STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Articles 17 and 25 of the New York State Environmental Conservation Law and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

RULING

DEC FILE NOS.
R2-20030505-128
R2-20030505-129

- by -

CALL-A-HEAD PORTABLE TOILETS, INC.;

CALL-A-HEAD CORP.;

CHARLES W. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp.;

KENNETH HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp.;

CHARLES P. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp.; and

THE CITY OF NEW YORK, DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES;

Respondents.

PROCEEDINGS

This ruling addresses a motion to dismiss (motion) filed with the Office of Hearings and Mediation Services by the City of New York, Department of Citywide Administrative Services (DCAS) on November 12, 2014. Staff of the Department of Environmental Conservation (Department) filed an undated reply (staff reply) in opposition to the motion.

By amended complaint (complaint), dated May 8, 2012, Department staff alleges that respondents violated numerous provisions of the laws and regulations pertaining to tidal wetlands and the State Pollution Discharge Elimination System (SPDES). The vast majority of the nineteen causes of action set forth in the complaint arise from the operation of a portable toilet business by respondents other than DCAS. The eighteenth cause of action, however,

alleges that all respondents, inclusive of DCAS, are liable for violating a Department-issued permit (complaint ¶ 104). Accordingly, DCAS is charged under only one of the nineteen causes of action.

By its motion, DCAS asserts two bases for dismissal: (1) that the complaint fails to state a cause of action against DCAS, and (2) that the action is time-barred pursuant to the New York Civil Practice Law and Rules (CPLR). As discussed below, I conclude that the complaint fails to state a cause of action against DCAS. Accordingly, the motion to dismiss is granted on the first basis asserted by DCAS and I do not reach the issue of whether the action is time-barred.

DISCUSSION

On a motion to dismiss for failure to state a cause of action, the facts alleged in the complaint are accepted as true and the complaint is given liberal construction. The analysis turns on whether the facts alleged in the complaint state a cognizable claim (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo, 113 AD3d 587, 588-589 [2d Dept 2014]).

Here, Department staff alleges a single cause of action against DCAS. Specifically, the complaint states that "[b]y altering, or allowing the alteration of, Site 2 through the placement of fill, addition of a fence and the continued storage of dozens of portable toilets [DCAS has] violated special condition 10 of Permit No. 2-6308-00357/[0]0001 [permit]" (complaint ¶ 104). Staff identifies "Site 2" as Queens County Tax Block 15375, Lot 20 and describes it as a small (30' x 100') "vacant parcel of land" (id. ¶¶ 27-28). The complaint alleges that DCAS "conveyed title to Site 2 to respondent [Charles W.] Howard" in 2001 and that, sometime after that conveyance, "[r]espondents[1] altered the site by placing fill, adding a fence and storing dozens of portable toilets on Site 2" (id. ¶¶ 67-70).

As alleged in the complaint, special condition 10 of the permit required DCAS to "take all appropriate measures to ensure that for [Site 2 and certain other properties that are not the subject of this allegation] site alterations and/or development were prohibited" (complaint ¶ 64; see also motion, exhibit 1 [permit at 5]).

DCAS argues that it "fully complied with special condition 10 of the permit" by including a restrictive covenant in the deed under which it conveyed Site 2 to respondent Charles W. Howard in December, 2001 (motion at 2-3). DCAS further argues that it cannot be held liable "for alleged violations that occurred entirely *after* DCAS relinquished ownership and control of the property" and that were "committed by a third party" (motion at 3). Lastly, DCAS argues that it cannot be compelled to enforce the restrictive covenant because the enforcement of a covenant is a "discretionary decision" (id.).

[1] Although the complaint does not differentiate between individual respondents with respect to this allegation, it is clear that Department staff is not alleging that DCAS engaged in the alteration of the site. Indeed, there is no indication that DCAS was even aware of the alleged alterations at Site 2 until the Department contacted DCAS about the matter. Accordingly, as reflected in the complaint, the charge against DCAS is that it violated special condition 10 by "allowing the alteration" of Site 2 after it was conveyed to respondent Charles W. Howard (see complaint ¶¶ 63-71, 104).

In response, Department staff argues that DCAS is obligated under the permit to prohibit alteration or development of Site 2 and, as demonstrated by the allegations against the other respondents, the restrictive covenant did not satisfy that obligation (staff reply at 5-6). Staff also argues that, because DCAS elected to fulfill its obligations under special condition 10 by including a restrictive covenant in the deed, DCAS no longer has discretion with regard to whether it should pursue enforcement of the covenant (id. at 6-7). Lastly, staff argues that DCAS' "failure to live up to its obligations was not cured by the expiration of the permit" in 2009 (id. at 7).

Special condition 10 is vague and does not specify what constitutes taking "appropriate measures" to prohibit site alterations or development.[2] Arguably, taking no action may be "appropriate" if, for example, alteration and development of the site were already prohibited by law or regulation. DCAS, however, sought to comply with special condition 10 by including a restrictive covenant in the deed for the site. Among other things, the covenant provides that there is to be "[n]o alteration on any vacant tract of land . . . which includes land contour work, topographic modifications, removal of top soil, vegetation, excavating, filling, dumping, changes in existing drainage systems," and "[n]o construction of a new building or other structure on the lot being sold" (motion, exhibit 2 [deed at 5]). The restrictive covenant is clearly intended to satisfy the requirements of special condition 10.

Department staff does not object to the text of the restrictive covenant. Rather, staff objects to the failure of DCAS to pursue enforcement of the covenant or use some other means to prohibit site alterations (staff reply at 6-7).

Notably, the permit requires DCAS to place a "notice covenant" in the deeds of all the parcels (not just that for Site 2) that are subject to the permit (motion, exhibit 1, permit at 5 [special condition 8]). This notice covenant places future purchasers on notice that "[a]ll or part of [each parcel] may be part of a tidal wetland or tidal wetland adjacent area . . . regulated under New York State law" (id. attachment A). Given that the Department included a permit condition that requires the use of a covenant to provide notice of possible wetlands to future purchasers, it would not seem unreasonable for DCAS to conclude that the use of a covenant would be an "appropriate measure" to ensure that future site alterations are prohibited at Site 2.

Department staff suggests that DCAS should have retained title to Site 2 in order to prohibit site alterations (staff reply at 6-7). While retaining ownership of Site 2 would have left DCAS in control of the site, nothing in the permit precluded DCAS from selling Site 2. Indeed, as reflected in the permit under the "Description of Authorized Activity," the very purpose of DCAS seeking the permit was to obtain authorization to subdivide the land so that the City could then sell the individual parcels (motion, exhibit 1, permit at 1-2).

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[2] DCAS did not raise the issue of whether special condition 10 is unenforceable on vagueness grounds and I do not reach that question here. I note, however, that permit conditions are enforceable in the same manner as regulations (see ECL 71-1929[1]) and should be written to clearly define a permittee's obligations (see Matter of Seneca Meadows, Decision of the Commissioner, May 24, 2013, at 4 [concurring with ALJ ruling on permit conditions], Hearing Report, Sept. 6, 2012, at 55 [holding that "in the absence of a definition of 'high winds,' [the proposed permit condition] is too vague to enforce"]).

Department staff points out that permits issued by the Department sometimes include provisions for ongoing maintenance, monitoring or reclamation of a site (at 7). As an example, staff states that wetlands permits sometimes include planting and monitoring requirements that extend beyond the expiration of the permit (id.). Staff does not, however, cite to an enforcement matter where the owner of a property that was subject to such a permit condition was held liable for violations of the permit condition that were caused entirely by the actions of a subsequent owner of the land.

Department staff states that DCAS "allowed the parcel to become part of a commercial facility without even trying to enforce the deed restriction" (id. at 6). Although staff acknowledges that enforcement of a restrictive covenant is normally discretionary, staff argues that "the discretion is no longer unlimited" where the covenant is intended to satisfy a permit condition. Staff appears to be arguing that DCAS is obligated, in perpetuity, to commence litigation if the restrictive covenant is ever breached. I can find no support for this position in Department precedent.

Under the circumstances presented here, I decline to hold that the Department may require that DCAS undertake litigation to comply with special condition 10. There is no allegation that any site alteration or development had occurred at Site 2 at the time DCAS sold the subject parcel. Nor does staff allege that DCAS in any way aided or encouraged, or for that matter was even aware of, the alleged actions of the other respondents that form the bases of staff's complaint. DCAS included a restrictive covenant in the deed out to respondent Charles W. Howard and I hold that the covenant was an appropriate measure to ensure that no alterations or development would occur at Site 2.

Accepting, as I must, that all the allegations set forth in the compliant are true, I conclude that Department staff has failed to state a cause of action against DCAS. Accordingly, DCAS' motion to dismiss this matter as against DCAS is granted. Because I grant DCAS' motion to dismiss for failure to state a cause of action, I do not reach DCAS' argument that the enforcement action is time-barred.

CONCLUSION

I hereby grant respondent City of New York, Department of Citywide Administrative Services' motion to dismiss and direct the staff to amend the caption in this proceeding accordingly.

I will contact the remaining parties shortly after they have been served with this ruling to discuss the status of discovery and to schedule the hearing on this matter.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: June 9, 2015
Albany, New York