
BULLETIN

OF THE NEW YORK CITY BOARD OF STANDARDS AND APPEALS

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DOCKETS

New Case Filed Up to January 29, 2013

8-13-BZ

2523 Avenue N, corner formed by the intersection of the north side of Avenue N and west of East 28th Street., Block 7661, Lot(s) 1, Borough of **Brooklyn, Community Board: 14**. Special Permit (§73-621) for the enlargement of an existing single family residence contrary to floor area and open space ZR 23-141(a); less than the minimum side yards ZR 23-461. R2 zoning district.

9-13-BZ

2626-2628 Broadway, east side of Broadway between West 99th Street and West 100th Streets., Block 1871, Lot(s) 22 and 44, Borough of **Manhattan, Community Board: 7**. Special Permit (§73-201) to allow a Use Group 8 motion picture theater, contrary to §32-17. R9A/C1-5 zoning district.

10-13-BZ

175 West 89th Street, Property is situated on the north side of West 89th Street, 80' easterly from the corner formed by the intersection of the northerly side of West 89th Street and the easterly side of Amsterdam Avenue., Block 1220, Lot(s) 5, Borough of **Manhattan, Community Board: 7**. Variance (§72-21) to permit the construction of a rooftop addition to the existing building on the site (South Building); and the construction of a connecting bridge at the fourth story level to connect to the School's building located at 148 West 90th Street (North Building) to serve the School's educational mission and provide for more efficient operations. The proposed project will result in development of an additional 4,008sf of community facility floor area on the site. R7-2 zoning district.

11-13-BZ

144-148 West 90th Street, south side of West 90th Street, 135' east from the corner formed by the intersection of the southerly side of West 90th Street and the easterly side of Amsterdam Avenue., Block 1220, Lot(s) 7506, Borough of **Manhattan, Community Board: 7**. Variance (§72-21) to permit the construction of a connecting bridge at the fourth story level to connect the school's building located at 175 West 89th Street (South Building) to the building located on the Site (North Building) to serve the school's educational mission and provide for more efficient operations. The proposed project will result in development of an additional 213sf of community facility floor area on the site, all of which will be located within the bridge. R7-2 zoning district.

12-13-BZ

2057 Ocean Parkway, east side of Ocean Parkway between Avenue T and Avenue U, Block 7109, Lot(s) 66, Borough of **Brooklyn, Community Board: 15**. Special Permit (§73-622) for the enlargement of a single family home contrary to side yards (ZR 23-461) and less than the required rear yard (ZR 23-47). R5 (OP) Ocean parkway Special zoning district.

13-13-BZ

98 DeGraw Street, north side of DeGraw Street, between Columbia and Van Brunt Streets., Block 329, Lot(s) 23, Borough of **Brooklyn, Community Board: 6**. Variance (§72-21) to allow a single family residential building contrary to use regulations §42-00. M1-1 zoning district.

14-13-BZ

98 DeGraw Street, north side of DeGraw Street, between Columbia, Block 329, Lot(s) 23, Borough of **Brooklyn, Community Board: 6**. Variance (§72-21) to allow a single family residential building contrary to use regulations §42-00. M1-1 zoning district.

15-13-A thru 49-13-A

Veterans Road East and Berkshire lane, Block 7094, Lot(s) , Borough of **Staten Island, Community Board: 3**. This is an appeal of the decisions of the Staten Island Borough Commissioner denying the issuance of building permits to construct thirty five (35) one and two-family dwellings, within an R3-1(SRD) zoning district, as the development is contrary to General City Law 36.

50-13-BZ

1082 East 24th Street, west side of East 24th Street, 100' north of corner of Avenue K and East 24th Street., Block 7605, Lot(s) 79, Borough of **Brooklyn, Community Board: 14**. Special Permit (§73-622) to permit the enlargement of a single family residence located in a residential zoning district. R2 zoning district.

51-13-A

10 Woodward Avenue, southwest corner of Metropolitan Avenue and Woodward Avenue., Block 3393, Lot(s) 49, Borough of **Queens, Community Board: 5**. Propose to waive the requirements of General City Law section 35 so as to permit the construction of a one story warehouse lying partially within the bed of mapped street. (Metropolitan Avenue).

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DESIGNATIONS: D-Department of Buildings; B.BK.-Department of Buildings, Brooklyn; B.M.-Department of Buildings, Manhattan; B.Q.-Department of Buildings, Queens; B.S.I.-Department of Buildings, Staten Island; B.BX.-Department of Building, The Bronx; H.D.-Health Department; F.D.-Fire Department.

CALENDAR

FEBRUARY 12, 2013, 10:00 A.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday morning, February 12, 2013, 10:00 A.M., at 22 Reade Street, Spector Hall, New York, N.Y. 10007, on the following matters:

APPEALS CALENDAR

10-10-A

APPLICANT – Law Office of Fredrick A. Becker, for Joseph Durzieh, owner.
SUBJECT – Application September 5, 2012 – Application to reopen pursuant to a court remand (*Appellate Division*) for a determination of whether the Department of Buildings issued a permit in error based on alleged misrepresentations made by the owner during the permit application process.
PREMISES AFFECTED – 1882 East 12th Street, west side of East 12th Street approx. 75’ north of Avenue S, Block 6817, Lot 41, Borough of Brooklyn.
COMMUNITY BOARD #15BK

FEBRUARY 12, 2013, 1:30 P.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday afternoon, February 12, 2013, at 1:30 P.M., at 22 Reade Street, Spector Hall, New York, N.Y. 10007, on the following matters:

ZONING CALENDAR

149-12-BZ

APPLICANT – Alexander Levkovich, for Arkadiv Khavkovich, owner.
SUBJECT – Application May 9, 2012 – Special Permit (§73-622) for the enlargement an existing single family home contrary to floor area and lot coverage (§23-141(b)) and less than the required rear yard (§23-47). R3-1 zoning district.
PREMISES AFFECTED – 154 Girard Street, between Hampton Avenue and Oriental Boulevard, Block 8749, Lot 265, Borough of Brooklyn.
COMMUNITY BOARD #15BK

153-12-BZ

APPLICANT – Harold Weinberg, for Ralph Bajone, owner.
SUBJECT – Application May 10, 2012 – Special Permit (§73-36) to legalize the space for a physical culture establishment (*Fight Factory Gym*). M1-1 in OP zoning district.
PREMISES AFFECTED – 23/34 Cobek Court, south side, 182.0’ west of Shell Road, between Shell Road and West 3rd Street, Block 7212, Lot 59, Borough of Brooklyn.
COMMUNITY BOARD #13BK

199-12-BZ

APPLICANT – Sheldon Lobel, P.C., for Delta Holdings, LLC, owner.
SUBJECT – Application June 25, 2012 – Variance (§72-21) to construct a self storage facility that exceeds the maximum permitted floor area regulations. C8-1 and R6 zoning districts.
PREMISES AFFECTED – 1517 Bushwick Avenue, east side of Bushwick Avenue with frontage along Furman Avenue and Aberdeen Street, Block 3467, Lot 5, Borough of Brooklyn.
COMMUNITY BOARD #4BK

306-12-BZ

APPLICANT – Eric Palatnik, P.C., for Vincent Passarelli, owner; 2 Roars Restored Inc aka La Vida Massage, lessee.
SUBJECT – Application November 5, 2012 – Special permit (§73-36) to allow the proposed physical culture establishment (*La Vida Massage*) in an M1-1 zoning district.
PREMISES AFFECTED – 2955 Veterans Road West, Cross Streets Tyrellan Avenue and W Shore Expressway, Block 7511, Lot 1, Borough of Staten Island.
COMMUNITY BOARD #3SI

Jeff Mulligan, Executive Director

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**REGULAR MEETING
TUESDAY MORNING, JANUARY 29, 2013
10:00 A.M.**

Present: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.

SPECIAL ORDER CALENDAR

548-69-BZ

APPLICANT – Eric Palatnik, P.C., for BP North America, owner.

SUBJECT – Application March 27, 2012 – Extension of Term for a previously granted variance for the continued operation of a gasoline service station (*BP North America*) which expired on May 25, 2011; Waiver of the Rules. R3-2 zoning district

PREMISES AFFECTED – 107-10 Astoria Boulevard, southeast corner of 107th Street, Block 1694, Lot 1, Borough of Queens.

COMMUNITY BOARD #3Q

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application for a waiver of the Rules of Practice and Procedure, a reopening, and an extension of term of a prior grant for an automotive service station, which expired on May 25, 2011; and

WHEREAS, a public hearing was held on this application on August 7, 2012, after due notice by publication in *The City Record*, with continued hearings on September 25, 2013, October 30, 2012 and January 8, 2013, and then to decision on January 29, 2013; and

WHEREAS, Community Board 3, Queens, recommends approval of this application with the following conditions: (1) the surface mounted refueling caps on the underground gasoline storage tanks be lowered to minimize scraping to the underside of cars and possible tripping hazards; and (2) curb cuts and sidewalk flags at 108th Street be repaired and resurfaced; and

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

WHEREAS, the subject site is an irregularly-shaped corner through lot bounded by 107th Street to the west, Astoria Boulevard to the north, and 108th Street to the east, within an R3-2 zoning district; and

WHEREAS, the site is occupied by a one-story automotive service station with an accessory convenience

store; and

WHEREAS, the Board has exercised jurisdiction over the subject site since May 25, 1971 when, under the subject calendar number, the Board granted a variance to permit the construction of an automotive service station with accessory signs restricted to the pumping of gasoline, which omitted automotive service and repair, for a term of ten years; and

WHEREAS, subsequently, the term was extended and the grant amended by the Board at various times; and

WHEREAS, most recently, on August 12, 2003, the Board granted a ten-year extension of term and an amendment to legalize a change of use from an accessory storage building to an accessory convenience store, to expire on May 25, 2011; and

WHEREAS, the applicant now seeks an extension of term for ten years; and

WHEREAS, at hearing, the Board directed the applicant to provide landscaping on the site, replace the slatted fencing, clean the dumpster area, remove the ice box, and relocate the shed so it is not visible; and

WHEREAS, in response, the applicant submitted photographs reflecting that landscaping has been planted on the site, the fence has been repaired, the dumpster area has been cleaned, and the ice box has been removed; and

WHEREAS, as to the Board’s request to relocate the shed from the northeast corner of the site, the applicant states that the 10’-0” by 10’-0” shed is currently located in the most concealed position possible and it cannot be placed behind the convenience store, as requested, because there is only 8’-0” separating it from the fencing along the rear lot line; and

WHEREAS, in response to the concerns raised by the Community Board, the applicant submitted a letter from the project manager stating that (1) it is essential that the gas tanks remain elevated in order to prevent water from seeping into the tank manways, and (2) the change in grade at the 108th Street exit is necessary for on-site draining and that it acts as traffic control (like a speed bump) to ensure drivers do not “shoot out” of the site which could be potentially dangerous due to the close proximity of the curb cut to the intersection; and

WHEREAS, the Board accepts the applicant’s explanations in response to the conditions proposed by the Community Board, and agrees that the shed on the site is not significantly visible from the street due to the topography on that portion of the site; and

WHEREAS, accordingly, based upon the submitted evidence, the Board finds that the requested extension of term is appropriate, with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals *waives* the Rules of Practice and Procedure, *reopens*, and *amends* the resolution, as adopted on May 25, 1971, as subsequently extended and amended, so that as amended this portion of the resolution shall read: “to permit an extension of term for an additional period of ten years from the expiration of the prior grant, to expire on May 25, 2021; *on condition* that the use shall substantially conform to drawings as filed with this application, marked ‘Received October 18, 2013’–

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(3) sheets, and *on further condition*:

THAT the term of this grant will be for ten years from the expiration of the prior grant, to expire on May 25, 2021;

THAT landscaping will be maintained in accordance with the BSA-approved plans;

THAT the site will be maintained free of debris and graffiti;

THAT signage will comply with C1 district regulations;

THAT the above conditions will be listed on the certificate of occupancy;

THAT all conditions from prior resolutions not specifically waived by the Board remain in effect;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.”

(DOB Application No. 401636510)

Adopted by the Board of Standards and Appeals, January 29, 2013.

136-06-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Fulton View Realty, LLC, lessee.

SUBJECT – Application August 24, 2012 – Extension of Time to complete construction of a previously approved variance (§72-21) which permitted the residential conversion and one-story enlargement of three, four-story buildings. M2-1 zoning district.

PREMISES AFFECTED – 11-15 Old Fulton Street, between Water Street and Front Street, Block 35, Lot 7, 8 & 9, Borough of Brooklyn.

COMMUNITY BOARD #2BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application for a waiver of the Rules of Practice and Procedure, a reopening, and an extension of time to complete construction of a previously granted variance to permit the residential conversion and one-story enlargement of three existing four-story buildings, which expired on May 8, 2011; and

WHEREAS, a public hearing was held on this application on January 8, 2013, after due notice by publication in *The City Record*, and then to decision on January 29, 2013; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan,

Commissioner Montanez, and Commissioner Ottley-Brown; and

WHEREAS, the subject site is located on the north side of Old Fulton Street, between Front Street and Water Street, in an M2-1 zoning district within the Fulton Ferry Historic District; and

WHEREAS, on May 8, 2007, under the subject calendar number, the Board granted a variance to permit the proposed residential conversion and one-story enlargement of three adjacent four-story buildings, with ground floor retail and 15 dwelling units, contrary to ZR §§ 42-10, 43-12, 43-26, and 54-31; and

WHEREAS, substantial construction was to be completed by May 8, 2011, in accordance with ZR § 72-23; and

WHEREAS, the applicant states that due to financing delays, additional time is necessary to complete the project; thus, the applicant now requests an extension of time to complete construction; and

WHEREAS, the applicant represents that the owner is now prepared to proceed with construction; and

WHEREAS, based upon its review of the record, the Board finds that the requested extension of time to complete construction is appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals *waives* the Rules of Practice and Procedure, *reopens*, and *amends* the resolution, dated May 8, 2007, so that as amended this portion of the resolution shall read: “to grant an extension of the time to complete construction for a term of four years, to expire on January 29, 2017; *on condition*:

THAT substantial construction will be completed by January 29, 2017;

THAT all conditions from prior resolutions not specifically waived by the Board remain in effect;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted.”

(DOB Application No. 301564162)

Adopted by the Board of Standards and Appeals, January 29, 2013.

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208-08-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Desiree Eisenstadt, owner.

SUBJECT – Application October 25, 2012 – Extension of Time to Complete Construction of an approved special permit (§73-622) to permit the enlargement of an existing single family residence which expired on October 28, 2012. R2 zoning district.

PREMISES AFFECTED – 2117-2123 Avenue M, northwest corner of Avenue M and East 22nd Street, Block 7639, Lot 1 & 3(tent.1), Borough of Brooklyn.

COMMUNITY BOARD #14BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application for a reopening and an extension of time to complete construction of a previously granted special permit for the enlargement of a single-family home, which expired on October 28, 2012; and

WHEREAS, a public hearing was held on this application on January 8, 2013, after due notice by publication in *The City Record*, and then to decision on January 29, 2013; and

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

WHEREAS, the subject site is located at the northwest corner of the intersection of Avenue M and East 22nd Street, within an R2 zoning district; and

WHEREAS, on October 28, 2012, under the subject calendar number, the Board granted a special permit pursuant to ZR § 73-622 to allow the enlargement of a single-family home, contrary to ZR §§ 23-141 and 23-461; and

WHEREAS, substantial construction was to be completed by October 28, 2012, in accordance with ZR § 73-70; and

WHEREAS, the applicant states that due to financing delays, additional time is necessary to complete the project; thus, the applicant now requests an extension of time to complete construction; and

WHEREAS, based upon its review of the record, the Board finds that the requested extension of time to complete construction is appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals *reopens* and *amends* the resolution, dated October 28, 2008, so that as amended this portion of the resolution shall read: “to grant an extension of the time to complete construction for a term of four years, to expire on January 29, 2017; *on condition*:

THAT substantial construction will be completed by

January 29, 2017;

THAT all conditions from prior resolutions not specifically waived by the Board remain in effect;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted.”

(DOB Application No. 310165335)

Adopted by the Board of Standards and Appeals, January 29, 2013.

135-46-BZ

APPLICANT – Eric Palatnik, P.C., for Arielle A. Jewels, Inc., owner.

SUBJECT – Application March 30, 2012 – Extension of Term (§11-411) of approved variance which permitted an automotive service station (UG 16B) with accessory uses, which expired on January 29, 2012, and an amendment (§11-413) to convert the use to auto laundry (UG 16B) hand car wash; waiver for the Rules. R4 zoning district.

PREMISES AFFECTED – 3802 Avenue U, southeast corner of East 38th Street, between Ryder Avenue and East 38th Street, Block 8555, Lot 37, Borough of Brooklyn.

COMMUNITY BOARD #18BK

ACTION OF THE BOARD – Laid over to February 26, 2013, at 10 A.M., for continued hearing.

130-88-BZ

APPLICANT – Sheldon Lobel, P.C., for Cumberland Farms, Inc., owner.

SUBJECT – Application August 13, 2012 – Extension of Term of approved Special Permit (§73-211) for the continued operation of UG 16B gasoline service station (*Gulf*) which expired on January 24, 2009; Extension of Time to obtain a Certificate of Occupancy which expired on October 12, 2003; Waiver of the Rules. C2-2/R4 zoning district.

PREMISES AFFECTED – 1007 Brooklyn Avenue, aka 3602 Snyder Avenue, southeast corner of the intersection formed by Snyder and Brooklyn Avenues, Block 4907, Lot 1, Borough of Brooklyn.

COMMUNITY BOARD #17BK

ACTION OF THE BOARD – Laid over to March 5, 2013, at 10 A.M., for continued hearing.

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103-91-BZ

APPLICANT – Davidoff Hatcher & Citron, LLP for 248-18 Sunrise LLC, owner.

SUBJECT – Application October 18, 2012 – Extension of term of approved variance permitting an auto laundry use (UG 16B); Amendment to permit changes to the layout and extend hours of operation. C2-1/R3-2 zoning district.

PREMISES AFFECTED – 248-18 Sunrise Highway, south side of Sunrise Highway, 103’ east of the intersection of Hook Creek Boulevard, Block 13623, Lot 19, Borough of Queens.

COMMUNITY BOARD #13Q

ACTION OF THE BOARD – Laid over to February 26, 2013, at 10 A.M., for continued hearing.

20-08-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Wegweiser & Ehrlich LLC, owners.

SUBJECT – Application January 3, 2013 – Extension of Time to Complete Construction of approved Special Permit (§75-53) for the vertical enlargement to an existing warehouse (UG17) which expired on January 13, 2013. C6-2A zoning district.

PREMISES AFFECTED – 53-55 Beach Street, north side of Beach Street between Greenwich Street and Collister Street, Block 214, Lot 1, Borough of Manhattan.

COMMUNITY BOARD #1M

ACTION OF THE BOARD – Laid over to February 5, 2013, at 10 A.M., for postponed hearing.

APPEALS CALENDAR

45-03-A thru 62-03-A & 64-03-A

APPLICANT – Joseph Loccisano, P.C., for Willowbrook Road Associates LLC, owner.

SUBJECT – Application October 3, 2011 – Proposed construction of a single-family dwelling which is not fronting on a legally mapped street and is located within the bed of a mapped street, contrary to Sections 35 and 36 of the General City Law. R3-1 zoning district.

PREMISES AFFECTED – Hall Avenue, north side of Hall Avenue, 542.56’ west of the corner formed by Willowbrook Road and Hall Avenue, Block 2091, Lot 60, 80, Borough of Staten Island.

COMMUNITY BOARD #2SI

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Staten Island

Commissioner Borough Commissioner, dated September 9, 2011, acting on Department of Buildings Application Nos. 520066945, 520066963, 520066954, 520067025, 520067105, 520067098, 520067089, 520067070, 520067061, 520067052, 520067043, 520067034, 520067258, 520067267, 520067276, 520067285, 520067588, 520067294, and 520067301, reads in pertinent part:

1. The streets giving access to proposed new building is not duly placed on the official map of the City of New York therefore:
 - a. No Certificate of Occupancy can be issued pursuant to Article 3, Section 36 of the General City Law.
 - b. Proposed construction does not have at least 8% of the total perimeter of building fronting directly upon a legally mapped street or frontage space contrary to Section 501.3.1 of the New York City Building Code.
2. Proposed development including site appurtenances is located in the bed of streets duly placed on the official map of the City of New York therefore:
 - a. No permit can be issued pursuant to Article 3, Section 35 of the General City Law.

Therefore refer to the Board of Standards and Appeals for further review; and

WHEREAS, this is an application to amend previously approved General City Law (“GCL”) §§ 35 and 36 applications which allowed for construction in the bed of a mapped street; and

WHEREAS, a public hearing was held on this application on September 25, 2012, after due notice by publication in *The City Record*, and then to decision January 29, 2013; and

WHEREAS, Community Board 2, Staten Island, recommends disapproval of this application; and

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

WHEREAS, the subject site is located on the north side of Hall Avenue, between Willowbrook Road and Hawthorne Avenue, within an R3-1 zoning district; and

WHEREAS, on May 11, 2004, the Board granted an application under GCL §§ 35 and 36 to permit the construction of 20 three-story one-family semi-detached homes in the bed of a mapped street, Hall Avenue; and

WHEREAS, the applicant states that the approved homes have not been constructed and subsequent to the Board’s grant the proposal has been revised; and

WHEREAS, on August 14, 2009, the Board issued a letter of substantial compliance approving (1) the modification of the site plan to reflect the construction of one two-family home on tax lots 60 and 61 instead of two semi-detached single-family homes as previously approved, (2) the merger of tax lots 60 and 61 into one tax lot (tax lot 60) on which the two-family home would be built, and (3) the subdivision of the

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single zoning lot that was approved for the entire project (Lot 80) into 19 individual zoning lots; and

WHEREAS, the applicant now seeks to construct 18 one-family, three-story semi-detached homes and one two-family, three-story, detached home located in the bed of Hall Avenue; and

WHEREAS, on August 24, 2010, the Fire Department approved a site plan for access on locations of hydrants; and

WHEREAS, by letter dated November 23, 2011, the Department of Environmental Protection (“DEP”) states that (1) there are no existing City sewers or existing City water mains at the site, (2) Amended Drainage Plan No. D-9 (R-16), dated April 10, 1979, calls for two future ten-inch diameter sanitary sewers and a 13’-6” by 5’-6” storm sewer in Hall Avenue between Hawthorne Avenue and Willowbrook Road, and (3) the applicant submitted a drawing showing a 30’-0” wide sewer easement on the south side of Hall Avenue; and

WHEREAS, DEP further states that it requires the applicant to submit a survey/plan showing the sewer corridor in the bed of Hall Avenue for the installation, maintenance, and/or reconstruction of the future 13’-6” by 5’ 6” storm sewer and two ten-inch diameter sanitary sewers; and

WHEREAS, in response to DEP’s request the applicant submitted a drawing showing a 30’-0” wide sewer easement along the northerly portion of the development for the installation, maintenance and or reconstruction of the future 13’-6” by 5’-6” storm sewer, and a 38’-0” wide easement on the south side of Hall Avenue, which will be available for the installation, maintenance, and/or reconstruction of the two future ten-inch diameter sanitary sewers and other utilities; and

WHEREAS, by letter dated January 6, 2012, DEP states that, based on the drawing submitted by the applicant, it has no objection to the proposed application; and

WHEREAS, by letter dated December 6, 2011, the Department of Transportation (“DOT”) requested that the applicant provide the following information: (1) a title search to determine the ownership of Darcy Lane, a record street; (2) a site plan clearly displaying the mapped street right-of-way and the property lines of the applicant’s property (Block 2090, Lot 110 & Block 2091, Lot 11), and of the northern boundary of Block 2040, Lot 1; and (3) a traffic study; and

WHEREAS, by letter dated February 1, 2012, DOT states that at the applicant’s request it has reconsidered the request for a traffic study and instead will accept a site plan that clearly displays curb cut locations and dimensions, and roadway and sidewalk widths; and

WHEREAS, by letter dated July 25, 2012, DOT states that the Law Department has reviewed the title search provided by the applicant and determined that the northern half of Darcy Lane is owned by the City, however the southern half of Darcy Lane is under the jurisdiction of the Dormitory Authority of the State of New York; therefore, DOT requests that the applicant revise the application, plans, and related document accordingly and submit for further review; and

WHEREAS, in response to DOT’s request the applicant submitted revised plans which include a survey of Hall

Avenue, an approved Builder’s Pavement Plan, and a map of the property, and which show the correct location of Darcy Lane as it relates to the subject site and the adjacent lot (the College of Staten Island); and

WHEREAS, by letter dated January 9, 2013 DOT states that the revised plan submitted by the applicant reflects that the southern half of Darcy Lane is within Block 2040 Lot 1 under the jurisdiction of the Dormitory Authority of the State of New York, and the improvement of Hall Avenue and a portion of Darcy Lane at this location, which would involve the taking of a portion of the applicant’s property (Block 2091, lot 11 and Block 2090, lot 110) is not presently included in DOT’s Capital Improvement Program; and

WHEREAS, accordingly, the Board has determined that the applicant has submitted adequate evidence to warrant this approval under certain conditions.

Therefore it is Resolved that the decision of the Staten Island Borough Commissioner, dated September 9, 2011, acting on Department of Buildings Application Nos. 520066945, 520066963, 5200666954, 520067025, 520067105, 520067098, 520067089, 520067070, 520067061, 520067052, 520067043, 520067034, 520067258, 520067267, 520067276, 520067285, 520067588, 520067294, 520067301, is modified by the power vested in the Board by Sections 35 and 36 of the General City Law, and that this appeal is granted, limited to the decision noted above; *on condition* that construction shall substantially conform to the drawing filed with the application marked “Received January 24, 2013” (1) sheet; that the proposal shall comply with all applicable zoning district requirements; and that all other applicable laws, rules, and regulations shall be complied with; and *on further condition*:

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

THAT DOB shall review the proposed plans to ensure compliance with all relevant provisions of the Zoning Resolution;

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals
January 29, 2013

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117-12-A, 118-12-A, 125-12-A, 126-12-A,
128-12-A, 129-12-A, 131-12-A, 132-12-A,
133-12-A, 182-12-A, 186-12-A, 187-12-A,
188-12-A

APPLICANT –

Stroock & Stroock & Lavan, LLP, for CBS
Outdoor Inc., lessee
Davidoff Hutcher & Citron LLP, for Lamar
Advertising, lessee.
Herrick Feinstein, LLP for Clear Channel
Outdoor, Inc.

OWNER OF PREMISES – MTA

SUBJECT – Application April 25, 2012 and June 11, 2012
– Appeal challenging Department of Buildings’
determination that multiple signs located on railroad
properties are subject to the NYC Zoning Resolution.

PREMISES AFFECTED –

QUEENS:

Van Wyck Expressway and Atlantic Avenue
(Block 9989, Lot 70);
Brooklyn Queens Expressway and Queens
Boulevard (Block 1343, Lots 129 and 139);
Long Island Expressway/east of 25th Street (Block
110, Lot 1);
Queens Boulevard and 74th Street (Block 2448,
Lot 213);
Van Wyck Expressway/north of Roosevelt
Avenue (Block 1833, Lot 230);
Woodhaven Boulevard/north of Elliot Avenue
(Block 3101, Lot 9)

BRONX:

Major Deegan Expressway (Block 2539, Lot 506
and Block 2541, Lot 8900)
Major Deegan Expressway and 161st Street,
(Block 2493, Lot 1)

COMMUNITY BOARD #1/2/4/6/12Q and 4BX

ACTION OF THE BOARD – Appeal Denied.

THE VOTE TO GRANT –

Affirmative: Vice Chair Collins and Commissioner Ottley-
Brown.....2

Negative: Chair Srinivasan, Commissioner Hinkson and
Commissioner Montanez3

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board
in response to a total of 13 Notice of Sign Registration
Rejection letters from the Queens and Bronx Borough
Commissioners of the Department of Buildings (“DOB”),
dated March 26, 2012 and May 10, 2012, denying registration
for signs at the subject sites (the “Final Determination”),
which read, in pertinent part:

The Department of Buildings is in receipt of
additional documentation submitted in response to
the Deficiency Letter from the Signs Enforcement
Unit and in connection with the application for
registration of the above-referenced sign.
Unfortunately, we find this documentation
inadequate to support the registration of the sign

and, as such, the sign is rejected from registration.
This sign will be subject to enforcement action 30
days from the issuance of this letter; and

WHEREAS a public hearing was held on this
application on October 17, 2012, after due notice by
publication in *The City Record*, with a continued hearing on
December 11, 2012, and then to decision on January 29, 2013;
and

WHEREAS, the subject appeal concerns 13 signs
located on numerous sites in the Bronx and Queens within
C2, C2-3, C4-4, M1-1, M3-1, M3-2, R3A, R4, R4-1, R5B,
R7A, and R7X zoning districts (the “Signs”); and

WHEREAS, the sites are all occupied by advertising
signs on Metropolitan Transportation Authority (MTA)
property; and

WHEREAS, this appeal is part of a larger body of
appeals brought by CBS, Lamar Advertising and Clear
Channel, all outdoor advertising sign companies that are
subject to registration requirements under Local Law 51 of
2005; and

WHEREAS, the Board notes that under Local Law 31
of 2005, the New York City Council enacted certain
amendments to existing regulations governing outdoor
advertising signs as a means for DOB to enforce 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 (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
one-half acre (5,000 m) or more; and

WHEREAS, pursuant to the requirements of Article
502 and Rule 49 with respect to signs within 900 feet of
arterial highways, each of the Appellants submitted an
inventory of outdoor signs under its control and completed a
Sign Registration Application for each sign and an OAC3
Outdoor Advertising Company Sign Profile; and

WHEREAS, DOB, by letters, dated March 26, 2012
and May 10, 2012, issued the determination related to 13
signs on MTA property within CBS, Lamar Advertising, and
Clear Channel’s inventory, which form the basis of the
appeal; and

WHEREAS, at the consent of the three Appellants –
one representing signs operated by CBS, one representing
signs operated by Clear Channel, and one representing signs
operated by Lamar Advertising, the Board heard and
reviewed a total of 38 appeal applications (for 38 permits
and 38 rejection letters) on the same hearing calendar; on
January 29, 2013, the Board rendered a decision related to
the applicability of the Zoning Resolution on Amtrak
properties (BSA Cal. Nos. 130-12-A and 171-12-A through
179-12-A), CSX properties (BSA Cal. Nos. 119-12-A
through 124-12-A, 127-12-A, 134-12-A, 135-12-A, 180-12-
A, 273-12-A, and 274-12-A), and property formerly

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controlled by the Department of Ports and Trade (BSA Cal. Nos. 183-12-A through 185-12-A); and

WHEREAS, the companion decisions cover the 25 applications not addressed in this resolution, which is solely for the 13 MTA signs; and

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

THE APPELLANT'S POSITION

WHEREAS, the Appellant contends that DOB's enforcement against the Signs is preempted by (1) the clear language of the MTA enabling statute; (2) New York State case law that addresses commercial enterprises on government property; and (3) the fact that the New York City Transit Authority (NYCTA) has the explicit right to signage that is inconsistent with zoning; and

A. Signs on MTA Properties are Exempt from Signage Regulations

1. A Plain Reading of the Public Authorities Law (PAL) § 1266(8) Sets Forth the Exemption

WHEREAS, the Appellant asserts that as a public benefit corporation created under State law, the MTA has a statutory exemption from local regulation, which is set forth at Public Authorities Law (PAL) § 1266(8) (*Metropolitan Commuter Transportation Authority/Special Powers of the Authority*); and

WHEREAS, the Appellant cites to PAL § 1266(8):

The authority may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority and its subsidiaries, and New York city transit authority and its subsidiaries; and

WHEREAS, the Appellant asserts that the enabling statute grants it broad special powers to effectuate its goals and to "do all the things necessary, convenient or desirable to carry out its purposes;" and

WHEREAS, further, PAL § 1266(8) provides that: local laws, resolutions, ordinances, rules and regulations of a municipality . . . conflicting with this title or any rule or regulation of the authority . . . shall not be applicable to the activities or operations of the authority . . . or the facilities of the authority and its subsidiaries . . . except such facilities that are devoted to purposes other than transportation or transit purposes; and

WHEREAS, the Appellant asserts that PAL § 1266(8) expressly preempts the City's signage regulations because the signs serve a transportation purpose under the plain statutory terms; and

WHEREAS, the Appellant contends that the MTA enabling statute states that local regulations are not applicable to MTA if it conflicts with the MTA's enabling statute, except those that are not devoted to transportation or transit purposes; and

WHEREAS, the Appellant asserts that the Zoning

Resolution is a local regulation that conflicts with the MTA's enabling statute and therefore, is inapplicable to MTA unless the facilities owned, used, or leased by MTA are not for transportation or transit purposes; and

WHEREAS, the Appellant asserts that the Signs, by generating significant revenues for MTA, serve a transportation purpose; and

WHEREAS, in support of its assertion that "transportation or transit purposes" should be interpreted broadly, the Appellant cites to PAL § 1261(13)'s definition of railroad facilities, which reads in pertinent part:

buildings, structures, and areas notwithstanding that portions thereof may not be devoted to any railroad purpose other than the production of revenues available for the costs and expenses of all or any facilities of the authority; and

WHEREAS, the Appellant states that "transportation purpose" is as broad as "railroad facilities" and this includes portions of railroad facilities, like signs, devoted only to revenue, because the same word or phrase used in different parts of a statute will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or a related statute, except if the statute provides otherwise (N.Y.Stat. Law 236 (McKinney 1971)); and

WHEREAS, the Appellant asserts that MTA's purpose includes the continuance, development and improvement of commuter transportation, and the legislature expressly declared that such purpose is for the benefit of all people of the State and that MTA is performing an essential governmental function (see PAL § 1264); the Appellant asserts that the goals and purposes of MTA are clear that any attempt to regulate Signs on MTA properties by the City would directly contravene MTA's on-going effort to provide an essential governmental function and fulfill the legislature's purpose and goals given to MTA; and

WHEREAS, the Appellant states that even if incidental uses, like the Signs, must provide a public benefit, the Board must still find the Signs to be exempt since the Signs provide a public benefit and serve a public purpose similar to how other commercial establishments in guiding case law were found to have some benefit as they are used in part by commuters and employees of the public authorities; and

WHEREAS, the Appellant asserts that the Signs provide a public benefit in that they make available to the commuters and the general public valuable information about products so that commuters and the public can make informed decisions about the marketplace; and

WHEREAS, further, the Appellant asserts that the Signs' service is akin to and greater than the benefits conferred by the restaurants and other commercial enterprises on governmental authorities' property recognized by New York State courts; and

2. The Signs are Exempt Pursuant to the Holdings of New York State Courts

WHEREAS, the Appellant cites to two primary cases to support its claim that the MTA is exempt from sign

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regulations: MTA v. City of New York, 70 A.D.2d 551 (1st Dept 1979) (“Grand Central”) and Penny Port v. NYC Dept of Health, 276 A.D.2d 1014, (1st Dept 2000); and

WHEREAS, the Appellant asserts that the fact that MTA properties are exempt from local law and regulation is a long-standing, well-established proposition of law, held most prominently in Grand Central in which the Appellate Division held that the commercial enterprises at Grand Central Station (e.g., food stores and drug stores) were “incidental to transportation upon railroad facilities,” and therefore exempt from local taxes, pursuant to PAL § 1275 (*Exemptions from Taxation*); and

WHEREAS, the Appellant asserts that the meaning given “transportation purpose” in Grand Central applies to PAL § 1266(8) (*Special Powers of the Authority*), which preempts the City’s laws, rules and regulations that conflict with MTA’s enabling statute to the extent that it serves a transportation purpose; and

WHEREAS, the Appellant looks to Penny Port, in which the court determined that the City could not enforce its anti-smoking law against a restaurant in Grand Central Station because the restaurant within the station serves a transportation purpose as contemplated by PAL § 1266(8); and

WHEREAS, the Appellant states that Grand Central and Penny Port held that commercial enterprises create revenue for the MTA and are incidental to transportation facilities and that Grand Central and Penny Port are consistent with the “railroad facilities” definition at PAL § 1261(13), which recognizes that buildings, structures and areas, even if they are not devoted to any railroad purpose other than the production of revenue, are railroad facilities and serve a transportation purpose; and

WHEREAS, the Appellant likens the commercial enterprises at Grand Central Station to the Signs on MTA properties, because they are “incidental to transportation upon railroad facilities,” and serve a transportation purpose in that revenues generated from the Signs support MTA’s operation and finds that there is no distinction between the Signs and the commercial enterprises in the station just because they are in the station; and

WHEREAS, the Appellant asserts that the signs and the railroad tracks and related facilities form a single transportation facility with the income derived from the Signs applied toward defraying the costs and expenses of the entire facility; and

WHEREAS, in support of its position about sites with co-existing government and revenue-generating purposes, the Appellant cites to (1) Bush Terminal v. City of New York, 282 N.Y. 306 (1st Dept 1940) in which the court found that a commercial tower above a terminal base was exempt since the use of that building was “purely incidental to the purpose of the Port Authority to operate a terminal facility;” (2) NYC Transit Authority v. NYC Department of Finance, NYLJ 18, August 7, 2002 in which the court found that “agencies or public authorities do not lose their tax exemption simply because they derived incidental revenue in

connection with their use of the property”; and (3) Hotel Dorset v. Trust for Cultural Resources of the City of New York, 46 N.Y.2d 358, 371 (1978) citing Bush Terminal stated that “property held by a State agency primarily for a public use does not lose immunity because the State agency incidentally derives income from the property” and further that the term incidental “does not mean that the public use must . . . outweigh the private use to which the facility is put;” and

WHEREAS, the Appellant asserts that in cases where preemption was found, the commercial enterprise or establishment was deemed incidental to transportation or other governmental purposes (a restaurant inside Grand Central Station, other commercial establishments within Grand Central Station, office and retail tenants in a headquarters building for certain public authorities); and

WHEREAS, the Appellant contrasts its guiding case law with that introduced by DOB; and

WHEREAS, specifically, the Appellant asserts that DOB ignores decades of law and relies on outmoded authority, namely People v. Witherspoon, 52 Misc.2d 320 (N.Y. Dist. Ct. 1966); a 1982 Attorney General’s Opinion (1982 N.Y. Op. Atty. Gen. (Inf.) 107, 1982 WL 178319) (the “1982 Attorney General Opinion”); and a 1979 N.Y.S. Comptroller Opinion (the “1979 Comptroller Opinion”); and

WHEREAS, as to Witherspoon, the Appellant asserts that it is not binding on the Board as it has effectively been overruled by Grand Central and Matter of County of Monroe, 72 N.Y.2d 338, 341 and 345 (1988) in which the court applied a balancing of public interests test and found that, under the balancing test, an airport terminal, parking facilities, and freight facility at an airport were immune from local land use regulations because they were incidental to an airport operation; and

WHEREAS, further, the Appellant asserts that the governmental/proprietary function test employed in Witherspoon to establish whether laws could be enforced against signs on MTA property is no longer applicable and that the court today would not reach the same conclusion as it did in Witherspoon that the signs served a proprietary rather than a governmental purpose and may be regulated; and

WHEREAS, the Appellant asserts that subsequent Attorney General and court opinions rely on the “balancing of public interests test for analyzing which governmental interest should prevail when there is a conflict” and that a 1996 Attorney General’s Opinion (N.Y. Op. Atty. Gen. 1120, (1996 WL 785984)) (adopting Monroe) labeled the governmental/proprietary function test “outmoded and difficult to apply;” and

WHEREAS, accordingly, the Appellant asserts that the Board can find no valid support in Witherspoon’s ultimate ruling even if the issue is directly analogous to the facts in this appeal, as DOB contends; and

WHEREAS, the Appellant asserts that the 1982 Attorney General Opinion and the 1979 Comptroller Opinion are similarly superseded; and

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WHEREAS, the Appellant asserts that Grand Central is the only currently valid case regarding preemption in this context; and

WHEREAS, the Appellant asserts that neither Witherspoon's test nor the Monroe balancing test apply since the MTA is specifically exempted from zoning and the Monroe test is only triggered "in the absence of an expression of contrary legislative intent;" and

WHEREAS, the Appellant concludes that, in the alternate, if the test were applied, each Monroe factor favors continuation of the status quo and a determination that local laws and regulations should not be permitted to infringe on the statutory authority and mandate of the MTA; and

WHEREAS, the Appellant asserts that the Penny Port decision, after Monroe, does not mention Monroe because Penny Port found express preemption under MTA's enabling statute and therefore never got to the Monroe balancing test because that is the only way to reconcile Monroe; and

3. MTA has All of the Powers of the NYCTA, including the Power to Erect Advertising Signs

WHEREAS, the Appellant contends that the MTA, as the controlling entity of NYCTA, has very broad authority, greater than that granted to NYCTA, and therefore should, like the NYCTA, be exempt from the City's signage regulations; and

WHEREAS, the Appellant cites to NYCTA's rights to advertising signs as set forth at PAL § 1204(13a) (*General Powers of the NYCTA*):

Notwithstanding the provisions of section fourteen hundred twenty-three of the penal law or the provisions of any general, special or local law, code, or ordinance, rule or regulation to the contrary the authority may erect signs or other printed, painted or advertising matter on any property, including elevated structures, leased or operated by it or otherwise under its jurisdiction and control may rent, lease or otherwise sell the right to do so to any person, private or public; and

WHEREAS, the Appellant asserts that NYCTA's right to install advertising signs was added to its enabling statute at the request of the NYCTA, which, in 1959, was concerned that an interpretation of the State Penal Law would prohibit the use of its property for revenue-generating advertising signs; and

WHEREAS, the Appellant asserts that the legislative history provides evidence that this authority was added to clarify that NYCTA can have advertising signs on its property, not to grant to NYCTA a new right regarding advertising signs; and

WHEREAS, the Appellant states that given that MTA (i) was established to, inter alia, strengthen the financial condition of companies providing rail commuter transportation services, (ii) is an umbrella and parent organization that controls various rail transportation authorities, including NYCTA, a subsidiary of MTA and

(iii) has broader authority than NYCTA, it is clear that the legislature's intent was to confer, and it is implausible to think that the legislature would not have conferred, upon MTA the right to advertising signs on its properties, the same right that it gave to NYCTA, an entity under the control of, and with less power and authority than, MTA; and

WHEREAS, the Appellant states that further support that MTA has broader authority than NYCTA is that NYCTA can perform only those functions that are "necessary or convenient" (PAL § 1204(14)); to carry out its purpose, while MTA can "do all things necessary, convenient or desirable to carry out its purpose" (PAL § 1266(8)); and

WHEREAS, the Appellant states that the reason why a specific provision relating to advertising signs is not found in MTA's enabling statute is because, by 1965, when MTA was created, it was established and commonly understood, that railroad properties can be used for advertising signs, exempt from local regulations; and

WHEREAS, the Appellant states that the City conceded in the Clear Channel litigation that it has no jurisdiction over signs on NYCTA properties; and

WHEREAS, finally, the Appellant states that DOB's position that it can regulate signs on MTA property, but not on NYCTA property, is irrational since, if MTA is deemed to not have the authority to erect advertising signs on its properties, which would be incorrect, MTA can, as the controlling authority of NYCTA, easily legalize all such signs on its properties through leases or other similar arrangements with NYCTA; and

B. Supplemental Arguments in Opposition to DOB's Enforcement

1. The Zoning Resolution Does Not Govern the Use or Development of Railroad Properties

WHEREAS, the Appellant asserts that the City lacks jurisdiction over all railroad properties; and

WHEREAS, the Appellant asserts that the City has stated that the Zoning Resolution "does not govern the use or development of the City's streets and sidewalks," and therefore, signage on or over streets are deemed exempt; the Appellant asserts that railroads are similar to streets in that they serve a similar purpose – the movement of people and goods; and

WHEREAS, the Appellant states that the Zoning Resolution recognizes the similarity between streets and railroad property, as evidenced in the Zoning Resolution's definition of "block," which is defined as a "tract of land bounded by streets, public parks, railroad rights-of-way ..."; and

WHEREAS, the Appellant states that additionally, under the New York City Charter § 643(7), DOB lacks jurisdiction over "bridges, tunnels or subways or structures appurtenant thereto;" and

WHEREAS, the Appellant states that since railroads are functionally equivalent to subways and at least some of the Signs are located on railroad overpasses, a type of a

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bridge, under the City Charter, DOB's jurisdiction does not extend to railroad properties and to structures appurtenant to railroad properties, such as the Signs; and

WHEREAS, accordingly, the Appellant concludes that the Zoning Resolution and the City Charter preclude DOB from exercising jurisdiction over railroad properties; and

2. DOB's Determination was Arbitrary and Capricious

WHEREAS, the Appellant asserts that DOB's notices of enforcement reflect a sudden change in the agency's position which is presumed to be arbitrary and capricious; and

WHEREAS, the Appellant asserts that for more than 30 years, DOB has taken the position that the City's signage laws and regulations give it no jurisdiction over advertising signs on railroad rights of way and DOB's consistent interpretation of its authority under the zoning laws not to extend to railroad rights of way is well documented; and

WHEREAS, the Appellant states that under the unreasonable departure doctrine, sudden changes in a government agency's position are presumed to be unlawful, which follows "from the policy considerations embodied in administrative law" by which sudden and unexplained changes in an agency's interpretation of laws it is charged with administering are presumed to be arbitrary and capricious; and

WHEREAS, the Appellant states that in Matter of Charles A. Field Delivery Services, 66 N.Y.2d 516, 518 (1985), the Court of Appeals reversed a decision of the Unemployment Insurance Appeal Board because of an unexplained inconsistency with prior decisions of the Board; and

WHEREAS, the Appellant also cites to Richardson v. N.Y. City Dep't of Soc. Svcs., 88 N.Y.2d 35, 40 (1996) in which the Court of Appeals rejected an agency's change in its interpretation of governing statute and implementing regulation as "arbitrary and capricious" where the new interpretation was "diametrically opposite" to the agency's longstanding interpretation of that same provision of law, and where the change was not supported by a "reasoned explanation on the part of the agency;" and

WHEREAS, the Appellant states that the principle underlying these decisions that an unexplained change in an agency's longstanding interpretation of law is presumed improper protects the reasonable expectations of regulated persons and institutions; and

3. DOB Engaged in a Rule Making without the Notice and Comment Procedures Required under the City Administrative Procedure Act (CAPA)

WHEREAS, the Appellant states that even if DOB's change in its interpretation of the signage regulations is found to be lawful, such change in interpretation would still be unlawful as it violates the CAPA; and

WHEREAS, specifically, the Appellant asserts that DOB's change in position regarding signs on railroad properties is tantamount to issuance of a new regulatory rule

without the notice and comment procedures required under CAPA; and

WHEREAS, the Appellant states that such a change in regulatory requirements without following CAPA is unlawful; and

4. Many of the Signs are Legal Non-Conforming Uses

WHEREAS, the Appellant asserts that even if the Signs are not deemed to be exempt, many would qualify as legal non-conforming uses and, therefore, be permitted to continue; and

WHEREAS, the Appellant admits that it has not presented a case to establish that the signs are legal non-conforming uses, and that it no longer has much of the records and documentation that would establish many of the Signs as being legal non-conforming uses, but that many of the signs would be deemed legal pursuant to ZR §§ 52-11 and 52-61 related to the continuation of non-conforming uses; and

5. These Enforcement Actions Against the Signs Would Constitute a Regulatory Taking that Requires Just Compensation

WHEREAS, the Appellant asserts that DOB's actions would deprive the MTA of any viable use of its property interest and amount to a regulatory taking, which is a governmental regulation of the uses of a property to so excessive a degree that the regulation effectively amounts to a de facto exercise of the government's eminent domain power; and

WHEREAS, the Appellant states that if DOB is affirmed and the Appellant is compelled to remove the Signs, the Appellant will be entitled to just compensation in the amount of the fair market value of the Signs' location usages under state and federal laws; and

DOB'S POSITION

WHEREAS, DOB asserts that neither state statute nor case law preclude it from enforcing signage regulations against MTA based on the primary arguments that (1) the MTA enabling legislation has a limited meaning, which reflects that mere revenue generation is not a transportation purpose; (2) case law supports a narrower reading of the term "transportation purpose" than the one Appellant posits; and (3) the statute reflects that MTA and NYCTA have separate and unequal authority related to signage regulations; and

A. Signs on MTA Property are Subject to Signage Regulations

1. The Plain Meaning of PAL § 1266(8) Reflects that the City is not Preempted from Enforcing Signage Regulations

WHEREAS, DOB finds that PAL § 1266(8)'s meaning is clear and that "transportation purpose" is more limited than "railroad facilities" in Appellant's citation to PAL § 1261(13); and

WHEREAS, DOB states that the Appellant's claim that PAL § 1261(13) "recognizes that buildings, structures and areas, even if they are not devoted to any railroad

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purpose other than the production of revenue, are railroad facilities and serve a transportation purpose” is erroneous; and

WHEREAS, DOB states that the Appellant conflates PAL § 1261(13)’s definition of “[r]ailroad facilities” with § 1266(8)’s statement that MTA’s facilities will not be exempt from local regulation if they are “devoted to purposes other than *transportation or transit purposes*”; and

WHEREAS, DOB states that while revenue generation may constitute a “railroad purpose” under PAL § 1261(13)’s definition of “railroad facilities,” this does not mean that it is a “transportation or transit purpose” under PAL § 1266(8); in this context (i.e., analysis of a railroad facility’s actions), “transportation and transit purposes” is a subset of activities (i.e., those related to moving people from one place to another) that are performed by a railroad facility as part of a more general set of “railroad purpose[s],” which can include purposes not directly related to transportation, such as revenue raising for general operations; and

WHEREAS, DOB states that the legislature must have been aware of the difference in the terms used between PAL § 1261(13) and § 1266(8) because they are so close in the same statute; thus, it seems most reasonable that the legislature intended to use the term “transportation or transit purposes” in 1266(8) to distinguish the scope of local law exemption from the scope of the definition of “railroad facilities;” and

WHEREAS, DOB notes that case law provides that “[w]hen different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended” (Albano v. Kirby, 36 N.Y.2d 526, (N.Y. 1975)); and

WHEREAS, DOB also notes that it is telling that Appellant’s argument from PAL § 1261 did not inform the opinions of any of the authorities that have interpreted PAL § 1266(8) (e.g., Witherspoon, the 1982 Attorney General Opinion, and the 1979 Comptroller Opinion), including those that specifically considered the issue of local immunity for commercial advertising signs; and

2. The Principles Set forth in Case Law Support the City’s Enforcement of Signage Regulations

WHEREAS, DOB cites to People v. Witherspoon, 52 Misc.2d 320 (N.Y. Dist. Ct. 1966), in which the court considered whether State immunity inured to the sublessee of land owned by the Metropolitan Commuter Transportation Authority (subsequently known as the MTA), which was being used for “commercial advertising signs” in violation of a local zoning ordinance (*id.*, at 323); and

WHEREAS, DOB notes that in analyzing whether the Authority itself would be immune from a local regulation requiring permits for the signs in question, the Witherspoon court said it must look to the “function under study” to determine whether it was a governmental function, in which case “the immunity may be deemed to apply” or a proprietary function, in which case “the immunity may not apply” (*id.*, at 321); and

WHEREAS, DOB notes that the court concluded: the use of the real property for the erection and maintenance of commercial advertising signs . . . has no direct bearing to the governmental function for which the . . . Authority was created. On the contrary, such use is merely *incidental* to the goal in chief – the continued operation of the formerly tottering railroads. To that extent the use of the land for that purpose is proprietary. The immunity, insofar as applicable, is a limited one. Witherspoon at 323 (holding that the Authority, and thus its sublessee, is subject to the signs regulation in the local zoning) (emphasis in original); and

WHEREAS, DOB finds that the issue and analysis of Witherspoon are directly analogous to the facts in this appeal, and so Witherspoon’s ruling that MTA commercial signs are not eligible for local zoning exemption should apply to the Signs; and

WHEREAS, further, DOB cites to the 1982 Attorney General Opinion in which it considered whether “the Buildings Department of the City of New York may remove commercial billboards erected in violation of the City’s zoning laws on . . . property in the City owned by the [MTA]”; and

WHEREAS, in this opinion, the Attorney General wrote that Witherspoon is “precisely on point,” and that it is: in accord with Public Authorities Law 1264 [which generally states that the purposes of MTA are to continue, develop and improve commuter transportation] *and* 1266(8), which generally authorize local regulation of MTA property not used for transportation purposes, and [in accord] with the general rule in New York that a governmental body is entitled to immunity from local zoning regulations only where its use of the property in question is in furtherance of a governmental, rather than a proprietary function Id. at 3-4 (emphasis added); and

WHEREAS, DOB states that the Attorney General concluded that, “the construction and maintenance of commercial billboards on MTA property must be in compliance with the City’s zoning ordinance” and “the City of New York may provide for the removal of commercial billboards erected in violation of its zoning law on property owned by MTA” (*id.*); and

WHEREAS, DOB states that the Appellant mistakenly argues that Witherspoon and the Attorney General’s opinion are “erroneous or superseded” by Grand Central because Grand Central interpreted a different statute (i.e., PAL § 1275 rather than § 1266(8)), which applies to taxation rather than special powers of the authority, and which has different requirements for local law exemption; and

WHEREAS, DOB states that PAL § 1275 reads, in pertinent part, “property owned by the [MTA], property leased by the authority and used for transportation purposes,

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and property used for transportation purposes by or for the benefit of the authority ... shall all be exempt from taxation....”; and

WHEREAS, DOB states that on its face, PAL § 1275 requires less of a connection between MTA-leased property and transportation purposes for tax exemption than § 1266(8) requires for local law exemption; by its terms, as long as a facility is used for transportation purposes, apparently, even incidentally, PAL § 1275 would exempt the property from taxation; and

WHEREAS, DOB states that in Grand Central, the Appellate Division upheld a lower court ruling that portions of Grand Central Station “used as food stores, drugstores, and other commercial enterprises, [] which cater to both commuters and passersby, are nonetheless used for transportation purposes,” and are thus exempt from tax regulation under PAL § 1275; the Appellate Division stated that “the commercial enterprises create revenue for the MTA and are incidental to transportation upon railroad facilities;” and

WHEREAS, DOB states that even if revenue generation by itself were considered incidental to transportation purposes and sufficient to qualify MTA for tax exemption under PAL § 1275, this tax exemption standard is different from PAL § 1266(8)’s exemption from local jurisdiction; PAL § 1266(8) excludes from local law exemption any facilities “devoted to purposes other than transportation or transit purposes;” and

WHEREAS, DOB states that assuming *arguendo*, that the Signs have an incidental transportation purpose, the Sign facilities, as commercial advertisements, are “devoted to purposes other than transportation or transit purposes” and are thus ineligible for exemption under 1266(8); and

WHEREAS, DOB asserts that the difference in scope between general local law exemption and tax exemption under PAL § 1275 was clearly considered by the Witherspoon court when it ruled that the signs were not eligible for general local zoning exemption, but that the fee charged for the required local signs permit “might be in contravention of *section 1275*” (52 Misc.2d at 596 (emphasis in original)); and

WHEREAS, DOB contends that it is also significant that the Grand Central court never said, as Appellant does, that the generation of revenue *itself* is a “transportation purpose” but rather, the fact that the stores at issue in Grand Central “cater to both commuters and passersby” was critical to the court’s ruling that the stores were “being used for transportation purposes” (70 A.D.2d at 613); and

WHEREAS, DOB notes that the Grand Central court even drew a distinction between mere revenue generation and activities catering to commuters when it said “the commercial enterprises create revenue for the MTA *and are incidental* to transportation upon railroad facilities” (emphasis added) (*id.* at 614) because the court did not say “the enterprises create revenue for the MTA *and are thus incidental* to transportation,” the court apparently believed that mere revenue generation – without a connection to the

transportation station and passengers – would not even be “incidental to transportation;” and

WHEREAS, DOB asserts that the Signs at issue in this case have no connection to transportation purposes other than the revenue they generate for MTA; thus, the ruling of Grand Central, even if it were applicable to PAL § 1266(8), is not applicable to the facts at issue in this appeal, and it does not establish the Signs’ exemption from regulation under PAL § 1266(8); and

WHEREAS, DOB states that Witherspoon is the only case to consider the applicability of local zoning restrictions on MTA commercial advertising signs, and it even distinguished between general exemption and tax exemption under PAL § 1275, thus, Witherspoon is the best legal authority on this issue; and

WHEREAS, DOB disagrees with the Appellant’s position that since Monroe, courts no longer use the governmental versus proprietary interests test used by Witherspoon in determining a government’s obligation to comply with local regulations, therefore, Witherspoon “has effectively been overruled;” and

WHEREAS, DOB asserts that although courts since Monroe have used a different analysis to determine cases of local law application to government entities, Witherspoon’s holding, that MTA signs are subject to DOB’s jurisdiction has not been overruled; and

WHEREAS, DOB does not find any support for Appellant’s position that it is “illogical to conclude that a court would now reach the same conclusion as in Witherspoon that the MTA is subject to local zoning regulations” as it is not up to the Board to guess what a court would conclude when Witherspoon has already ruled on this issue and has not been overruled; and

WHEREAS, DOB states that case law (both older and newer), influential authorities, and common sense application of statutory language all support DOB’s jurisdiction over the MTA Signs; and

WHEREAS, DOB adds that other cases including NYC Transit Authority v. NYC Dep’t of Finance, NYLJ 18, August 7, 2002 (“NYC Transit Auth”) also dealt with statutes different from PAL 1266(8), with different exemption standards; and

WHEREAS, DOB states that despite Appellant’s discussion of how the Monroe court might analyze the facts in the appeals under a “balancing of public interests analysis,” court precedent more recent than Monroe has looked to the language of § 1266(8) to determine local law applicability; and

WHEREAS, specifically, in the case of Penny Port, decided 11 years after Monroe, the court did not use a balancing test to determine whether the steak house lessee of MTA was subject to City smoking regulations; rather, it looked to the language of § 1266(8) and ruled:

there is no reason why the inquiry as to whether a restaurant or other commercial enterprise serves a purpose “incidental to transportation upon railroad facilities” should require an examination

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into the nature of the exemption sought. The question can be answered solely by evaluating the establishment's integration into the railroad facility station and use by its passengers; and

WHEREAS, DOB states that the Appellant argues that the Penny Port court "did not apply the balancing test because it found express preemption in Section 1266(8);" however, this assertion is baseless because such reasoning was never stated in the Penny Port decision, neither did that court ever cite Monroe; and

WHEREAS, rather, DOB finds that following Penny Port's lead, the Board must look to PAL § 1266(8)'s terms and find that the Signs are "devoted to purposes other than transportation or transit purposes" and are thus subject to local regulation; DOB states that this interpretation of PAL § 1266(8) is supported by influential authorities; and

WHEREAS, DOB states that even if the Monroe balancing test were applied, DOB's authority to regulate the MTA Signs would be upheld; and

WHEREAS, DOB also finds that PAL § 1266(8) would be rendered meaningless if anything that generated revenue for MTA would be considered a transportation purpose, leaving MTA immune from any kind of revenue-generating activity no matter how unrelated to transportation purposes; and

WHEREAS, DOB rejects the Appellant's interpretation of § 1266(8) as broad by distinguishing NYC Transit Auth. in which the NYCTA and other authorities claimed that a building used by the authorities was completely exempt from taxation under PAL § 1275 even though 1.9 percent of the building's square footage was leased to "non-affiliated commercial enterprises;" and

WHEREAS, first, DOB notes as an initial matter, NYC Transit Auth., like Grand Central, does not involve PAL § 1266(8), and this statutory difference alone renders this case inapposite, just like Grand Central and, secondly, a critical requirement of the taxation exemption in NYC Transit Auth. is that "the major portion of the Building [must be] used by the Public Authorities themselves," which 98.1 percent of the building at issue in that case was; and

WHEREAS, DOB finds that, in contrast, the Signs are purely for commercial rather than transportation purposes and that NYC Transit Auth.'s decision was also influenced by the fact that "the subtenants provide services for the Authorities and their employees" (*id.*), something that the Signs do not do for MTA employees; and

WHEREAS, DOB also distinguishes Bush Terminal and Dorset which the Appellant cites for the proposition that "developments are immune from local zoning regulations even if such developments are unrelated to governmental purposes other than production of revenues;" and

WHEREAS, DOB finds that aside from the fact that Bush deals with statutes wholly separate from those at issue in the instant appeal, the Appellant ignores the Bush court's statement that the Port Authority's power to construct a terminal that has incidental storage space "might be transcended if, under cover of that power, the Port Authority

assumed to construct an office or loft building intended primarily for revenue and only incidentally for terminal purposes" (*id.* at 316); and

WHEREAS, further, DOB notes that the Bush court went on to say "[p]roperty used primarily to obtain revenue or profit is not held for a public use and is not ordinarily immune from taxation" (*id.* at 321); and

WHEREAS, DOB notes that the MTA Signs are exclusively for revenue and not at all related to transportation; and

WHEREAS, DOB states that while the Appellant cites Crown Commc'n New York, Inc. v. Dep't of Transp. of State, 4 N.Y.3d 159, 168 N.E.2d 934 (2005), the Crown court specifically distinguished the proposed construction in its case (a telecommunications tower that would benefit public safety and environmental goals) with the case of Little Joseph Realty, Inc. v. Town of Babylon, 41 N.Y.2d 738 (1977), which "merely involve[d] the lease of government owned space to a private firm for the exclusive purpose of making a profit" (Crown, at 168); and

WHEREAS, thus, DOB finds that it was critical to the Crown court that the proposed land use serve a public interest that was not solely rental income from private businesses wholly unrelated to any further public purpose, but rather, that it was "an integral component of the State's plan of promoting public safety and reducing the proliferation of cellular towers, clearly salient public purposes;" and

WHEREAS, DOB finds that the facts of the instant appeal are also unlike facts that courts have found to pass the Monroe balancing analysis because such cases involved proposed land uses that had significant and direct benefit to the public such as Crown (construction of telecommunications antennae would promote "the State's public safety and environmental goals"); Monroe (finding that the expansion of an international airport serves "interstate and intrastate commerce goals [and] is in both the local and greater public interest"); and Town of Hempstead v. State of New York, 42 A.D.3d 527, 529-30 (2d Dep't 2007) (finding that constructing wireless communication equipment to close a "serious gap in wireless communication coverage" outweighed residents' complaints about the tower's visibility); and

3. There is a Distinction between MTA's and NYCTA's Authority as Related to Advertising Signs

WHEREAS, as to MTA's authority, DOB states that the Appellant erroneously argues that "if the legislature had intended the legislative grant of power to MTA regarding signage to be less than that granted to NYCTA, subsequent court decisions or advisory opinions ... (i.e., Witherspoon and 1982 Opinion) would have cited or referred to such ... to support the[ir] conclusions" however, there is no indication that the issue of NYCTA authority arose during Witherspoon and the Attorney General's consideration of these issues, nor is it relevant to their determination of 1266(8)'s application; and

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WHEREAS, DOB finds that the Appellant's argument that the general description of MTA's authority contained in PAL § 1265(14) (*General powers of the authority*), which states that MTA may "do all things necessary, convenient or desirable to carry out its purposes and for the exercise of the powers granted in this title," conveys to MTA local exemption for the Signs because NYCTA, a subsidiary of MTA with a specific local law exemption for advertising signs, has an analogous general powers section that omits the word "desirable" from the description of NYCTA's powers, is unsupported; and

WHEREAS, DOB states that there is no indication in any relevant authority that the addition of the word "desirable" in MTA's enabling statute grants it a local law exemption for the Signs or that, as the Appellant argues, its exempt activities "do not have to have any real relationship to its purpose;" and

WHEREAS, thus, DOB states that the *General Powers* section's use of the general term "desirable" should not be read to overrule the specific limit on local law exemption provided in PAL § 1266(8)'s use of the term "transportation or transit purposes;" and

WHEREAS, lastly, DOB states that given the above-detailed interpretive history of MTA signs exemption by relevant authorities, Appellant's arguments that MTA, as the "parent of NYCTA," has a *greater* right to advertising signs than the NYCTA must fail; in contrast, State statutes specifically give that authority to NYCTA but not to MTA; and

WHEREAS, DOB concludes that NYCTA has been specifically delegated the authority to have advertising signs and MTA has not and that questions about the wisdom or consistency of these enactments are beyond the scope of this appeal; and

WHEREAS, DOB states that it is also not significant under the Monroe balancing test that potentially inconsistent local signage regulations may be imposed upon MTA in different jurisdictions and finds no support for the Appellant's position that "the Legislature could not and would not have intended for MTA to be subject to a multitude of different local signage regulations;" and

B. Supplemental Arguments Regarding DOB's Authority

1. The Zoning Resolution Governs the Use and Development of the Railroad Properties at Issue

WHEREAS, DOB states that Appellant's assertion that NYC Charter § 643 precludes DOB enforcement over all of the Signs, including MTA, Amtrak, and CSX, is incorrect; and

WHEREAS, DOB notes that NYC Charter § 643 says, in relevant part, "the jurisdiction of the department ... shall not extend to ... such other structures used in conjunction with or in furtherance of waterfront commerce or navigation or to bridges, tunnels or subways or structures appurtenant thereto;" and

WHEREAS, DOB asserts that railroads are distinct

from subways, and if the legislature wanted to exclude railroads from DOB jurisdiction, it would have mentioned railroads along with subways in this section; and

WHEREAS, DOB asserts that railroads are not excluded from DOB jurisdiction based upon this Charter provision merely because subways are functionally similar to other kinds of railroads in some respects; and

WHEREAS, as to Appellant's assertion about railroad overpasses being the equivalent to bridges, DOB's records indicate that none of the Signs are located on bridges; if Appellant brings additional evidence that the Signs are, in fact, on bridges, DOB will review those facts; and

WHEREAS, DOB states that the Zoning Resolution governs the use of railroad properties as long as the Signs are located within a lot of record that existed on December 15, 1961, and there is no subsequent development that relied on the lot being merged into a larger zoning lot, or subdivided into smaller zoning lots, then the Signs are located within a zoning lot and subject to zoning, regardless of whether they are located on streets or railroad rights-of-way; and

WHEREAS, DOB finds that the Appellant erroneously argues that the Zoning Resolution does not govern the use or development of railroad properties because "[r]ailroads are similar to streets and sidewalks," and streets are not subject to zoning; and

WHEREAS, DOB notes that the Appellant's submissions list blocks and lots of record for all Signs on MTA property except 40072502 (BSA Cal. No. 118-12-A) and DOB requires more information on its precise location to determine whether it is located within a lot of record existing on December 15, 1961 or otherwise within an un-subdivided tract of land that also is subject to zoning; and

2. DOB has Authority to Correct its Interpretation of the Laws at Issue

WHEREAS, DOB states that the Appellant argues that its actions must be overturned as an unreasonable departure from prior agency practices because "sudden and unexplained changes in an agency's interpretation of laws ... are presumed to be arbitrary and capricious;" and

WHEREAS, DOB states that it previously held the opinion that it did not have jurisdiction over commercial advertising signs on railroad property (see, e.g., 1980 memorandum from Buildings Deputy Commissioner, Irving E. Minkin, P.E.); and

WHEREAS, however, after conducting further legal research during the course of the litigation in Clear Channel Outdoor, Inc. v. City of New York, 608 F.Supp. 2d 477 (S.D.N.Y. 2009) aff'd, 594 F.3d 94 (2d Cir. 2010), DOB states that it came to the conclusion that revenue generated from advertising signs does not, by itself, have the requisite connection to transportation necessary to support a local law exemption for the Signs; and

WHEREAS, DOB states that it has explained its change in position on railroad zoning jurisdiction both before and during the pendency of these appeals, and the change in interpretation is well founded in case law and

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statutory language including, Charles A. Field Delivery, which expressly supports administrative agencies' right to correct erroneous interpretations of law; and

WHEREAS, DOB states that, as required by Charles A. Field Delivery, it has given explicit and extensive treatment to the issue of its change in position on railroad jurisdiction during the proceedings of Clear Channel; in 2008, in connection with the litigation in Clear Channel, Phyllis Arnold, then the Deputy Commissioner for Legal Affairs and the Chief Code Counsel, wrote in an affirmation that "during my time as DOB's General Counsel I made the legal determination that, for the most part, DOB did not have the authority to enforce the arterial highway sign regulations against [MTA, Amtrak, and other governmental entities]" and that a 1980 memorandum by then DOB Deputy Commissioner Irving Minkin was likely "why historically DOB did not take enforcement against these entities;" and

WHEREAS, DOB notes that Ms. Arnold further wrote that she became aware, only after making a legal determination that DOB lacked authority to enforce the Zoning Resolution against MTA and Amtrak, that "the New York State Attorney General issued an opinion (the "Attorney General's Opinion") stating that the City did have the jurisdiction to require the removal of signs on railroad and Transit Authority property that had been erected in violation of the City's zoning laws" she also "c[a]me to the conclusion that revenue generated from advertising signs is not by itself transportation-related and thus [] DOB has the authority to enforce the arterial highway sign regulations against advertising signs ... owned or controlled by the MTA [as well as Port Authority and Amtrak];" and

3. DOB's Correction of Its Interpretation does not Require a Formal Rule

WHEREAS, DOB states that Appellant's argument that its change in the legal interpretations at issue is "tantamount to issuance of a new regulatory rule without the notice and comment procedures required under the CAPA" is unavailing as an interpretation of federal and State law in the application of the Zoning Resolution does not itself, require formal rule making; rather, "DOB [is] responsible for administering and enforcing the zoning resolution, and [its] interpretation must therefore be given great weight and judicial deference." Appelbaum v. Deutsch, 66 N.Y.2d 975 (1985); and

WHEREAS, secondly, DOB asserts that administrative agencies are "free, like courts, to correct a prior erroneous interpretation of the law," (Appelbaum, at 519) and DOB's change in interpretation merely corrects its prior incorrect interpretation (which was, itself, *not* a rule) in light of case law, influential opinions by State authorities, and statutory language; and

4. DOB Does Not Take a Position as to the Potential Legal Non-Conforming Status of the Signs

WHEREAS, DOB states that the Appellant has not pursued a claim that the Signs meet the requirements for a

legal non-conforming use that may continue pursuant to ZR §§ 52-11 and 52-61 and, accordingly, such claims are not addressed within the subject appeal; and

5. DOB's Enforcement Against the Signs is not a Regulatory Taking

WHEREAS, DOB states that the Appellant has failed to prove its claim that DOB's interpretation is a regulatory taking because DOB's jurisdictional position in these matters stems from the language of the statutes granting and limiting the rights and immunities of MTA and Amtrak; and

WHEREAS, DOB states that its correct interpretation of these statutes allowing for enforcement based upon its interpretation cannot be considered a taking since MTA and Amtrak would not be entitled to the rights and immunities allegedly being taken; and

WHEREAS, however, DOB states that if these statutes create an unconstitutional takings action, any such claim must necessarily be directed against the state and federal statutes themselves, rather than DOB's enforcement of the statutes and such a claim is outside of the Board's jurisdiction; and

CONCLUSION

WHEREAS, the Board upholds DOB's rejection of the Signs' registration based on the following primary conclusions: (1) revenue generation alone is not a transportation purpose within the meaning of PAL § 1266(8); (2) the MTA and NYCTA may have different rights related to sign regulations; and (3) DOB is not estopped from correcting its practice of allowing the Signs; and

WHEREAS, first, the Board concludes that the generation of revenue is not a transportation or transit-related purpose as required by PAL § 1266(8); the Board finds that the Appellant has not provided support for its claim that the generation of revenue, without any accompanying service, is a transportation or transit-related purpose; and

WHEREAS, the Board finds that Grand Central and Penny Port recognize certain active commercial use located within Grand Central Station as serving a transportation purpose and that those enterprises are distinct from advertising signs, which are visible objects that do not offer any interaction or service to railroad passengers; and

WHEREAS, further, the Board notes that the court in Penny Port was careful not to give unlimited exemption over the entire station, in recognition that there may be some commercial enterprises that are not exempt; and

WHEREAS, the Board agrees with DOB that the same or similar terms may have different meaning in different contexts and therefore is not persuaded by the Appellant's assertion that transportation purpose means the same thing from a taxation versus a zoning perspective or that case law that analyzes provisions related to taxation is binding on case law that analyzes a use regulation; and

WHEREAS, the Board agrees with DOB that the definition of "railroad facility" (PAL § 1261(13)) does not inform the meaning of "transportation or transit purpose"

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(PAL § 1266(8)) because the terms are starkly dissimilar in context and purpose and the Appellant erroneously conflates them in order to give broader meaning to transportation purpose, a connection the courts have not made; and

WHEREAS, the Board is not persuaded by the Appellant's assertions that the mere physical integration of the signs into the railroad facility reflects a transportation purpose as the courts have identified the actual use as a key factor in the transportation purpose analysis, rather than co-location or control; and

WHEREAS, similarly, the Board finds that the Appellant's assertion that the signs are for the benefit of passengers is very strained; the Board notes that the signs are for advertising and not for informational purposes and that many of the signs may not even be visible to train passengers as they are directed to the arterials; and

WHEREAS, the Board agrees with DOB that Witherspoon has not been overruled and notes that not even the Appellant asserts that Witherspoon has been explicitly overruled by Monroe or any other case; and

WHEREAS, the Board agrees with DOB that the Monroe balancing test is not necessary because the statute is clear that there is not preemption for non-transportation purposes, but that if the criteria were analyzed, it supports DOB's conclusions; and

WHEREAS, accordingly, the Board agrees with DOB that Witherspoon is the only case directly on point and it has not been overruled so, at the very least, is persuasive authority; and

WHEREAS, however, the Board concludes that even if Witherspoon were ignored, the Board does not find a basis for preemption, a conclusion informed by the statutory language and Penny Port and Grand Central; and

WHEREAS, specifically, the courts Penny Port and Grand Central note that revenue generation is incidental and the transportation purpose is the actual use (i.e. incidental commercial enterprises integrated into the station) and that the Appellant failed to show how the Signs are integrated or how they serve commuters; and

WHEREAS, the Board is not persuaded by the Appellant's assertion that because the MTA controls the NYCTA, it has broader power in all contexts; the Board finds that the power dynamic between a parent and subsidiary may vary depending on the entities and the weight given to the different entities can be different in different contexts; and

WHEREAS, the Board notes that NYCTA has explicit language allowing signs to be exempt and that the MTA has no such provision; and

WHEREAS, the Board does not find that these proceedings are the appropriate forum to question the wisdom of and establish the potentially intricate relationship between the NYCTA and the MTA; and

WHEREAS, accordingly, in the absence of explicit authority for MTA to have the ability to install advertising contrary to zoning regulations, the Board concludes that NYCTA and MTA have different rights; and

WHEREAS, the Board does not find that the fact that MTA is authorized to do all things "necessary, convenient or desirable" (PAL § 1265(14)) and NYCTA is authorized only to do all things "necessary or convenient" (PAL § 1204(17)) is persuasive that MTA has broader authority in the context of signs; and

WHEREAS, the Board finds that the Appellant failed to provide any legislative history to support its claim regarding MTA's absolute power; and

WHEREAS, the Board supports DOB's position that it erroneously exempted the Signs from zoning regulations and now seeks to correct its error for the reasons explained in Clear Channel; the Board finds that there is no support for the Appellant's claim that the right for the Signs continues because there was a longstanding arrangement for DOB not to enforce against the Signs, as DOB does not have the authority to make an arrangement contrary to zoning regulations; and

WHEREAS, the Board is not persuaded by the Appellant's position that no deference should be given to DOB's position since it was first articulated in the course of litigation; the Board finds that it is not relevant when DOB first articulated its position as long as that is the position it currently defends and substantiates; and

WHEREAS, the Board agrees with DOB that, as here, a correction of an erroneous interpretation is not within the scope of a rule, subject to CAPA requirements; and

WHEREAS, the Board disagrees with the Appellant that the application of zoning regulations constitutes a taking; the Board notes that the Appellant has the opportunity to establish the legality of its non-conforming Signs pursuant to ZR §§ 52-11 and 52-61, and maintain the Signs that meet those commonly-applied and upheld standards; and

WHEREAS, the Board notes that the City's right to eliminate non-conforming uses through zoning has been repeatedly upheld by the courts; specifically, the Board notes that the Court of Appeals has held that, "[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination[.]" and "municipalities may adopt measures regulating nonconforming uses and may, in a reasonable fashion, eliminate them." 550 Halstead Corp. v. Zoning Bd. Of Appeals, 1 N.Y.3d 561, 562 (2003) and that DOB's recent enforcement furthers that goal in line with what zoning regulations contemplate; and

WHEREAS, therefore, the Board finds that DOB's enforcement against the Signs is warranted, and as such, DOB properly rejected the Appellants' registration of the Signs.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determinations of the Department of Buildings, dated March 26, 2012 and May 10, 2012, is hereby denied.

Adopted by the Board of Standards and Appeals, January 29, 2013.

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119-12-A thru 124-12-A, 127-12-A, 134-12-A, 135-12-A, 180-12-A, 273-12-A, 274-12-A

APPLICANT – Stroock & Stroock & Lavan, LLP, for CBS Outdoor Inc., lessee.

OWNER OF PREMISES – CSX

SUBJECT – Application April 25, 2012, June 11, 2012 – Appeal challenging Department of Buildings’ determination that multiple signs located on railroad properties are subject to the NYC Zoning Resolution.

PREMISES AFFECTED –

QUEENS

Brooklyn Queens Expressway and 31st Street (Block 1137, Lot 22)

Brooklyn Queens Expressway and 32nd Avenue (Block 1137, Lot 22)

Brooklyn Queens Expressway and 34th Avenue (Block 1255, Lot 1)

Brooklyn Queens Expressway and Northern Boulevard (Block 1163, Lot 1)

Long Island Expressway and 74th Street (Block 2539, Lot 502)

BRONX

Major Deegan Expressway and South of Van Cortland (Block 3269, Lot 70)

Major Deegan Expressway at 167th Street (Block 2539, Lot 502)

COMMUNITY BOARD #1/2/5Q and 4/8BX

ACTION OF THE BOARD – Appeal Denied.

THE VOTE TO GRANT –

Affirmative:0

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

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to 12 Notice of Sign Registration Rejection letters from the Bronx and Queens Borough Commissioners of the Department of Buildings (“DOB”), dated March 26, 2012, May 10, 2012, and August 8, 2012, denying registration for signs at the subject sites (the “Final Determination”), which read, in pertinent part:

The Department of Buildings is in receipt of additional documentation submitted in response to the Deficiency Letter from the Signs Enforcement Unit and in connection with the application for registration of the above-referenced sign. Unfortunately, we find this documentation inadequate to support the registration of the sign and, as such, the sign is rejected from registration. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

WHEREAS a public hearing was held on this application on October 17, 2012, after due notice by publication in *The City Record*, with a continued hearing on December 11, 2012, and then to decision on January 29, 2013; and

WHEREAS, the subject appeal concerns 12 signs located on property owned by CSX, within R4, R5, R7-1,

M1-1, and M3-1 zoning districts (the “Signs”); and

WHEREAS, this appeal is part of a larger body of appeals brought by CBS, Lamar Advertising and Clear Channel, all outdoor advertising sign companies that are subject to registration requirements under Local Law 51 of 2005; and

WHEREAS, the Board notes that under Local Law 31 of 2005, the New York City Council enacted certain amendments to existing regulations governing outdoor advertising signs as a means for DOB to enforce 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 (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 one-half acre (5,000 m) or more; and

WHEREAS, pursuant to the requirements of Article 502 and Rule 49 with respect to signs within 900 feet of arterial highways, each of the Appellants submitted an inventory of outdoor signs under its control and completed a Sign Registration Application for each sign and an OAC3 Outdoor Advertising Company Sign Profile; and

WHEREAS, DOB, by letters, dated March 26, 2012 and May 10, 2012 issued the determinations related to the Signs within CBS’ inventory on CSX property, which form the basis of the appeal; and

WHEREAS, at the consent of the three Appellants – one representing signs operated by CBS, one representing signs operated by Clear Channel, and one representing signs operated by Lamar Advertising, the Board heard and reviewed a total of 38 appeal applications (for 38 permits and 38 rejection letters) on the same hearing calendar; on January 29, 2013, the Board rendered a decision related to the applicability of the Zoning Resolution on Metropolitan Transportation Authority (MTA) properties (BSA Cal. Nos. 117-12-A et al) (the “MTA Resolution”), Amtrak properties (BSA Cal. Nos. 130-12-A et al), and property formerly controlled by the Department of Ports and Trade (BSA Cal. Nos. 183-12-A through 185-12-A); and

WHEREAS, the companion decisions cover the 26 applications not addressed in this resolution which is solely for the 12 signs on CSX property; and

WHEREAS, only CBS has signs on the subject sites, so it is the only Appellant in the subject appeal associated with the rights of the Signs; and

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

WHEREAS, the Appeal arises from the Final Determinations for the Signs, for which DOB rejected Sign Registration based on the fact that the Signs do not comply with underlying zoning regulations and are not subject to any exemption; and

WHEREAS, in its initial submission, the Appellant

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asserted general claims about DOB's enforcement of the signs on railroad property, but in subsequent submissions only pursued its defense of signs on Amtrak and MTA property; and

WHEREAS, accordingly, DOB only defended its position in support of enforcing against signs on railroad property, generally; and

WHEREAS, the Appellant's general arguments against DOB's enforcement of signs on railroad property are "Supplemental Arguments" in the MTA Resolution and are reiterated here; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant asserts the following primary arguments in support of its position that DOB does not have the authority to enforce against the signs on CSX property: (1) zoning regulations do not apply on railroad properties; (2) DOB cannot reverse its position on enforcement without going through the rulemaking process; (3) many of the signs are legal non-conforming uses; and (4) enforcement against the signs constitutes a taking; and

1. The Zoning Resolution Does Not Govern the Use or Development of Railroad Properties

WHEREAS, the Appellant asserts that the City lacks jurisdiction over all railroad properties; and

WHEREAS, the Appellant asserts that the City has stated that the Zoning Resolution "does not govern the use or development of the City's streets and sidewalks," and therefore, signage on or over streets is deemed exempt; the Appellant asserts that railroads are similar to streets in that they serve a similar purpose – the movement of people and goods; and

WHEREAS, the Appellant states that the Zoning Resolution recognizes the similarity between streets and railroad property, as evidenced in the Zoning Resolution's definition of "block," which is defined as a "tract of land bounded by streets, public parks, railroad rights-of-way ..."; and

WHEREAS, the Appellant states that additionally, under the New York City Charter § 643(7), DOB lacks jurisdiction over "bridges, tunnels or subways or structures appurtenant thereto;" and

WHEREAS, the Appellant states that since railroads are functionally equivalent to subways and at least some of the Signs are located on railroad overpasses, a type of a bridge, under the City Charter, DOB's jurisdiction does not extend to railroad properties and to structures appurtenant to railroad properties, such as the Signs; and

WHEREAS, accordingly, the Appellant concludes that the Zoning Resolution and the City Charter preclude DOB from exercising jurisdiction over railroad properties; and

2. DOB's Determination was Arbitrary and Capricious

WHEREAS, the Appellant asserts that DOB's notices of enforcement reflect a sudden change in the agency's position which is presumed to be arbitrary and capricious; and

WHEREAS, the Appellant asserts that for more than 30 years, DOB has taken the position that the City's signage laws and regulations give it no jurisdiction over advertising signs on railroad rights of way and DOB's consistent interpretation of its authority under the zoning laws not to extend to railroad rights of way is well documented; and

WHEREAS, the Appellant states that under the unreasonable departure doctrine, sudden changes in a government agency's position are presumed to be unlawful, which follows "from the policy considerations embodied in administrative law" by which sudden and unexplained changes in an agency's interpretation of laws it is charged with administering are presumed to be arbitrary and capricious; and

WHEREAS, the Appellant states that in Matter of Charles A. Field Delivery Services, 66 N.Y.2d 516, 518 (1985), the Court of Appeals reversed a decision of the Unemployment Insurance Appeal Board because of an unexplained inconsistency with prior decisions of the Board; and

WHEREAS, the Appellant also cites to Richardson v. N.Y. City Dep't of Soc. Svcs., 88 N.Y.2d 35, 40 (1996) in which the Court of Appeals rejected an agency's change in its interpretation of governing statute and implementing regulation as "arbitrary and capricious" where the new interpretation was "diametrically opposite" to the agency's longstanding interpretation of that same provision of law, and where the change was not supported by a "reasoned explanation on the part of the agency;" and

WHEREAS, the Appellant states that the principle underlying these decisions that an unexplained change in an agency's longstanding interpretation of law is presumed improper protects the reasonable expectations of regulated persons and institutions; and

3. DOB Engaged in a Rule Making without the Notice and Comment Procedures Required under the City Administrative Procedure Act (CAPA)

WHEREAS, the Appellant states that even if DOB's change in its interpretation of the signage regulations is found to be lawful, such change in interpretation would still be unlawful as it violates CAPA; and

WHEREAS, specifically, the Appellant asserts that DOB's change in position regarding signs on railroad properties is tantamount to issuance of a new regulatory rule without the notice and comment procedures required under CAPA; and

WHEREAS, the Appellant states that such a change in regulatory requirements without following CAPA is unlawful; and

4. Many of the Signs are Legal Non-Conforming Uses

WHEREAS, the Appellant asserts that even if the Signs are not deemed to be exempt, many would qualify as legal non-conforming uses and, therefore, be permitted to continue; and

WHEREAS, the Appellant states that it has not

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presented a case to establish that the Signs are legal non-conforming uses, and that it no longer has much of the records and documentation that would establish the legal non-conforming uses, but that many of the signs would be deemed legal pursuant to ZR §§ 52-11 and 52-61; and

5. These Enforcement Actions Against the Signs Would Constitute a Regulatory Taking that Requires Just Compensation

WHEREAS, the Appellant asserts that DOB's actions would deprive CSX of any viable use of its property interest and amount to a regulatory taking, which is a governmental regulation of the uses of a property to so excessive a degree that the regulation effectively amounts to a de facto exercise of the government's eminent domain power; and

WHEREAS, the Appellant states that if DOB is affirmed and the Appellant is compelled to remove the Signs, the Appellant will be entitled to just compensation in the amount of the fair market value of the Signs' location usages under state and federal laws; and

DOB'S POSITION

WHEREAS, in support of its position that its enforcement is proper, DOB asserts that (1) the Zoning Resolution governs the use of the CSX properties; (2) DOB has the authority to correct its former erroneous position without going through a rulemaking; (3) the Appellant has not provided evidence to establish legal non-conforming use for any of the signs; and (4) enforcement against the signs does not constitute a regulatory taking; and

WHEREAS, DOB notes that the Appellant has not alleged that any State or Federal law exempts CSX, a private entity, from the City's jurisdiction and/or enforcement; and

1. The Zoning Resolution Governs the Use and Development of the Railroad Properties at Issue

WHEREAS, DOB states that Appellant's assertion that NYC Charter § 643 precludes DOB enforcement over all of the Signs, including MTA, Amtrak, and CSX, is incorrect; and

WHEREAS, DOB notes that NYC Charter § 643 says, in relevant part, "the jurisdiction of the department . . . shall not extend to . . . such other structures used in conjunction with or in furtherance of waterfront commerce or navigation or to bridges, tunnels or subways or structures appurtenant thereto;" and

WHEREAS, DOB asserts that railroads are distinct from subways, and if the legislature wanted to exclude railroads from DOB jurisdiction, it would have mentioned railroads along with subways in this section; and

WHEREAS, DOB asserts that railroads are not excluded from DOB jurisdiction based upon this Charter provision merely because subways are functionally similar to other kinds of railroads in some respects; and

WHEREAS, as to Appellant's assertion about railroad overpasses being the equivalent to bridges, DOB's records indicate that none of the Signs are located on bridges; if Appellant brings additional evidence that the Signs are, in fact, on bridges, DOB will review those facts; and

WHEREAS, DOB states that the Zoning Resolution governs the use of railroad properties as long as the Signs are located within a lot of record that existed on December 15, 1961, and there is no subsequent development that relied on the lot being merged into a larger zoning lot, or subdivided into smaller zoning lots, then the Signs are located within a zoning lot and subject to zoning, regardless of whether they are located on streets or railroad rights-of-way; and

WHEREAS, DOB finds that the Appellant erroneously argues that the Zoning Resolution does not govern the use or development of railroad properties because "[r]ailroads are similar to streets and sidewalks," and streets are not subject to zoning; and

WHEREAS, DOB notes that the Appellant's submissions list blocks and lots of record for all Signs except for two, neither of which is on CSX property; and

2. DOB has Authority to Correct its Interpretation of the Laws at Issue

WHEREAS, DOB states that the Appellant argues that its enforcement must be overturned as an unreasonable departure from prior agency practices because "sudden and unexplained changes in an agency's interpretation of laws . . . are presumed to be arbitrary and capricious;" and

WHEREAS, DOB states that it previously held the opinion that it did not have jurisdiction over commercial advertising signs on railroad property (see, e.g., 1980 memorandum from Buildings Deputy Commissioner, Irving E. Minkin, P.E.); and

WHEREAS, however, after conducting further legal research during the course of the litigation in Clear Channel Outdoor, Inc. v. City of New York, 608 F.Supp. 2d 477 (S.D.N.Y. 2009) aff'd, 594 F.3d 94 (2d Cir. 2010), DOB states that it came to the conclusion that revenue generated from advertising signs does not, by itself, have the requisite connection to transportation necessary to support a local law exemption for the Signs; and

WHEREAS, DOB states that it has explained its change in position on railroad zoning jurisdiction both before and during the pendency of these appeals, and the change in interpretation is well founded in case law and statutory language including, Charles A. Field Delivery, which expressly supports administrative agencies' right to correct erroneous interpretations of law; and

WHEREAS, DOB states that, as required by Charles A. Field Delivery, it has given explicit and extensive treatment to the issue of its change in position on railroad jurisdiction during the proceedings of Clear Channel; in 2008, in connection with the litigation in Clear Channel, Phyllis Arnold, then the Deputy Commissioner for Legal Affairs and the Chief Code Counsel, wrote in an affirmation that "during my time as DOB's General Counsel I made the legal determination that, for the most part, DOB did not have the authority to enforce the arterial highway sign regulations against [MTA, Amtrak, and other governmental entities]" and that a 1980 memorandum by then DOB Deputy Commissioner Irving Minkin was likely "why

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historically DOB did not take enforcement against these entities;” and

WHEREAS, DOB notes that Ms. Arnold further wrote that she became aware, only after making a legal determination that DOB lacked authority to enforce the Zoning Resolution against MTA and Amtrak, that “the New York State Attorney General issued an opinion (the “Attorney General’s Opinion”) stating that the City did have the jurisdiction to require the removal of signs on railroad and Transit Authority property that had been erected in violation of the City’s zoning laws” she also “c[a]me to the conclusion that revenue generated from advertising signs is not by itself transportation-related and thus . . . DOB has the authority to enforce the arterial highway sign regulations against advertising signs . . . owned or controlled by the MTA [as well as Port Authority and Amtrak];” and

3. DOB’s Correction of Its Interpretation does not Require a Formal Rule

WHEREAS, DOB states that Appellant’s argument that its change in the legal interpretations at issue is “tantamount to issuance of a new regulatory rule without the notice and comment procedures required under the CAPA” is unavailing as an interpretation of federal and State law in the application of the Zoning Resolution does not itself, require formal rule making; rather, “DOB [is] responsible for administering and enforcing the zoning resolution, and [its] interpretation must therefore be given great weight and judicial deference.” Appelbaum v. Deutsch, 66 N.Y.2d 975 (1985); and

WHEREAS, secondly, DOB asserts that administrative agencies are “free, like courts, to correct a prior erroneous interpretation of the law,” (Appelbaum, at 519) and DOB’s change in interpretation merely corrects its prior incorrect interpretation (which was, itself, *not* a rule) in light of case law, influential opinions by State authorities, and statutory language; and

4. DOB Does Not Take a Position as to the Potential Legal Non-Conforming Status of the Signs

WHEREAS, DOB states that the Appellant has not pursued a claim that the Signs meet the requirements for a legal non-conforming use that may continue pursuant to ZR §§ 52-11 and 52-61 and, accordingly, such claims are not addressed within the subject appeal; and

5. DOB’s Enforcement Against the Signs is not a Regulatory Taking

WHEREAS, DOB states that the Appellant has failed to prove its claim that DOB’s interpretation is a regulatory taking; and

WHEREAS, DOB states that its correct interpretation of relevant statutes allowing for enforcement based upon its interpretation cannot be considered a taking since CSX would not be entitled to the rights allegedly being taken; and

WHEREAS, however, DOB states that if the zoning regulations create an unconstitutional takings action, any such claim must necessarily be directed against the relevant statutes themselves, rather than DOB’s enforcement of the

statutes and such a claim is outside of the Board’s jurisdiction; and

CONCLUSION

WHEREAS, the Board upholds DOB’s rejections of the Signs’ registration and agrees that the signs on CSX property are subject to zoning regulations and DOB is not estopped from correcting its practice of allowing the signs; and

WHEREAS, the Board notes that the Appellant did not pursue any arguments specific to CSX and did not identify any claims against CSX throughout the hearing process; and

WHEREAS, the Board notes that the Appellant did not make any claims related to Federal or State statute and preemption for the CSX sites; and

WHEREAS, the Board supports DOB’s position that it erroneously exempted the Signs from zoning regulations and now seeks to correct its error for the reasons explained in Clear Channel; the Board finds that there is no support for the Appellant’s claim that the right for the Signs continues because there was a longstanding arrangement for DOB not to enforce against the Signs, as DOB does not have the authority to make an arrangement contrary to zoning regulations; and

WHEREAS, the Board is not persuaded by the Appellant’s position that no deference should be given to DOB’s position since it was first articulated in the course of litigation; the Board finds that it is not relevant when DOB first articulated its position as long as that is the position it currently defends and substantiates; and

WHEREAS, the Board notes that the Appellant has not asserted that DOB had a practice of non-enforcement against signs on CSX properties that was similar to its practice of non-enforcement against signs on MTA and Amtrak properties; and

WHEREAS, additionally, the Board notes that DOB did not acknowledge CSX properties specifically in the Clear Channel litigation; and

WHEREAS, the Board agrees with DOB that, as here, a correction of an erroneous interpretation is not within the scope of a rule, subject to CAPA requirements; and

WHEREAS, the Board disagrees with the Appellant that the application of zoning regulations constitutes a taking; the Board notes that the Appellant has the opportunity to establish the legality of its non-conforming Signs pursuant to ZR §§ 52-11 and 52-61, and maintain the Signs that meet those commonly-applied and upheld standards; and

WHEREAS, however, the Board agrees with DOB that any taking claim is more appropriate for another forum; and

WHEREAS, the Board notes that the City’s right to eliminate non-conforming uses through zoning has been repeatedly upheld by the courts; specifically, the Board notes that the Court of Appeals has held that, “[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination[,]” and “municipalities may adopt measures regulating nonconforming uses and may, in a

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reasonable fashion, eliminate them.” 550 Halstead Corp. v. Zoning Bd. Of Appeals, 1 N.Y.3d 561, 562 (2003) and that DOB’s recent enforcement furthers that goal in line with what zoning regulations contemplate; and

WHEREAS, therefore, the Board finds that DOB’s enforcement against the Signs is warranted, and as such, DOB properly rejected the Appellants’ registration of the Signs.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determinations of the Department of Buildings, dated March 26, 2012, May 10, 2012, and August 8, 2012, is hereby denied.

Adopted by the Board of Standards and Appeals, January 29, 2013.

130-12-A and 171-12-A through 179-12-A

APPLICANT – Stroock & Stroock & Lavan, LLP, for CBS Outdoor Inc., lessee.

OWNER OF PREMISES – Amtrak

SUBJECT – Application April 25, 2012, June 11, 2012 – Appeal challenging Department of Buildings’ determination that multiple signs located on railroad properties are subject to the NYC Zoning Resolution.

PREMISES AFFECTED –

QUEENS

Skillman Avenue between 28th and 29th Streets
(Block 72, Lot 250)

BRONX

Cross Bronx Expressway/east of Sheridan Expressway

Cross Bronx Expressway and the Bronx River
(Block 3905, Lot 1)

Cross Bronx Expressway/east of Sheridan Expressway and the Bronx River (Block 3904, Lot 1)

I-95 and Hutchinson Parkway (Block 4411, Lot 1)

Bruckner Boulevard and Hunts Point Avenue
(Block 2734, Lot 30)

Bruckner Expressway/north of and 156th Street
(Block 2730, Lot 101)

COMMUNITY BOARD #2Q and 2/6/9/11BX

ACTION OF THE BOARD – Appeal Granted.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a total of ten Notice of Sign Registration Rejection letters from the Queens and Bronx Borough Commissioners of the Department of Buildings (“DOB”), dated March 26, 2012 and May 10, 2012, denying registration for signs at the subject sites (the “Final Determination”), which reads, in pertinent part:

The Department of Buildings is in receipt of additional documentation submitted in response to the Deficiency Letter from the Signs Enforcement

Unit and in connection with the application for registration of the above-referenced sign. Unfortunately, we find this documentation inadequate to support the registration of the sign and, as such, the sign is rejected from registration. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

WHEREAS a public hearing was held on this application on October 17, 2012, after due notice by publication in *The City Record*, with a continued hearing on December 11, 2012, and then to decision on January 29, 2013; and

WHEREAS, the subject appeal concerns ten signs located on property owned by Amtrak, within C8-1, M1-2 (HP), M3-1, R3-2, and R7-1 zoning districts (the “Signs”); and

WHEREAS, this appeal is part of a larger body of appeals brought by CBS, Lamar Advertising and Clear Channel, all outdoor advertising sign companies that are subject to registration requirements under Local Law 51 of 2005; and

WHEREAS, the Board notes that under Local Law 31 of 2005, the New York City Council enacted certain amendments to existing regulations governing outdoor advertising signs as a means for DOB to enforce 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 (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 one-half acre (5,000 m) or more; and

WHEREAS, pursuant to the requirements of Article 502 and Rule 49 with respect to signs within 900 feet of arterial highways, each of the Appellants submitted an inventory of outdoor signs under its control and completed a Sign Registration Application for each sign and an OAC3 Outdoor Advertising Company Sign Profile; and

WHEREAS, DOB, by letters, dated March 26, 2012 and May 10, 2012 issued the determinations related to the Signs within CBS’ inventory on Amtrak property, which form the basis of the appeal; and

WHEREAS, the Appeal arises from the Final Determinations for ten signs, for which DOB rejected Sign Registration based on the fact that the Signs do not comply with underlying zoning regulations and are not subject to any exemption; and

WHEREAS, at the consent of the three Appellants – one representing signs operated by CBS, one representing signs operated by Clear Channel, and one representing signs operated by Lamar Advertising, the Board heard and reviewed a total of 38 appeal applications (for 38 permits and 38 rejection letters) on the same hearing calendar; on January 29, 2013, the Board rendered a decision related to the applicability of the Zoning Resolution on Metropolitan Transportation Authority (MTA) properties (BSA Cal. Nos. 117-12-A et al) (the “MTA Resolution”), CSX properties (BSA Cal. Nos. 119-12-A et al), and property formerly

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controlled by the Department of Ports and Trade (BSA Cal. Nos. 183-12-A through 185-12-A); and

WHEREAS, the companion decisions cover the 28 applications not addressed in this resolution which is solely for the ten signs on Amtrak property; and

WHEREAS, only CBS represents sites on Amtrak property, so it is the only Appellant in the subject appeal associated with Amtrak's rights; and

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

THE APPELLANT'S POSITION

WHEREAS, the Appellant asserts the following primary arguments: (1) Amtrak is exempt from the City's signage regulations, pursuant to 49 U.S.C. § 24301(g) because such regulations would affect its routes, rates, and services; and (2) Amtrak is exempt from the City's signage regulations, pursuant to 49 U.S.C. § 24902(j) because the Signs are an improvement within the Northeast Corridor Improvement Project (NCIP) and Amtrak has received federal subsidies during relevant periods; and

I. The Signs are Exempt from Local Zoning Pursuant to 49 U.S.C. § 24301(g)

WHEREAS, 49 U.S.C. § 24301(g) *Amtrak/Status and applicable laws*) provides, in pertinent part:

- (g) Nonapplication of rate, route, and service laws.—A state or other law related to rates, routes, or services does not apply to Amtrak in connection with rail passenger transportation; and

WHEREAS, the Appellant asserts that Amtrak is exempt from the City's signage regulation as such regulations affect rates, routes, and services; and

WHEREAS, the Appellant asserts that every dollar of revenue lost from the Signs would be irreversible and irreplaceable to Amtrak, and such loss of revenue would have substantial, adverse impacts on Amtrak's rates, routes and services in that Amtrak would be forced to, among others things, (i) increase its rates, (ii) reduce the routes served, (iii) reduce spending on maintenance and repairs, and (iv) reduce railroad transportation and related services; and

WHEREAS, in support of this claim, the Appellant submitted an affidavit from the Amtrak Project Director in charge of Amtrak third-party advertising, which states that "[w]ithout the revenue Amtrak generates from its outdoor advertising, Amtrak likely would require an additional \$4.2 million in government funding annually;" and

WHEREAS, the Appellant also cites to Nat'l Railroad Passenger Corp. v. Caln Township, CIV.A. 08-5398, 2010 WL 92518 (E.D. Pa. Jan. 8, 2010), in which the District Court analyzes 49 U.S.C. § 24301(g) and § 24902(j) in the context of a Pennsylvania township weed control ordinance applied to land "adjacent to the railroad roadbed" on part of an Amtrak route; the court concluded that Amtrak was exempt from the weed control ordinance pursuant to both sections; and

WHEREAS, the Appellant notes that the court in Caln stated that even a local regulation that indirectly impacts Amtrak's routes cannot be enforced against Amtrak under 49 U.S.C. § 24301(g); and

WHEREAS, specifically, the Appellant notes that the

court in Caln considered whether a local weed ordinance was preempted under 49 U.S.C. 24301(g), which states, in relevant part, "[a] State or other law related to rates, routes, or service does not apply to Amtrak in connection with rail passenger transportation;" and

WHEREAS, the Appellant notes that the Caln court was guided by Supreme Court cases that interpreted different preemption statutes with similar language as § 24301(g), finding preemption where local laws had a "connection with or reference to a carrier's rates, routes or services" "even if its effect on rates, routes, or services was only indirect" but not where "the impact of the state law is too tenuous, remote, or peripheral to have pre-emptive effect" (id. at 3); and

WHEREAS, the Appellant finds Caln to be on point in that it concerned a local law that was deemed to relate to Amtrak's rates, routes, or services and was thus not enforceable, even if such effects are indirect, except where the effects are tenuous, remote, or peripheral; and

WHEREAS, the Appellant states that the "relate to" language means any law that has a "connection with or reference to" rates, routes, or services (Caln at 3, citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)); and

WHEREAS, the Appellant rebuts DOB's argument that the enforcement of the City's signage regulations against Amtrak would have only a very tenuous, remote and peripheral effect on rates, routes and services; and

WHEREAS, the Appellant asserts that in the subject case, under the broad interpretation given to this statute, the City's signage regulations negatively impact Amtrak's routes and services in that such regulation will reduce Amtrak's revenues and ultimately result in Amtrak's greater reliance on government subsidies and/or increases to Amtrak's fares; and

WHEREAS, the Appellant asserts that this impact is not "tenuous, remote or peripheral;" rather, Amtrak would be directly burdened with a reduction in revenues, significantly impacting Amtrak's operations and would be forced to increase its reliance and dependence on federal governmental subsidies, directly against Congress' intent and goals for Amtrak; and

WHEREAS, the Appellant contends that the City's attempt to regulate signage on Amtrak properties would directly contradict and contravene Congress' statutory directive for Amtrak to minimize its reliance on government subsidies through the use of its facilities and agreements with the private sector; and

WHEREAS, the Appellant asserts that there is no meaningful distinction between expenditures required to comply with local regulations that put a drain on resources and local regulations that prohibit revenue generation - both set Amtrak back to a position of further deficit; and

WHEREAS, the Appellant asserts that DOB's conclusion that the Appellant or Amtrak is unsure of the effects of the City's prohibition of advertising signs on Amtrak properties or that such effects are speculative is not reasonable and the City's signage regulations have a direct and significant effect on rates, routes and services; and

II. The Signs are Exempt from Local Zoning Pursuant to 49 U.S.C. § 24902(j)

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WHEREAS, 49 U.S.C. § 24902(j) (*Amtrak/Goals and Requirements/NCIP*) provides, in pertinent part:

- (j) Applicable procedures.—No State or local building, zoning, subdivision, or similar or related law . . . shall apply in connection with the construction, ownership, use, operation, financing, leasing, conveying . . . of (i) any improvement undertaken by or for the benefit of Amtrak as part of, or in furtherance of, the Northeast Corridor Improvement Project . . . or chapter 241, 243, or 247 of this title or (ii) any land . . . on which such improvement is located and adjoining, surrounding or any related land . . . This subsection shall not apply to any improvement or related land unless Amtrak receives a Federal operating subsidy in the fiscal year in which Amtrak commits to or initiates such improvement; and

WHEREAS, the Appellant asserts that the City's signage regulations cannot be enforced against Amtrak under 49 U.S.C. § 24902(j) as no State or local building, zoning, subdivision, or similar or related to law is to apply in connection with the "construction, ownership, use, operation, . . . leasing, conveying" of an improvement taken for the benefit of Amtrak and any land on which such improvement is located and adjoining, surrounding, and related land; and

WHEREAS, the Appellant notes that in order to satisfy § 24902(j)'s exemption, the Signs must satisfy two requirements of the provision: (1) they must be an improvement undertaken for the benefit of Amtrak, or land on which such improvement is located, in furtherance of the NCIP or other specified general Amtrak goals; and (2) Amtrak must receive a federal operating subsidy for the year in which Amtrak commits to or initiates such improvement; and

WHEREAS, the Appellant asserts that despite the plain language of this exemption statute, DOB would like the Board to agree that the "Signs cannot be considered an improvement for the benefit of NCIP because they have no direct bearing to NCIP's core transportation purpose;" and

WHEREAS, the Appellant asserts that DOB does not cite any authority that requires that a beneficial improvement have a direct bearing to Amtrak's core transportation purpose and that DOB ignores the fact that such laws do not apply to any land on which such an improvement is located and to any adjoining, surrounding, and related land; and

WHEREAS, the Appellant asserts that the Amtrak properties are clearly within the scope of § 24902(j) and contends that DOB mistakenly states and suggests that "train transportation" is the purpose, as Amtrak's actual purpose is to provide "efficient and effective" railroad transportation (49 U.S.C. § 24101(b)); and

WHEREAS, the Appellant states that under DOB's reading of § 24902(j), anything that does not have a direct bearing to Amtrak's core transportation purpose would be subject to the City's signage and other building or zoning regulations; and

WHEREAS, the Appellant asserts that § 24902(j) does not mention transportation purpose anywhere and only states

that the improvement be undertaken by or for the benefit of Amtrak as part of, or in furtherance of, NCIP or other sections of the U.S. rail program for passenger transportation, including those under Chapters 241, 243 and 247 of Title 49; and

WHEREAS, in support of the assertion that § 24902(j) has broad applicability, the Appellant notes that the cited Chapter 241 of Title 49 is a general section under Part C, Passenger Transportation, of the U.S. Rail Programs that includes, among other things, Amtrak's missions and goals; Chapter 243 is the Amtrak authorizing statute; and Chapter 247 relates to the Amtrak route system; and

WHEREAS, the Appellant asserts that the exemption under § 24902(j) is a broad one, as recognized by the court in Caln; and

WHEREAS, the Appellant notes that in Caln, the court held that the governing weed control ordinance was inapplicable to Amtrak properties under § 24902(j), which broadly covers not only land within the railroad roadbeds, but also covers surrounding or related land; and

WHEREAS, the Appellant asserts that the use of Amtrak railroad properties for signage is an improvement undertaken for the benefit of Amtrak as part of, and in furtherance of, the NCIP in that it provides revenues necessary for the NCIP; and

WHEREAS, the Appellant asserts that it is apparent that the improvement need not be undertaken pursuant to or have any nexus to NCIP, but that it be undertaken by or for the benefit of Amtrak pursuant to various federal passenger rail transportation programs, including, but not limited to, NCIP; and

WHEREAS, the Appellant states that DOB's narrow reading is contrary to the broad exemption provided by § 24902(j); and

WHEREAS, as to the subsidy, the Appellant represents that Amtrak received federal subsidies that satisfy the exemption requirement; and

WHEREAS, the Appellant asserts that Amtrak has never been profitable and has always relied on and received federal subsidies; and

WHEREAS, further, the Appellant asserts that the Signs on Amtrak properties were erected at various times in the past during which time the DOB has held such signs to be exempt from the City's signage regulations, thus the only relevant period for Amtrak's receipt of federal subsidies should be the year in which DOB arbitrarily changed its mind and started to claim that such signs are subject to its jurisdiction (*i.e.*, 2012); and

WHEREAS, in support of this assertion, the Appellant submitted a February 3, 2012 News Release by Amtrak, which reflects that the federal government appropriated \$466 million in federal operating subsidy in fiscal year 2012, and for fiscal year 2013, Amtrak requested \$450 million in federal operating support; and

WHEREAS, the Appellant asserts that Amtrak subsidy dollars are allocated on a project by project basis, rather than on a program by program basis, pursuant to an annual grant agreement; therefore, specific information relating to the actual allocation to or use of such funds pursuant to the NCIP is not readily available and extremely difficult to obtain but Amtrak informed the Appellant that a great

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percentage of the federal grant money is used or allocated to NCIP and is available on a piecemeal basis; and

WHEREAS, the Appellant asserts that for example, during the fiscal year 2011, as of September 30, 2011, Amtrak had spent 38 percent of approximately \$1.3 billion authorized under the American Recovery and Reinvestment Act of 2009 on NCIP and that similar allocations have been and are made every fiscal year; and

WHEREAS, the Appellant asserts that contrary to DOB's assertion, there is no requirement that the government subsidy be used for, dedicated to, allocated or otherwise have any relationship to the NCIP; instead, the Appellant asserts that what is required by the plain language of § 24902(j) is that Amtrak receive such subsidies; and

WHEREAS, the Appellant notes that it has provided clear evidence demonstrating that Amtrak has received government subsidies every year since its creation and that, therefore, the exemption applies; and

WHEREAS, as far as subsidies, the Appellant believes that (i) DOB should not require it to produce evidence that Amtrak received government subsidies for the last several decades, a period during which the DOB held Amtrak properties to be exempt from the City's signage regulations, and (ii) that because of such determination, evidence of such subsidies for such period are not relevant; however, the Appellant provided documentation from the Federal Railroad Administration and Amtrak's Annual Report for Fiscal Year 2011, which demonstrates that Amtrak has relied on and received federal subsidies since its creation; and

WHEREAS, the Appellant asserts that by creating the NCIP, Congress found that it is a "valuable resource of the United States," (49 U.S.C. § 24101(a)(7)) and gave Amtrak the goals to "minimize Government subsidies by encouraging State, regional and local governments and the private sector, separately or in combination, to share the cost of ... operating the facilities," and to "maximize the use of its resources, including the most cost-efficient use of ... facilities and real property" (49 U.S.C. §§ 24101(c)(2) and (c)(12)); and

WHEREAS, the Appellant asserts that Amtrak was encouraged and directed to "make agreements with the private sector and undertake initiatives ... designed to maximize its revenues and minimize Government subsidies" (49 U.S.C. § 24101(d)); and

WHEREAS, the Appellant asserts that in order to comply with such federal statutory directives, Amtrak adopted a business plan that extracts financial value and generates income from its real estate and other assets and that such revenues support Amtrak's core business and contribute towards the intercity passenger rail operations that serve New York City and other cities and reduce "Amtrak's reliance on government funding;" and

WHEREAS, the Appellant asserts that its business plan specifically directs the development of advertising on Amtrak properties; and

WHEREAS, the Appellant asserts that Amtrak has not historically had a self-supporting operation (*i.e.*, Amtrak has not been able to generate revenues sufficient to cover all of its costs and expenses), and all revenues generated through

third-party advertising on Amtrak properties go toward reducing Amtrak's reliance on government subsidies; and

WHEREAS, the Appellant notes that no other jurisdiction has ever attempted to "impose local controls over advertising on Amtrak property," and asserts that this is further evidence that any such attempt would be in contravention of Amtrak's federal authorizing statute; and

WHEREAS, the Appellant concludes that the application of the City's signage regulations to NCIP, a program that the Amtrak railways in the City are under, would be contrary to the NCIP statute and Congress' intent; and

DOB'S POSITION

WHEREAS, in support of its position that the Signs on Amtrak property are not exempt from zoning regulations, DOB asserts that: (1) 49 U.S.C. § 24301(g) does not exempt the Signs because Appellant has failed to establish that such regulation would affect its routes, rates, and services; and (2) 49 U.S.C. § 24902(j) does not exempt the Signs because they do not serve a transportation purpose and the Appellant has not established the requisite federal subsidies during relevant periods; and

- I. The Amtrak Signs are not Eligible for Exemption from Local Zoning under 49 U.S.C. § 24301(g)

WHEREAS, DOB distinguishes Caln from the subject case and finds that it does not support the Appellant's conclusion; and

WHEREAS, DOB states that following the noted interpretive background, the Caln court found that the vegetation ordinance under consideration was "related to Amtrak routes" and not "tenuous, remote or peripheral" because "Amtrak would be burdened with using its limited workforce and funds on continuously maintaining the property in Caln Township to ensure it is 'free from weed or plant growth in excess of [eight inches];' this drain on resources was deemed to have a significant impact on other operations on the Keystone Route" (*id.* at 4 (alteration in original)); and

WHEREAS, DOB notes that the potential for other vegetation ordinances with varying height limits being enforced against Amtrak all along its route was disfavored and thus the court found the ordinance at issue "preempted by 24301(g)" (*id.* at 4); and

WHEREAS, DOB finds that the Caln case is distinguishable from the subject case in that zoning enforcement against the Signs would have only a very tenuous, remote, and peripheral effect on rates, routes, and services, if any effect at all; and

WHEREAS, DOB states that the Appellant claims that "the City's signage regulations negatively impact Amtrak's routes and services in that such regulation will reduce Amtrak's revenues and ultimately result in Amtrak's greater reliance on government subsidies *and/or* increases to Amtrak's fares" but never describes what effect, if any, there will be on rates, routes, and services except to state what the loss of revenue would be; and

WHEREAS, DOB asserts that Appellant's use of "and/or" language in describing the regulations' alleged effect on rates implies that Appellant does not know if there will be *any* effect on rates, nor does Appellant describe what

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the effect, if any, will be; and

WHEREAS, DOB states that it is also unclear how this speculative effect on fares supports Appellant's claim of an effect on "routes and services;" on this subject, Appellant's affidavit from the Amtrak Project Director in charge of Amtrak third-party advertising states only that "[w]ithout the revenue Amtrak generates from its outdoor advertising, Amtrak likely would require an additional \$4.2 million in government funding annually;" and

WHEREAS, DOB notes that Amtrak's Project Director does not say that losing the advertising revenue would have any effect on routes, rates, or services at all; thus, in contrast to the facts of Caln, the claimed impact of the City's zoning on Amtrak's routes, rates and services in this appeal is tenuous, remote, and peripheral and Amtrak is not, therefore, exempt from local regulation by § 24301(g); and

- II. The Amtrak Signs are not eligible for Exemption from Local Zoning under 49 U.S.C. § 24902(j)

WHEREAS, DOB states that this claim of exemption fails for the same reason as Appellant's arguments in the MTA context (see BSA Cal. No. 117-12-A et al); the Signs cannot be considered an improvement for the benefit of the NCIP because they have no direct bearing to NCIP's core transportation purpose; and

WHEREAS, firstly, as stated in Appellants' submissions, the goal in chief of Amtrak and the NCIP's enabling statutes is to provide train transportation; DOB cites to the Appellant's statement that "Amtrak was created ... [to provide] passenger railway services throughout the country"; and

WHEREAS, although, as Appellant has documented, Amtrak also has goals to "minimize Government subsidies" and to "maximize the use of its resources" (49 U.S.C. § 2410(c)1(12)), these goals are only indirectly related to its goal in chief of providing railway transportation; and

WHEREAS, DOB asserts that as with Appellant's arguments in the MTA context, Appellant's arguments under § 24902(j) fail because the Signs have no direct bearing to its core purpose; as Witherspoon decided:

the use of the real property for the erection and maintenance of commercial advertising signs [] has no direct bearing to the governmental function for which [the authority] was created. On the contrary, such use is merely *incidental* to the goal in chief – the continued operation of the formerly tottering railroads. To that extent the use of the land for that purpose is proprietary. The immunity, insofar as applicable, is a limited one. 52 Misc.2d at 323 (emphasis in original); and

WHEREAS, DOB asserts that the Signs on Amtrak property are no more entitled to exemption from local regulation than the Signs on MTA property; and

WHEREAS, further, DOB states that the Caln court's examination of 49 U.S.C. § 24902(j) in the context of the local weeding ordinance shows that § 24902(j) does not exempt the Amtrak Signs from zoning in this appeal; and

WHEREAS, DOB states that in Caln, the court found that Amtrak was exempt from the local law under this section because Amtrak had shown that the rail lines in the

township were an improvement for the benefit of the NCIP (id. at 4) and once that fact was established, it follows from the statute that land surrounding the tracks covered by the weeding ordinance was also exempt; and

WHEREAS, DOB contrasts Caln with the subject case in which Appellant argues that "[t]he use of Amtrak railroad properties for signage is an improvement undertaken for the benefit of Amtrak as part of, and in furtherance of, the NCIP in that it provides revenues necessary for the NCIP"; and

WHEREAS, DOB asserts that the Appellant has failed to address a critical exception to this immunity section, which reads, in relevant part, "[t]his subsection shall not apply to any improvement or related land unless Amtrak receives a Federal operating subsidy in the fiscal year in which Amtrak commits to or initiates such improvement;" and

WHEREAS, DOB asserts that the Appellant has not documented that Amtrak received a federal operating subsidy in the fiscal year in which Amtrak committed to or initiated each of the Signs at issue, and thus it has not documented that the Amtrak Signs are eligible for § 24902(j)'s exemption even if the Signs were an NCIP improvement; and

WHEREAS, DOB asserts that exemption is not appropriate in the absence of evidence of a subsidy in the fiscal year in which Amtrak committed to or initiated the Sign "improvement;" and

WHEREAS, DOB asserts that although the Appellant contends that Amtrak received a federal operating subsidy in the fiscal year in which it committed to the Signs, the Appellant has not provided

clear evidence demonstrating that Amtrak has received government subsidies every year since its creation; and has still not documented when Amtrak committed to or initiated each of the Amtrak Signs (or if it did so at all); and

WHEREAS, DOB asserts that until the Appellant can establish that it overcomes the exception to § 24902(j)'s local law exemption, it is not entitled to such exemption; and

SUPPLEMENTAL ARGUMENTS

WHEREAS, the Board notes that the Appellant made several supplemental arguments in the context of the larger appeal, which are addressed in full, with DOB's responses, in the MTA Resolution; and

WHEREAS, the Board notes that it was not persuaded by any of the Appellant's supplemental arguments common to all of the appeals related to signs on railroad property and, thus, declines to address the arguments here; the MTA Resolution includes the complete discussion of the arguments and the Board adopts the same rejection of all of the Appellant's supplemental arguments; and

CONCLUSION

WHEREAS, based upon its review of the record, the Board disagrees with the Appellant that 49 U.S.C. § 24301(g) affords Amtrak exemption from the City's signage regulations but agrees with the Appellant that 49 U.S.C. § 24902(j) affords it exemption; and

WHEREAS, as to 49 U.S.C. § 24301(g), the Board is not persuaded that the City's sign regulations are the kind of regulations that affect rates, routes, and services; and

WHEREAS, the Board agrees with DOB that the Appellant has failed to establish a connection between the

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regulations and Amtrak's rates, routes, and services and does not find that, by the clear language, zoning is the kind of law contemplated by § 24301(g); and

WHEREAS, however, the Board agrees with the Appellant that signs on Amtrak properties are exempt from the sign regulations in the Zoning Resolution in accordance with 49 U.S.C. § 24902(j); and

WHEREAS, as to 49 U.S.C. § 24902(j), the Board notes that there are two requisite conditions for the Signs: (1) that they must be an improvement undertaken for the benefit of Amtrak, or land on which such improvement is located, in furtherance of the NCIP or other specified general Amtrak goals; and (2) Amtrak must receive a federal operating subsidy for the year in which Amtrak commits to or initiates such improvement; and

WHEREAS, as to the first, the Board agrees with the Appellant that the language is clear and that the Signs fall within the plain meaning of the broad term "improvement;" and

WHEREAS, as to the subsidy requirement, similarly, the Board finds that the language is clear and that it reflects simply Amtrak as a whole must have received a federal operating subsidy for the year in which it committed to or initiated the Signs; and

WHEREAS, the Board agrees with the Appellant that the meaning of subsidy also lacks specificity and accepts Appellant's evidence that Amtrak has received a subsidy for every year of its existence and, thus, would have received a subsidy for the year it committed to the Signs; and

WHEREAS, the Board disagrees with DOB's finding that § 24902(j) requires that the subsidy be clearly linked to the NCIP as § 24902(j) also allows for the improvement to be associated with Amtrak's broader goals for passenger transportation, in the alternate; and

WHEREAS, however, even if there were a requirement that the improvement and the subsidy be related to the NCIP, it is reasonable to conclude that the Signs on land that is part of Amtrak's Northeast Corridor system are improvements that benefit the NCIP and that they were committed to or initiated by subsidy dedicated to the NCIP, given Amtrak's history of receiving federal subsidies; and

WHEREAS, the Board agrees with the Appellant that Caln supports the conclusion that § 24902(j) exempts the subject Signs from the City's signage regulations; and

WHEREAS, the Board finds that DOB's invocation of concepts and terminology from the MTA cases are misplaced for the following reasons: (1) the language of § 24902(j) is clear, and (2) as argued in the MTA appeal, terminology may have different meaning in different contexts/statutes and there is no reason to infer that "transportation purpose" in the MTA context was intended, in the absence of it actually being stated in the text; and

WHEREAS, accordingly, the Board finds that there is no basis to insert the concept of "transportation purpose" from the State's MTA enabling statute into § 24902(j); and

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determinations of the Department of Buildings, dated March 26, 2012 and May 10, 2012, is hereby granted.

Adopted by the Board of Standards and Appeals, January 29, 2013.

205-12-A

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

OWNER OF PREMISES – Borden Realty Corporation.

SUBJECT – Application June 29, 2012 – Appeal challenging the Department of Buildings' determination that a sign is not entitled to non-conforming use status as an advertising sign. R7-2 /C2-4 (HRW) Zoning District.

PREMISES AFFECTED – 355 Major Deegan Expressway, bounded by Exterior Street, Major Deegan Expressway to the east, Harlem River to the west, north of the Madison Avenue Bridge, Block 2349, Lot 46, Borough of Bronx.

COMMUNITY BOARD #1BX

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez

Negative:.....5

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Notice of Sign Registration Rejection letter from the Manhattan Borough Commissioner of the Department of Buildings ("DOB"), dated May 30, 2012, denying registration for a sign at the subject site (the "Final Determination"), which reads, in pertinent part:

The Department of Buildings is in receipt of additional documentation submitted in response to the Deficiency Letter from the Signs Enforcement Unit and in connection with the application for registration of the above-referenced sign. Unfortunately, we find this documentation inadequate to support the registration of the sign and as such, the sign is rejected from registration. We note that there is no proof of second roof sign structure except for undated and incomplete rider to lease agreement. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

WHEREAS a public hearing was held on this application on December 4, 2012, after due notice by publication in *The City Record*, and then to decision on January 29, 2013; and

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

WHEREAS, the subject site is bounded by Exterior Street, a service road adjacent to the Major Deegan Expressway, to the east, and the Harlem River to the west, within a C2-4 (R7-2) zoning district; and

WHEREAS, the site is occupied by a two-story warehouse building (the "Building") with two advertising signs, with dimensions of 19'-6" by 48'-0" (936 sq. ft.) each, mounted on a single rooftop sign structure with two

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identical interconnected sections, with one portion of the structure facing southeast and one portion of the structure facing northeast (the “Sign Structure”); and

WHEREAS, the southeast-facing sign was accepted for registration by DOB on March 4, 2011 (the “Registered Sign”), while the northeast-facing was rejected from registration by DOB (the “Subject Sign”); and

WHEREAS, the Appellant states that when the signs were installed the site was within an M1-2 zoning district which was rezoned to an M2-1 zoning district in 1988; pursuant to a 2009 rezoning, the site is now zoned C2-4 (R7-2); and

WHEREAS, the Subject Sign is located approximately 45’-7” from the Major Deegan Expressway, a designated arterial highway pursuant to Zoning Resolution Appendix H; and

WHEREAS, this appeal is brought on behalf of the lessee of the Sign Structure (the “Appellant”); and

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

REGISTRATION REQUIREMENT

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

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

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

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

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

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

Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of

its non-conforming status, pursuant to section 49-16 of this chapter; and

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

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

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

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

REGISTRATION PROCESS

WHEREAS, the Appellant states that on September 1, 2009, pursuant to the requirements of Article 502 and Rule 49, it submitted a Sign Registration Application for the Subject Sign and completed an OAC3 Outdoor Advertising Company Sign Profile, attaching the following documentation: (1) a diagram of the Subject Sign; (2) photographs of the Subject Sign; and (3) an affidavit from Richard Theryoung, a retired president of the sign company, attesting that the Subject Sign operated as an advertising sign at the time he began his employment in December 1979 (the “Theryoung Affidavit”); and

WHEREAS, the Appellant states that it submitted the same evidence in connection with the Subject Sign as it did for the Registered Sign, except that the application for the Registered Sign also included a DOB application submitted on November 30, 1979 with respect to that sign; and

WHEREAS, by letter dated March 4, 2011, DOB issued a Sign Identification Number to the Registered Sign but did not issue any comment regarding the Subject Sign; and

WHEREAS, on October 3, 2011, DOB issued a Notice of Sign Registration Deficiency, stating that it is unable to accept the Subject Sign for registration due to “Failure to provide proof of legal establishment;” and

WHEREAS, by letter dated December 14, 2011, the Appellant submitted to DOB a response letter which included evidence of the establishment of the Subject Sign (together with the Registered Sign) as of 1963; and

WHEREAS, by letter, dated May 10, 2012, DOB issued the determination which forms the basis of the appeal, stating that “the sign is rejected from registration;” and

RELEVANT STATUTORY PROVISIONS

ZR § 12-10 Definitions

Sign

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

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that:

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

* * *

Sign, advertising

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

* * *

Non-conforming, or non-conformity

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

* * *

ZR § 42-55

Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways
M1 M2 M3

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

- (a) Within 200 feet of an arterial highway or a #public park# with an area of one-half acre or more, #signs# that are within view of such arterial highway or #public park# shall be subject to the following provisions:
 - (1) no permitted #sign# shall exceed 500 square feet of #surface area#; and
 - (2) no #advertising sign# shall be allowed; nor shall an existing #advertising sign# be structurally altered, relocated or reconstructed.
- (b) Beyond 200 feet from such arterial highway or #public park#, the #surface area# of such #signs# may be increased one square foot for each linear foot such sign is located from the arterial highway or #public park#.
- (c) The more restrictive of the following shall apply:

- (1) any #advertising sign# erected, structurally altered, relocated or reconstructed prior to June 1, 1968, within 660 feet of the nearest edge of the right-of-way of an arterial highway, whose message is visible from such arterial highway, shall have legal #non-conforming use# status pursuant to Section 52-83 (Non-Conforming Advertising Signs), to the extent of its size existing on May 31, 1968; or
- (2) any #advertising sign# erected, structurally altered, relocated or reconstructed between June 1, 1968, and November 1, 1979, within 660 feet of the nearest edge of the right-of-way of an arterial highway, whose message is visible from such arterial highway, and whose size does not exceed 1,200 square feet in #surface area# on its face, 30 feet in height and 60 feet in length, shall have legal #non-conforming use# status pursuant to Section 52-83, to the extent of its size existing on November 1, 1979. All #advertising signs# not in conformance with the standards set forth herein shall terminate.

* * *

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

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

* * *

ZR § 52-61 *Discontinuance*
General Provisions

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

* * *

ZR § 52-83

Non-Conforming Advertising Signs

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

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

* * *

Building Code § 28-502.4 – Reporting Requirement

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

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

* * *

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

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

* * *

RCNY § 49-16 – Non-conforming Signs

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

* * *

RCNY § 49-43 – Advertising Signs

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

- (a) Signs that direct attention to a business on the zoning lot that is primarily operating a storage or warehouse use for business activities conducted off the zoning lot, and that storage or warehouse use occupies less than the full building on the zoning lot; or
- (b) All signs, other than non-commercial, larger than 200 square feet, unless it is apparent from the copy and/or depictions on the sign that it is used to direct the attention of vehicular and pedestrian traffic to the business on the zoning lot; and

THE APPELLANT’S POSITION

WHEREAS, the Appellant contends that the Final Determination should be reversed because (1) the Subject Sign was established as an advertising sign prior to November 1, 1979, as required under ZR § 42-55, and may therefore be maintained as a legal non-conforming advertising sign pursuant to ZR § 52-11, and (2) the Subject Sign has operated as an advertising sign with no discontinuance of two years or more since its establishment; and

Establishment Prior to November 1, 1979

WHEREAS, as to the establishment of the Subject Sign prior to November 1, 1979, the Appellant contends that the Subject Sign has been continuously maintained at the site in conjunction with the Registered Sign since at least 1963, when the Sign Structure was constructed for the two signs; and

WHEREAS, in support of its assertion that the Subject Sign was established prior to November 1, 1979, the Appellant relies on: (1) a lease agreement between Allied Outdoor Advertising, Inc. (“Allied”), and the then property owner dated September 25, 1963, for use of the Sign Structure at the site, to expire on November 30, 1966, with an option to extend to November 30, 1969 (the “1963 Lease”); (2) an affidavit from licensed Master Sign Hanger Robert Roniger dated June 29, 2012, stating that the structure supporting the Subject Sign and the Registered Sign was constructed in the 1960s as a unified structure with two sign faces on a single pedestal (the “Roniger Affidavit”); (3) a lease agreement between Allied and Metropolitan Roofing Supplies Company (“Metropolitan”) dated April 8, 1969 for use of the sign structure at the site, to expire on November 30, 1979 (the “1969 Lease”); (4) a letter dated December 5, 1969 from Metropolitan to Allied proposing a rider to adjust the rent of the signs following the enlargement of the two signs at the site (the “1969 Letter Agreement”); (5) a rider to the 1969 Lease extending the lease term to December 1, 1984 and granting permission to extend the width of the two signs by eight feet each (the “1969 Lease Rider”); (6) the Theryoung Affidavit, which states that the Subject Sign has operated as an advertising sign since at least December 1979; (7) an aerial

I DOB acknowledges that the surface area of the Subject Sign does not exceed 1,200 sq. ft. on its face, 30 feet in height, or 60 feet in length, and therefore the Subject Sign may have legal non-conforming status if erected prior to November 1, 1979 pursuant to ZR § 32-662.

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photograph dated January 3, 1980, taken from the rear of the Sign Structure, showing the Subject Sign and the Registered Sign mounted on the same structure (the “1980 Photograph”); and (8) aerial photographs dated August 10, 1983 which reflect that the Subject Sign and the Registered Sign were displaying advertising copy for Marlboro Lights on that date (the “1983 Photographs”); and

WHEREAS, the Appellant states that the 1963 Lease reflects that Allied leased a *de minimus* amount of space in the building to support the sign structure, “together with a steel sign structure erected on the roof of said premises”; however the Appellant asserts that there is no indication that Allied ever maintained an office at the site or used the Subject Sign to advertise for Allied; and

WHEREAS, the Appellant argues that the 1969 Lease Rider clearly shows that the rooftop sign structure supported two distinct signs at that time, as the 1969 Lease Rider granted Allied the right “to extend *both* signs 8 ft.” (emphasis added); and

WHEREAS, accordingly, the Appellant argues that as early as 1969 the documents specifically reference two signs at the site, and in rejecting the Subject Sign while accepting the Registered Sign, DOB ignored the record before it, which demonstrates that the Subject Sign was established along with the Registered Sign for advertising use prior to November 1, 1979; and

WHEREAS, in response to DOB’s claim that evidence of the establishment of the Subject Sign prior to November 1, 1979 is limited to an “undated and incomplete rider,” the Appellant asserts that while the date of execution of the rider to the 1969 Lease is unavailable, it is the date of the 1969 Lease (April 8, 1969), and not the rider, that is relevant, and the 1969 Rider references two signs that are covered by the 1969 Lease; and

WHEREAS, the Appellant argues that the 1969 Letter Agreement, signed by the same signatories as the 1969 Lease Rider, also references two signs and therefore provides further corroboration that the 1969 Lease covers two signs; and

WHEREAS, the Appellant asserts that, taken together, the 1969 Lease, the 1969 Lease Rider and the 1969 Letter Agreement establish that two advertising signs were existing at the site in 1969, a decade before the November 1, 1979 date by which the Subject Sign needed to have been established to be considered a legal non-conforming use pursuant to ZR § 42-55(c)(2); and

WHEREAS, the Appellant states that to further support the contemporaneous establishment of the Subject Sign with the Registered Sign, the Appellant consulted a sign construction expert (and an employee of a subsidiary of Appellant), Robert Roniger, who is one of approximately twenty licensed Master Sign Hangers in the City of New York, and has worked as a sign hanger in the City of New York for over thirty years; and

WHEREAS, the Roniger Affidavit identifies the Sign Structure supporting the Registered Sign and the Subject Sign as a stick-figure angle-iron type structure, which is a type of sign structure predominantly utilized in the 1950s

and 1960s, and states that after the 1960s the design of sign structures changed to a tubular design or I-beam construction; the Roniger Affidavit further states that the use of square head bolts and the condition and wear of the structure also point to its construction in the 1960s, as beginning in the 1970s installers and fabricators switched from square head to hex head bolts; and

WHEREAS, the Roniger Affidavit concludes that the Sign Structure was designed and constructed as a single interconnected structure with two sign faces in the 1960s; and

WHEREAS, the Board notes that Mr. Roniger also provided oral testimony at hearing in support of the statements made in his affidavit; and

WHEREAS, the Appellant notes that the same stick figure angle iron sign structure constructed in the 1960s continues to support both the Subject Sign and the Registered Sign today, and represents that a review of the photographs included with the Roniger Affidavit makes clear even to the layperson that the Sign Structure was constructed as a single unit; and

WHEREAS, the Appellant notes that the Theryoung Affidavit states that Allied had been operating two advertising signs at the time he began his employment in December 1979, and that at that time the two advertising signs were not then newly built; and

WHEREAS, the Appellant asserts that the 1980 Photograph clearly depicts two signs on the Sign Structure, and that the photograph, taken only two days and two months after November 1, 1979, corroborates the claim in the Theryoung Affidavit that the Subject Sign and the Registered Sign existed on the relevant date for legal establishment; and

WHEREAS, the Appellant states that during that same time period, on November 30, 1979, an application for what appears to be only the southeastern-facing Registered Sign only was submitted to DOB in order to legalize the already-existing Registered Sign; and

WHEREAS, the Appellant represents that despite its best efforts, it was unable to locate a similar application for the Subject Sign, but that nonetheless, all the evidence, including the 1980 Photograph, points to the existence of both signs simultaneously since the 1963 Lease; and

WHEREAS, the Appellant contends that there is no indication in the available records that the Registered Sign ever existed independently of the Subject Sign, but that consistent with the Roniger Affidavit, and per the 1979 DOB application, the earliest permit for the Registered Sign appears to have been issued in 1962 when the structure supporting both the Registered Sign and the Subject Sign was originally constructed; and

WHEREAS, the Appellant asserts that DOB accepted the Registered Sign based solely on the submission of the 1979 DOB application and rejected the Subject Sign for lacking the same documentation; however, as the 1980 Photograph shows, the Subject Sign and the Registered Sign were existing as part of a single structure while the 1979

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DOB application for the Registered Sign was pending; and

WHEREAS, while it was unable to locate a parallel application for the Subject Sign, the Appellant argues that the absence of this piece of evidence alone cannot cancel out the documentation provided, including leases and photographs, which clearly establish that the Subject Sign was erected upon the same structure as the Registered Sign well before November 1, 1979, and by rejecting the Subject Sign because a similar piece of documentation is not available, DOB impermissibly interpreted the standard set forth in Rule 49 to require that a particular form of evidence be submitted for the Subject Sign to be accepted for registration; accordingly, DOB's rejection of the Subject Sign is arbitrary and unreasonable; and

WHEREAS, the Appellant argues that Rule 49 provides that a range of evidence may be used to establish the legal non-conforming status of a given sign, and notes that Rule 49-15(d)(15)(b) sets for the relevant evidentiary standard 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. Affidavits, Department cashier's receipts and permit applications, without other supporting documentation, are not sufficient to establish the non-conforming status of a sign. [emphasis added]; and

WHEREAS, the Appellant asserts that, per Rule 49, it has provided ample evidence for the Board to conclude that the Subject Sign existed on the Sign Structure leased to and used by advertising companies since prior to November 1, 1979, including: (1) the leases which reference a single integrated sign structure supporting the Subject Sign and the Registered Sign; (2) the 1969 Lease Rider referring to the extension of *both* signs; and (3) photographs showing advertising copy from the 1980s; and

WHEREAS, the Appellant further asserts that affidavits that are supported by documentary evidence are also acceptable forms of evidence under Rule 49, and that the Roniger Affidavit corroborates the leases and photographs referencing a single sign structure; and

WHEREAS, the Appellant argues that because the Roniger Affidavit is supported by the leases and photographs and because it logically flows that the a two-faced sign structure was not constructed to display advertising signage on only one of its faces, it must be concluded that the Subject Sign existed along with the Registered Sign throughout its history; and

WHEREAS, the Appellant concludes that all the evidence taken together meets the requirements of Rule 49 and indicates that the Subject Sign was established as an advertising sign prior to November 1, 1979; and

Continuous Use

WHEREAS, the Appellant asserts that the Subject Sign has been continuously used to display advertising copy since November 1, 1979, without any two-year interruption

during that period; and

WHEREAS, in support of the continuous use of the Subject Sign as an advertising sign since November 1, 1979, the Appellant has submitted the following evidence: (1) the 1969 Lease Rider extending the lease term to December 1, 1984; (2) the 1980 Photograph; (2) aerial photographs dated August 10, 1983 showing advertising copy for Marlboro Lights on the Subject Sign and Registered Sign; (3) an aerial photograph dated July 17, 1985 showing the Subject Sign and the Registered Sign mounted on the same sign structure; (4) a lease agreement for the entire site between New York City Industrial Development Agency and Borden Realty Corp. dated September 1, 1991 and expiring September 13, 2001, recognizing Allied's existing lease and its right to sublease the sign structure for advertising use; (5) an assignment of the advertising signage sublease from Metropolitan to Borax Paper Products, Inc., dated September 13, 1991; (6) a lease dated November 18, 1992 between then property owner Borax Paper Products, Inc., and Allied for approximately 300 sq. ft. on the roof of the building, to expire on November 30, 2004; (7) a lease dated February 24, 2000 between the property owner and the Appellant referencing the double-faced sign structure, commencing November 30, 2004; (8) a photograph of the Registered Sign and Subject Sign with a Clear Channel logo from approximately 2003; (9) a photograph of the Subject Sign depicting advertising copy, dated January 2005; (10) a photograph of the Subject Sign depicting advertising copy, dated March 2006; (11) a photograph of the Subject Sign depicting advertising copy, dated August 2007; (12) a photograph of the Subject Sign depicting advertising copy, dated May 2008; (13) the Sign Registration Application, including photographs of the Subject Sign; (14) a photograph of the Subject Sign depicting advertising copy, dated May 2010; (15) a photograph of the Subject Sign depicting advertising copy, dated November 2011; and (16) a photograph of the Subject Sign depicting advertising copy, dated June 2012; and

DOB'S POSITION

WHEREAS, DOB asserts that the Appellant has not submitted sufficient evidence to meet the criteria set forth in RCNY § 49-15(d)(5) that a non-conforming northeast-facing sign existed at the site prior to November 1, 1979; and

WHEREAS, DOB states that ZR § 42-55(c)(2) confers non-conforming use status to any advertising sign erected, structurally altered, relocated or reconstructed prior to November 1, 1979, and that according to Rule 49, acceptable evidence that a non-conforming sign existed and the size of the sign that existed as of the relevant date set forth in the Zoning Resolution to establish its lawful status includes "permits, sign-offs of applications after completion, photographs and leases demonstrating the non-conforming use existed prior to the relevant date" and that "affidavits, Department cashier's receipts and permit applications without other supporting documentation, are not sufficient to establish the non-conforming status of a sign"; and

WHEREAS, DOB argues that the 1963 Lease, which

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references a “steel sign structure erected on the roof” describes a single sign and it is unclear whether the referenced sign is the Registered Sign or the Subject Sign at the site; and

WHEREAS, DOB further argues that the 1963 Lease does not provide the dimensions or surface area of the sign, and it does not describe the use of the sign as an advertising sign; and

WHEREAS, DOB asserts that if there were two signs existing at the site at this time, the 1963 Lease should refer to both signs, or the Appellant should provide DOB with a second lease for the Subject Sign for the relevant time period; and

WHEREAS, DOB notes that the Appellant concedes that the Sign Structure displayed an accessory sign in 1963 promoting the landlord’s roofing supply business at the site, and argues that the Appellant has not provided evidence of the date the Subject Sign was allegedly changed to an advertising use; and

WHEREAS, DOB contends that paragraph 2 of the 1963 Lease provides that “Tenant agrees to restore the sign to its present condition advertising Metropolitan Roofing Supplies Co. Inc. and its product” and the 1969 Lease between Metropolitan and Allied identifies Metropolitan as the landlord, which suggests that the Subject Sign’s use was accessory to a roofing supply business at the site; and

WHEREAS, DOB argues that the 1969 Lease does not support the claim that the Subject Sign existed at the site, as the lease describes only one sign and provides that the landlord will not permit “any other sign structure to be erected upon the said roof during the period of this lease” and that this provision does not apply to “the sign on the rear wall of the premises nor the sign called for in paragraph “6” which advertises the products of the Metropolitan Roofing Supplies Co., Inc.”; DOB asserts that this language indicates that there were only two signs at the site, a wall sign and the accessory sign that is the subject of the leases, and therefore instead of showing that the Subject Sign existed at the site, the leases provide more support for a presumption that the accessory sign described in the leases is the Registered Sign that was legalized as an advertising sign by the 1979 permit; and

WHEREAS, DOB asserts that the 1969 Letter Agreement also does not demonstrate that the Subject Sign existed, and argues that by changing paragraph 6 to grant a right to extend the “height and/or width of the existing sign (8’ long x 4’ high on one side of face and 5’ long by 4’ high on the other side of face),” this document appears to allow the lessee to convert the single sign to a double-faced sign, and the Appellant offers no evidence that the lessee exercised the right to install two sign faces; and

WHEREAS, as to the 1969 Lease Rider which refers to a right to increase the size of two signs at the site, DOB notes that it is an undated document and the Appellant offers no evidence that the right to reconstruct the sign as a double faced sign structure or to change the size of any sign at the site was exercised by the lessee; and

WHEREAS, DOB notes that neither the 1969 Letter

Agreement nor the 1969 Lease Rider provide the sign’s dimensions or mention that it was used for advertising; and

WHEREAS, DOB argues that a permit for the Registered Sign does not prove that the Subject Sign is an advertising sign erected, altered, relocated or reconstructed at the premises prior to November 1, 1979, and there is no reason both signs would not have received a permit in 1979 if both signs were eligible to be legalized per ZR § 42-55; and

WHEREAS, DOB asserts that the Roniger Affidavit, which states that the sign structure is a single integrated structure designed for two signs and installed in the 1960s, is insufficient to demonstrate that the Subject Sign is an advertising sign erected, altered, relocated or reconstructed at the premises prior to November 1, 1979, and in the event that such a structure was installed in the 1960s, the structure is not proof that an advertising sign was displayed prior to November 1, 1979; and

WHEREAS, DOB further asserts that the Roniger Affidavit was submitted without acceptable supporting documentation per Rule 49-15(d)(5) and does not demonstrate that a non-conforming sign existed at the site; and

WHEREAS, based upon the above, DOB concludes that the Appellant has not submitted sufficient evidence to prove that the Subject Sign was established as an advertising sign at the site prior to November 1, 1979; and

WHEREAS, the Board notes that DOB has not provided any testimony in response to the Appellant’s claim that the use of the Subject Sign as an advertising sign has been continuous since November 1, 1979, without any two-year interruption; and

CONCLUSION

WHEREAS, the Board agrees with the Appellant that the Subject Sign was established prior to November 1, 1979; and

WHEREAS, specifically, the Board finds that the totality of the evidence, including the 1963 Lease, the 1969 Lease, the 1969 Lease Rider, the 1969 Letter Agreement, the Roniger Affidavit, the Theryoung Affidavit, the 1980 Photograph, and the 1983 Photographs are sufficient to establish that a northeast-facing advertising sign was maintained on the Sign Structure prior to November 1, 1979; and

WHEREAS, at the outset, the Board notes that it finds the Roniger Affidavit, in addition to the testimony provided by licensed Master Sign Hanger Robert Roniger at hearing, compelling to establish that the sign structure located on the roof of the subject building was constructed in the 1960s as a unified structure with two identical interconnected sections, with one portion of the structure facing southeast and one portion of the structure facing northeast; and

WHEREAS, the Board agrees with DOB that the Roniger Affidavit, in and of itself, is insufficient to demonstrate that the Subject Sign existed as an advertising sign prior to November 1, 1979, however, the Board considers it to be relevant evidence that the Sign Structure existed as a single interconnected two-faced structure at the site prior to November 1, 1979; and

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WHEREAS, contrary to DOB's position that the Roniger Affidavit was submitted without acceptable supporting documentation per Rule 49-15(d)(5), the Board finds that in the instant case the photographs submitted with the Roniger Affidavit, in addition to the other evidence submitted by the Appellant, is sufficient supporting documentation for the purpose of establishing that the Sign Structure has existed at the site in its current form since the 1960s; and

WHEREAS, because the Board is convinced that the Sign Structure existed at the site since the 1960s, the Board finds that the references in both the 1963 Lease and 1969 Lease to a "steel sign structure erected on the roof" of the building refer to the Sign Structure which still exists on the roof of the building; and

WHEREAS, as to DOB's argument that the 1963 Lease and 1969 Lease describe only one sign and therefore provide more support for the position that only the Registered Sign existed at this time, the Board considers the reference to a single sign in the leases to be more indicative of a lack of clarity in regards to the proper way to reference the signs attached to the interconnected two-faced structure, such that the signs on the Sign Structure may have alternately been referred to as one sign or two signs in much the same way as the Board has seen historical references to double-sided signs alternately referred to as one sign or two signs; and

WHEREAS, the Board disagrees with DOB's position that the language in the 1963 Lease requiring the tenant to "restore the sign to its present condition advertising Metropolitan..." in the event it does not exercise the option to extend, and the fact that the 1969 Lease identifies Metropolitan as the landlord suggests that the sign's use was accessory to a roofing supply business at the site; rather, the Board considers the language in the 1963 Lease to suggest that Allied, an advertising company, intended to replace the accessory signage on the Sign Structure with advertising signage, and that the purpose of the lease provision in question was to require that Allied remove its advertising signage and re-install the accessory signage only in the event that it did not exercise the option to extend the lease; and

WHEREAS, the Board considers it unlikely that Allied, as an advertising company, would enter into the 1963 Lease and the 1969 Lease, which extended the lease for an additional ten years until November 30, 1979, solely to maintain the accessory signage that had previously been located on the Sign Structure; rather, the Board finds that a reasonable inference can be made that Allied entered into the leases in furtherance of its business as an advertising company, and as such replaced the accessory signage with advertising signage; and

WHEREAS, the Board agrees with the Appellant that the language in the 1969 Letter Agreement granting a right to extend the "height and/or width of the existing sign (8' long x 4' high on one side of face and 5' long by 4' high on other side of face)" indicates that there were two signs on the Sign Structure at the time and that the 1969 Letter Agreement authorized the tenant to extend each of the signs; and

WHEREAS, the Board further agrees with the Appellant that the 1969 Lease Rider, which granted Allied the right to "extend both signs 8 ft. and cut face of bottom of both signs 2 ½ ft" further indicates that two signs were maintained on the Sign Structure during the course of the 1969 Lease; and

WHEREAS, as to the fact that the 1969 Lease Rider is undated, the Board agrees with the Appellant that, because the 1969 Lease Rider refers back to the 1969 Lease, the relevant date is that of the 1969 Lease, and the Board notes that the 1969 Lease Rider would not be able to confer a right to extend both signs unless both signs already existed at the time of the 1969 Lease; and

WHEREAS, the Board considers it logical that Allied, as an advertising company leasing a sign structure with two faces, would place advertising copy on both the northeast-facing portion of the Sign Structure and the southeast-facing portion of the Sign Structure, rather than making use of only half of the Sign Structure; and

WHEREAS, the Board agrees with the Appellant that the 1980 Photograph provides further evidence that the Subject Sign existed at the site prior to November 1, 1979; and

WHEREAS, the Board finds that, although the 1980 Photograph was taken two months and two days after November 1, 1979, it clearly shows a northeast facing sign on the Sign Structure in addition to the Registered Sign, and considers the fact that the photograph was taken so shortly after the relevant date serves to corroborate the other evidence submitted by the Appellant regarding the existence of the Sign Structure and the Subject Sign at the site prior to November 1, 1979; and

WHEREAS, the Board notes that the 1980 Photograph shows the rear of the Sign Structure, and therefore it does not explicitly reflect that advertising copy was maintained on the Subject Sign at the time; however, the Board finds the fact that the Sign Structure was leased by an advertising company for more than 16 years prior to the date of the photograph, in combination with the 1983 Photographs which clearly show advertising copy on the Subject Sign to be convincing evidence that advertising copy was maintained on the Subject Sign prior to November 1, 1979; and

WHEREAS, while the Board does not consider any one piece of evidence submitted by the Appellant to be sufficient, standing alone, to demonstrate the establishment of the Subject Sign, it finds the totality of the evidence provided, when considered in the aggregate, to be sufficient for the Board to make a reasonable inference that the Subject Sign existed as an advertising sign prior to November 1, 1979; and

WHEREAS, as to the dimensions of the Subject Sign, the Board finds the existing dimensions of 19'-6" high by 48'-0" wide to be appropriate, based on (1) the Theryoung Affidavit, which states that the Subject Sign had those approximate dimensions as of December 1979, (2) the 1980 Photograph, which shows the Subject Sign occupying the entire width and the majority of the height of the northeast-facing portion of the Sign Structure, and which shows that the Subject Sign had approximately the same dimensions as the

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Registered Sign, (3) the fact that the dimensions of the northeast-facing portion of the Sign Structure are 32'-6" high by 48'-0" wide, and (4) the fact that the DOB application to legalize the Registered Sign, approved on March 24, 1980, lists the dimensions of the Registered Sign as 20'-0" high by 50'-0" wide; and

WHEREAS, as noted above, DOB did not provide any testimony contesting the Appellant's position that the Subject Sign has been continuously maintained as an advertising sign since November 1, 1979; and

WHEREAS, the Board finds the evidence submitted by the Appellant sufficient to establish the continued existence of the Subject Sign as an advertising sign since November 1, 1979 without any two-year interruption, such that the Subject Sign is entitled to legal non-conforming status pursuant to ZR § 52-11; and

WHEREAS, accordingly, the Board finds that the Appellant has established the existence of the Subject Sign as an advertising sign prior to November 1, 1979 and its continuous use as an advertising sign since that date.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determination of the Department of Buildings, dated May 30, 2012, is hereby granted.

Adopted by the Board of Standards and Appeals, January 29, 2013.

208-12-A, 216-12-A thru 232-12-A

APPLICANT – Rothkrug Rothkrug & Spector, LLP, for 647-649 Washington Avenue, LLC, owner.

SUBJECT – Application July 2, 2012 – Proposed construction of eighteen (18) single family homes that do not front on a legally mapped street, contrary to General City Law Section 36. R3A Zoning District.

PREMISES AFFECTED – 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47 and 49 McGee Lane, north side of McGee Lane, east of Harbor Road and West of Union Avenue, Block 01226, Lots 123, 122, 121, 120, 119, 118, 117, 116, 115, 114, 113, 112, 111, 110, 109, 108, 107 and 106, Borough of Staten Island.

COMMUNITY BOARD #1SI

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Staten Island Borough Commissioner, dated May 31, 2012, acting on Department of Buildings Application Nos. 520099312, 520099321, 520099330, 520099349, 520099358, 520099367, 520099376, 520099385, 520099394, 520099401, 520099410, 520099429, 520099438, 520099447, 520099456, 520099465, 520099474, and 520099483, reads in pertinent part:

The street giving access to proposed building is not

duly placed on the official map of the city of New York, Therefore:

A) No Certificate of Occupancy can be issued pursuant to Article 3, Section 36 of General City Law.

B) Proposed construction does not have at least 8% of the total perimeter of building fronting directly upon a legally mapped street or frontage space contrary to Section BC501.3.1 of the NYC Building Code; and

WHEREAS, this is an application under General City Law ("GCL") § 36, to permit the construction of eighteen two-story one-family homes with accessory off-street parking for two vehicles; and

WHEREAS, the proposed homes are part of a larger residential development which front on mapped streets (Harbor Road, Leyden Avenue, and Union Avenue), which do not require GCL relief from the Board; and

WHEREAS, a public hearing was held on this application on January 15, 2013, after due notice by publication in *The City Record*, and then to decision on January 29, 2013; and

WHEREAS, the subject block (Block 1226) was the subject of a private rezoning application to change the former M1-1 zoning district to the current R3A zoning district, which was approved by the City Council on May 11, 2011; and

WHEREAS, the subject site is located east of Harbor Road, north of Leyden Avenue, and west of Union Avenue, within an R3A zoning district; and

WHEREAS, by letter dated November 27, 2012, the Fire Department states that it has reviewed the proposal and has no objection as long as the following conditions are met: (1) interconnected smoke alarms are installed in compliance with NYC Building Code Section 907.2.10; (2) hydrants are located within 250 feet of the entrance to each home and the hydrants have eight-inch or greater water mains; (3) the height of the homes do not exceed 35 feet above grade plane; (4) No Parking signs are maintained at the entrance and along one side of the fire access road (McGee Lane) where is parking is prohibited; and (5) the No Parking signs have a minimum dimension of 12 inches wide by 18 inches high and have red letters on a white reflective background; and

WHEREAS, in response, the applicant submitted a revised site plan noting the conditions requested by the Fire Department; and

WHEREAS, accordingly, the Board has determined that the applicant has submitted adequate evidence to warrant this approval under certain conditions.

Therefore it is Resolved that the decision of the Staten Island Borough Commissioner, dated May 31, 2012, acting on Department of Buildings Application Nos. 520099312, 520099321, 520099330, 520099349, 520099358, 520099367, 520099376, 520099385, 520099394, 520099401, 520099410, 520099429, 520099438, 520099447, 520099456, 520099465, 520099474, and 520099483, is modified by the

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power vested in the Board by Section 36 of the General City Law, and that this appeal is granted, limited to the decision noted above; *on condition* that construction shall substantially conform to the drawing filed with the application marked "Received December 18, 2012"–(1) sheet; that the proposal shall comply with all applicable zoning district requirements; and that all other applicable laws, rules, and regulations shall be complied with; and *on further condition*:

THAT (1) the applicant will install interconnected smoke alarms in compliance with NYC Building Code Section 907.2.10; (2) hydrants will be located within 250 feet of the entrance to each home and the hydrants will have eight-inch or greater water mains; (3) the height of the homes will not exceed 35 feet above grade plane; (4) "No Parking" signs will be maintained at the entrance and along one side of the fire access road (McGee Lane) where is parking is prohibited and the signs will have a minimum dimension of 12 inches wide by 18 inches high and have red letters on a white reflective background, in accordance with the BSA-approved plans;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

THAT DOB will review the proposed plans to ensure compliance with all relevant provisions of the Zoning Resolution;

THAT the approved plans will be considered approved only for the portions related to the specific relief granted;

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals January 29, 2013.

287-12-A

APPLICANT – Zygmunt Staszewski, for Breezy Point Cooperative Inc., owner; Brian Rudolph, lessee.

SUBJECT – Application October 5, 2012 – Proposed enlargement of existing building located partially within the bed of a mapped street, contrary to General City Law Section 35, and upgrade of an existing private disposal system, contrary to the Department of Building policy. R4 zoning district.

PREMISES AFFECTED – 165 Reid Avenue, east side of Beach 201 Street, 335' north of Breezy Point Boulevard, Block 16350, Lot 400, Borough of Queens.

COMMUNITY BOARD #14Q

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Queens Borough Commissioner, dated September 21, 2012, acting on Department of Buildings Application No. 420618139, reads in pertinent part:

For Board of Standards and Appeals Only

A1- The proposed enlargement is on a site where the building and lot are located partially in the bed of a mapped street therefore no permit or Certificate of Occupancy can be issued as per Article 3, Section 35 of the General City Law.

A2- The proposed upgrade of the private disposal is contrary to the Department of Buildings policy; and

WHEREAS, a public hearing was held on this application on January 29, 2013, after due notice by publication in the *City Record*, and then to decision January 29, 2013; and

WHEREAS, by letter dated November 12, 2012 the Fire Department states that it has reviewed the subject proposal and states that as the enlargement is more than 125 percent of the existing square footage, the Fire Department requires that the entire building be fully sprinklered; and

WHEREAS, in response to the Fire Department's request the applicant has provided a revised site plan indicating that the building will be fully sprinklered and smoke alarms will be interconnected to the existing hard-wired electrical system; and

WHEREAS, by letter dated January 22, 2013, the Fire Department states that it has reviewed the submission and has no further objections; and

WHEREAS, by letter dated October 25, 2012, the Department of Environmental Protection states that it has no objection to the subject proposal; and

WHEREAS, by letter dated January 28, 2012, the Department of Transportation ("DOT") states that it has no objection to the subject proposal; and

WHEREAS, DOT states that the subject lot is not currently included in the agency's Capital Improvement Program; and

WHEREAS, accordingly, the Board has determined that the applicant has submitted adequate evidence to warrant this approval under certain conditions.

Therefore it is Resolved that the decision of the Queens Borough Commissioner, dated September 21, 2012, acting on Department of Buildings Application No. 420618139, is modified by the power vested in the Board by Section 35 of the General City Law, and that this appeal is granted, limited to the decision noted above; *on condition* that construction shall substantially conform to the drawing filed with the application marked "Received December 19, 2012"–one (1) sheet; that the proposal shall comply with all applicable zoning district requirements; and that all other applicable laws, rules, and regulations shall be complied with; and *on further condition*:

THAT this approval is limited to the relief granted by

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the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

THAT DOB will review the proposed plans to ensure compliance with all relevant provisions of the Zoning Resolution;

THAT the approved plans will be considered approved only for the portions related to the specific relief granted;

THAT the home will be fully sprinklered and will be provided with interconnected smoke alarms in accordance with the BSA-approved plans;

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, January 29, 2013.

119-11-A

APPLICANT – Bryan Cave LLP, for Kimball Group, LLC, owner.

SUBJECT – Application August 17, 2011 – Appeal seeking a determination that the owner has acquired a common law vested right to continue development commenced under prior zoning regulations in effect on July 14, 2005. R4 zoning district.

PREMISES AFFECTED – 2230-2234 Kimball Street, between Avenue U and Avenue V, Block 8556, Lot 55, Borough of Brooklyn.

COMMUNITY BOARD #18BK

ACTION OF THE BOARD – Laid over to April 9, 2013, at 10 A.M., for deferred decision.

265-12-A & 266-12-A

APPLICANT – Jesse Masyr, Watchel Masyr & Missry, LLP, for Related Retail Bruckner LLC.

OWNER OF PREMISES – Ciminello Property Associates.

SUBJECT – Application September 5, 2012 – Appeal challenging Department of Buildings’ determination that a sign is not entitled to continued non-conforming use status as an advertising sign. M1-2 & R4/C2-1 zoning district.

PREMISES AFFECTED – 980 Brush Avenue, southeast corner of Brush Avenue and Cross Bronx Expressway/Bruckner Expressway, Block 5542, Lot 41, Borough of Bronx.

COMMUNITY BOARD #10BX

ACTION OF THE BOARD – Laid over to April 9, 2013, at 1:30 P.M., for postponed hearing.

ZONING CALENDAR

115-12-BZ

CEQR #12-BSA-124K

APPLICANT – Sheldon Lobel, P.C., for RMDS Realty Associates, LLC, owner.

SUBJECT – Application April 24, 2012 – Special Permit (§73-44) to allow for a reduction in parking from 331 to 221 spaces in an existing building proposed to be used for ambulatory diagnostic or treatment facilities in Use Group 6 parking category B1. C4-2A zoning district.

PREMISES AFFECTED – 701/745 64th Street, Seventh and Eighth Avenues, Block 5794, Lot 150 & 165, Borough of Brooklyn.

COMMUNITY BOARD #4BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated April 6, 2012, acting on Department of Buildings Application No. 320230567, reads in pertinent part:

[R]eduction in the number of off street parking spaces...requires a special permit from the Board of Standards and Appeals, pursuant to section ZR 73-44; and

WHEREAS, this is an application under ZR §§ 73-44 and 73-03, to permit, partially within a C4-2 zoning district and partially within a C4-2A zoning district, a reduction in the required number of accessory parking spaces for an office building from 331 to 240, contrary to ZR § 36-21; and

WHEREAS, a public hearing was held on this application on October 16, 2012, after due notice by publication in The City Record, with continued hearings on December 4, 2012 and January 8, 2012, and then to decision on January 29, 2013; and

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

WHEREAS, Community Board 4, Brooklyn, recommends approval of this application; and

WHEREAS, New York City Council Member Sara M. Gonzalez provided testimony in support of this application; and

WHEREAS, the applicant’s initial application requested a reduction in the required number of accessory parking spaces from 331 to 221 spaces, to be provided at the subject site and at three separate off-site locations; and

WHEREAS, in response to concerns raised by the Board, the applicant revised its application to provide a total of 240 accessory parking spaces, to be provided at the

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subject site and at two off-site locations; and

WHEREAS, the subject site is located on the northeast corner of 7th Avenue and 64th Street, partially within a C4-2 zoning district and partially within a C4-2A zoning district; and

WHEREAS, the site has approximately 476 feet of frontage along 64th Street, 180 feet of frontage along 7th Avenue, and a total lot area of 86,680 sq. ft.; and

WHEREAS, the zoning lot is comprised of two tax lots (Lots 150 and 165), with a four-story building on Lot 150 (recently enlarged from two stories) and a three-story building located on Lot 165 (the "Buildings"), with a total floor area for both buildings on the zoning lot of 205,808 sq. ft. (2.4 FAR); the maximum permitted floor area is 258,000 sq. ft. (3.0 FAR); and

WHEREAS, the applicant notes that the Buildings were originally constructed prior to December 15, 1961, with a total pre-1961 zoning floor area of 73,344 sq. ft. for both buildings; and

WHEREAS, the applicant notes that the only parking spaces required for the Buildings is for developments or enlargements after December 15, 1961, and since 73,344 sq. ft. of the Buildings' floor area existed prior to December 15, 1961, only 132,464 sq. ft. of the Buildings' floor area is subject to the parking requirements of the Zoning Resolution; and

WHEREAS, the applicant states that the Buildings are currently occupied by office space throughout, with a 138-space parking garage in the cellar of the building on Lot 165, and a 17-space parking garage on a portion of the first floor of the building on Lot 150; and

WHEREAS, pursuant to ZR § 73-44, the Board may, in the subject C4-2 and C4-2A zoning districts, grant a special permit that would allow a reduction in the number of accessory off-street parking spaces required under the applicable Zoning Resolution provision, for ambulatory diagnostic or treatment facilities and the noted Use Group 6 office use in the parking category B1; in the subject zoning districts, the Board may reduce the required parking from one space per 400 sq. ft. of floor area to one space per 600 sq. ft. of floor area; and

WHEREAS, pursuant to ZR § 36-21 the total number of required parking spaces for the current and proposed uses at the site is 331; and

WHEREAS, the applicant represents that the proposed use of the site does not require 331 accessory parking spaces; and

WHEREAS, in addition to the 155 accessory parking spaces provided within the Buildings, the applicant proposes to provide an additional 85 parking spaces at two off-site locations, for a total of 240 accessory parking spaces; and

WHEREAS, specifically, the applicant states that 63 accessory spaces will be provided at 6208 8th Avenue (Block 5794, Lot 75), and 22 accessory spaces will be provided at 720 64th Street (Block 5821, Lot 13); and

WHEREAS, the applicant represents that the proposed 240 parking spaces are sufficient to accommodate the

parking demand generated by the use of the site; and

WHEREAS, the applicant notes that the proposed total of 240 accessory parking spaces would provide 19 more spaces than the minimum of 221 required under the special permit; and

WHEREAS, ZR § 73-44 requires that the Board must determine that the ambulatory diagnostic or treatment facility and Use Group 6 use in the B1 parking category are contemplated in good faith; and

WHEREAS, the applicant notes that the existing tenants at the Buildings are all Use Group 6 professional offices and the recently completed enlargement to the building on Lot 150 will facilitate expanded floor area available to the existing tenants or comparable tenants; and

WHEREAS, in addition, the applicant states that any Certificate of Occupancy for the building will state that no subsequent Certificate of Occupancy may be issued if the use is changed to a use listed in parking category B unless additional accessory off-street parking spaces sufficient to meet such requirements are provided on the site or within the permitted off-street radius; and

WHEREAS, the Board finds that the applicant has submitted sufficient evidence of good faith in maintaining the noted uses at the site; and

WHEREAS, while ZR § 73-44 allows the Board to reduce the required accessory parking, the Board requested an analysis about the impact that such a reduction might have on the community in terms of available on-street parking; and

WHEREAS, in response, the applicant states that the site is well served by mass transit, as it is on the same block as the entrance to the MTA N Subway Line, and City buses running along 8th Avenue and 65th Street, one block away from the site, are utilized by a significant number of employees and visitors to the site; and

WHEREAS, the applicant represents that the demand for on-site parking at the Buildings is further diminished by the fact that a number of employees and visitors to the site live close enough to walk, and visitors are often dropped off/picked up, such that they do not require a space when they come to the site; and

WHEREAS, the applicant submitted a parking demand and capacity analysis report which states that only approximately 50 percent of the Buildings' current employees travel by private auto or park on-site, and the Buildings' current occupants do not fully utilize the on-site parking that is available, as utilization of the Buildings' parking facilities is 81 percent, with 126 of 155 spaces occupied; and

WHEREAS, the applicant also submitted an on-street parking survey which reflects that between 11:00 a.m. and 2:00 p.m. approximately 21 legal spaces out of approximately 359 spaces, or six percent, were available in the immediate vicinity of the site; and

WHEREAS, based upon the above, the Board agrees that the accessory parking space needs can be accommodated even with the parking reduction; and

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WHEREAS, accordingly, the Board finds that, under the conditions and safeguards imposed, any hazard or disadvantage to the community at large due to the proposed special permit use is outweighed by the advantages to be derived by the community; and

WHEREAS, therefore, the Board has determined that the evidence in the record supports the requisite findings pursuant to ZR §§ 73-44 and 73-03; and

WHEREAS, the project is classified as an unlisted action pursuant to 6 NYCRR, Part 617.4; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 12BSA124K, dated April 17, 2012; and

WHEREAS, the EAS documents that the project as proposed would not have significant adverse impacts on Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Waterfront Revitalization Program; Infrastructure; Hazardous Materials; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; and Public Health; and

WHEREAS, no other significant effects upon the environment that would require an Environmental Impact Statement are foreseeable; and

WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

Therefore it is Resolved, that the Board of Standards and Appeals issues a Negative Declaration under 6 NYCRR Part 617 and §6-07(b) of the Rules of Procedure for City Environmental Quality Review and makes each and every one of the required findings under ZR §§ 73-44 and 73-03 to permit, partially within a C4-2 zoning district and partially within a C4-2A zoning district, a reduction in the required number of accessory parking spaces for an office building from 331 to 240, contrary to ZR § 36-21; on condition that all work shall substantially conform to drawings as they apply to the objections above noted filed with this application marked "Received January 24, 2013" – twenty (20) sheets, and on further condition:

THAT there shall be no change in the operation of the site without prior review and approval by the Board;

THAT a minimum of 240 parking spaces will be provided, with 155 parking spaces located in the Buildings, 63 parking spaces located at 6208 8th Avenue (Block 5794, Lot 75), and 22 parking spaces located at 720 64th Street (Block 5821, Lot 13);

THAT no certificate of occupancy may be issued if the use is changed to a use listed in parking category B unless additional accessory off-street parking spaces sufficient to meet such requirements are provided on the site or within the permitted off-street radius;

THAT the above conditions shall appear on the

Certificate of Occupancy;

THAT the layout and design of the accessory parking lot shall be as reviewed and approved by the Department of Buildings;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted; and

THAT the Department of Buildings must ensure compliance with all of applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, January 29, 2013.

9-12-BZ

APPLICANT – Eric Palatnik, P.C., for Mikhail Dadashev, owner.

SUBJECT – Application January 17, 2012 – Special Permit (§73-622) for the enlargement of an existing single family home, contrary to floor area (§23-141). R3-1 zoning district.

PREMISES AFFECTED – 186 Girard Street, corner of Oriental Boulevard and Girard Street, Block 8749, Lot 278, Borough of Brooklyn.

COMMUNITY BOARD #15BK

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to February 12, 2013, at 1:30 P.M., for decision, hearing closed.

61-12-BZ

APPLICANT – Sheldon Lobel, P.C., for Martha Schwartz, owner; Altamarea Group, lessee.

SUBJECT – Application March 15, 2012 – Variance (§72-21) to permit a UG 6 restaurant in a portion of the cellar and first floor, contrary to use regulations (§42-10). M1-5B zoning district.

PREMISES AFFECTED – 216 Lafayette Street, between Spring Street and Broome Street, 25' of frontage along Lafayette Street, Block 482, Lot 28, Borough of Manhattan.

COMMUNITY BOARD #2M

THE VOTE TO REOPEN HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin,

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Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to February 26, 2013, at 1:30 P.M., for decision, hearing closed.

106-12-BZ

APPLICANT – Eric Palatnik, P.C., for Edgar Soto, owner; Autozone, Inc., lessee.

SUBJECT – Application April 17, 2012 – Special Permit (§73-50) to permit the development of a new one-story retail store (UG 6), contrary to rear yard regulations (§33-292). C8-3 zoning district.

PREMISES AFFECTED – 2102 Jerome Avenue between East Burnside Avenue and East 181st Street, Block 3179, Lot 20, Borough of Bronx.

COMMUNITY BOARD #5BX

ACTION OF THE BOARD – Laid over to February 26, 2013, at 1:30 P.M., for continued hearing.

148-12-BZ

APPLICANT – Eric Palatnik, P.C., for Esther Kuessous, owner.

SUBJECT – Application May 8, 2012 – Special Permit (§73-621) for the enlargement of an existing single family semi-detached residence, contrary to floor area, lot coverage and open space (ZR §23-141(b)). R4 zoning district.

PREMISES AFFECTED – 981 East 29th Street, between Avenue I and Avenue J, Block 7593, Lot 12, Borough of Brooklyn.

COMMUNITY BOARD #14BK

ACTION OF THE BOARD – Laid over to March 5, 2013, at 1:30 P.M., for continued hearing.

159-12-BZ

APPLICANT – Eric Palatnik, P.C., for Joseph L. Musso, owner.

SUBJECT – Application May 22, 2012 – Variance (§72-21) to allow for the enlargement of a Use Group 4 medical office building, contrary to rear yard requirements (§24-36). R3-2 zoning district.

PREMISES AFFECTED – 94-07 156th Avenue, between Cross Bay Boulevard and Killarney Street, Block 11588, Lot 67, 69, Borough of Queens.

COMMUNITY BOARD #10Q

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to February 26, 2013, at 1:30 P.M., for decision, hearing closed.

233-12-BZ

APPLICANT – Richard G. Leland, Esq./Fried Frank Harris Shriver & Jacob, for Porsche Realty, LLC, owner; Van Wagner Communications, lessee.

SUBJECT – Application July 19, 2012 – Variance (§72-21) to legalize an advertising sign in a residential district, contrary to use regulations (§22-00). R3X zoning district.

PREMISES AFFECTED – 246-12 South Conduit Avenue, bounded by 139th Avenue, 246th Street and South Conduit Avenue, Block 13622, Lot 7, Borough of Queens.

COMMUNITY BOARD #13Q

ACTION OF THE BOARD – Laid over to February 26, 2013, at 1:30 P.M., for continued hearing.

234-12-BZ

APPLICANT – Rothkrug Rothkrug & Spector LLP, for 1776 Eastchester Realty LLC, owner; LA Fitness, lessee.

SUBJECT – Application July 20, 2012 – Special Permit (§73-36) to allow a physical culture establishment (*LA Fitness*). M1-1 zoning district.

PREMISES AFFECTED – 1776 Eastchester Road, east of Basset Avenue, west of Marconi Street, 385' north of intersection of Basset Avenue and Eastchester Street, Block 4226, Lot 16, Borough of Bronx.

COMMUNITY BOARD #11BX

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to February 26, 2013, at 1:30 P.M., for decision, hearing closed.

294-12-BZ

APPLICANT – Eric Palatnik, P.C., for David Katzive, owner; Thomas Anthony, lessee.

SUBJECT – Application October 11, 2012 – Special Permit (§73-36) to allow a physical culture establishment (*Everyday Athlete*). C5-2A/DB special zoning district.

PREMISES AFFECTED – 130 Clinton Street, aka 124 Clinton Street, between Joralemon Street and Aitken Place, Block 264, Lot 17, Borough of Brooklyn.

COMMUNITY BOARD #2BK

ACTION OF THE BOARD – Laid over to March 5, 2013, at 1:30 P.M., for continued hearing.

295-12-BZ

APPLICANT – Sheldon Lobel, P.C., for Laura Danoff and Scott Danoff, owners.

SUBJECT – Application October 15, 2012 – Variance (§72-21) to permit the expansion of a non-conforming Use Group 4 dentist's office, contrary to §52-22. R1-2 zoning district.

PREMISES AFFECTED – 49-33 Little Neck Parkway, Block 8263, Lot 110, Borough of Queens.

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COMMUNITY BOARD #11Q

ACTION OF THE BOARD – Laid over to February 26, 2013, at 1:30 P.M., for continued hearing.

302-12-BZ

APPLICANT – Davidoff Hutcher & Citron LLP, for YHD 18 LLC, owner; Lithe Method LLC, lessee.

SUBJECT – Application October 18, 2012 – Special Permit (§73-36) to allow a physical culture establishment (*Lithe Method*). C6-4A zoning district.

PREMISES AFFECTED – 32 West 18th Street, between Fifth and Sixth Avenues, Block 819, Lot 1401, Borough of Manhattan.

COMMUNITY BOARD #5M

ACTION OF THE BOARD – Laid over to February 26, 2013, at 1:30 P.M., for continued hearing.

Jeff Mulligan, Executive Director

Adjourned: P.M.

*CORRECTION

This resolution adopted on December 4, 2012, under Calendar No. 143-07-BZ and printed in Volume 97, Bulletin No. 50, is hereby corrected to read as follows:

143-07-BZ

APPLICANT – Fredrick A. Becker, for Chabad House of Canarsie, Inc., owner.

SUBJECT – Application July 16, 2012 – Extension of Time to complete construction of an approved variance (§72-21) to permit the construction of a three-story and cellar synagogue, which expired on July 22, 2012. R2 zoning district.

PREMISES AFFECTED – 6404 Strickland Avenue, northeast corner of Strickland Avenue and East 64th Street, Block 8633, Lot 1, Borough of Brooklyn.

COMMUNITY BOARD #18BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application for a reopening and an extension of time to complete construction of a previously granted variance to permit the construction of a three-story and cellar synagogue with accessory religious-based preschool, which expired on July 22, 2012; and

WHEREAS, a public hearing was held on this application on October 23, 2012, after due notice by publication in *The City Record*, and then to decision on December 4, 2012; and

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

WHEREAS, the subject site is located on the northeast corner of Strickland Avenue and East 64th Street, within an R2 zoning district; and

WHEREAS, on July 22, 2008, under the subject calendar number, the Board granted a variance to permit the proposed construction of a three-story and cellar synagogue with accessory religious-based preschool, contrary to the underlying zoning district regulations for front and side yards, floor area and floor area ratio, front wall height, sky exposure plane, and parking; and

WHEREAS, substantial construction was to be completed by July 22, 2012, in accordance with ZR § 72-23; and

WHEREAS, the applicant states that due to financing delays, additional time is necessary to complete the project; thus, the applicant now requests an extension of time to complete construction; and

WHEREAS, the applicant represents that the owner is now prepared to proceed with construction; and

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WHEREAS, based upon its review of the record, the Board finds that the requested extension of time to complete construction is appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals *reopens* and *amends* the resolution, dated July 22, 2008, so that as amended this portion of the resolution shall read: “to grant an extension of the time to complete construction for a term of four years, to expire on December 4, 2016; *on condition:*

THAT substantial construction will be completed by December 4, 2016;

THAT all conditions from prior resolutions not specifically waived by the Board remain in effect;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted.”
(DOB Application No. 302279488)

Adopted by the Board of Standards and Appeals, December 4, 2012.

***The resolution has been revised to correct the Public Hearing date on the 2nd WHEREAS, and the location on 4th WHEREAS. Corrected in Bulletin Nos. 4-5, Vol. 98, dated February 7, 2013.**