STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 25 of the New York State Environmental Conservation Law; Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York; and NYSDEC Permit No. 1-4738-03014/00001,	**RULING ON LIABILITY** **DEC Index Nos. R1-20070815-215 R1-20070815-216**

- by -

RICHARD and ELISE MARTINO, CHARLEY CARUSO and LA BELLA ROMA HOME IMPROVEMENT CORP.,

Respondents.

Appearances:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Gail Rowan, of counsel), for the Department of Environmental Conservation

-- Wickham, Bressler, Gordon & Geasa, P.C. (Eric J. Bressler, of counsel), for respondents

SUMMARY

Staff of the Department of Environmental Conservation ("DEC" or "Department") alleges that respondents[1] are liable for numerous violations of the tidal wetlands law arising from the construction of a concrete and stone stairway within the adjacent area of a regulated tidal wetland.

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[1] Unless otherwise indicated, expressly or by context, the term "respondents" refers to all four respondents: Richard and Elise Martino (the "Martino respondents"), La Bella Roma Home Improvement Corp. ("Bella Roma") and Charley Caruso.

An administrative enforcement hearing to consider Department staff's allegations was held on June 24 and June 25, 2008. For the reasons discussed below, the focus of the June hearing was on Department staff's factual allegations concerning respondents' liability. Staff's request for relief and its allegations concerning adverse environmental impacts were not considered. Accordingly, this ruling sets forth my determinations with regard to the liability of each respondent. I will address issues relating to the relief requested and environmental impacts in a subsequent hearing report.

The central issue in dispute between the parties is the location of the landward boundary of the tidal wetland adjacent area at the subject site. Department staff maintains that the adjacent area and, correspondingly, the Department's jurisdiction at the site extends 300 feet landward of the apparent high water mark. Respondents maintain that a small gully, running roughly diagonally down the face of the bluff[2] at the site, limits the Department's jurisdiction to a location seaward of the gully.

For the reasons set forth below, I conclude that Department staff's determination of the location of the adjacent area boundary is correct. Accordingly, the Department has jurisdiction over respondents' activities within 300 feet of the apparent high water mark. I also conclude that staff established that the Martino respondents and Bella Roma violated provisions of the tidal wetlands law and regulations. Staff did not, however, establish that respondent Charlie Caruso violated the wetlands law or regulations.

PROCEEDINGS

This enforcement proceeding was commenced by Department staff by service of two sets of notices of hearing and complaints; one notice of hearing and complaint against the Martino respondents ("Martino complaint") and the other against respondents Bella Roma and Charlie Caruso ("Bella Roma complaint"). Because the two complaints involved common issues of fact and law, proceedings on the complaints were consolidated (see Matter of Martino, Rulings of the Administrative Law Judges, April 28, 2008).

[2] The definition of "bluff" was a point of contention between the parties and is addressed in the discussion below.

By its complaints, Department staff alleges that the Martino respondents own property (the "site") at 3875 Hallock Lane Ext., Mattituck, Town of Southold, Suffolk County, New York, where a concrete stairway was constructed in violation of numerous provisions of the tidal wetlands law and of a tidal wetlands permit issued for work at the site. Staff alleges that the stairway was constructed by or at the direction of respondents Bella Roma and Charlie Caruso (collectively, the "Bella Roma respondents").

An administrative enforcement hearing to consider the allegations set forth in the complaints was held on June 24 and 25, 2008 at the Charles B. Wang Center, Stony Brook University, Stony Brook, New York. Department staff called three witnesses: Edward Forester, Director of Code Enforcement, Town of Southold; Gina Fanelli, Biologist I, DEC Region 1; and George Hammarth, Deputy Regional Permit Administrator, DEC Region 1. Respondents called three witnesses: Catherine Mesiano; Dr. Ronald Abrams, Principal Ecologist, Dru Associates, Inc.; and respondent Richard Martino.

At the commencement of the hearing, Department staff moved to adjourn the proceedings because the witnesses that staff intended to call regarding the environmental impacts of respondents' activities were not available. Respondents opposed the motion. Because both staff and respondents were prepared to go forward with their respective fact witnesses, I denied staff's motion for adjournment. Pending post-hearing briefs from the parties and my determinations regarding liability, I reserved on whether we would reconvene to hear testimony regarding environmental impacts and staff's request for relief.

Accordingly, this ruling sets forth my determinations regarding whether Department staff has met its burden to establish each respondent's liability as alleged in the complaints.

PLEADINGS

Department Staff's Complaints

By its complaints, Department staff charges the same eight causes of action against each respondent.[3] Specifically,

[3] The causes of action were not separately numbered in the complaints. For ease of reference, each cause of action will be

staff alleges that, on or before November 17, 2006, respondents violated section 25-0401(1) of the Environmental Conservation Law ("ECL") and part 661 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR")

1. "by causing and/or permitting to be caused, the non-compliance with Additional General Condition #10 of NYSDEC Permit No. 1-4738-03014/00001 [the "Permit"] and approved plans" by failing to undertake all authorized activities at the site in strict conformance with the Department-approved plans prepared by Sea Level Mapping, last revised September 27, 2002 (Martino complaint, ¶ 10; Bella Roma complaint, ¶ 11).

2. "by causing and/or permitting to be caused, the non-compliance with Additional General Condition #9 of [the Permit] and approved plans by failing to submit to the Department notice of commencement" (Martino complaint, ¶ 11; Bella Roma complaint, ¶ 12).

3. "by causing and/or permitting to be caused, the non-compliance with Special Condition #1 of [the Permit] and approved plans by placing or storing construction debris on the bluff face" (Martino complaint, ¶ 12; Bella Roma complaint, ¶ 13).

4. "by causing and/or permitting to be caused, the non-compliance with Special Condition #2 of [the Permit] and approved plans by altering the existing grade on the bluff" (Martino complaint, ¶ 13; Bella Roma complaint, ¶ 14).

5. "by causing and/or permitting to be caused, the non-compliance with Special Condition #3 of [the Permit] and approved plans by storing construction equipment and materials seaward of the crest of the bluff" (Martino complaint, ¶ 14; Bella Roma complaint, ¶ 15).

6. "by causing and/or permitting to be caused, the non-compliance with Special Condition #4 of [the Permit] and approved plans by clearing vegetation on the bluff" (Martino complaint, ¶ 15; Bella Roma complaint, ¶ 16).

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identified in this ruling by the numbers noted below.

7. "by causing and/or permitting to be caused, the non-compliance with Special Condition #5 of [the Permit] and approved plans by exceeding the disturbance limit" (Martino complaint, ¶ 16; Bella Roma complaint, ¶ 17).

8. "by causing and/or permitting to be caused, the installation and construction of a concrete staircase in the regulated adjacent area to a regulated tidal wetland at the Site without the required DEC permit" (Martino complaint, ¶ 17; Bella Roma complaint, ¶ 18).

As set forth in the complaints, Department staff requests the following relief:

1. that the Martino respondents, jointly and severally, pay a penalty in the amount of eighty-thousand dollars ($80,000).

2. that the Bella Roma respondents, jointly and severally, pay a penalty in the amount of eighty-thousand dollars ($80,000).

3. that respondents remove all portions of the concrete stairway and restore the stairway to its permitted condition.

4. that respondents restore and re-vegetate the bluff with appropriate native plantings in compliance with a Department-approved restoration plan.

Respondents' Answers

Answers were filed by the Martino respondents and by the Bella Roma respondents. Department staff moved for clarification of the affirmative defense of estoppel, which was raised in both answers. Staff's motion was granted (see Matter of Martino, Rulings of the Administrative Law Judges, April 28, 2008) and both the Martino respondents and the Bella Roma respondents filed amended answers dated May 8, 2008 (the "Martino answer" and the "Bella Roma answer," respectively).

By their respective answers, respondents deny each violation alleged by Department staff. The Martino respondents admit only that they were owners of the site during the time when the alleged violations occurred and that they continued to own the site as of the time of their answer. The Bella Roma respondents admit that respondent La Bella Roma Home Improvement Corp. is an active domestic business corporation in the State of New York.

Respondents raised the following as affirmative defenses:

1. Lack of personal jurisdiction over the Martino respondents because they were not properly served with the Notice of Hearing and Complaint (Martino answer, ¶ 19).

2. The Department is estopped from maintaining this proceeding against the respondents because all activities at the site were undertaken with the knowledge and consent of the Department (Martino answer, ¶¶ 20-22; Bella Roma answer, ¶¶ 20-22).

3. The Department lacks jurisdiction because the alleged activities at the site occurred outside the regulated wetland and adjacent area (Martino answer, ¶ 23; Bella Roma answer, ¶ 23).

4. No environmental damage was caused by the alleged activities at the site (Martino answer, ¶ 24; Bella Roma answer, ¶ 24).

5. Removal activities requested by staff will be more environmentally harmful than maintaining the status quo (Martino answer, ¶ 25; Bella Roma answer, ¶ 25).

FINDINGS OF FACT

On review of the record of this proceeding, I make the following findings of fact:

1. The Martino respondents were the owners of the site at all times relevant to the violations alleged in the complaints (see Martino answer, ¶ 4; Martino complaint, ¶ 4).

2. Respondent Bella Roma is a corporation organized under the laws of the State of New York (see Bella Roma answer, ¶ 5; Bella Roma complaint, ¶ 5).

3. Respondent Charley Caruso is an individual affiliated with Bella Roma (see Hearing Transcript ["Tr"], at 85 and 99; Hearing Exhibits ["Exh."] 3 and 10).

4. The northernmost boundary of the site abuts the tidal wetland depicted on tidal wetland map no. 702-540, along the coastline of Long Island Sound (see Exh. 12; Tr, at 150-53).

5. At the time the Martino respondents acquired the site, it included a pathway that led down the bluff on the northern portion of the site to the beach along Long Island Sound. Railroad tie steps were in place at various intervals along the pathway to facilitate traversing the slope to the beach (see Tr, at 250; Exh. 7, at 11, 12 and 14).

6. The Department issued respondent Richard Martino a tidal wetlands permit (DEC permit no. 1-4738-03014/00001) ("Permit"), effective December 3, 2002 through December 3, 2012 (Exh. 4).

7. The Permit authorized respondent Richard Martino to "[r]eplace railroad tie steps to beach. Clear vegetation in area of pathway. Install handrails" and required that "[a]ll work must be done in accordance with the attached plans prepared by Sea Level Mapping . . . stamped approved by NYSDEC on December 3, 2002" (Exh. 4 [page one of the Permit]).

8. The bluff at the site is covered with dense vegetation (see Exh.7, at 5 [applicant's project description includes "clearing and improving over-grown walk way"], 11-14 and 18-19 [2002 site photographs]; Exh. 1 [2007 site photographs]; Exh. 16 [2008 site photographs]).

9. In or about 2002 the Martino respondents cleared vegetation along the pathway to the beach and replaced railroad tie steps along the pathway in conformance with the Permit (Tr, at 251; Department's Closing Statement and Brief ["staff brief"], at 5).

10. In or about 2004 and again in 2006 sections of the pathway washed out. Respondent Richard Martino testified that, on both occasions, he contacted the Department and was advised to repair the pathway, and that, in 2006, he was advised to "repair it as best you can" (Tr, at 251-52).

11. On November 17, 2006 Environmental Conservation Officer ("ECO") Thomas Gadomski visited the site and issued Administrative Conservation Appearance Tickets

("ACATs") 688516 and 688520, citing respondent Richard Martino for clearing vegetation and constructing a stairway in the adjacent area of a tidal wetland in violation of ECL article 25 (see Exh. 3).

12. Also on November 17, 2006, ECO Gadomski issued ACATs 688494 and 688505 to respondent Charley Caruso, citing him for clearing vegetation and constructing a stairway in the adjacent area of a tidal wetland in violation of ECL article 25. The ACATs identify respondent Caruso as the "contractor" (see Exh. 3; Tr, at 43).

13. On November 18, 2006, Gina Fanelli, a biologist with the Department, and another member of Department staff visited the site to conduct a compliance inspection. As a result of that inspection, Ms. Fanelli prepared a Notice of Violation ("NOV"), dated November 21, 2006, addressed to respondent Richard Martino and citing him for numerous violations of the Permit (see Exh. 8; Tr, at 42 and 96).

14. Also as a result of the November 18, 2006 compliance inspection, Gina Fanelli prepared an NOV, dated February 28, 2007, addressed to respondent Bella Roma and citing it for numerous violations of the Permit (see Exh. 10; Tr, at 42 and 100).

DISCUSSION

Department staff bears the burden of proof on all charges and matters that it affirmatively asserts in the complaints (see 6 NYCRR 622.11[b][1]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation (see 6 NYCRR 622.11[c]). Accordingly, in order to establish that a respondent in this proceeding committed a specific violation alleged in either compliant, staff must establish the factual basis for that violation by a preponderance of the evidence.

As discussed below, staff has met its burden of proof in relation to certain, but not all, of the violations set forth in the complaints.

Delineation of the Adjacent Area

The proper delineation of the tidal wetland adjacent area boundary and, correspondingly, the extent of the Department's tidal wetlands jurisdiction at the site, are central to the issues presented in this matter. Department staff maintains that the Department's jurisdiction extends 300 feet, measured horizontally,[4] landward of the apparent high water mark. Respondents maintain that a small gully, running roughly diagonally down the face of the bluff at the site, limits the Department's jurisdiction to a point seaward of the gully.

On review of the record, I conclude that Department staff's determination of the adjacent area boundary is correct. Accordingly, the Department has jurisdiction over respondents' activities within 300 feet of the apparent high water mark. As detailed below, I further conclude that Department staff has established that certain respondents violated provisions of the tidal wetlands law and regulations at the site.

Respondents, in their closing brief and at hearing, challenged Department staff's determination that the site was located along a regulated tidal wetland. George Hammarth testified, however, that he was able to identify the site on the Department's Tidal Wetlands Map 702-540 (Exh. 12) based upon its proximity to the Riverhead-Southold town line, which runs perpendicular to Long Island Sound, and the topography of the site (Tr, at 149). He also testified that he confirmed the site's location by comparing the Suffolk County tax map (Exh. 13) with the tidal wetlands map (Tr, at 149).[5] Mr. Hammarth's testimony regarding the location of the site was credible and supported by the evidence. Accordingly, I conclude that the site is located along a regulated tidal wetland.

Respondents next contest Department staff's determination that a substantial portion of the bluff at the site

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[4] Pursuant to 6 NYCRR 661.16, all measurements required under the tidal wetlands regulations are to be measured horizontally unless otherwise specified.

[5] Respondents also objected to the use of the county tax map to confirm the location of the site on the tidal wetlands map. However, the application itself identifies the site on the county tax map (Exh. 7, at 7) and, adjusting for scale, it is readily apparent that the site is located along the regulated tidal wetland depicted on Tidal Wetlands Map 702-540 (Exh. 12).

falls within the adjacent area of a tidal wetland. The definition of what constitutes an adjacent area of a tidal wetland is provided at 6 NYCRR 661.4(b). As relevant here, the adjacent area begins at the apparent high water mark along Long Island Sound and extends to the lesser of 300 feet landward or the point at which the elevation contour above mean sea level reaches 10 feet, "except when such contour crosses the seaward face of a bluff or cliff, or crosses a hill on which the slope equals or exceeds the natural angle of repose of the soil, then to the topographic crest of such bluff, cliff, or hill" (see 6 NYCRR 661.4[b][1][i] and [iii]).

Given the regulatory definition of what constitutes a tidal wetland adjacent area and the topography of the site, three jurisdictional determinations are possible. First, the jurisdictional boundary could be determined to be 300 feet landward of the tidal wetland boundary. Second, the jurisdictional boundary could be determined to be coterminous with the 10 foot contour line. Third, the jurisdictional boundary could be determined to be at the topographical crest of a "bluff, cliff or hill." Staff argues that the first of these possible determinations applies. Respondents argue that the third determination applies and that the gully feature creates a crest on the bluff.

Note that if there were no "bluff, cliff or hill" at the site then only the second possible delineation could apply. This is because the 10 foot contour line is reached very near the toe of the slope, well seaward of either the delineation advanced by staff or that advanced by respondents. By definition, only the most seaward delineation applies. Thus, the 10 foot contour line would delineate the end of the Department's jurisdiction in the absence of a "bluff, cliff or hill." Accordingly, both staff's and respondents' respective determinations of the jurisdictional boundary at the site are based on the premise that at least some portion of the slope on the northern half of the site is a "bluff, cliff or hill." The parties differ in where upon the bluff face the jurisdictional boundary should be drawn.

Accordingly, although respondents' expert declined to refer to the slope at the site as a "bluff," it is clear that under his analysis he considered at least the lower portion of the slope (i.e., the area below the gully feature) to be a "bluff, cliff or hill" the crest of which is "the point of inflection" on the seaward side of the gully (Tr, at 231-32). Otherwise, the jurisdictional boundary would be at the 10 foot contour line.

Proper application of the regulatory definition of "adjacent area" requires a basic understanding of the site's layout and topography. The site is roughly rectangular in shape, approximately 150 feet wide at its northern boundary along Long Island Sound and 882 feet deep along its western boundary.[6] The Martino respondents' residence is located on the relatively flat southern half of the site. The northern half of the site slopes down, beginning at an elevation of approximately 115 feet, to the beach along the sound. The toe, or bottom, of the slope is at an elevation of approximately 5 feet.

The grade of the slope varies across the site. Along the eastern boundary of the site, beginning at the toe of the slope, the degree of incline is fairly constant until reaching an elevation of approximately 74 feet. Thereafter the degree of incline decreases for a short distance before increasing again and finally leveling off as it nears the relatively level southern half of the site. Along the western boundary, the degree of incline is fairly constant from the toe of the slope until leveling off at or near the 50 foot contour line. At that point, the terrain remains relatively level for approximately 90 lineal feet along the boundary line, briefly descends to 48 feet, and then rises steadily again until leveling off as it nears the top of the slope. The pathway runs down the slope in a somewhat serpentine fashion, generally at or near the midpoint between the eastern and western boundaries of the site, down to the beach.

Whether the slope, or some portion of the slope, at the site constitutes a "bluff, cliff or hill" under the regulation was a point of considerable dispute between the parties. During the hearing, the parties agreed to use the term "bluff" informally and staff acknowledged that it had the burden to demonstrate that the slope was a "bluff, cliff or hill" as contemplated by the regulation. In its closing brief, staff notes that "bluff" is not a defined term under the governing

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[6] A survey (the "Isaksen Survey") of the site, conducted by a licensed land surveyor, was included in the Permit application materials submitted to the Department in 2002 (see Exh. 7, at 9). The Isaksen Survey depicts, among other things, the site boundaries and topography as well as the location of the Martino residence and the pathway to the beach as it existed on April 29, 2002. Both Department staff and respondents' tidal wetlands expert relied upon by the Isaksen Survey, along with other information, to make their respective determinations regarding the Department's jurisdiction at the site (see Tr, at 157-59, 230).

regulation. Therefore, staff asserts the term bluff should be given its "usual or colloquial" meaning (staff brief, at 11).

On the record before me, I conclude that the slope at the site, to its crest at 115 feet, constitutes a bluff for the purposes of the tidal wetlands regulations. In the absence of a statutory or regulatory definition, terms used in regulations should be given their natural meaning. As applicable to this proceeding, a bluff is commonly understood to be a broad, steep rise of land (see e.g. The American Heritage Dictionary 208 [3d ed 1996] [defining a bluff as a "steep headland, promontory, riverbank, or cliff" or "[h]aving a broad, steep front"]).[7]

The record demonstrates that the slope at the site, although not uniformly steep, is part of a broad, steep land formation rising up from Long Island Sound, a regulated tidal wetland. The slope is steep and subject to erosion (see e.g. Exh. 7, at 8 [the application "Site Plan" stating that the purpose of the proposed steps and handrails is "Safe Access & Erosion Control"] and 9 [Isaksen Survey]; Exh. 16 [series of photographs of the bluff proffered by respondents]; Tr, at 172 [respondents' witness, Catherine Mesiano, testified, in reference to the lower portion of the slope, that it is "rather steep"]; Tr, at 231 [respondents' expert, Dr. Ronald Abrams, testified that the lower portion of the slope "rises steeply"]; Tr, at 251-52 [respondent Richard Martino describing washouts that occurred on the slope face in 2004, causing "a fairly good sized gap" and another washout in 2006, when some portion of the pathway "washed away"]).

In reaching this conclusion, I am mindful of the primary objective of the tidal wetlands act "to preserve and protect tidal wetlands, and to prevent their despoliation and

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[7] At the time of the 2002 application for the tidal wetlands permit, both the applicant and Department staff referred to the slope as a bluff. The application materials for the Permit repeatedly refer to the entire slope as a "bluff" (see Exh. 7, at 2 [project description notes clearing for the path will be done "along face of bluff"], 3 [states "Mr. Martino has cleared a ± 4' x 350' path along the bluff to the beach"] and 9 [the Isaksen Survey refers to the path on the slope as the "TRAIL DOWN BLUFF TO BEACH"] [capitalization in original]) and the Department issued Permit contains conditions premised upon the determination that the entire slope at the site constitutes a bluff (see Exh. 4 [page four of the Permit, Special Condition 2 (prohibiting the alteration of "the existing grade of the bluff or hill") and Special Condition 4 (prohibiting unauthorized clearing or trimming of vegetation "within 300' of the tidal wetland boundary")]).

destruction, giving due consideration to the reasonable economic and social development of this state" (ECL 25-0102). To determine whether a slope constitutes a bluff, or whether variations in the rise of a slope should limit the extent of a bluff for jurisdictional purposes, it is important to consider whether activities on the slope may adversely affect the wetland (see 6 NYCRR 661.2[j] ["The most important function of adjacent areas is to serve as buffers to protect the character, quality and values of tidal wetlands that adjoin or lie near these areas"]; see also Matter of Risi, Order of the Commissioner, October 29, 2004 [adopting the Hearing Report wherein the ALJ states that "where there is a steep slope which is less stable and thus more subject to erosion, it is important that the entire slope is protected in order to secure the wetland resource. . . . I find that the purpose of 6 NYCRR § 661.4(b)(iii) is to ensure that the resource is adequately shielded by including the entirety of a steep slope in the adjacent area boundary" (Hearing Report at 16)]). Here, the gully feature on the face of the bluff is not of sufficient dimension to ensure that the gully and the area seaward of the gully serve as a proper buffer.

As demonstrated by the record, the gully feature is most pronounced along the western boundary of the site, becomes less pronounced as it moves northward down the face of the bluff, and does not extend to the eastern boundary of the site (see Exh. 7, at 9 [Isaksen Survey]; Tr, at 247 [respondents' expert, Dr. Abrams, testified that "[t]here's a bit of a ditch that follows, the V shape [depicted on the Isaksen Survey] [and] comes to an end after the bridge crossing which is shown on the Martino path [photograph][8]"]). Given this topography, activities above the gully, or ditch, may adversely affect the adjacent area below the gully feature and the tidal wetland itself (see 6 NYCRR 661.2[n] ["While tidal wetlands and adjacent areas contain distinct zones . . . these areas are essentially an integrated natural system"]).

As noted above, the regulatory definition of "adjacent area" will reduce the Department's jurisdiction from the 300 foot maximum where the topography of the adjoining land rises at a modest rate to 10 feet above sea level (see 6 NYCRR 661.4[b], figure 3 [depicting a profile reaching the 10 foot elevation over relatively level area within 300 feet of a tidal wetland]) or, where the land rises more steeply, at the crest of that rise (see 6 NYCRR 661.4[b], figure 4 [depicting a profile rising relatively steeply and cresting within 300 feet of a tidal wetland]). The

[8] See Exh. 16-A.

record demonstrates that the bluff at the site rises steeply, although not uniformly, from its toe to its crest, and that the crest is more than 300 feet landward from the apparent high water mark. Accordingly, the Department's tidal wetlands jurisdiction at the site extends 300 feet, measured horizontally, from the apparent high water mark.[9]

Estoppel

Respondent Richard Martino testified that after portions of the stairway were washed out in 2006 he contacted the Department and was advised to "repair it as best you can." Respondent Martino did not recall the name of the Department staff member with whom he spoke and conceded that he was not told to construct the concrete and stone stairway as it exists today (Tr, at 260).

Irrespective of whether respondent Martino was advised to repair the stairway as best he could, the Department's right and obligation to enforce the tidal wetlands law would be unaffected. To conclude otherwise would run contrary to the long-established rule that a governmental unit may not be estopped from the proper discharge of its statutory duties (see e.g. Matter of Schorr v New York City Dept. of Housing Preserv. and Dev., 10 NY3d 776, 779, [2008] [noting that "[i]t is well settled that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties"] [internal quotation marks and citations omitted]).

[9] Although not directly relevant to the facts presented here, 6 NYCRR 661.4(b)(1)(ii) provides additional support for the determination that the gully does not limit the extent of the adjacent area at the site. For a fabricated structure, such as a road or bulkhead, to serve as a limitation on the extent of a tidal wetland adjacent area, it must run generally parallel to the tidal wetland boundary for a minimum of 100 feet (see id.). Here, the gully feature runs generally perpendicular to the tidal wetland boundary. Accordingly, had the gully been a fabricated structure, it could not be relied upon to limit the extent of the adjacent area. Moreover, it is reasonable to infer that the gully will tend to gather water during rain events and conduct that water, together with whatever sediments or other materials or pollutants it may contain, down to the tidal wetland. Fabricated structures running parallel to tidal wetlands generally tend to sever the connection between portions of the adjacent area and the tidal wetland. The gully at the site cannot be said to serve that function.

As discussed above, portions of the site are located within the adjacent area of a regulated tidal wetland. The Department is obligated to properly administer and enforce the State's tidal wetlands law and regulations. A statement made by a member of the Department in response to a telephone inquiry cannot serve to defeat that obligation.

Liability of Respondents

Respondents Richard and Elise Martino are owners of the site and Richard Martino is the named permittee. As such, they may be held liable for violations at the site relating to ECL article 25, 6 NYCRR part 661 and the Permit.

Respondent Charlie Caruso is an individual and is affiliated with respondent Bella Roma, a domestic corporation. The precise nature of his affiliation with or authority over Bella Roma was not established in the record and the evidence adduced by Department staff to demonstrate respondent Caruso's individual liability is inconclusive.[10] Accordingly, staff failed to meet its burden of proof and I decline to hold respondent Caruso individually liable for any of the violations alleged in the complaints (cf. Matter of Jahada, Order of the Commissioner, November 21, 2006, at 2 [holding a corporate officer personally liable where the factual record "establish[ed] his individual liability for all violations determined herein"]).

Respondent Bella Roma is a domestic corporation that was engaged to construct a stairway down the bluff at the site. As such, Bella Roma may be held liable for violations of ECL article 25, 6 NYCRR part 661 and the Permit[11] arising from its activities at the site.

Department Staff's Allegations

[10] Testimony concerning respondent Caruso's activities at the site was very limited. Gina Fanelli testified, without elaboration, that respondent Caruso "told [her] his name, company information and the address of the company" (Tr, at 85). Ms. Fanelli also testified that respondent Caruso was "present at the site walking around" and "appeared to be the supervisor of several workers" (id.).

[11] In accordance with "Item B" on page two of the Permit, a permittee's independent contractors "shall be subject to the same sanctions for violations of the Environmental Conservation Law as those prescribed for the permittee" (see Exh. 4).

Each of Department staff's causes of action cites ECL 25-0401(1) and 6 NYCRR part 661 as the legal basis for respondents' liability. Section 25-0401(1) provides that "no person may conduct [a regulated activity] unless he has obtained a permit from the commissioner to do so." Section 25-0401(2) defines regulated activities to include, inter alia, "any form of . . . excavating . . . dumping, filling, or depositing . . . of . . . fill of any kind; the erection of any structures . . . and any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area."

Part 661 sets forth the Department's implementing regulations for the tidal wetlands act. Among other things, this part defines various terms used in the tidal wetlands regulations and establishes use guidelines and permit requirements for various activities undertaken within tidal wetlands and their adjacent areas.

Specific Violations

-- Additional General Condition 10

By its first cause of action, Department staff alleges that respondents violated Additional General Condition 10 of the Permit by failing to undertake all authorized activities at the site in strict conformance the plans prepared by Sea Level Mapping, last revised September 27, 2002 (the "approved plans"). The approved plans state that construction of the stairway will "use 8"x 8" CCA [chromated copper arsenate] timber. . . . Secure [the] timber with metal tie rods. Place 4"x 4" cedar posts with 1"x 6" cedar cap as hand rails along the steepest sections" (Exh. 4 [attachment to the Permit]).

The record is replete with evidence that the stairway constructed at the site does not conform with the approved plans. Gina Fanelli testified that "the staircase was in non-compliance with the approved plans as it was constructed much larger [than] it was suppose[d] to be. . . . It was not constructed out of the proper materials" (Tr, at 105). Ms. Fanelli further testified that a large portion of the stairway was constructed out of concrete and stone (Tr, at 69). Numerous photographs in evidence corroborate Ms. Fanelli's testimony (see e.g. Exh. 1-B, C, D, E & F; Exh. 5, at 2, 4-8; Exh. 16-A).

Although respondents contested the Department's jurisdiction over the area where the concrete and stone stairway was constructed, respondents did not contest the fact that the

stairway was built with these materials. Respondents' assertion that the concrete and stone stairway was constructed in an area beyond the Department's jurisdiction is without merit (see supra, at 9-14).

Accordingly, Department staff has established that respondents Richard and Elise Martino, and Bella Roma are liable for the violation alleged in the first cause of action.

-- Additional General Condition 9

By its second cause of action, Department staff alleges that respondents violated Additional General Condition 9 of the Permit by failing to provide notice to the Department prior to commencement of the project. Pursuant to Additional General Condition 9, at least 48 hours prior to "commencement of the project," the permittee and the contractor are required to provide written certification, on a form provided by the Department, that they are aware of and understand all the terms and conditions of the Permit.

The initial "commencement of the project" occurred in 2002, prior to the Martino respondents' submittal of a permit application to the Department. Department staff was aware at that time that construction activities had commenced at the site prior to the submittal of an application, but staff did not seek enforcement against the Martino respondents. Staff acknowledges that notice prior to the initial commencement of the project was an impossibility, but argues that Additional General Condition 9 obligated respondents to provide notice prior to the repair and reconstruction activities that occurred after the washouts in 2004 and 2006 (Department's Reply to Respondents' Post-hearing Brief ["staff reply"], at 4). Respondents argue that the notice requirement only applied at the initial commencement of the project in 2002, which is not at issue in this proceeding, and that subsequent reconstruction activities are not subject to the notice requirement.

There was little testimony on this cause of action and, although the Permit states that a notification form was enclosed with the Permit, the form itself was not proffered by any party and is not in evidence. Department staff testified only that respondents "were suppose[d] to submit notice of a [sic] commencement signed by the contractor and applicant stating construction had begun and the promise to comply with all terms of the permit" and that this document was never received (Tr, at 108). The evidence proffered by staff does not establish whether Additional General Condition 9 applies to the commencement of

repair or reconstruction work undertaken subsequent to the completion of the original project.

The arguments advanced by both Department staff and respondents are plausible interpretations of Additional General Condition 9. On its face, however, Additional General Condition 9, may reasonably be read to require only that the notice be provided prior to the initial commencement of the project authorized under the Permit. That project was completed in or about 2002 and the general condition does not expressly state that subsequent repair or reconstruction activities require respondents to file an additional notice of commencement. Staff has not met its burden of proof on this cause of action.

Accordingly, Department staff failed to establish that respondents are liable for the violation alleged in the second cause of action.

-- Special Condition 1

By its third cause of action, Department staff alleges that respondents violated Special Condition 1 of the Permit by placing or storing construction debris on the bluff face. Special Condition 1 provides that "debris or excess material from construction of this project shall be completely removed from the adjacent area. . . . No debris is permitted in tidal wetlands and or protected buffer areas" (Exh. 4 [page four of the Permit]). Staff acknowledges that no time limit for removal of materials is established under the Permit. However, staff argues that, in the absence of a time limit, "immediate removal can be presumed" (staff reply, at 4). Although I cannot agree with staff's formulation, I nevertheless conclude that staff established respondents' liability relative to this cause of action.

The record reflects that Department staff entered an active construction site and observed debris and construction materials along the pathway in the adjacent area. By itself, this observation does not establish a violation of Special Condition 1. I do not read this permit condition to preclude temporary placement of construction materials and debris in the adjacent area. During the course of active construction, it is not uncommon to observe construction debris at a site. In the absence of an express provision regarding timeliness of removal, I decline to hold that "immediate removal can be presumed."

Nevertheless, photographs taken in April 2007 and testimony adduced at hearing establish that, while much of the debris observed by staff in November 2006 was removed,

substantial amounts remained on the face of the bluff several months after staff's observation (see Exh. 1-A and B; Tr, at 18, 26 and 27).

Accordingly, Department staff established that respondents Richard and Elise Martino, and Bella Roma are liable for the violation alleged in the third cause of action.

-- Special Condition 2

By its fourth cause of action, Department staff alleges that respondents violated the Permit by altering the existing grade of the bluff. The Permit states that "[a]lteration of the existing grade of the bluff or hill during construction of the stairway is prohibited" (Exh. 4 [page four of the Permit]). Department staff argues that the construction of the cement and stone stairway, including its footings, necessarily entailed altering the grade of the bluff (see staff reply, at 4). Gina Fanelli testified that "the bluff grade was altered by the placement of the concrete fill on top of the bluff as well as any excavation [they] had to do to install whatever footings exist" (Tr, at 106). On cross, Ms. Fanelli again stated that the placement of the cement steps and the excavation of the footings altered the grade of the bluff and clarified that staff was not alleging that respondents altered the grade elsewhere (Tr, at 129 [staff testimony that "in the area without the staircase the grade was not altered"]).

Under Department staff's formulation of Special Condition 2, construction of a stairway as authorized under the Permit would result in the alteration of the grade of the bluff. Authorized activities, such as, removing deteriorated railroad ties from the bluff face, excavating to set posts for handrails, and leveling the earth in order to set the new 8" by 8" timber steps, all necessarily entail some alteration of the existing grade. However, I do not read Special Condition 2 to reach these activities. Rather, I read this condition to preclude respondents from altering the grade of the bluff in more substantial ways, such as by excavating steeper sections of the bluff in order to reduce the pitch.

Because staff's allegations concern excavation and fill directly tied to the construction of the stairway and not to alterations of the grade of sections of the bluff, I decline to hold respondents liable for violation of Special Condition 2.

Accordingly, Department staff failed to establish that respondents are liable for the violation alleged in the fourth cause of action.

-- Special Condition 3

By its fifth cause of action, Department staff alleges that respondents violated Special Condition 3 of the Permit by storing construction equipment and materials seaward of the crest of the bluff. Similar to staff's third cause of action, staff's allegations here relate to observations made by staff during the active construction of the stairway. However, unlike the third cause of action, no evidence was proffered that indicates construction materials were stored on the bluff over extended periods of time.

Staff asserts that photographs taken at the site in November 2006 and April 2007 and testimony proffered at hearing establish that construction equipment and materials were stored on the bluff in violation of Special Condition 3. However, testimony concerning this allegation is extremely limited (see Tr, at 106 [staff witness, after stating the requirements set forth under Special Condition 3, testified only that "this was not done"]). The November 2006 photographs were taken at the time of staff's site visit and only establish that construction equipment was on the face of the bluff during construction. The April 2007 photographs show construction debris and, as noted above, form the basis for respondents' liability under the third cause of action. Moreover, there is no testimony or other evidence in the record to support a determination that the debris left on the bluff face, as shown in the April 2007 photographs, constitutes "storage" of construction equipment and materials.

Accordingly, Department staff failed to establish that respondents are liable for the violation alleged in the fifth cause of action.

-- Special Conditions 4 and 5

By its sixth and seventh causes of action, Department staff alleges that respondents violated Special Conditions 4 and 5, respectively, of the Permit. As discussed below, Special Conditions 4 and 5 are interrelated. In effect, Special Condition 5 provides an exception to the prohibition contained in Special Condition 4. Moreover, staff asserts the same factual allegations in support of the sixth and seventh causes of action.

Accordingly, I decline to hold respondents liable for separate violations of Special Conditions 4 and 5.

Pursuant to Special Condition 4, "[n]o trimming, limbing or remov[ing] of vegetation is authorized within 300' of the tidal wetland boundary without Department authorization." Department staff's sixth cause of action states that respondents violated this condition by "clearing vegetation on the bluff." Because the bluff at the site is a natural feature that is covered with dense vegetation, it would be impracticable to construct a stairway, as authorized under the Permit, without the clearing of some vegetation. Accordingly, Special Condition 4, must be read in conjunction with Special Condition 5 which authorizes "[d]isturbance to the existing vegetation" along the path of the stairway.

Specifically, Special Condition 5 states that "[d]isturbance to the existing vegetation shall be limited to an area 6' in width [the "disturbance area"] which shall include the 4' wide proposed stairway." The term "disturbance" is not defined, however, it is reasonable to infer that Special Condition 5 allows the permittee to trim, limb, remove or clear vegetation within the disturbance area without violating Special Condition 4.

Consistent with the allegations contained in the sixth cause of action, Department staff established that vegetation was cleared outside the authorized disturbance area (see e.g. Tr, at 107-108 [staff testimony that "the disturbance [area] was suppose[d] to be limited to a 6-foot wide pathway . . . [but the] total distance between one end of the disturbance [area] to the other was at least 20 feet wide"]; Exh. 5, at 4 and 5; Exh. 6).

In the context of this proceeding, it is apparent that staff viewed the clearing of vegetation, as alleged in the sixth cause of action, to be a "disturbance" of vegetation, as alleged in the seventh cause of action. Staff did not allege that some other disturbance of vegetation, beyond the clearing, provided an independent basis for the seventh cause of action. Rather, as staff suggests in its reply brief, Special Conditions 4 and 5 are appropriately read together and the evidence adduced at hearing supports the conclusion that respondents engaged in the unauthorized "trimming, limbing and clearing" of vegetation at the site (see staff reply, at 5).

The clearing of vegetation falls squarely under the allegations set forth under the sixth cause of action and no

facts are alleged to warrant a separate finding of liability under the seventh cause of action.

Accordingly, Department staff has established that respondents are liable for the violation alleged in the sixth cause of action. However, staff failed to establish that respondents should be held liable under the seventh cause of action.

-- Construction of a Concrete Stairway

By it eighth cause of action, Department staff alleges that respondents violated ECL 25-0401(1) and part 661 of 6 NYCRR by causing and/or permitting to be caused, the installation and construction of a concrete stairway in the adjacent area to a regulated tidal wetland without the required DEC permit.

The Permit, however, authorizes respondents to construct steps with handrails down the face of the bluff and the Permit does not expire until December 3, 2012. Clearly, the stairway as constructed by respondents is not in conformance with the approved plans and specific conditions of the Permit. Nevertheless, the Permit authorized construction of a stairway at the specified location at the site. Moreover, seven of Department staff's eight causes of action, including three for which I have found respondents liable, allege non-conformance with conditions set forth in the Permit.

Given that Department staff's allegations relate to the construction of the concrete and stone stairway at the site and that the Permit authorized construction of a stairway, I decline to hold that respondents' activities were undertaken without a permit. Had respondents constructed a structure other than a stairway or had they constructed the stairway elsewhere on the bluff, a cause of action premised on the lack of a permit may well have been warranted. On the facts presented here, however, the respondents' construction of the stairway does not warrant a separate holding of liability premised on the failure to obtain a permit.

Accordingly, I decline to hold respondents liable under the eighth cause of action.

CONCLUSION

With regard to respondent Caruso, I conclude that Department staff failed to demonstrate that he is personally

liable under any of the causes of action set forth in the complaints.

With regard to the Martino respondents and respondent Bella Roma, I conclude that Department staff has met its burden and demonstrated that these respondents are liable for violations of the tidal wetlands law, as noted above.

I will convene a conference call with the parties, shortly after service of this ruling, to schedule the next phase of this enforcement proceeding. I am amenable to undertaking the next phase by reconvening the hearing to receive live testimony or, if the parties prefer, by written submittals of the parties. The purpose of the next phase will be to hear testimony and receive other evidence primarily relating to (i) the potential environmental impacts associated with respondents' activities and (ii) Department staff's request for relief.

Dated: Albany, New York
January 6, 2009

_____/s/_____
Richard A. Sherman
Administrative Law Judge