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),	**RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE**
- by -	DEC File No. R7-20100726-52
ORIGINAL ITALIAN PIZZA, LLC,	December 15, 2010
Respondent.	

Appearances of Counsel:

-- Alison H. Crocker, 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 TO CLARIFY OR DISMISS AFFIRMATIVE DEFENSES

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) moves to clarify or dismiss affirmative defenses pleaded in the answer of respondent Original Italian Pizza, LLC. For the reasons that follow, the motion is granted to the extent of dismissing respondent's third and fifth affirmative defenses, and otherwise denied.

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 alleges 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 alleges 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 that issued from the restaurant's cooking vents and traveled 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 moves to clarify or dismiss all five affirmative defenses. Respondent filed a response dated October 29, 2010, opposing the motion. The matter was assigned to the undersigned Chief Administrative Law Judge (ALJ) as presiding ALJ.

DISCUSSION

The standards applicable to motions to clarify or dismiss affirmative defenses are discussed in detail in a recent ruling (see Matter of Truisi, Ruling of the Chief ALJ on Motion To Strike or Clarify Affirmative Defenses, April 1, 2010). As stated in that ruling, motions to clarify affirmative defenses under 6 NYCRR 622.4(f) are addressed to the sufficiency of the notice provided by the pleading (see id. at 4, 6-7). They are not an opportunity for staff to obtain, in effect, a bill of particulars, which are prohibited by Part 622 (see id. at 7 n 2; 6 NYCRR 622.7[b][3]). If an affirmative defense provides staff with sufficient notice of the nature and basis of the defense, staff must use available discovery devices to obtain any further detail concerning the defense (see id. at 6-7; see also Matter of Bath Petroleum Storage, Inc., ALJ Ruling on Motion to Clarify Affirmative Defenses, Jan. 27, 2005, at 10, 12).

Motions to dismiss affirmative defenses, on the other hand, are governed by the standards applicable to motions to dismiss defenses under CPLR 3211(b) (see Matter of Truisi, at 10-11). Motions to dismiss affirmative defenses may challenge the pleading facially -- that is, on the ground that it fails to state a defense -- or may seek to establish, with supporting evidentiary material, that a defense lacks merit as a matter of law (see id. at 10).

The threshold inquiry on a motion to clarify or dismiss affirmative defenses is whether the defense pleaded is, in fact, a true affirmative defense (see id. at 4-5). Where the defense is actually a denial pleaded as a defense, a motion to clarify or dismiss affirmative defenses does not lie (see id. at 5, 11).

I. Constitutional Issues

Department staff objects to respondent's third, fourth and fifth affirmative defenses in part on the ground that the defenses raise constitutional issues that are claimed to be outside the jurisdiction of an administrative tribunal. Department staff apparently views the alleged bar to review of constitutional issues as a general rule, which it is not.

Although the rule is subject to some exceptions, under the principle of exhaustion of administrative remedies, the general rule is that respondents are required to raise constitutional issues and objections at the agency level (see Matter of Schulz v State, 86 NY2d 225, 232, cert denied 516 US 944 [1995]; Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375-376 [1975] [YMCA]; Matter of Leogrande v State Liq. Auth. of State of New York, 19 NY2d 418, 424 [1967]; Matter of Vasquez v Senkowski, 186 AD2d 847, 848 [3d Dept 1992] [referring to this principle as the general rule]; Matter of Celestial Food Corp. v New York State Liq. Auth., 99 AD2d 25, 27, n [2d Dept 1984]; see also Matter of Bartell, ALJ Ruling, June 11, 2009, at 13; Matter of McCulley, Chief ALJ Ruling on Motion for Order without Hearing, Sept. 7, 2007, at 5-6). This rule allows the agency to consider and avoid the alleged constitutional error and to provide a remedy, if available (see YMCA, 37 NY2d at 375; People ex rel. McDaniel v Travis, 288 AD2d 940, 941 [4th Dept 2001], lv denied 97 NY2d

613 [2002]; Matter of Bates v Coughlin, 145 AD2d 854 [3d Dept 1988]). Thus, constitutional challenges to an agency's interpretation of a statute (see YMCA, supra), its application of a statute (see Matter of Roberts v Coughlin, 165 AD2d 964, 965-966 [3d Dept 1990]),[1] or constitutional challenges to an agency's regulations (see Matter of Murtaugh v New York State Dept. of Envtl. Conservation, 42 AD3d 986, 988 [4th Dept 2007]; Matter of Alston v New York City Tr. Auth., 186 AD2d 649, 650 [2d Dept 1992]) must be raised during administrative proceedings to allow the agency to consider the validity of those challenges and promptly provide a remedy, if available.

In support of its asserted jurisdictional bar, Department staff cites DiMaggio v Brown (19 NY2d 283, 291-292 [1969]). DiMaggio v Brown, however, does not hold that administrative tribunals are generally barred from considering constitutional claims. Rather, DiMaggio held that discriminatory enforcement claims are not properly reviewed at the agency level (see id.). As explained by the Court of Appeals, under New York law, a claim of discriminatory enforcement is not an affirmative defense to an administrative proceeding (see Matter of 303 West 42nd St. Corp. v Klein, 46 NY2d 686, 693 & n 5 [1979] [citing DiMaggio v Brown]; see also McCulley, at 8). Thus, DiMaggio merely applied a recognized exception to the general rule. DiMaggio should not be read broadly as stating a general rule that administrative tribunals lack jurisdiction to consider constitutional claims.

In this case, in its fourth affirmative defense, respondent claims that its constitutional right to due process has been violated because the complaint fails to provide sufficient notice of the charges against respondent (see Answer, at 4). This defense is, in essence, an as-applied due process challenge to the application of statutes and regulations governing the sufficiency of administrative complaints (see State Administrative Procedure Act [SAPA] § 301[2]; 6 NYCRR 622.3[a][1]). Constitutional challenges to an agency's application of governing statutes and its regulations are within the agency's jurisdiction to review (see Matter of Zelinsky v Tax Appeals Trib., 1 NY3d 85, 89 [2003] [confirming agency

[1] Although as-applied challenges to a statute are reviewable at the agency level, facial challenges to a statute are not (see Loretto v Teleprompter Manhattan CATV Corp., 53 NY2d 124, 138, 139 [1981]). The bar on reviewability of facial challenges to statutes is an exception to the general rule.

rejection of as-applied challenge to agency regulation under Commerce and Due Process Clauses], cert denied 541 US 1009 [2004]; Matter of New York State Empl. Relations Bd. v Christ the King Regional High School, 90 NY2d 244 [1997] [as-applied challenge to statute under Free Exercise and Establishment Clauses]; Murtaugh, 42 AD3d at 988 [constitutional challenge to ECL 71-0301 and 6 NYCRR part 620]). Accordingly, the fourth defense is not subject to dismissal on the ground that it raises a constitutional issue not reviewable in administrative adjudicatory proceeding.

In its third and fifth affirmative defenses, respondent pleads that the regulation at issue -- 6 NYCRR 211.2 -- is unconstitutionally vague and, therefore, void because the regulation is insufficiently definite to provide a person of ordinary intelligence with notice of the conduct that is forbidden by the regulation (see Answer, at 3-4). In its response to staff's motion, respondent also asserts that the regulation fails to provide government officials with clear standards for enforcement. Again, these defenses raise due process challenges to an agency regulation that fall within the agency's jurisdiction to review (see Murtaugh, 42 AD3d at 988; Alston, 186 AD2d at 650 [vagueness challenge to agency regulation must be raised before agency]).[2] Accordingly, the third and fifth defenses are also not subject to dismissal on the ground that they raise constitutional issues unreviewable in this proceeding.

II. Third and Fifth Affirmative Defenses -- Void for Vagueness

Although the third and fifth affirmative defenses are not subject to dismissal on the ground that they raise unreviewable constitutional issues, they nonetheless should be dismissed on the merits. The vagueness doctrine, although commonly applied to criminal statutes, is also applicable to administrative regulations (see Quintard Assocs., Ltd. v New York State Liq. Auth., 57 AD2d 462, 464 [4th Dept], lv denied 42

[2] Department staff also cites Matter of Alfredo (Order of the Commissioner, Aug. 21, 1996) in support of its general proposition that administrative agencies lack jurisdiction to consider constitutional issues. In the hearing report in Alfredo, the ALJ, citing DiMaggio, held that a constitutional challenge to the Department's regulations at 6 NYCRR part 620 could not be entertained at the agency level. I conclude that the ALJ's holding in Alfredo is a misinterpretation of DiMaggio, and against the weight of authority, including recent authority on point (see Murtaugh, 42 AD3d at 988). Accordingly, I decline to follow the ALJ's holding in Alfredo.

NY2d 805, appeal dismissed 42 NY2d 973 [1977]). In addressing a vagueness challenge, a two-part test is employed (see People v Stuart, 100 NY2d 412, 420 [2003]). First, "[t]o ensure that no person is punished for conduct not reasonably understood to be prohibited," it must be determined whether the regulation in question is "`sufficiently definite "to give a person of ordinary intelligence fair notice that [the] contemplated conduct is forbidden"'" by the regulation (id. [quoting People v Nelson, 69 NY2d 302, 307 (1987)]). Second, it must be determined whether "the enactment provides officials with clear standards for enforcement" (id.).

Respondent, as the party challenging the constitutionality of section 211.2, has failed to carry its heavy burden of overcoming the presumption of the regulation's validity (see id. at 421). Section 211.2 provides 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 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). Those courts that have addressed whether section 211.2 and other similar regulations are void for vagueness have rejected the claim (see Alberti v Eastman Kodak Co., 204 AD2d 1022, 1022-1023 [4th Dept 1994] [rejecting argument that section 211.2 is too vague to provide the basis for a cause of action pursuant to General Municipal Law § 205-3]; Matter of Delford Indus., Inc. v New York State Dept. of Envtl. Conservation, 126 Misc 2d 355 [Sup Ct, Orange County

1984] [rejecting void-for-vagueness challenge to section 211.2]; see also New Amber Auto Serv., Inc. v New York City Envtl. Control Bd., 163 Misc 2d 113 [Sup Ct, New York County 1994] [rejecting challenge to Administrative Code of City of NY § 24-101]).

I agree that section 211.2 is not void for vagueness. The regulation, although necessarily written in broad terms, is nonetheless sufficiently precise to provide notice to a person of ordinary intelligence of the conduct forbidden by the regulation (see Stuart, 100 NY2d at 420). The phrase "emissions of air contaminants to the outside atmosphere" is readily understandable when measured by common understanding and practice (see People v Shack, 86 NY2d 529, 538 [1995]). Moreover, although "air contaminants" is separately defined in the regulation (see 6 NYCRR 200.1[d]), section 211.2 expressly provides a non-exhaustive list of examples of air contaminants -- "any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emissions, either alone or in combination with others" -- and thereby offers further clarification of the meaning of the term. The regulations also provide a further definition of "outside atmosphere" -- "[t]he atmosphere outside of and surrounding all buildings, structures, stacks or exterior ducts" (6 NYCRR 200.1[ax]).

As applied to the conduct alleged by staff to have occurred in this case, section 211.2 is in no way vague. Staff alleges that respondent was responsible for the emission of large amounts of visible opaque smoke and grease, and strong odors from its cooking vents and onto the neighboring properties. Staff also alleges that the smoke and odors resulted in numerous complaints over a two year period. A person of ordinary intelligence would readily understand that this conduct, if proven, falls squarely within the prohibitions against smoke and odors contained in section 211.2.

Section 211.2 also provides clear standards for enforcement (see Stuart, 100 NY2d at 420). The regulation require emissions of air contaminants "of such quantity, characteristic or duration which are injurious to human, plant or animal life." This provides an objective standard -- injury to human, plant or animal life -- that is amenable to proof. In the alternative, the regulation prohibits emissions "which unreasonably interfere with the comfortable enjoyment of life or property." Contrary to respondent's assertion, the courts have

held that a "reasonableness" standard is an objective standard easily understood, the use of which does not render a regulation or statute vague (see id. at 427-428; People v Bakolas, 59 NY2d 51, 53-54 [1983]). And, just as the "useful enjoyment of property" phrase provides an objective standard (see Clements v Village of Morristown, 298 AD2d 777 [3d Dept 2002]), so does the phrase "comfortable enjoyment of life or property" contained in section 211.2. Thus, section 211.2 provides objective standards against which respondent's alleged conduct -- the emission of thick, opaque smoke and odors resulting in numerous complaints from neighbors over an extended period of time -- must be measured (see Matter of Mohawk Valley Organics LLC v New York State Dept. of Envtl. Conservation, 13 AD3d 938, 939-940 [3d Dept 2004], lv denied 5 NY3d 704 [2005] [confirming Commissioner order holding that facility created odors that were a nuisance to the surrounding area in violation of section 211.2]).

In support of its argument that section 211.2 is void for vagueness, respondent cites Bakery Salvage Corp. v City of Buffalo (175 AD2d 608 [4th Dept 1991]). In Bakery, the court struck the City of Buffalo's odor ordinance on the ground that it was void for vagueness. In contrast to section 211.2, however, the ordinance at issue in Bakery lacked an objective standard against which to measure the prohibited conduct (see id. at 610). Here, as noted above, the phrases "injurious to human, plant, or animal life" and "unreasonabl[e] interfer[ence] with the comfortable enjoyment of life or property" contained in section 211.2 provide objective standards against which the proscribed conduct must be measured. Thus, section 211.2 does not suffer from the infirmity that afflicted the odor ordinance involved in Bakery.

In sum, as applied to the conduct alleged in this case, section 211.2 provides sufficient notice of the conduct prescribed and objective standards against which the conduct must be measured. Thus, section 211.2 is not void for vagueness.[3] Accordingly, respondent's third and fifth affirmative defenses should be dismissed on the ground that they lack merit as a matter of law.

[3] Having concluded that respondent's as-applied challenge to the regulation fails as a matter of law, any facial challenge to the regulation, to the extent respondent raises a facial challenge, must necessarily fail as well (see Stuart, 100 NY2d at 421-423, 429).

III. First, Second and Fourth Affirmative Defenses -- Failure to State a Cause of Action

In its first defense, respondent pleads that the complaint "fails to state a cause of action against Respondents [sic] for which relief can be granted" (Answer [10-8-10], at 2). In its second defense, respondent states that the complaint "fails to set forth sufficient factual bases and does not comply with the specificity requirements of the laws of the State of New York applicable to pleadings, where made and required, and as such fails to state a cause of action against the Respondents [sic] herein" (id. at 3). In its fourth defense, respondent alleges that Department staff's actions "have denied and continue to deny Respondents [sic] their constitutional right to due process by failing to provide sufficient notice regarding the charges set forth in the Complaint and therefore the Complaint must be dismissed" (id. at 4).

The first, second, and fourth defenses are all variations on the assertion that the complaint fails to state a claim (see Burlew v American Mut. Ins. Co., 99 AD2d 11, 15 [4th Dept] [test on motion to dismiss for failure to state claim is whether pleading provides notice of what is intended to be proved and the material elements of the cause of action], affd on other grounds 63 NY2d 412 [1984]; Foley v D'Agostino, 21 AD2d 60, 62-63 [1st Dept 1964] [same]). As has previously been held, the failure to state a claim, however, is not properly pleaded as an affirmative defense (see Matter of Truisi, at 7; Matter of Gramercy Wrecking and Envtl. Constrs., Inc., ALJ Ruling, Jan. 14, 2008, at 3-4). Instead, it is more properly a ground for a motion to dismiss the complaint (see id. [citing Riland v Frederick S. Todman & Co., 56 AD2d 350, 352 (1st Dept 1977)]). Department staff may safely ignore these defenses unless and until respondent moves to dismiss the complaint on this basis (see Matter of Truisi, at 12). Accordingly, the motion, insofar as it seeks to clarify or dismiss the first, second, and fourth defenses, should be denied (see id.).

RULING

The motion by Department staff, insofar as it seeks dismissal of the third and fifth affirmative defenses pleaded in the October 29, 2010, answer by respondent Original Italian Pizza, LLC, is granted and the third and fifth affirmative defenses are dismissed on the ground that the defenses lack merit as a matter of law. The motion is otherwise denied.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: December 15, 2010
Albany, New York