

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30517
G/prt

_____AD3d_____

Argued - February 18, 2011

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
PLUMMER E. LOTT, JJ.

2010-04262

DECISION & ORDER

In the Matter of Penzim Produce Corp., etc., appellant,
v New York City Department of Consumer Affairs,
respondent.

(Index No. 11113/09)

Kreinces & Rosenberg, P.C., Westbury, N.Y. (Leonard Kreinces of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Kristin M. Helmers, Louise Lippin, and Norman Corenthal of counsel), for respondent.

In a proceeding pursuant to CPLR article 78 to review a determination of the New York City Department of Consumer Affairs dated January 9, 2009, which, after a hearing, found that the petitioner violated Administrative Code of the City of New York § 20-237(b) by maintaining sidewalk stands that exceed the dimensions permitted by the statute and imposed a fine in the sum of \$2,600, the petitioner appeals from a judgment of the Supreme Court, Kings County (Schmidt, J.), dated February 22, 2010, which denied the petition and, in effect, dismissed the proceeding.

ORDERED that the judgment is affirmed, with costs.

The petitioner is licensed by the New York City Department of Consumer Affairs (hereinafter the Department) to maintain sidewalk stands in front of its store for the display of fruits and vegetables. The petitioner brought this CPLR article 78 proceeding to challenge the Department's determination that it violated Administrative Code of the City of New York (hereinafter

March 22, 2011

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MATTER OF PENZIM PRODUCE CORP. v
NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

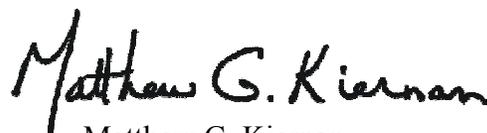
Administrative Code) § 20-237(b) by maintaining stands that exceed five feet in width, contending, inter alia, that the Department reached this conclusion by misinterpreting the subject Administrative Code provision. The Supreme Court denied the petition and, in effect, dismissed the proceeding. We affirm.

Courts apply the “arbitrary and capricious” standard of review to challenges to an agency’s interpretation or application of a statute or regulation (*see* CPLR 7803[3]; *Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239; *Matter of Jennings v Commissioner, N.Y.S. Dept. of Social Servs.*, 71 AD3d 98, 108-109; *Matter of Pro Home Bldrs., Inc. v Greenfield*, 67 AD3d 803, 805). Here, the Department’s determination that the petitioner violated Administrative Code § 20-237(b) by maintaining sidewalk stands that exceed five feet in width was not arbitrary and capricious. Administrative Code § 20-237(b) provides that where the sidewalk in front of a retail establishment is at least 16 feet wide, a sidewalk stand “shall not exceed ten feet in length nor five feet in width as long as a straight, unobstructed pathway of at least nine and one half feet is maintained at all times on the sidewalk in front of the entire length of the premises.” The petitioner’s contention that its sidewalk stands do not have to comply with the dimensional requirements of Administrative Code § 20-237(b) as long as 9½ feet of the sidewalk remains unobstructed is contrary to the plain and unambiguous language of this provision, which both restricts the maximum dimensions of sidewalk stands and requires the maintenance of an unobstructed pathway of at least 9½ feet.

The petitioner’s remaining contentions are without merit.

RIVERA, J.P., DICKERSON, ENG and LOTT, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court