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APPLICANT – Jack Lester, for SRS Real Estate Holdings c/o Richard Whel, Esq., owner.

SUBJECT – Application October 24, 2013 – An appeal to Department of Buildings’ determination to permit an eating and drinking establishment. Appellant argues that the non-conforming use has been discontinued and the use is contrary to open space regulations (§52-332). R6B zoning district.

PREMISES AFFECTED – 280 Bond Street, Block 423, Lot 35, Borough of Brooklyn.

COMMUNITY BOARD #3BK

ACTION OF THE BOARD – Application Denied.

THE VOTE TO GRANT –

Affirmative:.....0

Negative: Commissioner Hinkson, Commissioner Ottley-Brown and Commissioner Montanez3

THE RESOLUTION –

WHEREAS, this is an appeal of a final determination, issued by the Brooklyn Borough Commissioner of the Department of Buildings (“DOB”) on October 1, 2013 (the “Final Determination”), brought by the property owner (the “Appellant”); and

WHEREAS, the Final Determination states, in pertinent part:

First, you claim that the non-conforming use of the Premises has discontinued for more than two years in violation of ZR 52-61 and that therefore, no non-conforming use may remain.

In support of your claim, you provide multiple affidavits of neighbors who claim that they have not seen commercial activity at the Premises since September 11, 2001. As stated above, the Department conducted an audit of the Job Application and issued an Intent to Revoke letter on June 19, 2013 with an objection citing to ZR 52-61 to “confirm that the non-conforming use has not been discontinued”. In response, the applicant provided sufficient information to show that the non-conforming use had not discontinued for more than two years, including DOB records, utility bills, and aerial photographs.

In addition, the Department’s review of multiple images from Bing.com maps, Google.com maps, and Pictometry.com over a period stretching from 2003 to 2013 indicates commercial activity, including several different trucks and cars in the open space at the Premises and an open gate to the Premises (see attached images). Therefore, based on this information showing continuous commercial use and without additional, verifiable evidence to demonstrate discontinuance of more than 2 years, the Department has no reason to conclude that the non-conforming use discontinued on the basis

of the uncorroborated affidavits you provided.

Second, you claim that the use of the open space at the Premises as an eating and drinking establishment is prohibited by ZR 52-34. However, ZR 52-34 does not apply to this change in use because this change of use involves a change from a non-conforming Use Group 16 use to a non-conforming Use Group 8 theater and non-conforming Use Group 6 eating and drinking establishment. Such change is permitted pursuant to ZR 52-332(a) and is not governed by ZR 52-34. Rather, ZR 52-34 only applies to changes in use from Use Group 15 and some below, not to Use Group 16; and

WHEREAS, a public hearing was held on this appeal on January 14, 2014 after due notice by publication in *The City Record*, with continued hearings on April 1, 2014, and June 17, 2014, and then to decision on August 19, 2014; and

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

WHEREAS, the subject site is located at the corner of Bond Street and DeGraw Street, within an R6B zoning district; and

WHEREAS, the site is occupied by an 8,500-sq.-ft. building, designed for warehouse and office use; and

WHEREAS, this appeal of the Final Determination is brought on behalf of community members and We Are Gowan (the “Appellant” or “Appellants”) represented by counsel to challenge the legality of the permits issued to the property owner and lessee; and

WHEREAS, the Appellant asserts that the non-conforming use of the premises has discontinued for more than two years in violation of ZR § 52-61, therefore only a conforming use can occupy the subject site; and

WHEREAS, a supplemental issue on the appeal is that the Appellant asserts that the use of the open space at the building as an eating and drinking establishment is prohibited in accordance with ZR § 52-332; and

WHEREAS, the supplemental issue was not pursued during the course of the appeal; and

WHEREAS, New York State Senator Velmanette Montgomery and New York State Assemblywoman Joan L. Millman provided testimony in support of the appeal, seeking revocation of the permits; and

WHEREAS, DOB and the property owner (the “Owner”), both represented by counsel, appeared and made submissions in opposition to the appeal; and

PROCEDURAL HISTORY

WHEREAS, on October 16, 2012, the Owner filed an Alteration Type 1 application to convert from commercial (Use Group 16 non-conforming use) to theater (Use Group 8), eating and drinking establishment

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(Use Group 6), and non-commercial art galleries (Use Group 4) to be occupied by the Rock and Roll Playhouse (RRPH); and

WHEREAS, after repeated reviews including examination of the non-conforming uses, DOB approved the application on November 28, 2012 and work permits were issued on April 17, 2013; and

WHEREAS, on June 6, 2013, the Opposition submitted correspondence to DOB requesting that it revoke the permits; and

WHEREAS, DOB conducted an audit of the Job Application and issued an Intent to Revoke letter on June 19, 2013 with an objection citing to ZR 52-61 to “confirm that the non-conforming use has not been discontinued”; and

WHEREAS, in response, the Owner provided information to show that the non-conforming use had not discontinued for more than two years to DOB’s satisfaction; and

WHEREAS, on August 12, 2013, the Opposition filed an Article 78 action seeking an order to compel DOB to issue a response to the Opposition’s Freedom of Information Law (“FOIL”) request; by stipulation, dated September 25, 2013, the parties agreed upon a schedule for DOB’s response and production of documents; and

WHEREAS, on October 31, 2013 DOB issued the Final Determination, which forms the basis of the appeal; and

RELEVANT ZONING RESOLUTION 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 § 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 § 52-332 (Other buildings or structures in Residence Districts)

In all #Residence Districts#, a #non-conforming use# listed in Use Group 11A, 16, 17 or 18 which is not subject to the provisions of Sections 52-32 (Land with Minor Improvements) or 52-331 (Buildings designed for residential use), may be changed either to a conforming #use# or:

- (a) to any #use# listed in Use Group 6, 7B, 7C, 7D, 8, 9, 10, 11B or 14, in which case any subsequent change of #use# shall conform to the provisions of Section 52-34 (Commercial Uses in Residence Districts); or
- (b) in accordance with the provisions of the following table:

<u>From Use Group</u>	<u>To Use Group</u>
11A	11A
16 or 17	11A 16 or 17
18	11A 16 17 or 18

provided that such changed #use# shall conform to all regulations on performance standards applicable in M1 Districts, and that any such changed #use#, or the storage of materials or products #accessory# to any changed #use#, which is not located within a #completely enclosed building#, shall be screened by a solid wall or fence (including solid entrance or exit gates) at least eight feet in height. Whenever a #use# located within a #completely enclosed building# is changed to another #use#, no activity related to such changed #use#, including the storage of materials or products, shall be located outside of such #building#.

In no event shall any change of #use# permitted in paragraph (b) of this Section extend the statutory period of useful life applicable under the provisions of Section 52-74 (Uses Objectionable in Residence Districts); and

THE APPLICABLE STANDARD FOR NON-CONFORMING USES

WHEREAS, DOB and the Appellant agree that the site is currently within an R6B zoning district and that the proposed Use Group 8 and Use Group 6 uses are not permitted as-of-right within the zoning district; and

WHEREAS, accordingly, in order to establish the affirmative defense that the non-conforming use is permitted to remain, the Owner must meet the Zoning Resolution’s criteria for a “non-conforming use” as defined at ZR § 12-10; and

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WHEREAS, ZR § 12-10 defines “non-conforming” use as “any lawful *use*, whether of a *building or other structure* or of a tract of land, 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”; and

WHEREAS, additionally, the Appellant must comply with ZR § 52-61 (*Discontinuance, General Provisions*) which states that: “[i]f, for a continuous period of two years, either the *non-conforming 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 . . . shall thereafter be used only for a conforming *use*”; and

WHEREAS, thus, the Board notes that the standard to apply to the subject use is (1) the use existed lawfully as of December 15, 1961, and (2) that the use did not change or cease for a two-year period since then. See ZR §§ 12-10, 52-61; and

WHEREAS, the question of the use’s establishment and continuity are not under dispute, except for the period prior from 2001 until 2014; and

WHEREAS, as noted, the Appellant makes the supplemental argument that the proposed outdoor use is not permitted per ZR § 52-34, however did not pursue the argument the argument throughout the appeal process; and

WHEREAS, the Appellant’s position is that the non-conforming use at the site was discontinued for a period longer than two years and, thus, that no non-conforming use is permitted pursuant to ZR § 52-61 and, secondarily that the open space at the site could not be used as an eating and drinking establishment pursuant to ZR § 52-332; and

THE OWNER’S POSITION

- Evidence

WHEREAS, the Owner states that since at least May 1937, the site has been used for commercial use, as indicated on the 1937 Certificate of Occupancy, which reflects “Motor Truck Storage. One family”; and

WHEREAS, the Owner notes that the Certificate of Occupancy issued in February 1938 similarly reflects the use as “Storage Garage for Motor Trucks With One (1) 55 Gal Gasoline Tank in Open Yard” and the last recorded CO, dated April 1967 reflects the following: “First on ground: Loading and storage of boiler equipment. Non-storage garage for motor trucks; Mezzanine: offices”; and

WHEREAS, the Owner states that the Zoning Resolution lists the ground floor uses as Use Group 16 uses and the offices would be classified as accessory Use Group 16 uses; and

WHEREAS, accordingly, the Appellant states that it has established that the use was established as of

December 15, 1961, prior to the site being zoned with an R6 zoning district where the use is not permitted as of right; and

WHEREAS, the Owner asserts that since December 15, 1961 when the use was no longer permitted pursuant to zoning use regulations, there has not been any discontinuance for a period of two years or greater; and

WHEREAS, however, all parties focus their attention to the period of 1982 to 1985 and 2001 to 2012; and

WHEREAS, the Owner cites to DOB Technical Policy and Procedure Notice #14/1988 (Documentation In Support of Existing Use) (the “TPPN”), which sets forth guidelines for the application of ZR § 52-61 and the submission of proof to DOB in support of non-conforming uses; and

WHEREAS, the TPPN includes the following types of evidence, which DOB accepts: (a) City agency records such as tax records or licenses; (b) records, bills, documentation from public utilities, telephone ads; (c) other documentation of occupancy including ads and invoices; and (d) affidavits; and

WHEREAS, the Owner’s evidence within category (a) include: (1) Department of Finance records, (2) utility bills, and (3) aerial photographs, including multiple images from Bing.com maps, Google.com maps, and Pictometry.com during the period of 2003 to 2013, which reflect several different trucks and cars in the open space and an open gate; and

WHEREAS, the Owner submitted the following evidence for 2001: (1) a letter from Robert Grosseto of Superior Tinsmith Supply Co. reflecting its business relationship with Excellence (the “Grosseto Letter”) and (2) a letter from Robert Hepplewhite, mechanic, regarding repair of Excellence’s commercial vehicles (the “Hepplewhite Letter”); and

WHEREAS, the Owner submitted the following evidence for 2002: (1) eight DOB work permits issued to Excellence; (2) a 1040 tax form reflecting Excellence’s income and expenses; (3) Providence Washington Insurance of New York commercial insurance policies with March 26, 2002 commencement date, covering 280 Bond Street; (4) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (5) a Sanborn Map, which indicates commercial use of the site; (6) an affidavit from accountant Lawrence Bauman stating that he commenced preparing tax returns for the Owner d/b/a Excellence; (the “Bauman Affidavit”); (6) an affidavit from Matthew Germann, tool dealer stating that he visited the site in 2002 and witnessed commercial use (the “Germann Affidavit”) (7) the Grosseto Letter; and (8) the Hepplewhite Letter; and

WHEREAS, the Owner submitted the following evidence for 2003: (1) 11 DOB work permits issued to Excellence; (2) a 1040 tax form reflecting Excellence’s

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income and expenses; (3) Providence Washington Insurance of New York commercial insurance policies, covering 280 Bond Street; (4) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (5) a Sanborn Map, which indicates commercial use of the site; (6) the Bauman Affidavit; (7) the Germann Affidavit; (8) the Grosetto Letter; (9) the Hepplewhite Letter; and (10) an affidavit from Seth Nahoum, a former Excellence employee stating that Excellence operated at the site (the "Nahoum Affidavit"); and

WHEREAS, the Owner submitted the following evidence for 2004: (1) County Clerk's Office Judgment Docket & Lien Book search summary listing Excellence at the site; (2) nine DOB work permits issued to Excellence; (3) a 1040 tax form reflecting Excellence's income and expenses; (4) Providence Washington Insurance of New York commercial insurance policies, covering 280 Bond Street; (5) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (6) a Sanborn Map, which indicates commercial use of the site; (7) Excellence's Transaction Ledger from City Check Cashing; (8) the Bauman Affidavit; (9) the Germann Affidavit; (10) the Grosetto Letter; (11) the Hepplewhite Letter; and (12) the Nahoum Affidavit; and

WHEREAS, the Owner submitted the following evidence for 2005: (1) County Clerk's Office Judgment Docket & Lien Book search summary listing Excellence at the site; (2) 25 DOB work permits issued to Excellence; (3) a 1040 tax form reflecting Excellence's income and expenses; (4) Providence Washington Insurance of New York commercial insurance policies, covering 280 Bond Street; (5) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (6) Excellence's Transaction Ledger from City Check Cashing; (7) three client job analyses; (8) a Cassone Leasing invoice for trailer rental at a job site; (9) a Sanborn Map, which indicates commercial use of the site; (10) Worker's Compensation Insurance Premium; (11) the Bauman Affidavit; (12) the Germann Affidavit; (13) the Grosetto Letter; (14) the Hepplewhite Letter; and (15) the Nahoum Letter; and

WHEREAS, the Owner submitted the following evidence for 2006: (1) 34 DOB work permits issued to Excellence; (2) Department of Finance assessment rolls; (3) a 1040 tax form reflecting Excellence's income and expenses; (4) Scottsdale Insurance Company commercial insurance policies, covering 280 Bond Street; (5) Excellence's Transaction Ledger from City Check Cashing; (6) Cassone Leasing invoice for trailer rental at a job site; (7) four client job analyses; (8) the Bauman Affidavit; (9) the Germann Affidavit; (10) the Grosetto Affidavit; (11) the Hepplewhite Letter; (12) the Nahoum Affidavit; (13) a Sanborn Map, which indicates

commercial use of the site; and (14) Worker's Compensation Insurance Premium; and

WHEREAS, the Owner submitted the following evidence for 2007: (1) 16 DOB work permits issued to Excellence; (2) Department of Finance assessment rolls; (3) a 1040 tax form reflecting Excellence's income and expenses; (4) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (5) Scottsdale Insurance Company commercial insurance policies, covering 280 Bond Street; (6) Excellence's Transaction Ledger from City Check Cashing; (7) Cassone Leasing invoice for trailer rental at a job site; (8) five client job analyses; (9) the Bauman Affidavit; (10) a letter from accountant indicating net assets; (11) the Germann Affidavit; (12) the Grosetto Letter; (13) the Hepplewhite Letter; (14) the Nahoum Affidavit; (15) a Sanborn Map, which indicates commercial use of the site; and (16) Worker's Compensation Insurance Premium; and

WHEREAS, the Owner submitted the following evidence for 2008: (1) 1096 and 1099 tax forms; (2) 14 DOB work permits issued to Excellence; (3) Department of Finance assessment rolls; (4) a 1040 tax form reflecting Excellence's income and expenses; (5) water, Con Edison, and National Grid bills for the site; (6) partial release of lien; (7) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (8) Scottsdale Insurance Company commercial insurance policies, covering 280 Bond Street; (9) Excellence's Transaction Ledger from City Check Cashing; (10) Cassone Leasing invoice for trailer rental at a job site; (11) three client job analyses; (12) the Bauman Affidavit; (13) accountant's statement of income-profit & loss; (14) the Germann Affidavit; (15) the Grosetto Letter; (16) the Hepplewhite Letter; and (17) the Nahoum Affidavit; and

WHEREAS, the Owner submitted the following evidence for 2009: (1) ten DOB work permits issued to Excellence; (2) Department of Finance assessment rolls; (3) a 1040 tax form reflecting Excellence's income and expenses; (4) water, Con Edison, and National Grid bills for the site; (5) partial release of lien; (6) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (7) Scottsdale Insurance Company commercial insurance policies, covering 280 Bond Street; (8) Hanover Insurance Group commercial auto insurance policy; (9) Notice of Mechanic's Liens; (10) Excellence's Transaction Ledger from City Check Cashing; (11) an affidavit from Scott Levy, president of Eastern Effects; (12) one client job analysis; (13) the Bauman Affidavit; (14) accountant's statement of income-profit & loss; (15) the Germann Affidavit; (16) the Grosetto Letter; (17) the Hepplewhite Letter; and (18) the Nahoum Affidavit; and

WHEREAS, the Owner submitted the following

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evidence for 2010: (1) four DOB work permits issued to Excellence; (2) Department of Finance assessment rolls; (3) notice of mechanic's liens; (4) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (5) Scottsdale Insurance Company and Harleysville commercial insurance policies, covering 280 Bond Street; (6) Hanover Insurance Group commercial auto insurance policy; (7) one client job analysis; (8) the Bauman Affidavit; (9) the Grosetto Letter; (10) the Hepplewhite, Letter; and (12) the Nahoum Affidavit; and (13) a Sanborn Map, which indicates commercial use of the site; and

WHEREAS, the Owner submitted the following evidence for 2011: (1) Department of Finance assessment rolls; (2) Con Edison and National Grid account statement for RRPB; (3) Cole's Directory listing for Excellence; (4) lease agreement for RRPB, which allows for Excellence to maintain its office for business functions until the Addendum is executed; (5) affidavit from Scott Levy, president of Eastern Effects, whose last day of renting the site for truck and lighting equipment storage was August 31, 2011; (6) Cassone Leasing Inc. payment history; (7) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (8) Harleysville commercial insurance policies, covering 280 Bond Street; (9) a fax coversheet from the District Attorney's office listing all properties associated with the Owner, including the site; (10) an affidavit from the Owner noting the transfer from her to SRS Real Estate Holdings; (11) the Grosetto Letter; and (12) the Hepplewhite Letter; and

WHEREAS, the Owner submitted the following evidence for 2012: (1) copy of BIS printout of an Alteration Type 1 application proposing the change of use from commercial (Use Group 16 non-conforming use) to theater (Use Group 8), eating and drinking establishment (Use Group 6) and non-commercial art galleries (Use Group 4), approved by DOB; (2) a BIS printout of post-approval amendment; (3) a DOB Stop Work Order; (4) a DOB BIS Plan Exam approved for building structural modification; (5) DOF assessment roll; (6) a BIS printout of license details which reflects that Excellence maintained general liability insurance with Harleysville Worcester through March 26, 2012; (7) commercial insurance policies with Harleysville insurance through May 22, 2012; (8) lease Addendum between RRPB and SRS Real Estate Holdings to allow rental of the second-story office; (9) email exchange with Verizon which reflects the existence of the Excellence phone line through October 2012; (10) a Sanborn map; (11) Cassone Leasing invoice reflecting the trailer rental at the site; (12) satellite images of the site, which show various commercial parking configurations and demonstrate the presence of commercial vehicles; (13) a

Cole's Directory listing for Excellence; (14) affidavits from Larry Burda, general contractor who began working for RRPB at the site and who obtained permits for work there and parked commercial vehicles; (15) the Grosetto Letter; and (16) the Hepplewhite Letter; and

WHEREAS, the Owner submitted the following evidence for 2013: (1) the Final Determination; (2) work permits related to the Alteration Type 1 application; (3) a BIS printout of post approval amendments; (4) DOF assessment roll; (5) Excellence's transaction ledger from City Check Cashing; (6) Cassone Leasing invoice reflecting the trailer rental at the site; and (7) ModSpace Modular Office contract and invoice for RRPB; and

WHEREAS, the Owner submitted the following evidence for 2014: (1) a BIS printout of post approval amendments; and (2) Cassone Leasing invoice reflecting the trailer rental at the site; and

WHEREAS, the Owner asserts that any criticism of the strength of the evidence, the Owner notes that it all fits within the TPPN's (a) through (c) evidence and is reflective of the minimal actual work performed at the site primarily used for the storage of materials and vehicles; and

WHEREAS, on the contrary, the Owner claims that the Appellant's evidence is primarily within category (d) – affidavits – which DOB looks to only after satisfactory explanation or proof that the documentation pursuant to category (a), (b), and (c) are unavailable; and

WHEREAS, the Owner asserts that the affidavits lack detail, contain third-party testimony, and are in direct conflict with other evidence the Appellant offered; and

WHEREAS, the Owner also asserts that the Appellant's seven photographs of the site from April 20, 2003 to April 7, 2012 actually reflect the presence of commercial vehicles, in different configurations which is consistent with the movement of vehicles over a period of time when in use; and

WHEREAS, the Owner asserts that the photographs reveal physical evidence that is contradictory to the affiants' statements; and

WHEREAS, the Owner's evidence within category (d) includes affidavits from the two owners which explain that trucks would leave the site by 6:30 a.m. and return prior to 4:00 p.m. as well as letters from individuals and businesses which are either located near the site or have done business with the plumbing business formerly at the site; and

WHEREAS, the Owner provided a lease payment history for the rental of storage trailers at the site by Excellence in Plumbing, including one trailer that was rented from September 2011 until April 2014; work permit data printouts from the Buildings Information System (BIS) showing permits issued to Excellence in Plumbing for work at two different locations in 2010; general liability insurance maintained for Excellence in Plumbing through May 2013; evidence of insurance policies for Excellence in Plumbing operating at the site

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from March 26, 2009 to March 26, 2013; utility bills issued in November and December of 2011 to the lessees the RRPH; Coles Directory listings for 280 Bond Street from 2010 to 2012 for Excellence in Plumbing and Heating; and

WHEREAS, the Owner states that, despite an October 2011 lease to RRPH it was able to maintain an office in the building until June 2012, after which the lease was modified to allow the tenant's use of the office; and

WHEREAS, based on the above, the Owner contends that it has established that the use has been continuously in existence during the relevant periods; and

WHEREAS, the Owner asserts that the Board should not be guided by the Owner's testimony before the District Attorney which discusses the cessation of the business as (1) there was a context for those statements that is different than the context of establishing the continuation of a non-conforming use under the Zoning Resolution and (2) the Appellant's quotes should not be read in isolation, but with the remainder of the testimony which reflects the Owner's interest in seeking more business rather than abandonment of the site; and

WHEREAS, the Owner states that the deposition testimony is consistent with its position that the business existed but is slow; and

- The Legal Standard

WHEREAS, the Owner asserts that DOB is entitled to deference in its interpretation of the Zoning Resolution, citing the Court of Appeals: "it is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld," Matter of Howard v. Wyman, 28 N.Y.2d 434,438 (1971); and

WHEREAS, the Owner distinguishes the case law that the Appellant cites; specifically, the Owner states that Toys 'R' Us v. Silva, 89 N.Y.2d 411 (1996) centered upon an assertion that only the discontinuance of the entire nonconforming use would constitute the discontinuance required for termination of a nonconforming use; and

WHEREAS, the Owner asserts that an underperforming business, like Excellence in recent years, still qualifies as an active use; and

WHEREAS, otherwise, the Owner distinguishes other cases cited by the Appellant in that (1) none of them involve the applicability of ZR § 52-61; each is set outside New York City; three relate to variances, which require a hardship finding, and are thus inapplicable; the cases discuss intent, which is similarly not a factor in ZR § 52-61

- ZR § 52-332

WHEREAS, the Owner asserts that the Appellant misinterprets ZR § 52-332 in that section (b) makes it clear that the conditions relating to uses located outside of a building only apply to certain use changes and not to

the Use Group 16 to Use Group 6 change proposed; and

WHEREAS, accordingly, the proposed outdoor use is permitted; and

THE APPELLANT'S POSITION

- Evidence

WHEREAS, as to ZR §52-61, the Appellant asserts that there have been at least two periods of two years in which the non-conforming use ceased at the site – from 1982 to 1984 and from 2009 to 2012; and

WHEREAS, the Appellant asserts that the Owner's evidence does not include employee records, customer records, or sales receipts, which would be standard for a plumbing business; and the Appellant raises concerns about the majority of evidence the Owner has submitted; and

WHEREAS, the Appellant refutes the Owner's other evidence as follows: (1) federal tax records do not reflect purchase of plumbing supplies after 2008 and no labor expenses or business income after 2009; (2) no customer records have been submitted to demonstrate business transactions; (4) there is no substantiated documents evidencing employee records after 2009 or documentation of work performed; (5) there are not any sales receipts or other records of business transactions after 2009; (6) 2009 and 2010 building permits do not reference 280 Bond Street; (6) the Owner provided sworn testimony with the Manhattan District Attorney's office that the business ceased to exist after 2008; and (7) the parking activity is not consistent with an active business at the site; and

WHEREAS, the Appellant submitted the following affidavits and letters in support of its assertion that the non-conforming use ceased for a period greater than two years: (1) an affidavit from Frank Napoli which states that he is a private investigator who interviewed several witnesses with knowledge of the site; (2) and affidavit from Robert Conklin, general contractor, in which he says that for one of the projects associated with building permit evidence (Beach Street) never observed Excellence delivering supplies to the project and that the Owner stated that the warehouse was no longer used for the plumbing business; (3) an affidavit from Leslie Bernat which discusses the Owner stating that he would be retiring and that the business had "wound down"; (4) an affidavit from Jennifer Jones in which she says she has observed a racing car on site; (5) an affidavit from Franck Poisson stating that he sent a certified letter to the address on February 15, 2012, which was returned as undeliverable; (6) an affidavit from Brenda Bello saying that she has parked in front of the steel gate since June 2010 at various times and no one has ever complained or towed her car; (7) an affidavit from Emilie Poisson in which she states that she visited the site in 2012 she did not witness any commercial use; (8) an affidavit from Fernando Serna, who stated that he accompanied Emilie Poisson to the site in March 2012 and did not see any indication of an active business; (9) an affidavit from

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Bruno Pasquale who stated that in approximately 2009, the Owner stated that he had retired and given up his business; and (10) an affidavit from Jeffrey Tortora who stated that he saw people climbing the walls to gain access to the site, presumably for shelter; and

WHEREAS, the Appellant asserts that there is not any TPPN Category A evidence to support the Owner's contention that there was an active business from 2009 forward; and

WHEREAS, the Opposition asserts that there is not any TPPN Category B evidence to support the Owner's contention that there was an active business from 2009 forward; and

WHEREAS, the Appellant asserts that the National Grid and Con Edison account statements for RRPH that the Owner has submitted contradict the contention that Excellence continued an active business at the location until October 2012; and

WHEREAS, the Opposition asserts that there is not any TPPN Category C and D evidence to support the Owner's contention that there was an active business from 2009 forward; and

WHEREAS, the Appellant states that the Sanborn maps should be disregarded since some are illegible and many relevant years are missing; and

WHEREAS, as to the Cole's Directory listings, the Appellant questions why there were listings for 2010 to 2012, but not all other years prior and that the telephone number has changed or is inconsistent with that noted in the communication with Verizon regarding the telephone use history; and

WHEREAS, the Appellant questions the lack of specificity in the insurance documents in part because certain policy years cover three locations without specifying any for plumbing business activity; and

WHEREAS, further, the Appellant question whether the insurance companies ever inspected the sites; and

WHEREAS, the Appellant asserts that the Cassone leasing information, City Check Cashing documents, and fax cover sheet from the New York County District Attorney's office do not establish business activity at the site; and

WHEREAS, the Appellant states that the Nahoum Affidavit concludes that he was no longer visiting the site on a daily basis after 2008; and

WHEREAS, the Appellant states that the information about leasing the parking lot to a film equipment and studio rental business from 2009 to 2011 undermines the Owner's position as this was an unlawful change of use, even if it were substantiated; and

WHEREAS, the Appellant also asserts that the lease to RRPH does not demonstrate active or related business activity for the period from 2010 to 2012; and

WHEREAS, finally, the Appellant cites to the Owner's statements in a deposition for the District

Attorney in which he states that he did not have wages, employees or business from 2009 to 2011; and

WHEREAS, as to the period from 1982 to 1984, the Appellant states that the Owner states that he began to renovate the property in 1982, completing them in 1983, but that a New York City tax photograph from 1983 reflects the building was abandoned at that time; and

WHEREAS, further, the Appellant asserts that Cole's Directory lists Excellence as becoming active in 1985; and

WHEREAS, the Appellant states that any use by Eastern Effects was not permitted as the only non-conforming use permitted as to change the use a new CO authorizing it and a Department of Consumer Affairs license was required to substitute a new non-conforming use for an existing non-conforming use; and

WHEREAS, the Appellant asserts that inferences should be drawn from the failure to produce relevant material documents and witnesses; and

WHEREAS, in pursuit of additional information, the Appellant requested the Board to issue subpoenas for records and documents; and

WHEREAS, by letter dated May 5, 2014, the Board's counsel responded by saying that New York City Charter Section 663 limits the Board's subpoena authority to testimony and not documents and that the Board has the discretion to exercise its authority to subpoena witnesses, which it has chosen not to do; and

- The Legal Standard

WHEREAS, the Appellant states that the overriding public policy in zoning is aimed at the elimination of non-conforming uses while balancing the interest of not depriving business owners of their businesses; and

WHEREAS, in order to establish the standard for cessation of the use, the Appellant relies on the court's decision in Toys R Us; and

WHEREAS, specifically, the Appellant is not concerned with the question of whether Excellence once existed as a business at the site, but whether it was continuously active there; and

WHEREAS, the Appellant states that the Toys R Us court emphasized that ZR § 52-61 did not equate with the complete stoppage of all business activity at the site and that the Zoning Resolution does not contemplate a complete cessation but rather, the court established that a nonconforming use can be used to sustain a use that is detrimental to the zoning plan for the community *only* if it remains *active*; and

WHEREAS, the Appellant finds that the court emphasized that the evidence to demonstrate a continuation of activity that is in derogation of local zoning must be of an *active* nature to promote the protection of owners of ongoing viable businesses and does not protect businesses that are dormant and exist in name only; and

WHEREAS, the Appellant cites to Toys 'R' Us to support its position that intent, for one thing, is not a

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factor in the non-conforming use analysis: “intent to resume active operations *shall not affect* the determination whether a nonconforming use has been discontinued;” and

WHEREAS, the Appellant asserts that the law views non-conforming uses as detrimental to a zoning scheme and the overriding policy of zoning in New York State is for the reasonable restriction and eventual elimination of non-conforming uses See Matter of Syracuse Aggregate Corp. v. Weise, 51 N.Y.2d 278; and

WHEREAS, the Appellant asserts that evidence the Owner has produced does not demonstrate the presence of an *active* business between 1982 and 1984 at the site or show how there was an active continuation of business after 2009, and, even more specifically, since 2011; and

WHEREAS, the Appellant asserts that the Owner’s lack of evidence contrasts with eyewitness accounts, photographs and other documentary evidence; and

WHEREAS, the Appellant asserts that even though certain evidence may fit within the preferred categories of DOB’s TPPN 14 of 1988, it does not establish an active use because, for example, a minimal amount of electricity or evidence of parked vehicles is not sufficient to overcome the basic legal principles governing the extinguishment of non-conforming use; and

- ZR § 52-332

WHEREAS, the Appellant introduced an argument that even if there were a legal non-conforming use, the outdoor Use Group 16 use could not be maintained as a Use Group 6 use; and

WHEREAS, however, the Appellant did not proceed with its argument that in accordance with ZR § 52-332, whenever a non-conforming use that is located within a completely enclosed building is changed to another non-conforming use, no activity related to such changed non-conforming use is permissible outside of such building and, thus, the proposed outdoor use is not permitted; and

THE DEPARTMENT OF BUILDINGS’ POSITION

WHEREAS, DOB states that the Owner has submitted sufficient evidence to show continuous non-conforming commercial use at the site and the Appellant has not demonstrated that the non-conforming commercial use was discontinued for a continuous period of two years or more; and

WHEREAS, DOB notes that where a Certificate of Occupancy exists permitting a non-conforming use, as is the case here with the 1967 Certificate of Occupancy, it presumes the non-conforming use has continued unless it receives a substantiated complaint that the non-conforming use has ceased for more than two years; and

WHEREAS, accordingly, in this case, the Appellant provided DOB with affidavits from neighbors who claim that they have not seen commercial activity at the site since approximately 2001; and

WHEREAS, at the Appellant’s request, DOB

conducted an audit which led to the issuance of an Intent to Revoke letter with an objection citing to ZR § 52-61 to “confirm that the non-conforming use has not been discontinued;” and

WHEREAS, DOB states that in response, the Owner provided sufficient information to show that the non-conforming use had not discontinued for more than two years; and

WHEREAS, DOB concluded that the Appellant has submitted sufficient evidence, in keeping with the TPPN and DOB precedent, to establish the use and its continuity as required by ZR § 52-61; and

WHEREAS, conversely, DOB notes that the Appellant submitted affidavits and other uncorroborated evidence; and

WHEREAS, as to the Appellant’s concerns about the testimony to the District Attorney, DOB is not persuaded that such isolated statements in a different forum, made for a different purpose, should trump the credible evidence the Owner has submitted to support its claim of continuance; and

WHEREAS, DOB agrees with the Appellant that Sanborn maps are not listed on the TPPN as a type of documentation accepted in support of existing use because the source of the map information is unknown; thus, the maps are considered highly probative as to use and the absence of maps that show the site as commercial is not significant; and

WHEREAS, DOB takes the position that regardless of whether the site was used by Excellence in Plumbing or RRPH, the use by either in a continuing non-conforming use of the site; and

WHEREAS, DOB asserts that the Appellant’s concern that the premises as unlawfully from September 2009 to August 2011 to the extent it was leased in part by Eastern Effects for the storage of commercial trucking vehicles, is misplaced since the use is only documented by an affidavit and its nature is unclear; and

WHEREAS, accordingly, DOB concludes that the Appellant has not demonstrated that the alteration permits for a continuing non-conforming use contravene ZR 52-61; and

WHEREAS, as to the Appellant’s supplemental argument that ZR § 52-332 does not allow a change in use from a Use Group 16 to a Use group 6, DOB states that the Appellant is incorrect; and

WHEREAS, specifically, DOB states that ZR § 52-332(a) allows a non-conforming use listed in Use Group 16 to change to either a conforming use or any use listed in Use Group 6, as proposed; and

CONCLUSION

WHEREAS, the Board agrees with DOB that the Owner has met its burden of establishing that the non-conforming use has been in continuous use, without any two-year interruption during all relevant periods addressed in the appeal; and

WHEREAS, specifically, the Board finds the

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evidence submitted by the Owner sufficient to establish that the use of the site has been continuous since his ownership in 1982 and from 2001 to 2012, without any two-year interruption since that date; and

WHEREAS, as to the evidence submitted by the Owner to establish the continuous use, the Board notes that the Owner provided evidence in the form of photographs, leases, invoices, accounting statements, tax documents, copies of checks, certificates of liability insurance, and letters, and that some combination of this evidence was provided for each year beginning from 2001 until 2012 and later without any gaps; and

WHEREAS, the Board notes that the Owner submitted evidence for each year from 2001 and does not rely on the affidavits alone for any period, in contrast to the Appellant who relies on affidavits as its sole evidence; and

WHEREAS, instead, the Board notes that the Owner relies, in part, on evidence from neutral third-party sources for photographs and records; and

WHEREAS, accordingly, the Board does not need to rely on the affidavits from the Owner and is not persuaded by the Appellant's affidavits which, on their own, are not compelling enough evidence to refute the preferred forms of evidence that the Owner has submitted; and

WHEREAS, as to the question of veracity surrounding certain evidence in light of the Owner's statements to the Manhattan District Attorney, the Board agrees with DOB that those statements were made for a different purpose and in a different forum and, thus, do not have bearing on the evidence submitted to DOB within the Board's process; and

WHEREAS, further, the Board finds that the passages that the Appellant chose may have different meaning when read with the remainder of the statement and that they are not in direct contradiction with other evidence and statements; and

WHEREAS, the Board notes that its analysis is not one of criminal court, taxation, or business practices, but rather involved the review of evidence pursuant to ZR § 52-61; and

WHEREAS, the Board notes that the current Certificate of Occupancy, dated April 6, 1967, permits loading and storage of boiler equipment and non-storage for motor trucks at the first floor and offices at the mezzanine; and

WHEREAS, the Board accepts that a business such

as Excellence and the use described on the Certificate of Occupancy is not a conventional commercial business with standard activity and traffic flow; and

WHEREAS, the Board notes that DOB has established guidelines to assess a range of non-conforming uses and finds that the Owner's evidence is relevant to the question of continuity and sufficient, when considered in the aggregate; and

WHEREAS, the Board notes that it is unclear what amount of activity the Appellant suggests would be required for such work; and

WHEREAS, the Board is not persuaded by the Appellant's reading of Toys 'R' Us that Excellence's operations were inactive to an extent that the continuity was lost; and

WHEREAS, the Board accepts DOB's conclusion that neither the lease to Eastern Effects nor RRPB affects the assessment of continuity; and

WHEREAS, in sum, the Board concludes that the use has been continuous at the site in accordance with ZR § 52-61.

WHEREAS, the Board agrees with DOB's interpretation of ZR § 52-322 and accepts the conclusion that the outdoor use may be converted from Use Group 16 to Use Group 6; and

Therefore it is Resolved that this appeal, challenging a Final Determination issued on October 1, 2013 is *denied*.

Adopted by the Board of Standards and Appeals, August 19, 2014.

A true copy of resolution adopted by the Board of Standards and Appeals, August 19, 2014.

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Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

