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APPLICANT – New York City Board of Standards and Appeals

SUBJECT – Application September 11, 2013 – Reopening by court remand for supplemental review of whether the subject wall was occupied by an art installation or an advertising sign. M1-6 zoning district. PREMISES AFFECTED – 111 Varick Street, Varick Street between Broome and Dominick Street, Block 578, Lot 71, Borough of Manhattan.

COMMUNITY BOARD #2M

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 underlying case is an appeal requesting a Board determination that the owner has not lost the right to maintain a non-conforming advertising sign at the site; and

WHEREAS, the subject site is located at the northwest corner of Varick Street and Broome Street, within an M1-6 zoning district; and

WHEREAS, the site is occupied by a six-story parking garage with a 58'-0" high by 78'-3" wide sign structure located on the south wall (the "Sign Structure"); and

WHEREAS, the Sign faces Broome Street and is located approximately 57'-0" from the northern boundary of the Holland Tunnel approach, a designated arterial highway pursuant to Zoning Resolution Appendix H; and

WHEREAS, the subject appeal comes before the Board in response to a Notice of Sign Registration Rejection letter from the Manhattan Borough Commissioner of the Department of Buildings ("DOB"), dated March 12, 2012, denying registration for a sign at the 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. As evidence related to the sign points to its having been of various sizes, orientations, and even removed, the sign is rejected from registration. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

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

WHEREAS, on April 11, 2012, the Appellant filed an application with the Board seeking recognition of a right to continue its use of the wall at the subject premises for an advertising sign; and

WHEREAS, on January 15, 2013, under the subject

calendar number, the Board upheld DOB's Final Determination and found that advertising sign had been discontinued for a period of greater than two years, contrary to ZR § 52-61; specifically, that for the period of 1979 to 1989 when the Sign was occupied by an installation by artist Terry Fugate-Wilcox entitled "the Holland Tunnel Wall," the advertising sign use was discontinued; and

WHEREAS, on February 14, 2013, the property owner appealed the Board's determination in New York State Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules; and

WHEREAS, by decision and order in Van Wagner v. Board of Standards and Appeals, dated June 18, 2013, Supreme Court, New York County, Justice Rakower "remanded [the matter] back to the agency for a fuller record" and "granted the petition to the extent stated in the record"; and

WHEREAS, the record from the oral argument includes the following:

[the Board has] to figure out why this art installation, which was later dismantled and sold, which bore the name of the artist and served to perpetuate those sales that came later, was less than an advertising sign, and establish how it was that that is a departure from the non-conforming use that was in place.

So, I'm going to send it back and I'm not directing that they grant the permit, but there is an insufficient record here for me to – for anyone to know when it is that an art installation would be different from an advertising sign. And I think they have to clarify that issue; and

WHEREAS, a public hearing was held on the remand on October 29, 2013, after due notice by publication in *The City Record*, and then to decision on December 17, 2013; and

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

WHEREAS, the Board re-adopts the analysis and determination it made in its January 15, 2013 decision on the matter; and

WHEREAS, this resolution reflects the parties' supplemental arguments and the Board's associated analysis; it includes a summary of the parties' original arguments, which are presented in full in the January 15, 2013 resolution; and

WHEREAS, the Appellant and DOB appeared and, pursuant to the remand, made a total of six additional submissions on the question of whether the Sign constituted an advertising sign from the years of 1979 to 1989 when the wall was occupied by the "Holland

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Tunnel Wall”; the Board held one executive review session and one public hearing; and

Background

WHEREAS, the Appellant contends that DOB’s Final Determination should be reversed because (1) an advertising sign was established on the building prior to June 1, 1968, 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) an advertising sign has occupied the Sign Structure with no discontinuance of two years or more since its establishment; and

WHEREAS, as to the establishment of an advertising sign prior to June 1, 1968, DOB has stated that it does not contest the Appellant’s claim that an advertising sign existed on May 31, 1968; however, DOB asserts that the use was discontinued and must terminate per ZR § 52-61 because the wall was used to display an art installation for a period of approximately ten years; and

WHEREAS, the Appellant contends that the art installation at the site from approximately 1979 to 1989 constituted an “advertising sign” within the meaning of ZR § 12-10, and therefore the use of the Sign Structure from an advertising sign was continuous during that period; and

WHEREAS, accordingly, the sole question in dispute is whether the Sign Structure was occupied by an advertising sign, as defined by the Zoning Resolution, from 1979 to 1989 when the “Holland Tunnel Wall” art installation (the “Holland Tunnel Wall” or the “Art Installation”) occupied it; and

WHEREAS, the Appellant notes that ZR § 12-10 defines the term “sign” as follows:

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, 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#; and

The Appellant’s Original Arguments

WHEREAS, in sum, the Appellant contended that the Final Determination should be reversed because (1) an advertising sign was established prior to June 1, 1968, as required under ZR § 42-55, and may therefore be maintained as a legal non-conforming use pursuant to ZR § 52-11, and (2) the Sign Structure has been occupied by an advertising sign with no discontinuance of two years or more since its establishment; and

WHEREAS, the Appellant argued that the art installation met the ZR § 12-10 definition of a “sign,” in that (1) it was a pictorial representation (including illustration or decoration), (2) it was attached to the building; (3) it was used to direct attention to and advertise the artist Terry Fugate-Wilcox and his works; and (4) it was visible from outside the building; and

WHEREAS, the Appellant also contended that the context and circumstances applicable to the Sign make it clear that the Art Installation was simultaneously used for artistic and advertising purposes; and

WHEREAS, specifically, the Appellant asserted that the Sign Structure has a long history of use as an advertising sign from as early as the 1920’s, the Art Installation was affixed in the exact same position and location as advertising signs that had been posted on the Building for six decades prior, and that it met all of the elements of the definition of a “sign,” and based on this context the Art Installation may properly be construed as an advertising sign for the purposes of establishing a history of continuous use under the Zoning Resolution; and

The Appellant’s Position on Remand

WHEREAS, the Appellant asserts that the Board should reconsider its prior denial and order DOB to accept its sign registration for the following primary reasons: (1) the plain language of the ZR § 12-10 definitions controls; (2) sale of the pieces is indicative of an advertising signage and the inclusion of the artist’s signature and; (3) any ambiguity in the text must be read in favor of the property owner; and (4) there are unique conditions surrounding the Sign Structure and location that will not allow it to set a precedent; and

WHEREAS, the Appellant asserts that the art installation was a “sign” and an “advertising sign” under the plain language of the Zoning Resolution; and

WHEREAS, the Appellant asserts that to affirm DOB’s position that the Art Installation did not constitute an “advertising sign” during the time it was displayed, the Board would be taking a narrow reading of the statute that departs from its plain language; and

WHEREAS, the Appellant asserts that the installation was clearly a “sign,” because it satisfies all

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elements of the definition that it was a pictorial representation (including illustration or decoration), that was (a) was attached to the building, (b) used to direct attention to and advertise the artist Fugate-Wilcox and his works, and (c) visible from the outside of the building; and

WHEREAS, the Appellant asserts that as with any other types of business, an artist must develop his or her brand, and that the Art Installation served that purpose by directing attention to the artist and his work by attracting attention to the installation itself; thus, element (b) of the “sign” definition is satisfied; and

WHEREAS, the Appellant asserts that the Art Installation also satisfies the definition of an “advertising sign” in that it “direct[ed] attention to a business, profession, commodity, service or entertainment” by directing attention to the artist and his work, which can be construed as a “business” (the business of creating artwork), a “profession” (being an artist), a “service” (providing commissioned works) or “entertainment” (the viewing and enjoyment of artwork); and

WHEREAS, the Appellant submitted an affidavit from the vice-president of the property owner of the site from 1973 to 2010 which states that Mr. Fugate-Wilcox leased the space on the Sign Structure and thus paid for the right to advertise his work and display his signature by posting the Art Installation on the Sign Structure; and

WHEREAS, the Appellant asserts that the Art Installation was posted as an opportunity to promote the brand and the work of the artist Terry Fugate-Wilcox and that the aesthetic and creative aspects of the Art Installation do not preclude its function as an advertising sign; and

WHEREAS, the Appellant asserts that such an interpretation is not found within the Zoning Resolution, which does not include anything in the statutory definition of “advertising sign” to suggest that it must exclude signs that also have independent aesthetic value; and

WHEREAS, further, the Appellant asserts that the Art Installation, while displayed on the Sign Structure, functioned as advertising for the artist Terry Fugate-Wilcox because (1) after the Fugate-Wilcox installation was removed from the Sign Structure, it was broken apart and sold as individual pieces of artwork; and (2) the signature of the artist appeared on the corner of the installation; and

WHEREAS, the Appellant assert that in effect, the signature, and what the literature regarding Mr. Fugate-Wilcox’s works describes as his “artistic voice” in a genre known in the art community as “Actual Art,” which included an entire series of “weathering” art installations which directed attention to the artist and his unique works, thus satisfying the definition of “advertising sign”; and

WHEREAS, the Appellant asserts that, though not required by the statute, the fact that the installation functioned as advertising was then confirmed by the fact that patrons purchased pieces of the weathering wood as “works of art” after the installation was dismantled; and

WHEREAS, the Appellant asserts that the Art Installation served to draw attention to Mr. Fugate-Wilcox and became a source of commercial revenue for him, as pieces of the art were sold to the public due to the attention the art installation had garnered; and

WHEREAS, the Appellant assert that there is no requirement in the statute that an advertising sign have a “discernible message” as DOB contends; and

WHEREAS, the Appellant rejects DOB’s inclusion of the requirement that there be a discernible message, but, asserts, that even if there were such a requirement, the installation would satisfy it because the art community at the time recognized the work as an expression of Mr. Fugate-Wilcox’s “artistic voice”; and

WHEREAS, as to the artist’s signature, the Appellant asserts that it is not relevant that the signature was not “prominently featured” as there is no requirement in the Zoning Resolution that a signature be the “focal point”; and

WHEREAS, the Appellant asserts that it also does not matter that the signature of the artist may have worn away over time because whether the signature lasted for one year or ten, its initial presence created an association between the artist and the weathering wood that would have persisted even after the signature eroded; and

WHEREAS, the Appellant reiterated its position that a sign bearing the Target brand logo of a target is analogous because it is similarly abstract and similarly fails to convey a discernible message; and

WHEREAS, the Appellant asserts that the Art Installation constituted advertising because it was a sign that directed attention to the artist, Terry Fugate-Wilcox, and his works and it is immaterial that only those most familiar with the art world and its community, understood and reacted to the advertisement by knowing that the artwork of Mr. Fugate-Wilcox was commercially available for purchase elsewhere; and

WHEREAS, the Appellant asserts that the statutory language is ambiguous and thus should be construed in favor of the property owner; and

WHEREAS, the Appellant asserts that if the Board or DOB believes the statutory language is too broad, and that applying its plain meaning as urged by Appellant would yield unusual or undesirable results, the appropriate remedy would be to amend the statute through the proper legislative channels; and

WHEREAS, finally, the Appellant asserts that the Subject Sign represents a unique circumstance of a long-grandfathered signage location that does not set a precedent for all artistic displays to be advertising signs; and

WHEREAS, the Appellant asserts that the sign was

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a legal “non-conforming” advertising use prior to the Art Installation and it should be seen as a continuation of a non-conforming advertising use of the Sign Structure in that the installation was in the same format and location as advertising signs that had been at this location since the 1920s; and

WHEREAS, the Appellant asserts that additional unique features include that the artist leased the space from the property owner; the artist was identified on the installation; and the pieces were subsequently sold; and

WHEREAS, finally, the Appellant asserts that the Court has already found that there were insufficient findings in the record to support the Board’s prior decision and that DOB has presented no new evidence or arguments that would support new findings by the Board; and

DOB’s Original Arguments

WHEREAS, in sum, during the original case, DOB stated that it did not contest the Appellant’s claim that an advertising sign existed prior to June 1, 1968; however, DOB asserted that during the time the building wall was used to display the Art Installation, the non-conforming advertising sign use was discontinued, and therefore the use must terminate pursuant to ZR § 52-61; and

WHEREAS, DOB stated that pursuant to ZR § 12-10, a non-conforming “sign” must continue to be used to “announce, direct attention to or advertise,” and a non-conforming “advertising sign” must continue to be used as 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

WHEREAS, DOB concluded that painted plywood, whether visible in solid colors or eroded into patterns, does not announce, direct attention to or advertise a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot, and therefore, does not constitute a “sign” or “advertising sign” pursuant to the ZR § 12-10 definitions of those terms; and

DOB’s Position on Remand

WHEREAS, DOB maintains its position that the “Holland Tunnel Wall” displayed at the site from 1979 to 1989 did not meet the ZR § 12-10 definition of “sign” or “advertising sign” because: (1) the “Holland Tunnel Wall” did not “announce, direct attention to, or advertise” as per the sign definition’s requirement (b); and (2) the “Holland Tunnel Wall” did not direct attention to a business, profession, commodity, service or entertainment conducted, sold, or offered off the zoning lot as per the advertising sign definition’s requirement; and

WHEREAS, DOB cites to requirement (b) of the definition of “sign” which provides that a sign “announce, direct attention to, or advertise” a particular message because the threshold requirement that there be an exhibition of any writing, picture, emblem, flag or other

figure does not alone satisfy the other three elements of the ZR § 12-10 definition; and

WHEREAS, DOB states that the enumerated forms of expression must communicate a commonly understood message that is readily discernible by the viewer because otherwise the statute would include all forms of expression that met the sign definition’s requirements (a) and (c) and paragraph (b) would be without meaning; and

WHEREAS, DOB asserts that the “Holland Tunnel Wall” did not announce, direct attention to, or advertise because there was no particular message being conveyed; and

WHEREAS, in support of the assertion that the Art Installation failed to meet the definition of sign, DOB cites to historic records regarding the wall including copies of a Department of Finance photograph dated 1982-1987 and other photographs of the art installation posted on the Wikipedia website, which described the different layers of paint the artist used and the process of their degradation; and

WHEREAS, DOB notes that the article states that “[t]he artist’s intention was to use paints that were incompatible with each other so that as the work weathered, all the different colors would merge, in natural patterns;” and

WHEREAS, DOB also cites to a New York Times article dated August 7, 1981 titled “An Outdoor-Sculpture Safari Around New York” which described Fugate-Wilcox’s work at 111 Varick Street as “sheets of plywood painted yellow” covering the façade and noted that the artist felt that “[t]ime and the weather...will give [the display] esthetic appeal;” and

WHEREAS, accordingly, DOB asserts that the Art Installation was used to show changing paint patterns caused by exposure to the outdoors and not to “announce, direct attention to, or advertise” or (2) convey any message and, thus, was comparable to a display of colorful lights on a building, which also does not deemed to be a “sign” per zoning; and

WHEREAS, DOB asserts that in order to announce, direct attention to or advertise, as required by the definition’s (b), a sign must communicate a commonly understood message that is readily discernible by the viewer; and

WHEREAS, DOB states that the “Holland Tunnel Wall” did not “announce, direct attention to, or advertise” the artist, his artwork, or anything else; and

WHEREAS, first, DOB notes that there is no evidence that Mr. Fugate-Wilcox’s name was prominently identified such that the display was used for the purpose of promoting the artist and the work does not express any particular message about the artist or the artwork; and

WHEREAS, DOB notes that the artist’s signature was initially visible in the lower right hand corner of the Art Installation, but by the third year on display, the signature had worn away and was no longer legible; and

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WHEREAS, DOB submitted an image from the Wikipedia article showing the “Holland Tunnel Wall” in years one, two and three to support the point that for approximately seven of the ten years of the work’s installation, no signature was visible so if any message had ever been conveyed, it was certainly not during that period; and

WHEREAS, further, DOB asserts that for the life of the work, it did not contain identification of a museum exhibit, studio or gallery at which to view or buy the artist’s artwork, and so there was no basis to conclude that the Art Installation was used to direct attention to the artist, his profession, or his artistic product as none of that information included on advertising signs was present; and

WHEREAS, DOB cites to the Wikipedia article, which states that “[w]hen the sub-structure of the plywood billboard eventually gave way to the effects of weathering [and] had to be dismantled, the artist was able to reclaim many of the weathered plywood panels which, in turn became individual works of art;” and

WHEREAS, however, DOB notes that there was no information displayed on the art installation that offered it for sale and it cannot be concluded that the art installation was used to promote its purchase simply because the artist was able to sell the art installation segments after it was taken down; and

WHEREAS, DOB states that even if the Art Installation were a sign, it was not an advertising sign; and

WHEREAS, DOB asserts that it would be overly restrictive to interpret the work as an advertising sign because it would render every display an “advertising sign” directing attention to itself as a commodity for sale; and

WHEREAS, DOB notes that, contrary to the Appellant’s assertion, the Wikipedia article on the artist states that the wall space was not leased, but donated by the owner of the building; and

WHEREAS, further, the article states that the installation was painted by riggers of the Apollo Painting Company who donated their services and was sponsored by the Lower Manhattan Cultural Council (LMCC), which identifies itself as a non-profit art organization that produces cultural events and promotes the arts through grants, services, advocacy, and cultural development programs; and

WHEREAS, DOB asserts that regardless of whether the artist paid the building’s owner for the right to display his artwork or whether the project was funded by either a non-profit or commercial organization, the installation was not a sign, or advertising sign, regulated by the ZR because the face of the installation did not communicate a commonly understood message readily discernible by the viewer about the artist’s business or artwork; and

WHEREAS, DOB concludes that the Holland Tunnel Wall does not meet the definition of a “sign;” and

WHEREAS, DOB notes that an “advertising sign” per ZR § 12-10 is a “sign” that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered on another zoning lot and that, accordingly, to be an advertising sign under the ZR, the Appellant must show that this installation communicated a commonly understood message readily discernible by the viewer about the artist’s business or artwork sold elsewhere; and

WHEREAS, DOB disagrees with the Appellant’s position that the installation was not an advertising sign that directed attention to the artist’s business conducted on another zoning lot and artwork as a commodity sold on another zoning lot because the artist’s signature on the installation drew attention to the artist and the sale of the “Holland Tunnel Wall” generated revenue; and

WHEREAS, DOB asserts that the artist’s signature and sale of the installation do not satisfy the terms of the ZR “sign” or “advertising sign” definitions; and

WHEREAS, first, DOB notes that the artist’s name was not prominently featured in the display and that the overall effect of the small signature that wore away after three years in the context of the large display of changing paint colors did not direct attention to the artist; and

WHEREAS, DOB asserts that an artist’s signature is customarily used to show that a work is finished and authentic and is typically shown, as it was on the “Holland Tunnel Wall,” in a neutral color in the lower right hand corner of the work in order to not distract the viewer’s eye; and

WHEREAS, DOB asserts that given a signature’s conventional use on artwork, it would be unreasonable to consider the artist’s signature the focal point of the installation particularly given that the artist’s signature was no longer legible or even visible after the third year, therefore the signature was not an important element of the display during its ten year long use; and

WHEREAS, DOB finds that the temporary and incidental presence of the artist’s signature did not communicate a commonly understood message about the artist or his works and did not render the installation an advertising sign; and

WHEREAS, further, DOB asserts that how a display is used once it is removed from the premises is not a criterion for determining whether it was a sign or an advertising sign regulated by the ZR; and

WHEREAS, specifically, DOB states that the handling of the “Holland Tunnel Wall” after it was removed from the premises (to the extent it was dismantled and sold in pieces) does not support a finding that while it was displayed it promoted itself as a commodity that could be purchased; and

WHEREAS, DOB states that had the installation identified a museum exhibit, studio or gallery at which to view or buy the artist’s artwork, it would have been an

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advertising sign that directed attention to the artist's business and products offered on another zoning lot; and

WHEREAS, DOB states that here, there is no evidence of contemporaneous publicity to demonstrate that the installation was installed to encourage its sale or other artwork of the artist generally; and

WHEREAS, DOB states that the installation with abstract paint patterns on it does not direct attention to anything but itself as it exists on-site at the premises and does not meet the definition's standard for an advertising sign; and

WHEREAS, DOB disagrees with the Appellant's assertion that since the City does not have a policy with respect to whether art could constitute advertising, an art installation that does not meet the ZR sign definition should nevertheless be regulated as an advertising sign if it is located in the same wall space formerly used to display advertising signs; and

WHEREAS, DOB asserts that this argument misses the point because the only relevant question is whether the display meets the ZR's definition of a sign, not what the historic use of the Sign Structure has been; and

WHEREAS, moreover, DOB asserts that the Appellant's proposal to treat artwork as an advertising sign based only on the former use of the billboard space is incompatible with ZR § 52-61, which recognizes that once a non-conforming use ceases for a continuous period of two years, the right to the non-conforming use is lost; and

WHEREAS, DOB notes that the ZR does not make exception to allow the reactivation of a non-conforming advertising sign use following a ten year-long display of an art installation that did not meet the sign definition; and

The Board's Original Conclusion

WHEREAS, as noted, the Board re-adopts its prior resolution dated January 15, 2013 and re-affirms its position to uphold DOB's determination that the advertising sign use at the site was discontinued for a ten-year period between 1979 and 1989 when the "Holland Tunnel Wall" occupied the building and, thus, the advertising sign use must terminate pursuant to ZR § 52-61; and

WHEREAS, in sum, the Board found that the art installation, which consisted of sheets of plywood painted in layers of solid colors, did not meet the ZR § 12-10 definition of a "sign" or an "advertising sign" because it did not "announce, direct attention to, or advertise" a business, profession, commodity, service, or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot; and

WHEREAS, the Board agreed with DOB that the Art Installation is a creative expression that attracts attention to itself rather than directing attention to a use or product off the site, and therefore it lacks requirement (b)

of the ZR § 12-10 definition of "sign"; and

WHEREAS, the Board found the fact that the Art Installation is similar to many other murals displayed throughout the City, which DOB noted are not subject to the sign regulations of the Zoning Resolution, to be further evidence that an artist's signature is not sufficient to transform a piece of art into an advertising sign, since it is standard practice for artists to sign their work; and
The Board's Conclusion on Remand

WHEREAS, in consideration of all the supplemental points made in the record on remand, the Board is not persuaded by the Appellant's position that the "Holland Tunnel Wall" satisfies the definition of "sign" but that even if it were a "sign," by definition, it is not an "advertising sign," which is the regulated use subject to the discontinuation provisions of ZR § 52-61; and

WHEREAS, specifically, the Board does not find that the Art Installation created from paint and plywood satisfies requirement (b) of the ZR § 12-10 definition of "sign" for announcing, directing attention to, or advertising; and

WHEREAS, the Board finds that the inclusion of the requirement that a sign "announce, direct attention, or advertise" acknowledges that there are examples of writing, pictorial representation, emblems, flags or other characters which announce, direct attention to, or advertise and there are those that do not do any of those things yet may satisfy the other elements of the definition; and

WHEREAS, the Board finds that if every form of representation within the definition's list that is attached to a building (requirement (a)) and visible from outside the building (requirement (c)) "announce[d], directe[d] attention to, or advertise[d]" then there would not be any reason to include requirement (b); and

WHEREAS, the Board finds that the complete criteria for signs is enumerated so as to make clear that writing or pictorial representation along with being located on a wall alone do not meet the criteria for a sign and would fit into some other category not regulated by DOB; and

WHEREAS, the Board notes that there may be a pictorial representation that announces or advertises (requirement (b)) and is attached to a wall (requirement (a)) but is not visible from the outside of a building (requirement (c)) and therefore not a sign; and

WHEREAS, the Board notes that such a representation may have many qualities of a "sign" and even be referred to as a sign outside of the zoning context, but would not be a "sign" as per the Zoning Resolution and would not be regulated by DOB or the sign provisions; and

WHEREAS, the Board finds that the Appellant's interpretation of requirement (b) is overly broad, would lead to the conclusion that requirement (b) is unnecessary to state, and does not have any basis in either the statute

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or common sense; and

WHEREAS, the Board asserts that there are many forms of representation that would satisfy elements (a) and (c) but do not include (b) in any reasonable sense; and

WHEREAS, the Board cites to graffiti, which often includes a signature, would satisfy (a) and (c) but not (b) in any reasonable sense but, by the Appellant's reading, it would be a sign as it may direct attention to the graffiti artist's work there and elsewhere or to the graffiti artist; and

WHEREAS, additionally, the Board posits that, under the Appellant's interpretation, an architectural feature or piece of art attached to a building wall (such as a cornice or a metal sculptural relief on an exterior wall at Pace University) would be deemed a sign because it directs attention to itself and to the artist, like the "Holland Tunnel Wall" or ubiquitous graffiti; and

WHEREAS, the Board notes that if an architect imprinted her name on a building's exterior wall that had some form of decoration on it, by the Appellant's reasoning, that wall would be a sign because it announces, directs attention to, or advertises the architect; and

WHEREAS, in fact, the Board notes that it is difficult to imagine any visual representation that does not announce something, and would therefore not be a sign, if announcing its own presence or the identity of its creator alone would satisfy the (b) requirement; and

WHEREAS, the Board does not find that the statute's text is overly broad and leads to absurd results; and

WHEREAS, the Board notes that there are many examples of a representation fitting several of the definitional requirements, but not all, and thus may not be a "sign" in the zoning context and subject to the limitations and benefits of such use; and

WHEREAS, the Board finds that the plain reading of the text does not result in a conclusion that the "Holland Tunnel Wall" is a sign, because it does not announce, direct attention to, or advertise and the Board does not find the language to be ambiguous if the concepts in requirement (b) are given their plain meaning; and

WHEREAS, the Board does not see any requirement in the text that there be a discernible message, as DOB asserts, but finds that for the definition to have any meaning, there must be (1) a reasonable nexus between the sign and the business, profession, commodity, service or entertainment conducted, sold, or offered *offsite*, or else every "sign" would be an "advertising sign"; and

WHEREAS, furthermore, the Board questions whether the "Holland Tunnel Wall" satisfies the threshold requirement of being a "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" as the subject installation without any pictorial representation arguably does not satisfy even the threshold element of the "sign" definition; and

WHEREAS, the Board finds that the Appellant's repeated example of the Target brand logo is completely distinguishable as the Target logo is a pictorial representation (an illustration) of a target sign and it is an emblem (a symbol and a trademark); and

WHEREAS, the Board finds that, contrary to the Appellant's assertions, there is nothing abstract about the Target brand logo and no question that it satisfies requirement (b) that it announces, directs attention to, and advertises the brand; and

WHEREAS, the Board finds that even if the Holland Tunnel Wall were a "sign," by definition, it is not an "advertising sign" by definition because it does not "direct[] attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere"; and

WHEREAS, again, the Board finds that every sign has a connection to something offsite and in most every case the person who actually installed the sign is offsite, so, by the Appellant's reasoning, graffiti and decorative reliefs or architectural features, would be "advertising signs"; and

WHEREAS, the Board finds that the requirement is actually that "sign" direct attention to one of the enumerated endeavors *off* the zoning lot; so that, if the Holland Tunnel Wall were a "sign," it could only be so in the sense that it directs attention to itself as there is no perceptible nexus between it and an endeavor off of the zoning lot; and

WHEREAS, similarly, the Board does not find that the inclusion of a signature has any bearing on whether or not the Holland Tunnel Wall was an advertising sign, but notes that for approximately seven years no signature was visible, so finding the nexus between the installation and the "business," "profession," or "service" offsite is even more strained; on the contrary, the installation draws attention to something *on* the site, itself; and

WHEREAS, the Board notes that there is not any compelling evidence to refute the unbiased reporting that the Lower Manhattan Culture Council (LMCC) sponsored the project and secured the space, including the affidavit from someone affiliated with the building during the relevant period, which does not provide any evidence to establish that Mr. Fugate-Wilcox himself leased the space or that the LMCC did not lease the space on behalf of Mr. Fugate-Wilcox; and

WHEREAS, the Board notes that the distinctions between art and advertising are made to the benefit of art and that the exclusion of art installations from the definitions of "sign" and "accessory sign" protects the rights of artists and their expression thus, DOB routinely

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exempts murals and other art displays, which satisfy requirements (a) and (c) from sign regulations, but not (b); and

WHEREAS, the Board finds that the Appellant's argument that the Holland Tunnel Wall is an advertisement undermines the protections in place (including through the First Amendment and the Zoning Resolution) for art and the greater freedom it enjoys than advertising signs; and

WHEREAS, the Board notes that murals and other art installations on building walls are not regulated by the Zoning Resolution, or, indeed, any other local law, rule, or regulation except to the extent that the *process* of installing or maintaining such works requires agency approval; for example, scaffolds 40 feet or more in height require a work permit from the Department of Buildings pursuant to Building Code Section 3314.2; and

WHEREAS, the Board finds that an installation by an artist that was conceived of as art, according to reporting on the matter and which was completed using donated labor, materials, and through the support of a non-profit cultural organization that supports public art, fails to have any nexus to a commercial endeavor off of the zoning lot; and

WHEREAS, the Board notes that the Appellant looks to the unique history of the subject wall at 111 Varick Street, including that it has been occupied by a sign and sign structure for 80 or 90 years and that it is highly visible such that there is an expectation for an advertising sign to be there; and that the Holland Tunnel Wall occupied a former billboard space; and

WHEREAS, the Board finds such suppositions to be conclusory given that a high degree of visibility is not a requirement in zoning and that the shape and degree of visibility of an installation is not relevant to the analysis of whether it is advertising; and

WHEREAS, the Board notes that a flat rectangular form, such as that occupied by billboards, is a traditional and very natural backdrop for a painting and that any artist would prefer a location with optimal visibility; further, the fact that the Sign replaced a historic billboard is irrelevant to the question of whether it satisfies the definition of an advertising sign; and

WHEREAS, the Board concludes that through this decision, it does not have a basis to establish the distinction between all art and all advertising, but, based on the record before it, the Board determines that the the subject installation of plywood and layers of weathering paint was not an advertising sign and, thus, for the period

between 1979 and 1989, the advertising sign use on the subject wall at 111 Varick Street discontinued to an extent that such use is no longer permitted pursuant to ZR § 52-61; and

Therefore it is resolved, that the subject appeal, seeking a reversal of the Final Determination of the Department of Buildings, dated March 12, 2012, on remand is hereby denied.

Adopted by the Board of Standards and Appeals, December 17, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, December 17, 2013.

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Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

