67-13-A
APPLICANT – Bryan Cave LLC, for ESS-PRISAII LLC, owner; OTR 945 Zerega LLC, lessee.
SUBJECT – Application February 12, 2013 – Appeal challenging Department of Buildings' determination that the existing roof sign is not entitled to non-conforming use status. M1-1 zoning district.
PREMISES AFFECTED – 945 Zerega Avenue, Zerega Avenue between Quimby Avenue and Bruckner Boulevard, Block 3700, Lot 31, Borough of Bronx.
COMMUNITY BOARD #9BX
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 Montanez 5
THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Notice of Sign Registration Rejection letter from the Bronx Borough Commissioner of the Department of Buildings ("DOB"), dated January 14, 2013, denying registration for a sign at the subject premises (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 Sign Enforcement Unit and in connection with the application for registration of the above-referenced sign. However, such documentation does not support the establishment of the existing sign prior to the relevant non-conforming use date. As such the sign is rejected. This sign will be subject to enforcement action 30 days form the issuance of this letter; and

WHEREAS, a public hearing was held on this application on July 16, 2013, after due notice by publication in *The City Record*, and then to decision on September 24, 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 premises (the "Premises") is located on the southwest corner of the intersection of Zerega Avenue and Bruckner Boulevard, within an M1-1- zoning district; and

WHEREAS, the Premises is occupied by a five-story commercial building; atop the building is an advertising sign with a surface area of 672 sq. ft. (the "Sign"); and

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

WHEREAS, the Appellant states that the Sign is 50 feet from and within view of the Cross Bronx Expressway, an arterial highway pursuant to Appendix H of the Zoning Resolution; and

WHEREAS, the Appellant notes that on March 27, 2008, DOB issued Permit No. 210039224 for the repair of the structural elements of the Sign and on April 21, 2008, DOB issued Permit No. 201143253 for the repair of the Sign itself (collectively the "Permits"); however, on January 31, 2013, DOB revoked the Permits based on its determination that the Sign was not established as a non-conforming advertising sign; and

WHEREAS, the Appellant seeks a reversal of DOB's rejection of the registration (and related revocation of the Permits) of the Sign based on DOB's determination that the Appellant failed to provide evidence of the establishment of an advertising sign; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

REGISTRATION REQUIREMENT

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

WHEREAS, 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 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, affidavits are also listed as an acceptable form of evidence; and

WHEREAS, a DOB guidance document sets forth the instructions for filing under Rule 49 and states that any one of the following documents would be acceptable evidence for sign registration pursuant to Rule 49: (1) DOB issued permit for sign erection; (2) DOB-approved application for sign erection; (3) DOB dockets/permit book indicating sign permit approval; and (4) publicly catalogued photograph from a source such as NYC Department of Finance, New York Public Library, Office of Metropolitan History, or New York State Archives; and

REGISTRATION PROCESS

WHEREAS, on September 5, 2012, pursuant to the requirements of Article 502 and Rule 49, the Appellant submitted a Sign Registration Application for the Sign and completed an OAC3 Outdoor Advertising Company Sign Profile, attaching copies of cancelled checks, leases, and other agreements as evidence of establishment of the Sign; and

WHEREAS, on October 3, 2012, DOB issued a Notice of Sign Registration Deficiency, stating that "[DOB is] unable to accept the sign for registration at this time (due to a) failure to provide proof of legal establishment of the sign"; and

WHEREAS, by letter dated December 3, 2012, the Appellant submitted a response to DOB, including additional leases and DOB records, which it claimed demonstrated that the Sign was legally established; and

WHEREAS, DOB determined that the December 3, 2012 submission lacked sufficient evidence of the Sign's establishment, and on January 14, 2013, issued the Final Determination denying registration; likewise, DOB revoked the Permits for the Sign by letter dated January 31, 2013; and

RELEVANT STATUTORY PROVISIONS

ZR § 12-10 *Definitions*

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; and

* * *

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 § 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

* * *

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 and the Permits should be reinstated because the evidence it submitted was sufficient to demonstrate that the Sign was: (1) established as a non-conforming use; and (2) not discontinued for a period of two or more years since establishment; and

WHEREAS, the Appellant contends that the evidence it has submitted demonstrates that the Sign was established at the Premises prior to November 1, 1979 and therefore may be continued pursuant to ZR § 42-55(c)(2); specifically, the Appellant submitted: a June 12, 1978 lease between Joma Manufacturing Company (of the Premises) and Allied Outdoor Advertising (the "1978 Lease"), an affidavit from Allied Outdoor Advertising President Richard J. Theryoung (the "Theryoung Affidavit"), and an affidavit from advertising and media consultant Bruce Silverman (the "Silverman Affidavit"), and asserts that these items are, considered together, a sufficient basis for a finding that the Sign existed as of November 1, 1979; and

WHEREAS, the Appellant states that the 1978 Lease authorized Allied Outdoor Advertising ("Allied") to construct and maintain a sign atop the roof of the Premises for seven years, from June 15, 1978 to June 14, 1985; as such, it is evidence that the Sign existed as of November 1, 1979; and

WHEREAS, the Appellant contends that the Theryoung Affidavit, in which the affiant states that he was President of Allied from 1979 to 1997 and that the Sign was constructed in early 1979 and continuously maintained thereafter, further supports the establishment of the Sign; and

WHEREAS, as to the Silverman Affidavit, the Appellant notes that it should be understood as providing background information on the outdoor advertising industry in New York City in the 1970s and supportive of the establishment of the Sign; according to the affiant, recordkeeping practices in the industry at the time were so uneven that the presence of the 1978 Lease makes the existence of the Sign virtually certain; and

WHEREAS, accordingly, the Appellant asserts that it has demonstrated that the Sign existed as of November 1, 1979 and was therefore established as a non-conforming advertising sign; and

WHEREAS, the Appellant contends that the evidence it has submitted demonstrates that the Sign has not been discontinued since its establishment and is not subject to termination under ZR § 52-61; and

WHEREAS, specifically, the Appellant has submitted the following to evidence the Sign's continuity: (1) a July 15, 1980 Work Completion Notice (the "1980 Notice") for the construction of a Best Way Food Stores sign; (2) an affidavit from Frank Ferrovechio, who attests that he commuted on the Bruckner Expressway during the 1980s and 1990s and observed the Sign daily; (3) the 1980 Lease, which the Appellant asserts shows continuity from 1978 through 1985; (4) leases with substantial rents in 1988 and 1998; (5) the Theryoung Affidavit; (6) a November 26, 1996 contract for tobacco bulletins for the period 1994 to 1998; (7) miscellaneous lease forms and correspondence between Allied and Universal Outdoor from 1996, 1997, 1998, 2000, 2008 and 2009; (8) 1997 and 1998 rent invoices; (9) a 1998 late notice; (10) a check covering the period between the beginning of July

2004 and the end of August 2004; (11) insurance certificates from 2000 to 2005; (12) a 2007 lease termination; and (13) photographs of the Premises and the Sign from approximately 2005 and from February 2008 through the present; and

WHEREAS, as to any gaps in the evidence, the Appellant requests that the Board apply the evidentiary principle of the "presumption of continuity" as set forth in *Prince-Richardson on Evidence* § 3-101 (1995) and Wilkins v. Earle, 44 NY 172 (1870), to find that the Sign was not discontinued because DOB has not presented evidence of discontinuance; in particular, the Appellant asserts that under that principle, once an object, condition, or tendency is factually established, it may be presumed to continue for as long as is usual with such conditions; further, the Appellant explains that the presumption of continuity "reflects a common sense appraisal of the probative value of circumstantial evidence," Foltis v. City of New York, 287 NY 108, 115 (1941), and should be applied in the instant matter to find that the evidence supports a finding that the Sign continued even if the items of evidence of its existence do not cover the entire period in question; and

WHEREAS, furthermore, the Appellant points to the Silverman Affidavit to bolster its claim that recordkeeping was generally inconsistent in the outdoor advertising industry during most of the time period in question and that the existence of any supporting documentation is persuasive evidence that the Sign existed continuously; and

WHEREAS, as to DOB's assertion that a tax photograph from the 1980s shows that the Sign and its structure were removed, the Appellant states that such a photograph only shows the Premises at a single point in time and not over a period of time; as such, it is not sufficient evidence to conclude that the Sign was discontinued for more than two years, and the Appellant cites the Board's decision in BSA Cal. No. 96-12-A (2284 12th Avenue, Manhattan) in support of the principle that a single photo cannot, standing alone, demonstrate that a use was discontinued for more than two years; and

WHEREAS, the Appellant also notes that the 1980 Notice—which DOB asserts is evidence that the Sign was not constructed prior to November 1, 1979—merely supports the continued existence of the Sign and is not dispositive on the actual date that the Sign was established; and

WHEREAS, finally, as to whether the Sign was, as DOB contends, prohibited from being reconstructed after it was removed pursuant to ZR §§ 42-55 and 52-83, the Appellant asserts that DOB has previously accepted as a non-conforming use signs that appear to have been altered, relocated, or reconstructed; and

WHEREAS, specifically, the Appellant states that signs at the following addresses were structurally altered, relocated and/or reconstructed: 5 Eldridge Street, Manhattan; 330 East 126th Street, Manhattan; 2284 12th Avenue, Manhattan; 682-686 East 133rd Street, Bronx; 586 Third Avenue, Brooklyn; 51-06 Vernon Boulevard, Queens; and 54-30 43rd Street, Queens; and

WHEREAS, as such, the Appellant asserts that DOB's position that removal and reconstruction of the Sign violated ZR §§ 42-55 and 52-83 in this case is belied by its position in prior instances and is, thus, arbitrary; and

WHEREAS, accordingly, the Appellant states that DOB's Final Determination with respect to the Sign and revocation of the Permits should be reversed; and

DOB'S POSITION

WHEREAS, DOB asserts that: (1) the Appellant has not submitted sufficient evidence to demonstrate the Sign was established at the Premises prior to November 1, 1979; and (2) even if the Board were to find that the Sign was established, the evidence demonstrates that it was removed and reconstructed contrary to ZR §§ 42-55; and 52-83; and

WHEREAS, DOB states that the 1978 Lease and Theryoung Affidavit are, collectively, insufficient evidence of the establishment of the Sign at the Premises prior to November 1, 1979; and

WHEREAS, DOB asserts that under Rule 49(d)(15)(b), an affidavit, on its own and without supporting documentation, is insufficient evidence of establishment; and

WHEREAS, DOB contends that although the Appellant has submitted the 1978 Lease as supporting documentation for the statements of the Theryoung Affidavit, the 1978 Lease by its terms does not demonstrate the establishment of the Sign; and

WHEREAS, in particular, DOB asserts that, according to the language employed in the 1978 Lease ("Lessee will erect the said advertising sign structure and its appurtenances"), Allied was authorized to construct and maintain a sign at the Premises, rather than maintain an existing sign at the Premises; and

WHEREAS, DOB asserts that distinction is critical, because it demonstrates that no sign existed when the 1978 Lease was executed and gives no indication as to when the rights under the lease to construct the Sign were exercised; thus, DOB concludes that the evidence fails to demonstrate the Sign was established prior to November 1, 1979; and

WHEREAS, DOB also contends that a Department of Finance tax photograph from the 1980s shows the Premises without the Sign and its structure; accordingly, DOB concludes that the Sign was removed at some point and reconstructed, in violation of ZR §§ 42-55 and 52-83; and

WHEREAS, specifically, DOB states that pursuant to ZR § 42-55, which regulates advertising signs in manufacturing districts, no advertising sign may be structurally altered, relocated or reconstructed if that sign is located in a district regulated by ZR § 42-55 and is within 200 feet of an arterial highway; and

WHEREAS, DOB notes that ZR § 52-83 allows non-conforming advertising signs in specific zoning districts to be structurally altered, reconstructed, or replaced, provided that such alteration does not create any new non-conformity; however, the section also contains an exception clause, which states, "except as otherwise provided in Section 42-55"; and

WHEREAS, therefore, DOB contends that where

a non-conforming advertising sign is in a district covered by both ZR § 52-83 and ZR § 42-55, the exception clause in ZR § 52-83 requires that the more restrictive provisions of ZR § 42-55 apply; as such, in this case, ZR § 42-55 prohibits the Sign, which is within an M1-1 district and within 50 feet of an arterial highway, from being structurally altered, relocated or reconstructed; and

WHEREAS, accordingly, DOB contends that the Sign cannot have non-conforming status because it was removed and reconstructed in the 1980s contrary to ZR §§ 42-55 and 52-83; and

WHEREAS, accordingly, DOB asserts that it properly issued its Final Determination denying the registration of the Sign and properly revoked the Permits; and

CONCLUSION

WHEREAS, the Board finds that DOB properly denied the Sign registration because the Appellant has not met its burden of demonstrating that the Sign was established prior to November 1, 1979; and

WHEREAS, the Board agrees with DOB that, by its terms, the 1978 Lease is only evidence of what Allied was authorized to do, namely construct and maintain the Sign; and

WHEREAS, thus, the Board also agrees with DOB that nothing in the 1978 Lease provides a basis for the Board to determine when the Sign was actually constructed; the 1978 Lease speaks to, at most, when the Sign *could have been* constructed; and

WHEREAS, further, the Board finds that the only other item of evidence that is somewhat contemporaneous with the 1978 Lease is the 1980 Notice, which is dated July 15, 1980, and which suggests that the Sign construction was completed more than eight months after November 1, 1979, the required date of establishment in ZR § 42-55; and

WHEREAS, as to the Theryoung Affidavit, the Board finds that it lacks specificity and contains conclusory statements, which do not credibly establish that the Sign existed at the Premises prior to November 1, 1979; and

WHEREAS, the Board notes that although Theryoung states that he was "directly involved" in the "specific project" he provides no details regarding the dimensions, orientation, or message of the Sign; and

WHEREAS, as to the Silverman Affidavit, the Board finds that insofar as it seeks to equate the 1978 Lease with the existence of the Sign prior to November 1, 1979, it is not persuasive; indeed, the Board notes that in this case, the record indicates that there was a time period during the 1980s when a lease for the Sign existed, but the Sign—and its structure—were absent from the roof of the Premises; and

WHEREAS, accordingly, the Board agrees with DOB that the Appellant has not submitted sufficient evidence of the Sign's establishment prior to November 1, 1979; and

WHEREAS, because the Board finds that the Sign was never established as non-conforming, it is unnecessary to determine whether the Zoning Resolution permitted its removal and reconstruction or whether the presumption of continuity impels the Board to find, based on the Appellant's evidence, that the Sign was not discontinued; and

WHEREAS, therefore, the Board finds that DOB's enforcement against the Sign is warranted, and as such, DOB properly rejected the Appellant's registration of the Sign and properly revoked the Permits.

Therefore it is Resolved, that this appeal, challenging a Final Determination issued on January 14, 2013, is denied.

Adopted by the Board of Standards and Appeals, September 24, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, September 24, 2013.
Printed in Bulletin No. 39, Vol. 98.

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