MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 19

In the Matter of the Application of	INDEX NO. 19686/09
GROVICK PROPERTIES, LLC,	MOTION DATE: MAY 12, 2010
Petitioner,	MOTION CAL. NO. 13
For a Judgment Pursuant to Article 78 of the CPLR, and for a Declaratory Judgment Pursuant to Section 3001 of the CPLR	MOTION SEQ. NO. 1
	BY: SATTERFIELD, J.
-against-	DATED: August 24, 2010
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al.,	
Respondents.	

In this Article 78 proceeding, petitioner Grovick Properties, LLC seeks a judgment vacating the determination of respondent New York State Department of Environmental Conservation (DEC) dated March 20, 2009 which denied petitioner's application for readmission to the Brownfield Cleanup Program (BCP) with respect to the remediation of a contaminated parcel of land owned by petitioner and located at 83-10 Astoria Boulevard, Jackson Heights, New York. Petitioner further seeks a judgment directing respondent Alexander B. "Pete" Grannis, Commissioner of the DEC or respondent

Dale A. Desnoyers, Director of the DEC's Division of Environmental Remediation, to approve Grovick's application to the BCP, and directing these respondents to enter into a Brownfield Cleanup Agreement for the subject real property; and declaring that DEC is liable for petitioner's attorney's fees and costs incurred in this proceeding.

Petitioner Grovick Properties, LLC (Grovick) is the owner of real property known as 83-10 Astoria Boulevard, Jackson Heights, New York, which it purchased in April 2004. It is undisputed that the prior owner, Astoria Gas NY, d/b/a CityGas operated a gas station on the site until March 2001, when it entered into a stipulation agreement with the DEC to clean up the site. The site is contaminated with petroleum and petroleum-related products, associated with its past use, and these contaminants impact the soil, groundwater and soil vapors on or near the site. The prior owner, however, failed to clean up the site, and by November 2002, the DEC had assumed remediation. In 2003, DEC removed 13 underground storage tanks from the site, and 2,800 tons of contaminated soil, and thereafter installed a vapor abatement system.

The verified petition alleges that after Grovick purchased the property, the DEC represented that it would complete the remedial efforts in a timely manner, so as to allow petitioner to redevelop the property. It is alleged that in December 2004, the DEC informed petitioner that it had not completed the remediation, but would continue its efforts to do so. In February 2005, the DEC discharged its contractor at the site. Petitioner alleges that in March 2005, the DEC urged it to apply to the Brownfield Cleanup Program (BCP),

as a volunteer, and assume responsibility for the design and implementation of a remedial strategy and program. On April 14, 2005, petitioner attended a BCP "pre-application meeting" at the DEC's Region II offices in Queens County. Petitioner alleges that it was required to file a formal Freedom of Information Law request in order to obtain the DEC's files with respect to the site, and that the DEC thereafter made its records available for inspection and copying. Petitioner thereafter agreed to apply to the BCP as a volunteer.

The petition alleges that Grovick prepared an application for the BCP, which it filed in early September 2005. Petitioner's application included a Remedial Investigation Work Plan (RIWP) and an Interim Remedial Measures Work Plan (IRMWP). The DEC notified petitioner its application was complete on September 14, 2005. Petitioner alleges that although the DEC was required to determine petitioner's eligibility and rule upon its Remedial Investigation Work Plan (RIWP) and Interim Remedial Measures Work Plan (IRMWP), within 45 days after the letter of completion, the DEC did not approve petitioner's eligibility until February 2006, and did not approve the RIWP and IRMWP until May 2006. Petitioner entered into a Brownfield Cleanup Agreement (BCA), as a volunteer, with the DEC on February 3, 2006.

Petitioner alleges in its petition that it thereafter determined that a higher and better use may exist for the site than stated in its application, and notified the DEC of its change of use, and requested amendments to the RIWP. The DEC ultimately approved the amendment to the RIWP in June 2007. It is alleged that despite petitioner's best efforts to

secure timely approval of its "higher and better use," the New York City Department of Buildings delayed consideration of Grovick's requests for building permits. Petitioner alleges that it notified the DEC of this "force majuere" situation, and in January 2008, requested that the DEC either reverse the amendments to the RIWP or revoke its approval of the RIWP. On April 18, 2008, the DEC denied petitioner's requests and terminated the BCA. Petitioner's April 25, 2008 request for reconsideration was denied on May 22, 2008.

Petitioner alleges in its petition that after the BCA was terminated, the DEC threatened to commence an enforcement action, and impose penalties of up to $35,000.00 a day, if petitioner did not enter into a stipulation agreement with the DEC. Petitioner executed a stipulation agreement on October 16, 2008, which requires it develop and implement a remedial strategy and program for the site. Petitioner alleges that pursuant to this stipulation it is required to perform remediation at the site, without the benefits formerly available under the BCP.

Petitioner alleges that it filed a new application for entry into the BCP program on October 31, 2008, which the DEC denied in a letter dated March 20, 2009. The petition neither states the reasons for the denial, nor includes a copy of said determination.

Petitioner commenced this action on July 23, 2009, and alleges in its first cause of action that the DEC acted arbitrarily and capriciously "in reversing its approval of the Application." The second cause of action alleges that the DEC acted in violation of lawful procedure. The third cause of action alleges that the DEC was "affected by an error of law

in denying the Application." Petitioner seeks a judgment vacating the DEC's determination of March 20, 2009, directing respondent Alexander B. "Pete" Grannis, Commissioner of the DEC or respondent Dale A. Desnoyers, Director of the DEC's Division of Environmental Remediation, to approve Grovick's application to the BCP, and directing these respondents to enter into a BCA for the subject real property. Finally, petitioner seeks a judgment declaring that the DEC is liable for any and all damages suffered and costs incurred by Grovick arising from the denial of its application, including attorney's fees.

Respondents served an answer, along with an opposing affidavit, memorandum of law, and the certified administrative record. Respondents, in their answer and in opposition to the petition, assert as an affirmative defense that to the extent petitioner seeks judicial review of the termination of the BCA, this claim is barred by the statute of limitations. With respect to the March 20, 2009 denial of the application for admission to the BCP, it is asserted that the DEC's determination is neither arbitrary nor capricious, and has a reasonable basis in the law and the record.

Petitioner, after several adjournments, served two reply affidavits, a reply memorandum of law, and a 320-page "supplemental record." Respondents, upon receipt of petitioners' reply papers, requested that the court grant them time in which to review these papers, and requested permission to serve surreply papers. The parties were to participate in a conference call on March 24, 2010. However, due to scheduling difficulties, the parties appeared in this part on April 21, 2010, for oral argument on the issue of the surreply.

Respondents asserted that the petitioner's reply papers seek to introduce new facts and theories, and seek to improperly introduce into the record documents not considered by the DEC in making the administrative determination at issue here. Respondents argued that they should be granted permission to submit a surreply in order to respond to those claims. Petitioner argued that the reply merely responded to issues raised in the respondents' answer, and that a surreply is not permissible under the provisions of the CPLR. It was further argued that as respondents had failed to move to strike the portions of the reply they objected to, they were not entitled to such relief. The court directed respondents to submit their surreply affidavit and memorandum of law, and further directed the parties to submit copies of cases in support of their respective positions.

At the outset, the court will address the issues raised by the parties with respect to the request to submit the surreply papers. CPLR 7804(d) provides that "[t]here shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party there shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of. There shall be a reply to a counterclaim denominated as such and there shall be a reply to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed. The court may permit such other pleadings as are authorized in an action upon such terms as it may specify."

A surreply is not a pleading authorized in an action (*see* CPLR 3011). However, courts have permitted the service of a surreply in both Article 78 proceedings and in plenary actions, where a party raises new arguments in a reply, and the court's permission to serve surreply papers is requested prior to the submission of the papers to the court (*see Matter of Diggs v Board of Educ. of the City of Yonkers*, 24 Misc 3d 1235A [2009]; *Matter of Lucas v Board of Appeals of the Vil. of Mamaroneck*, 14 Misc 3d 1214A [2007]; *see also Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 [2006]; *Fiore v Oakwood Plaza Shopping Ctr., Inc.*, 164 AD2d 737, 739 [1991], *affirmed* 78 NY2d 572 [1991], *cert denied* 506 US 823 [1992]; *Hoffman v Kessler*, 28 AD3d 718, [2006]; *Basile v Grand Union Co.*, 196 AD2d 836, 837 [1993]).

Petitioner is seeking judicial review of the DEC's March 20, 2009 determination which denied the BCP application on the four separate grounds, each involving the public interest. One of the grounds cited by the DEC in its determination was Grovick's failure to pay the 2008 bill for expenses incurred in 2007, totaling $5,260.46. Notably, Grovick did not allege in its petition that it had paid this bill. Respondents, in the affidavit and memorandum of law submitted in support of their answer, discussed each of the findings with respect to the public interest, including Grovick's failure to pay said bill. Respondents, however, raised no new matters in their answer and supporting papers. Petitioner's reply, therefore, did not merely respond to new issues raised by the respondents. Rather, petitioner, in its reply, seeks to address the deficiencies in its petition, and now claim

for the first time the 2008 bill was paid. Under these circumstances, the court finds it appropriate to accept respondents' surreply affidavit and memorandum of law.

The DEC's determination was not made as a result of a hearing held and evidence taken, pursuant to direction by law. Therefore, the appropriate standard of review is whether the determination has a rational basis in law (CPLR 7803[4]; *see generally Matter of Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269 [1972]; *Matter of Colton v Berman*, 21 NY2d 322 [1967]). To the extent that petitioner asserts that respondents' determination was arbitrary and capricious, "[a]rbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *see also Matter of Arrocha v Bd. of Educ. of City of New York*, 93 NY2d 361 [1999]; *Matter of Zupa v Bd. of Trustees of Town of Southold*, 54 AD3d 957 [2008]; *Matter of Ball v New York State DEC*, 35 AD3d 732 [2006]).

The DEC denied Grovick's October 31, 2008 BCA application in a letter dated March 20, 2009, and stated that it had taken the following documents into consideration in making its determination:

> "-the relevant BCP application dated October 31, 2008;
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> -the Site's environmental status including the Department's 'Significant Threat Determination' for the Site;
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> -the Requestor's and Site's terminated Brownfield Cleanup Agreement("BCA") No. A2-05337-0106, effective February 3, 2006 and terminated April 18, 2008;

-the Department's BCP termination letter for that BCA dated April 18, 2008;

-the Requestor's subsequent letter of April 25, 2008;

-the Department's response to that letter dated May 18, 2008;

-the Department's March 24, 2008 BCA cost invoice;

-the Department's July 31, 2008 reimbursement demand to the Attorney Jon Brooks;

-the October 23, 2008 legal action letter to the attention of Attorney Jon Brooks from the Department and Office of the N.Y.S. Attorney General;

-the Stipulation entered between the Department and the Requestor dated October 16, 2008; and

-the Press Release related to the Site issued by the United States Attorney for the Eastern District of New York dated February 19, 2009."

The DEC determined that the public interest was not served by accepting Grovick's request to participate in the BCP and cited four separate grounds for its decision. First, the DEC found that the public interest was not served by accepting a request to participate in the BCP from a party previously removed from the BCP for having failed to comply with the BCA. The DEC stated that Grovick had been unable or unwilling to undertake a timely remedial program for the site since 2006, when it commenced participation in the previously terminated BCA; that Grovick had "linked its re-development fortunes with a land use change that depends on unrelated action by the City of New York" and that "[u]nder these circumstances, it is clear that the Requestor cannot demonstrate an undivided interest in the

speedy cleanup and economic redevelopment of the Site. In turn, the Requestor's dearth of interest further exacerbates the Site's already deteriorating environmental and public health conditions. The serious nature of these environmental and public health conditions has already been demonstrated by the Site's designation by the Department as a 'Significant Threat,' as well as the scientific and environmental date contained in the Application."

Second, the DEC found that the public interest was not served as the application contained a material inaccuracy. The DEC stated that Grovick had responded "No" to question 5, section V of the application, which asked if the site is "subject to a state or federal enforcement action related to hazardous waste or petroleum." The DEC stated that during the pendency of the application, it learned of a press release issued by the United States Attorney for the Eastern District, dated February 19, 2009, regarding a settlement in a civil environmental enforcement action against the former owner and operator of the site. The DEC stated that although it was not alleging deliberate fraud on the part of Grovick, it found it "inconceivable" that a BCP requestor involved with the site since at least 2006 would be unaware of the pendency of a major federal enforcement action directly related to the contamination at the site, and that this constituted, at a minimum, significant negligence by Grovick in the preparation of the application.

Third, the DEC found that the public interest was not served by accepting a request to participate in the BCP from a party who submitted an application for the same site, but had previously failed to comply with the terms of the BCA to pay State costs. They

stated that Grovick's failure to pay a 2008 bill for costs accrued under the BCA prior to its termination, and that the subsequent intervention of the Attorney General in the matter, constituted grounds to reject the application, pursuant to ECL § 27-1407(8)(b) and 1407(9).

Fourth, the DEC found that the stipulation entered into with Grovick provided additional grounds for denying the application. The October 16, 2008 stipulation contains a "corrective action plan," that required Grovick, among other things, to conduct a supplemental investigation to determine the current soil and groundwater quality both on-site and off-site, and submit a Supplemental Investigative Report to the DEC for approval, within 60 days of said stipulation. The DEC, in its determination, stated that Grovick requested an extension of the 60-day deadline on December 4, 2008, which was denied; that the Supplemental Investigative Report submitted on December 16, 2008 was disapproved; that the required Investigation Work Plan was finally submitted on January 28, 2009, and thereafter approved by the DEC; and that according to the work plan, a report on the final investigation was due May 5, 2009.

The DEC stated that despite the fact that Grovick was "to commence remediation at the site in 2006 under the original BCA, it still had not completed its investigation of the site, and that given its lackluster performance in this regard, it had failed to demonstrate credibility and competence in this area." The DEC stated that "the BCP is materially more difficult to comply with than the stipulation due to additional requirements

related to public health and citizen participation," and that the DEC "lacks confidence" in Grovick's "ability to successfully comply and complete the program in a timely fashion."

Grovick, in its petition, merely states in conclusory terms that the DEC's determination of March 20, 2009 was arbitrary and capricious, in violation of lawful procedure, and affected by an error of law, without stating any basis for these claims. Most of the allegations contained in the petition deal with the BCA and its termination. Mr. Novick, Grovick's managing member, in his reply affidavit essentially seeks to cure the petition's deficiencies and asserts that the DEC's reasons for denying the October 31, 2008 BCP application are based upon misrepresentations of fact. He asserts that Grovick was willing and able to remediate the site, but that it was prevented from doing so by the DEC, the DOH and the DOB; that the delays from September 2005 through December 2006 are attributable to the DEC or the DOH and not Grovick; that the delays from March to June 2007 are attributable solely to the DEC; and that the delays from June 2007 through the termination letter are attributable solely to the "force majeure" event caused by the DOB. It is also asserted that if the DEC believed that Grovick was "unable or unwilling to undertake an untimely remedial program" it would not have sought to have it perform the remediation pursuant to a stipulation in August 2008. Finally, he states that before the DEC filed its verified answer in this proceeding, Grovick completed the remediation of contaminated soil as required by the stipulation.

Grovick, along with its reply papers, submitted documents in a "supplemental record." Although the court may direct a respondent to amend its answer, affidavit or transcript (*see* CPLR 7804[d]), a petitioner may not, on its own initiative, amend the administrative record by submitting a "supplemental record." Here, petitioner did not move to supplement the record. Furthermore, many of the e-mails submitted by Grovick are included in the certified administrative record. However, copies of e-mails which are dated after the March 20, 2009 determination could not possibly form any part of the administrative record relied upon by the DEC in making its determination. Since those e-mails are outside of the administrative record, they shall not be considered for the first time here (*see Featherstone v Franco*, 95 NY2d 550 [2000]; *Yarbough v Franco*, 95 NY2d 342 [2000]). The documents submitted by Grovick pertaining to the 2008 bill for expenses incurred by the DEC in 2007 is discussed below.

In 2003, the New York State Legislature enacted the Brownfield Cleanup Program Act, in order to encourage voluntary cleanup of hazardous waste sites, and the ultimate restoration of such sites to productive use, including restoration to the tax rolls. (Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Book 17 ½, ECL § 27-1401 [2007]). The BCP is administered by the DEC. It is undisputed that the real property owned by Grovick qualifies as a Brownfield.

A property owner who seeks to participate in the BCP is required to "submit a request to the department [DEC] on a form devised by the department," and shall provide

therein information "sufficient to allow the department to determine eligibility and the current, intended and reasonably anticipated future land use of the site..." (ECL § 27-1407[1]). The DEC "may reject such request for participation if the department determines that the public interest would not be served by granting such request. The department shall consider factors, including but not limited to" those listed in ECL § 27-1407(9)(a)-(f) (ECL § 27-1407[9]). The governing regulation set forth in 6 NYCRR § 375-3.4(d), states as follows: "(d) Public interest consideration. The Department may reject a request to participate in the brownfield cleanup program, even if the real property meets the definition of 'brownfield site,' upon a determination that the public interest would not be served by granting such request. In making this determination, the Department shall consider, but is not limited to, the criteria set forth in ECL 27-1407(9)."

Petitioner's assertion that the phrase "public interest" must be construed and applied narrowly, is rejected, as the Legislature expressly provided that the factors to be considered by the DEC are not limited to those listed in ECL § 27-1407(9)(a) through (f).

The DEC, in its decision of March 20, 2009, recognized that none of the "public interest" criteria listed in Section 27-2407(9) envisioned the scenario present here. To summarize briefly, Grovick had applied for and been accepted into the BCP; it had entered into a BCA to clean up and remediate the real property; the BCA was terminated some two years later for the failure to substantially perform under the terms of the agreement; Grovick then entered into a stipulation to perform the cleanup and remediate the same real

property; and nearly simultaneously applied again to the BCP in order to clean up and remediate the same real property. Under these circumstances, it was within the purview of ECL § 27-2407(9) for the DEC to consider Grovick's immediate past history in order to determine whether the public interest would be served by admitting it into the BCP.

DEC's determination that it was not in the public interest to grant the BCP application based upon Grovick's previous failure to comply with its BCA obligations is supported by the evidence in the record. Grovick was required to comply with the terms of the prior BCA. While Grovick needed to obtain certain approvals from the DEC, the DOH, or the DOB in order to implement the remediation and construction plans under the BCA, the decision to change the development plan from a commercial building to a five-story hotel, was made solely by Grovick. Grovick was well aware of the time frames for performance under the BCA. It was incumbent upon Grovick to develop the property in a timely manner, consistent with the applicable zoning resolution, while meeting the public safety and health concerns of the DEC and the DOH.

Grovick may not, in this proceeding, challenge the legal and factual conclusions for terminating the BCA set forth in the DEC's determination of April 18, 2008. To the extent that Grovick asserts that the termination of the BCA contract constitutes a breach of contract, Grovick acknowledges that it must pursue this claim in the Court of Claims, as this court lacks jurisdiction to determination such claims.

That portion of the DEC's determination which found that it was not in the public interest to accept Grovick into the BCP based upon a material inaccuracy in its application, is not supported by the record. The DEC stated in its determination that it discovered through a February 29, 2009 press release that the prior owner and operator of the former gas station at the site had entered into a settlement in an environmental enforcement case brought by the United States Attorney for the Eastern District. The DEC's statement that it was "inconceivable" that Grovick would be unaware of the pendency of this federal environmental enforcement action and, therefore, was negligent in its preparation of its application, is conclusory at best. Mr. Novick states that he first became aware of the federal enforcement action against the prior owner and operator when he was served with the DEC's answer and opposing papers. There is no evidence that the federal authorities or the prior owner and operator ever contacted Grovick, Mr. Novick, or their counsel, with respect to the federal enforcement action. There is simply no evidence in the record that Grovick was aware of the federal enforcement action at the time it filed the October 31, 2008 BCP application. Therefore, that portion of the DEC's determination which found that it was not in the public interest to accept Grovick into the BCP based upon its response to questions set forth in its application, is arbitrary and capricious, as it lacks any basis in the record.

With respect to the 2008 bill for the DEC's expenses incurred in 2007, Grovick for the first time in its reply papers, asserts that it paid the 2008 bill, and includes in its "supplemental record" a copy of a facsimile transmission it sent to its counsel, and a copy

of the face of check number 34060, dated January 2, 2009, which was drawn on the account of Airway Inn, H.J.N. Corporation, in the sum of $5,260.46, and made payable to the DEC. Petitioner, however, presents no evidence which establishes that this third-party check was endorsed by the DEC, and thereafter cashed, or that the funds were electronically transferred from the maker's bank account to the DEC.

Furthermore, Laura Zeppetelli, the DEC's Chief of Cost Recovery Section states in a surreply affidavit that the DEC's records show that on March 24, 2008, the DEC sent Grovick a bill for costs incurred in the 2007 calendar year, in the sum of $5,260.46; that a past due notice was sent to Grovick on July 31, 2008; that a third joint letter from the DEC and the Attorney General's Office was sent on October 23, 2008, demanding payment within 20 days of said letter; and that the DEC has no record of receiving payment for this debt. Said bill and letters are referenced in the administrative record. Ms. Zeppetelli further states that with respect to the January 2, 2009 check issued by Airway Inn, H.J.N. Corporation, her office has no record of receipt of this check, and that she made a search of the DEC's Fiscal Management Information System to determine if check number 34060 was processed for deposit by the DEC, and found no record of the DEC having processed said check.

In view of the foregoing, the DEC's determination that it was not in the public interest to admit into the BCP an applicant who failed to meet its obligations under a BCA, is neither arbitrary nor capricious, and has a reasonable basis in the record.

With respect to the October 16, 2008 stipulation agreement, said agreement neither precluded Grovick from re-applying to the BCP, nor required that the DEC accept said application. The DEC examined Grovick's performance under the stipulation and found that it was less than stellar, and expressed a lack of confidence in its ability to perform the remediation in a timely manner. Grovick's consultant states in his reply affidavit that the required Supplemental Investigation Report was submitted to the DEC on December 16, 2008, and rejected on December 29, 2008, and that it submitted a Supplemental Investigation Work Plan on January 28, 2009, which was approved on February 5, 2009. It is asserted that the extensive sampling of the off-site wells required by the DEC under the stipulation did not result in any new, relevant or critical information and further delayed the remediation of the site from September 2008 to May 2009.

Whether the sampling of the off-site wells yielded new, relevant of critical information is irrelevant, as such sampling was a required element of the stipulation's corrective action plan, and Grovick was aware of the agreement's 60-day time frame. Grovick's account of events that occurred in April and May 2009 are irrelevant here, as the DEC's determination at issue here is dated March 20, 2009.

The DEC's examination of Grovick's performance under the stipulation agreement was within the purview of ECL § 27-2407(9), and the court finds that the DEC's determination in this regard is neither arbitrary nor capricious, and is supported by the evidence in the record.

In view of the foregoing, petitioner's request for a judgment vacating the DEC's determination of March 20, 2009, and for further relief is denied, and the petition is dismissed.

Settle judgment.

J.S.C.