

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	
CASEYVILLE SPORT CHOICE, LLC,)	
an Illinois Limited Liability Company)	
)	
Complainant,)	
)	
v.)	PCB 2008-030
)	
ERMA I. SEIBER, Administratrix of the)	
Estate of James A. Seiber, Deceased,)	
and ERMA I. SEIBER, in Her Individual)	
Capacity, and)	
FAIRMOUNT PARK, INC.,)	
a Delaware Corporation,)	
)	
Respondents.)	

RESPONDENT FAIRMOUNT PARK, INC'S MOTION TO DISMISS CAUSE AS FRIVOLOUS FOR LACK OF BOARD AUTHORITY TO GRANT RELIEF OF REIMBURSEMENT OF CLEAN UP COSTS AS REQUESTED BY COMPLAINANT

NOW COMES Respondent (and Counter-Claimant) FAIRMOUNT PARK, INC. ("Fairmount") by and through one of its attorneys, Penni S. Livingston, and in support of its Motion to Dismiss the Complaint of Caseyville Sport Choice, LLC's ("Caseyville Sport Choice") as frivolous, Complaint states as follows:

1. This matter is based on activity of a prior property owner who sold the property to Complainant for \$1.46 million where such activity complained of ended in 1993 with a court order. Complainant seeks to obtain relief in the form of reimbursement of cleanup costs incurred in 2005 and 2006 for removal and disposal of solid waste, mostly horse manure. See Paragraphs 8 and 9 of Caseyville Sport Choice's Complaint for relief requested.

2. No provision exists anywhere in the Illinois Environmental Protection Act to authorize

a private party to obtain reimbursement of clean up costs for removal and disposal of solid waste, thereby making this action frivolous and ripe for dismissal.

3. Section 45 (d) of the Illinois Environmental Protection Act (415 ILCS 5/45) (“Act”) only provides reimbursement for cleanup costs if the State brings an action under the Act. No such action has occurred here and there is no other authority in the Act for reimbursement of clean up costs as a remedy that the Board can grant. Section 45(d), in pertinent part, states:

“If the State brings an action under this Act against a person with an interest in real property upon which the person is alleged to have allowed open dumping or open burning by a third party in violation of this Act, which action seeks to compel the defendant to remove the waste or otherwise cleanup the site, the defendant may, in the manner provided by law for third-party complaints, bring in as a third-party defendant a person who with actual knowledge caused or contributed to the illegal open dumping or open burning, or who is or may be liable for all or part of the removal and cleanup costs. The court may include any of the parties which it determines to have, with actual knowledge, allowed, caused or contributed to the illegal open dumping or open burning in any order that it may issue to compel removal of the waste and cleanup of the site, and may apportion the removal and cleanup costs among such parties, as it deems appropriate.”

4. No other provision in the Act provides similar relief. The state did not bring an action; Fairmount Park is not a person with an interest in any real property at issue here; the action does not seek to compel removal of waste or to otherwise clean up the site; and Seiber, the responsible party did not third party in Fairmount Park. All of these are requirements in the first sentence of the only provision in the Act that allows reimbursement of clean up costs, thereby making this case frivolous. The entire second sentence relates to a court and to relief for removal of waste- relief not requested or needed in this case. Dismissal is the only remedy available. Only a Court under common law has jurisdiction to grant the relief requested herein. The Board lacking authority to grant the requested relief, the matter is frivolous and must be dismissed.

5. Section 101.500(a) of the Illinois Pollution Control Board procedural rules states that “[t]he Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure.” (35 Ill. Adm. Code 101.500). Pursuant to Section 5/2-619 (a)(9) of the Illinois Code of Civil Procedure, dismissal is appropriate when a claim is barred by other affirmative matter avoiding the legal effect of or defeating the claim. (735 ILCS 5/2-619(a)(9)).

6. Here, Complainant seeks relief which cannot be awarded. The State did not bring an action under the Act against Complainant to compel the cleanup as described in the Complaint. Caseyville Sport Choice cleaned up the land on its own volition and obtained an Environmental No Further Remediation Letter. At no time was Fairmount Park brought in as a third-party defendant in an enforcement action against Caseyville Sport Choice for the cleanup of the property in question as required by law as found in Section 45(d) of the Act.

7. Caseyville Sport Choice’s Count II against Fairmount must be dismissed with prejudice for failing to state a claim for which relief may be granted. No affidavit is necessary to support this motion as the grounds for dismissal are plainly stated on the face of the Complaint in Count II. This also means that Count I against Mr. Seiber must be dismissed as the Board is not the proper forum to seek reimbursement of clean up expenses. Therefore, the whole case must be dismissed in accordance with the law.

8. As the Board noted in its order in this matter dated November 1, 2007 before Fairmount Park was added, “Section 31(d)(1) of the Act further provides that ‘[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing.’ Id.; see also 35 Ill. Adm. Code 103.212(a). . . A complaint is frivolous if it requests ‘relief the Board does not have the

authority to grant' or 'fails to state a cause of action upon which the Board can grant relief.'”

9. Previously the Board dismissed Fairmount Park’s Counterclaim against Caseyville Sport Choice for the reason that the Act did not allow awarding of attorneys’ fees. The same principle applies to the relief requested in the underlying cause filed by Complainant. The Board will not be able to cite any provision of the Act, the statute creating and authorizing the Board’s activities that allows the Board to order a respondent to reimburse clean up costs, (other than in Section 45(d)) although this statement appears in the Board’s form Notice to Respondent dated August 22, 2008 in this matter.

10. Furthermore, as the Board has pointed out many times, pursuant to Section 31(d)(1) of the Act “any person may file with the Board a complaint, . . . against any person allegedly **violating** this Act. . .” (Emphasis added). There are no allegations of on-going violation here and in fact any violation occurred before 1993 and by another entity, not Fairmount Park. Section 45(b) is also of no help as the Complainant is not seeking injunctive relief.

11. There is just no remedy for this Complainant under the Act as the facts developed by their own actions of cleaning up, obtaining an NFR, and then suing for reimbursement- including suing a party with no liability for “causing or allowing” open dumping as can be seen in the companion Motion for Summary Judgment. The only forum that can grant relief requested is a court under common law theories that lie in tort and contract, not the Environmental Protection Act. As recognized by the Act in Section 2(b), the purpose of the Act to restore, protect, and enhance the quality of the environment, is to be supplemented by private remedies. Only a private remedy can apply here as to the relief requested and should apply to the entity causing the adverse effects upon the environment as stated in the purpose of the Act.

WHEREFORE for all these reasons, Respondent Fairmount Park respectfully requests that the Illinois Pollution Control Board find that it lacks authority to grant the Complainant's requested relief and that therefore the cause is frivolous such that the Board GRANTS this Motion to Dismiss Count II of Caseyville Sport Choice, LLC's Complaint and Count I against the Seibers as well.

Respectfully submitted this 13th day of July, 2010:

Fairmount Park, Inc.

By: /s/ Penni S. Livingston

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