

**\*CORRECTION**

**This resolution adopted on July 21, 2015, under Calendar No. 278-13-A and printed in Volume 100, Bulletin No. 31, is hereby corrected to read as follows:**

**278-13-A**

APPLICANT – Isaac Szpilzinger, Esq., for 121 Varick St. Corp., owner.

SUBJECT – Application September 27, 2013 – Appeal of Department of Buildings’ determination that the advertising sign was not established as a lawful non-conforming use. M1-6 zoning district/SHSD.

PREMISES AFFECTED – 121 Varick Street, southwest corner of Varick Street and Dominick Street, Block 578, Lot 67, Borough of Manhattan.

**COMMUNITY BOARD #2M**

**ACTION OF THE BOARD** – Application Denied.

THE VOTE TO GRANT –

Affirmative: .....0

Negative: Chair Perlmutter, Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Montanez .....4

THE RESOLUTION –

WHEREAS, on March 5, 1998, under application No. 101835221, the New York City Department of Buildings (“DOB”) issued a permit (the “Permit”) for a 75’ x 75’ illuminated advertising sign located at a point approximately fifty feet above curb level on the south-facing wall of the twelve-story building known as and located at 121 Varick Street, in Manhattan (the “Sign,” located on the “Building”), which occupies the subject site at the southwest corner of the intersection of Varick Street and Dominick Street, in an M1-6 zoning district within the Special Hudson Square District (the “Site”); and

WHEREAS, DOB revoked the Permit upon the issuance of the Borough Commissioner’s Revocation of Approvals and Permits, dated June 13, 2011 (the “Revocation”); and

WHEREAS, the subject appeal comes before the Board in response to a Final Determination, dated August 28, 2013, by DOB First Deputy Commissioner Thomas J. Fariello (the “Final Determination”), which was issued in response to the appellant’s submission of a Zoning Resolution Determination Form (the “ZRD1”) in which the appellant sought a rescission of the Revocation; and

WHEREAS, the Final Determination states, in pertinent part, that:

The request for a rescission of the Borough Commissioner’s Revocation of Approval and the reinstatement of Permit No. 101835221 is hereby denied... the advertising sign is within view of multiple “approaches” to an arterial highway (the Holland Tunnel), and is, therefore, not permitted pursuant to ZR 42-

55...; and

WHEREAS, this appeal is brought on behalf of 121 Varick St. Corp., the owner of the subject Building and Site (the “Appellant”)<sup>1</sup>; and

WHEREAS, this appeal turns on whether the Sign is located within 200 feet of, and within view of, an arterial highway such that the Permit was unlawful when it was issued; and

WHEREAS, as discussed in greater detail below, the Board concludes that the Sign is within 200 feet of, and within view of a point north of Broome Street, between Varick Street and Hudson Street, with a latitude of 40.724658 and a longitude of -74.007033 (the “Vantage Point”), which the Board finds to be located on an approach to the Holland Tunnel which has been designated as an arterial highway for purposes of ZR § 42-55 (previously § 42-53); as such, the Permit was properly revoked and this appeal is denied; and

WHEREAS, a public hearing was held on this application on September 9, 2014, after due notice by publication in *The City Record*, with a continued hearings on January 27, 2015, April 14, 2015, and May 19, 2015, and then to decision on July 21, 2015; and

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

**BACKGROUND AND PROCEDURAL HISTORY**

WHEREAS, the Board notes that the Holland Tunnel consists of a central subaqueous portion and enclosed approach tunnels at either side of the central subaqueous portion; the enclosed approach tunnels are connected to the street grade by open-cut approach ramps; and

WHEREAS, on the Manhattan side of the subaqueous portion of the Holland Tunnel, the enclosed approach tunnel diverges into two tubes; the “South Tube” (Manhattan bound), which leads to St. John’s Rotary, located south of Laight Street, between Varick Street and Hudson Street; and the “North Tube” (New Jersey bound) which is accessed via a series of entrance roadways bounded by Canal Street and Watts Street, to the south, Hudson Street, to the west, Varick Street, to the east, and Broome Street, to the north (the “Entrance Roadways”);

WHEREAS, the property on which the Entrance Roadways are located is owned by the Port Authority of New York and New Jersey (the “Port Authority”); and

WHEREAS, the Site is located on the northeast quadrant of the block north of the Entrance Roadways, which is bounded by Dominick Street, to the north, Varick Street, to the east, Broome Street, to the south and Hudson Street, to the west; and

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WHEREAS, the subject block is bisected by

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<sup>1</sup> Both the Appellant and DOB have been represented by counsel throughout this appeal.

the open-cut approach which connects the North Tube to the Entrance Roadways; and

WHEREAS, the entrance onto the open-cut approach into the North Tube is located on the north side of Broome Street, between Varick Street and Hudson Street (the “Broome Street Entrance”), the Vantage Point is located north of the Broome Street Entrance, on the open-cut approach to the North Tube; and

WHEREAS, DOB issued the Permit on March 5, 1998, under Application No. 101835221 for an illuminated advertising wall sign; and

WHEREAS, at the time the Permit was issued, ZR § 42-53, effective February 21, 1980 and applicable in the subject M1-6 zoning district, prohibited advertising signs located within 200 feet of and within view of an arterial highway; and

WHEREAS, the Permit was revoked on June 13, 2011, upon DOB’s determination that the Sign is “within view of multiple ‘approaches’ to an arterial highway (the Holland Tunnel), and is, therefore, not permitted pursuant to ZR 42-55”; and

WHEREAS, DOB issued the Final Determination, in which it denied the Appellant’s request that it rescind its revocation of the Permit, on August 28, 2013; and

WHEREAS, the Appellant seeks a reversal of the Final Determination on the grounds that (1) there are no approaches to the Holland Tunnel and, as such, the Final Determination was issued in error; (2) even if the Holland Tunnel has an approach, such approach is not a “designated arterial highway,” for the purpose of ZR § 42-55, which is the basis of the Final Determination; and (3) even if the Holland Tunnel and its approaches constitute a “designated arterial highway,” for the purpose of ZR § 42-55, the Sign is not within 200 feet of or within view of any such “designated arterial highway”; and

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

WHEREAS, the Board notes that for the purpose of this appeal it is examining the narrow issues of whether the Sign is within 200 feet of and within view of the Vantage Point and whether the Tunnel Approach, defined below, is, based on the Board’s examination of the Vantage Point, a roadway or approach which constitutes an arterial highway for purposes of ZR § 42-55; the Board need not, and does not, reach a conclusion as to whether the Sign is within view of and within 200 feet of the remainder of the Entrance Roadways or whether the remainder of the Entrance Roadways constitute arterial highways for purposes of ZR § 42-55; and

RELEVANT STATUTORY PROVISIONS and the MASTER PLAN

ZR § 42-53  
Additional Regulations for Advertising Signs  
M1 M2 M3

In all districts, as indicated no *advertising sign* shall be located, nor shall an existing

*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 or *public park*. For the purposes of this Section, arterial highways shall include all highways which are shown on the Master Plan of Arterial Highways and Major Streets, as “principal routes”, “parkways”, or “toll crossings”, and which have been designated by the City Planning Commission as arterial highways to which the provisions of this Section shall apply. 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*...

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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*...

For the purposes of this Section, 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

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Commission as arterial highways to which the provisions of this Section shall apply.

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ZR Appendix H

Designation of Arterial Highways

Pursuant to the provisions of Section 32-66 and 42-55 (Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways) of the Zoning Resolution of the City of New York, the City Planning Commission has designated as arterial highways to which the provisions of Sections 32-66 and 42-55 apply, the following 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. . . .

TOLL CROSSINGS . . . Holland Tunnel and Approaches;

\* \* \*

1 RCNY 49-01 Definitions

*Approach.* The term “approach” as found within the description of arterial highways indicated within Appendix C2 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; and

WHEREAS, the New York City Planning Commission Master Plan of Arterial Highways and Major Streets (the “Master Plan”) was adopted on April 11, 1945 and last modified in 1963 (Map No. 04-CH-1); the City Planning Commission report associated with the Master Plan is CP 3493, report no. 3254, April 11, 1945 (the “CPC Report”)<sup>3</sup>; and

WHEREAS, the Board notes that ZR § 42-53, which was in effect at the time the Permit was issued, was recodified as ZR § 42-55 on February 27, 2001; the Board notes further that in the context of this appeal, the relevant portions of the two provisions are identical; and

THE APPELLANT’S POSITION

WHEREAS, in support of its argument that the DOB’s revocation of the Permit was in error,

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2 The Board notes that “Appendix H” to the Zoning Resolution was formerly known as “Appendix C”, and that Rule 49 does not reflect the change, which took effect on February 27, 2001, and was purely administrative and had no substantive effect on the designation of any arterial highway.

3 The Master Plan superseded the “New York City Planning Commission Master Plan of Express Highway, Parkways and Major Streets” which was adopted by the City Planning Commission in 1940 and last modified in 1941.

the Appellant asserts that the Sign is not within 200 feet of an arterial highway as defined in ZR § 42-55, which states, in pertinent part, that:

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

and, as such, DOB’s revocation of the Permit was in error; and

WHEREAS, specifically, the Appellant contends that the Final Determination should be reversed because (1) the roadways identified by DOB as “approaches” to the Holland Tunnel are neither approaches nor “arterial highways,” thus the Sign was not erected in contravention of ZR § 42-53 (and is not in violation of § 42-55); and (2) the Sign is not within 200 feet of nor “within view” of any of the purported approaches to the Holland Tunnel; and

1. The Appellant’s Argument that the “Approaches” Identified by DOB Do Not Constitute Arterial Highways for the Purposes of ZR § 42-53

a. The Appellant Maintains that the Holland Tunnel Does Not Have any Approaches

WHEREAS, the Appellant argues that the New York State enabling legislation for toll crossings between New York and New Jersey is silent as to the boundaries of the approaches to the Holland Tunnel, but describes the approaches to certain other toll crossings, suggesting that the Holland Tunnel has no designated approaches and, as such, no such approaches can be the basis of DOB’s revocation of the Permit; and

WHEREAS, specifically, the Appellant maintains that the Port Authority has exclusive jurisdiction over the vehicular crossings between New York and New Jersey, including the Holland Tunnel, and that the locations of the approaches to New York City toll crossings, if any, are set forth in the Port Authority’s enabling legislation and the New York Codes, Rules and Regulations; and

WHEREAS, the Appellant notes that Tile 21 of the New York Codes, Rules and Regulations, Chapter XXVI, Subchapter A, Article 1, Section 1200.3 states that a tunnel is defined as “any tunnel within the jurisdiction of the Port Authority between the portals thereof, but shall not include the plazas, approaches and highway connections thereto”; and

WHEREAS, the Appellant argues that, taken in conjunction with the fact that the Port Authority’s enabling legislation references approaches to the George Washington Bridge and the then un-built

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Lincoln Tunnel, but not the already existing Holland Tunnel, the foregoing definition imposes boundaries of the Holland Tunnel that do not include anything beyond the portals of said tunnel; and

b. The Appellant Maintains that there are not any Approaches to the Holland Tunnel Shown on the Master Plan

WHEREAS, the Appellant argues that none of the purported “approaches” identified by DOB, located at the Entrance Roadways, meet the statutory definition of “arterial highway” because they are not shown on the Master as a “principal route,” “parkway,” or “toll crossing”; and

WHEREAS, in support of this argument, the Appellant highlights that the Holland Tunnel is clearly identified on the Master Plan, depicted by a series of circles which represent a “Toll Crossing Under Authorities” as indicated on the legend of the Master Plan; and

WHEREAS, the Appellant maintains that the Master Plan does not depict, and, therefore, has not shown, an entrance roadway to the Holland Tunnel anywhere in Manhattan; and

WHEREAS, the Appellant argues that the CPC Report further evidences that the Master Plan does not show an approach to the Holland Tunnel at the entrance to the North Tube; and

WHEREAS, specifically, the Appellant argues that the CPC Report provides a list, with description, of each of the arterial routes shown on the Master Plan, and that the Holland Tunnel, listed under “Toll Crossings” is described as the facility which connects lower Manhattan with New Jersey and also will connect with the proposed Lower Manhattan Expressway; and

WHEREAS, the Appellant notes that the CPC Report does not list an “entrance roadway” to the Holland Tunnel, but does reference the then-proposed Lower Manhattan Expressway, which was never constructed, and argues that the omission of any other description of a connection between the tunnel and an entrance roadway establishes that there simply is no approach to the Holland Tunnel; and

WHEREAS, the Appellant argues that the two elements of the § 42-53 definition of “arterial highway” are conjunctive and, where the first is not met (i.e., where the subject roadway is not shown on the Master Plan) there is no need to consider the second (i.e., whether the subject roadway has been designated by the City Planning Commission as an arterial highway); and

WHEREAS, in support of its argument that both elements of the ZR § 42-53 definition of “arterial highways” must be satisfied and that, upon failing to meet the first element the second element need not be addressed, the Appellant refers to ZR § 12-10(h), which states, in relevant part, that:

Unless the context clearly indicates the contrary, where a regulation involves two or

more items, conditions, provisions, or events connected by the conjunction “and”, “or”, or “either .... or”, the conjunction shall be interpreted as follows:

(1) “and” indicates that all the connected items, conditions, provisions or events shall apply...

and ZR § 12-10(c), which states, in relevant part, that:

The word “shall” is always mandatory and not discretionary...; and

b. The Appellant Maintains that the City Planning Commission has Not Designated any of the Entrance Roadways as Arterial Highways

WHEREAS, Appellant contends that because the first prong of ZR § 42-55 is not met, the second prong, need not be considered; and

WHEREAS, notwithstanding the foregoing, the Appellant maintains that there are no roadways which have been designated by the CPC as arterial highways and, as such, the Permit should not have been revoked as unlawful under ZR § 42-55; and

WHEREAS, the Appellant notes that the “designation” text of Appendix C, now Appendix H, provides, in pertinent part, that:

...the City Planning Commission has designated as arterial highways to which the provisions of Sections 32-66 and 42-55 apply, the following 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 notes that there are no approaches to the Holland Tunnel shown on the City Map or Master Plan; and

WHEREAS, the Appellant argues that the foregoing text does not contemplate the designation of “approaches” and provides only for the designation of “arterial highways” and that a roadway must, therefore, have been mapped as an “arterial highway” on the Master Plan and the City Map in order to be “designated” by CPC as an arterial highway to which the provisions of ZR § 42-53 apply; and

WHEREAS, in support of its argument that absent placement on the Master Plan and City Map as an arterial highway, none of the Entrance Roadways, or any other purported approach to the Holland Tunnel, could be designated by CPC as an arterial highway to which the provisions of ZR § 42-53 apply, Appellant cites to the CPC Report, which states, in pertinent part, that:

Pursuant to Article V, § 21-B of the Zoning Resolution of the City of New York,—

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effective June 28, 1940, the City Planning Commission hereby designates, as Express Highways to which provisions of § 21-B of the Zoning Resolution shall apply, all those streets which appear on the City Map and which are also indicated as “express highway – legally mapped” and “express parkway legally mapped” on the Master Plan of Express Highways, Parkways and Major Streets, duly adopted January 22, 1941...;4 and

WHEREAS, the Appellant argues that because none of the Entrance Roadways were ever placed on the City Map or Master Plan, that is, they were never legally mapped as a “principal route,” “parkway,” or “toll crossing,” they cannot be designated as arterial highways; and

WHEREAS, the Appellant maintains that the inclusion of “Holland Tunnel and Approaches” in the Appendix H list of arterial highways to which ZR § 42-55 applies is in contravention of both the CPC Report as well as ZR § 42-55; and

WHEREAS, the Appellant argues further that the purported inconsistencies between the language of ZR § 42-55 and the list in Appendix H must be understood in light of ZR § 12-10(b), which states that:

In case of any difference of meaning or implication between the text of this Resolution and any caption, illustration, summary table or illustrative table, the text shall control...

thus, the Appellant argues, the list in Appendix H does not support a finding that certain approaches to the Holland Tunnel are within the ambit of “arterial highways” to which ZR § 42-55 applies; and

WHEREAS, the Appellant further argues that even if the list in Appendix H did suggest that there are certain approaches to the Holland Tunnel which constitute “arterial highways” to which the provisions

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4 Article V, § 21-B of the Zoning Resolution of the City of New York, effective June 28, 1940, is a precursor to ZR § 42-53 and states, in pertinent part, that:

No advertising sign shall hereafter be erected, placed or painted, nor shall any existing advertising sign be structurally altered, in any use district within 200 feet of an arterial highway shown as a “principal route”, “parkway” or “toll crossing” on the “Master Plan of Arterial Highways and Major Streets”, provided such arterial highway has been designated by the City Planning Commission as an arterial highway to which the provisions of this section shall apply ... if such advertising sign is within view of such arterial highway ...

of ZR § 42-55 apply, ZR § 42-55 requires that such approaches be shown on the Master Plan, and, to the extent that such approaches are not shown on the Master Plan, their inclusion within Appendix H is irrelevant; and

c. The Appellant Maintains that DOB Impermissibly Relied on Rule 49 in Determining What Constitutes an Approach in this Instance

WHEREAS, the Appellant claims that the Final Determination is based, in part, upon DOB’s reliance on the definition of “approach” codified in 1 RCNY 49-01 (“Rule 49”); and

WHEREAS, the Appellant argues that Rule 49, which went into effect on August 25, 2006, eight years after the Permit was issued, is inapplicable to the instant matter; and

d. The Appellant’s Argument that ZR § 12-10(i) is Inapplicable to the Board’s Analysis of ZR § 42-55 and Cannot Extend the Scope of Arterial Highways to Include Approaches

WHEREAS, the Appellant maintains that ZR § 12-10(i), which states that:

The word “includes” shall not limit a term to the specified examples but is intended to extend its meaning to all other instances or circumstances of like kind or character.

has no bearing on the instant analysis, and does not extend the scope of ZR § 42-55 because ZR § 42-55 is clear on its face; and

WHEREAS, the Appellant maintains that the language of ZR § 42-55 is clear and unambiguous and as such it is inappropriate to resort to rules of construction “to broaden the scope and application of a statute, because no rule of construction gives [a] court discretion to declare the intent of the law when the words are unequivocal” (citing *Raritan Development Corp. v. Silva*, 91 NY2d 107 [1997]); and

WHEREAS, the Appellant further maintains that ZR § 12-10(i) is inapplicable because ZR § 42-55 does not provide a list of specified roadways which might constitute “specified examples” as contemplated in ZR § 12-10(i) but instead limits its applicability to those highways which are shown on the Master Plan, be they “principal routes”, “parkways”, or “toll crossings”; the Appellant concludes that ZR § 42-55 does not, therefore, provide a list of “examples” which could be extended upon an application of ZR § 12-10(i) to the word “includes”; and

WHEREAS, the Appellant also argues that extending the scope of ZR § 42-53 would lead to an irrational result because there are no approaches shown on the Master Plan; the Appellant maintains that employing a canon of statutory construction to reach an irrational result is contrary to law; and

**2. The Appellant’s Argument that the Sign 278-13-A**

is not Within View of an Arterial Highway

a. The Appellant Maintains that the Sign is Not Within View of an Arterial Highway Because it is Not Visible to a Traveler in a Vehicle at the Vantage Point or any Other Point along the Entrance Roadways

WHEREAS, the Appellant maintains that the Sign is not perceptible from the eye of a driver or passenger (a traveler) in a vehicle at the Vantage Point and, therefore, the Sign is not visible from an arterial highway even if the Vantage Point qualifies as such; and

WHEREAS, the Appellant argues that the Sign is not visible to a traveler in a vehicle because of the obstruction of the roof of the vehicle; and

a. The Appellant Maintains that the Sign is Not Within View of an Arterial Highway Because only a Portion of the Display is Visible from the Vantage Point

WHEREAS, notwithstanding its contention that the Sign is not visible from the Vantage Point, the Appellant argues that to the extent that it is visible, only the upper left portion of the Sign can be perceived by travelers in a vehicle at the Vantage Point; and

WHEREAS, the Appellant argues that ZR § 42-55 regulates advertising signs within view of arterial highways and, as such, is not applicable when the only portion of a sign visible from such arterial highway is a patch of color without the other indicia of an advertising sign; and

b. The Appellant Maintains that DOB's Evidence that the Sign is Visible from the Broome Street Entrance is Inadmissible and Does Not Establish that the Sign is Within View to a Person Traveling in a Vehicle

WHEREAS, the Appellant argues that DOB's evidence that the sign is within view of the Vantage Point, images taken from "Google Street View" is inadmissible and does not speak to whether the Sign is perceivable by the eye of a driver or passenger in vehicle, but only reveals what can be seen from outside a vehicle; and

3. The Appellant's Argument that the Sign is not Within 200 Feet of the Vantage Point

WHEREAS, the Appellant states that the methodology employed by DOB in measuring the distance between the Sign and the Vantage Point is not dispositive because that measurement, in that it reflects the distance from the Vantage Point to a point at the base of the wall of the Building to which the Sign is affixed, is based on Rule 49's directive that the distance "shall be calculated as the length of a horizontal plane extending between a vertical plane reflecting the edge of the sign, sign structure or sign location closest to the ... arterial highway and a vertical plane reflecting the portion of the ... highway closest to the sign..."; and

WHEREAS, the Appellant argues that the foregoing standard cannot be the standard by which the

distance between the Sign and the Broome Street Entrance is measured because Rule 49 was enacted after the Permit was issued and the Sign was erected; and

WHEREAS, the Appellant argues further that measuring the distance from the base of the Building to the Vantage Point prejudices the Appellant and is contrary to the Zoning Resolution definition of sign, which contemplates a writing or pictorial representation on a building or structure, not at the base of a building; and

WHEREAS, lastly, the Appellant maintains that the distance from the Sign to the Vantage Point was 207 feet; and

#### DOB'S POSITION

WHEREAS, DOB asserts that it properly revoked the Permit because the Sign violated regulations in effect at the time the Permit was issued and maintains that because the Sign was unlawful when erected it is not eligible to continue as a non-conforming use; and

WHEREAS, specifically, DOB argues that (1) the City Planning Commission designated the "Holland Tunnel and Approaches" as an arterial highway to which ZR § 42-53, now ZR § 42-55, applies; (2) the Entrance Roadways are approaches to the Holland Tunnel which constitute part of an arterial highway for the purposes of § 42-55; and (3) that the Sign is within view of and within 200 feet of three distinct approaches to the Holland Tunnel; and

1. DOB's Argument that the Master Plan shows the Holland Tunnel Toll Crossing, Including its Approaches

WHEREAS, DOB asserts that the Holland Tunnel and its approaches constitute a single arterial highway which is shown on the Master Plan; and

WHEREAS, DOB states that the Master Plan depicts a series of small circles labeled "Holland Tunnel" running from New Jersey across the Hudson River and ending at the Miller Highway; DOB states that the Master Plan identifies the small circles as "toll crossings under authorities" and concludes that the Holland Tunnel is, therefore, a highway which is shown on the Master Plan in satisfaction of the first prong of the two-prong definition of "arterial highway" provided in ZR § 42-53; and

WHEREAS, DOB refers the Board to the word "include" in ZR § 42-53, which states that "[f]or the purposes of this Section, arterial highways shall include all highways which are shown on the Master Plan...", and claims that the word "include" is, as per ZR § 12-10(i), intended to extend the meaning of the term "arterial highways" beyond specified examples (i.e., beyond those shown on the Master Plan) to all other instances or circumstances of like kind and character;

and

WHEREAS, thus, DOB argues that, notwithstanding its position that the Holland Tunnel is clearly shown on the Master Plan, the Holland Tunnel and its approaches are, by virtue of the rules of construction which govern the Zoning Resolution, included among those highways contemplated in ZR § 42-53 even if the approaches themselves are not shown on the Master Plan; and

2. DOB's Argument that the City Planning Commission Designated the Approaches to the Holland Tunnel as Part of the Arterial Highway to which ZR § 42-55 Applies

WHEREAS, DOB argues that Appendix H to the Zoning Resolution provides a list of arterial highways to which ZR § 42-55 applies, and that such list includes approaches to the Holland Tunnel; and

WHEREAS, in support of its argument, DOB notes that Appendix H provides, in pertinent part, that:

Pursuant to the provisions of ... Section 42-53 (Additional Regulations for Advertising Signs) ..., the City Planning Commission has designated as 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, DOB notes further that Appendix H, under the heading "Toll Crossings," lists "Holland Tunnel and Approaches"; and

WHEREAS, DOB also notes that the CPC Report is consistent with the City Planning Commission's Appendix C list of arterial highways to which ZR § 42-53 applies in that the CPC Report states, in its description of "toll crossings" that "[t]he water crossings, provided as toll facilities by specially constituted Authorities, which *together with their approaches* are essential links in the arterial highway and major street system, are listed below according to the Authority having jurisdiction" (emphasis supplied by DOB); and

3. DOB's Argument that the Entrance Roadways are the Approaches to the Holland Tunnel Listed in Appendix C and Designated by CPC for the Purposes of ZR § 42-55

WHEREAS, DOB states that the Master Plan is intended as a macroscopic framework for development that does not show precise lines for routes in order to depict general plans for future growth and development; and

WHEREAS, DOB maintains that in light of the foregoing, the Master Plan shows only the general locations of the approaches to the Holland Tunnel, and that the precise locations of the approaches to the Holland Tunnel are to be determined in accordance

with longstanding DOB practice, which is reflected in the definition of approach set forth in Rule 49 which states, in pertinent part, that

...an 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; and

WHEREAS, DOB argues that there are multiple approaches along the Entrance Roadways; and

WHEREAS, specifically, DOB maintains that there are three points along the Entrance Roadways which, consistent with Rule 49 and the longstanding DOB practice upon which that rule is based, constitute an approach to the Holland Tunnel; the first approach identified by DOB is that roadway which begins at the intersection of Varick Street and Broome Street (the "Broome Approach"); the second approach identified by DOB is that roadway which begins at the Broome Entrance and continues to the North Tube, which DOB identifies as the "Tunnel Approach" (the Vantage Point is located on the roadway which DOB labels the Tunnel Approach); and the third approach identified by DOB is that roadway which begins at the intersection of Watts Street and Varick Street (the "Watts Approach"); and

WHEREAS, DOB maintains that Rule 49 codifies its longstanding administrative interpretation of Appendix C, and notes that the Appellant has not presented any evidence that DOB has ever recognized another interpretation of the term "approaches" as presented in that Appendix; and

4. DOB's Argument that the Sign is Within 200 feet of the Tunnel Approach

WHEREAS, DOB states that the Appellant has conceded that the Sign is within 200 feet of the Holland Tunnel and argues that it is therefore within 200 feet of the Broome Approach and the Tunnel Approach; and

WHEREAS, moreover, DOB states that the Sign is located approximately 140 feet from the Tunnel Approach and submitted a Pictometry analysis to the Board in support of this contention; and

WHEREAS, DOB states that it is its longstanding practice to measure the distance of signs from an arterial highway horizontally from the nearest point on the sign to the arterial highway's nearest street line; and

WHEREAS, in support of the foregoing contention, DOB cites a number of its official notifications, including: (1) Technical Policy and Procedure Notice # 1/97 (1997) (requiring a site survey which shows the distance between a sign and an arterial highway if the sign is within view of said arterial highway); (2) Operations Policy and Procedure Notice # 10/99 (1999) ("Distance is to be measured horizontally, from the nearest street line of the arterial

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highway ... to the nearest point on the sign or sign structure.”); and (3) 1 RCNY 49-15(d)(1) (2006) (“Such distance shall be calculated as the length of a horizontal plane extending between a vertical plane reflecting the edge of the sign ... closest to the ...arterial highway and a vertical plane reflecting the portion of the ... Arterial highway closest to the sign...”); and

WHEREAS, DOB maintains that assuming that the distance between the Sign and the middle of the Broome Entrance was 207 feet, as the Appellant contends, and using a three-dimensional measurement, as opposed to a horizontal plane measurement, as Appellant maintains is proper, a measurement of the nearest point on the Sign to the nearest point on the Tunnel Approach places the Sign within 200 feet of the arterial highway as long as the Sign was less than 142 feet above curb level, based upon the horizontal distance between the Sign and the Tunnel Approach and the Pythagorean Theorem; and

WHEREAS, DOB notes that the Sign was approximately 100 feet above curb level; and

5. DOB’s Argument that the Sign is Within View of the Tunnel Approach

WHEREAS, DOB maintains that an advertising sign is “within view” of an arterial highway when it can be viewed from a specific point on said arterial highway in any direction within 360 degrees; and

WHEREAS, DOB notes that the Board previously recognized the 360-degree standard as an objective standard to determine whether a sign is “within view” for purposes of ZR § 42-55 in BSA Cal Nos. 88- and 89-12-A (*462 Eleventh Avenue, Manhattan*, decided December 11, 2012) (upheld on appeal in *Van Wagner v BSA*, 2014 WL 461074) and 134-13-A (*538 Tenth Avenue, Manhattan*, decided October 22, 2013); and

WHEREAS, DOB argues that the Sign is visible from the Tunnel Approach, among other approaches along the Entrance Roadways; and

WHEREAS, DOB challenges the Appellant’s argument that the view of the Sign from the Vantage Point is substantially obstructed and, therefore, the Sign is not “within view” for the purposes of ZR § 42-55 on the grounds that the standard advanced by the Appellant is a subjective standard based on whether the message on the subject sign is effectively communicated to a traveler in a vehicle located on an arterial highway within 200 feet of said sign and, therefore, should be rejected; and

CONCLUSION

WHEREAS, the Board finds that the Sign is within 200 feet of, and within view of, an arterial highway such that the Permit was unlawful when issued and, therefore, that DOB’s revocation of the Permit was proper; as such, the Final Determination is affirmed and the subject appeal is denied; and

*The Sign is Within 200 Feet of the Vantage*

*Point, Tunnel Approach and Holland Tunnel*

WHEREAS, the Board notes that the Appellant concedes, by letter dated April 23, 2013, that the Sign is within 200 feet of the Holland Tunnel; and

WHEREAS, the Board credits DOB’s argument that the Sign is within 200 feet of the Vantage Point and, therefore, the Tunnel Approach, using both the DOB’s horizontal plane measurement as well as the Appellant’s preferred three-dimensional calculation; and

*The Sign is Within View of the Vantage Point and, therefore, the Tunnel Approach*

WHEREAS, the Board finds that the Sign is within view of the Vantage Point and, therefore, the Tunnel Approach; and

WHEREAS, the Board rejects the Appellant’s argument that the Sign is not visible to a traveler within a vehicle located at the Vantage Point and, as such, is not “within view” of the Tunnel Approach; and

WHEREAS, the Board notes its well-established endorsement of the “360 Degrees Standard” for what constitutes “within view” for the purpose of ZR § 42-55; specifically, the Board has ruled that a sign is within view if it can be viewed from a specific point on an arterial highway in any direction, 360 degrees (i.e., by a driver in the front seat of a convertible car with the top down facing forward, or a passenger in the back seat of a convertible car with the top down facing backward, or to the side); and

WHEREAS, the Board notes that it previously examined the proper standard for “within view” in BSA Cal. No. 134-13-A (*538 Tenth Avenue, Manhattan*, decided October 22, 2013), in which it ruled that the 360 Degrees Standard was the “proper standard in interpreting the meaning of the term ‘within view’” and found that the 360 Degrees 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 notes that the 360 Degrees Standard furthers the intent of the arterial highway restrictions on signs, which include reducing driver distraction and beautifying public spaces; and

WHEREAS, the Board notes, as it did in BSA Cal. No. 134-13-A, that the 360 Degrees Standard is consistent with its decision in BSA Cal. Nos. 88-12-A and 89-12-A (*462 Eleventh Avenue, Manhattan*, decided December 11, 2012), in which the Board held that the meaning of “within view” is an objective standard deliberately calculated to be without nuance so as to best effect the statutory goal to regulate signs within view of arterial highways; and

WHEREAS, the Board rejects the Appellant’s argument that DOB impermissibly applied a definition of “within view” based on Rule 49, and notes that there is no evidence in the record contrary to DOB’s assertion that Rule 49 is consistent with and merely codified an



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existing Departmental practice; and

WHEREAS, in determining whether a sign is visible, the Board employs objective, clear-cut standards and as such, rejects the Appellant's argument that the Sign is not visible from the Vantage Point because, to the extent that it is visible, only a portion of the Sign can be seen; and

WHEREAS, in rejecting the Appellant's argument, the Board notes that the Appellant's reliance on BSA Cal. No. 90-12-A (*111 Varick Street, Manhattan*, decided January 15, 2013) to support that argument is misplaced; in *111 Varick Street*, the Board concluded that in order to qualify as an "advertising sign," painted plywood affixed to a building must meet all criteria of the ZR § 12-10 definition of sign in that it must direct attention to or advertise a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot; the Board did not consider, and certainly did not conclude, that a writing, pictorial representation, emblem, flag or other figure of similar character only constituted a sign when the entirety of its message was communicated to a person viewing such writing, pictorial representation, emblem, flag or other figure of similar character; and

WHEREAS, the Board notes that viewing a portion of a sign can have the same deleterious impact as viewing the entirety of a sign as contemplated in the arterial highway restrictions on signs and, consistent with those restrictions, finds that if any portion of a sign is within view of an arterial highway, the "within view" element of ZR § 42-55 is met; and

WHEREAS, the Board notes that the foregoing is consistent with its determination in BSA Cal. No. 101-12-A (*13-17 Laight Street, Manhattan*, decided January 8, 2013) (upheld on appeal in *Take Two Outdoor Media v Board of Standards and Appeals*, 128 AD3d 563 (1<sup>st</sup> Dept 2015)), in which it stated that, for the purposes of whether a sign is "within view," the intended audience for the sign is irrelevant; and

WHEREAS, having concluded that the Sign is within view of and within 200 feet of the Vantage Point and, by extension, the Tunnel Approach, the Board must consider whether the Tunnel Approach qualifies as an arterial highway to which the provisions of ZR § 42-55 apply; and

*The Tunnel Approach is an Approach to the Holland Tunnel to which the Provisions of ZR § 42-55 Apply*

WHEREAS, the Board finds that the Tunnel Approach is an approach to the Holland Tunnel; and

WHEREAS, in so finding that the Tunnel Approach is an approach to the Holland Tunnel, the Board notes that the instant appeal does not require it to find that all of the roadways which make up the Entrance Roadways are approaches to the Holland Tunnel; however, the Board finds that it is beyond dispute that the Tunnel Approach, an open cut approach ramp that connects the North Tube

to the street grade at Broome Street and which is bordered by high walls on both sides and which feeds exclusively into the North Tube of the Holland Tunnel, is an "approach" using any reasonable interpretation of the word, and that it has been so since the Holland Tunnel began operating; and

WHEREAS, in addition to the fact that the Tunnel Approach is an approach by any reasonable interpretation, the Board finds that the Appellant failed to refute DOB's arguments that (1) the Rule 49 definition of an "approach" is consistent with the Department's long-standing, pre-Rule 49, interpretation of the term and was such at the time the Permit was issued or that (2) the Tunnel Approach does indeed qualify as an approach under such definition; and

*The Tunnel Approach Constitutes an Arterial Highway For the Purpose of ZR § 42-55*

WHEREAS, having determined that the Tunnel Approach is an approach to the Holland Tunnel and that the Sign is within 200 feet and within view of the Tunnel Approach, the Board must consider whether the Tunnel Approach constitutes an arterial highway for the purpose of ZR § 42-53 (and current ZR § 42-55), i.e., (1) whether it is shown on the City Map and the Master Plan as a principal route, parkway or toll crossing, and (2) whether it has been designated by the City Planning Commission as an arterial highway; and

WHEREAS, the Board finds that it does; and

WHEREAS, the Board notes that it is uncontested that the Master Plan depicts the Holland Tunnel; and

WHEREAS, additionally, the Board credits DOB's argument that the Master Plan, a macroscopic document, need not depict the Tunnel Approach, or any approach, in order for such approach to be subject to the regulations set forth in ZR § 42-55 where, as here, the accompanying CPC Report designated approaches to the Holland Tunnel and such designation is consistent with Appendix H; and

WHEREAS, the Board notes that its conclusion that the macroscopic Master Plan signifies the designation of the Holland Tunnel and, by extension, the Tunnel Approach, is consistent with the CPC Report, which lists the Holland Tunnel as a "toll crossing" and describes toll crossings as "...water crossings, provided as toll facilities by specially constituted Authorities, which together with their approaches are essential links in the arterial highway and major street systems" (emphasis added); and

WHEREAS, the Board further notes its obligation to give effect to the language of the CPC Report cited above; and

WHEREAS, moreover, the Board finds that in the absence of the Tunnel Approach it would be impossible to access the North Tube and, by extension the Holland Tunnel itself, thus, the existence of an approach to the Holland Tunnel is not only grounded in the text but is

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also self-evident, and the Appellant's position that there are no approaches to the Holland Tunnel defies logic; and

WHEREAS, the Board finds that the CPC Report's characterization of toll crossings as including their approaches, coupled with its statement that "[t]hose crossings, constructed and operated as toll facilities by specific Authorities created by law, are shown as distinctive symbols on the modified Plan" suggests that City Planning intended that the Master Plan show the toll crossings themselves while recognizing that the approaches thereto could be designated but need not be depicted; and

WHEREAS, additionally, the Board cites City Planning Commission report CP 3606, report no. 3254 ("CPC Report 3606"), issued with the CPC Report on April 11, 1945, and notes that in considering changes to § 21-B of the 1916 Zoning Resolution, the precursor to ZR § 42-53 and ZR § 42-55, the City Planning Commission included, among the toll crossings to which § 21-B applies, the "Holland Tunnel and Approaches," further evidencing the City Planning Commission's intent to designate both the Holland Tunnel and its approaches while depicting only the tunnel itself on the Master Plan; and

WHEREAS, the Board notes further that Appendix C, now Appendix H, also has continued to list "Holland Tunnel and Approaches" under the "Toll Crossings" to which ZR § 42-53 and ZR § 42-55 applies; and

WHEREAS, the Board notes its obligation to give effect to the plain language of the CPC Report, CPC Report 3606, Appendix H, and ZR § 42-55, and notes that its decision herein harmonizes and effectuates the intent of those texts; and

WHEREAS, thus, the ZR § 42-55 criteria are met in that the Holland Tunnel and Tunnel Approach are effectively shown on the Master Plan and are designated in the CPC Report as an arterial highway, consistent with Appendix H of the Zoning Resolution, which lists the Holland Tunnel and Approaches as a designated arterial highway; and

WHEREAS, therefore, the Board has determined that the Tunnel Approach is an approach to the Holland Tunnel the existence of which is implied on the Master Plan and which has been designated by the City Planning Commission, in addition to being listed in Appendix H, hence it is an "arterial highway" to which ZR § 42-55 applies; the Board has further determined

**A true copy of resolution adopted by the Board of Standards and Appeals, July 21, 2015.**

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**To Applicant  
Fire Com'r.**

**Borough Com'r.**

that the Sign is within 200 feet of the Holland Tunnel and Tunnel Approach, based on the Board's examination of the Vantage Point thereupon, and within view from the Vantage Point and, by extension, the Tunnel Approach; and

*Therefore it is resolved* that the subject appeal, seeking a reversal of the Final Determination of the Department of Buildings, dated August 28, 2013, is hereby denied.

Adopted by the Board of Standards and Appeals, July 21, 2015.

**\*To correct the Applicant's Name which read "Slater & Beckerman, P.C" now reads "Isaac Szpilzinger". Dated August 27, 2015.**

