Respondent, premises owner, appeals from that portion of a master recommended decision and order sustaining Class 1 violations of Section 28-105.1 of the New York City Construction Codes (Code) for erecting an advertising sign without a permit while acting as an outdoor advertising company (OAC), Code Section 28-502.6 for failure to register as an OAC, Code Section 28-502.6.2 for engaging in outdoor advertising, and Section 32-63 of the Zoning Resolution of the City of New York for erecting an advertising sign in a prohibited district while acting as an OAC. The notices of violation (NOVs) were issued on January 21, 2010 and relate to the same advertising sign. At the hearing, Respondent's property manager testified that the building had been subject to a net lease since 1967, and that the net lessee had rented out spaces in the building to various subtenants. The property manager asserted that one of the subtenants, without Respondent's knowledge or consent, erected the cited sign, and that Respondent immediately removed the sign after it received the NOVs. He argued that as net lessor, Respondent had no day-to-day control over the property, and should not be considered an OAC because of the unauthorized installation of the sign by a subtenant. The administrative law judge (ALJ) found that as owner of the property, Respondent was responsible for actions of its tenants. Accordingly, the ALJ sustained the NOVs and imposed the mitigated penalties applicable to an OAC. The main issue on appeal is whether Respondent refuted Petitioner's case that it was acting an OAC by showing that a subtenant erected the cited sign without Respondent's knowledge or consent.

Code Section 28-502.6.2 imposes liability on an OAC if a sign under its control has been erected on a building in violation of any provision of the zoning resolution, Code or applicable rules.

Code Section 28-502.1 defines "outdoor advertising company" as:

> 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.

Code Section 28-502.1 defines "outdoor advertising business" as:

> the business of selling, leasing, marketing, managing, or otherwise either directly or indirectly making space on signs situated on buildings and premises within the city of New York available to others for advertising purposes . . . .

On appeal, Respondent, citing *NYC v. Suh You Pak Associates,*[1] argues that a property owner cannot be found as acting an OAC where a tenant, without the property owner's knowledge or consent, enters into an agreement to lease space on the building for advertising signs. Citing *NYC v. Almavi Eighth Avenue LLC,*[2] Respondent argues, as

[1] ECB Appeal No. 1000450, November 18, 2010.
[2] ECB Appeal No. 0900583, April 29, 2010.

it did at the hearing, that because it did not know of or consent to the erection of the sign and received no compensation for the sign, there is insufficient nexus between Respondent and any advertising activity. Respondent also again argues that Petitioner has not shown how Respondent held itself out as engaging in the outdoor advertising business, as required by Code Section 28-502.1.

Petitioner, the Department of Buildings, did not answer the appeal.

On this record, the Board finds that Respondent refuted Petitioner's case that it was acting an OAC by showing that a subtenant erected the cited sign without Respondent's knowledge or consent. Petitioner's case rests on the reasonable inference drawn from the presence of the sign on Respondent's building that Respondent either directly or indirectly made space on signs erected on its building available for advertising purposes as part of the regular conduct of its business and therefore was engaged in the outdoor advertising business. In rebuttal, Respondent's property manager testified that Respondent acquired the premises in February 2009 subject to a net lease. He argued that because the building was subject to a net lease, Respondent had no day-to-day control over the premises. The property manager argued further that a subtenant had erected the cited sign without Respondent's knowledge or consent. Copies of the net lease, effective January 15, 1967, and terminated on January 13, 2010, and the sublease were submitted. Respondent's property manager testified that while the sublease terminated on December 31, 2009, the subtenant remained in possession on a month-to-month lease.

Pursuant to the net lease, the net lessee had the right to sublet the premises or any portion thereof without Respondent's consent, provided a copy of the sublease was delivered to Respondent. Under the sublease, the subtenant was permitted to erect a sign with the net lessee's written approval and provided that the subtenant obtained the necessary permits and erected the sign in compliance with applicable rules and ordinances. Based on the testimony and documentation offered by Respondent, the Board credits that it had no knowledge of the cited sign and did not authorize its installation. Consequently, the Board concludes that Respondent did not directly or indirectly make space on the sign erected on its building available for advertising purposes as part of the regular conduct of its business. *See NYC v. Suh You Pak Associates*.

As owner, Respondent is responsible for any violations on its premises even if caused by a tenant without Respondent's knowledge. Nevertheless, because the Board finds Petitioner did not prove the Class 1 designation of the violations, all four violations must be dismissed. Class is an element of the charge that Petitioner has the burden to prove. *See NYC v. Beit Ohr* (ECB Appeal No. 0900009, July 14, 2009). By failing to establish that Respondent was acting an OAC or providing evidence that the sign posed an immediately hazardous threat, Petitioner failed to prove the designation of the violations as Class 1, warranting dismissal of the NOVs.[3]

Accordingly, the Board reverses the ALJ's findings of violation and dismisses the NOVs.

[3] Although not raised by Respondent at the hearing or on appeal, the NOV charging a violation of Code Section 28-502.6.2 for acting as an OAC is duplicative of the other NOVs, and can be dismissed on this ground.