolved and that they could then give the new interpretation only prospective effect. In its submissions to BSA, however, DOB shows that its intended revision of the ZR's "zoning lot" definition is just a correction of a long-standing, albeit untested, misinterpretation of statutory language. As it does not state a new legal principle, DOB's corrected interpretation would be entitled to retroactive application (*see Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 197-98 [1st Dept 2011], *citing, inter alia, Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, *cert. denied* 459 US 837 [1982]), which will invalidate the Permit.

Indeed, by publicly correcting its interpretation of ZR Section 12-10 (d) during the Appeal, DOB undermined the statutory basis for its issuance of the Permit in the first instance (*see Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282, *cert. denied* 488 US 801 [1988] [neither issuance of building permit nor laches estops municipality from enforcing zoning laws; "prior issue. . . of a building permit could not confer rights in contravention of its zoning laws"] [citations and internal quotation marks omitted]).

It also appears that DOB did not need to support affirmance of the Permit to avoid acting in an arbitrary and capricious manner. Despite its public pronouncement that the Minkin Memo's

interpretation of "zoning lot" is wrong, and that it intends to adopt Petitioners' definition of "zoning lot" published in the Draft Bulletin, DOB asked BSA to affirm the Permit. Noting that it must avoid acting differently in cases with similar facts, DOB felt affirmance was necessary to avoid a result it believed could be considered "arbitrary and capricious" (Zoltan letter at 8). Affirmance, however, does not appear to be justified on this ground (*compare Matter of Exxon Corp. v Board of Stds. & Appeals of the City of N.Y.*, 128 AD2d 289, 296 [1st Dept 1987] ["administrative agency may not rule or act in such a way as to result in inconsistent treatment of similarly situated parties"] and *Matter of Perrotta v City of New York,* 107 AD2d 320, 325 [1st Dept 1985], quoting *Natchev v Klein*, 41 NY2d 833, 834 [1977] [DOB commissioner's revocation of "'permits issued in error for failure to comply with code provisions cannot be characterized as arbitrary and capricious"];[6] *see also Matter of Parkview Assoc.,* 71 NY2d at 282

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[6] DOB is mistaken, if it believes affirmance of the Permit was required because Developer had somehow accrued rights to proceed with the Project. Under the vested rights doctrine:

> "[a]n owner of real property can acquire a common-law vested right to develop property in accordance with prior zoning regulations when, in reliance on a *legally issued permit*, the landowner effects substantial changes and incurs substantial expenses to further the development and the landowner's actions relying on the *valid permit* are so substantial that the municipal action results in serious loss rendering the improvements essentially valueless"

(*Matter of Perlbinder Holdings, LLC v Srinivasan*, 27 NY 3d 1, 8 [2016] [emphasis in original, citation, alterations and internal quotation marks omitted]).

Of course, vested rights cannot be acquired by relying on an invalid permit (*id.*, citing *Matter of Natchev* and *Matter of Perrotta*). Moreover, even if the Permit were deemed valid, Developer could not assert that it had accrued any vested rights. By the time of the Appeal, Developer had not yet installed footings at the Development Site (*see* Record on Appeal – Vol II [March 27, 2018 Tr., testimony of Paul Selver, Esq., 81:17 to 82:3]). In addition, Developer entered stipulations in this action, which the court has so ordered, under which Developer agreed that, during the pendency of this action, it would not rely on the progress of construction at the Development Site to argue that it is entitled to continue or complete construction, based on retroactivity, vested rights (including the common law vested rights doctrine), or estoppel, mootness, laches or other equitable defenses (*see* stipulation, so ordered on October 10, 2018 [NYSCEF Doc. No. 79]).

["the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results"] [citations omitted]).

For the reasons set forth above, this court vacates and annuls the BSA's Resolution as unreasonable and inconsistent with the plain language of the governing statute.

Accordingly, it is hereby

ORDERED and ADJUDGED that the Petition is granted, to the extent of nullifying and vacating the BSA's Resolution dated September 7, 2018, which affirmed the decision of DOB to issue Building Permit No 122887224-01-NB, and is otherwise denied; and it is further

ORDERED and ADJUDGED that this matter is remanded to BSA, with instructions to review DOB's approval of the building permit application in accordance with the plain language of the ZR and in accordance with this decision and order.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

3/14/2019
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE