SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA CRANE** **PART** **60M**

Justice

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LENDLEASE(US)CONSTRUCTION, LMB, INC.,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS-HEARINGS UNIT, NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS-APPEALS UNIT

Defendant.

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INDEX NO. 150741/2020

MOTION DATE 01/21/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 39, 40, 41, 42, 43

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

Upon the foregoing documents, it is

In this article 78 proceeding, petitioner LendLease (US) Construction, LMB, Inc., seeks a judgment reversing and annulling the September 12, 2019 decision made by respondent the New York City Office of Administrative Trials and Hearings (OATH) Appeals Unit (Appeals Unit) which denied petitioner's request for a superseding appeal dismissing a Class 1 violation of Building Code § 3301.2, and sustained a penalty in the amount of $25,000. Respondents the New York City Department of Buildings (DOB), OATH's Hearings Unit and the Appeals Unit (collectively, respondents), answer and oppose the petition. For the reasons set forth below, the petition is denied and the proceeding is dismissed.

BACKGROUND AND FACTUAL ALLEGATIONS

On May 26, 2018, a crated thousand-pound glass panel that was stored in a steel A-frame, tipped over and fell on a security guard, killing him. The security guard had been working at a construction site located at 217 West 57th Street, New York, New York. Petitioner was the general contractor at the construction site at the time of the accident. Burton Garcia, the DOB's issuing officer (IO), inspected the construction site on May 29, 2018, and issued six summons to petitioner. For summonses 35335640K, 35335638L, 35335642Y and 35335643X, petitioner was charged with violating Building Code § § 3307.4, 3301.2, 3301.6 and 3303.4.2, respectively. For summonses 35335641M and 35335639N, petitioner was charged with violating Administrative Code § § 28-105.12.2 and 28-105.1, respectively.

Specifically, with respect to the summons charging petitioner with violating Building Code § 3301.2, the IO noted the following:

> "At the time of my inspection of a 98 story building at 67 floor level, I observed storage of approximately 1000 lb to 4000 lb of curtain wall and glass being store[d] on floors within close proximity to other trades accessing area. It was also mention[ed], upon attempting to move debris via a forklift close to glass panel operation, that was touch[ed] by forklift an[d] collapse[d] onto a security guard killing him. I observed that glass panel freight was not stored as required[d], and forklift operator was not certif[ied], as require[d] by manufacturer specification, creating a hazardous condition that occur[red], as there were no additional safety measure in place to safeguard personnel accessing areas (barriers)."

NYSCEF Doc. 20 at 1.

Chapter 33 of the Building Code sets forth the safety requirements for construction sites. In pertinent part, Building Code § 3301.2 sets forth that "[c]ontractors, construction managers, and subcontractors engaged in construction or demolition operations shall institute and maintain all safety measures required by this chapter and provide all equipment or temporary construction necessary to safeguard the public and property affected by such contractor's operations."

Building Code § 3303.4.5.1 provides that "[w]hen not being used, material or equipment located on a working deck, unenclosed floor, roof, ground area, or similar exposed area shall be secured against dislodgement by wind or accidental impact."

OATH Hearing

A consolidated hearing was held at OATH on October 18, 2018 and January 24, 2019. Hearing Officer Marc Weiner (HO Weiner) presided and the parties submitted evidence and were represented by counsel. In relevant part, by decision dated January 29, 2019, HO Weiner sustained three summonses and dismissed the other three.

HO Weiner concluded that petitioner violated the charge alleging a violation of Building Code § 3301.2 for failure to institute and maintain safety measures and temporary safety equipment. He held, in pertinent part:

> "The failure to safeguard is the following: debris that was in a work/delivery area was left in the area for days; a worker, Mr. Kiesecker moving debris in a control access zone area (see Respondent's O and Mr. Dazzo's testimony as to a control access zone) and thus unsupervised; the security guard who was in a control access zone---walking 40 feet from the gate he was to maintain onto the delivery floor where panels were stored, at the time of the accident and thus also unsupervised when it was his duty to be at the gate: see Respondent's O, gate to be kept closed until glass panels are uncrated and set into place; glass panels stored in an active area for three days; the crates I find were not properly secured if a worker moving a piece of debris by hand, touches the wooden crate and it tips over. Mr. Kiesecker, the only witness of the accident in his first statement wrote that he did not know whether it was his body or the ductwork BRUSHED (emphasis added) against the panel/frame which caused it to fall. Any wooden crate with the glass panel that has something 'brushed' against it and it fell, was not secured. The debris that Mr. Kiesecker found was not to have been on the dock for days; a container for such debris was not to have been in the area where these items were unloaded and stored. The crates should not have been stored. In the first hearing Mr. Dazzo stated that the security guard was ten feet from the front gate and on the second hearing in referring to the site safety plan he was 40 feet from the front gate."

NYSCEF Doc. No. 29, HO Weiner's determination at 3-4.

HO Weiner summarized that he found "that the details of the summons alleged specific facts that caused the accident. I find that the security guard who was employed not by any of

[sic] the general contractor or a subcontractor but by a security company was a member of the public." *Id.* at 4. He further "noted that [petitioner] is the general contractor and Mr. Kiescecker wrote that he was under the direction and supervision of Lend Lease, the [petitioner]." *Id.* HO Weiner noted that he considered copies of the Appeals Unit decisions presented by petitioner's counsel, but found them to be inapplicable.

HO Weiner also sustained the alleged violation of Building Code § 3307.4 on the basis that "barriers are required even when the jobsite is closed" and that photos indicated that there were no barriers.[1] NYSCEF Doc. No. 6 at 4. The charge alleging a violation of Building Code § 3301.6 also was sustained, as HO Weiner did not accept the design drawings into evidence in defense of the charge.[2]

HO Weiner dismissed the two alleged violations of Administrative Code § § 28-105.1 and 28-105.12.2, stating that the DOB failed to present evidence in the form of the construction documents in order for him sustain these charges.[3] The charge related to Building Code § 3304.2 was also dismissed, as the DOB "did not present sufficient evidence for the class one classification." *Id.* at 4.

Petitioner submitted an appeal of HO Weiner's determination to the Appeals Unit.[4]

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[1] Building Code § 3307.4.3 provides that "[w]henever any work is being performed over, on, or in close proximity to a highway, street, or similar public way, control and protection of traffic shall be provided by barriers, signals, signs, flagpersons, or other devices, equipment, and personnel in accordance with the requirements of the Department of Transportation."

[2] Building Code § 3301.6.1 provides that "[w]henever design is specifically required by the provisions of this chapter, such design shall be in accordance with the requirements of this code and executed by, or under, the supervision of a registered design professional who shall cause his or her seal and signature to be affixed to such documents that may be required for the work."

[3] Administrative Code § 28-105.1 addresses the requirement to obtain a written permit prior to commencing construction work and Administrative Code § 28-105.12.2 states that "[a]ll work shall conform to the approved construction and submittal documents . . . ."

[4] As noted, HO Weiner's decision had dismissed three of the summonses, but sustained the three

Petitioner had argued that the DOB failed to satisfy its burden of proof that petitioner violated Building Code §3301.2. Among other things, petitioner had noted that the IO had issued the notice of violation three days after the incident had occurred, after a prior summons had already been issued on the date of the incident for the same violation.

With respect to the failure to safeguard in violation of Building Code § 3301.2, petitioner argued that HO Weiner "made numerous, unsupported findings that were insufficient to support a finding of violation of BC § 3301.2 in this case of a worker injury/fatality." NYSCEF Doc. No. 7 at 3. For instance, petitioner claimed that the security guard "was not a 'visitor' or 'first responder' or a member of the public; he was an experienced OSHA trained and FDNY certified security guard, employed at the Jobsite who had participated in a Site specific orientation program and had worked at the Jobsite for more than a year." *Id*. at 10.

According to petitioner, respondents failed to offer any evidence that petitioner incorrectly store the glass panels. It also argued, at length, about how the subcontractor "was responsible for the operation underway and was required to implement a controlled access zone." *Id.* at 12. In any event, "the action of Mr. Kiesecker was the direct cause of the accident was ultra vires, outside his responsibilities on the Jobsite. It was neither authorized, permitted, nor could it have been anticipated." *Id.* Regardless, petitioner "offered evidence that it maintains strict safety guidelines for any and all workers who work at the Jobsite, including security guards and teamsters who are required to attend a Jobsite specific orientation and instituted safety measures comparable to those employed by respondent at other construction sites." *Id.*

Petitioner concluded with the following:

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other summonses 35335640K and 35335642Y, which consisted of Class I violations of Sections 3302.1, 3307.4 and 3301.6 of the Building Code.

> "Rather than make a finding that a specific section of Chapter 33 had been violated to satisfy the 'first prong' of BC § 3301.2, he made numerous misleading findings which are not supported by the law or the facts and then incredibly 'found' that the security guard who had been working at the Jobsite for more than a year, was 'a member of the public.'"

Id. at 3.

Appeals Unit Determination

Pursuant to a decision dated June 27, 2019, the Appeals Unit partially reversed HO Weiner's determination with respect to summonses 35335640K and 35335642Y, and those summonses were dismissed. It stated that "the hearing officer's decision is supported by the law and a preponderance of the evidence as to the BC § 3301.2 charge, but not as to the BC §§ 3307.4 and 3301.6 charges." NYSCEF Doc. No. 8, Appeal Decision at 1.

With respect to the remaining summons charging petitioner with a violation of Building Code § 3301.2, the Appeals Unit provided a summary of the initial hearing in front of HO Weiner. It indicated that HO Weiner "found that the security guard was a member of the public and that '[a]ny wooden crate with the glass panel that has something 'brushed' against it and it fell, was not secured.'" *Id.* at 3. It noted, in relevant part, petitioner's arguments that "(1) the summons was duplicative of a summons issued on May 26, 2018; (2) the glass panels, properly stored in the A-frame in a closed site, did not endanger the public, and Petitioner failed to identify a provision of BC Chapter 33 that Respondent had violated; and (3) Permasteelisa [the subcontractor] was responsible and not Respondent." *Id.* at 2-3.

The Appeals Unit stated that the issues on appeal are, in relevant part, whether "1) the storage of glass panels, one of which fell and killed a security guard, was a failure to safeguard all persons and property, for which Respondent, as general contractor, was liable." *Id.* at 3.

At the outset, the Appeals Unit found that the "instant summons citing BC § 3301.2 is not duplicative of the summons issued to [petitioner] on May 26, 2018, as OATH records show that this summons was dismissed." *Id.* at 4.

The Appeals Unit summarized with the following:

> "It is undisputed that on May 26, 2018, a crated panel of glass stored in an open area fell onto a security guard, killing him. [Petitioner] submitted credible evidence to show that the glass panel, enclosed in a wooden pallet, was strapped to and wedged inside an A-frame at an angle. Nevertheless, the A-frame itself was on skates, and the accidental impact from ductwork or a worker caused the A-frame to topple onto the security guard. "BC § 3301.2 requires contractors engaged in construction or demolition operations to (1) institute and maintain safety measures required by BC Chapter 33 and (2) provide all equipment or temporary construction necessary to safeguard the public and property affected by such contractor's operations. While the second provision limits its application to safeguards for 'the public and property,' which does not include safeguards for workers, the first provision may apply to site conditions that affect workers. *See* NYC v. Gemstar Contracting Corp., Appeal No. 1700381 (July 20, 2017). Here, the A-frame containing a glass panel, stored in an exposed area, was not secured against dislodgement by accidental impact, as required by BC § 3303.4.5.1. While [petitioner's] attorney argues that Permasteelisa, not [petitioner], was responsible for the storage of the glass panels, the facts here are distinguishable from those in the cases cited on appeal. In each of those cases, a BC § 3301.2 charge was dismissed in the absence of evidence of specific safety measures that the respondent, a general contractor, failed to institute of maintain where the injury was caused by a subcontractor."

Id. at 4.

The Appeals Unit ultimately concluded that it did find "the storage of glass panels, one of which fell and killed a security guard, was a failure to safeguard all persons and property, for which Respondent, as general contractor, was liable." *Id.*

Superseding Appeals Decision

Petitioner subsequently filed a request with OATH for a Superseding Appeals Decision, seeking to overturn the June 27, 2019 Appeals Unit determination.

Pursuant to a decision dated September 12, 2019, the Appeals Unit denied petitioner's request for a superseding appeal dismissing a Class 1 violation of Building Code § 3301.2. NYSCEF Doc. 37. The decision noted petitioner's contentions "that the crated glass panel that fell was not stored in an open and exposed area," and that it "should not be held strictly liable for the actions of its subcontractor." *Id.* at 1. Nonetheless, the Appeals Unit held that its prior determination did not "contain a mistake of fact or law, or a ministerial error." It held the following, in relevant part:

> "On June 27, 2019, the Board issued Appeal Decision no. 1900468, affirming that part of a decision by Hearing Officer M. Weiner (Manhattan), dated January 29, 2019, sustaining a Class 1 violation of § 3301.2 of the Building Code (BC), found in Title 28 of the Administrative Code of the City of New York (Code), for failure to safeguard the public and property affected by a contractor's construction operations . . .
> ***
> "The Board incorporates by reference Appeal Decision no. 1900468 in its entirety. Upon review of the record, the Board finds that Appeal Decision no. 1900468 does not contain a mistake of fact or law, or a ministerial error. The facts relied upon in the decision are an accurate representation of the facts in the record, and the legal conclusions in the decision do not conflict with the applicable statute or rules, prior appeals decisions, or civil court precedent. The Board notes that the record does not support [petitioner's] attorney claim that the crated glass panel was not stored in an open or exposed area. The Board notes further that DOB v. Lend Lease (US) Construct has been overruled. *See DOB v NY Developers and Management*, Appeal No. 1901057 (September 12, 2019).
> "Accordingly, the Board denies [petitioner's] request for a superseding appeal dismissing a Class 1 violation of BC § 3301.2."

NYSCEF Doc. No. 37 at 1.

This Proceeding

Petitioner filed this article 78 proceeding seeking to vacate the decisions stemming from HO Weiner's initial determination, that culminated with the denial of a request for a superseding appeal dated September 12, 2019. Petitioner claims that, to sustain a charge of Building Code § 3301.2, HO Weiner was required to find that petitioner violated a specific section of Chapter 33 of the Building Code or that there was an impact on public or property. According to petitioner,

HO Weiner sustained the summons based on an allegedly erroneous determination that the security guard was a member of the public. The Appeals Unit subsequently did not address petitioner's claims that the security guard was not a member of the public. It also failed to address petitioner's argument that the DOB did not point to a specific section of Chapter 33 of the Building Code that had been violated. As a result, petitioner argues that the September 12, 2019 determination should be reversed as it is arbitrary and capricious. It summarizes, in pertinent part:

> "That OATH-AU Appeal Decision No. 1900468 affirmed the decision of HO Weiner based on grounds not relied upon in HO Weiner's 1/29/19 decision, not raised in Summons 35335638L nor raised nor discussed at either the Initial Hearing nor the Continuation Date, and not applicable to the facts of this case, i.e., an alleged violation of BC § 3303.4.5.1, supports the conclusion that the Appeal Decision No. 1900468 and the Denial of a Request for a Superseding Decision by Respondent OATH-AU was arbitrary and capricious and a violation of due process as well as a violation of the rules of OATH."

NYSCEF Doc. No. 1, Petition, ¶ 29.

Petitioner further argues that the Appeals Unit "based its decision on a theory of liability not put forth by DOB, not raised at the hearing and not applicable to the facts of the case, and denied Petitioner an opportunity to dispute such grounds, thereby denying Petitioner due process and in violation 48 R.C.N.Y. (Rules of the City of New York) Section 6-08(c) of OATH's own rules." *Id.*, ¶ 37.

Petitioner also claims that it was an error of law for HO Weiner to rely on the statements made in the summonses, because the IO "is not a person who is authorized to affirm statements pursuant to CPLR 2106." *Id.*, ¶ 19. Among other arguments, petitioner asserts that it was also an error of law for the superseding appeals decision to cite to a decision that was rendered nine months after HO Weiner's determination.

Respondents' Opposition

According to respondents, among other challenges, petitioner disagrees with HO Weiner's determination that the security guard was a member of the public. As a result, this proceeding purportedly presents a question as to whether the Board's determination is supported by substantial evidence and should be transferred for review to the Appellate Division, First Department.[5]

In any event, respondents argue that the court should uphold the determination as it was reasonable, rational and supported by substantial evidence. Respondents claim that the evidence in the record supports the determination that petitioner failed to safeguard the public from construction operations at the construction site. To start, HO Weiner appropriately "concluded that LendLease failed to safeguard the public from construction operations at the Construction Site." NYSCEF Doc. No. 39, Respondents' memorandum of law in support at 17. For example, testimony indicated that the crate containing the glass panels was not "wedged" and could fall over. Furthermore, the "glass panels were left on the loading dock, in an open and exposed area, for several days before they were to be installed." *Id.* at 21.

Regarding the status of the security guard, respondents claim that the security guard had no construction duties and that it was "proper for the Appeals Unit to uphold the finding that [he] was a member of the public . . . ." *Id.* They also argue that petitioner, as the general contractor at the construction site, was allegedly "in charge of implementing Chapter 33's safety measures." *Id.* at 19.

The Appeals Unit then allegedly "appropriately found that LendLease violated BC § 3301.2 under both provisions of the section . . . ." *Id.* at 16. Specifically, "[f]irst, the Appeals

[5] Petitioner does not agree that this proceeding warrants transfer to the Appellate Division. According to petitioner, the underlying issue in this proceeding is whether the Appeals Unit's determination was arbitrary and capricious.

Board found that LendLease failed to institute and maintain safety measures required by § 3303.4.5.1 of Chapter 33 of the Building Code by failing to secure A-frames containing 3000lb. glass panels, stored on a loading dock, from dislodgement by wind or accidental impact." *Id.* Respondents continue that, "[s]econd, the Appeals Unit found that LendLease failed to provide the temporary construction necessary – securing the glass panels from accidental impact – to safeguard the public from its construction activities." *Id.*

According to respondents, as noted in the superseding appeals decision, cases relied on by petitioner for its argument that it should not be liable for the actions of its subcontractor, were overruled. Respondents continue that petitioner "failed to submit any evidence establishing that it took adequate measures to ensure that its subcontractors instituted and maintained required safety measures at the Construction Site." *Id.* at 24. As a result, respondents claim that it was proper for the Appeals Unit to conclude that petitioner, as contractor, was liable for the charges in the summons.

DISCUSSION

I. Transfer to the Appellate Division is Not Necessary

As an initial matter, respondents allege that, to the extent a question of substantial evidence is raised, this proceeding should be transferred to the Appellate Division. Petitioner argues that a transfer is not warranted, as it has brought its request for relief under 7803 (3), and does not challenge substantial evidence under 7803(4).

Under CPLR 7803 (4), an Article 78 proceeding may question "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence." Pursuant to CPLR 7804 (g), when the issue of substantial evidence is raised, the court shall transfer the matter to the Appellate

Division. However, "[w]here the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding" (CPLR 7804 (g); *see e.g. Matter of Sunrise Manor Ctr. for Nursing & Rehabilitation v Novello*, 19 AD3d 426, 427 (2d Dept 2005) ("The issues framed by the pleadings submitted to the Supreme Court involved questions of law only, and no 'substantial evidence' question (CPLR 7803 [4]), was, in fact, presented. Thus, the transfer of the proceeding to [the Appellate Division] pursuant to CPLR 7804 (g) was improper")).

The facts of the underlying accident that prompted the summonses, are undisputed. Petitioner merely disputes the charges of the building codes, and alleges that the Appeals Unit's determination was, among other things arbitrary and capricious and made in violation of lawful procedure.

As a result, no substantial evidence issue is raised that would require transfer to the Appellate Division (*See e.g. Matter of Trustees of Columbia Univ. v City of New York*, 110 AD3d 467, 467 (1st Dept 2013) ("The subject petition does not contest that a worker was killed in petitioner's building when he fell from a scaffold into an elevator shaft, which was secured only by plastic sheeting. Since no substantial evidence question is raised, as the issues involve statutory interpretation, the matter should not have been transferred to this Court"); *see also Matter of Westmount Health Facility v Bane*, 195 AD2d 129, 131 (3d Dept 1994) ("What is disputed by petitioner is respondents' interpretation of certain statutes and regulations, and their application to the facts, matters which Supreme Court rightly determined were within its province to review in the first instance")).

Therefore, the question before the court is "whether a 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, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR 7803 (3).

II. CPLR 7803 (3)

In accordance with CPLR 7803 (3), the relevant standard herein is whether respondents' final determination dated September 12, 2019, confirming both HO Weiner and the Appeals Unit's decisions upholding a violation of Building Code § 3301.2 and imposing a $25,000 penalty, was arbitrary and capricious. "In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652 (2013) (internal quotation marks and citations omitted); *see also* CPLR 7803 (3) ("The only questions that may be raised in a proceeding under this article are . . . . whether a 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"). Once a court finds a rational basis for the agency's determination, its review ends (*Matter of Hughes v Doherty*, 5 NY3d 100, 107 [2005])).

It is well settled that "a reviewing court may not reevaluate the weight accorded the evidence adduced . . . since the duty of weighing the evidence, interpreting relevant statutes and making the determination rests solely in the expertise of the agency." (*Awl Indus., Inc. v Triborough Bridge & Tunnel Auth.*, 41 AD3d 141, 142 (1st Dept 2007) (internal quotation marks and citation omitted)). As set forth below, given the record, and the opportunities for the parties to brief the issue extensively, it was rational for the Appeals Unit to uphold HO Weiner's

determination that the unsecured glass panels posed a safety hazard to the public, in violation of Building Code § 3301.2.

As set forth at length above, on the date of the accident, it is undisputed that a glass panel fell on a security guard while he was walking by and the impact killed him. Evidently, the glass panel had been inside the crate on the dolly. The IO charged petitioner with a violation of Building Code § 3301.2, noting, among other things, that the "glass panel freight was not store [sic] as required . . . ." During the hearing, the IO testified that he was advised of a glass panel collapsing on a security guard. He continued that the glass panel should have been wedged on a pallet. According to HO Weiner, the IO "concluded that it wasn't properly safeguarded in that the glass panel in the wooden crate was not properly stored in a walkway where personal [sic] had access."

In the initial hearing before HO Weiner, petitioner presented an extensive record, including testimony and photos, related to the manner in which the glass panels were stored prior to their installation. HO Weiner heard the testimony the various subcontractors, including the glass subcontractor. He noted that petitioner is the general contractor and that the worker who brushed up against the glass was under the direction and supervision of petitioner.

Petitioner had argued that the security guard should not be considered a member of the public because, among other things, he had been at the site for three years and had received OSHA training. Nonetheless, HO Weiner concluded that he was a member of the public, noting that he was employed by the security company. He also observed that the accident was not on the loading dock, but where the trucks entered, and that the accident occurred approximately 40' from the front gate, where the security guard was supposed to be stationed.

The Appeals Unit summarized the relevant portions of the hearing in front of HO Weiner. It acknowledged petitioner's arguments on appeal that the security guard was not a member of the public, that the subcontractor was responsible for glass panel storage and that respondents failed to identify a provision that was violated. Nonetheless, the Appeals Unit found that the storage of the glass panels was a failure to safeguard all persons and property, for which petitioner, as general contractor, was liable. Although petitioner had demonstrated "that the glass panel, enclosed in a wooden pallet, was strapped to and wedged inside an A-frame at an angle . . . the A-frame itself was on skates, and the accidental impact from ductwork or a worker caused the A-frame to topple onto the security guard." Appeals Unit's decision at 4.

In the second paragraph related to failure to safeguard, the Appeals Unit advised petitioner of the specific section that was violated, stating that "the A-frame containing a glass panel, stored in an exposed area, was not secured against dislodgement by accidental impact, as required by BC § 3303.4.5.1." *Id.* It rejected petitioner's arguments about subcontractor liability, stating that the facts of the cases presented by petitioner's attorney are distinguishable. "In each of those cases, a BC § 3301.2 charge was dismissed in the absence of evidence of specific safety measures that the respondent, a general contractor, failed to institute of maintain where the injury was caused by a subcontractor." *Id.*

The Appeals Unit then denied petitioner's request for a superseding appeal dismissing the violation of Building Code § 3301.2 for failure to safeguard the public and property affected by a contractor's construction operations.

As previously mentioned, Building § Code 3301.2 states that "[c]ontractors, construction managers, and subcontractors engaged in construction or demolition operations shall institute and maintain safety measures required by this chapter and provide all equipment or temporary

construction necessary to safeguard the public and property affected by such contractor's operations." Caselaw from the Appeals Unit indicates that Building Code § 3301.2 requires contractors engaged in construction or demolition operations to: (1) institute and maintain safety measures required by Building Code Chapter 33 and (2) provide all equipment or temporary construction necessary to safeguard the public and property affected by the contractor's operations. While the first provision may apply to site conditions that affect workers, the second prong is limited to safeguards for the public and property and does not include safeguards solely for workers.

Pursuant to 48 RCNY § 6-12 (a), respondents had "the burden of proving the factual allegations contained in the summons by a preponderance of the evidence. The [petitioner] ha[d] the burden of proving an affirmative defense, if any, by a preponderance of the evidence."

"A court's role in an article 78 proceeding of this nature is not to determine the merits de novo, but to decide whether the [agency's] decision was rational, based on the evidence actually before them" (*Matter of Luisi v Safir*, 262 AD2d 47, 50 (1st Dept 1999)). Accordingly, the record, as presented, rationally supports HO Weiner's determination that petitioner violated the second prong of Building Code § 3301.2, because it failed to safeguard the public when it did not properly safeguard and secure glass panels when not in use. Here, it is undisputed that a crated glass panel weighing over a thousand pounds fell over onto a security guard who was passing by when a worker brushed up against it. The crates had been out for days and were in an active loading zone. It was rational for the Appeals Unit to sustain the decision that the security guard was a member of the public, as he was not employed the contractor or subcontractor but by a security company. He was not sitting by the front gate where he was supposed to stationed, but was walking unsupervised, by the loading dock where the trucks enter.

OATH decisions indicate that the Appeals Unit has dismissed charges of Building Code § 3301.2 "in the absence of evidence of specific safety measures that the [general contractors] had failed to implement" (*See e.g.* NYSCEF Doc. No. 38, Appeals Unit decisions, *DOB v Hunter Roberts Construction Corp*., Appeal No. 1900869 (August 29, 2019)). Here, however, at the hearing, respondents offered specific safety measures that petitioner, as general contractor, failed to institute, such as wedging the A-frame. Petitioner, as general contractor, is responsible for safeguarding the public affected by its construction operations. As a result, here, the court "cannot say that it was arbitrary and capricious" for respondents to conclude that petitioner, and not the general subcontractor, failed to maintain the safety of the construction site when it failed to implement safety measures to secure a glass panel against dislodgment by accidental impact, regardless of whether the glass subcontractor also instituted safety practices.

Petitioner disputes HO Weiner's determination that the security guard was a member of the public and argues that, regardless, there is no evidence to support a conclusion that petitioner's actions impacted the public or property. Nevertheless, "[r]espondents' interpretation of [Building Code § 3301.2] is entitled to deference, since the agency was responsible for administering the statute and its interpretation is reasonable and comports with the plain language of that provision" (*Matter of Trustees of Columbia Univ. v City of New York*, 110 AD3d at 467).

Petitioner argues that HO Weiner was required to determine that a specific section of Chapter 33 of the Building Code had been violated. However, as HO Weiner found that the security guard was a member of the public, he was not required to specifically cite to any safeguard Chapter 33 required, that was not implemented (*See e.g. DOB v Dream City Construction*, Appeal No. 1900546 (June 27, 2019) ("While [petitioner] contends on appeal that

[respondent] did not cite a statute specific to enclosed fire escapes, the Board has held that when BC § 3301.2 is charged for failing to safeguard the public and property, DOB need not cite a specific safeguard required by Chapter 33 that Respondent failed to implement")).

Petitioner also argues that respondents violated their own rules, as set forth in 48 RCNY § 6-08 (c), when the Appeals Unit based its decision on a theory of liability that the DOB did not raise. Pursuant to 48 RCNY § 6-08 (c) (2) and (3), the summons must contain "[a] clear and concise statement sufficient to inform the Respondent with reasonable certainty and clarity of the essential facts alleged to constitute the violation or the violations charged, . . . [and] [i]nformation adequate to provide specific notification of the section or sections of the law, rule or regulation alleged to have been violated." The IO issued a summons charging petitioner with a violation of Building Code § 3301.2, directly related to how the glass panels were stored prior to the accident. The IO wrote on the summonses, among other things, that the glass panels were not properly stored and that there were no additional safety measures for personnel accessing the area. As noted at length, the evidence presented to HO Weiner primarily focused on whether the glass panels could be "secured against dislodgment," and petitioner presented evidence in its defense. Accordingly, the court finds that respondents complied with its own rules when informing petitioner of the charges lodged against them.

Petitioner argues that the Appeals Unit then acted arbitrarily when it affirmed HO Weiner's determination, "on new never before cited grounds, a finding of BC § 3303.4.5.1 . . . ."[6]

[6] Respondents' arguments are evasive in response to petitioner's contentions. For example, respondents acknowledge that HO Weiner's determination was based on a finding under the second prong, as he explicitly stated that the security guard was a member of the public and he did not cite to a specific safety section violated. Then, they argue that the Appeals Unit appropriately found that petitioner violated both prongs of the statute, as the Appeals Unit found that petitioner failed to maintain safety measures required by a specific section of the building code and that petitioner also failed to safeguard the public from construction activities. As noted,

However, the mention of the Building Code § 3303.4.5.1, in specific, for the first time in the Appeals Unit determination, does not deprive the petitioner of due process or render this determination arbitrary and capricious. The record indicates that the Appeals Unit rendered its determination based on the record as presented in front of HO Weiner. It noted petitioner's contention that "the glass panels, properly stored in the A-frame in a closed site, did not endanger the public." Nonetheless, it upheld HO Weiner's determination sustaining a violation under the second prong of Building Code § 3301.2 for failing to safeguard the public from a contractor's operations. Accordingly, respondents "properly limited its administrative appellate review to the record established before the hearing officer (*see* RCNY § § 6-19 (f); 6-11 (g); *Matter of Whiting-Tuner Contr. Co. v Environmental Control Bd. of the City of N.Y.*, 170 AD3d 585, 585 (1st Dept 2019)).

The record indicates that, on appeal, petitioner had argued, among other things, that respondents failed to identify a specific provision of the Building Code that had been violated and that the subcontractor was responsible for the storage of the glass panels. The Appeals Unit addressed these contentions and, as with HO Weiner, rejected petitioner's theory of subcontractor liability. As noted, as petitioner was charged with failing to safeguard the public, HO Weiner did not need to cite to a specific safeguard that petitioner failed to implement. Nonetheless, the Appeals Unit indicated that Building Code § 3303.4.5.1 specifically, had been violated. Again, one of the primary issues in front of HO Weiner was whether the glass panels

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the first provision may apply to condition that affect workers and requires a specific provision of Chapter 33 that petitioner failed to implement. Then they summarize with an ambiguous conclusion that "both HO Weiner and the Appeals Board weighed the evidence presented by LendLease and DOB, and reasonably concluded that LendLease had failed to safeguard its Construction Site in violation of the Building Code." Respondents' memorandum of law at 22.

had been properly secured against dislodgment from accidental impact.[7] In any event, petitioner was then able to present additional arguments regarding the storage of the glass panels in violation of Building Code § 3303.4.5.1, in its request for a superseding appeal decision.

The Court of Appeals has held that "procedural due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time" (*Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 260 (2010)). Accordingly, given the record, the Appeals Unit's inclusion of Building Code § 3303.4.5.1 in its decision does not constitute a violation of petitioner's due process rights (*Cf. Whitbred-Nolan, Inc. v Shaffer*, 183 AD3d 610, 612 (1st Dept 1992) ("prejudice was created by the mere fact that if petitioners had known that the [issue] would be so crucial to the Administrative Judge's decision, they might have approached the hearing differently")).

Petitioner argues that it was arbitrary and capricious for the Appeals Unit to base its denial of the superseding appeal on a decision rendered nine months after HO Weiner's decision. However, the record indicates that, in the denial of petitioner's request for a superseding appeal, the Appeals Unit stated that it reviewed the underlying record and that it was affirming the part of HO Weiner's decision sustaining a Class I violation for failure to safeguard the public property affected by a contractor's construction operations. It only then noted, in dicta, that other arguments presented by petitioner in its superseding request for an appeal, were without merit.

Petitioner also claims that "undue" weight was given to the testimony of the IO, and others who testified. It also argued on appeal, that the IO's testimony was insufficient, as it was based on an inspection that occurred three days after the accident. However, it is well settled that

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[7] Building Code § 3303.4.5.1 provides that "[w]hen not being used, material or equipment located on a working deck, unenclosed floor, roof, ground area, or similar exposed area shall be secured against dislodgement by wind or accidental impact."

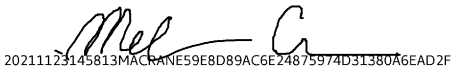
during OATH hearings, "[r]elevant and reliable evidence may be admitted without regard to technical or formal rules or laws of evidence applicable in the courts of the State of New York." 48-RCNY § 6-12 (c). In addition, hearing officers may "admit or exclude evidence." 48 RCNY § 6-13 (a). Accordingly, the record indicates that respondents' determinations were not made in violation of lawful procedure.

Petitioner's remaining arguments, including how the summonses issued by the DOB was purportedly untimely, will not be considered by this court as they were either not presented to the Hearing Officer initially, or were alleged for the first time in reply to respondents' answer.

CONCLUSION

Accordingly, it is hereby

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



11/23/2021
DATE

MELISSA CRANE, J.S.C.

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