

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the Alleged Violations of Articles 15 and 25
of the Environmental Conservation Law
and Parts 608 and 661 of Title 6 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York

-by-

MARY AND ALAN RISI,

Respondents.

DEC File No. R2-0303-98-02

RULING OF THE ASSISTANT COMMISSIONER
ON MOTION FOR RECONSIDERATION

April 5, 2005

RULING OF THE ASSISTANT COMMISSIONER
ON MOTION FOR RECONSIDERATION¹

By motion dated February 25, 2005, Mary Risi and Alan Risi ("respondents") seek reconsideration of the order signed on October 29, 2004 ("Order") by then Commissioner Erin M. Crotty of the New York State Department of Environmental Conservation ("Department").² For the reasons discussed in this ruling, the motion for reconsideration is denied.

Background

Pursuant to part 622 of title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York ("6 NYCRR"), an administrative enforcement hearing was convened to consider allegations by Department staff against respondents who reside at 154-43 Riverside Drive, Beechhurst, New York (the "property"). Department staff alleged that respondents failed to comply with a 1996 permit that the Department had issued for the construction of a revetment (which is a type of retaining wall designed to reduce shoreline erosion) at the property. Respondents were alleged to have built the revetment in a different location than was allowed by the 1996 permit, and to have extended the revetment further out into the tidal wetland than was otherwise permitted. In addition, Department staff alleged that respondents built additional structures in the adjacent area of the tidal wetland without the required tidal wetlands permit, and failed to maintain erosion controls during construction which resulted in the release of sediment into the East River.

Following a hearing conducted in February 2004, the Commissioner issued the Order finding respondents in violation of

¹By memorandum dated March 30, 2005, the Acting Commissioner of the New York State Department of Environmental Conservation delegated the authority to make this decision to the Assistant Commissioner for Hearings and Mediation Services.

²Respondents' motion states that on October 29, 2004, hearing officer "Helen Gallagher" issued a decision in this matter. It is presumed that the reference to "Helen Gallagher" is meant to be Helene Goldberger who was the Administrative Law Judge assigned to this matter and whose hearing report was attached to the Commissioner's Order.

sections 15-0505 and 25-0401 of the Environmental Conservation Law ("ECL") and 6 NYCRR parts 608 and 661 with respect to the construction of the revetment and other activities that respondents undertook on the property. The Order imposed a civil penalty in the amount of one hundred fifty thousand dollars (\$150,000) on respondents. Of this civil penalty, the Order provided that one hundred twenty thousand dollars (\$120,000) would be suspended, contingent upon respondents' removal of unpermitted fill that was placed in the regulated tidal wetland, its adjacent area and navigable waters, removal of unpermitted structures, restoration of the beach at the residence to its pre-fill size, and modification and relocation of the existing revetment so as to be in compliance with the terms and conditions of the 1996 permit.

Respondents' Motion for Reconsideration

In their motion for reconsideration, respondents argue that the Order would render their residence "unlivable" and the property "valueless," depriving them of their equity. Attached to the motion is a report which respondents maintain demonstrates "a clear and present danger" that the property would fall into the East River if the revetment were removed.

The report, prepared by Aaron Cheung, P.E., P.C. of Graceland Design-Build Associates, presents Mr. Cheung's findings based upon an onsite survey and inspection of the property that he conducted on December 14, 2004. Attached to the report are a diagram of the property and surrounding area, and photographs of various physical features along the front, side and rear of respondents' residence. Mr. Cheung concludes that the moving of any fill or the relocation of the revetment "will cause extreme [h]ardship and the unnecessary destruction of [respondents'] home. . . ."

By letter dated March 22, 2005, respondents request that consideration be given to a letter report dated March 21, 2005 by James J. Antonelli, P.E., AICP, of Sidney B. Bowne & Son, LLP. The letter report presents Mr. Antonelli's findings based on a March 19, 2005 inspection of the property "regarding slope stability and related environmental matters." Mr. Antonelli concludes that the removal of any portion of the property's sea wall, which consists of large boulders and extends the width of the property alongside the water, "would cause the immediate destruction of [respondents'] rear yard, and would likely cause further erosion closer to their home." He also comments that such removal would disturb the shoreline and would create an

"'eddy' effect" on areas east of respondents' property.³

Department Staff Response to the Motion for Reconsideration

Following receipt of respondents' motion for reconsideration, Chief Administrative Law Judge ("CALJ") James T. McClymonds, by letter dated March 14, 2005, advised the parties that, pursuant to 6 NYCRR 622.6(c)(3), Department staff was entitled to file a response to respondents' motion. The CALJ further advised that any response to the motion must be in writing and postmarked no later than March 21, 2005. No other submissions were authorized by the CALJ.

By letter dated March 18, 2005, Department staff oppose respondents' motion for reconsideration as "untimely and unfounded." Department staff state that, although no explicit statutory or regulatory deadline exists for the submission of a request for reconsideration, respondents' motion should be considered untimely. Department staff argue that the five-day time period for the filing of an expedited appeal should apply (see 6 NYCRR 622.6[e]). Furthermore, Department staff indicate that the motion for reconsideration was filed long after respondents, pursuant to the Order, were obligated to pay a civil penalty and, pursuant to paragraph IV of the Order, submit a property restoration plan to the Department.⁴

Department staff also argue that respondents are not seeking reconsideration based on the hearing record, but are seeking to introduce new information following the issuance of the Order.

Respondents' Reply to Department Staff's Response

By letter dated March 25, 2005, respondents replied to the response of Department staff. As the CALJ did not authorize any submissions other than a response to the motion by Department staff, respondents' reply may properly be excluded. However, I

³Although respondents were not authorized to submit any additional papers (cf. 6 NYCRR 622.6[c][3] [parties allowed an opportunity to respond to a motion, but no further responsive pleadings allowed without permission]), I have exercised my discretion to receive the letter report of Mr. Antonelli.

⁴Department staff also note that respondents have filed a petition pursuant to article 78 of the Civil Practice Law and Rules ("CPLR") challenging the Order.

have exercised my discretion and have considered respondents' reply for purposes of this ruling.

With their reply, respondents submit seven photographs which they state "appear to show the flanking coming up from the property immediately to the West toward attaching the South East in the direction of the 'Court'." Respondents argue that their residence is being undermined, and that they need to be able to extend their rip-rap wall westward to "stabilize the property containing the gullying to the West of their home. . . ."

Respondents in their reply reiterate that "a clear and present danger" to their residence exists, and that the Department "should allow the stabilizer of the property upon such terms and conditions that would be adequate to the re-stabilization and additionally to correct and control the problems that appear to be afflicting this property." Although respondents state that annexed to the reply is a letter from Alan Risi, no such letter was annexed.

Discussion

A Commissioner's order issued pursuant to 6 NYCRR 622.18, such as the Order served on respondents in this proceeding, represents a final action of the agency. Following its issuance, no express authority exists in 6 NYCRR part 622 or the ECL for the Department to reconsider the order or to entertain other post-motion practice. Although part 622 authorizes the reopening of the hearing record, this only relates to the period prior to the issuance of a final decision and for the purpose of considering "significant new evidence" (see 6 NYCRR 622.18[d]).

The Department has, however, recognized its inherent authority to reopen a hearing or otherwise reconsider a final decision (see, e.g., Matter of Mohawk Valley Organics, LLC, Commissioner's Ruling on Motion to Suspend Order and Reopen the Hearing Record, Sept. 8, 2003). The five grounds for vacating a civil judgment in CPLR 5015 ("Relief from judgment or order") have been applied to the consideration of motions for reconsideration in Department's permit application hearings under 6 NYCRR part 624, and "are similarly applicable to Part 622 proceedings" (id. at 5).

The five standards set forth in CPLR 5015, and which govern the Department's consideration of any motion for reconsideration, include: excusable default; newly-discovered evidence which, if introduced at trial, would probably have

produced a different result and which could not have been discovered in time to move for a new trial; fraud, misrepresentation, or other misconduct of an adverse party; lack of jurisdiction; or reversal, modification or vacatur of a prior judgment or order upon which the judgment or order is based. CPLR 5015(a)(1)-(5). In order for the Department to grant a motion for reconsideration, a showing must be made that one or more of these standards apply. Respondents have made no such showing.

In their motion and in their reply to Department staff's response, respondents raise arguments and offer information that were or could have been presented during the hearing conducted before ALJ Goldberger. Respondents had a full opportunity to offer evidence on their behalf. The following witnesses were presented in support of respondents' case: Henry Bokuniewicz, Professor of Oceanography, Marine Sciences Research Center, SUNY at Stony Brook; Michael Niebauer; Michael P. Bontje, President, B. Laing Associates; and respondent Alan Risi. To the extent that the letter reports of Mr. Cheung and Mr. Antonelli raise any new arguments that were not presented by respondents' witnesses during the hearing, respondents offer no explanation as to why such arguments were not raised at the hearing or why similar property inspection reports could not have been prepared at that time.

Furthermore, respondents make no showing that the information upon which Mr. Cheung and Mr. Antonelli based their reports in any way constitutes "newly discovered evidence" or that it was not otherwise available by the exercise of due diligence at the time of the hearing (see Oakdale Contracting Co v City of New York, 262 AD 494 [1st Dept], rearg denied, 263 AD 808 [1941]). For example, the statements in the motion papers on "build-out" of properties in the vicinity of respondents' residence and the information on the depths of New York City sewers under the street in front of respondents' residence is not new information. Similarly, no showing is made that the photographs of physical features in and around respondents' property similar to those that Mr. Cheung included in his report or the photographs that are attached to respondents' reply to show "flanking coming up from the property immediately to the West" could not have been presented during the hearing.

Department staff argue that respondents' motion, which was filed almost five months after the issuance of the Order and three months after respondents were to submit the payable penalty to the Department, was untimely. Respondents have provided no explanation in their papers to justify their delay. However,

because respondents have not made a showing that would support their motion for reconsideration under the standards of CPLR 5015, I need not reach whether respondents' motion was timely.

The arguments and information in respondents' motion for reconsideration do not support reopening the hearing record or otherwise reconsidering the Order. Accordingly, respondents' motion for reconsideration is denied in its entirety.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Louis A. Alexander
Assistant Commissioner

Albany, New York
Dated: April 5, 2005

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