

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Articles 15 and 25 of the New York State Environmental Conservation Law (“ECL”) and Parts 608 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

RULING ON MOTION

DEC Case No.
R2-20090702-399

- by -

**BETTY BUILDERS INC.,
ELIZABETH MOLLOY,
FRANK MOLLOY,
526 YZNAGA CORPORATION,
SEAMUS CAREY, and CITY OF NEW
YORK DEPARTMENT OF SMALL BUSINESS
SERVICES,**

Respondents.

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (James L. Simpson, Assistant Counsel, of counsel), for staff of the Department of Environmental Conservation.

- Sullivan PC (Peter Sullivan of counsel), for respondents Betty Builders Inc., Elizabeth Molloy, Frank Molloy, 526 Yznaga Corporation, and Seamus Carey.

BACKGROUND

Department staff commenced this administrative enforcement proceeding by service of a motion for order without hearing in lieu of complaint dated June 12, 2019, charging respondents with violations of articles 15 and 25 of the Environmental Conservation Law (ECL). In a Ruling dated October 21, 2019, I denied Department staff’s motion on the grounds that material facts were in dispute and accordingly, summary judgment was not appropriate. I directed Department staff to file a statement of readiness in accordance with 6 NYCRR 622.9 when they were ready to proceed to hearing.

By notices dated November 13, 2019, Department staff served respondents with a request to produce documents for inspection and copying, and a notice to permit entry for the purpose of

inspecting the site (Yznaga Place, Bronx County Tax Block 5611, Lots 49, 50 and 149). The notice indicated that the documents were to be produced within ten days of receipt of the notice. With regard to the permission for entry, Department staff requested entry on either December 2 or December 18, 2019. Respondents requested and Department staff granted several extensions of time within which to respond to the notice to permit entry.

Respondents' Motion

On December 9, 2019, respondents filed a notice of motion, together with an affirmation of good faith and a memorandum of law in support of the motion with 4 exhibits attached, seeking an order:

- directing the Department to comply with the undersigned's ruling dated October 21, 2019, and issue a statement of readiness;
- directing the Department to withdraw the first notice to produce documents and the notice to permit entry and prohibiting the Department from seeking any evidence in discovery that is not materially probative of the factual allegations; and
- granting such other and further relief as appropriate.

In their memorandum of law, respondents allege that, among other things, the documents that Department staff are seeking are irrelevant, and the notice to permit entry is legally, procedurally and equitably improper as well as irrelevant to the allegations in the complaint.

Department Staff's Reply and Motion to Compel

By notice dated December 11, 2019, Department staff opposed respondent's motion and served a notice to compel disclosure along with a memorandum of law in support of the motion and in opposition to respondents' motion, and an attorney affirmation, arguing that since the site is the principal matter at issue in the above-referenced enforcement proceeding, the notice to permit entry falls within the limits of discovery. For relief, Department staff requests an order:

- directing respondents to permit entry on December 18, 2019 at 10:00 a.m., or in the alternative, on a date selected by staff and subject to postponement contingent upon weather; and
- directing respondents to fully comply with the notice to produce documents.

Respondents' Reply

In a memorandum of law in reply and in opposition to the Department's motion to compel dated December 13, 2019, respondents opposed Department staff's motion to compel alleging that, among other things, the discovery request is overly broad and that entry onto the site is irrelevant because the use of the property is not in dispute. In addition, respondents argue that

the failure of the Department to provide a bond supporting indemnification renders the notice to permit entry improper.¹

On January 2, 2020, at 10:00 a.m., I convened a conference call with the parties to discuss the pending motions. At that time, Mr. Simpson, the attorney for the Department, indicated that inspection of the site was necessary because, among other things, the article 15 and 25 violations alleged in the complaint are of a continuing nature and, therefore, current conditions need to be assessed. When questioned, he indicated that a low-tide event will occur on January 31, 2020, during which time Department staff could inspect the site.

Mr. Sullivan, the attorney for respondents, argued that a site visit was unnecessary, as the complaint alleges violations that took place as far back as 2009 and, accordingly, current conditions at the site are irrelevant. Furthermore, Mr. Sullivan indicated that respondents would stipulate to the current use of the site, making an inspection unnecessary.

DISCUSSION

Respondents' Motion to Schedule a Hearing

In my ruling of October 21, 2019, I directed Department staff to file a statement of readiness in accordance with 6 NYCRR 622.9 when they were ready to proceed to hearing. As prescribed in the regulations, the statement of readiness for adjudicatory hearing must include, among other things, a statement that discovery is complete (6 NYCRR 622.9[b][2]). As evidenced by the Department's requests to permit entry and produce documents, discovery is not complete in this matter and, therefore, filing a statement of readiness and scheduling a hearing is not required at this time.

Ruling: Respondents' motion to direct the Department to file a statement of readiness and proceed to hearing is denied.

Respondents' Motion to Withdraw Notice to Permit Entry and Department's Motion to Compel

Pursuant to 6 NYCRR 622.7(a), "the scope of discovery must be as broad as that provided for under article 31 of the CPLR." Except as expressly provided for in the regulations, parties may employ any discovery device contained in article 31 of the CPLR (6 NYCRR 622.7[b][1]). A person against whom discovery is demanded may make a motion for a protective order, in general conformance with CPLR 3103, to deny the use of any disclosure device that may cause disadvantage or other prejudice. Here, respondents did not seek a protective order pursuant to 6 NYCRR 622.7(c)(1), nor have they alleged any unreasonable annoyance, expense,

¹ I note that respondents cite no relevant legal authority in support of their position that the State be required to post a bond for indemnification purposes prior to inspection of the site.

embarrassment, disadvantage or other prejudice. However, even if they had, respondents have not shown that a protective order is warranted.

CPLR 3120(1)(ii) provides that a party may serve a notice to permit entry upon designated land or other property for the purpose of inspecting the property. Generally, where the property in question is the central issue in the matter, access to the property is granted (*see Iskowitz v. Forkosh Constr. Corp., Inc.*, 269 AD2d 131 (1st Dept 2000); *see also Matter of Call-a-head Portable Toilets Inc.*, Ruling, April 29, 2005; *Matter of Mary and Alan Risi*, Ruling, October 29, 2002). Respondents are alleged to have conducted several regulated activities without a Department-issued permit. Furthermore, several of the alleged violations are of a continuing nature with each day's continuance a separate and distinct violation (*see* ECL 71-2503[a]). Accordingly, the site is the central issue in this enforcement matter and, therefore, an inspection is both relevant and reasonable.

Finally, I note that in their reply to Department staff's motion for order without hearing, respondents took a contrary position and argued that the law requires an inspection of the site.

"First, remarkably, no DEC staff person has actually taken the time to go and look at the Subject Property The most recent aerial photograph in the DEC Motion Submission is from [2016], three years ago. DEC does not know whether someone has in the past three years already done the work it seeks, or built a fish sanctuary on the waterfront of the Subject Property. DEC does not know, because it never looked." (Respondents Memorandum of Law in Opposition to Motion for Order without Hearing at 4-5, July 26, 2019)."

Respondents cannot have it both ways.

Ruling: Respondents' motion to direct the Department to withdraw the notice to permit entry, dated November 13, 2019, is denied. Department staff's motion to compel entry to the site is granted. Respondents will make the site (Yznaga Place, Bronx County Tax Block 5611, Lots 49, 50 and 149) available to Department staff at 10:00 a.m. on January 31, 2020. In the event that the inspection cannot take place due to snow cover, the parties will contact me and I will set an alternate date.

Respondents Motion to Withdraw First Notice to Produce Documents

In their memorandum of law, respondents indicate that the Department's first notice to produce documents "seeks a truckload of documents, nearly all of which, as will be detailed further herein, are irrelevant to the complaint" (*see* Respondents' Memorandum of Law at 3). However, other than that conclusory statement, respondent fails to further elaborate.

Ruling: Respondents' motion to direct the Department to withdraw the first notice to produce documents, dated November 13, 2019, is denied. Department staff's cross-motion to compel disclosure is granted. Respondents will provide Department staff with the requested documents no later than close of business, January 22, 2020.

The parties are reminded that pursuant to 6 NYCRR 622.7(c)(3), failure to comply with discovery after being directed to do so may lead to preclusion of the material demanded or an inference unfavorable to the noncomplying party's position.

_____/s/_____
Michele M. Stefanucci
Administrative Law Judge

Dated: January 6, 2020
Albany, New York