

**Matter of Atlantic Outdoor Advertising, Inc. v
Srinivasan**

2012 NY Slip Op 32827(U)

November 23, 2012

Sup Ct, New York County

Docket Number: 103078/12

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON
SUPREME COURT JUSTICE
Justice

PART 40 B

ATLANTIC OUTDOOR
ADVERTISING, Inc.

MEENAKSHI SRINIVASAN,
ET AL.

INDEX NO.

103078/19

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*petition is denied & the
process is dismissed in accordance
with the written decision & judgment
of this date*

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).

Dated: 11/23/12

HON. PETER H. MOULTON
SUPREME COURT JUSTICE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Supreme Court: New York County
Part 40B

-----X

In the Matter of the Application of

ATLANTIC OUTDOOR ADVERTISING, INC.

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

-against-

Index No. 103078/12

MEENAKSHI SRINIVASAN, Chairperson,
CHRISTOPHER COLLINS, Vice-Chairman
DARA OTTLEY-BROWN, SUSAN M. HINKSON, R.A.
EILEEN MONTANEZ, P.E., Commissioners,
Constituting the BOARD OF STANDARDS AND
APPEALS, and the DEPARTMENT OF BUILDINGS
OF THE CITY OF NEW YORK,

Respondents.

Peter H. Moulton, Justice

UNFILED JUDGMENT

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In this Article 78 proceeding petitioner seeks to vacate a resolution of the New York City Board of Standards and Appeals ("the BSA") dated June 5, 2012 ("June 5th Resolution"). In the June 5th Resolution the BSA upheld a determination of the New York City Department of Buildings ("the DOB"). In that determination, the DOB found that a large rooftop advertising sign near an approach to the Ed Koch Queensboro Bridge in Queens was not a "grandfathered" advertising sign that is a permitted nonconforming use under the City's Zoning Resolution. The practical import of the DOB's and

BSA's decisions is that the sign cannot be used to advertise products not being sold in the building upon which the sign rests.

Petitioner is a tenant in exclusive possession of the rooftop area and sign. It seeks to continue to let the sign to advertisers.

BACKGROUND

The sign in question, located on top of 23-10 Queens Plaza South, was erected in 1936 by The Eagle Electric Manufacturing Company ("Eagle"). The original sign featured the Eagle name and logo, and various products manufactured by Eagle, and two statements: 1) "Since 1920 We've Been In Your Home," and 2) "Perfection is not an Accident." For its day the sign was elaborate, involving the use of neon and other expensive aesthetic touches.

23-10 Queens Plaza South was one of Eagle's manufacturing plants. No wholesale or retail sales were conducted in the building.

Eagle remained in business until approximately 2000. The building is currently vacant. In or around 1999, the sign was leased to Atlantic, which began to use the sign to display different advertisements.

As a rule, advertising signs located specified distances from City highways have been subject to a general prohibition under the

City's Zoning Resolution since 1940. (Zoning Resolution § 42-55.) It is undisputed that 23-10 Queens Plaza is a location that falls into that general prohibition.

However, the Zoning Resolution makes an exception for advertising signs erected prior to June 1, 1968, which are grandfathered. (Zoning Resolution § 42-55(c)(1).) Petitioner argues that the original sign was an advertising sign, that it was grandfathered, and that it therefore can continue to be used for advertising.

The DOB found, and the BSA agreed, that the Eagle sign was not an advertising sign, but rather an "accessory use" to Eagle's use of the building as a manufacturing plant. Both "advertising sign" and "accessory use" are defined terms in the Zoning Resolution.

This proceeding hinges on whether BSA's decision that the sign was an "accessory use" was arbitrary and capricious. Petitioner seeks to bring the sign within the definition of "advertising signs." Respondents defend their position that the sign is properly characterized as an "accessory use" which bars any use of the sign to advertise products unrelated to economic activity occurring within the host building.

DISCUSSION

Judicial review of BSA action begins with the recognition that the BSA "is comprised of experts in land use and planning, and that

its interpretation of the Zoning Resolution is entitled to deference." (In the Matter of New York Botanical Garden v Board of Standards and Appeals of the City of New York, 91 NY2d 413, 418-19.) As summarized by the Court of Appeals in the Botanical Garden case:

So long as [the BSA's] interpretation is neither irrational, unreasonable, nor inconsistent with the governing statute it will be upheld. Of course, this principle does not apply to purely legal determinations; where the question is one of pure legal interpretation of statutory terms, deference to the BSA is not required. However, when applying its special expertise to a particular field to interpret statutory language, an agency's rational construction is entitled to deference.

(Id at 419 [internal quotations and cite omitted].)

Petitioner argues that this matter concerns only statutory construction which requires no deference to the BSA. Respondents argue that the matter concerns providing content for the relevant portions of the Zoning Resolution, and this task requires the BSA to apply its special expertise.

Section 12-10 of the Zoning Resolution defines both "advertising sign" and "accessory use."

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.

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 the land) ...; 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 of 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 of the principal use.

Both parties agree that subparagraph (c) is satisfied, as petitioner concedes that the sign and the building were both owned by Eagle.

Petitioner argues that neither subparagraph (a) or (b) is satisfied because Eagle did not sell any of its products at 23-10 Queens Plaza and the sign therefore did not have any function "accessory" to the building. Petitioner asserts that the sign was not designed to bring customers to 23-10 Queens Plaza; rather it was designed to direct consumers to Eagle products sold in stores. To distinguish it from an accessory sign, petitioner points to the sign's elaborate decoration and aesthetics. Petitioner distinguishes the sign from the more utilitarian signs on Eagle's other buildings in Queens, which simply stated the Eagle name and the factories' plant numbers. By contrast, the sign on 23-10 went far beyond announcing a company's presence in a given building, petitioner argues.

These arguments fall short of demonstrating that the BSA acted arbitrarily and capriciously. It was not unreasonable for the BSA to find that the sign drew attention to the company occupying that lot, and therefore was incidental to the principal use of that lot. The definition of "accessory use" in the Zoning Resolution does not require that the "use" in question be related to a purchasing opportunity at the building. The BSA is entitled to deference in determining whether a sign such as the one at issue was "customarily" found in connection with the principal use. This is fundamentally a fact-based question "which will clearly benefit from the expertise of specialists in land use planning" (see Botanical Garden, supra, 91 AD2d at 420, cf. Atkinson v Wilt, 94 AD3d 1218 [terms "single family residence" and "tourist accommodation" defined in zoning resolution and do not require expert interpretation].)

Petitioner argues that the BSA's determination in this case is at odds with prior determinations in similar cases and that this is evidence that it acted arbitrarily and capriciously. These prior cases were discussed in the BSA resolution challenged herein, and the BSA's distinguishing of these prior cases is sound and reasonable.


Where, as here, the BSA's interpretation of the applicable Zoning Resolution provisions is neither irrational, unreasonable nor inconsistent with other provisions of the Zoning Resolution, it

must be upheld. (See Matter of P.M.S. Assets v Zoning Board of Appeals of Village of Pleasantville, 98 NY2d 683.)

CONCLUSION

For the reasons stated, It is hereby ORDERED AND ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed, without costs and disbursements. This constitutes the decision and judgment of the court

DATE: November 23, 2012



J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE

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