SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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OTR MEDIA GROUP, INC., OTR 945 ZEREGA LLC

Petitioner,

- v -

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

Respondent.

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INDEX NO. 156725/2019

MOTION DATE 03/05/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 8, 9, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

This proceeding stems from New York City's long running attempts to obtain compliance with its rules and regulations pertaining to advertising signs, and from the desire of petitioners OTR Media Group, Inc. and OTR 945 Zerega LLC (collectively, petitioners or OTR) to maintain a 672 square foot advertising sign (the Sign) located at 945 Zerega Avenue, Bronx, New York, allegedly in violation of the New York City Zoning Resolution (the Zoning Resolution). Since 2013, the Department of Buildings (the DOB) and petitioners have been litigating whether the Sign, which is 50 feet from and within view of the Cross Bronx Expressway (an arterial highway), can be considered a non-conforming use status advertising sign. In order to be permitted at this location, in addition to other requirements, the Sign must have been in existence prior to November 1, 1979, and been continuously used as an advertising sign since November l, 1979 without a break in advertising use of more than two years.

Petitioners bring this proceeding pursuant to CPLR article 78, seeking an order annulling the March 19, 2019 resolution of respondent Board of Standards and Appeals of the City of the

New York (the BSA or the Board). The BSA resolution granted an application of the DOB for a rehearing based on the newly discovered evidence of five photographs taken and maintained by the New York State Department of Transportation (NYSDOT) of arterial highways. The BSA asserts that these photographs clearly show the Sign's non-existence in the late 1970s and early to mid-1980s, and thus rebut the valid existence of the Sign as a non-conforming use status advertising sign.

Petitioners contend that the BSA's determination was arbitrary and capricious, affected by errors of law, and directly contrary to its own determinations.

For the reasons set forth below, petitioners' application for Article 78 relief is denied.

FACTS

Background

In 2008, petitioners entered into a lease agreement with the property owner for the Sign for a term of ten years (petition [NYSCEF Doc No. 1], ¶ 7). The Sign is a billboard bulletin located on the roof of the building located at 945 Zerega Avenue, Bronx, New York, measuring 14 feet in height and 48 feet in length on a single structure (672 square feet) (*id.*, ¶ 8). Petitioners contend that, prior to entering into the lease agreement, they undertook research to ensure that the Sign was in compliance with the requirements of the Zoning Resolution (*id.*, ¶ 9). As the Sign is an advertising sign located 50 feet from the Cross Bronx Expressway, and as section 42-55 of the Zoning Resolution bans advertising signs within 200 feet of an arterial highway, in order for the Sign to comply with the Zoning Resolution it would have to qualify as a non-conforming use under section 42-55 of the Zoning Resolution (*id.*, ¶ 10).

Petitioners assert that multiple discussions and consultations with people involved with outdoor advertising during the relevant time confirmed that the Sign existed as an advertising sign

prior to November 1, 1979, which would entitle it to non-conforming use status under subsection (c) (2) of section 42-55 of the Zoning Resolution (*id*., ¶ 11). Petitioners further assert that, based on its research, and the discussions and consultations discussed, they determined that the Sign was lawfully established prior to November 1, 1979, and therefore qualified as a non-conforming use under section 42-55 of the Zoning Resolution (*id*., ¶ 12).

The Sign had been issued permit numbers 201143253 and 210039224 in order to refurbish and repair the existing structure. Both applications were for advertising signs. The permits were issued on April 21, 2008 and March 27, 2008, respectively (*id*., ¶ 13).

Relevant Statutory Provisions

Effective December 15, 1961, Zoning Resolution § 12-10 defined an advertising sign as "a sign which directs attention to a business, profession, commodity, service, or entertainment conducted sold or offered elsewhere than upon the same zoning lot."

Effective April 8, 1998, Zoning Resolution § 12-10 defines an advertising sign as "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 the use located on the zoning lot*" (emphasis added).

Zoning Resolution § 12-10 defines non-conforming use, in relevant part, as follows:

> "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
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> ***
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> A non-conforming use shall result from failure to conform to the applicable district regulations on either permitted Use Groups or performance standards. A non-conformity is a failure by a non-conforming use to conform to any one of such applicable use regulations."

Zoning Resolution § 12-10 (b) defines an accessory use as "a use which is clearly incidental to, and customarily found in connection with, such principal use."

Zoning Resolution § 52-11 allows for the continuation of a non-conforming use "except as otherwise provided in this Chapter." Zoning Resolution § 52-61 prohibits the continuation of a non-conforming use where the use has been discontinued for a period of two years, as follows:

> "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."

Zoning Resolution § 42-55 regulates advertising signs in proximity to designated arterial highways. Since 1940, pursuant to Zoning Resolution § 42-55, and its predecessor Zoning Resolution § 42-53, advertising signs which are in view of an arterial highway have not been permitted in manufacturing districts within 200 feet of the arterial highway. Since 196l, advertising signs which are beyond 200 feet from an arterial highway have been subject to surface area limitations. Zoning Resolution § 42-55 provides as follows:

> "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.
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> (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:
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> (1) no permitted sign shall exceed 500 square feet of surface area; and
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> (2) no advertising sign shall be allowed; nor shall an existing advertising sign be structurally altered, relocated or reconstructed.
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> (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.
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> (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
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> (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 nonconforming 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."

Thus, pursuant to subsection (c), advertising signs in existence prior to November 1, 1979 may remain as non-conforming uses pursuant to Zoning Resolution § 52-83, which provides that nonconforming advertising signs may continue, provided there is no lapse in continuous use lasting more than two years.

It is undisputed that the Sign is 50 feet from and within view of the Cross Bronx Expressway, an arterial highway. Thus, in order to be permitted at the location, in addition to other requirements, the Sign must have been lawfully existing prior to November 1, 1979.

Procedural History

On September 5, 2012, pursuant to the requirements of Article 502 of the Administrative Code and title 1, chapter 49 of the Rules of the City of New York, OTR filed an inventory of 8 outdoor signs under its control, along with photographs, permits, leases, affidavits and other documents establishing the legal use of all such signs. As part of its full submission packet, OTR submitted an OAC3 Outdoor Advertising Company Sign Profile for the Sign, attaching the diagram of the location as required (petition, ¶ 21).

On September 21, 2012, the DOB issued a Notice of Intent to Revoke permit numbers 201143253 and 210039224 (*id*., ¶ 22).

On October 3, 2012, Alex J. Berger, the Assistant Deputy Director of the DOB's Sign Enforcement Unit, issued a Notice of Sign Registration Deficiency, which stated that the DOB was unable to accept the Sign for registration due to "Failure to provide proof of legal establishment of the sign" (*id*., ¶ 23).

By Letter dated December 3, 2012, Phyllis Arnold, counsel for OTR, responded to the Notice of Sign Registration Deficiency. Petitioners contend that, as required to demonstrate the Sign's lawful, non-conforming use status, the letter included evidence of its lawful establishment prior to November 1, 1979, as well as its continuous display as advertising since that time (*id*., ¶ 24).

On January 14, 2013, the DOB issued a Notice of Sign Registration Rejection, in which it rejected OTR's application for registration of the Sign. The DOB then issued a Revocation of Approvals and Permits of Permit Numbers 201143253 and 210039224, dated January 31, 2013 (the "DOB's Determinations") (*id*., ¶ 25).

On February 13, 2013, OTR appealed the DOB's Determinations (*id*., ¶ 26). On July 16, 2013, the BSA held a hearing at which OTR presented evidence that the Sign qualified for the protection contained in subsection (c) (2) of section 42-55 of the Zoning Resolution (*id*., ¶ 27).

The BSA denied OTR's appeal, and affirmed the DOB's Determinations pursuant to a resolution issued on September 24, 2013. The BSA found that OTR had not met its burden of proving that the Sign was established prior to November 1, 1979. As the BSA determined that OTR had not established legal establishment, it decided not to proceed with further discussion of any issues pertaining to the continuous use of the Sign (*id*., ¶ 28).

On October 24, 2013, OTR commenced an Article 78 proceeding, seeking to annul the BSA's determination (*id*., ¶ 29). On August 13, 2014, the parties entered into a stipulation, which remanded the action to the BSA for the sole purpose of contemplating and possibly amending the BSA's determination, in order to distinguish the BSA's determination from a determination in a similar case, matter no. 96-12-A, dated January 8, 2013, pertaining to 2284 12th Avenue, New York, NY (the 2284 case) (*id*., ¶ 30).

On September 16, 2014, the BSA issued a revised determination, which was substantially similar to its initial determination, except for the addition of several supplementary paragraphs included in an attempt to distinguish the subject case from its dissimilar findings in the 2284 case (*id*., ¶ 31).

On January 14, 2015, OTR moved to restore the Article 78 proceeding, and annul the amended BSA determination (*id*., ¶ 32). On April 15, 2015, the court granted the petition, annulling the BSA's amended determination, and remanding the case back to the BSA to determine two questions. The first question was for the BSA to determine whether there had been continuous use of the Sign at its location since November 1979. The second was for the BSA to determine whether the Sign had been in continuous use for advertising purposes during that time (*id*., ¶ 33).

On September 19, 2016, the BSA issued a new determination denying OTR's application. In its decision, the BSA found that, although the Sign has continuously existed since 1979, Phillip Morris, which had utilized the Sign as a permanent advertiser for several years during the late 1980's and early 1990's, had utilized the Sign as an accessory sign rather than as an advertising sign, and thereby allowed the Sign's legal prior non-conforming advertising use to lapse. The BSA concluded that any advertising use of the Sign established prior to November 1, 1979 was discontinued for a period of at least two years, pursuant to Zoning Resolution § 52-61, and that the

Sign has not continuously been used for advertising purposes since its establishment prior to November 1, 1979 (*id*., ¶¶ 34-35).

On October 13, 2016, OTR filed an Article 78 petition challenging the BSA's determination that the Sign had not been continuously in use as an advertising sign and was not used as an advertising sign for a period of two years or more, and therefore, could not be considered a legal non-conforming advertising sign (*id*., ¶ 37; *see* exhibit A [NYSCEF Doc No. 2]).

On March 20, 2018, the court issued a judgment remanding the matter back to the BSA for the sole purpose of reconsidering its resolution in light of a different BSA case, 2368 12th Avenue, Block 2005, Lot 32, Borough of Manhattan, BSA Calendar No. 24-12-A (the "2018 Remand") (*id*., ¶ 38; *see* exhibit B [NYSCEF Doc No. 3]).

By application dated June 7, 2018, petitioners submitted an appeal to commence the remand, as directed by the 2018 Remand (answer [NYSCEF Doc No. 13], ¶ 130). Although the remand proceeding as a result of the 2018 Remand had commenced, the BSA resolution for that remand has not yet been issued (*id*., ¶ 131).

On June 8, 2018, the DOB filed an application with the BSA seeking to reconsider the application pursuant to the 2018 Remand based on newly discovered evidence from the NYSDOT that allegedly contradicts the BSA's determination in 2016 that the Sign was established prior to November 1, 1979, and/or provides further support for the BSA's determination that the Sign was not continuously used for advertising purposes (petition, ¶ 39).

By application dated June 8, 2018, the DOB submitted a request for a rehearing pursuant to § 1-12.5 of the Board of Standards and Appeals Rules of Practice and Procedures (the BSA rules), which provides that:

> "The Board will not grant a request to rehear a case which was denied, dismissed, or withdrawn with prejudice unless: (1) ***substantial new evidence is submitted that***

> ***was not available at the time of the hearing***, (2) there is a material change in plans or circumstances, or (3) an application is filed under a different jurisdictional provision of the law"

(*id*., ¶ 46; emphasis added).

Specifically, the DOB requested a rehearing so that the BSA could consider:

> "substantial new evidence that was not available at the time of the initial hearing [(or prior remands)] on this matter. This evidence contradicts the conclusion reached by the Board in its July 12, 2016 resolution in the captioned matter that the sign at 945 Zerega Avenue existed on November 1, 1979"

(answer, ¶ 132).

The specific evidence that the DOB sought to submit was five NYSDOT photographs of the location of where the Sign should be, if it existed, from the viewpoint of the Cross Bronx Expressway: (1) a photograph dated June 28, 1978 (no sign or any sign structure visible); (2) a photograph dated June 18, 1981 (no sign or any sign structure visible); (3) a photograph dated May 7, 1985 (no sign or any sign structure visible); (4) a photograph dated October 20, 1990 ("Marlboro" sign visible); and (5) a photograph dated May 16, 1996 ("Marlboro" sign visible) (*id*., ¶ 133).

As the DOB further explained in its application, it had recently learned that the NYSDOT had photographic evidence that contradicted the Board's prior conclusion that the Sign existed prior to November l, 1979, and demonstrated that the Sign was not present at the subject premises around November l, 1979. According to the DOB, the newly obtained photographs showed that the Sign was not present until sometime after 1985, as it was not seen in the 1985 photograph, but was seen in the 1990 photograph. The DOB explained the need for a rehearing, as follows:

> "New evidence demonstrates that the advertising sign never existed at the Premises as of November 1, 1979, and therefore was never granted legal non-conforming advertising status pursuant to ZR § 42-55.[] If the Board finds, pursuant to this Application for Rehearing, that the Sign did not exist on November l, 1979, then the issue of whether it continued as a non-conforming advertising sign is moot"

(*id.*, ¶ 134).

By Notice of Public Hearing, dated July 26, 2018, the BSA notified the DOB that a public hearing had been scheduled on its application for September 13, 2018 (*id.*, ¶ 135). On September 12, 2018, a public review session was held before the Board (*id.*, ¶ 136). On September 13, 2018, a public hearing was held before the Board. At the hearing, the availability of the five photographs as evidence in this case was discussed. The Board explained that, even though evidence might be technically available, if none of the parties were aware of the existence of that source of evidence, it should not be precluded from being considered new evidence once that source of material is discovered. During the discussion, Vice-Chair Chanda noted that the Board was also unaware of the existence of NYSDOT photographs of highways and their surroundings, and that none had ever been previously used as evidence in a case before the Board:

> "VICE-CHAIR CHANDA: The way I see it, the way I see it is that yes there is information available all around the world but not everybody is informed about or aware of it. You do the research to the extent that, that, from your vast experience, from your past research work, you dig into those. As new information becomes available you become aware of the new sources and this is one of those things. We have never seen this document being presented for any of our other cases.
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> CHAIR PERLMUTTER: Yeah, correct.
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> VICE-CHAIR CHANDA: This is the first time a New York State DOT documentation has been used to justify whether a sign existed or not, and so there no was past history of knowing that there -- that source existed. So I definitely do see it as a new form of evidence that is being provided to us"

(*id.*, ¶ 137). The Board also noted that OTR did not acknowledge that it knew that these types of photographs existed (*id.*, ¶ 138).

During the hearing, the DOB explained that if it had known that the NYSDOT was a source of documentation to prove or disprove the existence of the Sign on November 1, 1979, it would have obtained the photographs when the BSA proceedings began in 2013. The DOB also

explained that the five photographs were discovered after the Board's last resolution in 2016, and so could not have been submitted as part of an earlier hearing (*id*., ¶ 141).

As the Board requested further briefing on the issues discussed during the hearing, it set a briefing schedule, and adjourned the case until December 4, 2018. By request for adjournment application dated September 28, 2018, petitioners requested an adjournment of the next hearing date. The request was granted. By request for adjournment application dated October 25, 2019, petitioners requested a second adjournment of the next hearing date. This request was granted (*id*.).

By submission dated November 27, 2018, petitioners requested that the Board deny the DOB's request for a new hearing based on new evidence. Specifically, petitioners argued that the rehearing request should be denied because the evidence was previously available to the DOB. In support of their argument they cited to *Matter of Douglaston Civic Assn. v Galvin* (36 NY2d 1 [1974]), in which a rehearing was denied because the party sought a new hearing based upon discovering an earlier appraisal of the property at issue that had been admitted in an earlier estate tax proceeding for that property (*id*., ¶¶ 142-143).

Petitioners also argued that, even if the photographs were to be evaluated by the Board, they would not show anything to change the prior decisions regarding the Sign's establishment or continuous use. They further argued that, because the photographs were a State agency document and not a City agency or public utility, they should be weighted the same as third tier evidence, such as bills. Petitioners also argued that the 1981 and 1983 photographs did not show a break in the continuous use of the Sign for a period of more than two years, and that a 1978 lease, third party invoices and work specifications, and blurry, distant photographs were enough to contradict the NYSDOT photographs of the location that did not show a sign (*id*., ¶ 144).

Finally, petitioners argued that the BSA was not the proper forum to determine, or revisit, the issue of the establishment of the Sign because the court had made a decision regarding establishment in an earlier Article 78 proceeding (*id*., ¶ 145).

In support of their submission, petitioners submitted the following documents: the Supreme Court's decision in *Douglaston*; an outdoor advertising lease, dated June 12, 1978, for the subject premises (the 1978 lease); specifications for work to be performed at the subject premises by Premier Roofing Co. Inc., dated November 21, 1978 (the 1978 Specifications); an affidavit from Brett Perry, the founder and President of National Environmental Title Research and the Historic Aerials website, sworn to on October 5, 2018; the Supreme Court decision, dated May 4, 2015; DOB Technical Policy and Procedure Notice #14188; Work Completion Notice from Allied Outdoor Advertising, dated July 15, 1980; photographs of 944 Havemeyer Avenue, 931 Zerega Avenue and 450 Zerega Avenue, and photographs related to those properties; and an invoice from Allied Outdoor Advertising, dated August 12, 1985 (*id*., ¶ 146).

During the January 28, 2019 public review session and the January 29, 2019 public hearing, the Board noted that this case was being adjourned until March 19, 2019 (*id*., ¶ 149).

By submission to the BSA dated February 6, 2019, the DOB explained the circumstances surrounding the DOB's recent discovery of the NYSDOT photographs, and included the affidavit of Edward Fortier (Fortier), the Executive Director of Special Enforcement. In that affidavit, Fortier explained that he had only learned of the NYSDOT highway photograph archive in the spring of 2017, and that he quickly reached out to the NYSDOT to obtain copies of any relevant photographs once he learned that these photographs existed (*id*., ¶ 150).

The DOB also distinguished the instant rehearing application from the situation that was the basis of the decision in *Douglaston*. The DOB explained that the "reasonable diligence

standard" that the Court set forth in *Douglaston* was inapplicable in the instant case because the NYSDOT photographs, unlike the document in *Douglaston*, was not something that was in a public record for the property at issue. Unlike the photographs in this application, the document in *Douglaston* had been submitted as evidence in a prior proceeding related to the property at issue (*id*., ¶ 151).

The DOB also explained that the photographs were official business records of the NYSDOT. The DOB stated that they should be treated with as much weight as City agency records, which are the most preferred types of documentation to be used in BSA proceedings, and not third tier source materials (*id*., ¶ 152).

The DOB also rebutted petitioners' arguments that were made to discredit what the photographs showed regarding the establishment and non-continuous use of the Sign. The DOB argued that the 1978 lease, by itself, was not enough to establish that the Sign was actually erected because petitioners failed to submit any corroborating documentation such as permits for the Sign or photographs showing the Sign during any time of the period of the lease, which was 1978 through 1985. In direct contrast, the DOB had photographs to show that, in fact, there was no Sign shortly after the lease was signed, approximately midway through the lease period, nor shortly before the lease period was stated to end in 1985 (*id*., ¶ 153).

Likewise, the DOB argued that the 1978 Specifications also lacked probative value, as they did not make any mention of the existence of the Sign. It further argued that the 1980 Work Completion Notice also lacked probative value because it was an unverified, third-party sign-off document, it did not explain that the work was completed for an advertising sign, and the stated completion date was July 1980, which was almost eight months after the critical establishment date of November l, 1979 (*id*., ¶ 154).

Additionally, the DOB argued that the NYC tax photographs of other properties were not persuasive evidence as they were unclear, and that even if the photographs showed that the Sign existed in 1983, that, at most, would only show that the Sign existed over three years after the critical establishment date of November 1, 1979 (*id*., ¶ 155).

Finally, the DOB argued that the BSA was the proper place to determine if the Sign was established as of November l, 1979, because these photographs were not previously before the Board, and judicial review of the Board's decision is limited to what was in the record before the Board. As a result, the court could not review these photographs before the BSA was given an opportunity to evaluate and issue a decision based upon them. The DOB also explained that, because these photographs were only recently discovered, they were not previously available to be submitted as part of the record, but that they proved that the Sign was not established prior to November 1, 1979 (*id*., ¶ 156).

In support of its submission, the DOB submitted the following evidence: the Fortier affidavit, sworn to on February 5, 2019, with exhibits; a NYSDOT letter, dated December 13, 2018, stating the State's procedures for obtaining and maintaining the five photographs and additional technical information about the photographs; copies of the five photographs with a NYSDOT document certification stating that these photographs were official business records; DOB Technical Policy and Procedure Notice #14/88; and Evidence for Sign Registration Pursuant to Rule 49 (*id*., ¶ 158).

By reply letter, dated February 27, 2019, petitioners responded to the DOB's submission, and argued that the DOB had failed to refute petitioners' points raised in their November 27, 2018 submission (*id*., ¶ 159).

During the public review session on March 18, 2019, the Board discussed why it thought that, if the parties knew about the NYSDOT photographs, they would have presented them in one of the prior proceedings, and why the *Douglaston* case was distinguishable from the instant application (*id*., ¶ 160).

During the public hearing on March 19, 2019, the Board continued to discuss the application, and unanimously voted to grant the application (*id*., ¶ 161).

After the hearing, the Board issued its resolution on the application (*see* petition, exhibit C [NYSCEF Doc No. 4]). The BSA resolution provides, in pertinent part:

> "WHEREAS, at [the] hearing, the Appellant acknowledged that they were not previously in possession the NYSDOT photographs and members of the Board stated that they had been previously unaware of NYSDOT as a source for evidence relating to signage adjacent to arterial highways; and
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> WHEREAS, the Board notes that DOB filed this application separately pursuant to § 1-12.5 of the Board's Rules, which permits the filing of requests to rehear cases previously before the Board, and that the Board continues to hold public hearings on the 2018 Remand, as mandated by the Supreme Court; and
>
> WHEREAS, in written submissions to the Board, DOB clarified that the agency was not previously in possession of the NYSDOT photographs and provided the affirmation of DOB's Executive Director of Social Enforcement, in which such DOB employee states that he first obtained the NYSDOT photographs in April 2017, subsequent to the 2016 Resolution, after first learning that NYSDOT maintains a photographic archive of New York State highways in a meeting in early spring 2007; DOB also submitted a letter from NYSDOT explaining the procedure followed by NYSDOT's Pavement Data Section, which from 1975- 2010, took photographs of interstate highways, state routes. federal routes and parkways at intervals of 1/100th of a mile (52.8 feet); and
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> * * *
>
> WHEREAS, the Board finds that the five NYSDOT photographs submitted by DOB constitute substantial new evidence that was not in DOB's possession prior to the 2016 Resolution and finds that Appellant's arguments in opposition to this application to be without merit; and
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> * * *

> WHEREAS, the NYSDOT photographs submitted herewith by DOB constitute the only clear photographs of the subject site prior to 2005 refute evidence previously proffered into the record on this appeal including, but not limited, to the affidavits from Richard J. Theryoung, President of Allied Outdoor Advertising, which stated that the Sign was constructed in early 1979 and continuously maintained thereafter, and Bruce Silverman, an advertising and media consultant, who stated that rooftop signage adjacent to or highly visible from major arteries in New York are so valuable that they are unlikely to be without advertising for an extended of time—statements that are contradicted by Photograph 2, taken on June 18, 1981, and Photograph 3, taken on May 7, 1985, which indicate, on at least two dates post-November 1, 1979, neither the Sign nor a vacant sign structure on the roof of the premises.
>
> Therefore, it is Resolved, that the Board of Standards and Appeals grants the subject request for a rehearing to consider substantial new evidence not available at the time of the initial hearing pursuant to § 1-12.5 of the Board's Rules of Practice and Procedure"

(BSA resolution, at 3-4).

DISCUSSION

In this Article 78 proceeding, petitioners are challenging the BSA's March 19, 2019 resolution that granted the DOB's application for a rehearing based on the discovery of the five photographs, which contradict petitioners' claims about the establishment and continuous use of the Sign. Specifically, the first three photographs, which were taken in 1978, 1981 and 1985, do not show any sign (or even any sign structures) at this location. The Sign only appears in the photographs taken in 1990 and 1995, which is years after the critical date of November 1, 1979.

Administrative agencies have broad discretionary power when making determinations on matters they are empowered to decide. The BSA is a local body of experts which is empowered to determine, under certain specific conditions, whether to grant an appeal from a DOB determination regarding the issuance of a permit (*see* City Charter § 666 [6]; Zoning Resolution § 72-11). Specifically, the BSA has the power "to hear and decide appeals from and to review interpretations of this Resolution" (Zoning Resolution § 72-01 [(a]).

In an Article 78 proceeding to review an administrative determination of a local zoning body, such as the BSA, judicial review is limited in scope, and a court may set aside the determination of a zoning board of appeals "only where the record reveals illegality, arbitrariness or abuse of discretion" (*Matter of Cowan v Kern*, 41 NY2d 591, 599 [1977] ["(j)udicial review of local zoning decisions is limited; not only in our court but in all courts"]; *accord Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004] ["(t)his Court has often noted that local zoning boards have broad discretion . . . . [and] (c)ourts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion"]; *see also Matter of Wilson v DeChance,* 129 NYS3d 10, ___ AD3d ___, *1 [2d Dept 2020]; *Matter of Ferncliff Cemetery Assn. v Town of Greenburgh*, 184 AD3d 95, 100 [2d Dept 2020]). The rationale for this rule is that "'[l]ocal officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community'" (*Matter of Pecoraro,* 2 NY3d at 613 [citation omitted]; *accord Matter of White Plains Rural Cemetery Assn. v City of White Plains*, 168 AD3d 1068, 1069 [2d Dept 2019]).

The reviewing court cannot substitute its judgment for that of the local zoning body (*Conley v Town of Brookhaven Zoning Bd. of Appeals,* 40 NY2d 309, 314 [1976]; *Matter of Ignizio v City of New York,* 85 AD3d 1171, 1174 [2d Dept 2011] ["courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or [to] choose among alternatives"] [internal quotation marks and citations omitted]). Rather, if "there is a rational basis for the local decision, that decision should be sustained" (*Matter of Cowan*, 41 NY2d at 599; *accord Matter of Feinberg–Smith Assoc., Inc. v Town of Vestal Zoning Bd. of Appeals,* 167 AD3d 1350, 1351 [3d Dept 2018]; *see Matter of Metro Enviro Transfer, LLC v Village of Croton-*

on-Hudson, 5 NY3d 236, 241 [2005] [where a determination of a zoning board of appeals has a rational basis in the record, a court may not substitute its own judgment, even where the evidence could support a different conclusion]).

A rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion (*see Awl Indus., Inc. v Triborough Bridge & Tunnel Auth.*, 41 AD3d 141, 142 [1st Dept 2007]; *Sewell v City of New York*, 182 AD2d 469, 473 [1st Dept 1992]). Conversely, an action is arbitrary if it "is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Town of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

Here, the BSA's determination to grant the DOB's application for a rehearing based on new evidence was not unreasonable, arbitrary, capricious or an abuse of discretion, as the determination had a sound basis in fact, was supported by the evidence in the administrative record, and was in accordance with the applicable laws and rules.

In this case, the location where the Sign is sited does not permit advertising signs as of right (Zoning Resolution § 42-55). However, Zoning Resolution §§ 42-55 and 52-11 do permit the maintenance of an advertising sign if the sign was continuously maintained as an advertising sign at the same location, commencing prior to November 1, 1979. Pursuant to Zoning Resolution § 52-11, a party may continue a non-conforming use, i.e., a lawful use which does not conform to any one or more of the applicable use regulations of the district in which it is located. As the assertion of non-conforming use status is an affirmative defense, the party asserting it bears the burden of establishing that its property is entitled to non-conforming use status (*Matter of Syracuse Aggregate Corp. v Weise*, 51 NY2d 278, 284-5 [1980]; *Matter of Mohan v Zoning Bd. of Appeals of Town of Huntington*, 1 AD3d 364, 364 [2d Dept 2003]).

It is uncontested that, in order for petitioners to establish that the Sign was entitled to non-conforming use status, they were required to establish that: 1) the Sign existed prior to November l, 1979; 2) the Sign was being used for advertising as of November l, 1979; and 3) the use did not change or cease for a period of two or more years since November 1, 1979 (*see* Zoning Resolution §§ 42-55, 52-11, 52-61).

After many years of litigating whether petitioners established that the Sign existed prior to November 1, 1979, whether the Sign was being used for advertising as of November 1, 1979, and whether the use did not change or cease for a period of two or more years since November 1, 1979, the DOB discovered the five photographs that it contends are a source of objective and unambiguous evidence that was previously unknown to both the DOB and the BSA that would answer these questions about the Sign. Therefore, pursuant to § 1-12.5 of the BSA rules, the DOB requested that the case be re-opened at the BSA so that it could submit the newly discovered evidence.

In support of their article 78 application, petitioners argue that the BSA's March 19, 2019 resolution granting the DOB's application for a rehearing based on new evidence is arbitrary and capricious, because the photographic evidence was always available to the DOB (petition, ¶ 45). This court disagrees.

The BSA's determination to grant the DOB's request was reasonable, rational, and in accordance with the applicable law. Section 1-12.5 (1) of the BSA rules provides that either party may seek to re-open a case by submitting an application for a rehearing, if "substantial new evidence is submitted that was not available at the time of the hearing." Here, the DOB requested a new hearing based on its discovery of the five photographs that it contends were newly discovered evidence that showed that the Sign did not exist prior to November 1, 1979, and in fact,

did not exist until sometime after 1985. It was reasonable and rational for the Board to grant DOB's application so that the Board could evaluate this evidence, because the DOB established that this was indeed new evidence that was not available at the time of the initial hearing or any of the prior rehearings at the BSA. The DOB explained in detail that it was unaware that these photographs or even their source (the NYSDOT highway database) existed before early 2017. In support of this fact, in addition to testimony by the DOB attorney at the BSA hearings, the DOB submitted the Fortier affidavit, in which Mr. Fortier explained that he only learned of the NYSDOT highway photograph archive in the spring of 2017, and that he quickly reached out to the NYSDOT to obtain copies of any relevant photographs once he learned these photographs existed.

The DOB also provided the BSA with a letter from the NYSDOT, dated December 13, 2018, which set forth the State's procedures for obtaining and maintaining the five photographs, and additional specific information regarding them, as well as copies of the five photographs with a NYSDOT document certification stating that these photographs were official business records.

Moreover, multiple members of the Board explicitly stated that they were also unaware of the NYSDOT as a source of potential photographic evidence relevant to this case (or other types of cases). They explained that if they knew or suspected that the NYSDOT was a source of evidence, let alone such clear evidence, about a location, they would have expected and noted that the parties had or did not have such evidence to support their positions.

Therefore, because its conclusions were supported by the record before it, it was rational and reasonable for BSA to find that the photographs were new evidence that was previously unavailable, and as such, the BSA properly granted the DOB's application for a rehearing (*see Matter of HV Donuts, LLC v Town of LaGrange Zoning Bd. of Appeals*, 169 AD3d 678, 680 [2d Dept 2019]; *Matter of Bray v Town of Yorktown Zoning Bd. of Appeals*, 151 AD3d 720, 720–

721 [2d Dept 2017]; *Matter of Bartolacci v Village of Tarrytown Zoning Bd. of Appeals,* 144 AD3d 903, 904 [2d Dept 2016]).

Petitioners also argue that the BSA's determination to grant the rehearing was arbitrary and capricious because the photographs do not establish that the Sign did not exist prior to November 1, 1979, or that it was not continuously used as an advertising sign (*see* petition, ¶ 52). Petitioners' arguments fail. Contrary to petitioners' third-party documents with vaguely relevant information, blurry photographs with uncertain dates and a lease that has no corroborating documentation, the five NYSDOT photographs are a clear, consistent and objective record of the fact that the Sign was not present at the subject premises in 1978, 1981 or 1985, and therefore not established prior to November 1, 1979. Accordingly, the BSA's determination to grant a rehearing based on these photographs was both reasonable and rational.

Finally, petitioners argue that the BSA did not have the authority to open the case for a rehearing to consider the photographs. According to petitioners, the Supreme Court should be the body to review these photographs because it has previously issued decisions regarding the establishment of the Sign.

However, it is well-established that a court may not review a record de novo in an article 78 proceeding (*see Awl Indus., Inc. v Triborough Bridge & Tunnel Auth.*, 41 AD3d at 142 ["a 'court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious'"]). Rather, the court's role in reviewing BSA determinations involves only a review of the record that was before the Board when the Board rendered its determination (*Matter of Pecoraro*, 2 NY3d at 613 ["'(t)he judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them'"]

[citation omitted]). Therefore, the DOB's application for a rehearing was properly made to the Board.

Thus, based upon the administrative record, this court finds that the BSA resolution granting a rehearing to consider the five new photographs was reasonable and rational, and in accordance with all applicable rules and laws.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/13/2020					**W. FRANC PERRY, J.S.C.**		
DATE							
CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**