

90-12-A

APPLICANT – Fried Frank by Richard G. Leland, Esq., for Van Wagner Communication LLC.

OWNER OF PREMISES – Robal Arlington Corporation.

SUBJECT – Application April 11, 2012 – Appeal from determination of the Department of Buildings regarding right to maintain existing advertising signs. M1-6 zoning district.

PREMISES AFFECTED – 111 Varick Street, between Broome and Dominick Street, Block 578, Lot 71, Borough of Manhattan.

COMMUNITY BOARD #2M

ACTION OF THE BOARD – Appeal Denied.

THE VOTE TO GRANT –

Affirmative:0

Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Notice of Sign Registration Rejection letter from the Manhattan Borough Commissioner of the Department of Buildings (“DOB”), dated March 12, 2012, denying registration for a sign at the subject site (the “Final Determination”), which reads, in pertinent part:

The Department of Buildings is in receipt of additional documentation submitted in response to the Deficiency Letter from the Signs Enforcement Unit. As evidence related to the sign points to its having been of various sizes, orientations, and even removed, the sign is rejected from registration. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

WHEREAS a public hearing was held on this application on November 27, 2012, after due notice by publication in *The City Record*, and then to decision on January 15, 2013; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, and Commissioner Ottley-Brown; and

WHEREAS, the subject site is located at the northwest corner of Varick Street and Broome Street, within an M1-6 zoning district; and

WHEREAS, the site is occupied by a six-story parking garage (the “Building”) with a 58’-0” high by 78’-3” wide sign located on the south wall of the Building (the “Sign”); and

WHEREAS, the Sign faces Broome Street and is located approximately 57’-0” from the northern boundary of the Holland Tunnel approaches, a designated arterial highway pursuant to Zoning Resolution Appendix H; and

WHEREAS, this appeal is brought on behalf of the owner of the sign structure (the “Appellant”); and

WHEREAS, DOB appeared and made

submissions in opposition to this appeal; and

REGISTRATION REQUIREMENT

WHEREAS, the Appellant identifies the relevant statutory requirements related to sign registration in effect since 2005; and

WHEREAS, the Appellant states that under Local Law 31 of 2005, the New York City Council enacted certain amendments to existing regulations governing outdoor advertising signs; and

WHEREAS, the amendments are codified under Articles 501, 502, and 503 of the 2008 Building Code and were enacted to provide DOB with a means of enforcing the sign laws where signs had been erected and were being maintained without a valid permit; and

WHEREAS, pursuant to Article 502 (specifically, Building Code § 28-502.4), an outdoor advertising company is required to submit to DOB an inventory of:

- all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet [60.96 m] from and within view of a public park with an area of ½ acre (5000 m) or more; and

WHEREAS, further, Local Law 31 authorized the Commissioner of DOB to promulgate rules establishing permitting requirements for certain signs; the DOB rules, enacted under Rule 49, provide specific procedures for registration of advertising signs; Rule 49-15(5) reads in pertinent part:

Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter; and

WHEREAS, subchapter B of Rule 49 (Registration of Outdoor Advertising Companies), (specifically, Rule 49-15(d)(15)(b)), sets forth the acceptable forms of evidence to establish the size and the existence of a non-conforming sign on the relevant date set forth in the Zoning Resolution; and

WHEREAS, the Appellant asserts that the acceptable forms of evidence set forth at Rule 49 are, in pertinent, part as follows:

Acceptable evidence may include permits, sign-offs of applications after completion, photographs and leases demonstrating that the non-conforming use existed prior to the relevant date; and

90-12-A

WHEREAS, the Appellant notes that affidavits are also listed as an acceptable form of evidence; and REGISTRATION PROCESS

WHEREAS, the Appellant states that on April 4, 2011, pursuant to the requirements of Article 502 and Rule 49, it submitted a Sign Registration Application for the Sign and completed an OAC3 Outdoor Advertising Company Sign Profile, attaching the following documentation: (1) a diagram of the Sign; (2) photographs of the Sign; and (3) 1953 plans associated with BSA Cal. No. 796-53-A which showed an “advertising wall sign” taking up the second through sixth floors of the south wall of the building; and

WHEREAS, on September 12, 2011, DOB issued a Notice of Sign Registration Deficiency, stating that it is unable to accept the Sign for registration due to “Failure to provide proof of legal establishment;” and

WHEREAS, by letter, dated November 30, 2011, the Appellant submitted a response to DOB, referencing the previously-submitted evidence that the Sign has existed as an advertising sign since the 1920’s, and providing three additional photographs in support of the establishment of the Sign; and

WHEREAS, by letter dated January 30, 2012, the Appellant submitted to DOB an affidavit from Donald Robinson, an employee of various outdoor advertising companies from 1959 until 1989, stating that there was an advertising wall sign on the Building from 1963 through 1989; and

WHEREAS, by letter, dated March 12, 2012, DOB issued the determination which forms the basis of the appeal, stating that “the sign is rejected from registration;” and

RELEVANT STATUTORY PROVISIONS

ZR § 12-10 *Definitions*

Sign

A “sign” is any writing (including letter, word, or numeral), pictorial representation (including illustration or decoration), emblem (including device, symbol, or trademark), flag, (including banner or pennant), or any other figure of similar character, that:

- (a) Is a structure or any part thereof, or is attached to, painted on, or in any other manner represented on a #building or other structure#;
- (b) Is used to announce, direct attention to, or advertise; and
- (c) Is visible from outside a #building#. A #sign# shall include writing, representation or other figures of similar character, within a #building#, only when illuminated and located in a window...

* * *

Sign, advertising

An “advertising sign” is a #sign# that directs

attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same #zoning lot# and is not #accessory# to a #use# located on the #zoning lot#.

* * *

Non-conforming, or non-conformity

A “non-conforming” #use# is any lawful #use#, whether of a #building or other structure# or of a #zoning lot#, which does not conform to any one or more of the applicable #use# regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto. . .

* * *

ZR § 42-55

Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways

M1 M2 M3

In all districts, as indicated, the provisions of paragraphs (a), (b) and (c), or paragraph (d), of this Section, shall apply for #signs# near designated arterial highways or certain #public parks#.

(a) Within 200 feet of an arterial highway or a #public park# with an area of one-half acre or more, #signs# that are within view of such arterial highway or #public park# shall be subject to the following provisions:

- (1) no permitted #sign# shall exceed 500 square feet of #surface area#; and
- (2) no #advertising sign# shall be allowed; nor shall an existing #advertising sign# be structurally altered, relocated or reconstructed.

(b) Beyond 200 feet from such arterial highway or #public park#, the #surface area# of such #signs# may be increased one square foot for each linear foot such sign is located from the arterial highway or #public park#.

(c) The more restrictive of the following shall apply:

- (1) any #advertising sign# erected, structurally altered, relocated or reconstructed prior to June 1, 1968, within 660 feet of the nearest edge of the right-of-way of an arterial highway, whose message is visible from such arterial highway, shall have legal #non-conforming use# status pursuant to Section 52-83 (Non-Conforming Advertising Signs), to the extent of its size existing on May 31, 1968; or
- (2) any #advertising sign# erected, structurally altered, relocated or

90-12-A

reconstructed between June 1, 1968, and November 1, 1979, within 660 feet of the nearest edge of the right-of-way of an arterial highway, whose message is visible from such arterial highway, and whose size does not exceed 1,200 square feet in #surface area# on its face, 30 feet in height and 60 feet in length, shall have legal #non-conforming use# status pursuant to Section 52-83, to the extent of its size existing on November 1, 1979. All #advertising signs# not in conformance with the standards set forth herein shall terminate.

* * *

ZR § 52-11 *Continuation of Non-Conforming Uses*

General Provisions

A #non-conforming use# may be continued, except as otherwise provided in this Chapter; and

* * *

ZR § 52-61 *Discontinuance*

General Provisions

If, for a continuous period of two years, either the #nonconforming use# of #land with minor improvements# is discontinued, or the active operation of substantially all the #non-conforming uses# in any #building or other structure# is discontinued, such land or #building or other structure# shall thereafter be used only for a conforming #use#. Intent to resume active operations shall not affect the foregoing . . . ; and

* * *

ZR § 52-83

Non-Conforming Advertising Signs

In all Manufacturing Districts, or in C1, C2, C4, C5-4, C6, C7 or C8 Districts, except as otherwise provided in Section...42-55, any non-conforming advertising sign except a flashing sign may be structurally altered, reconstructed, or replaced in the same location and position, provided that such structural alteration, reconstruction or replacement does not result in:

- (a) The creation of a new non-conformity or an increase in the degree of non-conformity of such sign;
- (b) An increase in the surface area of the sign; or
- (c) An increase in the degree of illumination of such sign; and

* * *

Building Code § 28-502.4 – Reporting Requirement

An outdoor advertising company shall provide

the department with a list with the location of signs, sign structures and sign locations under the control of such outdoor advertising company in accordance with the following provisions:

- (1) The list shall include all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet (60 960 mm) from and within view of a public park with an area of ½ acre (5000 m) or more...

* * *

RCNY § 49-15 – Sign Inventory to be Submitted with Registration Application

...(d)(5) Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter.

* * *

RCNY § 49-16 – Non-conforming Signs

(a) With respect to each sign identified in the sign inventory as non-conforming, the registered architect or professional engineer shall request confirmation of its non-conforming status from the Department based on evidence submitted in the registration application. The Department shall review the evidence submitted and accept or deny the request within a reasonable period of time. A sign that has been identified as non-conforming on the initial registration application may remain erected unless and until the Department has issued a determination that it is not non-conforming...

* * *

RCNY § 49-43 – Advertising Signs

Absent evidence that revenue from the sign is clearly incidental to the revenue generated from the use on the zoning lot to which it directs attention, the following signs are deemed to be advertising signs for the purposes of compliance with the Zoning Resolution:

- (a) Signs that direct attention to a business on the zoning lot that is primarily operating a storage or warehouse use for business activities conducted off the zoning lot, and

90-12-A

that storage or warehouse use occupies less than the full building on the zoning lot; or

- (b) All signs, other than non-commercial, larger than 200 square feet, unless it is apparent from the copy and/or depictions on the sign that it is used to direct the attention of vehicular and pedestrian traffic to the business on the zoning lot; and

THE APPELLANT’S POSITION

WHEREAS, the Appellant contends that the Final Determination should be reversed because (1) the Sign was established as an advertising sign prior to June 1, 1968, as required under ZR § 42-55, and may therefore be maintained as a legal non-conforming advertising sign pursuant to ZR § 52-11, and (2) the Sign has operated as an advertising sign with no discontinuance of two years or more since its establishment; and

WHEREAS, as to the establishment of the Sign prior to June 1, 1968, at the outset DOB states that it does not contest the Appellant’s claim that the Sign existed on May 31, 1968; however, DOB asserts that the use was discontinued and must terminate per ZR § 52-61 because the wall was used to display artwork for a period of approximately ten years; and

WHEREAS, the Appellant contends that the art installation at the site from approximately 1979 to 1989 (the “Art Installation”) constituted an “advertising sign” within the meaning of ZR § 12-10, and therefore the use of the Sign as an advertising sign was continuous during that time period; and

WHEREAS, the Appellant notes that ZR § 12-10 defines the term “sign” as follows:

any writing (including letter, word, or numeral), pictorial representation (including illustration or decoration), emblem (including device, symbol, or trademark), flag, (including banner or pennant), or any other figure of similar character, that: (a) is a structure or any part thereof, or is attached to, painted on, or in any other manner represented on a #building or other structure#; (b) is used to announce, direct attention to, or advertise; and (c) is visible from outside a #building#; and

WHEREAS, the Appellant argues that the Art Installation met the ZR § 12-10 definition of a “sign,” in that (1) it was a pictorial representation (including illustration or decoration), (2) it was attached to the Building; (3) it was used to direct attention to and advertise the artist Terry Fugate-Wilcox and his works; and (4) it was visible from outside the Building; and

WHEREAS, as to the requirement that a “sign” be “used to announce, direct attention to, or advertise,” the Appellant asserts that as with any other type of business an artist must develop his or her brand in order to be successful in the marketplace, and that the Art Installation served to direct attention to the artist and his work by attracting attention to the Art Installation itself; and

WHEREAS, the Appellant argues that many other types of advertisements are similarly abstract and do not explicitly direct viewers to a particular location; the Appellant points to the example of advertisements for the chain-store Target, which often contain representation of the retailer’s logo, building awareness of the brand but not necessarily displaying any particular products or directing viewers to any particular store; and

WHEREAS, the Appellant notes that ZR § 12-10 further defines an “advertising sign” as “a #sign# that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same #zoning lot# and is not #accessory# to a use located on the #zoning lot#”; and

WHEREAS, the Appellant argues that the Art Installation “direct[ed] attention to a business, profession, commodity, service or entertainment” by directing attention to the artist and his work, which can be construed as a “business” (the business of creating artwork), a “profession” (being an artist), a “service” (providing commissioned works) or “entertainment” (the viewing and enjoyment of artwork); and

WHEREAS, the Appellant asserts that the fact that the artist was not paid for posting the Art Installation and that the work included his signature reflects that the Art Installation was posted as an opportunity to promote his brand and his work; and

WHEREAS, the Appellant contends that many other types of advertisements, such as the Target bullseye logo, are abstract representations that direct attention to a brand and do not explicitly direct viewers to a particular product or location; and

WHEREAS, the Appellant argues that the Art Installation also met the criteria that the business, profession, commodity, service or entertainment be “conducted, sold, or offered elsewhere than upon the same #zoning lot#” in that the work of the artist was not performed on the zoning lot and his other works were offered and sold elsewhere as well; and

WHEREAS, the Appellant argues that, based on the Board’s decision in BSA Cal. Nos. 88-12-A and 89-12-A, it is not the intent but the effect of a sign that is relevant in reviewing the applicability of the Zoning Resolution, and the effect of posting the Art Installation in a high traffic area on a wall that had been used for advertising signs for more than 50 years was that the artist and his work received publicity because the Art Installation directed attention to the artist and his work; and

WHEREAS, the Appellant contends that the context and circumstances applicable to the Sign make it clear that the Art Installation was simultaneously used for artistic and advertising purposes; and

WHEREAS, specifically, the Appellant asserts that the Sign has a long history of use as an advertising sign from as early as the 1920’s, the Art Installation was

90-12-A

affixed in the exact same position and location as advertising signs that had been posted on the Building for six decades prior, and that it met all of the elements of the definition of a “sign,” and based on this context the Art Installation may properly be construed as an advertising sign for the purposes of establishing a history of continuous use under the Zoning Resolution; and

WHEREAS, the Appellant acknowledges that not every public art installation qualifies as an advertising sign, but where an art installation is displayed in a space typically and historically used for advertising, is signed and identified with the name of the artist and takes the shape of an advertising billboard, context dictates that it should be considered an advertising sign; and

WHEREAS, the Appellant notes that DOB has previously issued Technical Policy and Procedure Notice (“TPPN”) # 8/96 to establish DOB’s policy that abstract architectural features of buildings are subject to sign regulations, and argues that DOB cannot consider certain abstract representations to be signs while denying other abstract representations constitute signs; and

DOB’S POSITION

WHEREAS, DOB states that it does not contest the Appellant’s claim that the Sign existed prior to June 1, 1968; however, DOB asserts that during the time the building wall was used to display the Art Installation, the non-conforming advertising sign use was discontinued, and therefore the use must terminate pursuant to ZR § 52-61; and

WHEREAS, DOB states that pursuant to ZR § 12-10, a non-conforming “sign” must continue to be used to “announce, direct attention to or advertise,” and a non-conforming “advertising sign” must continue to be used as a sign that “directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot”; and

WHEREAS, DOB notes that the Wikipedia website states that the artist, Terry Fugate-Wilcox, was commissioned to create the Art Installation, identified as the “Holland Tunnel Wall,” as an art piece; and

WHEREAS, DOB states that the webpage describes the artwork as a 60’-0” by 80’-0” billboard covered in layers of different colors of paint that would be revealed in patterns as the work weathered, and notes that the Art Installation was dismantled and the plywood panels were reclaimed by the artist as individual works of art; and

WHEREAS, DOB further states that a New York Times article dated August 7, 1981 titled “Outdoor-Sculpture Safari Around New York,” describes the Art Installation as “sheets of plywood painted yellow” covering the façade; and

WHEREAS, DOB asserts that painted plywood, whether visible in solid colors or eroded into patterns, does not announce, direct attention to or advertise a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot, and therefore, does not constitute a “sign” or

“advertising sign” pursuant to the ZR § 12-10 definitions of those terms; and

WHEREAS, DOB further asserts that the Art Installation is a creative expression that attracts attention to itself rather than directing attention to a use or product off the site, and therefore it lacks the message element of the ZR § 12-10 definition of “sign”; and

WHEREAS, DOB argues that murals similar to the Art Installation are displayed throughout the City and none are subject to the sign regulations of the Zoning Resolution; and

WHEREAS, DOB contends that, contrary to the Appellant’s argument, the Art Installation cannot be compared with the Target bullseye logo because (1) the purpose of the Art Installation is to be art while the purpose of the logo is to promote Target products, (2) the Target bullseye design is a registered trademark of Target Brands, Inc., and is the distinctive symbol used to distinguish products from those of another manufacturer, and (3) there is no indication that the Art Installation was installed to reference the product of the artist, his studio, the source of the work, or the availability of his artwork for purchase; and

WHEREAS, as to the Appellant’s argument that TPPN # 8/96 supports the notion that abstract representations are signs and therefore the Art Installation should be recognized as a Sign, DOB asserts that TPPN # 8/96 incorrectly allowed the display of a corporate logo to be exempt from sign regulations if it could be treated as a “distinctive architectural feature”, and it was rescinded on July 14, 1998 by TPPN # 6/98; and

WHEREAS, accordingly, DOB concludes that during the approximately ten years that the Art Installation was displayed, the non-conforming advertising sign use was discontinued and must be terminated pursuant to ZR § 52-61; therefore the sign registration application was properly denied because the sign is not entitled to non-conforming use status per ZR § 42-55; and

CONCLUSION

WHEREAS, the Board agrees with DOB that the non-conforming advertising sign use was discontinued during the approximately ten years that the Art Installation was displayed on the Building, and therefore the use must be terminated pursuant to ZR § 52-61; and

WHEREAS, the Board finds that the Art Installation, which consisted of sheets of plywood painted in layers of solid colors, did not meet the ZR § 12-10 definition of a “sign” or an “advertising sign” because it did not announce, direct attention to, or advertise a business, profession, commodity, service, or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot; and

WHEREAS, the Board agrees with DOB that the Art Installation is a creative expression that attracts

90-12-A

attention to itself rather than directing attention to a use or product off the site, and therefore it lacks the message element of the ZR § 12-10 definition of “sign”; and

WHEREAS, the Board finds that in order to satisfy the ZR § 12-10 definition of “sign” or “advertising sign,” the sign must announce, direct attention to, or advertise something outside of the sign itself, and that interpreting the definition otherwise would lead to absurd results, as any object that is visible could be argued to direct attention to itself by the mere act of being seen; and

WHEREAS, the Board disagrees with the Appellant that the Art Installation is comparable to other types of abstract advertisements that do not explicitly direct viewers to a particular location, in that the Art Installation is not an advertisement and does not provide any information that would direct attention to products or uses found off the site; and

WHEREAS, the Board agrees with distinctions made by DOB between the Art Installation and the Target bullseye logo; and

WHEREAS, the Board disagrees with the Appellant that, merely because the artist was not paid for creating the Art Installation and because his signature was on the work, the purpose of the Art Installation was to promote the artist’s business and his other work; rather, the Board finds the primary purpose of the Art Installation to be one of creative expression and aesthetic appreciation; and

WHEREAS, the Board finds the fact that the Art Installation is similar to many other murals displayed throughout the City, which DOB noted are not subject to the sign regulations of the Zoning Resolution, to be further evidence that an artist’s signature is not sufficient to transform a piece of art into an advertising sign, since it is standard practice for artists to sign their work; and

WHEREAS, the Board disagrees with the Appellant’s contention that context dictates that the Art Installation be construed as an advertising sign, and does not find the fact that the Art Installation was displayed in a space that was previously used for advertising or that it takes the shape of an advertising billboard to be relevant to the Board’s determination; and

WHEREAS, the Board finds the Appellant’s reliance on BSA Cal. Nos. 88-12-A and 89-12-A, for the proposition that the relevant consideration is not the intent of the sign but the effect of the sign, to be misplaced; and

WHEREAS, specifically, the Board notes that BSA Cal. Nos. 88-12-A and 89-12-A concerned an analysis of the meaning of “within view” in the context of whether the signs at issue were within view of an arterial highway pursuant to ZR § 42-55, and the Board’s discussion of intent was limited to a determination that the intended

audience of the signs was not relevant in determining whether the signs were “within view” of the arterial highway; the Board did not make a broad determination that the intent of a sign is never a relevant consideration; and

WHEREAS, notwithstanding the above, the Board finds that regardless of whether it reviews the Art Installation based on its intent or effect, it does not meet the ZR § 12-10 definition of an advertising sign; and

WHEREAS, therefore, the Board finds that the non-conforming advertising sign use was discontinued for more than two years and must be terminated pursuant to ZR § 52-61, and as such, DOB properly rejected the Appellant’s registration of the Sign.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determination of the Department of Buildings, dated March 12, 2012, is hereby denied.

Adopted by the Board of Standards and Appeals, January 15, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, January 15, 2013.

Printed in Bulletin No. 3, Vol. 98.

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.