101-12-A
APPLICANT – Fried Frank by Richard G. Leland, Esq. for Take Two Outdoor Media LLC c/o Van Wagner Communications.
OWNER OF PREMISES – Mazda Realty Associates.
SUBJECT – Application April 11, 2012 – Appeal from determination of the Department of Buildings regarding right to maintain existing advertising sign. M1-5 zoning district.
PREMISES AFFECTED – 13-17 Laight Street, south side of Laight Street between Varick Street and St. John's Lane, Block 212, Lot 18, Borough of Manhattan.
COMMUNITY BOARD #1M
ACTION OF THE BOARD – Application Denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
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, and asserting that this sign is not intended to be seen from the arterial and as such has the appropriate non-arterial permit for construction. Unfortunately, the intent of viewing is not relevant in this assessment and as such, the sign is rejected from registration. While we recognize your assertion that the sign was not intended to be visible from arterial, we affirm our rejection. 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 October 30, 2012, after due notice by publication in *The City Record*, with a continued hearing on November 15, 2012, and then to decision on January 8, 2013; and

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

WHEREAS, the subject site is located on the south side of Laight Street between Varick Street and St. John's Lane, in a C6-2A zoning district within the Special Tribeca Mixed Use ("TMU") District; and

WHEREAS, the site is occupied by a six-story building with a north-facing sign located on the roof of the building (the "Sign"); and

WHEREAS, on October 4, 1998, DOB issued Permit Nos. 101827114-01-SG and 101985827-01-AL for installation of an "illuminated advertising billboard roof sign" at the site (the "1998 Permits"), and on October 20, 2000, DOB issued Permit No. 102743435-01-SG for the installation of an "illuminated sign on roof structure at the site (the "2000 Permit"); and

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

WHEREAS, the Appellant states that the Sign is a rectangular advertising sign measuring 19.5 feet in height by 48 feet in length for a surface area of 936 sq. ft.; and

WHEREAS, the Appellant states that the Sign faces Varick Street and is located one block south of Canal Street and approximately 317'-6" east of the nearest boundary of the exit roadway from the Holland Tunnel, which emerges above ground south of Canal Street near Hudson Street; and

WHEREAS, the Appellant states that when the Sign was installed the site was in an M1-5 zoning district within the TMU District, but that pursuant to a 2010 rezoning, the site is now zoned C6-2A within the TMU District; and

WHEREAS, the Appellant seeks a reversal of DOB's rejection of its sign registration based on the fact that (1) the exit roadway of the Holland Tunnel is not a "designated arterial highway" and therefore ZR § 42-55 does not apply to the Sign; (2) even if the Holland Tunnel exit is considered a "designated arterial highway," the Sign is not "within view" of such arterial highway and therefore is not subject to the limitations associated with signs within view of arterial highways; and (3) the Sign was constructed pursuant to DOB-issued permits, which reflects DOB's acceptance that the Sign is not "within view" of a designated arterial highway; 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

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

REGISTRATION PROCESS

WHEREAS, the Appellant states that on September 1, 2009, pursuant to the requirements of Article 502 and Rule 49, it submitted an inventory of outdoor signs under its control and 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) Permit Nos. 1018227114-01-SG and 101985827-01-AL; and

WHEREAS, on October 3, 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 4, 2011, the Appellant submitted a response to DOB, providing evidence that the Sign was installed within the requisite time period; and

WHEREAS, the Appellant also included evidence demonstrating that the Sign was installed to be visible to traffic heading southbound on Varick Street and is not within view of vehicles exiting the Holland Tunnel; and

WHEREAS, by letter, dated February 9, 2012, the Appellant made a submission to DOB of photographs to support its position that the Sign is directed toward Varick Street and is not within view of vehicles exiting the Holland Tunnel; and

WHEREAS, by letter, dated March 12, 2012, DOB issued the Final Determination which forms the basis of the appeal, stating that it found the "documentation inadequate to support the registration and as such the sign is rejected from registration;" and

RELEVANT STATUTORY PROVISIONS

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 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 § 42-58
Signs Erected Prior to December 13, 2000
M1 M2 M3
In all districts, as indicated, a #sign# erected prior to December 13, 2000, shall have #non-conforming use# status pursuant to Sections 52-82 (Non-Conforming Signs Other Than Advertising Signs) or 52-83 (Non-Conforming Advertising Signs) with respect to the extent of the degree of #non-conformity# of such #sign# as of such date with the provisions of Sections 42-52, 42-53 and 42-54, where such #sign# shall have been issued apermit by the Department of Buildings on or before such date.

* * *

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; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant contends that the Final Determination should be reversed because (1) ZR § 42-55 does not apply to the Sign because, pursuant to the plain language of the statute, the Sign is neither near an "arterial highway," nor "within view" of such arterial highway; (2) the Sign was constructed pursuant to DOB-issued permits, which reflects DOB's acceptance that the Sign is not "within view" of an arterial highway; and

1. ZR § 42-55 Does Not Apply to the Sign

WHEREAS, the Appellant asserts that DOB committed an error of law and abused its discretion because it misconstrued and misapplied the plain language of ZR § 42-55, which only regulates advertising signs that are (a) "near" an "arterial highway" and (b) "within view" of such "arterial highway"; and

WHEREAS, the Appellant argues that in interpreting ZR § 42-55 the Board must give effect to the intention of the Department of City Planning in drafting ZR § 42-55, including the specific language contained therein and its plain meaning if no definition is provided; and

WHEREAS, in support of this position, the Appellant cites to Kramer v. Phoenix Life Insurance Co., 15 N.Y.3d 539, 550-51 (N.Y. 2010) (noting that "courts must give effect to [a statute's] plain meaning," and applying a Merriam Webster's Collegiate Dictionary definition to interpret an undefined term), and Samiento v. World Yacht Inc., 10 N.Y.3d 70, 77-80, 80 n.2-3 (N.Y.2008) (noting that the "primary consideration [in statutory interpretation] is to ascertain and give effect to the intention of the Legislature" so as to give statutory language "its natural and most obvious sense…in accordance with its ordinary and accepted meaning, unless the Legislature by definition or from the rest of the context of the statute provides a special meaning") and notes that in both of those cases the court applied a Merriam Webster's Collegiate Dictionary definition to interpret undefined terms; and

WHEREAS, accordingly, the Appellant contends that because there are no definitions for the terms "arterial highway" and "within view" in the Zoning Resolution, effect must be given to the plain meaning of those terms, which leads to a conclusion that ZR § 42-55 does not apply to the Sign because the exit roadway

to the Holland Tunnel is not an "arterial highway," and even if the Holland Tunnel exit were considered to be an arterial highway, the Sign is not "within view" of such arterial highway; and

a. The Holland Tunnel Exit is not an "Arterial Highway"

WHEREAS, the Appellant asserts that DOB committed an error of law and abused its discretion because the exit roadway of the Holland Tunnel is not an "arterial highway" for the purposes of ZR § 42-55; and

WHEREAS, the Appellant notes that ZR § 42-55 provides guidance regarding the classification of arterial highways:

> arterial highways shall include all highways that are shown on the Master Plan of Arterial Highways and Major Streets as "principal routes," "parkways" or "toll crossings," and that have been designated by the City Planning Commission as arterial highways to which the provisions of this Section shall apply; and

WHEREAS, the Appellant states that arterial highways designated by the City Planning Commission are listed in Appendix H of the Zoning Resolution, and includes "Holland Tunnel and Approaches" on a list of arterial highways "which appear on the City Map and which are also indicated as Principal Routes, Parkways and Toll Crossings on the duly adopted Master Plan of Arterial Highways and Major Streets"; and

WHEREAS, the Appellant contends that while the Zoning Resolution does not define what constitutes the "approaches" to the Holland Tunnel, additional points of reference for which roadways are covered are: (1) arterial highways identified as "principal routes," "parkways," or "toll crossings" on the City's Master Plan of Arterial Highways and Major Streets; and (2) arterial highways which appear on the City Map; and

WHEREAS, the Appellant represents that the Master Plan does not identify the exit roadway from the Holland Tunnel as part of the "toll crossings" that are covered by ZR § 42-55, and the City Map similarly does not identify the exit roadway of the Holland Tunnel as an arterial highway; and

WHEREAS, the Appellant argues that a plain language interpretation of "approach" would also not include the exit roadway of the Holland Tunnel as an "approach," and cites to Webster's Dictionary which defines the noun "approach," in relevant part, as "a drawing near in space or time" or "the ability to approach," and the definition of "approaches," in relevant part, as "the means of approaching an area" or "an embankment, trestle, or other construction that provides access at either end of a bridge or tunnel"; and

WHEREAS, the Appellant asserts that the exit roadway of the Holland Tunnel, therefore, may not be identified as an "approach" because, by its very nature, the exit roadway takes traffic away from the Holland Tunnel; and

WHEREAS, the Appellant notes that in Rule 49, DOB provides its own definition of "approach" for guidance in interpreting the relevant provisions of the Zoning Resolution, and asserts that DOB's definition in Rule 49 comports with the plain language meaning that an "approach" would not include an exit:

> The term "approach" as found within the description of arterial highways indicated within appendix C of the Zoning Resolution, shall mean that portion of a roadway *connecting the local street network to a bridge or tunnel* and from which there is no entry or exit to such network. (Emphasis added); and

WHEREAS, the Appellant contends that a plain language interpretation of Rule 49's definition of "approach" would also not include the exit roadway of the Holland Tunnel because an exit does not connect the local street network to the tunnel; rather, an exit connects *from* the tunnel to the local street network; and

WHEREAS, the Appellant asserts that if DOB had intended for an exit to be included in this definition, it would have used express language, such as "connecting the local street network to *or from* a bridge or tunnel"; and

WHEREAS, accordingly, the Appellant argues that because neither the plain language of ZR § 42-55, the Master Plan of Arterial Highways and Major Streets, nor the City Map in any way includes exit roadways (such as the one from the Holland Tunnel) as arterial highways, ZR § 42-55 does not apply to the Sign; and

b. The Sign is Not "Within View" of an Arterial Highway

WHEREAS, the Appellant asserts that even if the exit roadway of the Holland Tunnel is considered a designated arterial highway, DOB misinterprets the meaning of "within view" under ZR § 42-55; and

WHEREAS, the Appellant notes that the Zoning Resolution does not define "within view," however they look to ZR § 42-55 subsections (c)(1) and (c)(2), which include in their criteria for coverage by the regulations that the sign's "message is visible" from an arterial highway; and

WHEREAS, additionally, the Appellant notes that the Zoning Resolution does not define what constitutes a "message" being "visible," so they find that a plain language interpretation is required; and

WHEREAS, the Appellant cites to Webster's Dictionary which defines "message," as "a written or oral communication or other transmitted information sent by messenger or by some other means (as by signals)" or "a group of words used to advertise or notify;" and

WHEREAS, the Appellant also cites to the dictionary for the definition of "visible," which states "capable of being seen," "easily seen," or "capable of being perceived mentally;" and

WHEREAS, the Appellant concludes that according to the definitions, the intent of the zoning is to limit the applicability of ZR § 42-55 to signs that actually communicate their message to persons that are

on an arterial highway and would not be applicable to a sign that is substantially obstructed such that the message of the obstructed sign cannot be communicated to a person on the arterial highway; and

WHEREAS, in contrast, the Appellant asserts that ZR § 42-55 does not apply to a sign that does not face an arterial highway or a sign that is obstructed by objects between the sign and the arterial highway because those signs are incapable of communicating or advertising; and

WHEREAS, the Appellant submitted photographs and maps in support of its position that the orientation and position of the Sign make it extremely difficult to view it from the exit roadway, let alone understand what it is communicating as the roadway abruptly veers away from the Sign, which is approximately 70 feet in the air; and

WHEREAS, the Appellant asserts that the view of the Sign is further obstructed by numerous permanent installations located between the Sign and the roadway, including buildings, light poles, and a traffic sign; and

WHEREAS, the Appellant notes that DOB provides its own definition of "within view" in Rule 49 as follows: "the term 'within view' shall mean that part or all of the sign copy, sign structure, or sign location that is discernible;" and

WHEREAS, the Appellant asserts that through Rule 49, DOB exceeded its authority by creating a new definition of "within view" which DOB has construed otherwise since December 15, 1961; and

WHEREAS, the Appellant contends that the intent of ZR § 42-55 was clearly to regulate only signs whose message is visible from an arterial highway, and if the Rule 49 definition of "within view" is upheld, then a sign that faces directly away from an arterial highway, with no part of its message visible to the arterial highway, would be prohibited; and

WHEREAS, accordingly, the Appellant asserts that DOB's definition of "within view" under Rule 49 far exceeds its authority to interpret the Zoning Resolution and must be disregarded; and

WHEREAS, the Appellant further asserts that if the Rule 49 definition is disregarded, and only the plain language interpretation of the "within view" standards of ZR § 42-55 is applied, the message of the Sign is not visible from the exit roadway of the Holland Tunnel and ZR § 42-55 does not apply to the Sign; and

2. The Sign was Constructed Pursuant to DOB-Issued Permits

WHEREAS, the Appellant asserts that the Sign was constructed pursuant to DOB-issued permits, which reflects DOB's agreement at the time of permit issuance that the Sign was not "within view" of an "arterial highway" and that DOB's reversal of position with respect to its prior confirmation of the legality of the Sign is improper; and

WHEREAS, the Appellant asserts that it provided DOB with evidence of permits, which demonstrate that the Sign was installed pursuant to lawfully-issued permits, which were issued when the Sign was permitted in the underlying M1-5 zoning district and DOB was aware of its location vis a vis the Holland Tunnel, but permitted the Sign pursuant to its interpretation of then-ZR § 42-53 (which has been recodified as ZR § 42-55); and

WHEREAS, the Appellant asserts that DOB has changed its position with regard to the application of ZR § 42-55 and that Local Law 31 did not give DOB the authority to create a new interpretation of long-standing language requiring that a sign be "within view" of an "arterial highway" and at the time of the permit issuance, DOB did not consider the Sign to be "within view" of any "arterial highway"; and

WHEREAS, the Appellant represents that it has relied in good faith on DOB's approval of the Sign, has made investments in maintaining and marketing in reliance on the approvals, and equity does not allow DOB to revise its prior approvals and require the removal of the Sign; and

DOB'S POSITION

WHEREAS, DOB asserts that it rejected the Sign Registration Applications because the 1998 Permits and 2000 Permit were unlawful and improperly issued since the surface area of the Sign did not comply with the requirements of then-ZR § 42-53; ZR § 42-53, in effect at the time the permits were issued, regulated advertising signs that were within view of arterial highways in Manufacturing Districts and stated, in pertinent part:

> No advertising sign shall be located, nor shall an advertising sign be structurally altered, relocated or reconstructed, within 200 feet of an arterial highway or of a public park with an area of one-half acre or more, if such advertising sign is within view of such arterial highway . . . Beyond 200 feet from such arterial highway or public park, an advertising sign shall be located at a distance of at least as many linear feet therefrom as there are square feet of surface area on the face of such sign; and

WHEREAS, therefore, DOB states that signs in manufacturing districts, like the M1-5 district the Sign was in at the time of its installation until 2010 when the area was rezoned to be within a C6-2A zoning district, were and still are permitted as-of-right under the current ZR § 42-55 (under which the former ZR § 42-53 was recodified) with certain restrictions, when located more than 200 feet from an arterial highway; and

WHEREAS, however, DOB states that such signs are limited in surface area based on their distance from the arterial highway; and

WHEREAS, DOB asserts that it is undisputed that the "Holland Tunnel and Approaches" is considered an arterial highway within the meaning of then-ZR § 42-53, as indicated in Appendix H of the Zoning Resolution; and

WHEREAS, DOB disagrees with the Appellant's position that the definition of an approach under Rule 49 as "a roadway connecting the local street network to a bridge or tunnel and from which there is

no entry or exit to such network" was meant to exclude exit roadways merely because the definition does not state "to or from" a bridge or tunnel; and

WHEREAS, DOB asserts that the text of the Rule 49 definition does not support the Appellant's position, as the text simply defines an approach as "a portion of a roadway connecting an arterial highway to the local street network" and the reason the definition does not state "to or from" a bridge or tunnel is because the use of "to or from" in the sentence would be improper grammar, not because it was meant to exclude exit roadways from the definition; and

WHEREAS, DOB further asserts that the definition does not state which direction the traffic needs to flow from the "roadway" in order to be an "approach"; rather, it clearly states that if a roadway connects a local street to a tunnel without any exit to the street, it shall be considered an "approach"; and

WHEREAS, DOB argues that the exit roadway of the Holland Tunnel at issue is a "roadway connecting the local street network" to the Holland Tunnel and "from which there is no entry or exit to such network," and therefore it fits within the definition of an "approach"; and

WHEREAS, DOB also disagrees with the Appellant's position that, assuming the exit roadway of the Holland Tunnel is an "approach," the Sign is not subject to the restrictions on surface area set forth in the former ZR § 42-53 because it is not "within view" of the arterial highway – the Holland Tunnel and approaches; and

WHEREAS, DOB states that it has examined photographs of the Sign taken from the approaches and finds that the Sign is clearly visible and thus "within view" of the approach to the tunnel; and

WHERWEAS, DOB notes that the Appellant's effort to register the Sign reflects a concession on the Appellant's part that the Sign is within view of the arterial highway since Rule 49-15 specifically requires "a sign inventory that shall include all signs, sign structures and sign locations located (1) within a distance of 900 linear feet from and within view of an arterial highway; or (2) within 200 linear feet from and within view of a public park of one half acre or more;" and

WHEREAS, DOB asserts that since the Sign is within view of the arterial highway and located 317 feet from it, the maximum permitted surface area of the Sign was 317 sq. ft. when the 1998 Permits and 2000 Permit were erroneously issued; DOB notes that the 1998 Permits indicate a surface area of 560 sq. ft., the 2000 Permit indicates a surface area of 1,600 sq. ft., and the Sign Registration Application indicates a surface area of 936 sq. ft., which exceeded the then-ZR § 42-53 and still exceeds the permitted surface area per the current ZR § 42-55; and

WHEREAS, accordingly, DOB finds that the 1998 Permits and the 2000 Permit for the Sign were unlawful and improperly issued and the Sign must be removed since no advertising sign is permitted as-of-right in the current C6-2A zoning district pursuant to ZR § 32-63; and

WHEREAS, DOB states that the Appellant cites to ZR § 42-58 but does not make an argument that the Sign should be granted non-conforming use status pursuant to ZR § 42-58 and any such future claim that the Sign should be granted non-conforming use status is without merit; and

WHEREAS, DOB cites to ZR § 42-58, which states in pertinent part:

> A sign erected prior to December 13, 2000, shall have non-conforming use status pursuant to Section 52-82 (Non-Conforming Sings Other Than Advertising Signs) or 52-83 (Non-Conforming Advertising Signs) with respect to the extent of the degree of non-conformity of
>
> such sign as of such date with the provisions of Section 42-52, 42-53, and 42-54, where such sign shall have been issued a permit by the Department of Buildings on or before such date; and

WHEREAS, DOB concludes that the 1998 Permits and the 2000 Permit for the Sign were unlawful and improperly issued since the proposed sign did not comply with the surface area requirements of then- ZR § 42-53; therefore, the sign cannot be granted non-conforming use status under ZR § 42-58; and

CONCLUSION

WHEREAS, the Board agrees with DOB that (1) the exit roadway to the Holland Tunnel qualifies as an "approach," and as such is a designated arterial highway under ZR § 42-55, and (2) that the Sign is "within view" of the Holland Tunnel approach and thus subject to the restrictions of ZR § 42-55; and

WHEREAS, on the analysis of the meaning of an "approach," the Board finds that the exit roadway to the Holland Tunnel fits within the Rule 49 definition of an "approach" and therefore is considered an arterial highway within the meaning of former ZR § 42-53 (and current ZR § 42-55), as indicated in Appendix H of the Zoning Resolution which includes "Holland Tunnel and Approaches" among the designated arterial highways; and

WHEREAS, the Board finds the Appellant's position that the definition of an "approach" under Rule 49 was meant to exclude exit roadways because the definition does not state "to or from" a bridge or tunnel to be misguided, and agrees with DOB that the definition does not state which direction the traffic needs to flow from the "roadway" in order to be an "approach"; and

WHEREAS, the Board finds that the Rule 49 definition of "approach" is clear and that the exit roadway to the Holland Tunnel meets the relevant criteria of the definition, in that it is a "roadway connecting the local street network to a bridge or tunnel and from which there is no entry or exit to such network"; and

WHEREAS, the Board notes that the Rule 49 definition of "approach" makes no distinction as to

whether traffic is entering or exiting the tunnel via the

roadway, and the Board does not find the Appellant's attempt to insert the direction of the traffic as an additional criteria in the definition to be compelling; and

WHEREAS, as noted above, the Board considers the Rule 49 definition of "approach" to be clear and unambiguous, and therefore does not find it necessary to resort to dictionary definitions in order to ascertain the intent of the Zoning Resolution; and

WHEREAS, on the analysis of the meaning of "within view," the Board finds that the Appellant's assertions about intent are misplaced and the Appellant's interpretation of the meaning of the term is strained; and

WHEREAS, the Board notes that (1) there is not any indication in the text that the intended audience for signs is relevant, and (2) the plain meaning of "within view" is a more objective and less-nuanced concept than the Appellant proposes; and

WHEREAS, the Board finds that regardless of whether travelers on the approach to the Holland Tunnel were the intended audience for the Sign, if they are within the travelers' view, ZR § 42-55 must apply; and

WHEREAS, the Board finds that the goal of the statute was to regulate signs within view of arterial highways and that enforcement is best-served by applying an objective standard, rather than a subjective standard involving a scale of the levels of visibility; and

WHEREAS, the Board finds that the Appellant's approach and emphasis on discernibility of a message is untenable due to the individuality associated both with the sense of sight and the amount of time it takes to communicate a message as well as the broad range of advertising messages, which can include large logos and illustrations or smaller text; and

WHEREAS, similarly, the Board is not persuaded that obstructions (like light poles and traffic signs) along the arterial highway at certain points along the traveler's path renders the Sign outside of view; and

WHEREAS, contrary to the Appellant's assertion that the orientation and position of the Sign combined with the aforementioned obstructions render the Sign extremely difficult, if not impossible, to view from the exit roadway of the Holland Tunnel, the Board notes that DOB submitted two photographs which clearly reflect that the Sign can be viewed from different points along the exit roadway of the Holland Tunnel; and

WHEREAS, as to the Appellant's contention that DOB has inequitably changed its position on the meaning of "within view," the Board notes that there is no indication that DOB formerly had a different interpretation of "within view," or that it relies on the definition set forth in Rule 49; but, even if DOB did change its position, it has the ability to correct erroneous determinations; and

WHEREAS, the Board declines to take a position on the fairness of DOB's rejection of the registration after erroneously issuing the 1998 Permits and the 2000 Permit, but it does note that the Appellant has enjoyed the benefit of the Sign since that time; and

WHEREAS, the Board also declines to take a position on whether the Sign could be established as a legal non-conforming sign because that alternate relief was not at issue in the appeal; and

WHEREAS, accordingly, the Board finds that DOB appropriately applied ZR § 42-55 to the Sign and it is not permitted; and

WHEREAS, therefore, the Board finds that 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 8, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, January 8, 2013.
Printed in Bulletin Nos. 1-2, Vol. 98.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.