197-12-A
APPLICANT – Davidoff Hutcher & Citron LLP, for Interstate Outdoor Advertising.
OWNER OF PREMISES – Hamilton Plaza Associates.
SUBJECT – Application June 21, 2012 – Appeal from Department of Buildings' determination that a sign is not entitled to continued legal status as advertising sign. M1-2/M2-1 zoning district.
PREMISES AFFECTED – 1-37 12th Street, east of Gowanus Canal between 11th Street and 12th Street, Block 10007, Lot 172, Borough of Brooklyn.
COMMUNITY BOARD #7BK
ACTION OF THE BOARD – Appeals Denied.
THE VOTE TO GRANT –
Affirmative:.....0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Notice of Sign Registration Rejection letter from the Brooklyn Borough Commissioner of the Department of Buildings ("DOB"), dated May 25, 2012, denying registration for a sign at the subject premises (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 Sign Enforcement Unit and in support of the legal establishment of this sign. Unfortunately, we find this documentation inadequate to support the registration for advertising use. We note that the permit provided is for an accessory sign, and 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 February 5, 2013, after due notice by publication in *The City Record*, and then to decision on April 9, 2013; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by Commissioner Montanez; and

WHEREAS, the subject premises ("the Premises") is located on the north side of 12th Street between Hamilton Place and the Gowanus Canal, in an M1-2 zoning district; and

WHEREAS, the Premises is occupied by a five-story commercial building and, on the roof of the building, a south-facing advertising sign ("the Sign"); and

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

WHEREAS, the Appellant states that the Sign is a rectangular advertising sign measuring 24 feet in height by 75 feet in length for a surface area of 1,800 sq. ft. and located within 900 feet of the Gowanus Expressway; and

WHEREAS, on August 29, 1968, DOB issued a permit in connection with application BN 4655/68 for the construction of a "steel structure on roof as per plan filed herewith (Business Sign)" (the "Permit"); and

WHEREAS, DOB states that the Sign is located 550 feet from the Gowanus Expressway; and

WHEREAS, the Appellant seeks a reversal of DOB's rejection of the registration of the Sign based on DOB's determination that the Appellant failed to provide evidence of the establishment of an advertising sign; and

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

REGISTRATION REQUIREMENT

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

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 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 DOB guidance document sets forth the instructions for filing under Rule 49 and states 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, on September 1, 2009, pursuant to the requirements of Article 502 and Rule 49, the Appellant submitted an inventory of outdoor signs under its control and a Sign Registration Application for the Sign and completed an OAC3 Outdoor Advertising Company Sign Profile, attaching one undated photograph and a copy of the Permit as evidence of establishment of the Sign; and

WHEREAS, on September 29, 2011, DOB issued a Notice of Sign Registration Deficiency, stating that "[DOB is] unable to accept the sign for registration (due to) "Failure to provide proof of legal establishment – 1972 BN 4655 for accessory sign"; and

WHEREAS, by letter dated February 29, 2012, the Appellant submitted a response to DOB, asserting that the Permit established the use in 1968 and that the applicable date for lawful establishment under the Zoning Resolution was actually October 31, 1979; and

WHEREAS, DOB determined that theFebruary 29, 2012 arguments lacked merit, and issued the Final Determination on May 25, 2012; and

RELEVANT STATUTORY PROVISIONS

> ZR § 12-10 *Definitions*
>
> Non-conforming, or non-conformity
>
> A "non-conforming" #use# is any lawful #use#, whether of a #building or other structure# or of a #zoning lot#, which does not conform to any one or more of the applicable #use# regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto. . .
>
> * * *
>
> 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

* * *

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; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant contends that the Final Determination should be reversed because: (1) the Sign was established as an advertising sign prior to June 1, 1968 and may therefore be maintained as a legal non-conforming advertising sign; (2) the Sign has not been discontinued; and (3) equitable estoppel prevents DOB from taking enforcement action against the Sign; and

Lawful Establishment

WHEREAS, the Appellant contends that that the Sign was established prior to June 1, 1968 because the text of the Permit contains references to DOB applications from 1966; and

WHEREAS, the Appellant contends that such references are sufficient proof that the Sign existed as an advertising sign rather than a business sign prior to June 1, 1968; and

Continuous Use

WHEREAS, the Appellant asserts that the Sign has not been discontinued for a period of two or more years since establishment as a non-conforming use on June 1, 1968; and

WHEREAS, the Appellant contends that it has submitted sufficient evidence proving the requisite continuity in the form of DOB Buildings Information System printouts showing "numerous BN and electric sign applications" from 1965-1984 and one undated photograph; and

Estoppel Against the City

WHEREAS, the Appellant asserts that it has relied on the Permit for several years and made substantial investments relative to the continued operation of the Sign; and

WHEREAS, the Appellant asserts that under established principles of equity, DOB should be estopped from ordering the removal of the Sign; and

WHEREAS, the Appellant asserts that although as a general rule estoppel or laches cannot be used against a municipality enforcing its zoning law, New York courts have ruled that these doctrines are not foreclosed entirely and may be invoked as a rare exception; and

WHEREAS, the Appellant states that two New York State court decisions – Town of Hempstead v. DeMasco, 2007 WL 4471362 (Sup. Ct. 2007), aff'd, 62 A.D.3d 692 (2d Dept. 2009) and Inner Force Econ. Dev. Corp. v. Dep't of Educ. Of the City of New York, 36 Misc.3d 758, 559 (Sup. Ct. 2012) – to support its conclusion that the City should be estopped; and

WHEREAS, the Appellant notes that in DeMasco, the Town sought to enforce its zoning ordinance against a metal salvage business which had existed for many years prior to a zoning change, and the Appellate Division affirmed that the Town was equitably estopped in part because it continued business with the junkyard and "gave an imprimatur to the businesses' continued operation"; and

WHEREAS, the Appellant argues that this appeal is similar to DeMasco, in that DOB "did not prohibit the [Appellant] from continuing to maintain its advertising signage during the period following the issuance of the Permit[s]" and that "by not enforcing against the signage [DOB] implicitly permitted its continued use"; and

WHEREAS, the Appellant notes that Inner Force involved an action against the New York City Department of Education in which a plaintiff filed its Notice of Claim with the Comptroller's Office instead of the Office of the Corporation Counsel, which should have received the claim instead, and the Comptroller's Office acknowledged the receipt of the Notice, informed the plaintiff that it was conducting an investigation and ultimately denied the claim based in part on the improper notice; and

WHEREAS, the Appellant notes that the Inner Force court found estoppel applicable to the conduct of the Comptroller's Office because the Comptroller's response to the plaintiff's erroneous notice wrongfully or negligently induced reliance by the plaintiff to its detriment to believe that its notice of claim was proper and that the proper party had been served; and

WHEREAS, the Appellant contends that this appeal is similar because "DOB clearly understood or should have understood that by not pursuing enforcement action against the maintenance of valuable advertising signage there was every reason for the [Appellant] to continue its operation"; and

WHEREAS, accordingly, the Appellant argues that DOB should be estopped from taking any enforcement action against the Sign and DOB's Final Determination with respect to the Sign should be reversed; and

DOB'S POSITION

WHEREAS, DOB asserts that the Appellant has not submitted sufficient evidence to demonstrate that an advertising sign was established at the Premises; and

WHEREAS, DOB states that in order to show proof of establishment of an advertising sign under the non-conforming use provisions of ZR § 42-55, an applicant only needs to demonstrate that the advertising sign was constructed prior to June 1, 1968 or November 1, 1979 (depending on the size of the sign); and

WHEREAS, DOB explains that the Department does not require proof of an advertising sign permit under this Zoning Resolution section because the section was promulgated on February 21, 1980 to legalize, as non-conforming, certain advertising signs that were previously prohibited; and

WHEREAS, DOB asserts that there is insufficient evidence of the establishment of an advertising sign at the Premises; and

WHEREAS, DOB contends that the only evidence the Appellant has produced to demonstrate establishment of an advertising sign at the Premises is the Permit, which by its terms indicates that it is for a "business sign"; and

WHEREAS, however, DOB states that the designation of "business sign" on the Permit indicates that the Permit was for an "accessory sign" and not for an "advertising sign"; and

WHEREAS, consequently, DOB asserts that the Permit cannot be relied upon as evidence of the establishment of anything other than an accessory sign; and

WHEREAS, DOB notes that the Appellant has also not produced any evidence that the 1968 accessory sign was converted to an advertising sign; and

WHEREAS, DOB notes that if an advertising sign was in fact constructed at the Premises between June 1, 1968 and November 1, 1979, the advertising sign could only obtain non-conforming status under ZR § 42-55(c)(2) if the advertising sign did not exceed 1,200 sq. ft. in surface area because the Premises is within 900 feet of an arterial highway; and

WHEREAS, DOB notes that the Sign measures 1,800 sq. ft. in surface area; and

WHEREAS, thus, DOB asserts that the Appellant has not demonstrated the lawful establishment of an advertising sign; and

WHEREAS, accordingly, DOB asserts that it properly issued its Final Determination denying the registration of the Sign; and

CONCLUSION

WHEREAS, the Board finds that: (1) DOB properly denied the Sign registration because the Appellant has not met its burden of demonstrating that the Sign was established prior to June 1, 1968 or November 1, 1979 as an advertising sign; and (2) DOB is not equitably estopped from correcting its erroneous issuance of the Permit; and

WHEREAS, the Board finds that, in fact, there is no basis to conclude that an advertising sign was ever lawfully established at the Premises; and

WHEREAS, the Board agrees with DOB that the Permit is evidence of the establishment of an accessory

sign rather than an advertising sign; and

WHEREAS, the Board notes that, historically, the Zoning Resolution defined a "business sign" as "an accessory sign which directs attention to a profession, business, commodity, service, or entertainment conducted, sold, or offered upon the same zoning lot"; and

WHEREAS, the Board finds that Permit authorized the construction of an accessory business sign rather than an advertising sign because: (1) the "proposed work" noted on the Permit was the construction of a "business sign"; and (2) the two sketches included with the Permit contain a note stating that the sign is "For Business Conducted on the Premises"; and

WHEREAS, the Board finds that, contrary to the Appellant's assertions, the references to two 1966 alteration applications on the Permit are not relevant to the question of whether an advertising sign existed at the Premises prior to 1968; and

WHEREAS, thus, the Board finds that the Appellant's reliance on the Permit as evidence of the establishment of an advertising sign is misplaced; and

WHEREAS, the Board concludes that, since the Appellant has offered no other evidence regarding the establishment of an advertising sign pursuant to ZR § 42-55(c), an advertising sign has never been lawfully established at the Premises; and

WHEREAS, the Board does not find the Appellant's arguments regarding equitable estoppel persuasive; and

WHEREAS, the Board distinguishes the Appellant's case law on the matter of equitable estoppel on the primary basis that in DeMasco the City actually maintained a business relationship with the junkyard on which the junkyard relied as an indication that its rights were preserved and in Inner Force, the City made a specific procedural decision that deprived the claimant of a right he might otherwise have had, if the City had not accepted his claim without notifying him of its defective notice; and

WHEREAS, the Board finds the Appellant's assertions about reasonable reliance to be particularly dubious since it is unreasonable to rely on a "business sign" permit but maintain an "advertising sign"; and

WHEREAS, the Board notes that the Appellant, by its own admission, has enjoyed approximately 45 years' worth of revenue from an advertising sign that has never been permitted by the Zoning Resolution at the Premises; and

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

Therefore it is Resolved that this appeal, challenging a Final Determination issued on May, 25, 2012, is denied.

Adopted by the Board of Standards and Appeals, April 9, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, April 9, 2013.
Printed in Bulletin Nos. 13-15, Vol. 98.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.