

169-12-A & 170-12-A

APPLICANT – Davidoff Hatcher & Citron LLP, for Lamar Advertising of Penn LLC.

OWNER OF PREMISES – 26-28 Market Street, Inc.

SUBJECT – Application June 7, 2012 – Appeal from Department of Buildings' determination that signs are not entitled to continued non-conforming use status as advertising signs, pursuant to Z.R. §52-731. R7-2 zoning district.

PREMISES AFFECTED – 24-28 Market Street, southeast intersection of Market Street and Henry Street, Block 275, Lot 20, Borough of Manhattan.

COMMUNITY BOARD #3M

ACTION OF THE BOARD – Appeal Denied.

THE VOTE TO GRANT –

Affirmative:0

Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez ...4

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to Notice of Sign Registration Rejection letters from the Manhattan Borough Commissioner of the Department of Buildings (“DOB”), dated May 9, 2012, denying Application Nos. 10039802 and 10039701 from registration for two signs at the subject site (the “Final Determinations”), 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 December 11, 2012, after due notice by publication in *The City Record*, and then to decision on February 5, 2013; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by Chair Srinivasan; and

WHEREAS, the subject site is located at the southeast corner of Market Street and Henry Street, in an R7-2 zoning district; and

WHEREAS, the site was previously within a C8-4 zoning district which was rezoned to the current R7-2 zoning district pursuant to a rezoning on August 20, 1981; and

WHEREAS, the site is occupied by a building with a rooftop sign structure supporting two advertising signs with dimensions of 14'-0" high by 48'-0" wide (672 sq. ft.) each; one sign faces southeast, and one sign

faces northwest (the “Signs”); and

WHEREAS, the Signs are located approximately 27 feet from and within view of the Manhattan Bridge and approach, a designated arterial highway pursuant to Zoning Resolution Appendix H; and

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

WHEREAS, the Appellant seeks a reversal of DOB’s rejection of its sign registrations based on its assertion that (1) ZR § 52-731 has no application to lawful, non-conforming uses that predate its adoption; and (2) the application of ZR § 52-731 would result in an unconstitutional taking of property; and

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

REGISTRATION REQUIREMENT

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

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

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

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

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

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

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

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date set forth in the Zoning Resolution; and

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

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

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

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

WHEREAS, the parties agree that prior to September 29, 2011, the Appellant submitted Sign Registration Applications for the Signs; and

WHEREAS, on September 29, 2011, DOB notified the Appellant that its Sign Registration Applications failed to establish any basis for the sign to remain, and requested proof that the Signs complied with ZR § 52-731; and

WHEREAS, on February 29, 2012, the Appellant responded that the Signs were legal non-conforming uses which pre-dated the adoption of ZR § 52-731 and therefore it was not applicable to the Signs; and

WHEREAS, by letter dated May 9, 2012, DOB issued the determination which forms the basis of the appeal, stating that it found the “documentation inadequate to support the registration and as such the sign is rejected from registration;” and

RELEVANT STATUTORY PROVISIONS

ZR § 52-11

General Provisions

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

* * *

ZR § 52-731

Advertising signs

In all #Residence Districts#, a #non-conforming advertising sign# may be continued for ten years after December 15, 1961, or such later date that such #sign# becomes #non-conforming#, providing that after the expiration of that period such #non-conforming advertising sign# shall terminate.

* * *

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

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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 Determinations should be reversed because (1) ZR § 52-731 has no application to lawful, non-conforming uses that predate its adoption; and (2) the application of ZR § 52-731 would result in an unconstitutional taking of property; and

1. Legal Precedent Supports the Continuation of Pre-Existing Non-Conforming Uses

WHEREAS, the Appellant asserts that the Signs were lawfully established prior to the adoption of ZR §52-731, and therefore such section does not apply to the Signs; and

WHEREAS, the Appellant notes that a permit for the Signs was issued by DOB in 1934; and

WHEREAS, the Appellant cites to Toys-R-Us v. Silva, 89 N.Y.2d 411, 421 (1996) for the principle that “zoning restrictions, being in derogation of common law property rights, [are] strictly construed and any ambiguity [is] resolved in favor of the property owner”; and

WHEREAS, the Appellant asserts that the Zoning Resolution protects the continued use of non-conforming signs since “[i]t is the law of this state that non-conforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding contrary provisions of the [zoning] ordinance.” Costa v. Callahan, 41 A.D. 3d 1111, 1113 (3d Dept. 2007), citing Matter of Rudolf Steiner Fellowship Found v. DeLuccia, 90 N.Y.2d 453, 463 (1997); and

WHEREAS, the Appellant argues that statutes are to be construed prospectively and not retrospectively unless otherwise provided (See In re Town of Islip v. Caviglia, 73 N.Y.2d 544, 560-61 (1989)), and that unlike the statute at issue in Caviglia, the Appellant asserts that ZR § 52-731 is not content-neutral since it is exclusively directed to advertising signs and not any other manner of signs, and, accordingly, the general rule of prospective construction of statutes should apply; and

WHEREAS, the Appellant claims that the subject case is distinguishable from the authorities previously

relied upon by the Board in upholding the applicability of ZR § 52-731; and

WHEREAS, specifically, the Appellant asserts that (1) in 550 Halstead Corp. v. Zoning Bd. of Appeals, 1 N.Y.3d 561, 562 (2003) the non-conforming use was expanded and extended contrary to the local ordinance, whereas in this case the use as advertising signs pursuant to permits has remained constant, and (2) in Off Shore Restaurant Corp. v. Linden, 30 N.Y.2d 160 (1972), there was a clear change in use from a delicatessen to a cocktail lounge, thus requiring compliance with the municipal off-street parking requirement; and

WHEREAS, accordingly, the Appellant contends that since the statute at issue was adopted in 1963, after the non-conforming use status of the Signs, permitted in 1934, were established, it cannot be applied with respect to the Signs; and

2. DOB's Enforcement of the Signs would be an Unconstitutional Taking

WHEREAS, the Appellant asserts that the application of ZR § 52-731 would result in an unconstitutional taking of property in violation of the Fifth Amendment; and

WHEREAS, the Appellant contends that amortization provisions, such as the one set forth in ZR § 52-731, do not provide just compensation for the taking of a lawful advertising sign use consistent with the taking clause of the Fifth Amendment, which states: “...nor shall private property be taken for public use without just compensation;” and

WHEREAS, the Appellant argues that the Federal Highway Administration (“FHWA”) has provided clear guidance on this issue, and has expressly determined that the removal of legal advertising signs (such as those at issue on these appeals) located on federal roads or controlled highways pursuant to the Highway Beautification Act, 23 U.S.C. 131, requires the payment of just compensation to the owner of such advertising signs; and

WHEREAS, the Appellant asserts that Congress has repeatedly rejected the amortization of lawful advertising sign uses and amended the Highway Beautification Act in 1978 to clarify that “just compensation shall be paid upon the removal” of such advertising signs; and

WHEREAS, the Appellant further asserts that, as recently as 2006, FHWA confirmed as part of a national assessment of advertising sign control programs that amortization of sign uses is no longer an issue because of the settled principle that cash compensation must be paid in connection with such takings, and that in response to efforts by those seeking the removal of non-conforming advertising signs, FHWA noted: “some continue to advocate amortization as a means to accomplish this, but widespread use of this approach was effectively prohibited by Federal legislation;” and

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WHEREAS, the Appellant argues that DOB is relying on a statute that merely provided the owners and operators of lawfully established signs a period of years to continue such operations, without regard for any cash compensation for such takings; and

WHEREAS, accordingly, the Appellant asserts that ZR § 52-731 is inconsistent with Federal guidance on this issue and, if applied as DOB intends, will impose a significant deprivation of the Appellant's constitutional rights; and

DOB'S POSITION

WHEREAS, DOB asserts that zoning regulations prohibit the Signs in the subject R7-2 zoning district, as set forth at ZR § 22-30, which does not include advertising signs among the permitted uses; and

WHEREAS, DOB states that non-conforming advertising signs are permitted in residential zoning districts only when they comply with Chapter 2 of Article 5 of the Zoning Resolution; and

WHEREAS, specifically, DOB cites to ZR § 52-11, which states that "a non-conforming use may be continued, except as otherwise provided in this Chapter;" and

WHEREAS, DOB continues by citing ZR § 52-731, which expressly provided a limitation on the use of non-conforming advertising signs in residential zoning districts; the original text states that:

[i]n all Residence Districts, a non-conforming advertising sign may be continued for eight years after the effective date of this resolution or such later date that such sign becomes non-conforming, provided that after the expiration of that period such non-conforming advertising sign shall terminate; and

WHEREAS, DOB notes that on August 22, 1963, the original ZR § 52-731 was amended to allow a ten-year, rather than an eight-year, amortization period; the 1963 version of the text, allowing for a ten-year amortization period remains in effect today; and

WHEREAS, DOB states that in order to maintain the Signs, the Appellant must demonstrate that: (1) the Signs are non-conforming (a lawful pre-existing non-conforming use, as defined at ZR § 12-10) and (2) it has been less than ten years since the Signs became non-conforming; and

WHEREAS, DOB states that the lawful use must have been established on December 15, 1961 or at the time of a relevant zoning amendment; and

WHEREAS, DOB notes that the Appellant has submitted proof of a permit issued by DOB in 1933 for a roof sign structure and for electric sign permits issued by DOB in 1979, two years prior to the date the site was rezoned from C8-4 to R7-2; and

WHEREAS, DOB asserts that even assuming that the Signs existed lawfully on August 20, 1981, they

became "non-conforming" on that date since the site was rezoned to R7-2; therefore, on August 20, 1981, the ten-year amortization period set forth in ZR § 52-731 began to run and the Signs were required to be removed no later than August 20, 1991; and

WHEREAS, accordingly, DOB asserts that its rejection of the sign registrations are appropriate because the Signs do not comply with ZR § 52-731; and

CONCLUSION

WHEREAS, the Board agrees with DOB that the language of ZR § 52-731 is clear and requires that because any advertising sign at the site became a non-conforming use on August 20, 1981 when it was mapped to be within an R7-2 zoning district, such use should have been terminated by August 20, 1991; and

WHEREAS, the Board agrees with DOB that even if the Appellant were to establish that the Signs were lawfully non-conforming at the relevant dates, the question is moot since even a lawfully non-conforming sign would have to have been terminated on or before August 20, 1991; and

WHEREAS, accordingly, the Board finds that the advertising sign use should have been terminated on or before August 20, 1991, pursuant to ZR § 52-731; and

WHEREAS, the Board notes that the ZR § 12-10 definition of non-conforming use and ZR § 52-731 contemplate prospective enforcement in that uses that were rendered non-conforming on December 15, 1961 (like the subject Sign) were able to remain for ten years so long as they were lawful on December 15, 1961 (per ZR § 12-10); and

WHEREAS, the Board notes that the adoption of the 1961 Zoning Resolution did not prohibit the continuance of non-conforming uses, but rather newly non-conforming uses were able to exist in derogation of the Zoning Resolution, but only for a specified period; and

WHEREAS, as to the applicability of statutes adopted after a use has been established, the Board notes that per the Court of Appeals, municipalities may adopt laws regarding previously existing nonconforming uses. 550 Halstead Corp., 1 N.Y.3d at 562; Matter of Toys "R" Us v Silva, 89 N.Y.2d 411, 417, (1996); and

WHEREAS, 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., 1 N.Y.3d at 562; and

WHEREAS, further, the Board notes that in Off Shore Restaurant Corp., the Court stated, "the courts do not hesitate to give effect to restrictions on non-conforming uses . . . It is because these restrictions flow

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from a strong policy favoring the eventual elimination of nonconforming uses” 30 N.Y.2d at 164; and

WHEREAS, the Board finds that, despite the Appellant’s attempt to distinguish the facts of 550 Halstead Corp. and Off Shore Restaurant Corp. from those of the subject case, the cited cases are relevant with regard to the above-mentioned holdings pertaining to the regulation of non-conforming uses; and

WHEREAS, the Board notes that ZR § 52-731 is not contrary to ZR § 52-11, which states that “a nonconforming use may be continued, except as otherwise provided in [Chapter 2]” because the Board notes that non-conforming uses are protected by Article V, but, as anticipated at ZR § 52-11, there are limiting conditions; and

WHEREAS, the Board finds that the Appellant has failed to provide evidence that its purported satisfaction of the Sign Registration requirement supersedes the clear, undisputed text of the Zoning Resolution; and

WHEREAS, as to the Appellant’s assertion that the application of ZR § 52-731 would amount to a regulatory taking, the Board disagrees with the Appellant that the application of zoning regulations constitutes a taking; however, the Board finds that to the extent ZR § 52-731 does constitute an unconstitutional takings action, any such claim is properly directed against the statute itself, rather than DOB’s enforcement of the statute, and such a claim is more appropriately addressed in a different forum; and

WHEREAS, the Board disagrees with the Appellant’s reliance on the Federal Highway Beautification Act, which regulates advertising signs located within 660 feet of federal roads or controlled highways, and distinguishes that statute from ZR § 52-731, which prohibits advertising signs in residential districts regardless of the proximity of such signs to an arterial or highway; and

WHEREAS, the Board notes that the purpose of ZR § 52-731, to eliminate prior non-conforming advertising signs from residential districts in which such commercial uses are incompatible, has no relationship to the stated purpose for the Federal Highway Beautification Act’s regulation of advertising signs, which is “to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty”; thus, the Board finds the Appellant’s reliance on the Federal Highway Beautification Act to be misguided; and

WHEREAS, the Board further notes that the

Appellant has provided no evidence that the Federal Highway Beautification Act should apply to the regulation of the Signs, where DOB’s enforcement results from the location of the Signs in a residential districts and not their proximity to any federal roads or controlled highways; and

WHEREAS, the Board notes that in addition to the ten-year amortization period provided under ZR § 52-731, the Appellant has enjoyed the benefit of the Signs for more than 20 years past the August 20, 1991 date when any sign at the site should have been terminated; and

WHEREAS, accordingly, the Board finds that DOB properly rejected the Signs from registration.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determinations of the Department of Buildings, dated May 9, 2012, is hereby denied.

Adopted by the Board of Standards and Appeals, February 5, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, February 5, 2013.

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Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.