MEMORANDUM

SUPREME COURT: QUEENS COUNTY
IA PART 2

BY: WEISS, J.

In the Matter of the Application of

MAURICE OPARAJI,
Petitioner,

For an Order Pursuant to Article 78:
Of the Civil Practice Law and Rules

CITY OF NEW YORK, NEW YORK CITY BUILDING DEPARTMENT ENVIRONMENTAL CONTROL BOARD (ECB),

Respondent.

Index No.: 12402/11

Motion Date: 10/5/11

Motion Seq. No.: 1

In this Article 78 proceeding, self represented petitioner Maurice Oparaji seeks a judgment annulling the determination of respondent New York City Environmental Control Board (ECB) dated January 21, 2011, which affirmed a determination that petitioner had violated Section 27-127 of the Administrative Code of the City of New York by failing to install hand rails or guardrails on the front stoop of his premises located at 245-11 133rd Road, Rosedale, New York and had violated Zoning Resolution § 22-00 by storing motor vehicles on his property, and imposed fines for each violation, totaling $2,000.00.

Maurice Oparaji is the owner of real property located at 245-11 133rd Road, Rosedale, New York. On November 24, 2006, Department of Buildings (DOB) Inspector San Agustin issued Notice of Violation (NOV) No. 34546562H(62H) to petitioner for a violation

of "ZR 22-00," stating as follows: "Illegal use in a residential district. Dead storage of approx. 13 unlicensed motor vehicles with no visible plates parked thru-out premises including 1-white GMC truck and 1-Ford School Bus with number 2050." The NOV provided a remedy of "[d]iscontinue illegal use and remove unlicensed motor vehicles from premises immediately"; stated that it was a second offense, based on prior ECB violation number 34470285K(85K); and directed petitioner to cure the violation by January 1, 2007, and appear at a hearing on January 9, 2007. Respondent ECB attaches to this NOV an affidavit/affirmation of service executed by Inspector Agustin who stated that on November 24, 2006 at 2:30 P.M., he served the NOV at 245-11 133rd Road, Queens, New York, pursuant to the alternative method of service set forth in the "New York City Charter § 1404(d)(2)(ii) [Affix and Mail Service]" by "POSTED AT FRONT."

On January 5, 2008, DOB Inspector Bhattachaya issued NOV No. 34624903H(03H) to petitioner for a violation of "22-00," which stated as follows: "Illegal use in a residential district, Noted: Dead storage of 9 vehicles with no visible plates, expired registration/inspections"; The NOV provided a remedy of "[d]iscontinue illegal use"; stated that it was a second offense based upon NOV No. 62H; and directed petitioner to cure date by February 19, 2008 and appear at a hearing on March 4, 2008. Respondent ECB attaches to this NOV an affidavit/affirmation of

service executed by DOB Inspector Diego Fonseca, in stated that on January 14, 2008 at 11:45 A.M. he served "the NOV" at 245-11 133rd Road, Queens, New York, pursuant to the alternative method of service set forth in the "New York City Charter § 1404(d)(2)(ii) [Affix and Mail Service]" by "Posted on front door." On January 5, 2008, DOB Inspector Bhattachaya issued NOV No. 34624904J(04J) to petitioner for a violation of "26-126.3(a)" which stated as follows: "Failure to comply with Commissioner's order to correct the violating condition and file a Certificate of Correction with NYC Department of Buildings for Notice of Violation #34546562H. The same conditions still exists (9 vehicles and 1 construction equipment in the premises stored)." The NOV provided a remedy of "Correct the violating condition and file a Certificate of Correction"; stated that this is a hazardous condition; and directed petitioner to appear at a hearing date on March 4, 2008. Respondent ECB attaches to this NOV an affidavit/affirmation of service executed by DOB Inspector Diego Fonseca, who stated that on January 14, 2008 at 11:45 A.M. he served "the NOV" at of 245-11 133rd Road, Queens, New York, pursuant to the alternative method of service set forth in the "New York City Charter § 1404(d)(2)(ii) [Affix and Mail Service]" by "Posted on front door." The DOB, in a notice dated January 31, 2008 and addressed to Mr. Oparaji, stated that there was a change to violation number 03H "issued on January 14, 2008"; that this was a second offense violation; that

he was required to appear for a hearing on March 4, 2008; and that he could not submit a Certificate of Correction prior to the hearing.

On January 5, 2008, DOB Inspector Bhattachaya issued to petitioner NOV No. 34624902X(O2X) for a violation of "27-127," which stated as follows: "Failure to maintain building exterior. Defects noted: At the front stoop comprising of 4 risers of approx 5 feet long has no handrails/guardrails." The NOV provides a remedy of "[p]rovide Rails"; stated that this is a hazardous condition; and directed petitioner to appear at a hearing date on March 4, 2008. Respondent ECB attaches to this NOV an affidavit/affirmation of service executed by DOB Inspector Diego Fonseca, who stated that on January 14, 2008 at 11:45 A.M. he served "the NOV" at of 245-11 133rd Road, Queens New York, pursuant to the alternative method of service set forth in the "New York City Charter § 1404(d)(2)(ii) [Affix and Mail Service]" by "Posted on front door."

On June 12, 2008, DOB Inspector Sampson issued NOV No. 34657699K(99K) to petitioner for a violation of "27-127," which stated as follows: "Failure to maintain. Defect noted: Concrete steps at the front of building has no handrails-creating potential falling hazard." The NOV provided a remedy of "[i]nstall handrails"; stated that this a hazardous condition; that it is a second offense based upon NOV 02X; and directed petitioner to

appear for a hearing on August 5, 2008. Respondent ECB attaches to this NOV an affidavit/affirmation of service executed by Inspector Sampson who stated that on June 12, 2008 at 8:10 A.M. he served the NOV at 245-11 133 Road, pursuant to the alternative method of service set forth in the "New York City Charter § 1404(d)(2)(ii) [Affix and Mail Service]" by "viol posted on door."

In support of the within petition, Mr. Oparaji has submitted a copy of an order of adjournment, which states that the March 4, 2008 hearing on Violation 34546562H was adjourned by the ECB until September 9, 2008, on the motion of the respondent (Oparaji) on the grounds of "issuing officer required," and is it "so ordered" by an administrative law judge (ALJ). Neither party states whether all of the scheduled ECB hearings were adjourned or when the hearings on all five NOVs were consolidated. On April 13, 2009, Mr. Oparaji served a motion on the ECB by mail seeking to dismiss the five NOVs on grounds of improper service. He specifically stated that he did not see or receive any of the NOVS. Mr. Oparaji states in his reply papers that a hearing was held on April 14, 2009, at which time Inspector Diego Fonseca testified with respect to his service of the three NOVs issued on January 5, 2008 and served on January 14, 2008.[1]

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[1] Mr. Oparaji states that prior to the full submission of the within proceeding, he requested a copy of the transcript of the April 14, 2009 hearing, and that the ECB has failed to produce this transcript.

On September 29, 2009, an OATH hearing was held with respect to all five NOVs. Mr. Oparaji appeared on his own behalf and testified at the hearing. The DOB was represented by counsel and Inspector Bhattachaya appeared and testified on behalf of the DOB. Mr. Oparaji denied the allegations contained in the NOVs, and asserted that the NOVs were not properly served and therefore should be dismissed on the grounds of lack of personal jurisdiction. In particular, he asserted that he was not served by mail with a copy of each NOV, and that he did not receive a copy of the NOVs.

At the hearing, counsel for the DOB stated that an earlier NOV, identified as No. 34470385K had been dismissed as it had named the wrong respondent. The ALJ then determined that NOV No. 62H would be treated as a first offense and not a second offense. Mr. Oparaji contested service of NOV No. 62H, asserting that the inspector was not present at the subject property on November 24, 2006; that the NOV was not posted on his property; and that he was not mailed a copy of the NOV. Counsel for the DOB, after consulting the agency's computerized records, stated that a summation of the notice of violation had been mailed to the last know address of the respondent, based on the address on file with the DOB, the Department of Finance and HPD. DOB Inspector Bhattachaya testified that he inspected the premises on January 5, 2008; that he observed the vehicles on the premises and took

photographs of the same; and he issued NOV No. 03H; but did not serve said NOV on Mr. Oparaji. These photographs, depicting the front steps of the premises, and vehicles parked at the premises were admitted into the record. The majority of Mr. Oparaji's testimony given in connection with the photographs taken on January 5, 2008 regarding the vehicles on the property is transcribed as "inaudible."

With respect to NOV Nos. 04J and 02X, DOB Inspector Bhattachaya testified that he was not the person who served these NOVs. The ALJ stated that all five NOVs were entered into the record, and read into the record the allegations set forth in NOV No. 03H. Mr. Oparaji again orally moved to dismiss all of five NOVs on the grounds of lack of jurisdiction and asserted that the NOVs were not properly served on him. At the close of the hearing the ALJ informed Mr. Oparaji that he would have a right to appeal his forthcoming written decision.

The ALJ, in a decision and recommended order, dated September 30, 2009, stated, in pertinent part, as follows:

> "Mr. Maurice Oparaji is the owner of 245-11 133rd Road, the property cited in five separate NOVs referenced and categorized above. These NOVs named Mr. Oparaji as Respondent and can be categorized into 2 groups based on the violating conditions alleged. The NOVs in Group I (346 249 02X-issued January 5, 2008 and 346 576 99K-issued June 12, 2008) contained allegations that Mr. Oparaji maintained conditions that violated Section 27-127, insofar as he failed to install handrails and/or guardrails on the

front stoop of the premises, which contained four risers. Photographs taken at the time of inspection unambiguously established the hazardous nature of the violation. Six months later, re-inspection of the property revealed the continued presence of the violating conditions. Consequently, the second NOV in Group I was issued as a second offense."

"Mr. Oparaji appeared and denied all allegations in the Group I NOVs. Mr. Chris Oliver appeared as counsel for the Department of Buildings(DOB) the Petitioner herein. The Respondent's primary argument is that the NOVs were not properly served upon him, insofar as he claimed not to have received a copy of the NOVs. However, Mr. Oliver established conclusively that the Petitioner undertook the appropriate mailings required by the New York City Charter Section 1404(d); thus alternative service of each NOV was properly effectuated. Moreover, Mr. Oparaji testified under oath that he was actually present at the time of the inspection of January 5, 2008, and has specific recollection of discussions and arguments with the issuing Inspector. He also testified that he was in fact the owner of the premises at issue, although he later disputed whether the Inspector's photographs of the cited premises fairly and accurately represented his property and the conditions thereat at the time of the issuance of the NOV. It must be emphasized however that following issuance of NOV 346 576 99K Mr. Oparaji submitted a Certificate of Correction claiming that he had undertaken the remedial steps ordered by the Commissioner and containing a photograph of the premises which clearly matched those presented by the Inspector. Unfortunately, notwithstanding approval of the Respondent's Certificate of Correction, it cannot serve to mitigate the applicable penalties because of the hazardous nature of the violating conditions."

"Group II consists of three NOVs numbered 345 465 62H, 346 249 03H, and 346 249 04J. The first NOV in this group was issued back on

November 24, 2006, and alleged a violation of Zoning Resolution(ZR) 22-00, insofar as Respondent placed approximately 13 unlicensed passenger and commercial motor vehicles on the premises. The NOV sought penalties as a second offense based on prior NOV 344 702 85K, which had been issued back in March of 2005. The next two NOVs in Group II, numbered 346 249 03H and 346 249 04J, were issued on January 5, 2008, nearly 14 months after the first, when re-inspection of the premises in response to complaints again showed the presence of nine passenger and commercial vehicles on the premises, in violation of ZR 2-00. Accordingly, NOV 346 249 03H was issued as a second offense and NOV 346 249 04J was issued as a failure to comply with the Commissioner's order contained in NOV 345 465 62H, which ordered the Respondent to remove the illegal storage of the vehicles on the premises nearly 14 months ago."

"Once again, Mr. Oparaji argued that no effective decision should be rendered against him with respect to these NOVs because he was never properly served. He argued that the appropriate mailing did not take place; thus this administrative body has no jurisdiction over him. Moreover, with respect to NOV 345 465 62H, Mr. Oparaji argued that the issuing Inspector never appeared to conduct an inspection of the premises on the date of issuance. He claimed that the allegations in the NOV were copied off the prior NOV issued back in 2005. Moreover, he argued that the NOV of 2005 did not name him as Respondent and thus cannot be the basis for the Petitioner's demand for the penalties as a second offense."

"In response to the Respondent's arguments, Mr. Oliver established conclusively that the mailings required by Section 1404(d) did in fact take place to the appropriate address obtained from various public and official records for the Respondent, including records maintained by the DOB, the Department of Finance and/or the Housing Preservation Department. Moreover, Mr. Oparaji's arguments

> with regard to the Inspector's presence on the premises, his observation of the violating conditions, and the appropriateness of the NOV ring hollow and remain unsubstantiated. Aside from his self-serving testimony, the Respondent offered no other information that can rebut the prima facie case presented by the Petitioner. His other arguments were irrelevant to the issues involved in this matter, or wholly unpersuasive. However, cursory review of the 2005 NOV 344 703 85K supports Mr. Oparaji's contention that it cannot serve as a proper foundation for penalties as a second offense, insofar as the NOV was indeed issued to a different Respondent by the name of Serge Obas back in 2005. Moreover, Petitioner's own records indicate that the NVO [sic] had been dismissed. Given these circumstances, Mr. Oliver agreed to withdraw the Petitioner's demand for penalties as a second offense. Accordingly, the applicable penalty will be that of a first offense."

The ALJ sustained each NOV and imposed the monetary penalties of :$800.00 for NOV 02X; $2,000.00 for NOV 99K; $480.00 for NOV 62H; $1,200.00 for NOV 03H; $500.00 for NOV 04J; and a civil penalty of $2000.00.

Mr. Oparaji sought to appeal the ALJ's determination, and in a submission to the ECB dated November 12, 2009, argued that the ALJ had failed to rule on his written motion to dismiss NOVs 62H, 02X, 03H, and O4J on the grounds of lack of jurisdiction and improper service; that the ALJ had failed to rule on his oral motion to dismiss NOV 99H on the grounds that correction had been effectuated; lack of prosecution, the failure of the issuing inspector to appear and be cross examined; the failure to exercise

due diligence in effectuating service prior to the use of affix and mail, and the failure to mail a copy of the NOV to the respondent; and that the NOV 02X, 03H and 04J should have been dismissed as the server, "Diego," failed to establish that due diligence was exercised before affix and mail service was utilized. Mr. Oparaji, in support of his application, cited to CPLR 308(4) and New York City Charter § 1404(d)(2)(ii).

The ECB appeals attorney, in a letter dated August 5, 2010, responded to the issues raised by Mr. Oparaji and rejected the request for an appeal on the grounds that he had failed to raise any appealable issues.

On August 13, 2010, Mr. Oparaji filed an appeal with the ECB to "reargue/renew/reconsider" its decision of August 5, 2010, and asserted that the NOVs were not properly served, and therefore, as the agency lacked personal jurisdiction over him, the ALJ's determination should be set aside. The ECB, in a decision dated January 20, 2011, denied all of Mr. Oparaji's objections, and affirmed the ALJ's determination. The ECB stated in its determination as follows:

> "The sole challenge on appeal relates to service of the NOVs. Petitioner served each of the NOVs in accordance with the alternative "affix and mail" method of service authorized by the New York City Charter(Charter) Section 1404(d)(2)."
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> "At the consolidated hearing on all five NOVs, Respondent challenged service, claiming that he never received a copy of any of the NOVs,

either at the premises or by mail. Petitioner, Department of Buildings, presented affidavits of service for the NOVs (posting affidavits), each of which showed that an inspector posted a copy of the NOV at the premises where the violation occurred. Respondent noted that none of the affidavits of service indicated that the inspector who posted the specific NOV at the premises subsequently mailed it. With respect to the three NOVs dated January 5, 2008, Respondent complained that the issuing officer who inspected the premises that day did not serve the NOV, despite the fact that Respondent was present at the time of the inspection. The affidavits of service for these NOVs indicated that the NOVs were posted at the place of occurrence by another inspector on January 14, 2008."

"Petitioner responded that the mailings were computed-generated copies of the NOVs that were mailed later. As proof of the required mailings, Petitioner submitted a computer printout of the SVB1 and SVB2 pages pertaining to each NOV from the AIMS computer system. Petitioner further noted that there was no requirement under the Charter that the NOV be served by the same person who performed the inspection or that it be served on the day of inspection. The administrative law judge (ALJ) found that the alternative service of each NOV was properly effectuated under Charter Section 1404(d). The issue on appeal is whether Petitioner established proper service of each NOV under Charter Section 1404(d)(2)."

"On appeal, Petitioner reiterates that he never received a copy of any of the NOVs. He maintains that the NOVs were never served in accordance with the requirements of the Charter. For the first time on appeal, he claims that the process server failed to establish that due diligence was exercised in trying to effectuate service pursuant to Section 308(1) or (2) of the Civil Practice Law and Rules (CPLR) before "affix and mail"

service was utilized."

"Petitioner did not submit a response to the appeal."

"Pursuant to the "affix and mail" method of service under Charter Section 1404(d)(2), after a reasonable attempt to deliver a copy of the NOV to a person at the premises upon whom service may be made under Article Three of the Civil Practice Law and Rules (CPLR) or the Business Corporation Law (BCL), service may be effected by posting a copy of the NOV to the premises, followed by one or more mailings to the Respondent. One mailing must be made to the premises address. If, as here, Respondent is the owner or managing agent of the premises and such person's identity and address, other than the premises address, is located in any one of specified records, the a copy of the NOV must also be mailed to Respondent at the other address."

"On this record, Petitioner established proper service of each NOV under Charter Section 1404(d)(2). Petitioner's evidence consisted of posting affidavits and printouts from the AIMS computer system showing the required mailings. The Board first notes that at the hearing Respondent did not challenge the inspector's statements on any of the posting affidavits. [the Board noted in a footnote that: 'Although Respondent refers to testimony by Diego Fonseca, the inspector who posted three of the NOVs at the premises, there was no testimony by that inspector at the September 29, 2009 hearing of these matters.'] Each affidavit contains the following statement that was checked off by the inspector who posted the NOV: 'A true copy of the [NOV] was posted in a conspicuous place upon the premises where the violation occurred after a reasonable attempt to effectuate service upon the respondent or upon other person whom service may be made was unsuccessful.' Under the Charter, 'affix and mail' service may be made after a 'reasonable attempt' to deliver a copy of the NOV to a

> person at the premises upon whom service may be made under Article 3 of the CPLR is unsuccessful. Once such a reasonable attempt is made and is unsuccessful, alternative service under 'affix and mail' method may be effected. *See NYC v Hechtman, Pres.* (ECB Appeal No. 31035, September 16, 1998). 'Due diligence', the standard under CPLR service, is not required."
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> "Petitioner presented the SVB1 and SBV2 printouts from the AIMS computer system both as proof that it had performed the required lookup of a second address for Respondent in records specified in the Charter and as proof that it had made the required mailings. Each SVB1 page listed an address for Respondent at the place of occurrence. Each SVB2 page listed the same address for Respondent in Department of Finance (DOF) records, along with a mailing date for the NOV. Pursuant to Section 3-54(c), the ALJ took official notice, based on the information on the SVB1 and SVB2 pages, that computer-generated copies of the NOVs were printed on the mailing dates listed on the SBV2 pages, and that subsequent mailings were made to Respondent at the place of occurrence. *See NYC v Monte Hill LLC*(ECB Appeal No. 900213, October 29, 2009). Consequently, Petitioner met the mailing requirements under Charter Section 1404(d)(2) for each NOV."

Petitioner Oparaji commenced this Article 78 proceeding on May 20, 2011 and challenges the ECB's final determination of January 21, 2011. He states in his petition that on December 31, 2007, a tree branch fell from the sidewalk onto his front porch, destroying the porch and railing, and that he hired Rand Iron Work to perform repairs. He alleges that on January 5, 2008 he was served with NOV No. 02X, and that on June 12, 2008, an employee of

Rand Iron Work who was performing work at the property handed to him NOV No. 99K, which he had received from a City inspector. Petitioner alleges that he filed a Certificate of Correction with the enforcement unit on June 14, 2008; that it was disapproved on July 7, 2008, as he had not submitted a copy of the NOV and notarized statement; and that he resubmitted the Certificate of Correction to the Department of Buildings on July 15, 2008, and received a Certificate of Approval.

Petitioner Oparaji alleges that at the hearing held on April 14, 2009, respondents introduced three more NOVs identified as No. 34546562H, No. 34624903H, and No. 3462490J; that he was never served with these additional NOVs; and that he was granted an adjournment until September 29, 2009, so that he could determine whether any family members residing with him had received these NOVs, and that he later determined that no family members had knowledge of the NOVs. It is alleged that at the September 29, 2009 hearing, Mr. Oparaji informed the ALJ that neither he nor his family members had previously seen, or had any knowledge of, these three NOVs. Petitioner alleges that at said hearing DOB inspector Bhattachaya conceded that he has issued, but had not served, NOV Nos. 03H and 04J; that "Diego" testified that he "is not used to the route" and that he was handed violations "to post at front," and admitted that he never mailed any copies of the NOVs to the petitioner and "just posted at Front" as instructed. Petitioner

further alleges that NOV No. 62H was issued and served by "San Agustin," and that as this individual did not appear at the hearing he was "denied the opportunity to cross examine him as to disputed facts."

Petitioner alleges that the ALJ and the ECB erred as matter of law, in that they failed to dismiss all five NOVs for lack of jurisdiction and lack of prosecution. He alleges that the ECB in its decision of August 5, 2010 applied the wrong standard of review, and misstated the plain meaning of City Charter § 1404(d)(2)(ii) with respect to affix and mail service. Petitioner alleges that the process server, "Diego" failed to establish that due diligence was exercised prior to utilizing "affix and mail" service, under the provisions of New York City Charter §1404(d)(2)(ii), and CPLR 308(4), and therefore the agency never had jurisdiction. It is asserted that the ECB Appeals Board failed to apply the correct standard in determinating the jurisdictional issue. Petitioner asserts that the ALJ and the ECB Appeal Board should have dismissed NOV 99K as duplicative of NOV 02X, and as petitioner took steps to correct the violation, and should have also dismissed NOV 62H for lack of prosecution. Petitioner further asserts that the DOB had the burden of proving that the statutory and due process prerequisites were met, and that as service was invalid, he was denied due process.

Respondents City of New York, and the ECB, in their

answer, assert as an affirmative defense that this proceeding should be transferred to the Appellate Division, Second Department, as the petition raises an issue of substantial evidence. In opposition to the within petition, respondents state in their memorandum of law that "[a]s ECB held a hearing at which testimony was taken and evidence received, and the evidence was reviewed for credibility purposes, the Court should transfer petitioner's claim for Article 78 relief to the Appellate Division, in this instance, to the Second Department."

Respondents also assert that the ECB's final determination was based upon substantial evidence in the administrative record and in all respects conforms with the applicable statutes, laws and regulations, and was a proper exercise of the ECB's discretion, and was reasonable and rational and should be upheld by the court.

Petitioner in his reply papers assert that as the petition raises a question solely as to jurisdiction, and does not involve a question of substantial evidence, transfer to the Appellate Division is not warranted.

It is well settled that a court's function in an Article 78 proceeding is "to scrutinize the record and determine whether the decision of the administrative agency [in question] is supported by substantial evidence and not arbitrary and capricious" (*Matter of Marsh v Hanley*, 50 AD2d 687 [1975]); *see also Arbuiso v*

New York City Dept. of Bldgs., 64 AD3d 520, 522 [2009], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*, 34 NY2d 222, 231 [1974]). Here, as petitioner does not challenge the ECB's determination on the ground that it was unsupported by substantial evidence, and only alleges constitutional violations and other legal error, judicial review is limited to whether the ECB's determination was arbitrary and capricious because it exceeded the ECB's statutory authority or was made in violation of the Constitution or the laws of this State (*see Matter of Small v City of New York*, 74 AD3d 828 [2010]). Transfer of the proceeding to the Appellate Division, therefore, is not warranted.

The proceedings at the April 14, 2009 hearing before the ECB are not subject to review here, as the administrative record is devoid of any record of said hearing. Furthermore, the ECB's determination of January 20, 2011 only addressed the issues raised in the appeal from the ALJ's determination following the September 29, 2009 hearing. Contrary to respondents' assertions, petitioner did not waive jurisdiction by appearing at September 29, 2009 OATH hearing. Rather, petitioner clearly raised the issue of jurisdiction and contested the service of the NOVs at the OATH hearing, and both the ALJ and the ECB addressed these issues in their determinations.

It is undisputed that the DOB utilized the alternative "affix and mail" service for all five NOVs. Petitioner in his

final appeal asserted that no evidence had been presented which established that the serving officer had exercised due diligence in attempting to personally serve him prior to resorting to "affix and mail" service, and further asserted that he had never received a copy of the NOVs in the mail. As stated by the Court of Appeals, "[t]he incontestable starting proposition in cases of this kind is that once jurisdiction and service of process are questioned, plaintiffs have the burden of proving satisfaction of statutory and due process prerequisites" (*Stewart v Volkswagen of Am.*, 81 NY2d 203 207 [1981], citing *Lamarr v Klein*, 35 AD2d 248 [1970], *affd* 30 NY2d 757 [1972]). The burden of establishing the propriety of service rests upon the party asserting jurisdiction (*see 72A Realty Assocs. v New York City Envtl. Control Bd.*, 275 AD2d 284, 285-287 [2000]). In addition, "compliance with statutory service requirements is not obviated by a defendant's actual receipt of service" (*New Hampshire Ins. Co. v Wellesley Capital Partners*, 200 AD2d 143, 150 [1994], citing *McDonald v Ames Supply Co.*, 22 NY2d 111 [1968]).

New York City Charter §1049-a(2)(a)(ii) [formerly Section 1404] provides that "service of a notice of violation of any provision of the charter or administrative code, the enforcement of which is the responsibility of the ... the commissioner of buildings ... and over which the environmental control board has jurisdiction, may be made by affixing such notice in a conspicuous

place to the premises where the violation occurred." Section 1049-a(2)(b) further provides, in pertinent part, that "[s]uch notice may only be affixed or delivered pursuant to items (I) and (ii) of subparagraph (a) of this paragraph where a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law. When a copy of such notice has been affixed or delivered, pursuant to items (I) and (ii) of subparagraph (a) of this paragraph, a copy shall be mailed to the respondent at the address of such premises..."

The City Charter's requirement that the serving officer make a "reasonable attempt" to serve the NOV on a person who is amenable to service under Article 3 of the CPLR, provides for a lesser standard than that of "due diligence" as required under CLR 308(4), before resort can be made to conspicuous service ("affix and mail"). The City Charter thus permits in hand delivery, as well as delivery to a person of suitable age and discretion. Although the term "reasonable attempt" is not defined, RPAPL § 735 similarly requires that a process server make a "reasonable application" to effectuate service. It is well settled in the Second Department that at least two attempts at personal service, one during normal working hours and one attempt when a person working normal business hours could reasonably be expected

to be home, are required to satisfy the "reasonable application" standard (RPAPL § 735[1]; *Martine Associates LLC v Minck*, 5 Misc 3d 61 [2004]; citing to, *Eight Assocs. v Hynes*, 102 AD2d 746, 1 [1984], *affd* 65 NY2d 739 [1985]; *Hynes v Buchbinder*, 147 AD2d 371 [1989]; *see also Brooklyn Heights Realty Com v Gliwa*, 92 AD2d 602 [1983]; *Dolan v Linnen*, 195 Misc 2d 298 [2003]; *see also Matter of Schulder v NYC Environmental Control Board*, 2010 NY Slip Op 33554U; 2010 NY Misc. LEXIS 6450 [2010]).

Here, the ECB correctly determined that the standard to be applied for affix and mail service was not due diligence. The ECB, in its determination of January 20, 2011, however, ignored the requirement that the serving officer make a reasonable attempt to serve the petitioner with the NOVs before resorting to "affix and mail" service and only focused on the mailing requirement. The affidavits/affirmations of service relied upon by the ECB merely include a preprinted statement that a reasonable attempt at service was made, and is devoid of any information with respect to the affiants reasonable attempt" to effectuate personal service. The serving officers' attempt at service thus could not have been discerned simply by reading the affidavits/affirmations of service, and the serving officers did not testify at the September 29, 2009 hearing.

With respect to the mailing requirement, it is noted that at the September 29, 2009 OATH hearing, counsel for the DOB

referred only to the mailing of NOV 62H, and it is unclear as to whether the daily affidavits of mailing pertaining to each NOV were submitted at that time, as no exhibits were marked or referred to by the ALJ. The daily affidavits of mailing submitted herein state that each of the subject NOVs were mailed to Mr. Oparaji at his Rosedale address. It is noted, however, that counsel for the DOB stated on the record that the DOB mailed summations of the NOV and not actual copies of the NOV to the property owner. The ALJ also acknowledged that summations were mailed. The mailing of a summation of a NOV, rather than a copy of the NOV, does not comply with the statutory mandate.

The court finds that as the ECB failed to determine whether the serving officers made a reasonable attempt to serve each NOV on petitioner prior to resorting to "affix and mail" service, its determination that the five NOVs at issue here were properly served on Maurice Oparaji, and that the ECB had jurisdiction over him, was arbitrary and capricious, and affected by an error of law.

Accordingly, petitioner request to annul respondent ECB's determination of January 20, 2011, is granted.

Settle judgment.

Date: December 12, 2011
D: 45

J.S.C.