STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF THE DENIAL OF THE OUTDOOR ADVERTISING APPLICATION NUMBER 75708, NEW JERSEY TURNPIKE(I-95) E. ALIGNMENT E/S, MILEPOST 113.8 N.R.D. SECAUCUS TOWN, HUDSON COUNTY	FINAL DECISION OAL DKT NO. TRP-02196-16 AGENCY DOCKET NO.75708

The Department of Transportation ("DOT") has proposed the denial of an outdoor advertising permit to Hartz Mountain Industries, Inc. ("Hartz") for a multi-message digital commercial billboard sign visible to the south-bound traffic on the New Jersey Turnpike in Secaucus. The denial was issued pursuant to N.J.A.C. 16:41C-8.7(b)(2) [1], which prohibits an outdoor advertising sign within 500 feet of an interchange, intersection at grade or a safety rest area.

Prior to issuing this final agency decision, I reviewed and considered the Initial Decision of the Administrative Law Judge (ALJ), the letter of exceptions to the Initial Decision filed by Hartz in this matter, as well

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[1] The Roadside Sign Control and Outdoor Advertising regulations, Chapter 41C, were readopted as R. 2015 d. 032, effective March 2, 2015, which changed among other things, the section numbering of the regulations. Because Hartz's application was submitted on February 25, 2015, prior to the effective date of the new regulations, the prior regulations and section numbers were used for this matter. N.J.A.C. 16:41C-8.7(b)(2) of the prior regulations is now N.J.A.C. 16:41C-8.1(d)(2) in the current regulations.

as the reply to exceptions filed on behalf of the DOT. Based upon a de novo review of the record presented, I hereby accept and adopt the findings and conclusions contained in the Initial Decision.

History of the Roadside Control and Outdoor Advertising Act and Regulations:

In 1965, Congress enacted the Federal Highway Beautification Act ("FHBA"), 23 U.S.C. § 131. The FHBA seeks to curb the proliferation of signs along the nation's highways and to "protect the public investment in such highways, to promote the safety and recreational value of public travel and to preserve natural beauty." 23 U.S.C. § 131(a). The FHBA requires states to effectively control the erection and maintenance of signs within 660 feet of interstate and primary highways. 23 U.S.C. § 131(b). States that fail to make provisions for effectively controlling such signs, risk losing 10 percent of their federal highway funds. Ibid. Signs within commercial and industrial zones are to be regulated under an agreement between the state and the Secretary of Transportation. 23 U.S.C. § 131(d). Furthermore, states may impose stricter limitations on signs along the federal highway systems than those established under federal law. 23 U.S.C. § 131(k); 23 C.F.R. § 750.701.

In 1971, the State of New Jersey, through the DOT, entered into an agreement with the Secretary of Transportation governing regulation of outdoor signs under the federal program. Pursuant to the agreement, "no sign structure may be located adjacent to or within 500 feet of an interchange, intersection at grade or safety rest area." Federal Agreement, Section III ("Agreement"). In accordance with the Agreement and the FHBA, New Jersey adopted the Outdoor Advertising Act, N.J.S.A. 54:40-50 to -73 (repealed in 1992) and more recently the Roadside Sign Control and Outdoor Advertising Act, N.J.S.A. 27:5-5 to -26 ("State Act")(replacing N.J.S.A. 54:40-50 to -73).

The Commissioner of the DOT is tasked with adopting rules and regulations to effectuate the purposes of the State Act. N.J.S.A. 27:5-18. Pursuant to that authority, the DOT adopted The Roadside Signs and Outdoor Advertising regulations, N.J.A.C. 16:41C-1.1 et seq. The regulations, including N.J.A.C. 16:41C-8.1(d)(2), have been periodically amended and re-adopted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-4, and the Rules of Administrative Procedure, N.J.S.A. 52:14B-7. The last time the rules were proposed for adoption in 2014, the DOT held a public hearing and responded to public comments from interested persons in compliance with N.J.S.A. 52:14B-

4. 47 N.J.R. 540(a). In regulating outdoor advertising, the DOT has stated its need to balance the promotion of safety, convenience and enjoyment of highway travel with the recognition that roadside signs and outdoor advertising promotes economic prosperity, commercial and public expression and free speech. 28 N.J.R. 4742(a). Outdoor advertising signs are regulated to control adverse public safety impacts such as when signs which are too close to interchanges compete for drivers' attention during critical vehicle movements. Ibid.

Legal Analysis:

In the Initial Decision, the ALJ properly concluded, after a comprehensive analysis of the applicable legal principles, that the OAL is not the appropriate forum for Hartz's constitutional challenges to the regulatory scheme and the issues raised by Hartz to that end should be addressed by the Appellate Division. The ALJ properly found that there is no genuine issue of material fact that the proposed billboard would not satisfy the distance requirement of N.J.A.C. 16:41C-8.1(d)(2), and the DOT is entitled to summary decision as a matter of law.

At the outset, and central to the determination that a hearing before the OAL is not warranted in this matter, is the fact that Hartz does not contest the

material fact that the proposed billboard is 375 feet from the beginning of the pavement widening[2] for the ramp to N.J. Route 495. Instead, Hartz contends the regulatory scheme itself, including N.J.S.A. 27:5-5 et seq., N.J.A.C. 16:41C-2.1, N.J.A.C. 16:41C-8.1(d)(2) and the Agreement, is arbitrary and capricious and violates Hartz's first amendment free speech rights under the United States Constitution.

In its argument, Hartz relies upon Jones v. Department of Community Affairs, 395 N.J. Super. 632 (App. Div. 2007), to support its contention that a hearing before the OAL is necessary to develop a factual record upon which the Appellate Division can assess Hartz's constitutional challenges. However, Jones is distinguishable from this case because, in Jones, there was an issue regarding what constituted the definition of a boarding house and whether the property at issue was being used as such. Thus, a hearing before the OAL was necessary to develop a factual record as to how the property was being used. Here, the ALJ correctly found that, unlike in Jones, there is no room for interpretation of the regulation or its application in this

[2] "Beginning of pavement widening" is defined as the point where a highway begins to widen beyond the width of the main-traveled way, leading toward an exit ramp or another highway. N.J.A.C. 16:41C-2.1.

case – i.e. no facts need to be found to determine if 375 feet is less and 500 feet. Furthermore, Hartz does not dispute that N.J.A.C. 16:41C-8.1(d)(2) is the applicable regulation to assess the distance requirement. Therefore, there is no challenge to the applicability of the regulation.

The nature of the facts for which Hartz is asserting an OAL hearing is required are not necessary for the Appellate Division to decide Hartz's constitutional claims. First, Hartz proposes to present expert testimony of a traffic safety engineer to opine whether the regulatory provisions at issue, including the definition of pavement widening, are ambiguous. However, whether the statutory and regulatory provisions are ambiguous is a legal question of statutory interpretation. McGovern v. Rutgers, 211 N.J. 94, 107-08 (2012). In addition, expert witnesses may not render opinions on matters which involve purely questions of law. Healey v. Fairleigh Dickingson University, 287 N.J. Super. 407, 413 (App. Div. 1996). As such, the ALJ correctly found that the presentation of expert testimony regarding the alleged ambiguity in the regulatory scheme was impermissible.

Hartz also argues that an OAL hearing is necessary to allow Hartz to explore the DOT's policy

rationale for the regulation and whether the placement of Hartz's sign at the proposed location presents a traffic safety concern[3]. However, the regulation prescribing the 500 foot distance requirement, N.J.A.C. 16:41C-8.1(d)(2), was adopted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 to 15, and the Rules of Administrative Procedure, N.J.S.A. 52:14B-7(g). In accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-4(a)(1), and the Rules, N.J.A.C. 1:30-3.1, notice was given to the general public, of the proposed regulation. All interested persons were afforded a reasonable opportunity to submit data, views or arguments respecting the proposed rule. N.J.S.A. 52:14B-4(a)(3).

As such, Hartz could have presented evidence at that time that the 500 foot distance requirement imposed by N.J.A.C. 16:41C-8.1(d)(2) was not supported from a traffic safety standpoint. It is the agency that must consider this type of data and information at the time of the rulemaking process. "The basic purpose of establishing agencies to consider and promulgate rules is to delegate the primary authority of implementing policy in a

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[3] Hartz proposed the testimony of a traffic safety engineering expert to testify that the placement of the sign at the proposed location did not present a traffic safety concern.

specialized area to governmental bodies with the staff, resources and expertise to understand and solve these specialized problems." Bergen Pines County Hospital v. N.J. Dept. of Human Services, 96 N.J. 456, 474 (1984). In Bergen Pines, the Supreme Court held that a hospital was not entitled to a factual hearing when it had possessed evidence contrary to the proposed rule's factual premises and had not raised those objections at the time of the rule's promulgation. Ibid. Similarly, Hartz is not entitled to a fact-finding hearing now to challenge whether the 500 foot distance requirement of N.J.A.C. 16:41C-8.1(d)(2) is supported by reliable traffic safety data.

Agency regulations are presumptively valid and anyone challenging them has the burden of proving their invalidity. Medical Soc'y v. New Jersey Dept. of Law and Public Safety, 120 N.J. 18, 25 (1990). The presumption of validity attaches if the regulations are within the authority delegated and not beyond the agency's power. Ibid. The burden is on the party challenging the regulation to overcome that strong presumption. Ibid. The agency's factual findings enjoy a presumption of correctness as long as they are supported by "sufficient credible evidence in the record as a whole". In re Adoption of Amendments and New Regulations at N.J.A.C.

7:27-27.1, 392 N.J. Super. 117, 135 (App. Div. 2007)(citing Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood, 257 N.J.Super. 413, 456-57 (App. Div. 1992). Simple disagreement, even if based on contradictory expert opinions, is insufficient to overcome the presumption of reasonableness ascribed to an agency's findings. Animal Protection League of New Jersey v. The Bear Education and Resource Group, 423 N.J. Super. 549, 562 (App. Div. 2011).

Hartz is not challenging whether the DOT acted beyond its statutory authority in promulgating N.J.A.C. 16:41C-8.1(d)(2). Thus, the regulation is afforded a strong presumption of validity. Furthermore, the DOT's finding that the 500 foot distance requirement prescribed by N.J.A.C. 16:41C-8.1(d)(2) sufficiently protects the safety of drivers exiting the highway, is presumed correct as it is based on sufficient evidence considered and reviewed during the rulemaking process. See 46 N.J.R. 1946(a) and 47 N.J.R. 540(a). The DOT held a public hearing regarding the readoption of N.J.A.C. 41C et seq. and addressed all of the comments submitted during the rule readoption. Ibid. The fact that Hartz would now like to present expert testimony to contradict the necessity of the 500 foot requirement is insufficient to overcome the

presumption of reasonableness ascribed to the DOT's findings.

Hartz also contends the regulatory scheme is unconstitutional because there are different standards for acceptable distance from the interchange, intersection at grade or safety rest area for different categories of signs. For instance, Hartz contends there is no distance limit for an on-premise sign. However, this argument has already been considered and rejected by the United States Supreme Court. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511 (1981); see also, United States Advertising Corp. v. Borough of Raritan, 11 N.J. 144 (1952)(sustaining the distinction between offsite and onsite commercial advertising).

Furthermore, the ALJ correctly found that Hartz does not have standing to bring a first amendment challenge to provisions of the regulatory scheme that did not apply to Hartz's conduct. See Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006)(affirms the general principle that in order to have standing to bring a first amendment challenge a plaintiff must be contesting provisions upon which the restriction was based).

Alternatively, Hartz contends that even if DOT disagrees with Hartz's interpretation of the regulatory

scheme, any shortfall in the 500 foot distance requirement is de minimus and the DOT has the inherent authority to waive a de minimus variation in its standard. However, that the any shortfall in the 500 foot distance requirement of the regulation is not a de miminus variation. Instead, N.J.A.C. 16:41C-8.1(d)(2) enforces an important policy determination regarding traffic safety. See S.M.B. Associates v. NJ DEP, 264 N.J.Super. 38, 59 (App. Div. 1993)(finding regulations which enforce important policy determinations regarding the development of coastal lands, is not appropriate for waiver under the agency's inherent power to waive de minimus violations of objective standards). Furthermore, despite Hartz's contention otherwise, whether any shortfall in the 500 foot distance requirement is a de minimus violation of the regulation is not a question of fact requiring the need for an OAL hearing, but rather a question of law. Thus, the ALJ correctly concluded that the DOT does not have the discretion to waive enforcement of N.J.A.C. 16:41C-8.1(d)(2) absent an explicit waiver rule, and that an OAL hearing is not required on this issue.

Hartz raised a number of exceptions to the Initial Decision, which contend the ALJ misstates the constitutional arguments advanced by Hartz. These

exceptions are immaterial and do not change the correct legal analysis and conclusions of the ALJ in the Initial Decision.

Hartz also contends that the Initial Decision in this matter fails to note that there was an extended oral argument before the ALJ on the summary judgment motion, and the transcript of the proceedings should be considered before a Final Decision is rendered in this matter. The Initial Decision was issued on April 5, 2017, and as of the writing of this Final Decision, Hartz has not submitted a transcript of those proceedings. Nonetheless, Hartz has failed to present any inconsistencies between the facts and arguments presented at the hearing and those stated in the Initial Decision. As such, this is not significant.

Finally, Hartz has filed a motion to reopen the record, N.J.A.C. 1:1-18.5(b), and remand to the OAL for a plenary hearing, N.J.A.C. 1:1-18.7(a). In this regard, an agency head may enter an order remanding a contested case to the OAL for further action on issues or arguments not previously raised or incompletely considered. Ibid. Hartz contends the ALJ failed to consider evidence that various signs located near Hartz's proposed location do not meet the distance requirements of N.J.A.C. 16:41C-8.1(d)(2). However, Hartz failed to raise it in its opposition to

DOT's motion for summary disposition. Nevertheless, in its motion, Hartz has merely presented photographs of the alleged nonconforming signs, without any other evidence to support its contention that the signs do not meet the distance requirement of the regulation.

Hartz argues it is entitled to explore whether those signs meet the distance requirements of the regulation through an OAL hearing. However, the OAL is not the correct forum for Hartz to conduct exploratory investigations of whether other signs meet the distance requirement of the regulation. Instead, the OAL is the place for a fact-finding hearing as to whether Hartz's proposed sign location met the distance requirements of the regulation at issue. Because that fact is not in dispute, an OAL hearing is not needed in this matter. As such, Hartz's motion to reopen the record is denied.

CONCLUSION

For the foregoing reasons, the ALJ in the Initial Decision properly granted the DPT's motion for summary decision as a matter of law, and Hartz's motion to reopen the record and remand this matter to the OAL for a hearing is hereby denied. Therefore, I adopt the Initial Decision with the modifications discussed above.

This FINAL AGENCY DECISION may be appealed in accordance with R. 2:4-1(b) by filing a Notice of Appeal with the New Jersey Superior Court, Appellate Division, within 45 days from the date of service or notice of this decision.

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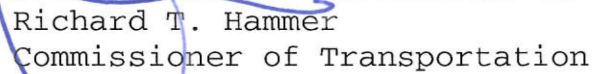

Richard T. Hammer
Commissioner of Transportation

DATED: June 29, 2017