STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of article 24 of the Environmental Conservation Law (ECL) and part 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) by

ANTHONY VENDITTI and KATHY VENDITTI,

Respondents.

RULING

DEC Case Nos. R2-20011119-223 and R2-0179-96-02

March 29, 2006

On January 26, 2006, DEC Staff served a subpoena and subpoena duces tecum ("the subpoena")on Claudia Sanjour, Esq. As discussed in a ruling dated February 3, 2006, the subpoena directed Ms. Sanjour to appear at the Department of Environmental Conservation's Region 2 Office on February 9, 2006 to provide testimony in the above hearing, and to bring with her and produce certain documents as described in the subpoena. The documents include photos of the site of the alleged violations, surveys, or other images, sales or purchase contracts, and contracts for materials placed on the site or landscaping work done at the site.

On February 1, 2006, Respondents moved "either to quash the subpoena or to 'table' it until the end of the scheduled hearing dates to see if the subpoena is relevant and/or necessary at that point." DEC Staff opposed the motion, by letter dated February 2, 2006. On February 3, 2006, I denied Respondents' motion. A copy of my ruling was sent to Ms. Sanjour.

The hearing, which had started in December 2005, continued on February 8, 2006. At the end of the day on February 8, it was apparent that Respondents' witnesses would be testifying all day on February 9, 2006 and that DEC Staff would not have an opportunity to call Ms. Sanjour to testify on that date. I asked Mr. Drescher to notify Ms. Sanjour that she would not need to appear on February 9, 2006 and that I would notify her of the additional hearing date once this was scheduled. Udo Drescher, Esq., Assistant Regional Attorney, DEC Region 2, provided this notification to Ms. Sanjour at 5:00 P.M. on February 8, 2006.

On February 17, 2006, I notified the parties that the hearing would continue on March 30, 2006. I sent a copy of this correspondence to Ms. Sanjour, and also wrote her a letter on February 17, 2006 stating that she would need to appear at the hearing at 3:00 P.M. on March 30, 2006. On February 24, 2006,

Ms. Sanjour replied, stating that she intended to oppose the subpoena.

On March 3, 2006, Ms. Sanjour submitted a request "to withdraw and/or modify the...subpoena and subpoena duces tecum." Among other things, this correspondence stated that she has already provided DEC Staff with all records in her possession responsive to its request. DEC Staff replied by letter dated March 10, 2006, as discussed further below. Richard Rosenzweig, Esq., counsel for Respondents, sent an electronic mail message on March 13, 2006, renewing Respondents' argument that the subpoena was premature. Also on March 13, 2006, Ms. Sanjour sent an e-mail message stating that she could no longer accept or respond to e-mails sent to her office e-mail address.

On March 20, 2006, I sent an e-mail to Mr. Drescher and Mr. Rosenzweig asking whether there are any documents that (1) were provided to DEC Staff by Ms. Sanjour; (2) are documents DEC Staff intends to offer as rebuttal evidence to Respondents' fourth affirmative defense[1]; and (3) are documents Respondents would argue are not authentic and should not be received in evidence unless Ms. Sanjour testifies and identifies the documents as being authentic. These questions were answered by the parties on March 29, 2006.

Arguments

Under the Department's enforcement hearing procedures, an Administrative Law Judge (ALJ) has the power to "upon the request of a party, issue, quash and modify subpoenas except that in the case of a non-party witness the ALJ may quash or modify a subpoena regardless of whether or not a party has so requested" (6 NYCRR 622.10(b)(1)(v); see also section 622.7(d)). Ms. Sanjour is not a party to this hearing (see May 20, 2005 ruling, at 7).

Ms. Sanjour's March 3, 2006 letter asked "to withdraw and/or modify" the subpoena. I am interpreting this as a request to quash or modify the subpoena. The reasons Ms. Sanjour stated for this request may be summarized as follows: (1) proper service of the subpoena was never made; (2) the subpoena is substantially defective in that it defines documents as being things "now in

[1] The fourth affirmative defense states, "The acts complained of herein were caused by others not parties hereto, with no culpable conduct on the part of Respondents."

the possession, custody or control, or available to the Respondent" although Ms. Sanjour is not a respondent in this case; (3) it is overbroad in that it asks for documents related to lots that Ms. Sanjour never owned[2] and specifies no beginning or ending time period; (4) modifying the subpoena in response to the first two arguments would be futile, because Ms. Sanjour does not have any additional documents responsive to the modified request except for a contract of sale that she attached with her March 3, 2006 letter; and (5) due to the passage of time and Ms. Sanjour's limited involvement with the site, Ms. Sanjour would not be able to provide any useful information and consequently the subpoena is futile.

Ms. Sanjour included with her March 3, 2006 correspondence an affirmation that, among other things, states that she has "furnished the Department will [sic, probably with] all records in my possession responsive to its requests" and that "[a]fter the passage of over ten years, I have no personal recollection of details of Lots surrounding the house at 44 Aultman Avenue."

DEC Staff's March 10, 2006 reply asks that I modify the subpoena to limit the time period of the documents to be April 1992 to April 9, 2001, and to "clarify that the subpoena pertains only to documents now in the custody or power of the witness."

DEC Staff stated that my February 3, 2006 ruling found that the subpoena was served. DEC Staff argued that the reference to "Respondent" in the definition of "document" was a typographical error and that Ms. Sanjour's earlier correspondence indicates that she understood the subpoena to refer to documents in her possession. DEC Staff stated that the subpoena duces tecum was not fatally overbroad, in that Ms. Sanjour had lived at the property in the past and had represented Tina Sanjour Gough in an appeal before the Freshwater Wetlands Appeals Board and in a DEC enforcement proceeding regarding the subject properties. DEC Staff repeated an excerpt from its February 2, 2006 arguments about Respondents' motion to quash, including that some of Ms. Sanjour's letters have been received in evidence. This excerpt also stated that "DEC staff's right to subpoena the witness does not become void simply because of a witness makes unsworn claims

[2] The site of the alleged violations is lots 45, 47, 51, 53, 55, 57 and 58 of tax block 2280 on Staten Island. Ms. Sanjour stated that she was never an owner of lots 45, 47 or 51, and that she never had any legal right, title or interest in these three lots.

that the witness has nothing to add to what is already in the record."

Ruling: Based upon the arguments of Ms. Sanjour and the parties, the record as it exists at present, and Ms. Sanjour's affirmation, I conclude that there is little, if any, relevant testimony that Ms. Sanjour could provide for the record and no additional documents. For the reasons discussed below, the subpoena is quashed, including both the subpoena to testify and the subpoena duces tecum.

Discussion

The question whether the subpoena was properly served was not in dispute in Respondents' motion to quash (see February 3, 2006 ruling, at 1). The subpoena was, however, properly served by mailing a copy to Ms. Sanjour and delivering a copy to a person of suitable age and discretion at Ms. Sanjour's place of business (see, January 26, 2006 affirmation of service and section 308(2) of the Civil Practice Law and Rules (CPLR)). Despite the reference to "Respondents" in the definition of "documents," the correspondence about the subpoena demonstrates that both parties and Ms. Sanjour understood the subpoena sought documents in Ms. Sanjour's possession rather than documents in Respondents' possession.

Although Ms. Sanjour used to own only a subset of the lots involved in the complaint, that would not rule out the possibility that she might have documents (particularly photographs) that would depict or provide facts about the other nearby lots. She submitted her attorney's affirmation, however, stating that she has already furnished DEC Staff with all records in her possession responsive to its requests. In addition, Ms. Sanjour stated in her letter that she does not have any photographs of any of the lots in the complaint from 1996 or anytime thereafter, does not have or know of any surveys of these lots other than the ones attached with an earlier motion submitted by Respondents, and does not have or know of any "landscaping contracts" for the lots.

DEC Staff's March 10, 2006 reply limited the requested documents to those now in the custody or power of Ms. Sanjour, and did not address her affirmation's statement that she had furnished all documents in her possession responsive to Staff's requests.

With regard to the portion of the subpoena that seeks Ms. Sanjour's testimony, DEC Staff's March 10, 2006 reply repeated

earlier arguments and did not take into account Ms. Sanjour's affirmation that she has no personal recollection of details of the lots that are involved in the complaint. Ms. Sanjour is an attorney, and her affirmation carries the same weight as an affidavit (CPLR section 2106). DEC Staff did not present any reasons why Ms. Sanjour might be able to provide relevant testimony.

The only relevant testimony that Ms. Sanjour might provide would be to authenticate any documents that she provided to DEC Staff and that DEC Staff intends to offer in evidence. This possibility led to my March 20, 2006 question to the parties.

On March 29, 2006, DEC Staff stated the documents it might offer are Exhibit 27, Exhibit 52, and a sales contract that is attachment E of Ms. Sanjour's March 3, 2006 correspondence. Exhibit 27 is a May 18, 1996 letter from Ms. Sanjour to Louis Oliva, Esq., of DEC Region 2, and is already in evidence (Transcript (Tr.), pages 92 - 93). In addition, paragraph 7 of Ms. Sanjour's affirmation states that she wrote this letter on behalf of her client Tina Sanjour Gough and that the information contained in that letter was provided by her client.

Exhibit 52 is a letter that the Respondents asked to have marked as an exhibit but then immediately withdrew (Tr. 368). Respondents stated on March 29, 2006 that they would not object to receipt of Exhibit 52 or the sales contract, and that these documents speak for themselves, but that Respondents do not stipulate to the truth of the contents of the documents.

Ms. Sanjour's testimony is not necessary in order for the documents to be received in evidence. Based upon her affirmation, she would not be able to add to the record regarding the subjects covered in these documents, and DEC Staff has not explained how her testimony would add anything substantive to the record on these subjects.

_____/s/_____
Albany, New York
March 29, 2006

Susan J. DuBois
Administrative Law Judge

TO: Richard A. Rosenzweig, Esq.
Udo Drescher, Esq.

cc: Claudia Sanjour, Esq.