134-13-A
APPLICANT – Bryan Cave, for Covenant House, owner.
SUBJECT – Application May 9, 2013 – Appeal of NYC Department of Buildings' determination regarding the right to maintain an existing advertising sign. C2-8/HY zoning district.
PREMISES AFFECTED – 538 10th Avenue aka 460 West 41st Street, Tenth Avenue between 41st and 42nd Streets, Block 1050, Lot 1, Borough of Manhattan.
COMMUNITY BOARD #4M
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, this is an appeal of a final determination, issued by the First Deputy Commissioner of the Department of Buildings ("DOB") on April 9, 2013 (the "Final Determination") acting on DOB Application No. 121398246, which states, in pertinent part that:

> The request to accept the existing non-illuminated advertising sign at the premises, currently located in a C2-8 zoning district, as lawfully non-conforming is hereby denied . . . If an advertising sign can be viewed from a specific point on the arterial highway in any direction, 360 degrees (i.e., whether it is the driver of a car who is facing forward, or a passenger in the back seat of a car facing to the side or the rear, or a passenger in the back seat of a convertible facing the side or rear, etc.), the advertising sign is considered within view (hereinafter, the "360 Degrees Standard"); and

WHEREAS, a public hearing was held on this appeal on August 20, 2013 after due notice by publication in *The City Record*, with a continued hearing on October 8, 2013, and then to decision on October 22, 2013; and

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

WHEREAS, the subject site is located on the northeast corner of the intersection of Tenth Avenue and West 40th Street, within a C2-8 zoning district within the Special Hudson Yard District; and

WHEREAS, the site is occupied by an eight-story community facility building and one-story community facility building; a 3,300 sq. ft. non-illuminated advertising sign (the "Sign") is located the south wall of the eight-story building; and

WHEREAS, this appeal is brought on behalf of OTR Media Group, Inc., the lessee of the Sign (the "Appellant" or "OTR"); and

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

PROCEDURAL HISTORY

WHEREAS, on October 4, 2012, the Appellant filed a permit application with DOB under Job. No. 121398246 to construct the Sign on the south wall of the eight-story building at the site (the "Permit"); the Permit application indicated that the Sign was an existing, non-conforming use; and

WHEREAS, on October 4, 2012, DOB disapproved the Permit application, finding insufficient evidence of the Sign's non-conforming use status; and

WHEREAS, on December 18, 2012, the Appellant submitted a determination request asserting that the Sign was protected pursuant to ZR § 42-58, because a painted sign existed at the site as of December 13, 2000, and, at the time, the site was within a Manufacturing district and not within view of an arterial highway or its approaches, as set forth in Appendix H of the Zoning Resolution; and

WHEREAS, following a series of discussions between DOB and the Appellant in which the Appellant attempted to establish the Sign's legal use under the Zoning Resolution, on April 9, 2013, DOB issued its Final Determination denying the Permit; and

WHEREAS, DOB's Final Determination, the full text of which is available under ZRD1 Control No. 26253, articulates three grounds for its denial of the Permit: (1) the Sign's proximity within 200 feet and within view of the portion of Dyer Avenue between West 39th Street and West 42nd Street, which, at that point, is considered an "approach" to the Lincoln Tunnel, contrary to ZR § 42-55; (2) the Sign's surface area, which is in excess of that permitted under ZR § 42-55 due to the Sign's proximity within view of an approach to the Lincoln Tunnel; and (3) even if the Sign is not subject to the arterial highway restrictions, the Sign cannot achieve non-conforming status pursuant to ZR § 42-58, because that section only applies where a sign has been constructed pursuant to a permit prior to December 13, 2000, and the Sign prior to that date was a painted sign, which did not require a permit; and

WHEREAS, on May 9, 2013, the Appellant filed the instant appeal, which challenges the first and second grounds of the Final Determination1; and

WHEREAS, through the hearing process, the Appellant and DOB came to agree that the Sign existed prior to the establishment of the traffic patterns on Dyer Avenue that, on occasion, render the Sign within 200 feet and within view of an approach to the Lincoln Tunnel2; and

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1 On appeal, the parties do not address the applicability of ZR § 42-58.

2 Initially, DOB took the position that because an "approach" is, per 1 RCNY 49-01, "that portion of the roadway connecting the local street network to a bridge or tunnel and from which there is no entry or exit to such network," and buses could either exit Dyer Avenue and enter the ramp into the Port Authority Bus Terminal or make a U-turn onto West 40th Street, Dyer Avenue was an "approach" whenever it was being used to connect to West 40th Street. Through the hearing process, it was revealed that the Port Authority controls the portion of Dyer Avenue in question and did not allow U-turns onto West 40th Street until 2003. Accordingly, DOB concedes that Dyer Avenue became an "approach" after the Sign was first painted in 2000.

WHEREAS, therefore, the only dispute remaining is whether, beyond 200 feet, the Sign is within view of an approach to the Lincoln Tunnel because it may be seen at some angles by drivers or passengers; and

RELEVANT ZONING RESOLUTION 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.

THE APPELLANT'S POSITION

WHEREAS, the Appellant asserts that the Sign is not "within view" of an approach to the Lincoln Tunnel; as such, it is not subject to the arterial highway restrictions set forth in ZR § 42-55; and

WHEREAS, the Appellant contends that a motorist traveling along the approach to the Lincoln Tunnel must turn around to view the Sign, and, thus, the Sign is not "within view" of the Lincoln Tunnel; and

WHEREAS, the Appellant states that DOB's interpretation of "within view" (as set forth in the Final Determination) is contrary to principles of statutory construction, does not, given the facts of this case, further the purposes of the arterial highway restrictions, and is inconsistent with comparable provisions of federal and state law; and

WHEREAS, the Appellant asserts that the 360 Degrees Standard—which considers objects behind a viewer to be "within view" of the viewer—offends common senses and is therefore contrary to the settled principles of statutory construction that legislation is presumed to be based in common sense and laws must be construed in the light of common sense, citing McKinney's Statutes § 143, People v. Ahern, 196 NY 221, 227 (1909) and People ex rel. Hallock v. Hennessy, 205 NY 301, 306 (1912); and

WHEREAS, the Appellant contends that the 360 Degrees Standard when applied to the facts of this case does not further the purposes of the arterial highway restrictions (reducing driver distraction and beautifying public spaces) because a driver or passenger must turn completely around in order to even catch a glimpse of the Sign; and

WHEREAS, the Appellant also states that the 360 Degrees Standard is inconsistent with comparable provisions of federal and state law, which reflect a common sense application of the "within view" concept and indicate that a sign is objectionable only if it is capable of being seen in the ordinary course of traveling along a highway; and

WHEREAS, in particular, the Appellant states that the Highway Beautification Act (23 USC § 131(b)) uses the phrase "visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way" when describing its analog of "within view" and the law's implementing rules as set forth in 23 CFR 750.102(s) define "visible" as "capable of being seen (whether or not legible) without visual aid by a person of normal visual acuity," and New York State's scheme uses the phrase

"visible from the main traveled way" in New York State Highway Law § 88(2) and that statute's rule (17 NYCRR § 150.1(vv)) defines "visible" identically to the federal rule; and

WHEREAS, finally, the Appellant asserts that the 360 Degrees Standard should be rejected in favor of a standard that excludes from "within view" a sign that only becomes visible when the traveler along the arterial highway has passed the plane of the sign, is traveling away from the sign, and must turn around in order to view the sign (the "Bypass Standard"); and

WHEREAS, the Appellant asserts that the Bypass Standard is an objective standard that comports with common sense, furthers the objectives of the underlying federal law, is consistent with similar state and federal regulations regarding arterial signs, and can be easily implemented by DOB; and

WHEREAS, as such, the Bypass Standard should be applied in the instant case to support a finding that the Sign: (1) is not within view of an approach to the Lincoln Tunnel; (2) is not subject to the arterial sign restrictions; and (3) therefore became a legal non-conforming advertising sign (as to height and surface area) when the site was rezoned from M1-5 to C2-8 on January 19, 2005; and

WHEREAS, finally, the Appellant states that it has submitted sufficient evidence to demonstrate that the Sign has existed without any two-year period of discontinuance since becoming a non-conforming use in 2005; therefore the Sign is permitted to remain pursuant to ZR § 52-11; and

WHEREAS, accordingly, the Appellant states that DOB's refusal to approve the Permit application must be reversed; and

DOB'S POSITION

WHEREAS, DOB asserts that the Sign is "within view" of an approach to the Lincoln Tunnel; thus, the painting of the Sign in 2000 was contrary to the arterial sign restrictions; and

WHEREAS, DOB states that in 2000 when the Sign was painted in violation of ZR § 42-533, which regulated signs "within view" of an arterial highway and provided that

> [b]eyond 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 fact of such sign; and

WHEREAS, DOB states that, as noted above, it interprets "within view" using the 360 Degree Standard; and

WHEREAS, DOB contends that the 360 Degree Standard is the only reasonable interpretation of "within view"; and

WHEREAS, DOB states that other measurements of "within view," including the Appellant's Bypass Standard, would be unworkable, necessarily involve some measure of subjectivity in determining the angle of the viewer's sightline, and would result in inconsistent determinations regarding whether a sign was within view; and

WHEREAS, DOB responds to the Appellant's arguments regarding the Federal Beautification Act and New York State Highway Law, which DOB characterizes as applying only where a sign may be viewed by "a driver of a car looking straight ahead," by asserting that there is nothing in the legislative history of the arterial highway restrictions of the Zoning Resolution that suggest they were intended to replicate the federal and state requirements; and

WHEREAS, further, DOB notes that neither the Department of City Planning, nor the City Council has signified an intent to adopt a "within view" standard similar to the state or federal regulation despite opportunities to do so in connection with the various sign regulation amendments over the years; and

WHEREAS, DOB also states that the 360 Degrees Standard is both long-standing and endorsed by the Department of City Planning; and

WHEREAS, DOB asserts that applying the 360 Degrees Standard, the Sign is approximately 520 linear feet from and within view of the Lincoln Tunnel; as such, DOB asserts that when the 3,300 sq.-ft. Sign was painted in 2000, it exceeded its permitted surface area by 2,780 sq. ft.; and

WHEREAS, accordingly, DOB states that the Sign was never lawfully established and could not have become a non-conforming use in 2005, when the site was rezoned from M1-5 to C2-8; and

CONCLUSION

WHEREAS, the Board agrees with DOB that the proper standard in interpreting the meaning of the term "within view" is the 360 Degrees Standard; as such, the Board finds that the Sign was never lawfully established; and

WHEREAS, the Board rejects the Appellant's contention that the 360 Degrees Standard is an interpretation of "within view" that is unreasonable; on the contrary, the Board finds that the standard is the only objective measurement of whether a sign is within view of a motorist traveling along an arterial highway; and

WHEREAS, the Board agrees with DOB that other measures of "within view" including the Bypass Standard, would be difficult, if not impossible to apply, and would necessarily involve subjective decision-making by DOB; and

WEHREAS, the Board is not persuaded that the arterial highway restrictions on signs in the Zoning Resolution are intended to replicate the similar provisions of state and federal legislation; as DOB noted, the Board finds that there is nothing in the Zoning Resolution to support such a contention; and

WHEREAS, the Board also finds that the standard furthers the intent of the arterial highway restrictions on signs; and

WHEREAS, in particular, the Board notes that the policy objectives of restrictions on signs near arterial highways include reducing driver distraction and beautifying public spaces, and the Board finds that the 360 Degrees Standard furthers both objectives; indeed, the Board observes that glancing in the rear or side view

3 ZR §42-53 was modified and renumbered as ZR § 42-55 as a result of the February 27, 2001 text amendment.

mirror at a particularly large sign could be more distracting and therefore more dangerous than glancing at a sign while looking straight ahead; and

WHEREAS, the Board also notes that the 360 Degrees Standard is consistent with the Board's decisions in BSA Cal. Nos. 88-12-A and 89-12-A (462 11th Avenue, Manhattan); in those cases, the appellant argued, among other things, that if a sign was only within view of a motorist on an arterial highway for a "fleeting moment," the sign was not "within view" of the arterial highway; the Board rejected this argument, noting that the plain meaning of within view is a more objective and less-nuanced concept; the Board also noted that the goal of the statute was to regulate signs within view of arterial highways and that enforcement would be best-served by applying an objective standard, rather than a subjective standard; likewise, the Board favors DOB's objective, 360 Degrees Standard over the Appellant's subjective, Bypass Standard in the instant matter; and

WHEREAS, thus, applying the 360 Degrees Standard, the Board finds that when the Sign was first painted in 2000, it far exceeded the allowable surface area for a sign approximately 520 feet from and within view of an approach to the Lincoln Tunnel; and

WHEREAS, the Board notes that even if it determined that the Sign was not within view of an approach to the Lincoln Tunnel, the Sign became subject to surface area and height limitations generally applicable within Manufacturing districts pursuant to a February 27, 2001 text amendment; as such, the Sign would have become non-conforming as to height and surface area as of that date, and the rezoning of the site to C2-8 on January 19, 2005 would have merely increased the degree of non-conformity of the Sign; and

WHEREAS, accordingly, the Board finds that the Sign was never established as a non-conforming use and DOB properly refused to issue the Permit; and

Therefore it is Resolved, that this appeal, challenging a Final Determination issued on April 9, 2013, is denied.

Adopted by the Board of Standards and Appeals, October 22, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, October 22, 2013.
Printed in Bulletin Nos. 42-43, Vol. 98.

Copies Sent
To Applicant
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