STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 19 of the New York State Environmental Conservation Law (ECL), and Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR),

- by -

ORIGINAL ITALIAN PIZZA, LLC,

Respondent.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR ORDER WITHOUT HEARING

DEC File No. R7-20100726-52

October 17, 2011

Appearances of Counsel:

-- Steven C. Russo, Deputy Commissioner and General Counsel (Margaret A. Sheen of counsel), for staff of the Department of Environmental Conservation

-- Cerio Law Offices (David W. Herkala of counsel), for respondent Original Italian Pizza, LLC

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR ORDER WITHOUT HEARING

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) moves for an order without hearing pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Department staff moves for summary judgment on its September 22, 2010, complaint alleging that respondent Original Italian Pizza, LLC, emitted large amounts of smoke and noxious odors from its restaurant located in Mattydale, New York, in violation of 6 NYCRR former 211.2.[1] For the reasons that follow, the motion is granted on the issue of liability, and otherwise denied.

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[1] Effective January 1, 2011, 6 NYCRR former 211.2 was renumbered 211.1 without any changes to the text. This ruling refers to former section 211.2 throughout.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated September 22, 2010. In the complaint, Department staff alleged that since May 2008, respondent Original Italian Pizza, LLC, has operated a restaurant located at 2230 Brewerton Road, Mattydale, New York. Staff alleges that starting in August 2008 and continuing to the date of the complaint, the Department received multiple complaint calls and complaint forms filled out by neighbors of the restaurant raising air quality concerns about emissions from the restaurant's cooking vents. Staff further alleged that on five separate occasions from June 2009 through September 2010, Department inspectors observed emissions of large amounts of heavily opaque smoke and grease, and burning odors issuing from the restaurant's cooking vents and traveling along a neighboring alley and onto nearby properties.

As a result of the alleged emissions, Department staff charged respondent with a continuing violation of the prohibition against air pollution established at 6 NYCRR 211.2. Department staff seeks a civil penalty in the amount of $25,375, and an order directing respondent to cease and desist from any future violations of 6 NYCRR part 211.

Respondent filed an answer dated October 8, 2010. In addition to denying the allegations of the complaint, respondent pleaded five affirmative defenses.

By notice of motion dated October 20, 2010, Department staff moved to clarify or dismiss all five affirmative defenses. Respondent filed a response dated October 29, 2010, opposing the motion. By ruling dated December 15, 2010, I granted staff's motion to the extent of dismissing respondent's third and fifth affirmative defenses challenging section 211.2 as void for vagueness, and otherwise denied the motion (see Matter of Original Italian Pizza, LLC, Ruling of the Chief Administrative Law Judge [ALJ], Dec. 15, 2010).

By notice of motion dated March 2, 2011, Department staff now seeks an order without hearing pursuant to 6 NYCRR 622.12 on its September 2010 complaint. In support of its motion, staff has filed an attorney affirmation of Margaret A.

Sheen, Esq., with attachments, an affidavit of Reginald Parker with attachments, and a memorandum of law.

Respondent opposes Department staff's motion in papers dated March 31, 2011. Respondent's submissions consist of an attorney affidavit of David W. Herkala, Esq., with attachments, an affidavit of Bruce Pleeter with attachment, an affidavit of Rosario Amato with attachments, and a memorandum of law.

DISCUSSION

A motion for order without hearing pursuant to 6 NYCRR 622.12 is the Departmental equivalent of a motion for summary judgment under CPLR 3212 (see 6 NYCRR 622.12[d]; Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, at 3-4). A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action is established sufficiently to warrant granting summary judgment under the CPLR (see id.). The motion must be denied if any party shows the existence of substantive disputes of facts sufficient to require a hearing (see 6 NYCRR 622.12[e]). Moreover, the existence of a triable issue of fact regarding the amount of civil penalties will not bar granting a motion for order without hearing on the issue of liability (see 6 NYCRR 622.12[f]). If a triable issue of fact is presented only on the issue of penalty, the ALJ will convene a hearing to assess the amount of penalties to be recommended to the Commissioner (see id.).

On the motion, Department staff carries the initial burden of establishing its entitlement to judgment as a matter of law on the claims asserted and any penalty and remedial relief sought (see Locaparra, at 4). Staff must support its motion with evidence in admissible form establishing the material facts supporting its claims (see id.).

Once Department staff makes a prima facie showing of its entitlement to summary judgment, the burden shifts to respondent to raise substantive disputes of fact requiring a hearing (see 6 NYCRR 622.12[e]; Locaparra, at 4). To carry its burden, a respondent must lay bare its proof (see id.). Conclusory assertions and unsupported allegations are insufficient to avoid summary judgment (see id.; see also Matter of Mustang Bulk Carriers, Inc., Chief ALJ Ruling and Summary

Report, at 6-7 [feigned issues of fact will not defeat summary judgment], adopted by Order of the Acting Commissioner, Nov. 10, 2010).

I. Liability

In its complaint, Department staff charges respondent with continuing violations of 6 NYCRR 211.2. Section 211.2 provided that

> "[n]o person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others."

Section 211.2, which follows the statutory definitions of "air pollution" and "air contamination" (see ECL 19-0107[2], [3]), incorporates the common law standard for public nuisances, among other standards (see Matter of Delford Indus., Inc., ALJ Hearing Report, at 44, concurred in by Commissioner Decision and Order, April 13, 1989).

Department staff has made a prima facie showing that respondent violated section 211.2 on a recurring and continuing basis since at least August 2008. In its answer, respondent admits that it is a limited liability corporation duly authorized and registered to do business in New York State, and that it has operated the restaurant located at 2230 Brewerton Road, Mattydale, New York, since May 2008. Thus, respondent is a "person" under section 211.2 (see 6 NYCRR 200.1[bi]).

Department staff made a prima facie showing that respondent caused or allowed emissions of air contaminants to the outdoor atmosphere. "Air contaminants" include any

particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emissions, either alone or in combination with others (see 6 NYCRR 211.2; see also 6 NYCRR 200.1[d]). "Smoke" is further defined as an air contaminant "consisting of small gas-borne particles emitted by an air contamination source in sufficient number to be observable" (6 NYCRR 200.1[bx]). "Opacity" is further defined as "the degree to which emissions other than water reduce the transmission of light and obscure the view of an object in the background" (6 NYCRR 200.1[ay]). The affidavit of Departmental inspector Reginald Parker and supporting documentation establish that the affected neighborhood is predominantly down-wind of the restaurant, and that on at least five separate occasions, respondent emitted large amounts of high-opacity smoke and odors from the restaurant's cooking vents and onto neighboring properties. In addition, the odor complaint logs further establish frequent emissions of smoke and odors on numerous additional occasions (see Parker Affidavit, Attachment A). Thus, Department staff has made a prima facie showing that respondent caused or allowed emissions of air contaminants from its restaurant to the outdoor atmosphere on numerous occasions.

Department staff has also established that the air contaminants emitted from the restaurant were of such quantity, characteristic, or duration as to unreasonably interfere with the comfortable enjoyment of life or property at nearby residences. As previously noted, the "unreasonable interference" element of section 211.2 adopts the common law public nuisance standard for the enforcement of the State's prohibition against the emission of air contaminants (see Delford Indus., ALJ Hearing Report, at 44; compare ECL 19-0107[3] and 6 NYCRR 211.2 with Copart Indus., Inc. v Consolidated Edison Co., 41 NY2d 564, 568 [1977]). Whether a particular use constitutes a nuisance is generally a question of fact, and depends upon the reasonableness of the use under all the circumstances (see Delford Indus., ALJ Hearing Report, at 44). The determination requires the balancing of the reasonableness of the respondent's use against the rights of the affected neighbors and members of the public (see id.). Factors considered include location, nature of the use, character of the neighborhood, extent and frequency of the injury, the effect on the enjoyment of life, health, and property, and so on (see id.; see also McCarty v Natural Carbonic Gas Co., 189 NY 40, 47-48 [1907]).

With respect to whether a particular use is reasonable, the availability of measures to abate the nuisance and the extent to which a respondent has implemented those measures is relevant to the analysis (see Delford Indus., Commissioner Order, at 3; Matter of Town of Huntington, Commissioner Decision and Order, May 17, 1989, at 2; McCarty, 189 NY at 50). A use is more likely to be considered unreasonable if reasonable measures are available to mitigate the use's impacts (see id.).

With respect to the requisite interference, the interference must be substantial, amounting to the actual invasion of interests in land, and affect a significant number of people (see 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc., 96 NY2d 280, 292 [2001]; Matter of Town of Huntington, at 1-2 [fly ash in residential area that interfered with normal outdoor activity and forced neighbors to remain indoors with windows closed]). Not every annoyance constitutes a nuisance (see Domen Holding Co. v Aranovich, 1 NY3d 117, 124 [2003]). The objectionable conduct must be recurring or continuous (see id.; Matter of Mohawk Valley Organics, Commissioner Order, July 21, 2003 [persistent and continuing nuisance odors off-site and, in some cases, causing health problems to neighbors]; Matter of Town of Huntington).

On this motion, Department staff has made a prima facie showing that respondent's conduct constitutes an unreasonable interference with the comfortable enjoyment of life and property in the neighborhood surrounding the restaurant. Although the restaurant is in a mixed use area, respondent acknowledges that it is located immediately adjacent to residential properties. Department staff's proof establishes that the design and location of the restaurant's cooking vents result in the emission of thick, greasy and malodorous smoke directly into the adjacent neighborhood and onto residential yards and homes. As a result of these emissions, numerous residents are unable to use their yards or pools, or engage in other outdoor activities. Pool toys, lawn chairs, automobiles, house siding, windows, and other outdoor property are covered in grease. The smoke and odors are such that residents are forced to keep their windows closed, and even then, the smoke and odors infiltrate nearby houses. Neighbors report of burning eyes, throats, and lungs, and coughing as a result of the smoke and odors. Further, the proof supports the conclusion that the

noxious smoke and odors have been recurring on a continuous basis during business hours since August 2008.

Department staff also makes a prima facie showing that reasonable steps may be taken to abate the smoke and odors, thereby supporting the conclusion that respondent's use is unreasonable. Specifically, staff establishes that respondent's vent system could be redesigned and that pollution control devices, such as a "smog hog," could be installed. In response, respondent challenges whether use of a smog hog is economically feasible for the restaurant. However, respondent's own submissions indicate that steps short of installation of a smog hog could be undertaken to abate the emissions from the cooking vents. Thus, respondent has failed to raise a triable issue of fact concerning the reasonableness of its use, at least on the issue of liability.

Respondent raises several arguments in opposition to Department staff's motion. First, respondent argues that section 211.2 does not contain an objective standard against which to measure whether the emissions are injurious to human health or unreasonably interfere with enjoyment of life or property and, therefore, the regulation is unconstitutionally vague. I have previously rejected this argument (see Matter of Original Italian Pizza, Inc., Ruling of the Chief ALJ, Dec. 15, 2010, at 7-8). As I ruled on Department staff's motion to dismiss respondent's void for vagueness defense, the "reasonableness" standard contained in section 211.2 is an objective standard -- the reasonable person standard -- that is readily amenable to proof (see id.). I also concluded that the regulation is not unconstitutionally vague, either as-applied or facially.

Respondent also points to the opacity standard provided for at 6 NYCRR current 211.2 and argues that its adoption amounts to Departmental recognition that former section 211.2 is inherently arbitrary. Respondent's argument is unpersuasive. The circumstance that the Department has adopted a separate opacity standard does not render former section 211.2 arbitrary or unenforceable. As noted above, former section 211.2 merely codifies the objective common law public nuisance standard for emissions, whether opaque or otherwise, that unreasonably interfere with the comfortable enjoyment of life or property.

Second, respondent asserts that Department staff's motion relies on the hearsay statements of neighbors. Respondent argues that those hearsay statements do not constitute competent admissible evidence and, thus, are insufficient to support a prima facie case. In the administrative context, however, summary judgment motions may be supported by hearsay. As the Commissioner has previously explained,

> "unlike civil court proceedings, hearsay evidence is admissible in an administrative adjudicatory proceeding and can be the basis of an administrative enforcement determination (see State Administrative Procedure Act ["SAPA"] § 306[1] [agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law]; Matter of Gray v Adduci, 73 NY2d 741, 742 [1988]; People ex rel. Vega v Smith, 66 NY2d 130, 139 [1985]; Matter of Concerned Citizens Against Crossgates v Flacke, 89 AD2d 759, 760 [3d Dept 1982], affd for reasons stated below 58 NY2d 919 [1983]). Accordingly, Department staff's proof in support of summary judgment should not [be] rejected on the hearsay basis alone.
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> "Although hearsay evidence is admissible in administrative adjudicatory proceedings, it must nonetheless be sufficiently reliable, relevant and probative to provide a basis for the agency's determination (see Matter of Dadson Plumbing Corp. v Goldin, 104 AD2d 346 [1st Dept 1984], affd as modified on other grounds 66 NY2d 713 [1985]).
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> "Ordinarily, when hearsay evidence is offered at the evidentiary portion of an administrative adjudicatory proceeding, the circumstance that such evidence is hearsay goes to the evidence's weight (see Matter of Tubridy, Decision of the Commissioner, April 19, 2001, at 9). At the summary judgment stage of proceedings, however, weight of evidence is not considered. Rather, the issue is whether the moving party has offered sufficient evidence to support a prima facie case for summary judgment. The test for sufficiency of evidence in the administrative context is the substantial evidence test -- whether the factual "`finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious

> affairs.' . . . Put another way, substantial evidence `means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'" (People ex rel. Vega v Smith, 66 NY2d 130, 139 [citations omitted]; see also 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 181 [1978] ["substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably -- probatively and logically"])"

(Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 2-3 [footnote omitted]).

In this case, although the neighbors' complaints are hearsay, they are admissible. In addition, they are sufficiently reliable, relevant and probative, and are corroborated by the observations of the Department's inspector. Thus, Department staff has provided substantial evidence in support of its prima facie case.

Respondent further argues that staff's proof rests on subjective opinion and issues of fact that can only be determined at a hearing. I disagree. The complaints of the neighbors, the observations of the Department's inspector, and the photographs and video submitted by the Department are sufficient to support the conclusion that a reasonable person would find respondent's emissions of malodorous smoke and grease on a recurring and continuous basis to constitute an unreasonable interference with the comfortable enjoyment of life and property in the neighborhood and, thus, are substantial evidence in support of staff's prima facie case.

Because Department staff has met its initial burden on this summary judgment motion, the burden shifted to respondent to raise triable issues of fact. Respondent has offered no evidence in response that raise a triable issue concerning the existence and nature of the emissions from the restaurant's cooking vents, or the impacts of those emissions on the comfortable enjoyment of life and property in the residential neighborhood adjacent to the restaurant. Accordingly, staff's motion for an order without hearing may be granted on the issue of liability.

II. Penalty

Although Department staff's motion for summary judgment may be granted on the issue of liability, I conclude that respondent has raised triable issues of fact relevant to the penalty and other relief sought by Department staff. Staff seeks a penalty in the amount of $25,375, and an order of the Commissioner directing respondent to cease and desist from all further violations of current section 211.1.

With respect to penalty, prior to May 2010, ECL 71-2103 authorized a penalty of up to $10,000 for a first violation of the regulations adopted pursuant to ECL article 19, and an additional penalty of up to $10,000 for each day the violation continues. For second and any further violations of the regulations, the maximum authorized penalty amount was $15,000 with an additional $15,000 for each day during which the violation continued. In May 2010, the maximum penalty authorized by ECL 71-2103 was increased to $18,000 for a first violation of the regulations and $15,000 for each day during which the violation continues. The maximum penalty for second and further violations was increased to $26,000 per violation with an additional $22,500 for each day the violation continues.

In determining the appropriate penalty to be imposed, ECL 71-2115 requires the Commissioner to consider "any evidence introduced by a party regarding the economic impact of a penalty on a business, the compliance history of a violator, good faith efforts of a violator to comply, any economic benefit obtained from noncompliance, the amount of risk or damage to public health or the environment caused by a violator, whether the violation was procedural in nature, or such other factors as justice may require" (accord DEC Commissioner Policy DEE-1, Civil Penalty Policy, June 20, 1990).

Respondent has raised triable issues of fact concerning several of the ECL 71-2115 factors. The affidavit of Rosario Amato raises factual issues concerning the ability of respondent to pay the requested penalty. Both the Amato and Bruce Pleeter affidavits raise factual issues concerning respondent's good faith efforts to comply, including respondent's alleged installation of six grease extractors in September 2010, and respondent's plans to relocate the ventilation ducting system to avoid the down wash condition. A

hearing is required to resolve these fact issues before a penalty can be recommended to the Commissioner in this case.

With respect to the economic benefit obtained from non-compliance, it is unclear from staff's papers whether it considers the cost of installing a smog hog as the measure of avoided costs. To the extent it does, respondent has raised a triable issue of fact concerning the actual installation and operating costs of a smog hog, and whether the device is in fact economically feasible for the facility. Thus, a triable issue of fact is raised concerning the appropriate economic benefit obtained from non-compliance to be considered.

With respect to the injunctive relief sought by Department staff, ECL 71-2103 provides that a person violating the air pollution control regulations "may be enjoined from continuing such violation as hereinafter provided" (ECL 71-2103[1]). Although ECL 71-2107 authorizes the Department, through the Attorney General, to bring an action for an injunction in a civil judicial forum, research fails to reveal statutory authority for imposing injunctive relief through the administrative enforcement process. Further hearing is required to determine Department staff's authority for imposing injunctive relief through an administrative order.

FINDINGS OF FACT

Where, as here, a motion for order without hearing must be denied in part and a hearing held, the ALJ is to specify what facts, if any, are deemed established for all purposes in the hearing (see 6 NYCRR 622.12[e]). The facts determinable as a matter of law on this motion are the following.

1. Respondent Original Italian Pizza, LLC, is a limited liability corporation duly authorized and registered to do business in New York State. Since May 2008, respondent has operated a restaurant located at 2230 Brewerton Road, Mattydale, New York.

2. Starting in August 2008 and continuing to the date of the complaint, the Department received multiple complaint calls and complaint forms filled out by neighbors of the restaurant raising air quality concerns about emissions from the restaurant's cooking vents. The complaints establish that on a recurring and continuous basis, respondent emitted large amounts

of thick, opaque, and malodorous smoke and grease from its cooking vents into the atmosphere and onto properties neighboring the restaurant. As a result of these emissions, numerous residents are unable to use their yards or pools, or engage in other outdoor activities. Pool toys, lawn chairs, automobiles, house siding, windows, and other outdoor property are covered in grease. The smoke and odors are such that residents are forced to keep their windows closed. Smoke and odors infiltrate both outdoor and indoor areas. Neighbors report of burning eyes, throats, and lungs, and coughing as a result of the smoke and odors.

3. On five separate occasions from June 2009 through September 2010, a Department inspector observed emissions of large amounts of heavily opaque smoke and grease, and burning odors issuing from the restaurant's cooking vents and traveling along a neighboring alley and onto nearby properties.

4. Various measures are available to respondent to abate the smoke and odors issuing from its cooking vents, although triable issues of fact remain concerning the economic feasibility of some of those measures.

CONCLUSIONS OF LAW

1. Respondent Original Italian Pizza, LLC, as a limited liability corporation duly authorized and registered to do business in New York State, is a "person" under 6 NYCRR former 211.2.

2. Respondent caused or allowed emissions of air contaminants from its restaurant to the outdoor atmosphere by allowing thick, greasy, and odorous smoke to issue from its cooking vents on a recurring and continuous basis.

3. The quantity, characteristics and duration of the thick, greasy, odorous smoke emitted from respondent's restaurant has caused an unreasonable interference with the comfortable enjoyment of life or property and, thus, constitute a violation of 6 NYCRR former 211.2. These violations have occurred on a recurring and continuous basis since at least August 2008.

RULING

The motion by Department staff for an order without hearing is granted on the issue of liability. Respondent Original Italian Pizza, LLC, is adjudged to have violated 6 NYCRR former 211.2 by allowing emissions of air contaminants from its restaurant to the outdoor atmosphere in such quantity, characteristic and duration as to unreasonably interfere with the comfortable enjoyment of life or property in neighboring areas. The motion is otherwise denied on the issues of penalty and injunctive relief.

A conference call will be convened with the parties to set a date for a hearing on the appropriate penalty and injunctive relief.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: October 17, 2011
Albany, New York

TO: Margaret A. Sheen, Esq.
New York State Department of
Environmental Conservation
Office of General Counsel, Region 7
615 Erie Boulevard West, 2nd Floor
Syracuse, New York 13204-2400

David W. Herkala, Esq.
Cerio Law Offices
407 S. Warren Street
Syracuse, New York 13202