STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 19 of the New York Environmental Conservation Law ("ECL") and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),	**ORDER**
- by -	DEC File No. R7-20100726-52
ORIGINAL ITALIAN PIZZA, LLC,	
Respondent.	

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation ("Department") charged respondent Original Italian Pizza, LLC, with emitting large amounts of smoke, grease, and noxious odors from its restaurant located at 2230 Brewerton Road, Mattydale, New York, in continuing violation of the Department's regulatory prohibition against air pollution (see 6 NYCRR former 211.2).[1]

In its September 2010 complaint, staff alleged that starting in August 2008 and continuing to the date of the complaint, the smoke, grease, and odors caused a nuisance condition in the neighborhood adjacent to the restaurant in violation of section 211.2. Accordingly, staff sought a civil penalty in the amount of twenty-five thousand three hundred

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[1] Former section 211.2 provided:

> "[n]o person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others."

Effective January 1, 2011, 6 NYCRR former 211.2 was renumbered 211.1 without any changes to the text. This order refers to former section 211.2 throughout.

seventy-five dollars ($25,375) and an order directing respondent to cease and desist from any future violations of 6 NYCRR part 211.

Respondent filed an answer in October 2010. The matter was referred to the Department's Office of Hearings and Mediation Services for adjudicatory proceedings pursuant to 6 NYCRR part 622, and assigned to Chief Administrative Law Judge (ALJ) James T. McClymonds.

Department staff moved, pursuant to 6 NYCRR 622.12, for an order without hearing on its September 2010 complaint. A motion for order without hearing is the Department's equivalent to a motion for summary judgment pursuant to Civil Practice Law and Rules (CPLR) § 3212. Chief ALJ McClymonds granted in part Department staff's summary judgment motion on the issue of liability, but directed a hearing on the issue of penalty and injunctive relief (see Matter of Original Italian Pizza, LLC, Ruling of the Chief ALJ on Motion for Order Without Hearing, Oct. 17, 2011).

An adjudicatory hearing was held on February 3, 2012, solely on the issue of the appropriate penalty and injunctive relief to be imposed for the continuing violation of section 211.2. After the close of the hearing record, Chief ALJ McClymonds prepared the attached hearing report. Based upon the record, I adopt the Chief ALJ's report as my decision in this matter, subject to the following comments.

I agree that Department staff established respondent's liability for the continuing violation of section 211.2. On its summary judgment motion, Department staff established that the emission of smoke, grease, and odors from respondent's restaurant created a nuisance condition in the adjacent neighborhood that unreasonably interfered with the comfortable enjoyment of life or property. I also agree that on the motion, respondent failed to raise a triable issue of fact on the issue of liability. Accordingly, I affirm the Chief ALJ's ruling dated October 17, 2011 granting Department staff summary judgment on the issue of liability.

As to the civil penalty, I agree that the penalty of twenty-five thousand three hundred seventy-five dollars ($25,375) that Department staff requested is authorized and appropriate on the record of this proceeding. I also agree that injunctive relief is authorized by Environmental Conservation Law (ECL) § 19-0509 and that the appropriate relief on this

record is to direct respondent to relocate the restaurant's vents as far from residential property lines as possible.

Upon review of the record, and in consideration of the remedial relief that respondent is being directed to undertake, I am suspending a total of twenty-two thousand dollars ($22,000) of the civil penalty. Of this suspended amount, two thousand dollars ($2,000) shall be suspended, contingent upon respondent's (1) submission to Department staff of an approvable plan for relocating the restaurant's vents as far from residential property lines as possible pursuant to a timetable that takes into account weather, local approvals, and other considerations that impact installation, and (2) compliance with the other terms and conditions of this order. Respondent shall submit an approvable plan to Department staff within forty-five (45) days of the service of this order upon it. Of the suspended amount, twenty thousand dollars ($20,000) shall be suspended, contingent upon respondent (1) undertaking the vent relocation work, and (2) complying with the other terms and conditions of this order. Unless extended by Department staff upon good cause shown, all relocation work shall be completed no later than one hundred twenty (120) days after service of this order upon respondent.

The payable amount of the penalty, three thousand three hundred seventy-five dollars ($3,375), shall be due within forty-five (45) days of the service of this order upon respondent.

Finally, for the reasons stated by the Chief ALJ in his three rulings on the issue, I reject respondent's argument that section 211.2 is unconstitutionally void for vagueness (see Hearing Report, at 17; Ruling of the Chief ALJ, Oct. 17, 2011, at 7; Ruling of the Chief ALJ on Motion to Clarify or Dismiss Affirmative Defenses, Dec. 15, 2010, at 5-8). Moreover, as the Chief ALJ sets forth, section 211.2, which adopts the common law standard for public nuisances, among other standards, has been judicially upheld against void for vagueness challenges (see Alberti v Eastman Kodak Co., 204 AD2d 1022, 1022-1023 [4th Dept 1994]; Matter of Delford Indus., Inc. v New York State Dept. of Envtl. Conservation, 126 Misc 2d 355 [Sup Ct, Orange County 1984]).

NOW, THEREFORE, having considered the matter and being duly advised, it is **ORDERED** that:

I. Respondent Original Italian Pizza, LLC, is adjudged to have violated 6 NYCRR former 211.2 by allowing emissions of smoke, odors, and grease from its restaurant to the outdoor atmosphere in such quantity, characteristics, and duration so as to unreasonably interfere with the comfortable enjoyment of life or property in the neighboring areas. The violation of former section 211.2 continued from May 2008 to September 2010, the date of the complaint.

II. Respondent Original Italian Pizza, LLC, is assessed a civil penalty in the amount of twenty-five thousand three hundred seventy-five dollars ($25,375), of which twenty-two thousand dollars ($22,000) shall be suspended as follows:

A. Two thousand dollars ($2,000) shall be suspended, contingent upon respondent’s (1) submission to Department staff of an approvable plan for relocating the restaurant’s vents as far from residential property lines as possible pursuant to a timetable that takes into account weather, local approvals, and other considerations that impact installation, within forty-five (45) days of the service of this order upon it, and (2) compliance with the other terms and conditions of this order; and

B. Twenty thousand dollars ($20,000) shall be suspended contingent upon respondent (1) undertaking the vent relocation work in accordance with the plan approved by Department staff and (2) complying with the other terms and conditions of this order. Unless extended by Department staff upon good cause shown, all relocation work shall be completed no later than one hundred twenty (120) days after service of this order upon respondent.

The non-suspended portion of the penalty (three thousand three hundred seventy-five dollars [$3,375]), shall be due and payable within forty-five (45) days after service of this order upon respondent. Payment shall be made in the form of a cashier’s check, certified check, or money order payable to the order of the “New York State Department of Environmental Conservation” and mailed to the Department at the following address:

Margaret A. Sheen, Esq.
New York State Department of
Environmental Conservation
Office of General Counsel, Region 7
615 Erie Boulevard West, 2nd Floor
Syracuse, New York 13204-2400

Should respondent fail to satisfy any of the terms and conditions of this order, the suspended portion of the penalty (that is, twenty-two thousand dollars [$22,000]) shall become immediately due and payable upon notice by Department staff and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

III. Within fourteen (14) days of the completion of the relocation work, respondent shall provide proof to the Department that the work was completed in accordance with the approved plan.

IV. All communications from respondent to the Department concerning this order shall be made to Margaret A. Sheen, Esq., at the address listed in paragraph II of this order.

V. The provisions, terms, and conditions of this order shall bind respondent Original Italian Pizza, LLC, and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: ___________________________________
Joseph J. Martens
Commissioner

Dated: November 25, 2012
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 19 of the New York State Environmental Conservation Law (ECL), and Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR),

- by -

ORIGINAL ITALIAN PIZZA, LLC,

Respondent.

HEARING REPORT

DEC File No. R7-20100726-52

Appearances of Counsel:

-- Steven C. Russo, Deputy Commissioner and General Counsel (Margaret A. Sheen of counsel), for staff of the Department of Environmental Conservation

-- Cerio Law Offices (David W. Herkala of counsel), for respondent Original Italian Pizza, LLC

HEARING REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) charged respondent Original Italian Pizza, LLC, with emitting large amounts of smoke, grease, and noxious odors from its restaurant located in Mattydale, New York, in continuing violation of the Department's regulatory prohibition against air pollution (see 6 NYCRR former 211.2).[1] After I granted

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[1] Former section 211.2 provided:

> "[n]o person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor,

Department staff's motion for summary judgment on the issue of liability, an adjudicatory hearing was held solely on the issue of the appropriate penalty and injunctive relief to be imposed for the continuing violation.

Based on the record of the penalty phase hearing, I recommend that the Commissioner impose the penalty sought by Department staff, but suspend a portion of the penalty contingent upon respondent implementing specific measures to mitigate the smoke and odors emitted from its restaurant. I further recommend that the Commissioner otherwise deny the injunctive relief sought by Department staff.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated September 22, 2010. In the complaint, Department staff alleged that since May 2008, respondent Original Italian Pizza, LLC, has operated a restaurant located at 2230 Brewerton Road, Mattydale, New York. Staff alleged that starting in August 2008 and continuing to the date of the complaint, the Department received multiple complaint calls and complaint forms filled out by neighbors of the restaurant raising air quality concerns about emissions from the restaurant's cooking vents. Staff further alleged that on five separate occasions from June 2009 through September 2010, Department inspectors observed emissions of large amounts of heavily opaque smoke, grease, and burning odors issuing from the restaurant's cooking vents and traveling along a neighboring alley and onto nearby properties.

As a result of the alleged emissions, Department staff charged respondent with a continuing violation of the prohibition against air pollution established at 6 NYCRR 211.2. Department staff sought a civil penalty in the amount of $25,375, and an order directing respondent to cease and desist from any future violations of 6 NYCRR part 211.

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pollen, toxic or deleterious emission, either alone or in combination with others."

Effective January 1, 2011, 6 NYCRR former 211.2 was renumbered 211.1 without any changes to the text. This ruling refers to former section 211.2 throughout.

Respondent filed an answer dated October 8, 2010. In addition to denying the allegations of the complaint, respondent pleaded five affirmative defenses.

By notice of motion dated October 20, 2010, Department staff moved to clarify or dismiss all five affirmative defenses. Respondent filed a response dated October 29, 2010, opposing the motion. By ruling dated December 15, 2010, I granted staff's motion to the extent of dismissing respondent's third and fifth affirmative defenses challenging section 211.2 as void for vagueness, and otherwise denied the motion (see Matter of Original Italian Pizza, LLC, Ruling of the Chief Administrative Law Judge [ALJ] on Motion to Clarify or Dismiss Affirmative Defenses, Dec. 15, 2010).

By notice of motion dated March 2, 2011, Department staff moved for an order without hearing pursuant to 6 NYCRR 622.12 on its September 2010 complaint. A section 622.12 motion for order without hearing is the Departmental equivalent of a CPLR 3212 motion for summary judgment. Respondent opposed Department staff's motion in papers dated March 31, 2011.

By ruling dated October 17, 2011, I granted Department staff summary judgment on the issue of liability, holding that from August 2008 through the date of the complaint, respondent's emissions of thick, greasy, and odorous smoke from the restaurant's cooking vents constituted a continuing violation of section 211.2 (see Matter of Original Italian Pizza, LLC, Ruling of the Chief ALJ on Motion for Order Without Hearing, Oct. 17, 2011, at 9). In ruling on liability, I again rejected respondent's argument that section 211.2 is unconstitutionally vague (see id. at 7).

On the issue of penalty and injunctive relief, however, I held that issues of fact remained requiring a hearing. Accordingly, I otherwise denied staff's summary judgment motion, and directed that a penalty phase hearing be convened.

I issued a notice of enforcement hearing dated December 20, 2011, directing the parties to appear on Wednesday, February 1, 2012, in the Department's Region 7 offices in Syracuse, New York. The parties appeared as directed. However, at the request of the parties, the hearing was adjourned to Friday, February 3, 2012, to allow for settlement discussions.

Those discussions failed to produce a settlement and, accordingly, the hearing proceeded on February 3, 2012, as scheduled. At the hearing, Department staff presented one witness: Reginald Parker, Regional Air Pollution Control Engineer, Department Region 7. Respondent presented two witnesses: Bruce Pleeter, owner and operator of Pleeter Sheet Metal, Inc.; and Joseph Crabbe, a partner in respondent Original Italian Pizza, LLC. The hearing concluded that afternoon.

I established the following briefing schedule. Department staff was authorized to file its closing brief by February 13, 2012, and respondent was to file its closing brief by February 20. Department staff was authorized to file a reply brief, if needed, by February 27.

Department staff submitted a closing brief dated February 13, 2012. Respondent filed a closing brief dated February 20, 2012. By letter dated February 23, 2012, Department staff informed the parties that it would not be submitting a reply brief. A transcript of the proceeding was received by the Chief ALJ on February 23, 2012, thereby closing the hearing record.

FINDINGS OF FACT

The facts that were determined as a matter of law on staff's motion for order without hearing (see 6 NYCRR 622.12[e]) are as follows (see Ruling, Oct. 17, 2011, at 11-12).

1. Respondent Original Italian Pizza, LLC, is a limited liability corporation duly authorized and registered to do business in New York State. Since May 2008, respondent has operated a restaurant located at 2230 Brewerton Road, Mattydale, New York.

2. Starting in August 2008 and continuing to September 22, 2010 -- the date of the complaint -- the Department received multiple complaint calls and complaint forms[2] filled out by

[2] Of the six odor complaints submitted for the record, one is dated "Spring 08," one is dated "9-21-10," one is dated "9-22-10," and one is marked received September 27, 2010 (see Hearing Exhibit [Exh] 10). The remaining two complaints are undated. At the hearing, respondent objected to admission of the odor complaints as hearsay. In administrative adjudicatory hearings,

neighbors of the restaurant raising air quality concerns about emissions from the restaurant's cooking vents. The complaints established that on a recurring and continuous basis, respondent emitted large amounts of thick, opaque, and malodorous smoke and grease from its cooking vents into the atmosphere and onto properties neighboring the restaurant. As a result of these emissions, numerous residents were unable to use their yards or pools, or engage in other outdoor activities. Pool toys, lawn chairs, automobiles, house siding, windows, and other outdoor property were covered in grease. The smoke and odors were such that residents were forced to keep their windows closed. Smoke and odors infiltrated both outdoor and indoor areas. Neighbors reported of burning eyes, throats, and lungs, and coughing as a result of the smoke and odors.

3. On five separate occasions from June 2009 through September 2010, a Department inspector observed emissions of large amounts of heavily opaque smoke and grease, and burning odors issuing from the restaurant's cooking vents and traveling along a neighboring alley and onto nearby properties.

4. At the time of staff's motion for order without hearing, various measures were available to respondent to abate the smoke and odors issuing from its cooking vents, although triable issues of fact remained concerning the economic feasibility of some of those measures.

Additional facts established by a preponderance of the record evidence at the penalty phase hearing are as follows:

5. In response to the neighbor's complaints, respondent's landlord installed a stack on the exhaust vents to move the smoke higher (Transcript [Tr] at 155). The stack, however, blew off in a storm (see id.).

6. In September 2010, respondent installed six high-efficiency grease extractors in the restaurant's ventilation system (Tr at 22, 132-133; Exh A). The grease extractors are engineered to

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however, hearsay is admissible (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 2-3 [and cases cited therein]; see also Matter of Original Italian Pizza, LLC, Ruling of the Chief ALJ on Motion for Order Without Hearing, Oct. 17, 2011, at 8-9). Accordingly, respondent's objection was overruled. However, the circumstance that evidence is hearsay bears upon that evidence's weight (see id.).

extract 94 percent of airborne grease particles (see Tr at 133; Exh A).

7. During an inspection on September 17, 2010 -- after the installation of the grease extractors -- heavy smoke and odors were observed issuing from the restaurant's vents (Tr at 22-23). No evidence was presented concerning the emission of grease.

8. In May 2011, respondent proposed to run the exhaust from the restaurant along the building's roof so that it would exhaust along the building's south end and furthest away from residential property lines (see Tr at 134; Exh 4). This proposal would avoid the downwash effect from the vent's present location and move the smoke away from the rear neighbor's property (see id.). The cost for relocating the vent is $19,800.00 (see Exh B). The proposal does not meet the Uniform Building Code and would need approval from the Town of Salina before installation (see Tr at 146).

9. The Department conducted another inspection during the early evening on January 27, 2012 (Tr at 31-32). Heavy smoke and cooking odors were observed (see id.; Exh 3). No mention was made about observations of grease emissions.

10. Department staff has recommended installation of a Smog Hog with a carbon filtration system to reduce or eliminate emissions of smoke, grease, and odors. A Smog Hog is an electrostatic precipitator that removes particles from exhaust (see Exh 7; Exh 8). The charcoal or granulated carbon filtration system removes vapors and organic odorous compounds (see id.). An estimate received by the Department indicates that a Smog Hog would cost between $15,000 and $30,000 for the unit and $5,000 to $10,000 to install (see Exh 7). In addition, annual maintenance costs would total $3,600 to $4,400 (see id.).

11. Respondent's estimate for the cost of a Smog Hog is $30,000 for the unit and $50,000 to install (see Tr at 138; see also CaptiveAire Quote [3-30-09], unnumbered page attached to Exh 8). Annual maintenance costs are between $6,000 and $12,000 (see Tr at 139). Respondent's witness, Mr. Pleeter, was not aware of any Smog Hog being installed in Syracuse, or in a pizza restaurant. He was aware of a Smog Hog being used in a $22-23 million project in Lake Placid (see id. at 140).

12. Respondent operates six restaurants, including the Mattydale restaurant that is the subject of this proceeding (see Tr at 149). Respondent has received no complaint about any of its other five restaurants. Before the Mattydale restaurant was opened, respondent was warned by the landlord that it would receive complaints from neighbors, who complained to the landlord about the commercial development at the site (see Tr at 153). Respondent began receiving complaints seven to ten days after opening (see id. at 154). The immediately adjacent neighbor complains not only about the emissions from the restaurant's vents, but also steam from the adjacent laundromat, and the back light at the restaurant (see id. at 158). That neighbor has also indicated that he wants the restaurant closed (see id.).

13. The Mattydale restaurant grosses about $750,000 annually (see Tr at 159, 162, 165). The restaurant is subject to a ten-year lease, with a net monthly rental of about $4,200 (see id. at 150). Monthly expenses, including rent, payroll for about 16 employees, food, and other expenses, are about $57,000 (see id. at 151). Monthly income is about $60,000 (see id. at 152).

14. Mr. Crabbe testified that respondent could not afford the additional $400 per month for the Smog Hog system proposed by staff, and would have to close (see id. at 158-159). In the alternative, if respondent stopped grilling wings, which is the source of the smoke and odors, respondent would lose between 40 and 50 percent of the business at the restaurant (see id. at 163-164). Respondent would also be forced to close if it cannot grill wings (see id. at 164).

15. On Department staff's summary judgment motion, respondent asserted that the restaurant is located in a mixed use (residential and commercial) neighborhood, and the parcel on which the restaurant is situated is zoned for commercial use (see Amato Affidavit [3-31-11]). These assertions were undisputed throughout this proceeding.

DISCUSSION

I. Penalty

As noted above, respondent's liability for a continuing violation of section 211.2 was determined on summary judgment (see Ruling, Oct. 17, 2011). Accordingly, the issue

presented is the appropriate penalty to be imposed for the violations established.

For violations prior to May 2010, Environmental Conservation Law (ECL) § 71-2103(1) provided that any person who violated any regulation promulgated pursuant to ECL article 19, such as section 211.2, is liable for a civil penalty of not less than $375 nor more than $15,000 for the first violation, and an additional penalty of not more than $15,000 for each day during which the violation continues. In the case of a second or any further violation, the penalty authorized was not to exceed $22,500 for the violations, and an additional penalty not to exceed $22,500 for each day the violation continued.[3]

In determining the amount of any penalty to be imposed, ECL 71-2115 directs the Commissioner to consider any evidence introduced by a party regarding the economic impact of a penalty on a business, the compliance history of a violator, good faith efforts of a violator to comply, any economic benefit obtained from non-compliance, the amount of risk or damage to public health or the environment caused by a violator, whether the violation was procedural in nature, or such other factors as justice may require. The Department's Civil Penalty Policy (Commissioner Policy DEE-1, June 20, 1990) counsels similar considerations. No other Departmental policy applies to section 211.2 violations.

A. Statutory Maximum

An initial step under the Department's civil penalty policy is a calculation of the maximum penalty authorized by statute (see id. ¶ IV.B). Department staff seeks a penalty of $375 for the first violation observed during staff's inspection of the restaurant, and $5,000 for each of five additional observed violations, for a total civil penalty of $25,375 (see Exh 2 [Penalty Calculation Chart]). The requested penalty is

[3] In 2010, ECL 71-2103(1) was amended to increase the maximum authorized penalty for a first time violation occurring after May 2010 from $15,000 to $18,000. Department staff based its penalty calculation on the six violations observed by Department staff during its inspections, the first of which occurred prior to May 2010. Staff treated the remaining five violations as a continuation of the first. The maximum penalty authorized for the continuation of a first violation -- $15,000 -- remained the same both prior to and after the 2010 amendments.

well below the statutory maximum for one violation continuing on five subsequent days (total of $90,000 [$15,000 x 6 violations]). It is also well below the statutory maximum authorized for a violation that continued almost daily since May 2008, which staff estimated as being worth over $3 million (see Tr at 29).

B. Economic Impact of Penalty/Ability to Pay

With respect to the economic impact of the requested penalty on respondent's business, Department staff argues that respondent's evidence concerning the restaurant's finances should be rejected, and a negative inference drawn from respondent's failure to provide tax returns and other financial statements and reports to support its live testimony. Staff relies on 6 NYCRR 622.7, which allows the ALJ or Commissioner to draw negative inferences as a sanction against a party that fails to comply with an order compelling disclosure (see 6 NYCRR 622.7[c][3]; see also CPLR 3126). However, staff has failed to satisfy the conditions required before the ALJ or Commissioner may draw the requested negative inferences. First, although staff made a demand for the production of financial documents respondent intended to introduce at hearing, the record does not indicate whether staff requested disclosure of respondent's financial documents, irrespective of whether respondent intended to rely on them at hearing or not. Moreover, Department staff did not make a motion, either before or during the hearing, for an order compelling disclosure (see 6 NYCRR 622.7[c][2]). Thus, Department staff has not established a basis for drawing a negative inference from respondent's failure to submit financial records in support of its testimony.

In addition, Department staff does not establish a basis for rejecting respondent's evidence concerning its finances. Respondent produced Mr. Crabbe, who is the person responsible for and, thus, personally knowledgeable about, the restaurant's finances. Mr. Crabbe provided detailed testimony about the restaurant's income and expenses, and that testimony was subject to the Department's cross examination. Thus, although Mr. Crabbe's testimony was not corroborated, I nevertheless find respondent's evidence competent and probative, and the only evidence on this record on the issue of respondent's finances.

Based upon Mr. Crabbe’s testimony, the record reflects that respondent nets approximately $36,000 annually from the Mattydale restaurant (see Finding of Fact No. 13, above). Factored out over the remaining five-year term of the lease, the requested penalty would cost respondent $5,075 per year plus any applicable finance charges. Accordingly, the record does not support the conclusion that respondent lacks the ability to pay the requested penalty.

C. Compliance History

The compliance history factor is generally considered to be an aggravating factor, based upon a respondent’s history of non-compliance with environmental requirements (see Civil Penalty Policy, ¶IV.E.3). As noted by Department staff, respondent has no other history of non-compliance, and this was taken into account in staff’s recommended penalty (see Department Staff’s Closing Brief, at 3).

D. Good Faith Efforts to Comply

With respect to good faith efforts to comply, the record on this factor is mixed. On the one hand, attempts were made to mitigate the smoke emissions by raising the vent stack. However, this proved unsuccessful. In addition, respondent installed high-efficiency grease traps to remove air borne grease from the smoke. The traps did not address smoke and odors, which they are not designed to do. However, no evidence was presented indicating a continuing grease problem after the traps were installed. On this record, it may fairly be concluded that the traps are operating as designed.

Finally, respondent has proposed to relocate the vents to the south side of the building, and has obtained an estimate for the installation work. However, respondent has not begun the installation work, although it has had ample opportunity to do so, apparently out of concern that it will continue to receive complaints no matter what steps are taken. Based upon the above considerations, I conclude that, on balance, respondent has taken some reasonable steps to address the problem, and should receive some credit for those efforts when considering the appropriate penalty in this case.

E. Economic Benefit to Respondent vs. Gravity of Harm

In terms of the economic benefit respondent has gained by non-compliance, Department staff uses the avoided costs of not installing a Smog Hog as the economic measure. I disagree that the costs of installing and operating a Smog Hog is the appropriate measure in this case. As has previously been held, section 211.2, which incorporates the statutory definitions of "air pollution" and "air contamination" (see ECL 19-0107[2], [3]), incorporates the common law standard for public nuisances (see Matter of Original Italian Pizza, LLC, Ruling of the Chief ALJ on Motion for Order Without Hearing, Oct. 17, 2011, at 4; see also Matter of Delford Indus., Inc., ALJ Hearing Report, at 44, concurred in by Commissioner Decision and Order, April 13, 1989). Under the common law standard, the reasonableness of the respondent's use is balanced against the rights of the affected neighbors and members of the public, taking into consideration the use's effect on the enjoyment of life, health, and property, among other things (see Original Italian Pizza, 2011 ALJ Ruling, at 5-6; Delford Indus., ALJ Hearing Report, at 44; see also McCarty v Natural Carbonic Gas Co., 189 NY 40, 47-48 [1907]).

Whether a particular use is reasonable depends upon the availability of measures to abate the nuisance (see Original Italian Pizza, 2011 ALJ Ruling, at 6; Delford Indus., Commissioner Order, at 3; Matter of Town of Huntington, Commissioner Decision and Order, May 17, 1989, at 2; McCarty, 189 NY at 50). A use is more likely to be considered unreasonable if reasonable measures are available to mitigate the use's impact (see id.; but see Restatement [Second] of Torts § 828, Comment h; id. § 830, Comment c, Illustration 2 [invasion not practicably avoidable where installation of pollution control device would render operation unprofitable; whether use is unreasonable under these circumstances depends upon whether gravity of harm is great enough to outweigh utility of conduct]).

Under the circumstances of this case, the installation of a Smog Hog is not a reasonable measure to mitigate the smoke and odors. Mr. Crabbe testified that the installation of a Smog Hog would render the restaurant unprofitable and would likely require its closure (see Tr at 159). This assertion is supported by credible record evidence. Based upon the costs testified to by respondent's witnesses (which I find to be the

more accurate estimate in this case),[4] and factoring those costs out over a ten-year period (the period of respondent's lease), the annual costs associated with installing and maintaining a Smog Hog system would be between $14,000 to $20,000 per year. Based upon a net profit of $36,000 per year for the Mattydale restaurant, the costs associated with the Smog Hog would amount to at least 39 to 56 percent of those profits over a ten-year period. If the costs of installing and maintaining a Smog Hog are factored out over the five years remaining on respondent's lease, the costs would consume almost all of respondent's profits for those years. And this does not take into account any financing costs associated with the system.

Balanced against the cost to respondent is the impact of the smoke and odors upon the neighborhood and, in particular, upon the immediately adjacent neighbor. Violations of section 211.2 are based either upon injuries to human, plant, or animal life or to property, or upon nuisances. I have already determined on Department staff's summary judgment motion that the smoke, grease, and odors emitted from the restaurant caused an unreasonable interference with the comfortable enjoyment of life and property in the area as a matter of law (see ALJ Ruling, Oct. 17, 2011, at 4-9). However, the record contains no evidence of any injury to public health or the environment (see, e.g., Department Staff's Closing Brief, at 5 [indicating that the Department lacks data concerning the risk to public health or the environment from the smoke emitted from the restaurant]).

Moreover, evidence on this record of the severity of the nuisance created by respondent's operation is weak. Much of the evidence concerning the impacts upon the neighborhood is based upon written complaints from 2010 and earlier from complainants who were not produced at the hearing. Accordingly, the weight of that evidence has not been tested.[5] Furthermore, the record lacks more recent evidence of the impacts upon the neighborhood beyond staff's observation that smoke and odor

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[4] Both Department staff and respondent have provided additional information in their closing briefs concerning the costs of a Smog Hog system and its use in restaurants such as respondent's. Those additional submissions were unauthorized and outside the hearing record. Accordingly, I have not considered the parties' additional submissions or the factual assertions based upon them.

[5] As noted above in footnote 2, respondent's objection to the admission of the odor complaints on hearsay grounds was overruled. The circumstance that the odor complaints are hearsay goes to the weight of that evidence.

emissions observed in 2012 are similar to those observed in 2009 and 2010. Thus, although the record supports the conclusion that respondent's emissions of smoke, grease, and odors constitutes a nuisance, the severity of the nuisance established on this record is limited. Accordingly, use of the Smog Hog, which would require respondent to run its restaurant unprofitably or close, does not constitute a reasonable measure for the mitigation of the smoke and odors impacts from a pizza restaurant located in a mixed use neighborhood. In other words, absent a showing of a severe nuisance, the gravity of the harm established on this record would not justify a mitigation measure that would require closure of the restaurant. Thus, the avoided costs of installing and maintaining a Smog Hog device is not an available measure of the economic benefit respondent derived from non-compliance with section 211.2.

In the alternative, Department staff argues that respondent's economic benefit from non-compliance may also be measured by the profits it derives from selling grilled wings. However, Mr. Crabbe testified that grilled wings account for between 40 and 50 percent of the business at the restaurant. As with installation of a Smog Hog, given the limited severity of the harm established on this record, a 40 to 50 percent loss of business as a measure to mitigate the smoke and odor impacts is not reasonable under the circumstances.

Based upon the record before me, the appropriate measure of respondent's economic benefit from non-compliance is the cost of relocating the vents to the south of the building. Relocating the vents to the south would move the emissions the furthest distance away from residential property lines as possible, and avoid the downwash effect that is causing the emissions to directly impact the neighbor immediately adjacent to the restaurant (see Finding of Fact No. 8, above). The cost of installation -- $19,800 plus any applicable finance charges -- when factored out over the ten-year period of respondent's lease, is approximately $1,980 per year or 5.5 percent of respondent's annual net income from the Mattydale restaurant. When factored out over the five years remaining on the lease, the cost of relocating the vents constitutes only 11 percent of respondent's annual net income. Although this solution would result in somewhat reduced profits, the measure is reasonable under the circumstances of this case (see McCarty, 189 NY at 50). Thus, based upon the record in this case, the cost of relocating the vents is the appropriate measure of the economic

benefit respondent has enjoyed as a result of non-compliance with section 211.2.

F. Procedural Nature of Violation/Unique Factors

Respondent's continuing violation of section 211.2 is substantive, and not procedural, in nature. Moreover, Department staff argues that unique factors exist in this case, including the duration and on-going nature of the nuisance, and the effect it has had on the everyday lives of the nearby residences. Nevertheless, Department staff indicates that it has not recommended increasing the penalty sought based on these factors (see Department Staff's Closing Brief, at 5).

G. Conclusion

In sum, Department staff's requested civil penalty of $25,375 is justified and supported by the record in this case. The requested penalty takes into account the economic benefit of non-compliance, as measured by the avoided costs of relocating the cooking vents. It also reflects that although respondent has taken some steps to address the violation, additional reasonable steps are available. The penalty is also well below the maximum penalty available under the ECL, takes into account the lack of any other history of environmental non-compliance, and does not impose an unreasonable economic burden on respondent. Accordingly, based upon these and the other considerations discussed above, I recommend that the Commissioner impose the $25,375 penalty requested by Department staff.

II. Injunctive Relief

In addition to a civil penalty, Department staff also seeks an order directing respondent to cease and desist from any and all future violations of 6 NYCRR part 211. Among the authorities cited for this request for relief, Department staff cites ECL 19-0509, which provides that after a hearing, the Commissioner may issue an order, among other things, requiring the "immediate cessation of any activity in contravention of [the] codes, rules and regulations" of the Department

promulgated pursuant to ECL article 19 (ECL 19-0509[2]; see also ECL 19-0505).

Respondent contends that under this statutory provision, the Commissioner lacks the authority to enjoin violations of the "catch all nuisance regulation" found at section 211.2. The Commissioner's authority under ECL 19-0509 is not so limited, however. Section 211.2 was adopted pursuant to the Department's authority at ECL 19-0301, among other statutory provisions. Under ECL 19-0301, the Department is authorized to promulgate codes, rules and regulations for preventing, controlling, or prohibiting air pollution, and to include in those regulations a general provision for controlling air contamination (see ECL 19-0301[1][a]). Section 211.2 is a general regulatory provision prohibiting air pollution that incorporates both the statutory definition of "air pollution," which includes nuisance conditions, and the statutory definition of "air contaminants," which includes smoke and odors (see ECL 19-0107[2], [3]). Thus, section 211.2 is a regulation of the Department promulgated pursuant to ECL article 19, and nothing in the ECL exempts section 211.2 from the Department's injunctive power under ECL 19-0507.

Moreover, contrary to respondent's assertions, Department staff's recognition at hearing that restaurants are generally not subject to Departmental air permits does not compel the conclusion that restaurants are exempt from section 211.2's general prohibition against air pollution (see, e.g., Tr at 16-17). Section 211.2 applies to any "person," the definition of which is broad enough to include limited liability companies such as respondent (see 6 NYCRR 200.1[bi]; see also ECL 19-0107[1]). Neither the regulation nor the ECL exempt restaurants from coverage under ECL article 19. To the contrary, ECL 19-0107(5) expressly includes restaurants among the air contamination sources subject to regulation. Thus, the Commissioner has the authority to enjoin a restaurant from activities that contravene section 211.2's prohibition against nuisances, even though that restaurant is not otherwise subject to a Departmental air permit.

In determining whether to grant an injunction under ECL 19-0509, the Commissioner is directed to consider evidence received at the hearing relating to the adequacy and practicability of various means of complying with the Department's regulations, and the financial ability of the

respondent to comply (see ECL 19-0509[3]). If the Commissioner finds that immediate compliance would be impossible or impracticable, the order shall establish the reasonable time within which the required steps, both intermediate and final, are to be taken (see id.). The burden of proving impossibility, impracticability, or financial inability is on the respondent (see id.).

Based upon the considerations discussed above, I recommend that the Commissioner conclude that an order directing the immediate cessation of smoke and odor emissions from the restaurant would be impracticable on this record. An order directing immediate cessation would effectively require respondent to cease grilling wings, causing an unreasonable economic burden under the circumstances presented here.

The record also supports the conclusion that practical and affordable measures are available to mitigate the smoke and odor impacts associated with respondent's operation, specifically, the relocation of the restaurant's vents to the south end of the building. Accordingly, I recommend that the Commissioner direct respondent to relocate the restaurant's vents to a location as far away from residential property lines as possible and to do so in a time frame that takes into account weather, local approvals, and other considerations that impact installation. In addition, to encourage compliance with the directive, I recommend that the Commissioner suspend a portion of the penalty equal to the installation costs -- approximately $20,000 -- contingent upon respondent's timely installation of the relocated vents.

Respondent has expressed concern on this record regarding whether relocating the vents will be effective and whether, no matter what is done short of closing the restaurant, complaints by neighbors will continue. As discussed above, under the nuisance standard applicable in this case, respondent is only required to take reasonable steps to avoid nuisance conditions. Provided such reasonable steps are taken, the circumstance that some smoke and odors may remain to annoy the neighbors "is part of the price paid for living where there are neighbors" (McCarty, 189 NY at 50). Absent a much stronger showing of harm than was established on this record, requiring respondent to close a business conducted in an area zoned for mixed use is not warranted.

III. Other Issues

At the hearing, respondent continued to argue that section 211.2 is unconstitutionally void for vagueness. I have twice before rejected respondent's argument and, for the reasons stated before, do so again (see Ruling, Dec. 15, 2010, at 5-8; Ruling, Oct. 17, 2011, at 7). As noted above, section 211.2, in part, adopts the common law nuisance standard. Such a standard, based upon the reasonable person standard, is considered an objective standard. Only if the common law standard is impermissibly vague should section 211.2 be found impermissibly vague. Inasmuch as nothing in the case law concerning common law nuisances indicates that the nuisance standard is infirm, I conclude that nothing compels the conclusion that section 211.2 is unconstitutional.

CONCLUSIONS OF LAW

1. Respondent's liability for a continuing violation of section 211.2 was determined on summary judgment (see Ruling, Oct. 17, 2011).

2. After hearing on the issue of penalty, Department staff's requested penalty of $25,375 is authorized and justified by the record in this case.

3. Based upon the record, the correct measure of the economic benefit respondent derived from non-compliance with section 211.2 is the cost of relocating the restaurant's vents -- approximately $20,000. Because the costs associated with the installation and maintenance of a Smog Hog system far outweigh the gravity of the harm established on this record, the costs of a Smog Hog system are not an appropriate measure of the economic benefit respondent derived from non-compliance.

4. The appropriate injunctive relief, based upon the record in this proceeding, would be to direct respondent to relocate the restaurant's vents to a location as far away from residential property lines as possible and to do so in a time frame that takes into account weather, local approvals, and other considerations that impact installation.

RECOMMENDATION

I recommend that the Commissioner:

1. Find respondent Original Italian Pizza, LLC, liable for violating 6 NYCRR former 211.2 by allowing emissions of smoke, odors, and grease from its restaurant to the outdoor atmosphere in such quantity, characteristics, and duration so as to unreasonably interfere with the comfortable enjoyment of life or property in the neighboring areas. I recommend that the Commissioner find that the violation of section 211.2 continued from May 2008 to September 2010, the date of the complaint;

2. Impose a penalty of $25,375 for the continuing violation, but suspend $20,000 of the penalty provided respondent relocate the restaurant's vents as provided below; and

3. Direct respondent to submit to Department staff an approvable plan for relocating the restaurant's vents to a location as far away from residential property lines as possible pursuant to a timetable that takes into account weather, local approvals, and other considerations that impact installation and, upon the Department's approval, complete the plan.

/s/

____

James T. McClymonds
Chief Administrative Law Judge

Attachment -- Exhibit List

STATE OF NEW YORK
DEPARTMENT OF ENVIROMENTAL CONSERVATION

MATTER OF ORIGINAL ITALIAN PIZZA, LLC
DEC File No. R7-20100726-52

EXHIBIT LIST
Updated February 7, 2012

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
1	Memorandum by Reginald Parker, Regional Air Pollution Control Engineer, Sept. 21, 2009 RE: Original Italian Pizza Complaint	✓	✓	DEC Staff	
2	Penalty Calculation Chart, Original Italian Pizza, NYSDEC File No. R7-20100726-52	✓	✓	DEC Staff	
3	Memorandum by Reginald Parker, Jan. 27, 2012 RE: OIP Site Visit	✓	✓	DEC Staff	
4	Letter from David W. Herkala, Cerio Law Office, to Margaret A. Sheen, Assistant Regional Attorney, May 25, 2011, with attachment	✓	✓	DEC Staff	
5	Letter from Bernard D. English, Director Planning & Development, Town of Salina, to Margaret Sheen, Assistant Regional Attorney, Jan. 23, 2012	✓	✓	DEC Staff	Admitted upon receipt of certification by Bernard English dated Feb. 6, 2012
6	Letter from Margaret A. Sheen, Assistant Regional Attorney, to Bernard English and George Keller, Jan. 19, 2012	✓	✓	DEC Staff	
7	Memorandum by Reginald Parker, Jan. 19, 2012 RE: Phone Conservation	✓	✓	DEC Staff	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
8	Letter from Robert D. Ventre, Coulter, Ventre & McCarthy, LLP, to Margaret Sheen, Assistant Regional Attorney, Jan. 24, 2010 RE: Original Italian Pizza/Mattydale, New York, with attachments	✓	✓	DEC Staff	
9a	Photograph 070.jpg, March 18, 2010	✓	✓	DEC Staff	Date corrected and photograph admitted upon receipt of Parker affidavit dated Feb. 6, 2012
9b	Photograph OIP7.jpg, Aug. 6, 2009	✓	✓	DEC Staff	
9c	Photograph OIP3.jpg, Aug. 6, 2009	✓	✓	DEC Staff	
9d	Photograph P917006.jpg, Sept. 17, 2010	✓	✓	DEC Staff	
9e	Photograph P9170004.jpg, Sept. 17, 2010	✓	✓	DEC Staff	Date corrected and photograph admitted upon receipt of Parker affidavit dated Feb. 6, 2012
9f	Photograph P9170009.jpg, Sept. 17, 2010	✓	✓	DEC Staff	
10	6 Odor Complaint Forms, various dates	✓	✓	DEC Staff	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
A	Invoice, Pleeter Sheet Metal Inc. to Original Italian Pizza - Mattydale, Sept. 8, 2010	✓	✓	Respondent	
B	Proposal, Pleeter Companies, Inc. to Original Italian Pizza, Nov. 8, 2011	✓	✓	Respondent	