

September 30, 2008

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New York State Department of Environmental Conservation
Office of General Counsel
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Albany, New York 12233-1500

Frederick Neroni, Esq.
203 Main Street
Delhi, New York 13753

Mrs. Tatiana Neroni
203 Main Street
Delhi, New York 13753

Re: NYSDEC v. Frederick Neroni

Dear Ms. Lapinski, Mr. Neroni and Mrs. Neroni:

This letter ruling addresses the third party motion of Tatiana Neroni to vacate an August 2006 ruling on Department Staffs motion for order without hearing. Mrs. Neroni has moved to vacate the August 2006 ruling because she was not named as respondent. Department Staff has opposed the motion.

The facts supporting the motion by Mrs. Neroni are as follows: the NYS Department of Environmental Conservation Staff brought a motion for order without hearing in lieu of complaint against Frederick Neroni. It is alleged that respondent constructed a pond in the course of a tributary of the Delaware River that runs through property he owns in Hamden, New York (site), without a permit, in violation of 6 NYCRR 608.2. It is also alleged that he violated 6 NYCRR 703.2 by causing a substantial visible contrast in the protected stream on the site. The motion was brought in April, 2006. Mr. Neroni admitted ownership of the property and opposed the motion by affirmations dated May 22, 2006 and June 16, 2006. By Ruling dated August 2006 the motion was granted with respect to the alleged violations of 6 NYCRR 608.2 and 703.2. By Ruling dated December 2006 a hearing was ordered on Department Staff's request for remediation of the site and penalties. The hearing was held on June 5, 2007. Prior to the start of the hearing on June 5, 2007, Mrs. Neroni brought her motion to vacate the August 2006 Ruling.

Unbeknownst to Department Staff or this office, by warranty deed dated July 26, 2006 Frederick Neroni transferred title to the property that is the subject of this enforcement action from himself to himself and his wife Tatiana. They now own the property as tenants by the entirety. *Blacks Law Dictionary* defines this ownership interest as follows: *A common-law estate in which each spouse is seized of the whole of the property.*

Mrs. Neroni argues that if Department Staff is successful in its request that Mr. Neroni remediate the site, her use will be restricted and the property value will be diminished. She claims that her right to due process was denied as she was not a party to the action from commencement. (When the action was commenced she did not hold title.) She also claims that her constitutional rights are being violated as remediation by her husband would constitute an unreasonable search and seizure. Finally, she states that ECL 24-0901 only allows for cooperative remediation and that the Department does not have the authority to order remediation.

Mr. and Mrs. Neroni agree that they did not notify Department Staff or this office of the change in title. Mr. Neroni indicated that he did not have to notify the Department of the change in title since it is a public record. Mrs. Neroni stated at the hearing that she was not aware of the pending enforcement action until Spring, 2007 when she did a search of her husband's name on the search engine Google. However, when she became aware of the enforcement action she did not contact Department Staff nor did she contact this office to advise anyone of her ownership interest. The first that Department Staff and this office learned of the change in title was at the June 5, 2007 hearing regarding remediation and penalties.

Mrs. Neroni has argued that pursuant to Civil Practice Law and Rules (CPLR) 1001 a party shall be joined if "complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by the judgment in the action". Mrs. Neroni contends that her use of the property in question is restricted by Department Staff's request for remediation and remediation imposes encumbrances upon the property which directly affect her rights. Because of the consequences of remediation, she argues that she should be allowed to participate in the proceedings from the beginning. Mrs. Neroni refers to ECL 24-0903 and ECL 24-0901 and claims that those sections support her argument that her use of the subject land is restricted. Title 9 of section 24 of the ECL applies to the freshwater wetlands preservation program. New York State regulates the use and development of wetlands. It is the policy of this State "to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent their despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the State." (ECL 24-0103) Mrs. Neroni notes that New York State has recognized that regulated wetlands have restricted use that should be recognized when determining assessed value for property tax purposes. She equates regulated wetlands with remediation of the property at issue here.

Mrs. Neroni has also argued that compulsory remediation without affording the landowner notice or opportunity to be heard since the start of the lawsuit affects the owners constitutional rights under the 4th Amendment of the United States Constitution and the NYS Constitution. She argues that remediation constitutes unreasonable search and seizure. Mrs.

Neroni cited the case of *Matter of John Ames 1994 WL 734482* in support of her argument that the Department can not order remediation on property without the owner's permission.

Section 622.10(f) of 6 NYCRR allows for the filing of a petition to intervene as a party in a Department proceeding. Mrs. Neroni has not cited this section of the regulations, nor has she filed the required petition to intervene in this proceeding, but I will address it. 6 NYCRR 622.10 (f)(2) dictates the requirements for the petition for intervention that must be stated with preciseness and particularity:

- (i) petitioner's relationship to the matters involved;
- (ii) the nature of the material petitioner intends to present in evidence;
- (iii) the nature of the argument petitioner intends to make;
- (iv) any other reason that the petitioner should be allowed to intervene.

The petition will be granted only where it is demonstrated that there is a reasonable likelihood that the petitioner's private rights would be substantially adversely affected by the relief requested and that those rights can not be adequately represented by the parties to the hearing. (6 NYCRR 622.10[f][3]) Mrs. Neroni has not met the burden of §622.10(f)(2). She has not shown that her private rights would be substantially affected by the requested relief *and* that those rights can not be adequately represented by the respondent.

RULING

Mrs. Neroni's request to vacate the August 2006 Ruling on Department's Staff's motion for Order Without Hearing is denied. I am also not going to grant Mrs. Neroni the right to intervene in the action. I am allowing Mrs. Neroni an opportunity to submit argument regarding Department Staffs request for remediation. Since Mrs. Neroni has an ownership interest in the site now, I will afford her an opportunity to submit argument or comments on the remediation portion of the proceedings. Therefore, I will provide Mrs. Neroni 45 days from the date of this Ruling to submit in writing any arguments or comments she would like heard with regard to Department Staff's request for remediation of the site. Department Staff will have 10 business days after Mrs. Neroni's submission to respond.

Mrs. Neroni also moved to dismiss the action against Frederick Neroni due to a lack of subject matter jurisdiction. Mr. Neroni previously moved for the same relief at the June, 2007 hearing. Mrs. Neroni's motion is based upon the same arguments made by Mr. Neroni in June, 2007. The motion was denied on the record on June 5, 2007. As the motion has already been heard and decided, the motion is denied.

Very truly yours,



Molly T. McBride
Administrative Law Judge

