STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations of New York State Environmental Conservation Law Articles 24 and 71 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 663	**RULING ON PRE-HEARING MOTIONS**
	DEC Case No. R1-20070830-252
by:	
EDIVANE FRANCO,	**(June 18, 2008)**
(Suffolk County) Respondent.	

Summary

This ruling addresses two motions made by Staff of the Department of Environmental Conservation (Department Staff) and one motion by Respondent: 1) Department Staff's Motion to Strike or Clarify Affirmative Defenses and Dismiss Counterclaims; 2) Department Staff's Motion to Amend the Complaint; and 3) Respondent's Cross-Motion to Dismiss. In response to Department Staff's opposition to asserted counterclaims, Respondent withdrew its counterclaims.

The Motion to Amend is granted, as Respondent will suffer no prejudice by granting the motion. Department Staff's Motion to Strike affirmative defenses and Respondent's Cross-Motion to Dismiss are rendered moot, in view of the prospective Amended Complaint. The parties may renew these motions, as they deem appropriate, in answering the Amended Complaint or responding to the Answer.

Introduction/Proceedings

In April 2005, Department Staff issued freshwater wetlands permit number 1-4730-01202/00001, effective from April 8, 2005 through April 8, 2020, to Ubirajara Brasil Franco (husband of Respondent Edivane Franco) for real property located at 970 East Main Street, Riverhead, New York (the site). The permit

authorizes installation of a fence, pool and driveway; construction of a garage; and installation of a four-foot wide access path and a dock (4 feet by 50 feet).

This freshwater wetlands administrative enforcement proceeding was commenced by Department Staff by service of a Notice of Hearing and Complaint (dated October 3, 2007) upon Respondent Edivane Franco.

Department Staff's Complaint identifies Edivane Franco as the sole Respondent, and alleges Respondent committed seven violations of the Environmental Conservation Law (ECL) and regulations issued pursuant thereto, at the site: two counts of placing fill in a regulated freshwater wetland, in violation of ECL §24-0701 and 6 NYCRR 663.4(d)[Item 20]; two counts of placing fill in the adjacent area of a freshwater wetland, in violation of ECL §24-0701 and 6 NYCRR 663.4(d)[Item 20]; one count of causing the clearing of vegetation in the adjacent area of a freshwater wetland, in violation of ECL §24-0701 and 6 NYCRR 663.4(d)[Item 23]; one count of causing the clearing of vegetation in a regulated freshwater wetland, in violation of ECL §24-0701 and 6 NYCRR 663.4(d)[Item 20]; and one count of causing the failure to comply with a special condition of a freshwater wetland permit issued for the site, permit number 1-4730-01202/00001 (requiring filing of a Notice Covenant).

Respondent filed an Answer and Counterclaims dated February 1, 2008, denying the seven alleged violations and asserting nine affirmative defenses and four counterclaims.

Affirmative Defenses

Department Staff filed a Notice of Motion to Strike or Clarify Affirmative Defenses and Dismiss Counterclaims and supporting Affirmation, both dated March 14, 2008. In its Motion, Department Staff seeks a ruling striking the nine affirmative defenses and dismissing the four counterclaims. The nine affirmative defenses, Department Staff asserts, are improperly pleaded either because Respondent has failed to include the requisite factual and legal grounds to support the asserted affirmative defenses.

As Department Staff notes in its motion papers, a respondent bears the burden of proof regarding all asserted affirmative defenses. 6 NYCRR 622.11(b)(2). A respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each asserted defense. 6 NYCRR 622.4(c). In addition, Department Staff may move for clarification of affirmative defenses on the

grounds that the affirmative defenses pleaded in the answer are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which respondent's defense is based. 6 NYCRR 622.4(f).

Counterclaims

Respondent asserts four counterclaims, each of which identifies a violation of the U.S. Constitution: 1) violation of the Fourth Amendment proscription of takings of private property for public use without just cause; 2) restrictions upon use of Respondent's property in violation of the Fifth and Fourteenth Amendments; 3) selective enforcement of regulations in violation of the Fourteenth Amendment and violation of equal protection of the Fifth and Fourteenth Amendments; and 4) imposition of excessive fines, in violation of the Eighth Amendment.

Department Staff correctly states that the Environmental Conservation Law and the Department's administrative enforcement hearing regulations, 6 NYCRR Part 622, make no provision for the assertion of a counterclaim in the administrative forum. 6 NYCRR Part 622; *see also, Matter of David E. Hanson,* Hearing Report adopted by Commissioner's Order, January 3, 2000. Instead, these claims must be pursued in a court of competent jurisdiction (or may be re-pled as affirmative defenses or cross-motions). *Id.*

In response to Department Staff's motion to strike counterclaims, Respondent withdrew the counterclaims and instead, filed a Notice of Cross-Motion to Dismiss (dated April 21, 2008), essentially re-pleading the four counterclaims as cross-motions.

May 2, 2008 Telephone Conference

By letter dated April 17, 2008, Department Staff requested a telephone conference to discuss scheduling matters, including Department Staff's response to a February 12, 2008 letter from Respondent Edivane Franco and her husband, Ubirajara Brasil Franco, denying site access to Department Staff.

A telephone conference was convened on May 2, 2008 to address scheduling matters. During the telephone conference, a brief discussion occurred of Respondent's February 12, 2008 letter and Department Staff's enforcement prerogatives in response. In addition, a schedule was agreed upon for Department Staff to respond to Respondent's Cross-motion.

During the telephone conference, Department Staff requested permission to file an Amended Complaint, proposing to add a new party, Mr. Ubirajara Franco (spouse of Respondent Ms. Edivane

Franco, and joint owner of the site). A schedule was agreed upon for filing of Department Staff's motion to amend and Respondent's response. These additional filings were timely received by May 21, 2008: 1) Department Staff counsel's affirmation of Kari E. Wilkinson, Esq., in opposition to the cross-motion to dismiss (dated May 12, 2008); 2) Department Staff's motion to amend or supplement pleadings (dated May 6, 2008), with proposed Amended Complaint (dated May 12, 2008); 3) and Respondent's affirmation of Michael J. Kaper, Esq., in opposition to the motion to amend or supplement pleadings.

On May 15, 2008, Department Staff sent a Notice of Intent to Revoke Permit to Ubirajara Brasil Franco. Department Staff provided a copy of the Notice of Intent to Respondent's counsel and me by letter dated May 19, 2008.

Motion to Amend Complaint

Department Staff moves, pursuant to 6 NYCRR Part 622.5, for leave to supplement or amend its complaint to include Ubirajara Brasil Franco as an additional party. 6 NYCRR Part 622.5(b) provides that, "[c]onsistent with the [New York Civil Practice Law and Rules ["CPLR"], a party may amend its pleadings at any time prior to the final decision of the commissioner or by permission of the ALJ or commissioner absent prejudice to the ability of the other party to respond."

CPLR 3025(b) provides: "Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just, including the granting of costs and continuances."

CPLR 1001(a) provides: "Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

Department Staff asserts that its review of real property tax records of the Suffolk County Real Property Tax Service Agency and the Office of the Suffolk County Treasurer (2006 CD-ROM) shows that in 2000, Ubirajara Franco and Edivane Franco were grantees of the property located at 970 East Main Street in Riverhead, New York, the property that is the subject of this enforcement action and for which site the freshwater wetlands permit, above referenced, has been issued. (The permit was

issued only to Ubirajara Franco). On the basis of these real property tax records, Department Staff contends that Ubirajara Franco is a necessary party who might be inequitably affected by a judgment in this administrative enforcement action, and consequently he should be a respondent in this action.

Respondent opposes Department Staff's motion to amend, noting that the Department brought this proceeding only against Edivane Franco, even though the Department Staff had previously issued a freshwater wetlands permit for the site to Ubirajara Brasil Franco. Respondent contends that in a situation where the amending party has long been aware of the facts upon which the motion was based without proffering a reasonable excuse for the delay, that a motion to amend should not be granted, citing *Sidor v Zuhoski.*, 257 A.D.2d 564, 683 N.Y.S.2d 590 (2nd Dept. 1999). Respondent cites two lower court cases in support of the contention that because Edivane Franco and Ubirajara Franco are married and both own the site, unity of interest exists between them and consequently joinder is not necessary. In sum, Respondent opposes the motion to amend and seeks denial of the motion.

Ruling: In New York practice, leave to amend is to be "freely given, upon such terms as may be just." *See,* CPLR 3025(b). Similarly, this is the case in the Department's administrative practice. *See,* 6 NYCRR 622.5(b). In commenting upon CPLR 3025(b), Professor David Siegel states that "[the] policy is to permit amendment, for almost any purpose, as long as the adverse party cannot claim prejudice. This policy is spelled out in the instruction that 'leave shall be freely given'." McKinney's Cons Laws of NY, Book 7B, CPLR § 3025, Practice Commentary C3025:4.

In view of these statutory and regulatory provisions, I find Respondent's objections to the motion to be unconvincing. While the doctrine of "unity of interest" may apply to the Francos as wife and husband, Ubirajara Franco alone apparently applied for, and received, the freshwater wetlands permit issued for the site. Additionally, the administrative forum is intended to be a less formal forum than the courts with more relaxed procedures. In this instance, Respondent Edivane Franco will suffer no prejudice if the motion is granted. Although several months have elapsed since the initial Complaint was served, a Statement of Readiness has not yet been issued (*see,* 6 NYCRR 622.9), nor has the adjudicatory hearing been scheduled. Respondents will be given the opportunity to file an amended answer and engage in additional discovery (if any), should Respondents wish to do so.

Lastly, I am unpersuaded that delay occasioned by granting the proposed amendment causes any substantial prejudice to Respondent Edivane Franco. Normally, in a Departmental enforcement proceeding, it is Department staff, not the Respondent, who is aggrieved by delay. Department Staff brings the action and bears the burden of proof. Respondent has not identified any reason why different circumstances exist in this case. While I recognize the burden of the additional expense in responding to the amended pleading, when balanced with the public interest in having a full review of all allegations, I find this expense to be *de minimis*. Under these circumstances, in view of the provisions of 6 NYCRR Part 622 and the CPLR that strongly favor granting leave to amend, I find any prejudice to Respondents arising from answering the proposed Amended Complaint to be *de minimis.*

Department Staff's motion to amend is hereby granted. Department Staff may serve the Amended Complaint upon Respondents.

Department Staff's Motion to strike affirmative defenses and Respondent's Cross-Motion to Dismiss are rendered moot, in view of the prospective Amended Complaint. The parties may renew these motions, as they deem appropriate, in answering the Amended Complaint or responding to the Answer.

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Kevin J. Casutto
Administrative Law Judge

Albany, New York
June 18, 2008

To: Franco Service List