STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of the New York State Environmental Conservation Law Articles 25 and 34 and Parts 505 and 661 of Title 6 of the New York Compilation of Codes, Rules and Regulations by

RULINGS OF THE ADMINISTRATIVE LAW JUDGE ON MOTIONS TO DISMISS

DEC File No. R2-2007830-339

SKYLINE POINT HOMEOWNERS ASSOCIATION, INC., CARV CONSTRUCTION CORP. OF N.Y., RUEBEN MARABUTO, also known as RUBEN MARABUTO, individually and as chief executive officer of Carv Construction Corp. of N.Y., NEW YORK CITY DEPARTMENT OF BUILDINGS, SPRING RIDGE DEVELOPMENT CORP., LAWRENCE BRESNICK, individually and as chief executive officer of Spring Ridge Development Corp., and as president of Carv Construction Corp. of N.Y., and the following individual homeowners as necessary parties: GLORIA KECK, NATALYA DUBRANOVSKAYA, THERESA TORRES, INESSA SABLE, ABE STUCK, SVETLANA STUCK, ANATOLY BRUSHTYN, ARINA BRUSHTYN, ALEXANDR BOTANOV, MALVINA BOTANOV, VALENTINA FELDSHEROV, FELICIA ZELCER, and HESHAM HUSSEIN,

Respondents.

(Richmond County)

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Background

On or about January 22, 2009, Department of Environmental Conservation (DEC or Department) staff issued a notice of hearing and complaint to the respondents named in this proceeding which include Spring Ridge Development Corp., the contractor, developer, and former owner of the 27-unit residential development at the northeastern shore of Staten Island called Waterview Court Development (Waterview), encompassing the mailing addresses of 14-28, 15-29, and 41-57 Waterview Court. The other respondents include the contractor, CARV Construction Corp. (CARV), the individual homeowners that have been named as necessary parties to this proceeding, officers of the construction company and development companies (Rueben Marabuto and Lawrence Bresnick), the homeowner's association, Skyline Point Homeowners Association, Inc. (Skyline), and the New York City Department of Buildings

DOB).[1] The staff alleges in its complaint that the developers and contractors violated Articles 25 and 34 of the Environmental Conservation Law (ECL) as well as parts 505 and 661 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) by failing to obtain the required permits for development activities in the tidal wetland (Official New York State Tidal Wetlands Inventory map, panel number 578-496), tidal wetland adjacent area and regulated New York State coastal erosion hazard area. In addition, the Department staff allege that the City is also liable for issuing a building permit for the construction of these structures without a DEC tidal wetlands permit in violation of ECL § 25-0302(1).

While these activities are alleged to have occurred in 1997, the Department staff maintains that it was unaware of the activities until a severe storm caused a retaining wall collapse in April 2007. The DOB issued vacate and emergency declarations for some of these buildings and once DOB determined that these structures were in an area of DEC's jurisdiction, the Department staff were contacted for emergency approval of temporary stabilization of the retaining wall and slope. Staff granted such approval in April 2007.

On February 17, 2009, respondent Marabuto submitted an answer in the form of a letter and after retaining counsel submitted a formal answer dated April 24, 2009. A pre-hearing settlement conference was held on March 18, 2009 but the parties were unable to reach an agreement. Respondents Hussein, Feldsherov, Botanov, Botanov, Brushtyn, Brushtyn, Sable, and Dubranovskaya submitted an answer on March 20, 2009. Ms. Zelcer submitted an answer on March 31, 2009.[2] DOB submitted its answer on April 3, 2009. I have not received an answer, other pleading, or indication that one was filed on behalf of Spring Ridge Development Corp., CARV Construction Corp., Skyline Point Homeowners' Association, Gloria Keck, Theresa Torres, Abe Stuck, Svetlana Stuck, or Lawrence Bresnick.

On or about March 17, 2009, DOB submitted a motion to dismiss the complaint on the grounds of failure to state a cause of action and the statute of limitations contained in the Civil Practice Law and Rules (CPLR) § 213 (6 years). On or about March 30, 2009, respondent Rueben Marabuto moved to dismiss the complaint alleging that the pleadings were not served within a reasonable time pursuant to the State Administrative Procedures Act (SAPA), violate the statute of limitations contained in CPLR § 214 (3 years), and fail to state a claim against this respondent. Staff submitted its affirmation with points of law in opposition to the motions to dismiss on or about April 20, 2009. Respondents DOB and Marabuto submitted their respective replies to staff's affirmation on May 11, 2009.

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[1] Although named in the complaint, Assistant Regional Attorney Udo Drescher states in his letter of January 22, 2009 accompanying the notice of hearing and complaint that staff does not intend to pursue punitive measures against the individual homeowners or "based on the currently available information, homeowners' association."

[2] The caption in this matter had Ms. Zelcer's name spelled as "Zelcher." This appears incorrect based upon the answer she filed and the "white pages" on-line listing.

In these proceedings, staff is represented by Udo M. Drescher, Assistant Regional Attorney; respondent DOB is represented by Haley Stein, Assistant Corporation Counsel; respondent Marabuto is represented by Delight D. Balducci of Periconi, LLC; respondent Zelcer is represented by John L. Barone, Esq. of the Joan Iacono Law Office; respondents Hussein, Feldsherov, Botanov, Sable, and Dubranovskaya are represented by Charles N. Internicola, Esq. of Decker, Decker, Dito & Internicola, LLP.

I have reviewed the following submissions to make these rulings:

1. Staff's notice of hearing and complaint dated January 22, 2009,
2. Respondent Zelcer's answer dated March 31, 2009,
3. Respondent Marabuto's answer dated April 24, 2009,
4. Respondent DOB's answer dated March 31, 2009,
5. Respondent homeowners Hussein, Feldsherov, Botanov, Brushtyn, Sable and Dubranovskaya's answer,
6. City respondent's notice of motion to dismiss the complaint dated March 17, 2009,
7. City respondent's memorandum of law in support of its motion to dismiss the complaint dated March 17, 2009 with the following attachments:

   A) Staff's letter of 1/22/09 with notice of hearing and complaint;
   B) Work Permit Data - NYC Dep't of Buildings re: 41, 43, 45, 47, 49, 51, 53, 55, and 57 Waterview Court, Staten Island issued to Lawrence Bresnick, Spring Ridge Development Corp.;
   C) City of New York Department of Buildings Job Data - Items Required Prior to Approval for 41, 43, 45, 49, 51, 53, 55, and 57 Waterview Court w/certification by architect James J. DiFiore;
   D) Department of Buildings Vacate Orders dated April 17, 2008 for 41, 43, 45, 47, 49, 51, 53, 55, and 57 Waterview Court;
   E) Memoranda dated April 18, 2007 from Fatma Amer, Deputy Commissioner & Chief Code Engineer - Technical Affairs, NYC Department of Buildings to Vito Mustaciuolo, Associate Commissioner, Housing Preservation & Development, David J. Burney, AIA, Commissioner, Department of Design & Construction, Eric Macfarlane, Deputy Commissioner, Infrastructure, Department of Design & Construction re: An Immediate Emergency Condition re: 41, 43, 45, 47, 49, 51, 53, 55, and 57 Waterview Court;
   F) DEC Emergency Permit Authorization dated April 20, 2007,

8. Respondent Rueben Marabuto's notice of motion to dismiss the complaint dated March 30, 2009 with affidavit in support of Delight D. Balducci, Esq. and the following attachments:

   A) Developement [sic] Agreement between CARV Construction Corp., and

Spring Ridge Development Corp. (undated and unsigned);
B) Memorandum from Rueben Marabuto dated 2/11/09; and
C) State of New York Department of State Certificate of Dissolution of CARV Construction Corp.,

9. Respondent Marabuto's memorandum of law in support of motion to dismiss dated March 30, 2009,
10. Staff's affirmation with points of law in opposition to the motions to dismiss dated April 20, 2009 with the following attachments:

    1) Respondent homeowners' answer;
    2) Respondent Zelcher's answer;
    3) NYC Department of Buildings Application Details for 57 Waterview Court,

11. DOB's reply dated May 11, 2009 , and
12. Respondent Marabuto's affirmation in support of motion to dismiss and reply memorandum in support of motion to dismiss.

Discussion

Respondents DOB and Marabuto have moved to dismiss staff's complaint based upon statute of limitations, SAPA, and a failure to state a claim. Some basic facts are not in contest - the Skyline Point Development was constructed in and around 1997. While the respondents deny the allegations in the complaint alleging that the construction was performed without the issuance of Department tidal wetland or coastal erosion management permits pursuant to Articles 25 and 34 of the ECL, neither the City nor Marabuto provide any information to demonstrate that permits were issued. On or around April 17, 2007, a storm caused the gabion walls that had been constructed on a bluff east of the development to collapse, undermining some of these homes. As a result of this failure, DOB issued a vacate order for the affected homes. Because the temporary remedy for stabilization required DEC authorization, the Skyline Point Homeowners Association through McLaren Engineering requested an emergency authorization from the Department which alerted staff to this development.

Statute of Limitations and SAPA

As has been repeatedly ruled by this ALJ and others in the Department, administrative enforcement proceedings are not actions governed by the CPLR and therefore, CPLR §§ 213 and 214 do not apply to them. See, e.g., Matter of Gaul, ALJ Ruling (1/12/09). CPLR § 101 sets forth that the civil practice law and rules govern "procedure in civil judicial proceedings in all courts of the state and before all judges, . . .". Section 103(b) of the CPLR provides that provisions of the CPLR apply to actions and special proceedings.

However, SAPA 301(1) requires that "[i]n an adjudicatory proceeding, all parties shall be

afforded an opportunity for hearing within reasonable time." Citing to the leading case interpreting this law, Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169 (1985), reargument denied, 66 NY2d 1035 (1985), cert denied, 476 US 1115 (1986), both DOB and Marabuto argue that the circumstances at issue require dismissal. Specifically, the Cortlandt factors cited are:

1) the nature of the private interest allegedly compromised by the delay;
2) the actual prejudice to the private party;
3) the causal connection between the conduct of the parties and the delay; and
4) the underlying public policy advanced by the government regulation.

DOB contends that it will be "substantially prejudiced" because the passage of twelve years between the issuance of the building permit/construction in question and the commencement of this enforcement proceeding will "undoubtedly lead to great difficulty in gathering testimony from witnesses with knowledge of the facts." See, DOB's reply memorandum, p. 11. The City casts the sole blame for the delay on DEC. DOB also contends that a balancing of enforcing the public's interest in enforcing the Tidal Wetlands Act versus the public policy served by DOB's issuance of building permits weighs in DOB's favor. The City elaborates by arguing that at least one key witness, Lawrence Bresnick, the site's former owner and corporate officer of the construction company that filed the application with DOB, has not yet been located. Id., p. 12. DOB maintains that his appearance is important because the building permit applications filed by his company stated that no further DEC approvals were required prior to construction. Id. The City blames the Department for not discovering the building project earlier describing it as "clearly visible from the shoreline." Id., p. 13. DOB argues that impacts resulting from the Department's failure to act timely on this matter should not be borne by the City. Id. The City emphasizes the fundamental duties of the DOB in issuing building permits - enforcing building codes for the public safety. Id., 14. Thus, while not questioning the importance of the Tidal Wetlands Act, the City maintains the important public policy with respect to issuance of local building permits should be recognized. Id.

Respondent Marabuto argues that the private interests compromised by the Department's delay in bringing this proceeding consist of his inability to mitigate damages or effect compliance with the law by bringing his influence on Spring Ridge during the construction process to bear. Marabuto memorandum in support of motion to dismiss, p. 3. He maintains that if the Department had brought this proceeding when construction commenced or "CARV still held the purse strings over Spring Ridge rather than waiting twelve years until construction was complete and homeowners had purchased their properties," there might have been opportunity for rectification. Id., pp. 3-4. With respect to prejudice resulting from the delay, Marabuto claims that "it will likely be impossible to locate witnesses" such as parties responsible for construction, DEC employees, the architect who certified that Spring Ridge does not need a DEC permit - and Lawrence Bresnick. Id., 4. Respondent Marabuto states that the documents that may explain the circumstances were never kept in his control and he would have to rely on others' maintenance of those records and memories of events that are twelve years old. Id. He too blames DEC for the

lengthy delay and states that he had no involvement in the management of the construction and no connection to the project after CARV was dissolved in 2002. Marabuto asks that the significant prejudice caused by the delay be weighed against the public interest in enforcement of the tidal wetlands and coastal erosion laws and finds that the great prejudice and cause of the delay make it clear that the complaint was not served within a reasonable time.

Department staff agrees with the respondents that the Court of Appeals established the criteria in Cortlandt to assess what constitutes a reasonable period in the commencement of a hearing in an administrative proceeding. Staff's affirmation with points of law in opposition, p. 4. Staff cites to DEC precedent contending that the reasonableness of the delay should be assessed from the time staff discovered the alleged violations. See, Matter of Tougher, 2003 WL 1563287 and Matter of Hansen, 2000 WL 214678 (proceeding brought 9 years after violations.) Staff challenges respondent Marabuto's assertion that the time for the Department to commence this proceeding was at the time of the construction so that the respondent could have addressed the alleged violations. Id., p. 5. Staff notes that this would mean that the only time it could bring an enforcement proceeding was during an illegal action or immediately afterwards and contends there is no such obligation. Id.

As for any prejudice resulting from the delay, the staff maintains that Marabuto and the City have both produced documentary evidence and therefore have not established that there is insufficient factual information available. Id., p. 6. In addition, staff emphasizes that it is the party that bears the burden of proof in these proceedings. Id. Staff argues that the alleged violations consist of the construction of buildings and associated activities in the regulated areas and that jurisdiction and location can be determined by reference to maps, photographs and the buildings themselves. Id. Staff adds that the facts in this matter make the testimony of individual witnesses less important. Id. Staff states that the matter should at least be allowed to continue through discovery where the parties will be able to assess the evidence and further determinations may result as to whether the proceeding continues against these respondents. Id., pp. 6-7.

With respect to the causal connection of the conduct of the parties and the delay, staff emphasizes that the location of the development is not off any major road nor in an area subject to routine inspections by DEC staff. Id., p. 7. Staff stresses that 578 miles of shoreline in Region 2 and a limited staff contributed to the lack of detection of the development until the collapse that brought the matter to its attention. Id., pp. 8, 10. Finally, staff emphasizes the importance of the relevant laws in protecting tidal wetlands and preventing coastal erosion and thus, argues that public policy determinations weigh in favor of holding those responsible for violations of Articles 25 and 34. Id., pp. 12-13.

Staff also makes the argument that because the unpermitted structures remain on the site, the violations are continuing and therefore the time limitation arguments of the respondents are unavailing. Staff Aff., ¶ 18.

There is no question that a considerable amount of time has passed since the construction of the homes in question occurred.[3] However, as staff notes, SAPA does not set forth any set period of time beyond which it is unreasonable to commence an administrative enforcement proceeding. While both the City and Marabuto indicate that there might be difficulty in garnering evidence in this matter due to the passage of time, neither party definitively states that this is the case. The staff has pointed to the availability of a number of documents the parties themselves have presented in addition to other resources such as the tidal wetlands map, the construction itself, and photographs of the site. Marabuto's assertion that staff should have brought the proceeding during the construction or immediately afterwards may be a nice aspiration but is often not possible. Government enforcement of many laws would certainly be hamstrung if prosecutors and administrative agencies could only react during the commission of violations or immediately afterwards. At this point, without more information as to the availability of witnesses and evidence, there is no showing by either the City or Marabuto that there has been prejudice brought by the passage of time.

With respect to the respondents' claim that DEC is solely responsible for the delay in bringing the proceeding, it appears that staff did take action within a reasonable time after being alerted to the alleged violations. While twelve years have passed since the homes were erected, according to staff it only learned of the development in April 2007. In Matter of Breeze Hill Farm, 1993 WL 393562 and Matter of Timothy Jones, 1996 WL 3140643, the hearing officers found that the delay will be measured from the time staff became aware of the alleged violation to the commencement of the proceeding. While ALJ Buhrmaster discounted the lack of resources as a defense to staff's delay in bringing the enforcement proceeding in Matter of Manor Maintenance, 1996 WL 172655, in that matter the delay was shown to prejudice the defense. That has not been shown to be the case in this matter as of yet.[4]

With respect to the public policy considerations, I find adherence to the relevant statutes crucial not only to the conservation of important environmental resources but also to the safety of the community. Loss of wetlands, coastal erosion, and land instability are matters that are addressed in these statutes and are also the very matters that are alleged to have been the bases for the unfortunate circumstances that the Skyline homeowners face. I do not find that these policy considerations and the enforcement of these laws are in any way counter to the

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[3] I do not accept staff's argument that the alleged violations are ongoing. Courts have found that a specific construction project occurs at one time and if a required permit is not obtained prior to that work, the relevant statute has been violated. The requirement for a pre-construction permit applies prior to the activity and once the work is completed, the time to obtain the permit is past and therefore, there is not an ongoing violation. See, State of New York v. Niagara Mohawk Power Corp., 263 F.Supp 2d 658 (WDNY 2003).

[4] In Wedinger v. Goldberger, 71 NY2d 428 (1988), the Court of Appeals took notice of the "formidable task" of the Department's mapping of freshwater wetlands on Staten Island - a process that took over 12 years.

Department of Buildings' responsibilities.

Based upon the above discussion, I decline to dismiss the complaint on the grounds of statute of limitations or SAPA.

Failure to State a Cause of Action - New York City Department of Buildings

DOB moves to dismiss the complaint against it based upon the failure of the Department to set forth a legally cognizable cause of action. City memorandum of law, pp. 6-7. DOB disputes the Department's claims that it can be found liable pursuant to ECL § 25-0302(1) for issuing a building permit for the activities on this site. Id., p 7. The City takes issue with the Department staff's interpretation of this section of the Tidal Wetlands Act as prohibiting DOB from issuing building permits with respect to sites in or near tidal wetlands. Id. The law is entitled "Land-use regulation of tidal wetlands." This section of the law directs the Commissioner to adopt land-use regulations that would govern the uses of mapped wetlands and sets forth the various factors to consider in formulating restrictions such as potential value for food production, wildlife habitat, etc. The closing sentence of this section states, "[n]o permits may be granted by any local body, nor shall any construction or activity take place at variance with these regulations."

The City and DEC staff argue the meaning of this sentence from many perspectives including an extensive analysis of legislative history as well as sentence diagramming. I will not belabor much of this discussion as I found much of it superfluous and unnecessary to an understanding of the relevant law.[5] I read this sentence to mean that localities may not issue wetland permits and that all construction or activity in wetlands and adjacent areas must be in conformity with the promulgated regulations which are now contained in Part 661 of 6 NYCRR. This interpretation is supported by Professor Weinberg's Commentaries in which he states that "[e]nforcement [of the Tidal Wetlands Act] is lodged totally in the Department, unlike the freshwater act which permits delegation to local governments." See, Practice Commentaries, McKinney's, Volume 17 1/2, p. 8.

In addition and perhaps more importantly, in the section of the Act that addresses "Regulated Activities", ECL § 25-0401, the law specifically states that "[t]he permit issued by the commissioner shall be in addition to, and not in lieu of, such permit or permits as may be required by any municipality within whose boundary such wetland or portion thereof is located."

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[5] While I am appreciative of the extensive research and analysis performed by staff with respect to the legislative history, I agree with the City that it is inappropriate to rely upon the history of prior versions of the bill. Moreover, I find it unnecessary because the law on its face is plain, particularly when read with other portions of Article 25. Statutory construction dictates that if the language is clear, it is not appropriate to look to legislative history or other means to interpret the intention of the legislature. See, McKinney's Cons Law of NY, Book 1, Statutes § 92.

If the Legislature meant to prohibit localities from issuing building permits, this sentence would make no sense. Statutory construction does not permit an interpretation that would cast aside entire provisions of the law. Rather, all parts of an act are to be interpreted together "and harmonized, if possible." See, McKinney's Cons Laws of NY, Book 1, Statutes §§ 98, 231; Beekman Hill Ass'n v. Chin, 274 AD2d 161, 175 (1st Dep't 2000).

And, while it is true that § 253 of Statutes states that the punctuation is "subordinate to the text," this section of the law also states that ". . . the common marks of punctuation have been in use for centuries, and it is well known that their chief function is to make the writer's meaning clear. Hence if such meaning is not clear the marks may be considered, and they frequently form a valuable aid in determining legislative intent."

As pointed out by the City, in the ALJ's report that accompanies the decision in Matter of Louis Abrams, 1986 WL 26264, ALJ Pearlstein specifically held that "[t]he fact that the Applicant has obtained a building permit from the Town of Hempstead has no bearing on the application for a tidal wetland permit before the Department since the Town building permit, while presumptive evidence of the Project's conformance with Town zoning restrictions, was granted without any consideration of the Tidal Wetlands Act or companion Land Use Regulations, which are applicable to the Project in this proceeding." While it is true as Mr. Drescher notes that the Commissioner's decision in Abrams makes no mention of the building permit approval, that does not lead to a conclusion that the action was illegal. Nor am I aware of any other occasion where the sole action of building permit issuance for a project in a regulated area resulted in such enforcement action by DEC.

While it certainly would have been preferable for the City to follow up on the assertions made by the applicants that their project did not require a tidal wetlands permit given the proposal's location, I do not find that the law can make the City liable for its decision to issue a building permit.[6]

Accordingly, I grant the City's motion to dismiss this proceeding against the Department of Buildings on the grounds that there is not jurisdiction.

Failure to State a Cause of Action - Rueben Marabuto

The second ground upon which respondent Marabuto moves to dismiss the complaint is his claim that the Department staff has failed to state a claim against him. Mr. Marabuto

[6] It is laudable that the City has amended its Administrative Code to require coordination with DEC with respect to any construction, excavation or fill in wetland and coastal areas and to prohibit approval of such projects without documentation that DEC and any other relevant agency has signed off. See, Administrative Code of the City of New York, Article 104 (March 2009). Hopefully, this action will assist in the prevention of violations of the tidal wetlands and coastal erosion laws and the unfortunate results of such violations.

provides that his role in the Skyline Point development was only as a "passive investor in a corporation that simply provided financing for the project and he therefore has no more liability than any other lender." Marabuto memorandum of law, p. 1. Annexed to the affidavit of attorney Balducci in support of Marabuto's motion to dismiss is an undated and unsigned document that is alleged to be a copy of the development agreement for Skyline Point. See, Exhibit A to Balducci Aff. In this document, Spring Ridge is charged with the construction activities but "[t]he authority in responsibility for the management of all other aspects of the ownership of the Property shall remain with CARV." Agreement, Article II, Section 2.1. In Article III of the agreement, there is indemnification language that purports to hold Spring Ridge accountable for any loss caused by Spring Ridge's "negligence or misconduct in the construction and development of the Property." Id., Section 3.1(b).

In Mr. Marabuto's February 11, 2009 letter to Mr. Drescher in his initial response to the complaint, the respondent explains that the involvement of CARV was strictly financial and those involved in CARV were only investors. Exhibit B to Balducci Aff. After the project was completed and the units were sold, Mr. Marabuto states the corporation was dissolved. Exhibit C to Balducci Aff.

Based upon these contentions, the respondent argues that the staff has failed to set forth any facts that would identify Mr. Marabuto as personally liable because there are no allegations that he supervised construction, was responsible for obtaining permits, or reviewed any permit applications. See, Marabuto reply memorandum of law, p. 8 citing Matter of Jackson's Marina, Inc. v. Jorling, 193 AD2d 863 (3d Dep't 1993) (court found respondent liable for specific participation in activities that led to violations). The respondent claims that the staff's complaint is deficient because it does not plead sufficient allegations to impose liability on Marabuto. Reply mem., p. 9. In Marabuto's reply affirmation, he states that his role in the development of Spring Ridge was to receive "requests for additional funding from Spring Ridge and Larry Bresnick (the President of Spring Ridge), fundraising among CARV's other officers and shareholders and issuing the funding checks." Reply Affirmation, ¶ 4. Marabuto claims that he was not involved in any construction activities including the receipt or review of construction documents or applications for permits. Id., ¶ 8. He states that he never saw the permit application to NYC DOB and although CARV originally purchased the property on behalf of Spring Ridge, he did not individually own any of the property subject to this proceeding. Id., ¶ 9.

The staff responds to Marabuto's motion to dismiss by stating that the complaint provides sufficient grounds to establish a cause of action because it identifies Marabuto as a corporate officer of CARV and because he is alleged to have "caused or permitted to be caused construction and other regulated activities at the Site during the period of time the violations alleged herein were committed." Staff's Aff., p. 13 and Complaint, ¶ 14. Staff criticizes the reliance on the agreement provided with the Balducci affidavit because it is undated and unsigned and fails to identify the property at issue. Staff points to the identification of Marabuto as an officer on NYC DOB webpages related to the construction project as well as the chairman or chief executive officer on the New York State Department of State website.

As respondent Marabuto has set forth in his motion papers, in order to support individual liability of a corporate officer, the law requires a factual basis for imposing such liability. Matter of Salvatore Vitti, 2008 WL 1275421. An individual may be found to be derivatively liable if it can be shown that in his capacity as a corporate officer, he had the authority and responsibility to prevent the violations. United States v. Park, 95 S. Ct. 1903 (1975); United States v. Dotterweich, 64 S. Ct. 134 (1943); In the Matter of Sheldon Galfunt and Hudson Chromium Company, Inc., 1993 WL 267967. The dissolution of CARV has no bearing on these proceedings in terms of liability because the allegations refer to events that occurred prior to dissolution. Business Corporation Law § 1006(b); Matter of F.I.C.A., 1982 WL 178111.

While the staff has set forth the most basic of allegations against the respondent, 6 NYCRR § 622.3(a)(iii) only requires "a concise statement of the matters asserted." At this stage of the proceedings, there is an opportunity to develop the facts further in discovery. Based upon that process, the parties may be able to reach an agreement or to move for summary judgment. In any case, it would be premature at this stage to grant respondent Marabuto's motion.

CONCLUSION

I grant the City's motion to dismiss and deny respondent Marabuto's motion to dismiss without prejudice to renew at a later point in these proceedings, if appropriate.

Dated: Albany, New York
June 15, 2009

_____/s/_____
Helene G. Goldberger
Administrative Law Judge