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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of

MANOCO LLP,
Petitioner,

-against-

For a Judgement Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules,

THE CITY OF NEW YORK; ROBERTO VELEZ, as Chief Administrative Law Judge; NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS; SUZANNE BEDDOE, as Executive Director of the NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; and ROBERT LIMANDRI, as Commissioner of the NEW YORK CITY DEPARTMENT OF BUILDINGS,
Respondents.

INDEX NO. 117293/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion by petitioner(s) for a an order and judgement pursuant to Article 78 of the Civil Practice Law and Rules reversing, annulling and setting aside the decision and finding of the appeals board of the New York City Environmental Control Board (ECB).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

In this Article 78 proceeding, petitioner, Manoco LLP (Manoco), seeks an order reversing, annulling and setting aside the October 29, 2009 decision and order of the

Environmental Control Board (ECB) (the Board), which she claims wrongfully imposed fines on petitioner as an outdoor advertising outdoor (OAC) pursuant to the Administrative Code of New York City (Administrative Code) §§ 26-259 and 26-262, relating to the alleged violations of the New York City zoning rules applicable to outdoor advertising signs.

For the reasons set forth below, the petition is denied.

BACKGROUND

On November 2, 1994, petitioner, owner of the premises located at 150 East 58th Street, New York, New York (the Premises), entered into a long term lease with Culver Amherst, LLC, the predecessor-in-interest of Signal Outdoor Advertising, LLC (Signal), an OAC registered with the City of New York, which permitted Signal with the use of outdoor space at the Premises for the purpose of displaying advertisements.

On May 5, 2007, the DOB issued three notices of violation (NOV) to petitioner for violating both the zoning rules and the administrative code. Petitioner does not deny these violations.

On July 17, 2008, a hearing was held before Administrative Law Judge (ALJ) Haken, wherein it was held that although petitioner was in violation of the administrative code and zoning rules, petitioner was not an OAC. The ALJ declined to impose the penalties set forth in Administrative Code § 26-262.

The DOB appealed, arguing that the ALJ incorrectly ruled that Manoco was not an OAC as defined under the Administrative Code §§ 26-259 (b) and (c).[1] On October 29, 2009, the Board reversed the decision, holding instead that petitioner was an OAC pursuant to the plain

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[1] Administrative Code §§ 26-259 and 26-262, as adopted by Local Laws 14 and 31, were repealed by Local Law 33 of 2007, and are currently set forth in the Plumbing Code 28-502.1 - Definitions, and 28-502.6 - Criminal and Civil Penalties. For purposes of this motion, the court will use the former sections of the Code as they were in effect at all relevant times herein.

language of Administrative Code § 26-259 (b).

Specifically, section 26-259 (b) of the Administrative Code provides that an outdoor advertising company is "a person, corporation, partnership or other business entity that as a part of the regular conduct of its business engages in, or by way of advertising, promotions or other methods, holds itself out as engaging in the outdoor advertising business." Under sub-section (c) of § 26-259, "outdoor advertising business" "means the business of selling, leasing, marketing, managing or otherwise directly or indirectly making space on signs situated on buildings and premises within the City of New York available to others for advertising purposes ... ."

Based on those definitions, the Board held that "an OAC is a person, who, as part of his or her regular conduct of business, directly or indirectly makes space on signs available to others for advertising." The Board gave deference to the DOB's interpretation of its own rule, finding that it is "consistent with the purpose of the statute". The Board held that "the current statutory language of 'directly or indirectly' by making space available to others for advertising purposes is sufficiently broad to include the rental of space by a property owner to a registered OAC." The Board found that Manoco failed to show that the leasing of space was outside its regular conduct of business. As such, it imposed the greater civil penalties of $5,000 for each of the three violations.

On December 16, 2009, petitioner filed the instant petition seeking annulment of the Board's decision and order.

DISCUSSION

The standard of review in this Article 78 proceeding is whether the DHCR's "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]; *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore,

the Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assocs. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of the DHCR within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269, 278 [1972]; *see also Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

While deference is generally given to an administrative agency's interpretation of the statutes it enforces, when the question is one of pure statutory reading and analysis, as here, there is little basis to rely on the expertise of that agency (*see Matter of Belmonte v Snashall*, 2 NY3d 560 [2004]). Therefore, we must first look to the plain reading of the statute to determine its intent (*Matter of M.B.*, 6 NY3d 437 [2006]).

Respondents argue that the matter must be transferred to the Appellate Division, because it involves a question of substantial evidence. A petitioner can either challenge the decision as not being supported by substantial evidence, or that it is not rationally based, and therefore is arbitrary and capricious (*Matter of Mason v Department of Bldgs. of City of N.Y.*, 307 AD2d 94 [1st Dept 2003]). Under CPLR 7804 (g), a case presenting a question of substantial evidence must be transferred to the Appellate Division (*id.*; *Matter of Padilla v Levy*, 300 AD2d 62 [1st Dept 2002]). It is not the parties' characterization of the issues that determines whether a proceeding must be transferred (*see Matter of Robinson v Finkel*, 194

Misc 2d 55 [Sup Ct, NY County 2002], *aff'd* 308 AD2d 355 [1st Dept 2003] [internal citation and quotation marks omitted]).

Here, petitioner does not dispute the board's determination based on the evidence submitted, rather it concedes and accepts all facts as stated therein. Petitioner questions the Board's interpretation of the Administrative Code, claiming its decision was arbitrary and capricious. As the question presented concerns the interpretation of law, transfer to the Appellate Division is not required (*see Matter of Rosenkrantz v McMickens*, 131 AD2d 389, 390 [1st Dept 1987]; *Matter of Robinson, 194 Misc 2d at 64, citing Matter of Duboff Elec., Inc. v Goldin*, 95 AD2d 666 [1st Dept 1983]).

At issue herein is whether the amendment to the Administrative Code § 26-59 (b) brought petitioner, as a lessor of outdoor advertising space, within the parameters of the definition of an OAC. For the reasons set forth below, we find in the affirmative.

Section 26-259 (b), as adopted under Local Law 14, formerly provided that an OAC "shall not include the owner or manager of a building or premises who markets space on such building or premises directly to advertisers." In 2005, Local Law 31 was enacted, which enhanced enforcement procedures relating to outdoor advertising signs, and deleted the aforementioned language from section 26-259 (b) as quoted above.

Petitioner argues that the deletion of the last sentence was not intended to expand the class of liable parties to all property owners leasing space, but rather was intended to eliminate a narrow exception applied to those property owners who were directly leasing/marketing space to advertisers. We disagree. Looking at the plain language of the statutes, an OAC is defined as a business entity that, as part of its regular business, among other things, engages in the outdoor advertising business (Administrative Code § 26-259 [b]). An entity is engaged in the outdoor advertising business when it "leas[es] ... or otherwise directly or indirectly mak[es] space or signs situated on buildings and premises within the city of New York available to

others for advertising purposes" (Administrative Code § 26-259 [c]).

To the extent that petitioner argues that the Board has taken conflicting positions as to whether property owners who lease advertising space to an OAC, citing *NYC v Edison Second Avenue. Ms. Prop. LLC*, ECB Appeal No. 46894 (2009) and *NYC v Tribeca Tower, Inc., ECB* Appeal No. 46583 (2009), the court finds otherwise. As respondents point out, that while the two cases were decided on the same day, the Board in *Edison* holding that Local Law applies "only to OACS and do[es] not extent to or include premises owners", but found so because the violations therein predated the enactment of Local Law 31. In *Tribeca Tower*, the violations occurred in 2007, after the enactment of Local Law 31. Therefore, it cannot be said that there is any inconsistency in the findings.

While petitioner asserts that the Section 49-01, of Title 1 of the Rules of the City of New York (Rule 49-01)[2] suggests that property owners shall not be considered engaging in outdoor advertising business where they lease space to an independent registered OAC, this is only applicable to filing a single registration of those signs, and is inapplicable herein. The Board found that petitioner failed to rebut that its leasing of space was not part of its regular conduct of business. There is nothing irrational in so finding.

As such, the court holds that the Board's decision was not arbitrary and capricious and must be upheld.

In light of the foregoing, the remaining arguments need not be addressed.

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[2] Rule 49-01 provides that for purposes of that rule, owners and managers involved strictly to the extent of leasing space to a registered OAC will not be considered in the outdoor advertising business.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition is denied and the proceeding is dismissed, without costs on disbursements to respondents.

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 8-25-10

Enter:

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**