

ILLINOIS POLLUTION CONTROL BOARD  
January 24, 2002

DORIS GLAVE,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 02-11
	)	(Citizens Enforcement - Noise)
BRENT HARRIS, PATTY HARRIS and	)	
WINDS CHANT KENNEL, INC.,	)	
	)	
Respondents.	)	
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VILLAGE OF GRAYSLAKE,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 02-32
	)	(Citizens Enforcement - Noise)
WINDS CHANT KENNEL, INC.,	)	(Consolidated)
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

On September 12, 2001, the Village of Grayslake (Grayslake) filed a complaint against Winds Chant Kennel, Inc. (Winds Chant). The Board docketed the complaint as PCB 02-32. On October 18, 2001, the Board accepted the complaint for hearing, and consolidated the case with PCB 02-11 for the purposes of hearing. On November 13, 2001, Winds Chant filed an answer to the complaint and set forth eight affirmative defenses. Grayslake filed an answer to the affirmative defenses and a motion to strike specific affirmative defenses on November 21, 2001. To date, the Board has received no response to the motion to strike.

For the reasons outlined below, the Board strikes the second and third affirmative defenses, but declines to strike the sixth affirmative defense.

**MOTION TO STRIKE AFFIRMATIVE DEFENSES**

In its November 13, 2001 answer, Winds Chant asserts the following contested affirmative defenses:

Second Affirmative Defense

Winds Chant Kennel has substantial social and economic value. Winds Chant Kennel provides a valuable service to dog owners located throughout

Northern Illinois providing quality and affordable grooming and boarding services.

#### Third Affirmative Defense

Winds Chant Kennel is well suited to its location. It is located on property within the Village of Grayslake and zoned for agricultural usage. Illinois Route 120, a four-lane thoroughfare is located immediately to the north. The kennel is bounded on the east, south and southwest by unincorporated portions of Lake County. It is bounded on the west principally by land zoned for general business. The complainant lives in an area surrounded by land zoned for general business with the exception of her eastern boundary which she shares with Winds Chant Kennel, located on property zoned for agriculture.

#### Sixth Affirmative Defense

The Illinois Farm Nuisance Suit Act, 740 ILCS 70/0.01 et seq., bars the Village's and Ms. Glave's complaint because the kennel operations are part of the farm operated by Brent and Patty Harris. The farm was not a nuisance at the time it began operation and can only now even be alleged to be a "private nuisance" because of changed conditions in the surrounding area occurring after the farm has been in operation for more than one year. Winds Chant Answer at 3-5.

Grayslake moves to strike, in whole or part, Winds Chant's second, third and sixth affirmative defenses. Grayslake alleges that the second affirmative defense and the first sentence of the third affirmative defense should be stricken because they constitute an opinion or a conclusion. Grayslake cites International Ins. Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 635, 609 N.E.2d 842, 856 (1st Dist. 1993) as authority for this proposition. Grayslake moves to strike the sixth affirmative defense because it is an affirmative defense based on whether a respondent should pay complainant's attorney fees and costs, and that such affirmative defenses are not properly raised in defense of a violation.

### **DISCUSSION**

Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. *See* International Ins. Co., 242 Ill. App. 3d at 635. The Board finds that Winds Chant alleges specific facts to support the initial statement of each asserted affirmative defense. The motion to strike does not raise any additional arguments. However, the Board notes that the second and third asserted affirmative defenses are not, by definition, affirmative defenses because even if proven true at hearing they would not impact the complainant's legal right to bring the action. *See* People v. Crane, PCB 01-76 (May 17, 2001). Therefore, the Board on its own motion strikes the second and third affirmative defenses. The facts contained within these asserted defenses are properly considerable by the Board under Section 33(c) of the Act (415 ILCS 5/33(c) (2000)), and Winds Chant will have the opportunity to raise the substance of the stricken affirmative defenses at hearing.

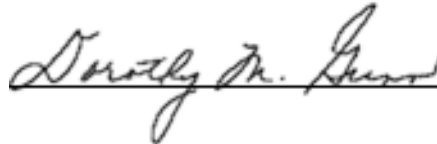
Grayslake next contends that the sixth affirmative defense should be stricken because it is based on whether attorney's fees and costs are appropriate and, therefore, not properly raised in defense of a violation. In Geon, the Board determined that an affirmative defense concerning mitigation factors with regard to penalty, including attorney fees and costs, is not an appropriate defense to a claim that a violation has occurred. Geon at 4. A reading of the sixth affirmative defense shows that Winds Chant is asserting that the Farm Nuisance Suit Act bars the filing of the complaint, and the motion to strike the sixth affirmative defense is denied. It should be noted, however, that the Board previously addressed the issue raised in the sixth affirmative defense in Gott v. M'Orr Pork, Inc., PCB 96-98 (Feb. 20, 1997). The parties are advised to consider that opinion prior to hearing in this matter.

### **CONCLUSION**

The Board strikes the second and third affirmative defenses, but declines to strike the sixth affirmative defense. The hearing officer is directed to proceed expeditiously to hearing in this matter.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 24, 2002, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board