Respondent appeals from a recommended master decision and order sustaining two Class 1 violations of Section 28-105.1 of the Administrative Code of the City of New York (Code), for installing signs without a permit while acting as an outdoor advertising company (OAC), and two Class 1 violations of Section 32-63 of the New York City Zoning Resolution (ZR) for installing prohibited advertising signs in a C2-4 district while acting as an OAC. On the notices of violation (NOVs), all dated September 9, 2010, the issuing officer described the violating conditions as two OAC signs on display at the cited location advertising "Nikita" and "Topman," which were erected without a permit in a zoning district in which advertising signs are not permitted.

At the hearing, Petitioner, the Department of Buildings (DOB), submitted a photograph of the two signs in question. Respondent's attorney did not dispute that Respondent had erected the signs depicted in the photograph without a permit, but moved to dismiss the NOVs on the ground that the signs were accessory signs, rather than advertising signs. He argued that the small lettering on the top of the signs promoting a contest within the grocery and deli establishment (establishment) on the site made the signs accessory to the use of that premises, because the contest drew passersby into the establishment. Respondent's attorney offered undated photographs that he represented were taken around the time, and at the place, of occurrence. The photographs showed signs saying "Free posters, while supplies last – Enter here to win great prizes." He cited a declaratory judgment issued by Judge Rakower of the New York State Supreme Court (declaratory judgment)[1] holding that signs consistent with Respondent's business model were accessory signs, as defined in ZR Section 12-10. The attorney argued that the cited signs were consistent with Respondent's business model, and therefore were accessory signs.

The administrative law judge (ALJ) found that the cited signs differed from the models found to be accessory by the declaratory judgment, and held that both the cited signs were advertising rather than accessory signs. He found that: the promotional text on the signs was so small as to be inconsequential; the primary purpose of the signs was to advertise the Nikita television program and the Top Man clothing store; and the signs fell within the definition of an advertising sign as set forth in the New York City Building Code and the ZR. The ALJ sustained the violations, holding that these two advertising signs had been erected without a permit, in a zoning district in which advertising signs are prohibited.

The issues on appeal are whether: (1) it is a defense to the Code Section 28-105.1 violations that the cited signs were accessory signage; and (2) Respondent established a defense to the ZR Section 32-63 violations by showing that the cited signs were accessory signs.

Applicable law

The zoning district of the place of occurrence, C2-4, is not included in the list set forth in ZR 32-63 of zoning districts in which advertising signs are permitted. ZR 12-10 defines an

[1] *Contest Promotions-NY LLC v. New York City Department of Buildings*, Index No. 112333/10 (Sup. Ct. N.Y.Cnty., January 12, 2011).

advertising sign as “a sign that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot and is not accessory to a use located on the zoning lot.”

ZR Section 12-10 defines an “accessory use” as one that:

> (a) is a use conducted on the same zoning lot as the principal use to which it is related . . .
>
> (b) is a use which is clearly incidental to, and customarily found in connection with, such principal use; and
>
> (c) is either in the same ownership as such principal use, or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use.

ZR Section 12-10 states that “accessory use” includes accessory signs.

Code Section 28-502.1 defines an “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 . . . the outdoor advertising business.” The statute defines “outdoor advertising business” as:

> The business of selling, leasing, marketing, managing, or otherwise either directly or indirectly making space on the signs situated on buildings and premises within the city of New York available to others for advertising purposes, whether such advertising directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered on the same or a different zoning lot and *whether such sign is classified as an advertising sign pursuant to section 12-10 of the zoning resolution.* [Emphasis added.]

The appeal

On appeal, Respondent, by its attorney, again argues that the cited signs were consistent with its business model as presented to Judge Rakower, and therefore were accessory signs pursuant to the declaratory judgment. Respondent contends that the declaratory judgment is binding on the issue of whether the cited signs are accessory signs. Respondent argues that it reasonably relied on the “expanded” definition of accessory use set forth in the declaratory judgment. Respondent also claims that Petitioner’s issuance, subsequent to the date of the declaratory judgment, of accessory sign permits for signage similar to the cited signs demonstrated “acquiescence to this change in the law.” Respondent further argues that the signs were accessory signs within the three-prong definition of “accessory” under ZR 12-10, in that they were: located on the same zoning lot as the principal use of the lot; clearly incidental to and customarily found in connection with such principal use; and of substantial benefit or convenience to the owner of the lot and store. Finally, Respondent contends, as it did at the hearing, that the violations were improperly designated Class 1 because such

classification pertains solely to advertising signs, and the cited signs were merely accessory signs lacking proper permits, a Class 2 violation.

In its answer, Petitioner argues that Respondent was engaged in the outdoor advertising business when it erected the cited signs without a permit, which is a Class 1 violation irrespective of whether the cited signs were accessory signs. Additionally, Petitioner contends that Respondent failed to show that the cited signs were "clearly incidental to and customarily found in connection with" the principal use of the cited property, as required by the definition of an accessory sign under the ZR.

Advertising signs, under the Code, include accessory signs

Preliminarily, the Board finds that it is not a defense to the Code Section 28-105.1 violations that the cited signs were accessory signs. At the hearing, Respondent did not dispute that it installed the cited signs without a permit. Rather, Respondent argued that because the cited signs were accessory signs, the designation of the violation as Class 1 was improper, as this classification applies only to advertising signs. However, under Code Section 28-502.1, "outdoor advertising business" is broadly defined as making space available for advertising purposes on any sign, irrespective of whether such sign is classified as an advertising sign under the ZR. Consequently, that the cited signs may have been accessory signs is irrelevant. As Respondent was engaged in the outdoor advertising business by making space on signs available to others for advertising purposes, the NOV was properly designated as Class 1.

Cited sign not incidental and customary to the principal use

The Board finds further that Respondent failed to establish a defense to the ZR Section 32-63 violations by showing that the cited signs were accessory signs. At the hearing, Respondent did not dispute that the signs were located in a zoning district in which advertising signs are prohibited. Rather, Respondent argued that the signs were accessory to the establishment and therefore were a permitted use. On appeal, as at the hearing, Respondent argues that the declaratory judgment is "binding precedent" in determining whether the cited signs are accessory signs. However, the declaratory judgment was reversed and vacated by the New York State Supreme Court, Appellate Division, First Department on March 6, 2012.[2] Respondent also argues on appeal that it reasonably relied on the declaratory judgment in installing the cited sign. The Board finds this argument to be without merit, as the declaratory judgment was entered after the date of the violations. The Board finds irrelevant the fact that Petitioner may have issued accessory sign permits for similar signs during the period between the date of the declaratory judgment and the date of the appeal decision reversing that judgment.

On this record, the Board finds that Respondent did not prove that the use of the signs was "clearly incidental to, and customarily found in connection with," the principal use of the premises, as required by paragraph (b) of the definition of accessory in ZR Section 12-10. Here, Respondent offered no evidence of the principal use of the establishment at the premises. On appeal, Respondent argues that "incidental to" and "customarily found in

---

[2] *Contest Promotions-NY LLC v. New York City Department of Buildings,* Index 112333/10 (1st Dep't Mar. 6, 2012).

connection with" are broad terms that do not exclusively refer to the establishment's primary business. Respondent urges that the requirements of paragraph (b) were met because the promotional contest was incidental to the establishment and generated traffic into it. The Board disagrees. In order to meet the definition of accessory use, Respondent must show that the sign is clearly incidental to the principal use of the premises, not the "incidental" use of the establishment for a promotional contest. Moreover, Respondent must establish that signs for a promotional contest are customarily found at the establishment at the cited premises. Here, Respondent failed to offer any evidence that such signs are customarily found in connection with the establishment at the cited premises.

Accordingly, the Board affirms the recommended master decision and order.