

ILLINOIS POLLUTION CONTROL BOARD
February 4, 1993

JOHN ZARLENGA and	)	
JEAN ZARLENGA,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 92-178
	)	(Enforcement)
HOWARD EDISON, BRUCE MCCLAREN,	)	
and GARY LAKEN,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by J. Anderson):

Currently before the Board are 1) a December 11, 1992 motion to strike or dismiss the complaint in this matter by Partnership Concepts, Howard Edison, Bruce McClaren, Cove Development Company, Thomas O'Brien, and Gary Laken (respondents), 2) a December 11, 1992 motion for leave to file the motion to strike or dismiss instant by respondents, 3) a January 20, 1993 motion for an extension of time to file a response to respondents' motion to dismiss by John and Jean Zarlenga, and 4) a January 20, 1993 motion for waiver from the Board's recycled paper requirement by the Zarlengas.

Respondents' Motion for Leave to File Instant

On November 12, 1992, the Zarlengas filed a formal complaint in this matter. On November 19, 1992, the Zarlengas filed a motion to amend their complaint. The Board granted the Zarlengas' motion to amend on December 3, 1992. 35 Ill. Adm. Code 103.140(a) provides that a respondent may file a motion to strike or dismiss the complaint within 14 days after receipt of the complaint.

In their motion, respondents assert that they will suffer material prejudice if their motion is denied, in that they would be compelled to incur additional and substantial costs and attorneys fees in defending against allegations that have already been litigated in PCB 89-169. Respondents add that the Zarlengas will not suffer any prejudice if the motion is granted in that this action is in its earliest stages and no substantial proceedings have yet occurred.

The Board hereby grants respondents' motion for leave to file its motion to strike or dismiss instant.

Zarlengas' Motion for Extension of Time

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In their motion, the Zarlengas ask that the Board grant them until January 27, 1993, to file their response to respondents' motion to dismiss. In support of their motion, the Zarlengas assert that they first retained counsel on January 11, 1993, having determined that further pro se representation was not in their best interest. The Zarlengas further assert that their counsel has not had a reasonable opportunity to review the documents in this matter and in relation to PCB 89-169 so as to be able to respond to respondents' motion to dismiss by the January 20, 1993, as ordered by the Board in its January 7, 1993 order. Respondents have not filed a response to the motion.

The Board hereby grants the Zarlengas' motion to extension of time, until January 27, 1993, to file a response.

Zarlengas' Motion for Waiver from Recycled Paper Requirement

In support of their motion, the Zarlengas assert that their counsel has been unable to locate a source of recycled paper stock for it January 20, 1993 filings, but will attempt to locate a supplier for all subsequent filings. Respondents have not filed a response to the motion.

The Board hereby grants the motion.

Respondents' Motion to Strike or Dismiss

As previously stated, respondents filed their motion to dismiss or strike on December 11, 1992. The Zarlengas filed their response to the motion on January 27, 1993.

In support of their motion, respondents assert that, under the doctrine of res judicata, the complaint should be dismissed as to all parties because it fails to allege any new facts, cause of action, claims, or injuries that were not conclusively determined and resolved by the Board's July 30, 1992 order in PCB 89-169.

Respondents also note that the parties in this action include individual respondents which the Board specifically dismissed from the prior action (i.e., Partnership Concepts, Cove Development Company, and Thomas O'Brien). Respondents assert that the Zarlengas have failed to allege any facts showing that any of these respondents have acquired any interest in One Bloomingdale Place subsequent to the Board's dismissal order. Respondents argue that, under the doctrines of res judicata and collateral estoppel, the Zarlengas are barred from bringing action against these parties and that the complaint should be dismissed as to these parties.

At the outset, the Board notes that, in its May 9, 1991 interim opinion and order in PCB 89-169, it dismissed Partnership

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Concepts, Cove Development Company, and Thomas O'Brien from the action on the grounds that none of the respondents owned or operated One Bloomingdale Place. The Zarlengas, in their response to respondents' motion to dismiss, have failed to allege any facts showing that any of these respondents have acquired any interest in One Bloomingdale Place subsequent to the Board's dismissal order. Accordingly, the Board dismisses Partnership Concepts, Cove Development Company, and Thomas O'Brien from this cause of action.

The Board also notes that, although the Zarlengas have named Bloomingdale Partners as a respondent in their motions in this matter, they never named Bloomingdale Partners as a respondent in their initial complaint or amended complaint. Moreover, the Zarlengas never served Bloomingdale Partners with their complaint or amended complaint. As a result, Bloomingdale Partners is not a party to this action. Accordingly, the Board will delete Bloomingdale Partners from the caption of this case.

The theory of res judicata does not bar actions based on facts occurring after the initial judgment. Ossler v. Village of Norridge (N.D. Ill. 1983) 557 F. Supp. 219. In fact, the Board, in its September 17, 1992 order in PCB 89-169, stated:

...if a party believes that a noise problem persists...
[that] party would be expected to file another
complaint because any finding of a continuing noise
problem would have to be based on the Board's
evaluation of new facts.

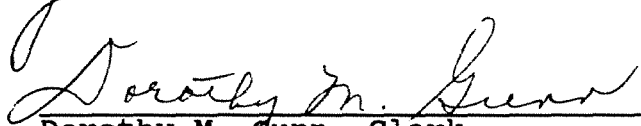
In this instance, respondents have made several changes at One Bloomingdale Place in an effort to abate the noise emitted therefrom. Moreover, new numeric data has been collected after the Board's July 30, 1992 final opinion and order in PCB 89-169, and after such changes had been made. Accordingly, there are new facts to be presented into evidence in this matter. Moreover, as the Zarlengas correctly note, a party may maintain a cause of action against another for the continuance of a nuisance. Admiral Builders Corp. v. Robert Hall Village (1st Dist. 1981), 101 Ill.App.3d 132, 427 N.E.2d 1032, 1036-37 citing to Chicago, Burlington & Quincy Railroad v. Schaffer (1988), 124 Ill. 112, 121, 16 N.E. 239.

Accordingly, for the foregoing reasons, the Board hereby grants respondents' motion to strike or dismiss the Zarlengas' complaint as it relates to Partnership Concepts, Cove Development Company, and Thomas O'Brien. The Board also will delete Bloomingdale Partners from the caption of this case. The Board, however, denies respondents' motion to dismiss or strike the Zarlengas' complaint in its entirety.

IT IS SO ORDERED.

0139-0075

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 4th day of February, 1993, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

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