State of New York
Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at 518-455-7711 or gspencer@nycourts.gov.

To be argued Wednesday, November 18, 2020 (arguments begin at 2 pm)

No. 88 Matter of Peyton v New York City Board of Standards and Appeals

Maggi Peyton and other residents of Park West Village, a three-building apartment complex on the Upper West Side of Manhattan, brought this proceeding to challenge a building permit granted by New York City's Department of Buildings (DOB) in 2014 to Jewish Home Life, Inc. (JHL) for construction of a 20-story nursing home on land owned by PWV Acquisition, LLC on the same zoning lot as Park West Village. They contended the JHL project violated the open space requirements of the City's Zoning Resolution. Previously, Park West Village residents had unsuccessfully challenged a permit issued by DOB in 2007 for construction of an apartment tower known as 808 Columbus on the zoning lot. They objected to the inclusion of a roof garden at 808 Columbus, which would be accessible only to its residents, in the calculation of open space required for the project. The Board of Standards and Appeals (BSA) upheld the permit in 2009, finding that the roof garden qualified as open space. In the current case, the Park West Village residents objected to inclusion of the roof garden at 808 Columbus in the open space calculation for JHL's nursing home project, which would not meet the open space requirements without it. The BSA denied their appeal in 2015, saying the Zoning Resolution "could be read to allow some open space to be reserved for the residents of a single building."

The Park West Village residents brought this article 78 proceeding to annul BSA's decision and revoke JHL's permit. They argued that the exclusive roof garden did not qualify as open space under amendments made to the Zoning Resolution in 2011, after approval of 808 Columbus and before approval of JHL's project, which substituted the words "zoning lot" and "all zoning lots" for "building" and "any buildings." Section 12-10 of the Zoning Resolution now 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."

Supreme Court dismissed the suit, finding the resolution is ambiguous and deferring to the interpretation of DOB and BSA. The court said "the 2011 amendments do not unambiguously alter the meaning or measurement of open space as interpreted by BSA.... [T]he court cannot say that the open space provisions could not be subject to different interpretations, and concludes there is enough ambiguity to defer to [DOB]."

The Appellate Division, First Department reversed on a 3-1 vote and revoked JHL's permit, finding the definition of open space in ZR § 12-10 is "clear and unambiguous" and precluded use of the roof garden in the open space formula. It said, "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." The dissenter said, "[P]etitioners are bound by [BSA's] 2009 Resolution and cannot now relitigate whether 808 Columbus's roof complies with open space requirements in relation to the present proposed project." He also said, "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."

For appellant BSA: Assistant Corporation Counsel Jonathan Popolow (212) 356-4084
For appellant PWV Acquisition: Philip E. Karmel, Manhattan (212) 541-2000
For respondents Peyton and Hoffman et al: John R. Low-Beer, Brooklyn (718) 744-5245

State of New York
Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at 518-455-7711 or gspencer@nycourts.gov.

To be argued Wednesday, November 18, 2020 (arguments begin at 2 pm)

No. 89 People v Sergio Del Rosario *(papers sealed)*

Sergio Del Rosario is challenging his designation as a risk level three sexually violent offender under the Sex Offender Registration Act (SORA). He pled guilty to first-degree rape in 2014, admitting he forcibly raped a 16-year-old girl who was a close family member. Serving five years in prison, he told therapists during sex offender treatment that he planned the rape to exact revenge on his wife for alleged infidelity. Prior to his release, the Board of Examiners of Sex Offenders prepared a case summary and risk assessment instrument (RAI) to determine his risk to the public. It assessed risk factor points for use of violence, sexual contact, duration of the offense, age of the victim, and failure to accept responsibility, resulting in a presumptive level two designation. The Board did not assess any points under risk factor 7, which applies when the offender's crime "was directed at a stranger" or "arose in the context of a professional or avocational relationship," according to the SORA Risk Assessment Guidelines and Commentary. Where the relationship is not familial, the Guidelines say, "The need for community notification ... is generally greater when the offender strikes at persons who do not know him well or who have sought out his professional care." At the SORA hearing, the prosecutor asked Supreme Court to grant an upward departure from level two based on Del Rosario's "gross abuse of familial trust" between himself and the victim and also based on his motive of revenge.

Supreme Court ordered the upward departure and designated Del Rosario a level three offender, saying "the Guidelines do not account for the complete and gross abuse of trust exhibited by [an offender] who physically, sexually and emotionally abuses [a close family member].... Nor do the Guidelines provide for the assessment of RAI Risk Factor points for the circumstances under which a defendant physically beats [a family member] and completely strips her clothes from her body before forcibly raping her in the back of his truck...." It said "such omissions ... reflect a failure of the RAI ... to properly account for the defendant's complete and gross abuse of the child victim's trust..., despite the obvious significance of such conduct with respect to the defendant's risk of recidivism and the threat he poses to the public safety."

The Appellate Division, Second Department affirmed, ruling "Supreme Court providently exercised its discretion" in ordering the upward departure. "The fact that the defendant had a close family relationship with the victim was not taken into account by the RAI...," it said. "Moreover, the defendant's reported motivation for raping the victim reflects a lack of insight into his conduct not adequately taken into account by the RAI."

Del Rosario argues, "Since the 'abuse of familial trust' was already accounted for in the RAI, through age and relationship, it could not form the basis of an upward departure. Inasmuch as the other factors cited by the hearing court such as the use of force and violence, sexual intercourse, duration, and failure to accept responsibility had also been adequately accounted for by the RAI, the court erred in granting an upward departure." He cites the Second Department's conflicting decision in People v Mota (165 AD3d 988), which held that an offender's "abuse of trust within a family relationship is already adequately accounted for by the Guidelines" and is not an aggravating factor that could justify an upward departure.

For appellant Del Rosario: Debra A. Cassidy, White Plains (914) 286-3400
For respondent: Westchester County Asst. District Attorney Christine DiSalvo (914) 995-3496