OTR Media Group, Inc. v Board of Std. & Appeals of the City of N.Y.
2014 NY Slip Op 31243(U)
May 12, 2014
Sup Ct, New York County
Docket Number: 101533/13
Judge: Michael D. Stallman

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 101533/2013

OTR MEDIA GROUP, INC.

vs

NYC BOARD OF STANDARDS

Sequence Number : 001

ARTICLE 78

PART 21

INDEX NO. _____

MOTION DATE 2/24/14

MOTION SEQ. NO. 001

The following papers, numbered 1 to 6, were read on this motion to/for Art 78

Notice of ~~Motion/Order to Show Cause~~ Petition/Petition — Affidavits — Exhibits, affd/exhs No(s). 1-3

Answering ~~Affidavits~~ — Exhibits, Admin. Record (+ memo) No(s). 4-5

Replying Affidavits _____ No(s). 6

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the annexed Decision and Judgment (memorandum of Decision).

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. MICHAEL D. STALLMAN

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): _____

Dated: 5/12/14

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

----------X

OTR MEDIA GROUP, INC.,

Petitioner,

-against-

Index № 101533/13
DECISION AND
JUDGMENT

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,

Respondent.

----------X

UNFILED JUDGMENT

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HON. MICHAEL D. STALLMAN, J.:

In this Article 78 proceeding, petitioner OTR Media Group, Inc. (OTR) petitions this court for a judgment annulling the resolution of the respondent Board of Standards and Appeals of the City of New York (BSA) which upheld the revocation of OTR's sign permit on the ground that the sign did not qualify as a nonconforming use. The question presented in this petition is whether the agency determination was arbitrary and capricious or an abuse of discretion (CPLR 7803 [3]).

Petitioner OTR is a limited liability company in the business of leasing outdoor advertising spaces, including building walls and roofs, from building owners and then renting these spaces for the display of advertisements. Respondent BSA consists of a five member body of experts in land use and planning, architecture, and engineering (NY City

Charter § 659) which is empowered under the New York City Charter to, among other things, review and decide appeals from land use determinations by the Department of Buildings (DOB) (NY City Charter § 666 [6]). The DOB is the agency empowered under the City Charter to enforce the New York City Zoning Resolution and other laws, rules and regulations governing the construction and use of buildings and structures in the City of New York (NY City Charter §§ 643, 645, 669).

At issue here is a 30 feet high by 26 feet wide (780 square feet) existing advertising wall space on the west-facing exterior wall of an older building located at 174 Canal Street, New York, New York (the Building), which had been used for advertising any number of times over prior decades. The underlying facts are that, in or about 2006, OTR entered into a lease agreement with the owner (Owner) of the Building to paint and operate advertisements in the 780 square foot wall space (the Sign). The lease agreement was for a term of five years with an option to renew for an additional five years, which has been exercised.

The Building, which is located in an area currently zoned as C6-1G, was built prior to 1947, the year in which that part of the City was rezoned as a Business District and no longer permitted advertising signs of this

nature, as of right. Additional land use regulations were enacted in 1961, and effective as of December 15, 1961, which, like the 1947 rezoning legislation, prohibited advertising signs, as of right, in the City's business districts. As of December 15, 1961, the Building's district was zoned "C6-1," and as of October 4, 1984, the same district was rezoned as "C6-1G."

The use of buildings, such as the one at issue, to continue display advertising signs which were in place prior to the 1947 rezoning, was permitted and the signs were allowed to remain in place and accept new advertisements if the sign itself was found to qualify for nonconforming use status under NY City Zoning Resolution § 52-11. A nonconforming use occurs when there is "[a] use of property that is no longer authorized due to rezoning, but lawfully existed prior to the enactment of the existing zoning ordinance" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 417 [1996], citing Kenneth H. Young, Anderson's American Law of Zoning § 6.01 at 481-482 [4th ed 1996-1997]; NY City Zoning Resolution § 12-10).

NY City Zoning Resolution § 12-10 defines a nonconforming use as "any lawful use, whether of a building or other structure . . . which does not conform to any one or more of the applicable use regulations of the district

in which it is located, whether on December 15, 1961, or as a result of any subsequent amendment thereto . . . ." "As a general rule, a nonconforming use of real property that exists at the time a restrictive zoning ordinance is enacted is constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance" (*Jones v Town of Carroll*, 15 NY3d 139, 143 [2010] [internal quotation marks and citations omitted], *rearg denied* 15 NY3d 820 [2010]). NY City Zoning Resolution § 52-11 is the regulation that permits this continuation of a nonconforming use, commonly referred to as "grandfathering." However, the benefit of a grandfathered nonconforming use, under NY City Zoning Resolution § 52-11, can be lost if the use, which existed and continued since prior to the rezoning, was discontinued for two or more years. Pursuant to NY City Zoning Resolution § 52-61:

> "[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 or building or other structure shall thereafter be used only for a conforming use. Intent to resume active operations shall not affect the foregoing."

In dispute here is whether the Sign is entitled to nonconforming use status.

According to OTR's petition, on March 31, 2008, it filed a permit

application with the DOB seeking to repaint the 780 square foot advertising wall sign on the Building. OTR claimed in its application that this otherwise nonconforming use of the east wall of the Building was "grandfathered-in." The application was promptly approved, the permit, under permit number 104849185, was issued on April 18, 2008, and OTR began to rent out the space for advertisements, as defined in NY City Zoning Resolution § 12-10. OTR's permit application, as permitted by the DOB, had been "professionally certified," meaning that a professional engineer or registered architect certified that the application for the proposed wall sign was in compliance with applicable laws and codes, thereby allowing for the permit to be issued on an expedited basis and without DOB review, subject to auditing at a later date.

A compliance audit subsequently took place in or about 2012, and by Notice of Intent to Revoke, together with a Notice of Objections (the Objection Sheet), the DOB informed OTR that the Sign did not meet Zoning Resolution requirements and that unless, within 15 days, "sufficient information is presented to the (DOB) to demonstrate that the approval and permit should not be revoked," the DOB would revoke the permit (petition exhibit 2). The reasons underlying the DOB's decision, set forth on the

Objection Sheet, were that, based on the DOB's own data, the wall sign (1) was discontinued and removed for more than two years (NY City Zoning Resolution § 52-61); (2) is not permitted in this district (NY City Zoning Resolution § 32-63); (3) exceeds the maximum square footage allowed (NY City Zoning Resolution §§ 32-641, 32-642); and (4) is too tall (NY City Zoning Resolution § 32-655).

According to the petition, OTR met with and/or communicated with the DOB on several occasions, and provided it with additional documentation to establish that the Sign had been operated as an advertising sign on a continuous basis since prior to 1961, and was therefore entitled to nonconforming use status. However, despite OTR's efforts and numerous submissions, the DOB issued a final determination on February 5, 2013, revoking the prior approval and the permit on the ground that the Sign was not entitled to nonconforming use status (Final Determination).

On March 6, 2013, OTR timely notified the BSA that it was appealing the DOB's Final Determination. Through its appeal papers, OTR attempted to show the presence of an advertising sign on the Building's exterior wall prior to the 1961 enactment of the Zoning Resolution, which

has continued, without interruption, as required under NY City Zoning Resolution § 52-61. Its evidence consisted of photographs, telephone book listings, leases, letters, credit applications, and contracts spanning the period from 1959 to the present time, as well as several legal arguments including the presumption of continuance. To this end, OTR argued that:

> "in sign cases, the application of the presumption of continuance is justified by the dynamics of the outdoor advertising market. The probabilities are such that once such a site is claimed for advertising, it is not now and was not decades ago likely to be relinquished. It is just too valuable. Accordingly, common sense and logic support use of the presumption of continuance to enable the [outdoor advertising company] to discharge its burden of production by proving the existence of a sign at periodic intervals throughout the years in question.
>
> * * *
>
> "Each of the photographs of advertising signs from the years 2007, 2008, and 2010 is accompanied by a contract for the display depicted. Throughout the period in question, the occupancy data make clear that none of the products advertised was associated with an occupant of the Building. The evidence thus shows an advertising sign at the location from before 1961 to the present at intervals no less frequent than once a decade and in many cases, much more frequently.
>
> "The presumption of continuance applies to enable the [BSA] to find, based on the evidence of the Sign's lawful existence before 1961 and its recurrence at regular intervals from that time until the present, that it continued as an advertising display for the period of any gaps in the documentary evidence. Taken

> together, the evidence tendered demonstrates both the lawful establishment and the continuous display of an advertising sign on the wall of the Building sufficient to render it a lawful non-conforming use."

On or about April 4, 2013, the BSA provided OTR with a Notice of Comments to its appeal application. OTR responded on June 3, 2013, with a "First Revised Statement of Facts," and the DOB submitted its response on or about July 2, 2013, insisting that the permit was properly revoked "as the Sign was not entitled to remain as a non-conforming use pursuant to Sections 52-11, 52-61, and 52-81 of the Zoning Resolution . . . ."

The DOB explained in its response that OTR has not demonstrated, as it must, that the Sign was lawfully established as nonconforming within the zoned business district, as the oldest acceptable photograph of the Building and Sign dates back only to 1953. Next, even if OTR established that the Sign was present prior to 1953, and of greater importance, to 1947, it has not provided sufficient evidence to prove that the Sign had not been discontinued for a period of more than two-years since that time. The DOB asserted that the Technical Policy and Procedure Notice 15/1988 (TPPN) sets forth guidelines for the DOB to follow in determining whether a nonconforming use has been continuous, which OTR did not meet. Under

the TPPN, and in order of preference, an applicant seeking continuous use status for a sign must provide: (a) records from a City agency; and/or (b) records/bills from public utilities; and/or (c) other documentation or bills such as telephone ads, trash hauler invoices; and/or (d) affidavits regarding the use of a building.

Based upon its review of the evidence submitted by OTR, the DOB made a finding that none of the submissions come from preferred categories (a) and (b), and that, even giving substantial weight to the bulk of the submitted evidence, consisting mainly of photographs, significant gaps in continuity remain. Namely, it found a six year gap between 1953 and 1959, a nine year gap between 1959 and 1968, an eight year gap between 1968 and 1976, an eight year gap between 1985 and 1993, a six year gap between 1993 and 1999, and a five year gap between 1999 and 2004. Ariel images dated April 13, 2003, April 25, 2003, May 31 2003 and June 3, 2003, show a blank wall with no advertising sign. The DOB also found that the balance of OTR's evidence, consisting of an affidavit, a 1977 lease agreement for a period of three years, a 1999 lease agreement for a period of five years, and several contracts post-2007, "are not corroborated by any objective, independently verifiable evidence," as the "leases and

contracts only speak to what a particular party may have had the right to do," and do not demonstrate that the conditions contemplated under the leases/contracts "actually existed at the Premises." The lone affidavit was discounted as lacking in "pertinent, specific information regarding the Sign at the Premises."

At a hearing held on July 16, 2013, the BSA heard testimony from the OTR and the DOB. Upon request, the BSA granted OTR leave to submit further proof, and the matter was continued until September 24, 2013. By letter dated August 20, 2013, OTR submitted additional documentation in its effort to demonstrate that the Sign qualified for nonconforming use protection under NY City Zoning Resolution § 52-11 (that it was "grandfathered-in"). This evidence consisted of two zoning maps, one showing that the Building was in an unrestricted district in 1937 (when advertising signs were permitted as of right), and another showing that the Building was in a business district in 1947 (when advertising signs were not permitted as of right), and a 1932 photograph purporting to establish the presence of the Sign on the Building. OTR acknowledged that it was difficult to see the Sign in the 1932 photograph or to distinguish the Building from among others depicted, and indicated that it was

endeavoring to find a way to make both the Sign and Building more discernible.

The DOB responded on August 27, 2013, arguing that, because the 1932 photograph was so unclear, it did not demonstrate that an advertizing sign was present at that location prior to 1947. The DOB also argued that OTR did not resolve the problem of multiple time-gaps between 1953 and 2003, and as a result, it did not establish that the Sign had not been discontinued for a period of two or more years since 1947, entitling it to nonconforming use status. OTR responded by letter dated September 4, 2013, together with recent photographs of the Building in an effort to clarify which structure depicted in the 1932 photograph is actually the Building and to confirm the presence of the Sign on that Building. OTR also proffered an alternate argument concerning the DOB's acceptance of a "blurry" photograph in connection with an unrelated, nonconforming use application for two signs erected on top of a building located at 55 Washington Street, Brooklyn, in order to show that the DOB was being arbitrary and capricious in its revocation of the permit in this instance. The continued BSA hearing was held on September 24, 2013, at which time the DOB responded to OTR's comparison to 55 Washington Street by

explaining that it had credited other evidence (inspection cards and a clearer photograph) which had been submitted for review in that matter.

On October 22, 2013, the BSA issued Resolution 87-13-A, denying OTR's appeal and affirming the Final Determination revoking the permit (the Resolution). The Resolution contained the BSA's finding that the Sign was not entitled to nonconforming use protection because OTR "has not submitted sufficient evidence of the Sign's establishment prior to 1947," inasmuch as the 1932 photograph shows, at most, "that the east wall of the Building is a different color than the front facade of the Building," and that there is "nothing about the color of the wall [that] 'directs attention . . . to a business, profession, commodity, service or entertainment'; as such the 1932 Photograph does not depict an "advertising sign" as that terms is defined under ZR § 12-10" (Resolution at 5). The BSA noted in the Resolution that it had granted OTR's request for more time to find a way to bring the 1932 photograph into sufficient focus to establish the Sign's presence, and it permitted OTR to submit other forms of evidence to meet its burden of proof. However, despite OTR's efforts, its submissions remained inadequate. Specifically, and despite its promise to do so, OTR did not submit a clearer, more focused version of the 1932 photograph to

establish first, that the building depicted in the photograph is the subject Building, and second, that there is a sign painted on the Building that contains a message which is identifiable as "advertising" (Resolution at 4).

Next, according to the Resolution, the BSA accepted the DOB's argument that, "even assuming the 1932 Photograph is accepted as demonstrating that the Sign existed as of 1932, there is no evidence of the Sign's existence as of 1947, when the Sign needed to have been in place in order to become established as a non-conforming use" (*id.*), or proof that the Sign continued to "exist[] from 1947 to the present without any two-year period of discontinuance" (*id.* at 5). With respect to 55 Water Street, the BSA also accepted the DOB's determination that the photographs used in support of nonconforming use status for the two signs, were significantly clearer and were supported by other evidence, including records of inspection maintained by the DOB (*id.* at 4). The BSA concluded that, because OTR failed to "demonstrate[] that the Sign existed prior to 1947, when the site was zoned as a Business District . . . the Sign was not established as a non-conforming use," and because "the Sign was never established as non-conforming," the BSA found it "unnecessary to determine whether the presumption of continuity impels [it] to find, based

on [OTR's] evidence, that the Sign was not discontinued" (*id.* at 6).

OTR has exhausted all of its administrative remedies; the instant Article 78 proceeding is properly before this court for review.

In support of its petition, OTR claims that the Resolution is arbitrary and capricious in its failure to recognize that the Sign was lawfully established prior to 1947, specifically, as far back as 1932, when such signs were permitted as of right. OTR also takes issue with the DOB's previous acceptance of "unclear and indecipherable photographs" in the 55 Washington Street application and questions the reliability of the other evidence submitted in support of the 55 Washington Street signs, insisting that the DOB has reached contrary rulings in fairly indistinguishable matters. OTR concludes, and asks this court to conclude, that the BSA Resolution, which is based on "erroneous interpretations of the evidence" and "non-existent distinctions" between the evidence presented here and in previous cases, creating incongruous results, should be annulled.

In the verified answer to the petition, the BSA reviews the land use history of the C6-1G business district, the OTR and DOB's actions with respect to the DOB's initial approval and later revocation of the permit, the applicable zoning resolutions and TPPN guidelines, OTR's evidence and

why the Final Determination was affirmed and the permit ultimately revoked. Central to that finding is the 1932 photograph, which both the DOB and BSA found to be inadequate to establish the existence of an advertising sign at the Building prior to 1947, due to the unclear image which does not permit an identification of the Building, let alone the existence of an advertisement on the Building's exterior wall. Also problematic to the BSA's five member body of experts was the fact that OTR failed to provide other forms of evidence, deemed acceptable under the TPPN guidelines, to corroborate what the 1932 photograph was meant to depict and/or to independently establish the legal nonconforming use dating back to 1947. With respect to the DOB's approval of the two nonconforming signs at 55 Washington Street, the BSA asserts that the DOB relied in that instance on inspection cards maintained in DOB files from both before and after November 1, 1979, which established the signs' existence and continued operation. The DOB did not rely simply on the "blurry" photographs from the 1950s.

In response, OTR points out now, as it did before the BSA, that the location of the Sign on the highly-trafficked Manhattan street (Canal Street) is so visible, and therefore, valuable, that it makes little sense, and

therefore, unlikely, that the west-facing exterior wall of the Building would not have been used for advertising purposes, either continuously, or without time gaps of more than two years, throughout the decades. OTR also points out that a discrepancy exists between the square footage listed on the inspection cards and the actual square footage of the signs at 55 Water Street. Therefore, because the discrepancy should have prevented approval, the DOB must have actually relied on the "blurry" photographs, and not the inspection cards, when it approved the nonconforming signage. OTR argues that it would be both arbitrary and capricious for the DOB to rely on a "blurry" photograph in its grant of approval at 55 Water Street, and then to deny approval for nonconforming use signage at the Building under similar circumstances.

It is well settled that the standard of judicial review in an Article 78 proceeding requires the reviewing court to give deference to the agency determination unless that determination is made in excess of the agency's jurisdiction, or in violation of lawful procedure, or, as is alleged here, is made arbitrarily, capriciously and constitutes an abuse of the agency's discretion (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222,

231 [1974]). The reviewing court is not permitted "to weigh the facts and merits *de novo* and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis" (*Matter of Clancy-Cullen Stor. Co. v Board of Elections of City of N.Y.*, 98 AD2d 635, 636 [1st Dept 1983]). If the court finds that the agency's determination is "supported by facts or reasonable inferences that can be drawn from the record and has a rational basis in the law, it must be confirmed" (*Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984], *rearg denied* 62 NY2d 943 [1984]). Stated another way, in determining whether the BSA Resolution was "arbitrary, capricious, or an abuse of discretion, [the court is] limited to an assessment of whether a rational basis exists for the administrative determination 'without disturbing underlying factual determinations'" (*Matter of Gill v Hernandez*, 22 Misc 3d 390, 394 [Sup Ct, NY County 2008], quoting *Matter of Heintz v Brown*, 80 NY2d 998, 1001 [1992]), and "[a] rational or reasonable basis for the agency's determination exists if there is evidence in the record to support its conclusion" (*id.*, citing *Sewell v City of New York*, 182 AD2d 469, 473 [1st Dept 1992], *appeal denied* 80 NY2d 756 [1992]).

Upon review of the BSA Resolution, the DOB's Final Determination, and the evidence submitted in support of OTR's application at each juncture, the court does not find a basis to annul the Resolution, and the petition must be denied. OTR has failed to show that the BSA was arbitrary and capricious, or that the Resolution, in upholding the DOB's finding that OTR's evidence does not establish the existence of the Sign prior to 1947, created incongruous rulings in indistinguishable matters. Based on the copy of the 1932 photograph annexed to the record, which OTR has previously acknowledged lacked clarity, this court is unable to find (as OTR urges) that the evidence cannot support the agency's conclusion that nonconforming use of the Sign prior to 1947 is not established by that photograph (*id.*). OTR's attempt to clarify which structure is the subject Building in the 1932 photograph by offering more recent photographs of the same area, is unavailing. Whether it is a question of resolution, focus or otherwise, the 1932 photograph remains too indiscernible for the purpose of comparing, identifying or locating the subject Building from among the others in the photograph, and too indiscernible to note the presence of an actual advertisement painted on the Building's exterior wall. To find otherwise, would be to impermissibly

substitute the reviewing court's judgment for that of the agency (*see Matter of Clancy-Cullen Stor. Co. v Board of Elections of City of N.Y.*, 98 AD2d at 636). The court is also unable to find, based on its examination of the record below, that the photographic evidence offered in support of the two signs at 55 Water Street, cannot reasonably be viewed by the DOB and BSA as clearer and more discernable than the 1932 photograph, or that there is no reasonable basis for the DOB and BSA to credit the data on the information cards maintained by the DOB pertaining to 55 Water Street.

Finally, it was also neither arbitrary nor capricious for the BSA not to address arguments pertaining to whether the Sign's use was subsequently discontinued. Having already determined that OTR had not established the Sign's existence prior to 1947, there was no cause for the BSA to resolve whether OTR had adequately addressed the gaps of more than two-years time in OTR's purported continuity evidence.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent as taxed by the

Clerk, and that respondent have execution therefor.

Dated: May 27 2014
New York, New York

ENTER:

J.S.C.

UNFILED JUDGMENT

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