68-13-A
APPLICANT – Bryan Cave LLP, for ESS PRISA LLC, owner; OTR 330 Bruckner LLC, lessee.
SUBJECT – Application February 13, 2013 – Appeal challenging Department of Buildings' determination that the existing sign is not entitled to non-conforming use status. M3-1 zoning district.
PREMISES AFFECTED – 330 Bruckner Boulevard, Bruckner Boulevard between E. 141 and E. 149 Streets, Block 2599, Lot 165, Borough of Bronx.
COMMUNITY BOARD #1BX
ACTION OF THE BOARD – Appeal Denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Notice of Sign Registration Rejection letter from the Manhattan Borough Commissioner of the Department of Buildings ("DOB"), dated January 14, 2013, 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 connection with the application for registration of the above-referenced sign. [S]uch documentation does not support the establishment of the existing sign prior to the relevant non-conforming use date. 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 July 16, 2013, after due notice by publication in *The City Record*, with a continued hearing on September 24, 2013, and then to decision on January 28, 2014; and

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

WHEREAS, the subject premises ("the Premises") is located on the east side of Bruckner Boulevard between East 141st Street and East 149th Street, within an M3-1 zoning district; and

WHEREAS, the Premises is occupied by an eight-story warehouse; on the northeast wall of the building is an advertising sign measuring 79 feet by 143 feet (11,297 sq. ft.) (the "Sign"); and

WHEREAS, this appeal is brought on behalf of the lessee of the Sign structure, OTR Media Group, Inc. (the "Appellant" or "OTR"); and

WHEREAS, the Appellant states that the Sign is located 35 linear feet from and within view of the Bruckner Expressway, which is an arterial highway pursuant to Appendix H of the Zoning Resolution; and

WHEREAS, the Appellant states that the Premises has been located within an M3-1 zoning district since the adoption of the Zoning Resolution on December 15, 1961; and

WHEREAS, the Appellant states that DOB has issued permits for the Sign in connection with the following application numbers: (1) 201143217 in 2008 (the "2008 Permit"); (2) 200080170 in 1990 (the "1990 Permit"); and (3) BN 27/81 in 1981 (the "1981 Permit"); in addition, in 2012, the Appellant applied for and was denied a permit for the sign under Application No. 220233110 ("the 2012 Permit"); and

WHEREAS, the 1981 Permit application was filed on January 21, 1981 to legalize an existing business sign; the application includes an amendment (the "Amendment"), dated March 18, 1981, which states

> Request reconsideration to the objection of 3/4/81 on grounds that the sign under construction is a business sign. Since a storage and office facility is maintained in this building by the company whose sign is located on the easterly wall of said building, said sign complies with section 42-51 of the Zoning Resolution for a business sign; and

WHEREAS, below the reconsideration request is a handwritten note, which states that "Request denied as per report herewith attached" and is signed by the Bronx Borough Commissioner and dated March 18, 1981; and

WHEREAS, the 1981 Permit application also includes: (1) an April 14, 1981 letter from the Chairman of Community Board 1 to New York Bus Service ("Community Board letter"), in which the Chairman states that he knows of "no objection to the sign as a business sign"; and (2) an April 15, 1981 declaration (the "Declaration") executed by the owner of the Premises at the time, Peter's Bag Corp., which states that "when New York Bus Service ceases to use a portion of [the Premises] to conduct their business, the sign indicating their business will be removed from the face of [the Premises]"; and

WHEREAS, finally, the 1981 Permit application includes a Departmental Memorandum, dated May 7, 1981, from the DOB Commissioner to the Bronx Borough Commissioner regarding the Premises (the "Reconsideration"); the Reconsideration makes reference to the Zoning Resolution definition of "business sign," the Chairman's letter, and the Declaration, and provides, in pertinent part, that "[i]n view of the above . . . reconsideration is given in this matter provided that the Declaration is acceptable to the Department Counsel, reference is made on Building

Notice Application and the Declaration is filed with the City Register prior to issuance of the permit"; and

WHEREAS, the 1990 Permit was revoked on March 15, 2013, the 2008 Permit was revoked on April 23, 2013, and the 2012 Permit application was disapproved on July 15, 2013; the permit revocations and denial, and DOB's January 14, 2013 Final Determination denying registration of the Sign reflect the DOB's interpretation that the Sign is not a lawful, non-conforming advertising sign because it was changed under the 1981 Permit to an accessory business sign, which discontinued the advertising sign use; and

WHEREAS, the Appellant now seeks a reversal of DOB's rejection of the registration of the Sign[1]; 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 5, 2012, pursuant to the requirements of Article 502 and Rule 49, the Appellant submitted a Sign Registration Application for the Sign and completed an OAC3 Outdoor Advertising Company Sign Profile, attaching copies of the following in support of the establishment of the Sign: the 1981 Permit; the 1990 Permit; the 2008 Permit; a 1958 photo; a 1959 and 1980 Bronx Yellow Pages excerpt; a 1967 photo; a 1978 mortgage; a 1980 photo; a 1980 letter from the president of the New York Bus Service; Bronx address book excerpts from 1956, 1959, 1967, and 1980; a 1973 New York Bus Service Bus Schedule; photos from 1988, 1993, 1994, 1998, 2001, 2005, 2008, 2009, 2010, 2011, and 2012; and two affidavits from sign painters; and

WHEREAS, on October 3, 2012, DOB issued a Notice of Sign Registration Deficiency, stating that "[DOB is] unable to accept the sign for registration at this time (due to your) failure to provide proof of legal establishment"; and

WHEREAS, the Appellant states that, believing its evidence to be sufficient, it did not submit further evidence in response to the October 3, 2012 notice; and

WHEREAS, accordingly, on January 14, 2013, DOB issued the Final Determination denying

---

1 DOB's basis for denying the 2012 Permit application on July 15, 2013 and denying the request to register the Sign on January 14, 2013 are identical. As such, this appeal challenges both DOB actions.

registration; and

RELEVANT STATUTORY PROVISIONS

ZR § 12-10 *Definitions*

Accessory use, or accessory

An "accessory use":

(a) is a #use# conducted on the same #zoning lot# as the principal #use# to which it is related (whether located within the same or an #accessory building or other structure#, or as an #accessory use# of land), except that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, #accessory# docks, off-street parking or off-street loading need not be located on the same #zoning lot#; and

(b) is a #use# which is clearly incidental to, and customarily found in connection with, such principal #use#; and

(c) is either in the same ownership as such principal #use#, or is operated and maintained on the same #zoning lot# substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal #use#.

When "accessory" is used in the text, it shall have the same meaning as #accessory use#.

* * *

Sign, advertising

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

* * *

Non-conforming, or non-conformity

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

* * *

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.

* * *

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

* * *

Administrative 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…

* * *

1 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.

* * *

1 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

* * *

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

* * *

RELEVANT DOB POLICY AND PROCEDURE NOTICES

Technical Policy and Procedure Notice No. 14/1988
Documentation in Support of Existing Use
[T]he following shall be a guideline, in order of preference, for the acceptable documentation in support of [an] existing use for legalization or proof of continual non-conforming use:
a) Records of documentation from any City Agency. Such records may include, but not be limited to, tax records, multiple dwelling registration cards, I cards from HPD and cabaret licenses.
b) Records, bills, documentation from public utilities indicating name and address of business and time period bills cover.
c) Any other documentation or bills indicating the use of the building, such as telephone ads, commercial trash hauler invoices, liquor licenses, etc.
d) Only after satisfactory explanation or proof that the documentation pursuant to (a), (b) or (c) does not exist, affidavits regarding the use of a building will be accepted to support either an application for legalization or as proof concerning whether or not a prior non-conforming use was continual per ZR 52-61. However, where such affidavits are submitted, they may be accepted only after the Borough Superintendent has reviewed them with close scrutiny; and

* * *

Operations Policy and Procedure Notice No. 10/1999

Signs Presumed to be Not Accessory / Advertising

In the following instances, there will be a rebuttable presumption that the proposed sign is not accessory, i.e., there will be a rebuttable presumption that the sign is an advertising sign.

a. A sign proposed in connection with a principal use whose activity on the zoning lot consists primarily of storage or a warehouse for its business activities conducted off the zoning lot and where the principal use occupies less than the full building on the zoning lot.

ISSUE ON APPEAL

WHEREAS, the Board notes that the Appellant and DOB agree that advertising sign use was established at the Premises as of May 31, 1968[2]; and

WHEREAS, in addition, the Board notes that the Appellant and DOB agree that messages for New York Bus Service were displayed on the side of the building at the Premises from 1981 to 1988; and

WHEREAS, accordingly, at issue is whether the display of such messages constituted a discontinuance of the advertising sign use, per ZR § 52-61; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant contends that the Final Determination should be reversed because the Sign has been used for advertising since before May 31, 1968 until the present, without any two-year period of discontinuance, making it a protected non-conforming advertising sign pursuant to ZR §§ 42-55(c)(2) and 52-11; and

WHEREAS, the Appellant concedes that the 1981 Permit was for an accessory business sign, but asserts that the Sign never actually displayed messages regarding the principal use of the Premises; and

WHEREAS, specifically, the Appellant states that although from 1981 to 1988, the Sign hosted messages relating to New York Bus Service in ostensible accordance with the 1981 Permit, during that time period the Sign continued to satisfy the definition of "advertising sign" because New York Bus Service did not conduct any operations at the Premises; and

WHEREAS, in support of this assertion, the Appellant submitted several affidavits from individuals claiming personal knowledge of the use of the Premises during the time period in question; the affiants include: (1) the vice president of the corporate entity ("Peter's Bag Corp.") that owned the Premises from 1965 through 1987; (2) the chief financial officer of Peter's Bag Corp. from 1987 through 1989; (3) a purchasing and inventory manager for New York Bus Service from 1980 through 1996; (4) a sign painter who worked at the Premises and painted the Sign from 1977 until 1994; and (5) the principal of OTR; each of the affiants assert that New York Bus Service did not occupy the Premises; and

WHEREAS, the Appellant asserts that, taken together, the sworn statements demonstrate that New York Bus Service had no presence at the Premises other than the Sign; and

WHEREAS, the Appellant also attacks the validity of the 1981 Permit, arguing that it does not contain a sufficient basis for the conclusion that New York Bus Service was the principal use of the Premises such that a New York Bus Service sign could be permitted as a business sign; and

WHEREAS, the Appellant asserts that the 1981 Permit does not include any direct evidence of New York Bus Service's use of the building located at the Premises as a warehouse; as such, the Appellant asserts that the 1981 Permit was issued based on a clear misstatement of fact; and

WHEREAS, the Appellant states that the Community Board Chairman's letter does not attest to New York Bus Service's actual presence at the Premises and that the Declaration merely implies but does not state that New York Bus Service conducts business at the Premises; and

WHEREAS, the Appellant also submitted the following evidence, which it contends contradicts the notion that New York Bus Service had business operations at the Premises when the 1981 Permit was issued: (1) New York Bus Service letterhead from the 1980s, showing its address off the New England Thruway at Exit 13; (2) the 1980 Bronx Yellow Pages listing New York Bus Service at Hutchinson Avenue; and (3) the 1980 Bronx Address Book listing only Peter's Bag Corp. at the Premises; and

WHEREAS, as to the Reconsideration in the 1981 Permit application, the Appellant states that it lacked factual support, and, as such, was clearly granted in error and must be disregarded by DOB and by the Board, citing BSA Cal. No. 251-12-A (330 East 59th Street, Manhattan), in which the Board upheld a DOB determination that a reconsideration was issued in error and could not be relied upon because the Board agreed with DOB that the reviewing official at DOB failed to consider the relevant dates under the Zoning Resolution and BSA Cal. Nos. 95-12-A and 96-12-A (2284 12th Avenue, Manhattan), in which the Board reversed a DOB determination that a reconsideration was issued in error, finding insufficient evidence that DOB clearly

2 The parties disagree over the number of signs and the calculation of the total surface area occupied by the advertising sign use; however, the Board declines to take a position on this issue for reasons set forth below.

issued the reconsideration in error; and

WHEREAS, the Appellant contends that the 1981 Permit was merely a sham and that it should be disregarded from the Board's analysis of whether advertising sign use was continuous at the Premises; and

WHEREAS, the Appellant asserts that DOB's recognition of the sham accessory permit is embodied in Operations Policy and Procedure Notice No. 10/1999 ("OPPN 10/99"), which was issued to govern DOB's handling of permit applications for signs in proximity to arterial highways, and in 1 RCNY 49-43(a), which deems certain signs on zoning lots with warehouses advertising signs; and

WHEREAS, the Appellant notes that in BSA Cal. Nos. 24-12-A and 147-12-A (2368 12th Avenue, Manhattan), the Board sustained DOB's application of Rule 49-43(a) and the OPPN 10/99 to reject registration of two signs as accessory where accessory sign permits had been obtained and the principal use of the zoning lot was purported to be a warehouse, but the evidence of the *bona fides* of the warehouse operation was found by DOB to be insufficient; and

WHEREAS, the Appellant asserts that the facts and circumstances of BSA Cal. Nos. 24-12-A and 147-12-A (2368 12th Avenue, Manhattan) and those surrounding the Sign are similar; however, in that case, DOB repudiated the permits based on the OPPN 10/99 and Rule 49-43(a), but in this case, DOB ignores evidence suggesting that the 1981 Permit was a sham and asserts that it was properly issued; and

WHEREAS, the Appellant states that, accordingly, even if the Board agrees with DOB that the 1981 Permit was properly issued, the Board should find that the arrangement constituted a sham and that the Sign was always used for advertising; and

WHEREAS, in conclusion, the Appellant asserts that the record contains an overwhelming factual basis for the Board to conclude that the Sign has been used continuously for advertising since before May 31, 1968, and, that, absent the erroneous issuance of the 1981 Permit by DOB, there would be no question as to the Sign's continuity and right to protection under ZR §§ 42-55 and 52-11; and

WHEREAS, as such, the Appellant asserts that the Final Determination should be reversed, the Sign registration application accepted, and the 2012 Permit application approved; and

DOB'S POSITION

WHEREAS, DOB asserts that to the extent that an advertising sign use was established as non-conforming at the Premises, such use cannot be recognized as non-conforming today because the New York Bus Company sign displayed in 1981 was legalized pursuant to a permit for an as-of-right accessory sign; as such, per ZR § 52-61, the Sign lost its non-conforming status; and

WHEREAS, DOB states that in 1981, ZR § 42-52 generally allowed accessory business signs with no restriction on size, illumination or proximity to an arterial highway or park; in contrast, ZR § 42-53 prohibited advertising signs within 200 feet and within view of an arterial highway (which continued the prohibition on arterial advertising signs that has existed since June 28, 1940); and

WHEREAS, DOB asserts that in 1981, where a sign was in proximity to an arterial highway and purported to be accessory to a warehouse, the sign was presumed to be an advertising sign (DOB notes that this presumption was later formalized as OPPN 10/99 and Rule 49-43(a)); and

WHEREAS, accordingly, DOB states that when it initially reviewed the 1981 Permit application, it determined that the application lacked sufficient evidence to overcome the presumption that the New York Bus Service sign was an advertising sign; and

WHEREAS, however, DOB states that it ultimately determined that the applicant had provided sufficient documentation to overcome the presumption of advertising; and

WHEREAS, in particular, DOB asserts that it relied on multiple representations in the 1981 Permit application documents that the sign was an accessory use to an on-site business, including: (1) the application job description, which was certified by a registered architect and states that the application is "filed for business sign painted on easterly wall of building in accordance with plans filed herewith"; (2) the Amendment, which was also certified by a registered architect and states that "a storage and office facility is maintained in this building by the company whose sign is located on the easterly wall of said building"; and (3) the Declaration, made by the vice president of Peter's Bag Corp., which implies that New York Bus Service conducts business on the Premises when it declares that the Sign will be removed when it ceases to conduct business; and

WHEREAS, further, DOB notes that the 1981 Permit application includes the Community Board letter, which implies but does not directly state that the proposed sign is a business sign rather than an advertising sign; and

WHEREAS, therefore, DOB states that, in 1981, it had a sufficient basis to issue the 1981 Permit legalizing the accessory sign; and

WHEREAS, likewise, DOB asserts that the Appellant has not in the course of this proceeding advanced a sufficient reason to question the validity of or repudiate the issuance of 1981 Permit; and

WHEREAS, to support this assertion, DOB cites to the Board's decision in BSA Cal. Nos. 95-12-A and 96-12-A (2284 12th Avenue, Manhattan); in that case, DOB states that the Board found that where the record reflects DOB's prior acknowledgement that a sign use

was legally established and there is no sufficient evidence to invalidate that determination, it should not be disturbed or disregarded; and

WHEREAS, DOB states that the evidence provided by the Appellant allegedly demonstrating that the 1981 Permit was a sham is unpersuasive; and

WHEREAS, specifically, DOB states that the Appellant erroneously relies on four affidavits—two from former officers of Peter's Bag Corp., and one each from a former manager of New York Bus Service, a sign painter, and the president of OTR Media Group, Inc.—to support its sham argument; and

WHEREAS, DOB contends that these affidavits are not sufficient to demonstrate that the accessory sign permit was issued in error and do not undermine the position that an accessory sign was displayed from 1981 through 1988 in accordance with the 1981 Permit; and

WHEREAS, DOB notes that under Technical Policy and Procedure Notice No. 14/1988 ("TPPN 14/88"), affidavits cannot be the sole basis for demonstrating a use; and

WHEREAS, DOB asserts that the affidavit of the vice president of Peter's Bag Corp. is particularly questionable since the 1981 Permit application appears to bear his signature; of the two contradictory statements from this affiant, the statement made contemporaneously with the filing of the permit application stating that the sign was accessory to the New York Bus Service's use of the premises to conduct its business is more credible than a conflicting statement made 32 years later as to the actual use of the sign; and

WHEREAS, DOB also states that the sign painter's statement that he did not see any offices or storage for New York Bus Service inside the building in 1977 does not prove exclusive use of the building located at the Premises by other tenants; and

WHEREAS, in addition, DOB states that the Appellant's evidence that Peter's Bag Corp. occupied the Premises in 1980 and that New York Bus Service had facilities at locations during the 1980s other than at the Premises does not prove that New York Bus Service did not also operate a storage facility at the Premises when the 1981 Permit was issued; nor does the Appellant's evidence of New York Bus Service facilities in other locations prove that the statements made in connection with the 1981 Permit application were untrue and made with the intent to circumvent the law; and

WHEREAS, DOB also observes that evidence of a contemporaneous use provided on behalf of the current occupant of the building, such as that reviewed by DOB in 1981, is likely to be more credible than evidence of a historical use; and

WHEREAS, finally, DOB observes that whereas BSA Cal. Nos. 95-12-A and 96-12-A (2284 12th Avenue, Manhattan) involved a determination that a sign was entitled to non-conforming use status, here, DOB determined in 1981 that the Sign was *conforming*; in such a case, DOB asserts that there is even less cause to overturn a DOB determination since non-conforming uses are disfavored under the Zoning Resolution; and

WHEREAS, accordingly, DOB states that it properly issued the Final Determination denying registration of the Sign as a non-conforming advertising sign; and

CONCLUSION

WHEREAS, the Board finds that DOB properly denied the Sign registration because the use of the Sign for advertising was discontinued for a period of more than two years; and

WHEREAS, in particular, the Board finds that, based on the record, the Sign was used to display messages that were accessory to the principal use of the warehouse at the Premises for more than two years, beginning in 1981, when the 1981 Permit was obtained to legalize an existing business sign for New York Bus Service, until 1988[3]; and

WHEREAS, the Board agrees with DOB that the Appellant has not submitted sufficient evidence to demonstrate that DOB clearly erred in issuing the 1981 Permit; and

WHEREAS, the Board also agrees with DOB that the Reconsideration issued in connection with the 1981 Permit was properly issued and supported by substantial evidence, including numerous contemporaneous assertions by different people—an officer of the corporate entity that owned the Premises at the time, the job applicant, and the Chairman of the Community Board—each with an obligation under the Administrative Code not to provide false or misleading statements to DOB; as noted above, the officer of the corporate entity that owned the Premises stated that "when New York Bus Service ceases to use a portion of [the Premises] to conduct their business, the sign indicating their business will be removed from the face of [the Premises]," the job applicant stated that "[the Sign] complies with section 42-51 of the Zoning Resolution for a business sign," and the Chairman of the Community Board stated that he had "no objection to the sign as a business sign"; and

WHEREAS, the Board notes that the job applicant, as a registered architect, also had an ethical obligation not to provide false statements or misleading statements in a permit application; and

WHEREAS, the Board disagrees with the Appellant that a parsing of the 1981 Permit application documents indicates that no one actually stated that New York Bus Service occupied the Premises; rather, the

---

3 Based on the record, the parties agree that messages for the New York Bus Service were displayed on the Sign from 1981 until 1988.

Board finds that the clear intent of the documents and the statements made therein was to convince DOB that New York Bus Service occupied the Premises so that DOB would grant a permit legalizing the New York Bus Service sign, which, as noted above, measured 11,297 sq. ft. in surface area and was located 35 feet from the Bruckner Expressway and was permitted as an accessory business sign but prohibited as an advertising sign; and

WHEREAS, as to the Appellant's affidavits asserting that New York Bus Service did not use the Premises while the New York Bus Service sign was displayed, the Board agrees with DOB that they are not a sufficient basis to conclude that the 1981 Permit was issued in error; and

WHEREAS, the Board observes that although the Appellant's affidavits suggest the existence of a sham accessory permit, affidavits are the least valuable form of evidence of a use according to TPPN 14/88, and, as such, they must be scrutinized closely and are insufficient to establish a fact, absent supporting documentation; and

WHEREAS, under close scrutiny, the Board finds the affidavits unpersuasive, as follows: (1) the affidavit of the vice president of Peter's Bag Corp. is directly contradicted by statements made by the vice president himself in connection with the 1981 Permit application; (2) the affidavit from chief financial officer of Peter's Bag Corp. could only be based on personal knowledge acquired during 1987 or 1988, because the CFO states that he was employed by Peter's Bag Corp. from 1987 through 1989; (3) the affidavit of the purchasing and inventory manager for New York Bus Service from 1980 through 1996 is vague and contradicted by evidence in the record; (4) the affidavit of the sign painter who worked at the Premises is insufficient to prove the actual use of the building since it is unclear when and how often he visited the building and how much of the building he actually observed; and (5) the affidavit of the principal of OTR is not based on personal knowledge and may be tainted by OTR's interest in the outcome of the appeal; and

WHEREAS, the Board also noted, importantly, that none of the affiants claims to have occupied the building during the time period in question; as such, the affidavits are of limited value when weighed against contemporaneous statements to the contrary that were made proactively in support of a permit application; and

WHEREAS, as for the non-affidavit evidence submitted by the Appellant, the Board agrees with DOB that it is of limited evidentiary value; and

WHEREAS, specifically, the Board agrees with DOB that documentary evidence that Peter's Bag Corp. occupied the Premises in 1980 and that New York Bus Service had facilities at locations during the 1980s other than at the Premises does not prove that New York Bus Service did not also operate a storage facility at the Premises when the 1981 Permit was issued; similarly, the Appellant's evidence of New York Bus Service facilities in other locations do not prove that it did not also maintain a storage facility at the Premises; and

WHEREAS, accordingly, the Board agrees with DOB that neither the Reconsideration nor the 1981 Permit was issued in error; as such, and consistent with the Board's rationale in BSA Cal. Nos. 95-12-A and 96-12-A (2284 12th Avenue, Manhattan), the Board declines to overrule DOB's 1981 determination; and

WHEREAS, the Board also rejects the Appellant's assertion that the facts in the instant matter are similar to those in BSA Cal. Nos. 24-12-A and 147-12-A (2368 12th Avenue, Manhattan); and

WHEREAS, the Board notes that the 1981 Permit was subjected to a full plan examination, including a rigorous fact-finding inquiry on the issue of the principal use of the Premises, and supported by a Commissioner-level reconsideration and a restrictive declaration by the owner of the Premises; in contrast, the accessory permits obtained in BSA Cal. Nos. 24-12-A and 147-12-A (2368 12th Avenue, Manhattan) were filed under professional certification and signed off nearly four years after the adoption of OPPN 10/99; and

WHEREAS, additionally, the Board notes that when the 1981 Permit was obtained, the Sign was subject to ZR § 42-53 (the pre-cursor to ZR § 42-55), which was amended on February 21, 1980 to, among other things, confer non-conforming use status upon advertising signs subject to the arterial highway restrictions to the extent of their size as of May 1, 1968; and

WHEREAS, accordingly, at hearing, the Board questioned why there was no attempt in 1981 to legalize the Sign as an advertising sign under ZR § 42-53; in response, the Appellant speculated that the evidence of the Sign's establishment and/or continuous use (under ZR § 52-61), was unavailable at the time; and

WHEREAS, thus, the Board observes that it is reasonable to conclude that the 1981 Permit was obtained for an accessory sign because there was insufficient evidence to support a permit application to "grandfather" an advertising sign pursuant to the 1980 amendment to ZR § 42-53 and ZR § 52-61; and

WHEREAS, as to the Appellant's assertion that even if the 1981 Permit was not issued in error, the Board should find that, based on the record, the New York Bus Service sign was, by definition, an advertising sign because the message displayed was related to a business operated off the zoning lot, the Board disagrees; and

WHEREAS, the Board observes that, according to TPPN 14/88, the highest value documentation for demonstrating a use is a record from a city agency; the 1981 Permit *is* a record from a city agency, namely, DOB, the agency responsible for regulating the use and occupancy of buildings; by issuing the 1981 Permit,

DOB made an official statement about not only the accessory use authorized by the permit (the New York Bus Service sign), but also the principal use of the Premises (a storage facility for New York Bus Service); the Appellant's evidence to the contrary consists of affidavits, which are the lowest value evidence under TPPN 14/88; further, as noted above, the affidavits contain statements that are vague, virtually unsupported, contradictory, and/or self-serving; and

WHEREAS, therefore, the Board finds that DOB properly determined that to the extent that a non-conforming advertising sign use was established at the Premises, such use was discontinued, per ZR § 52-61, from 1981 until 1988 when an accessory sign was maintained; as such, DOB properly rejected the Appellant's registration of the Sign as a non-conforming advertising sign and properly denied the 2012 Permit application; and

WHEREAS, the Board notes that a secondary issue arose in the context of the appeal regarding the number of signs and total surface area of advertising sign use displayed as of May 31, 1968; the Appellant contends that, based on a 1967 photo, an 11,297 sq.-ft. sign existed at the Premises as of May 31, 1968; DOB contends that the 1967 photo shows that six separate signs existed with less than 11,297 sq. ft. of surface area; in essence, the parties disagree over how the surface area of a sign is measured under the applicable provisions of the Zoning Resolution; however, the Board finds that the precise size of the Sign (or signs) as of May 31, 1968 is inconsequential, since, for the reasons set forth above, the Board finds that no advertising sign is permitted at the Premises, per ZR §§ 42-55 and 52-61; therefore, the Board does not take a position on this issue; and

Therefore it is Resolved that this appeal, challenging a Final Determination issued on January 14, 2013, is denied.

Adopted by the Board of Standards and Appeals, January 28, 2014.

A true copy of resolution adopted by the Board of Standards and Appeals, January 28, 2014.
Printed in Bulletin Nos. 4-5, Vol. 99.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.