

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAR 15 2004

STATE OF ILLINOIS  
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS, )  
by LISA MADIGAN, Attorney General )  
of the State of Illinois, )

Complainant, )

v. )

PCB No. 04-138  
(Enforcement - Water)

PINNACLE CORPORATION d/b/a )  
TOWN & COUNTRY HOMES, )  
an Illinois Corporation, )

Respondent. )

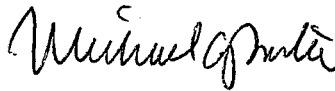
**NOTICE OF FILING**

TO: Glenn C. Sechen  
Daniel C. Shapiro  
Schain, Burney, Ross & Citron, Ltd.  
222 North LaSalle Street, Suite 1910  
Chicago, Illinois 60601-1102

PLEASE TAKE NOTICE that I have today filed the **Complainant's Response to Respondent's Motion to Dismiss** with the Office of the Clerk of the Illinois Pollution Control Board, a true and correct copy of which is herewith served upon you.

PEOPLE OF THE STATE OF ILLINOIS,  
by LISA MADIGAN, Attorney General  
of the State of Illinois

BY:



MICHAEL C. PARTEE  
Assistant Attorney General  
Environmental Bureau/North  
188 West Randolph Street, Suite 2001  
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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I caused to be served the attached **Complainant's Response to Respondent's Motion to Dismiss** by First Class Mail, postage prepaid upon each of the persons listed on the Notice of Filing on March 15, 2004.

BY: Michael C. ParTEE  
MICHAEL C. PARTEE

I, the undersigned, also certify that I caused to be served the **Complainant's Response to Respondent's Motion to Dismiss** plus nine (9) copies of the same by hand-delivery upon the following person on March 15, 2004:

Pollution Control Board, Attention: Clerk  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

BY: Michael C. ParTEE  
MICHAEL C. PARTEE

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STATE OF ILLINOIS  
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PCB No. 04-138  
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**COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS**

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS ("People"), by LISA MADIGAN, Attorney General of the State of Illinois, and hereby responds to Respondent's, PINNACLE CORPORATION d/b/a TOWN & COUNTRY HOMES ("Town & Country"), Motion to Dismiss Complaint as follows:

**I. INTRODUCTION**

On February 2, 2004, the People filed a Complaint containing five counts against Town & Country pursuant to the Illinois Environmental Protection Act ("Act") (415 ILCS 5/1 *et seq.* (2002)). The Complaint alleges that Town & Country caused, threatened or allowed water pollution (Count I), caused or allowed the construction of a sewer without a permit (Count II), caused, threatened or allowed the discharge of contaminants without an NPDES storm water discharge permit (Count III), failed to submit plans and specifications for a public water supply before construction (Count IV), and caused or allowed the construction or installation of a public water supply without a permit (Count V).

On February 5, 2004, the Board entered an Order in which it summarized the allegations in the Complaint and made *prima facie* finding that the Complaint meets the content requirements of Board Procedural Rules 103.204(c) and (f) and 103.212(c) (35 Ill. Adm. Code 103.204(c) and (f) and 103.212(c)). (Order at 1.) Accordingly, the Board accepted the Complaint for hearing and advised Town & Country that its failure to file an answer to the Complaint within 60 days after receiving it may have severe consequences. (*Id.*)

On March 2, 2004, Town & Country filed a Motion to Dismiss Complaint ("Motion"). Town & Country's baseless Motion argues that the People's Complaint "fails to articulate the nature, extent, duration and strength of discharges or omissions [*sic*] which Town & Country allegedly caused." (Motion at 2-3.) The Motion categorically argues that the Complaint fails to meet the content requirements under Board Procedural Rule 103.204(c), which flies directly in the face of the Board's previous Order, dated February 5, 2004.

## **II. LEGAL STANDARD FOR A MOTION TO DISMISS**

A complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense. 35 Ill. Adm. Code 103.204(c)(2); see also People v. Bentronics Corp., PCB 97-20, 1996 WL 633410, at \*6 (Oct. 17, 1996). A complaint "need not present evidence on every essential element in pleadings." *Id.* Rather, a complaint need only allege ultimate facts necessary to state a cause of action and inform the respondent of what it must defend against. People v. Old World Ind., PCB 97-168, 1998 WL 660355, at \*3 (Sept. 17, 1998).

"For purposes of ruling on a motion to dismiss, all well pled facts contained in the pleadings must be taken as true and all inferences from them must be drawn in favor of the nonmovant." People v. Skokie Vall. Asphalt, PCB 96-98, 2003 WL 21405849, at \*6 (June 5,

2003). "A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle complainant to relief."

Id. A complaint should survive a motion to dismiss where the Board can foresee a set facts upon which a complainant can recover. See Miehle v. Chicago Br. and Iron Co., PCB 93-150, 1993 WL 468414, at \*5 (Nov. 4, 1993).

**III. TOWN & COUNTRY'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE IT DIRECTLY CONTRADICTS THE BOARD'S PREVIOUS FINDING AND BECAUSE THE PEOPLE'S COMPLAINT MEETS THE CONTENT REQUIREMENTS**

**A. Town & Country's Motion Contradicts the Board's Previous Finding that the People's Complaint Meets the Content Requirements**

On February 5, 2004, the Board entered an Order making a *prima facie* finding that the People's Complaint meets the content requirements under Board Procedural Rules 103.204(c) and (f) and 103.212(c). (Order at 1.) Thereafter, Town & Country moved to dismiss the Complaint on the ground that it fails to meet the content requirements under Rule 103.204(c). (Motion at 2-3). Town & Country's Motion does not rebut the Board's finding under the same procedural rule, much less acknowledge the Board's finding. Because the Board previously found that the People's Complaint meets the content requirements, the Motion should be denied.

**B. The People's Complaint Meets the Content Requirements**

The Board's *prima facie* finding that the People's Complaint meets the content requirements is correct. The Complaint clearly advises Town & Country of the extent and nature of the alleged violations to reasonably allow preparation of a defense. However, instead of taking all well pled facts contained in the Complaint as true and drawing all inferences from them in favor of the People, Town & Country ignores well-pled facts and inferences from them. Moreover, Town & Country invents case elements and then argues that the People failed to plead

facts in support thereof.

1. Count I of the People's Complaint Clearly States a Cause of Action for Causing, Threatening or Allowing Water Pollution

Count I of the People's Complaint clearly states a cause of action for causing, threatening or allowing water pollution in violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2002)). Through a set of explicit and unambiguous facts common to all counts of the Complaint, Count I alleges that Town & Country owns and/or operates an expansive construction site known as Liberty Lakes, which is located in an environmentally sensitive area along Gilmer Road just west of Fairfield Road in Wauconda, Lake County, Illinois ("site"). (Complaint, ¶¶ 3-5.) Count I alleges that, as of September 24, 2002, Town & Country had disturbed approximately 400 acres of land at Liberty Lakes and excavated trenches for hundreds of feet of sewer and public water supply lines without an NPDES storm water permit, sewer permit or public water supply permit and without submitting plans and specifications for a public water supply. (Complaint, ¶¶ 6-8, 10 and 11.) Count I alleges that Town & Country had inadequate erosion and silt control measures at Liberty Lakes on September 24, 2002, and based on information provided by Town & Country, had pumped storm water from on-site catch basins into an adjacent wetland area. (Complaint, ¶¶ 7 and 9.) Count I alleges that silt is a contaminant that will or is likely to create a nuisance or render waters of the State harmful or detrimental or injurious to public health, safety or welfare, or domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. (Complaint, ¶¶ 18 and 19.) Further, Count I alleges that, based on these facts, Town & Country caused, threatened or allowed water pollution in Section 12(a) of the Act. (Complaint, ¶¶ 22-24.) Count I also pleads facts above and beyond those recited above, restates Section 12(a) of the Act and relevant

definitions in their entirety, and contains a prayer for relief.

Despite all of this, Town & Country claims that Paragraphs 6 through 9 of Count I are “absent of any facts specifying the extent, duration, nature or strength of any purported discharges or emissions by Town & Country.” (Motion at 3.) However, Town & Country simply ignores the factual allegations and inferences in these paragraphs. Further, Town & Country levels its criticism at four paragraphs of Count I, while ignoring 20 other paragraphs, not including the prayer for relief. When considered in its entirety, Count I contains specific allegations regarding the extent, duration, and nature and strength of actual or threatened discharges. Even if one or more the facts alleged in Count I were omitted, that is not a ground for a motion to dismiss because a complaint need not present evidence on every essential element. Bentronics Corp., PCB 97-20, 1996 WL 633410, at \*6.

Town & Country also claims that Count I fails to explain “whether any claimed harm/damage was permanent or even the nature of alleged damages.” (Motion at 4.) Town & Country has invented this case element. Based on its plain language, Section 12(a) does not require a showing of permanent harm or damage. The People are not aware of any precedent for adding such an element to the case, nor has Town & Country provided any precedent. Also, Town & Country simply ignores that Section 12(a) refers to persons “*threatening*” the discharge of a contaminant to waters. The People (and the Board) are permitted to take action against threatened water pollution, which are circumstances not yet amounting to actual water pollution. The Board has found violations based upon the threat of pollution. See, e.g., Wasteland, Inc. v. PCB, 456 N.E.2d 964, 971-72 (Ill. App. 3d Dist. 1983).

The well-pled facts and inferences from them in Count I of the Complaint clearly satisfy the Board’s content requirements by stating a cause of action and informing Town & Country of

what it must defend against. Town & Country's Motion ignores these well pled facts and inferences, and invents a case element regarding permanent harm. Because Count I meets the content requirements, Town & Country's Motion as to Count I should be denied.

2. Count II of the People's Complaint Clearly States a Cause of Action for Causing or Allowing the Construction of a Sewer Without a Permit

Count II of the People's Complaint clearly states a cause of action for causing or allowing the construction of a sewer without a permit in violation of Section 12(c) of the Act (415 ILCS 5/12(c) (2002)) and Section 309.202(a) of the Board's Water Pollution Regulations (35 Ill. Adm. Code 309.202(a)). Indeed, Count II contains the same explicit and unambiguous factual allegations as Count I, restates relevant statutory and regulatory provisions, and contains a prayer for relief. Without regard to the well pled facts and inferences from them, Town & Country argues that the People failed to "specifically explain how or why the failure to secure a construction permit violated [Section 12(c) of the Act] or caused any harm to the property in the development." (Motion at 4-5.) However, this is not an essential element for a finding that Town & Country violated the sewer construction permit requirements. Again, Town & Country has invented this pleading requirement.

In relevant part, Section 12(c) of the Act and Section 309.202(a) of the Board's Water Pollution Regulations prohibit a person from causing or allowing the construction or installation of a sewer without a construction permit issued by the Illinois EPA. Town & Country's construction or installation of hundreds of feet of sewer pipes at the site without a sewer permit from Illinois EPA as alleged in Count II is a violation in and of itself. It is not necessary to inquire "how" and "why" Town & Country constructed without this permit in order to conclude that it was not obtained in a timely manner.



Town & Country's argument is an indication that it does not understand the programmatic significance of the State's permitting programs. A violation of the permitting requirements "goes directly to the heart of the State's enforcement program and ability to protect against environmental damage." Std. Scrap Metal. Co. v. PCB, 491 N.E.2d 1251, 1256 (Ill. App. 1st Dist. 1986). "The permit program is a method through which the State of Illinois can control emitters of contaminants into the [environment], as well as emissions that may result in the presence of contaminants in the environment." Id. By constructing without a sewer permit (or any other permit) from Illinois EPA, Town & Country took away the State's ability to monitor construction and created the opportunity for water pollution. Therefore, the simple fact that Town & Country constructed a sewer without a sewer permit is a serious violation.

Town & Country's argument that Count II fails to satisfy the content requirements is based on a case element that Town & Country has invented. Because the People are not required to specifically explain how or why Town & Country failed to obtain the sewer permit in order to state a cause of action for causing or allowing the construction of a sewer without a permit, Town & Country's Motion should be denied.

3. Counts III through V of the People's Complaint Also Clearly State Causes of Action for Causing, Threatening or Allowing the Discharge of Contaminants Without an NPDES Storm Water Discharge Permit, Failing to Submit Plans and Specifications for a Public Water Supply Before Construction, and Construction or Installation of a Public Water Supply Without a Permit

Counts III through V of the People's Complaint also clearly state causes of action for causing, threatening or allowing the discharge of contaminants without an NPDES storm water discharge permit in violation of Section 12(f) of the Act (415 ILCS 5/12(f) (2002)) and Section 309.102(a) of the Board's Water Pollution Regulations (35 Ill. Adm. Code 309.102(a)), failing to submit plans and specifications for a public water supply before construction in violation of

Section 15(a) of the Act (415 ILCS 5/15(a) (2002)), and construction or installation of a public water supply without a permit in violation of Section 18(a) of the Act (415 ILCS 5/18(a) (2002)) and Sections 602.101(a) and 652.101(a) of the Board's and Illinois EPA's Public Water Supply Regulations, respectively (35 Ill. Adm. Code 602.101(a) and 652.101(a)).

These counts contain the same explicit and unambiguous factual allegations as Counts I and II, restate all relevant statutory and regulatory provisions, and contain prayers for relief. Without regard to the well pled facts and inferences from them, Town & Country summarily argues that Counts III and V fail to specify the location, extent, duration or nature of the discharges. (Motion at 5.) Town & Country again simply ignores the well pled facts and inferences from them. Town & Country also argues that Counts III and IV essentially fail to specify the manner in which construction without an NPDES storm water and without submitting plans and specifications for a public water supply, respectively, caused violations of the Act. (Id.) On this point, Town & Country has again invented a case element. Its construction without obtaining the permit or submitting plans and specifications resulted in the violations without specifying the so-called manner of its violations. Because Counts III through V meet the content requirements, the Motion should be denied.

#### **IV. CONCLUSION**

In conclusion, the Board correctly found that the People's Complaint meets the content requirements. The Complaint states a cause of action on all counts such that Town & Country is clearly advised of the extent and nature of the alleged violations to reasonably allow preparation of a defense. Given even fewer facts than those alleged, it would be easy to foresee a set facts upon which the People can recover such that the Complaint should survive Town & Country's Motion.

However, Town & Country does not take all well pled facts as true and draw all inferences in favor of the People. Town & Country also does not show that no set of facts would entitle the People to relief. Instead, Town & Country ignores facts, invents pleading requirements, and then asks the Board to disregard established content requirements in order to grant its Motion. Because the Complaint meets the content requirements, Town & Country's Motion should be denied.

WHEREFORE, the People request that the Board deny Town & Country's Motion.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,  
by LISA MADIGAN, Attorney General  
of the State of Illinois

BY:



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