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

**EFSTATHIOS VALIOTIS, STAMATIKI,
VALIOTIS, and MALBA ASSOCIATION,**

Respondents.

RULINGS OF THE
ADMINISTRATIVE LAW
JUDGE

Staff's Motion to
Clarify Affirmative
Defenses

DEC File No.
R2-20060511-199

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Background

Department of Environmental Conservation (DEC or Department) staff served a notice of hearing and complaint on the respondents, Efstathios Valiotis, Stamatiki Valiotis (collectively, Valiotis family), and Malba Association, dated November 8, 2006. In this pleading, staff alleges that the respondents Valiotis violated Environmental Conservation Law (ECL) §§ 15-0503(1)(b), 15-0505, and 25-0401 and §§ 608.4 and 661.8 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) by conducting certain activities - removal of vegetation, construction of a seawall, and placement of fill in navigable waters, tidal wetlands and adjacent area of the State without the required permits. Staff states in its complaint that Malba Association is named as a necessary party in order to facilitate restoration activity.

The respondents Valiotis have submitted their answer dated December 12, 2006. In the answer, these respondents put forward thirteen affirmative defenses. In response to several of these affirmative defenses, by motion dated December 13, 2006, DEC staff moved for clarification pursuant to 6 NYCRR §§ 622.4(f) and 622.6(c). In the cover letter to Chief Judge McClymonds, staff provides that this motion was served upon the Valiotis family's counsel at the pre-hearing settlement conference on December 13, 2006. Respondents Valiotis submitted their reply to staff's motion with an attorney's affirmation in opposition dated December 22, 2006.

In these proceedings, staff is represented by Udo M. Drescher, Assistant Regional Attorney and respondents Valiotis are represented by Steven R. Montgomery, Esq. of Sullivan Gardner PC, New York, NY.

I have reviewed the following submissions to make these rulings:

1. Staff's notice of hearing and complaint dated November 8, 2006.
2. Respondents Valiotis' answer dated December 12, 2006.
3. Staff's notice of motion and affirmation in support of staff's motion for clarification of affirmative defenses dated December 13, 2006.
4. Respondents Valiotis' affirmation in opposition to staff's motion for clarification of affirmative defenses.

Discussion

Staff has moved for clarification of respondents Valiotis' seventh, eighth, ninth, and tenth affirmative defenses.

An affirmative defense is a matter that is the respondent's burden to plead and prove and includes such defenses such as collateral estoppel, statute of limitations, and release. See CPLR 3018(b). As explained by Professor Siegel, an affirmative defense raises a matter that is not plain from the face of the complaint. See, New York Practice, 4th Ed., (Siegel 2005) at 368-370. Section 622.4(c) of 6 NYCRR reiterates the CPLR's requirements in stating that "[t]he respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted."

Staff has specifically identified the affirmative defenses it has found to be lacking in clarity. Using the language in 6 NYCRR § 622.4(f), staff alleges in its notice of motion that these "affirmative defenses are so vague and ambiguous that Department staff is not placed on notice of the facts or legal theory upon which respondents' defenses are based." In response, the respondents Valiotis' counsel argues that the information requested by staff goes beyond the requirements of pleading and is rather an attempt to "obtain discovery." Mr. Montgomery states that 6 NYCRR § 622.4(f) requires that the affirmative defenses be pled sufficiently in terms of facts or law and that his clients have put staff sufficiently on notice of the legal theory supporting each affirmative defense.

Seventh Affirmative Defense

The seventh affirmative defense states "[a]ny alleged construction was pursuant to DEC approval." In its "Appendix" to the notice of motion, with respect to the seventh affirmative

defense, staff asks "what are the specific dates, act or acts and person or persons regarding the alleged approval by DEC?" Counsel for the Valiotis family maintains that "[t]he legal theory behind this affirmative defense is self-evident." He further explains that "an action pursuant to DEC approval is not a violation of any State regulation."

I agree with staff that this statement is insufficient to meet the requirements of 6 NYCRR § 622.4(c). Mr. Montgomery's statement that the respondents need only provide either facts or law to support their affirmative defenses is an incorrect interpretation of 6 NYCRR § 622.4(f). The basis for a motion to clarify affirmative defenses is that either facts or law are lacking to sufficiently establish these claims. Clearly, based on 622.4(c) which requires "a statements of the facts which constitute the grounds of each affirmative defense," a mere mention of a legal theory is not sufficient to plead an affirmative defense. Here, the respondents have failed to indicate the factual grounds for this defense.

While it is true that staff has not provided specific dates with respect to the alleged violations, this information is typically more within the knowledge of the respondents. The respondents can only provide the information that they are aware of and to the extent that they do not have knowledge of or access to the precise dates of these approvals, they can provide the facts that they do have.

As for the legal theory, it appears that the respondents are alleging estoppel. Estoppel is rarely recognized against the State. See, Wedinger v. Goldberger, 71 NY2d 428, 441 (1988). In order to determine whether this case is one of those rare exceptions, the respondents must clarify this defense.

Staff's motion for clarification with respect to this affirmative defense is granted.

Eighth Affirmative Defense

In paragraph 12 of the answer, respondents maintain that "[a]ny alleged work was undertaken to protect the property from DEC approved work on abutting property." In its "Appendix," Department staff asks ". . . specifically which property is referred to as the "abutting property?" and ". . . what are the specific dates, act or acts and person or persons regarding the alleged DEC approved work on abutting property?"

In paragraph 13 of Mr. Montgomery's affirmation in opposition, he clarifies that the "abutting property" refers to the same property identified in the complaint - the lot owned by the Malba Association. With this statement, respondents have clarified this issue. However, with respect to DEC's second question, staff is entitled to basic information that supports respondents' claim that the work was performed "to protect the property from DEC approved work . . ." Accordingly, I grant staff's motion for clarification with respect to this affirmative defense.

Ninth Affirmative Defense

In paragraph 14 of the answer (there is no paragraph 13), respondents state that "[a]ny alleged work undertaken on property owned by anyone other than respondents . . . was done at the request of and with the approval and consent of that property owner and for its benefit." Staff asks two questions in its "Appendix" concerning this affirmative defense as follows: "what are the specific dates, act or acts and person or persons involved in the request by the '[other] property owner' to conduct alleged work on such owner's property?" and ". . . what are the specific dates, act or acts and person or persons regarding the 'approval and consent of the property owner?' In Mr. Montgomery's affirmation, he explains that "any violations alleged by DEC on this property should be the sole burden and responsibility of the third party." However, this statement adds nothing to elucidate the grounds for this defense. The respondents have failed here as in the above mentioned affirmative defenses to meet the requirements of 6 NYCRR § 622.4(c) by providing the necessary factual grounds. Accordingly, I grant staff's motion to clarify the ninth affirmative defense.

Tenth Affirmative Defense

Respondents' tenth affirmative defense contained in paragraph 15 of the answer states: "[i]n the interest of justice the DEC must be directed to withdraw the above-titled action due to the arbitrary and capricious nature of the actions of the DEC in the Town of Malba." The respondents explain in Mr. Montgomery's affirmation that "[t]he legal theory is that petitioner repeatedly failed to address work performed in the area by third parties rendering the instant prosecution arbitrary and capricious." Staff asks in its "Appendix" to Mr. Drescher's affirmation, "which provisions of applicable law are allegedly applicable that constitute the basis of this tenth affirmative defense?" I do not find that respondents' reply to staff's

motion sufficiently explains the legal theory. Mr. Montgomery merely reiterates what was already stated by the respondents in paragraph 15 of their answer. Thus, with respect to this affirmative defense, the respondents fail to provide the factual grounds and do not identify the legal basis for their claim.

CONCLUSION

I grant staff's motion to clarify respondents' seventh, eighth, ninth, and tenth affirmative defenses. The respondents are to serve an amended answer that clarifies these affirmative defenses by January 27, 2007.

Dated: Albany, New York
December 27, 2006

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

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