Matter of Van Wagner Communications, LLC v Board of Standards
2014 NY Slip Op 30271(U)
January 28, 2014
Supreme Court, New York County
Docket Number: 100418/13
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART 58**

Justice

In the Matter of the Application of
VAN WAGNER COMMUNICATIONS, LLC,

Index No. 100418/13

Petitioner,

MOTION DATE _____

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

MOTION SEQ. NO. 001

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

Respondent.

MOTION CAL NO. _____

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-3
Answering Affidavits– Exhibits	4-6
Replying Affidavits	

CROSS-MOTION: _____ YES X NO

Upon the foregoing papers, it is ordered that this motion is:

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).

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 1/28/14

DONNA M. MILLS, J.S.C.

Check one: X FINAL DISPOSITION ___ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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In the Matter of the Application of
VAN WAGNER COMMUNICATIONS, LLC,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law And Rules

-against- Index No. 100418/13

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

Respondent,

----------X

DONNA MILLS:

Petitioner Van Wagner Communications, LLC (Van Wagner) brings this Article 78 proceeding to annul the February 5, 2013 resolution (Resolution) of the Board of Standards and Appeals of the City of New York (BSA), which affirmed the March 12, 2012 decision of the Manhattan Borough Commissioner of the Department of Buildings of the City of New York (DOB) denying registration for two commercial advertising signs (Signs) that have been leased by Van Wagner since 1990. Petitioner contends that the Resolution is arbitrary and capricious, and that, in adopting it, the BSA abused its discretion. The petition also seeks an order directing the BSA to grant petitioner's appeal, and an order awarding petitioner costs, fees, and disbursements. The Court notes that, while petitioner argues that the Resolution is wrong, petitioner nowhere explains how the BSA abused its discretion in adopting it.

The Signs, one of which faces northwest and the other

southwest, are installed on the roof of the building located at 620 12th Avenue in Manhattan, between 47th and 48 Streets (Building). The Signs were placed so as to be visible from cars traveling over the West Side Highway (Highway).

In December 1973, a portion of the then-elevated Highway collapsed and cars were barred from travelling on the Highway between the Battery and 46th Street and between 72nd and 82nd Streets. In 1976, demolition of the Highway commenced. However, demolition was not completed, and construction work to rebuild the Highway, now at grade, did not commence until early 1989. Verified petition, exhibit F. The business of Van Wagner, and of other outdoor advertising companies, is to sell advertising space on signs that they own or lease. The Signs became unmarketable to advertisers after the collapse of the Highway, and they were unused until the Highway reopened.

Because the Building is located in an M2-4 manufacturing zoning district within the Special Clinton District, advertising signs may, generally, be placed upon it. New York City Zoning Resolution (ZR) § 42-52. While ZR § 42-55 bars the display of such signs within 200 feet of an arterial highway, such as the Highway, ZR § 42-53 (a) provides for the grandfathering, in certain circumstances, of signs that would, otherwise, be barred by section 42-55:

> "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, shall have the legal *non-conforming use* status pursuant to section 52-83, to the extent of its size existing on May 31, 1968."

A legal non-conforming use of property is a use that is unauthorized as the result of an amendment to the Zoning Resolution, but that is nonetheless lawful because it was authorized prior to such amendment. *See generally Matter of Toys "R" Us v Silva*, 89 NY2d 411, 417 (1996). It is undisputed that the Signs were installed in the 1940s, and that they have been used for advertising since at least 1953. Accordingly, they come, presumptively, within the ambit of ZR 42-55. However, the legality of a non-conforming use may be lost by an interruption of such use. ZR § 52-61 provides, in relevant part,

> "If, 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 structure is discontinued, such land or building or structure shall thereafter be used only for a conforming use. Intent to resume active operations shall not affect the foregoing.
>
> "The provisions of this Section shall not apply where such discontinuance of active operations is directly caused by war, strikes or other labor difficulties, a governmental program of materials rationing, or the construction of a duly authorized improvement project by a governmental body or a public utility company."

Courts have expanded the last contingency set forth in § 52-61 to include construction that is carried out by private parties, where such construction is performed pursuant to a governmental requirement or permit. *See e.g. Matter of 149 Fifth Ave. Corp. v Chin*, 305 AD2d 194, 194-195 (1st Dept 2003) (interruption of nonconforming use in order to comply with legally mandated inspection and repairs); *Matter of Hoffman v Board of Zoning & Appeals of Inc. Vil. of Russell Gardens*, 155 AD2d 600 (2d Dept

1989) (reconstruction of a restaurant, after a fire, was performed pursuant to a municipal building permit).

Title I, Rule 49 of the Rules of the City of New York (Rule 49), adopted pursuant to Local Law 31 of 2005, requires that the use of any outdoor advertising sign that cannot be registered with DOB must be discontinued. On September 1, 2009, Van Wagner applied to the New York City Department of Buildings (DOB) for registration of 57 outdoor signs that it controlled, including the two that are at issue here. DOB rejected registration, noting that the documentation provided by petitioner was inadequate to support proof "of advertising sign use during relevant establishment periods." Administrative record at 245-246. Van Wagner, thereupon, appealed to the BSA. After accepting multiple submissions and holding a public hearing, the BSA denied the appeal by the resolution that is here reviewed. The BSA noted that the Signs were not used between 1974 and 1989, and it held that the running of the two-year limit on interruption of use was not tolled, for two reasons. First, the BSA found that the closure of the Highway

> "did not *directly cause* the discontinuance of the Signs but rather created a market condition in which the Appellant may have been unable to lease the Signs and made the decision to discontinue their use."

Certified Record at 649. Secondly, the BSA found that the collapse and closure of the Highway "in and of themselves," did not constitute "the commencement of `the construction of a duly authorized improvement project by a governmental body.'" and that Van Wagner had provided "no evidence that the Signs were in use as

advertising signs during the period between the collapse of the highway and the actual commencement of the dismantling and reconstruction [thereof]," more than two years later. *Id.* at 649.

"Judicial review of an administrative determination is limited to whether it was arbitrary or capricious or without a rational basis in the administrative record, and once it is determined that the agency's conclusion had a sound basis in reason, the judicial function comes to an end." *Matter of Rucker v NYC/NYPD License Div.*, 78 AD3d 535, 535 (1st Dept 2010), citing *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425 (1st Dept 2007), *affd* 11 NY3d 859 (2008).

It was hardly irrational for the BSA to conclude that the interruption in the use of the Signs from January 1974 until the start of demolition, which itself preceded the start of reconstruction by approximately 13 years, was not directly caused by "the construction of a duly authorized improvement project by a governmental body." Petitioner refers to "the closure of the elevated highway as part of a government-run improvement project," and to "the `construction of a duly authorized improvement project by a governmental body,' specifically, the closure and reconfiguration of the West Side Highway" (memorandum of law at 1 and 2), but the Highway was not closed as part of a governmental plan to rebuild it in a different way. As petitioner elsewhere recognizes, it was closed because travel upon it became unacceptably dangerous (*see* memorandum of law at 4), and, as

petitioner's own exhibits show, there were years-long controversies as to what would replace it, which preceded any reconstruction. The closing of the Highway to traffic, by itself, can no more be described as part of a governmental improvement project than a fire department order sealing a structurally weakened building. *See Administrative Code of City of New York* §§ 15-227 (b).

The closing of the Highway may well have made it impossible to sell the advertising space on the Signs. The second paragraph of RZ § 52-61, however, does not take account of a diminution of economic value, and it does not provide that any contingency that causes a two-year, or more, discontinuance of a nonconforming use bars application of the first paragraph. Rather, it sets forth specific causes of discontinuance, the occurrence of any of which bars application of the first paragraph. The more than two-year interruption in the use of the Signs, between January 1974, when the Highway was closed and 1976, when demolition began, was not directly caused by any of the contingencies set forth in § 52-61.

Because the second reason that the BSA gave for denying petitioner's appeal suffices for the result reached in the Resolution, this court needs not discuss the first reason given by the BSA.

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated 1/28/14

ENTER:

DONNA M. MILLS, J.S.C.