BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

COUNTY OF JACKSON,
Complainant,
vs.
EGON KAMARASY,
Respondent.

ORIGINAL

AC No. 2004-063

RESPONDENT'S POST-HEARING BRIEF

I

INTRODUCTION

The County of Jackson ("County") seeks to impose civil penalties for two (2) alleged violations of the Act.

Mr. Kamarasy denies that his actions violated the Pollution Control Act. He further denies that his actions gave rise to any "pollution".

II

FACTUAL AND PROCEDURAL BACKGROUND

For the sake of brevity, the respondent refers to and incorporates herein the Factual and Procedural Background section of his Memorandum Supporting Petition to Contest Administrative Citation filed at the hearing on November 22, 2004. It accurately states the evidence that was adduced at the hearing.

Don Terry, a solid waste inspector employed by the Jackson County Health Department, with seventeen (17) months on the job[1] and no prior relevant experience (Tr. 7 – 8,

[1] At the time of the inspection of the site involved in this case and on the date of his written report that was admitted into evidence, Mr. Terry had been a solid waste inspector for only approximately eight (8) months.

18 – 19), testified that he conducted a three-minute inspection of the site[2] on March 25, 2004, and took one photograph (Tr. 11 – 12) that was introduced into evidence. (P 7). The inspection was visual only, no testing or sampling was done (Tr. 23 – 24), and the inspector never got any closer than approximately 300 feet to the materials depicted in the photograph. (Tr. 10) He was careful not to enter upon the respondent's property since he had neither permission of the landowner to enter nor a warrant.[3] (Tr. 31 –32)

Based upon this cursory inspection, Mr. Terry prepared a written report and concluded that at least eight (8) violations of the Act had occurred. (P 3)

On March 30, 2004, the County filed the Administrative Citation against the respondent in this cause. Although containing more legal conclusions than facts, the Administrative Citation charges the respondent with two (2) violations of the Act: (1) "[t]he Respondent has caused or allowed litter at the facility in violation of 415 ILCS § 5/21(p)(1)"; and (2) "[t]he Respondent has caused or allowed the deposition of general construction or demolition, or clean construction or demolition debris in violation of 415 ILCS § 5/21(p)(7)."

The respondent timely filed a Petition to Contest Administrative Citation in which he denied that his conduct violated the Act.

At the hearing, Mr. Terry testified that he had inspected the site in question on December 5, 2003 in the same manner as the March 25, 2004 inspection. (Tr. 12 – 13) Mr. Terry testified that he found the site on March 25, 2004 to be substantially similar to the condition of the site on December 5, 2003.

Following the December 5, 2003 inspection, Mr. Terry's supervisor, Bart Hagston, sent the respondent a letter, dated January 9, 2004, in which certain corrective actions were requested of the respondent to be completed by a date certain, February 13, 2004, or else the matter would be referred to prosecutorial authorities. (Tr. 33 –34; R-4).

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2 "The site" shall mean and refer to the property owned by the respondent that is identified in the Administrative Citation.

In response to Mr. Hagston's letter, the respondent called Mr. Terry on January 15, 2004. (Tr. 32 – 35, 53) During this conversation, the respondent and the County reached an agreement that the pile of materials on the site would be removed and properly disposed on or before a date certain, February 13, 2004. (Tr. 34 – 35, 53 – 55) The respondent told Mr. Terry, during this telephone conversation, that he had arranged already for a contractor to remove and dispose of the materials and that he believed that the job would be completed not later than February 13, 2004. (Tr. 34 – 35, 53 - 55) This agreement was confirmed by a letter, dated January 16, 2004, from Mr. Terry to the respondent. (R-5)

Mr. Terry's next action concerning this case came on March 25, 2004, when he went to the site, stood at the gate, conducted the 3-minute inspection, took one (1) photograph (P-7), and prepared a written report that accused the respondent of eight (8) separate violations of the Act. (Tr. 35 - 36) Mr. Terry did not call or otherwise communicate with the respondent concerning the respondent's apparent failure to remove and dispose of all the materials on the site, until March 30, 2004, when the Administrative Citation was filed. (Tr.. 35 – 36)

Mr. Terry's next visit to the site occurred after the Administrative Citation had been filed. (Tr. 37) The materials that he had seen on March 25, 2004 had been removed, but Mr. Terry did not contact the respondent to verify the disposal of the materials because "the administrative citation had already been filed". (Tr. 37)

Based upon this evidence, the County asks the Board to find two (2) violations of the Act and to assess a fine in the amount of One Thousand Five Hundred and no/100 Dollars ($1,500.00) for each violation.

The respondent denies violating the Act and specifically denies causing any pollution. (Tr. 45)

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[3] As the facts in AC 04-064, involving a nearby site owned by the respondent that was the subject of an inspection by Inspector Terry, reveal, he showed no such caution about entering upon the respondent's property in that case without the landowner's consent and with no warrant issued by judicial authority. (Tr. 38 – 39, 42)

The site is rural, unimproved land that is used to pasture horses. There are no houses nearby and the land is located within the unincorporated area of Jackson County. (Tr. 10, 46) It is located within one (1) mile of the Raccoon Valley Mobile Home Park that is owned by the respondent. (Tr. 46 – 47)

In November 2003, the Illinois Department of Public Health, as a result of its inspection of the mobile home park, ordered the respondent to remove mobile homes from several of the lots in the mobile home park that had been abandoned there by their owners (Tr. 47 – 49) (*See* R-1) The Department of Public Health demanded the structures be removed from the mobile home park by December 12, 2003, so the respondent removed them to the site for the purpose of recycling the recyclable materials and he had retained a contractor to take the remaining materials to a local landfill. (Tr. 50)[4]

On January 15, 2004, after receiving a violation notice from the Jackson County Health Department, the respondent called and spoke with Mr. Terry. (Tr. 53) The respondent informed Mr. Terry that he already had contracted with Mr. McMurphy to remove and dispose of the materials left in the pile and expected the process to be completed before February 13, 2004. (Tr. 53 – 55)[5] However, due to weather conditions, Mr. McMurphy was unable to complete the job by February 13, 2004[6] and the respondent hired another firm. (Tr. 54 – 55) The job was completed by approximately April 16, 2004 after the respondent contracted with a licensed waste hauler to remove the materials to a local landfill. (Tr. 54 – 58)

[4] Archie Mays testified that the pile of materials consisted of wood and other materials from mobile homes that people had abandoned in Raccoon Valley Mobile Home Park and that he participated in separating the materials, taking some to a local recycler and using the usable wood. (Tr. 65 – 67)

[5] The respondent believed there was an agreement with the Jackson County Health Department that no enforcement proceedings would result if the removal procedure were completed by February 13, 2004. (Tr. 57)

[6] This was corroborated by the testimony of Mr. McMurphy. (Tr. 68 – 69)

III

ARGUMENT

A. The complainant's evidence is insufficient to support a finding of any violation of the Pollution Control Act that is alleged in the administrative citation.

The Act requires that in the administrative citation process an enforcement agent must base his testimony upon his direct observations. The legislature created the administrative citation process as a streamlined and efficient method of enforcing and obtaining compliance with the Pollution Control Act. It limited the amount of fines that are assessable and limited consideration of other circumstances, mitigating or aggravating. And, it required that enforcement agents base their testimony and evidence upon their direct observations in order to sustain a finding of a violation of the Act.

The respondent argued in his Memorandum Supporting Petition to Contest Administrative Citation ("Resp. Memo") that the inspector did not observe, and could not have observed, on March 25, 2004, the specific items that he claims to have observed in his inspection report, therefore, his report should be disregarded as mere speculation, lacking any foundation. (Resp. Memo, 11 – 13)

The complainant argues in its post-hearing brief that since the respondent admitted that the materials at the site consisted of the mobile homes that others had abandoned upon his property, the speculation and lack of foundation for the inspector's evidence is overcome. (Complainant's Post-Hearing/Closing Argument, 4)

In this case, an inexperienced inspector made a three minute inspection from a distance of 300 or more feet, saw what he described as a pile of materials on the site, and made no testing or sampling of the materials he observed. He personally observed no acts of transporting or dumping or doing anything with or to the materials. He knew from prior conversations with the respondent that the materials were mobile homes abandoned by their

owners at the respondent's mobile home park located about one mile away that the respondent had moved to the site, disassembled, separated the materials, recycled some, reused some, and had contracted with a waste hauler to dispose of the remaining materials on or before February 13, 2004. It appeared, however, to the inspector on March 25, 2004 that the material had not been removed from the site by the promised date. But, rather than contacting the respondent to find out the cause for the apparent non-compliance with the agreement to remove the remaining materials, the inspector filed an administrative citation against the respondent charging, not one, but two violations of the Act thereby seeking a fine in the amount of Three Thousand and no/100 Dollars ($3,000.00).

It should be clear that this is not what the legislature had in mind when it created the administrative citation enforcement mechanism for the Pollution Control Act. It is clear that the evidence presented is insufficient to support the findings that the complainant must prove to establish a violation under the administrative citation procedure.

The inspector's evidence is not based upon his direct observation. The respondent's attempt to resolve the issue previously with the inspector should not and cannot be used to cure that deficiency. The complainant cannot be allowed to testify about what materials comprised the pile that he observed from more than 300 feet away and this support a finding of a violation of the Act in an administrative citation procedure.

The complainant's argument that the respondent admitted to every factual element needed to show the two violations charged is misleading and is not accurate. The act of moving the abandoned mobile homes to the site from his mobile home park, especially when done at the behest of a state agency in the interest of the public health and welfare, is not an admission that open dumping occurred or that the activity caused or resulted in litter because there was no showing that there was actual or even a likelihood that the items placed on the site entered the environment, were emitted into the air or discharged into the waters. Nor did the admission of moving the abandoned mobile homes to the site evidence that the activity created a public

nuisance, fire, health or safety hazard or that the items scattered freely and entered upon surrounding property.

The competent evidence presented by the complainant, therefore, simply is insufficient to sustain a finding of the two (2) violations charged in this case.

B. The complainant has not alleged nor proven that the respondent created an "open dump" or engaged in "open dumping" of waste that resulted in unlawful litter or the deposition of general or demolition debris or clean construction or demolition debris.

The predicate for finding a violation of § 21(p) of the Act is a finding that the respondent caused or allowed "open dumping" of any waste material.

The respondent argued in his Memorandum Supporting Petition to Contest Administrative Citation that the abandoned mobile homes on the site are neither the result of open dumping nor open dumping because none of the material comprising the so-called pile of materials threatened or was allowed to scatter freely into the environment; and, it cannot be that any pile of materials that a landowner places upon his land creates a "disposal site" under the Act since such an expansive interpretation of the Act would be arbitrary and unenforceable. (Resp. Memo, 13 – 18)

In response, the complainant argues that "[p]roof of dumping" is all that must be shown" by the County. (Complainant's Post-Hearing/Closing Argument, 5)

The act of depositing materials upon one's own land is not "open dumping", as that term is defined in the Pollution Control Act and by the Board's regulations. (See 415 ILCS §§ 5/3.385. 5/3.535 and 5/3.305) The complainant must show that the respondent created a "disposal site" on his land by the act(s) of depositing material thereon.

It cannot be true, however, that any time a landowner places any household item (for example, a broken chair) on his land, or piles up some branches and leaves, that he or she has thereby created a "disposal site" under the statute. Such an interpretation would render the Pollution Control Act so broad as to be arbitrary and unenforceable. *See* Alternate Fuels, Inc. v.

Director of the Illinois Environmental Protection Agency, 2004 WL 2359398 (Ill. Sup. Ct. 2004)

It would mean for example that every homeowner who has ever placed a broken chair in his backyard, or an old piece of plywood has thereby created a "disposal site" under the law, and would be subject (in the case of the plywood) to charges of both littering and depositing demolition debris in violation of the Pollution Control Act. Hopefully, this Board would agree that that is not the type of problem that the Pollution Control Act was meant to address.

The crucial concept that distinguishes a violation from a non-violation is whether the act of depositing material on one's land will cause "pollution". The evidence in this case failed to show that there was any pollution caused by the respondent's act of moving the abandoned mobile homes from his mobile home park to the site for the purposes he intended. There was no scattering of the material, or constituents thereof, freely into the environment. And there was no evidence presented that the abandoned mobile homes, at least for the period of time that they remained at the site, even threatened to enter and damage the environment.

Consequently, the complainant failed to establish its *prima facie* case of "open dumping" by the respondent in this case under the Pollution Control Act.

C. The complainant has not shown that the respondent caused or allowed open dumping that resulted in litter or the deposition of general construction or demolition debris or clean construction or demolition debris.

The Act defines "disposal" to mean "the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters". (415 ILCS § 5/3.185)

The respondent argues that since "open dumping" can be found only if the material involved may enter the environment or be emitted into the air or discharged into any waters or the activity in question created a public health or safety hazard, a public nuisance or a fire

hazard, the evidence shows that he did not cause or allow open dumping because there was no showing that anything was emitted or entered into the environment and no evidence showing that his action of removing the abandoned mobile homes from the mobile home park one mile away to the site for the purpose of recycling the recyclable, re-using the re-usable, and disposing of the remainder created a public health or safety hazard, a public nuisance or a fire hazard. (Resp. Memo, 13 - 18)

The complainant does not address this argument directly, but maintains that "[p]roof of open dumping is all that must be shown" because requiring a showing of more "would make any successful prosecution under Section 21(p) nearly impossible and subject to overly technical scientific theories and data". (Complainant's Post-Hearing/Closing Argument, 5)

The testimony and exhibits offered by the complainant do not show that the abandoned mobile homes created a public health or safety hazard, a public nuisance, or a fire hazard. The complainant did not show that the abandoned mobile homes on the site might scatter or freely enter into the environment.

These concepts are crucial because the Pollution Control Act is designed to protect the environment from some damage. Without a showing that materials deposited on one's own land somehow are emitted or enter into the environment, enforcement of the Act is impeded and misguided because the Act then becomes a law that simply regulates private conduct without regard to the consequences thereof. In the field of environmental law, nothing could be more destructive than heavy-handed attempts to regulate conduct having no substantial or discernable environmental impact.

These are elements of the charges of open dumping resulting in litter or the deposition of general construction or demolition debris. The charges of open dumping resulting in litter or the deposition of construction debris cannot be sustained without proof, at least by a preponderance of the evidence, that the materials deposited on the site entered into the environment in a damaging or potentially damaging manner.

The evidence produced by the complainant in this case fails to establish these crucial elements; therefore, no findings of the violations charged are sustainable.

D. The complainant has not shown that the respondent caused or allowed open dumping that resulted in litter or the deposition of general construction or demolition debris or clean construction or demolition debris.

Count 1 of the Administrative Citation alleges that the respondent caused or allowed open dumping that resulted in "litter" in violation of § 21(p)(1) of the Act. The Act itself does not define the term "litter", but the Board has adopted the meaning of "litter" as it is used in the Litter Control Act (*see e.g.* St. Clair County v. Louis Mund, AC 90-64); and, those provisions of the Litter Control Act that pertain to the case at bar require either (1) that dumping, discarding or depositing litter on one's own property "create a public health or safety hazard, a public nuisance, or a fire hazard" or (2) accumulation of litter upon one's own property "in such a manner as to constitute a public nuisance or in such a manner that the litter may be blown or otherwise carried by the natural elements on to the real property of another person"(*see* 415 ILCS §§ 105/4 and 105/6)

The respondent argued that the evidence showed that he did not cause or allow open dumping that resulted in or caused litter under the Act because the definition of litter under the Litter Control Act requires a showing that the respondent, in depositing the abandoned mobile homes upon the site, created a public health or safety hazard, a public nuisance, or a fire hazard; and, the evidence adduced at the hearing showed that the placing of the abandoned mobile homes upon the site and the subsequent activities taken with respect to those items did not create a public health or safety hazard, a public nuisance, or a fire hazard. (Resp. Memo, 18 – 22)

Ironically, the complainant appears to argue that the definition of litter found in the Litter Control Act does not govern the definition of litter used in the Pollution Control Act, which the respondent is charged with violating: section 21 of the Pollution Control Act, argues the complainant, "pertains to littering in an open dumping context", while the Litter Control

Act "speaks to other types of littering violations", and "the Litter Control Act does not say . . . [that its provisions] are applicable to any facet of a Section 21 case other than to the definition of 'litter' ."(Complainant's Post-Hearing/Closing Argument, 5)

But, this argument flies in the face of prior Board precedent and leaves the Pollution Control Act vulnerable to constitutional infirmities due to vagueness, and the lack of guidelines given to the enforcement agents leading to the sort of unbridled discretion that breeds disrespect for the law.

E. The complainant should not be allowed simply to rename the materials at the site as construction debris rather than litter in order to sustain a finding of violation of the Act.

The Administrative Citation also charges the respondent with open dumping that "caused or allowed the deposition of general construction or demolition or clean construction or demolition debris in violation of 415 ILCS § 5/21(p)(7)". The Act prohibits causing or allowing "the open dumping of any waste . . . in a manner which results in . . . [the] deposition of . . . general construction or demolition debris . . . or clean construction or demolition debris". (415 ILCS § 5/21(a), (p)(7)(i) and (ii))

The respondent argued that he cannot be found to have violated the Act in the manner charged, under the evidence adduced at the hearing, because the Act must be interpreted in such a manner to allow a landowner, such as the respondent, to deposit the abandoned mobile homes on his own land provided those things do not cause a public nuisance, migrate onto a neighbor's property, or create a health, safety or fire hazard; and, because fundamental fairness requires that since he did not violate the Litter Control Act, he cannot be found to have violated the Pollution Control Act for the same activity that is alleged to violate the Litter Control Act simply by calling the materials so deposited onto his own land "demolition debris" instead of "litter". (Resp. Memo, 22 – 25) The respondent also argues that if he is found to have violated the Pollution Control Act due to placing the abandoned mobile homes on his own land prior to recycling the recyclable, reusing the re-usable, and disposing of the rest, then only one, not two, violations may be found. (Resp. Memo, 24 – 26)

The complainant argues that multiple charges for the same offense " are acceptable and prior Board precedent has allowed it". (Complainant's Post-Hearing/Closing Argument, 5)

The respondent conceded that the materials at the site consisted of remaining parts from several mobile homes that others had abandoned at his mobile home park located about a mile away, after he had disposed of certain recyclable and reusable materials.

However, the Board must dismiss this "depositing demolition debris" charge for the same reason as it must dismiss the littering charge. The littering charge must be dismissed because the Litter Control Act expressly grants a landowner the right to deposit on his own land the kind of "stuff", which does not spread freely onto other people's land, that the respondent deposited at the site, in the manner that he did so (in order that it did not cause a public nuisance, or health, safety or fire hazard).

In its second claim in this case, the complainant simply attempts to rename the materials as "construction debris" rather than "litter" in order to attain a second fine assessment for the same act of depositing the materials at the site. This should no be tolerated.

The respondent cannot rightfully be convicted of both littering and depositing demolition material in this case. If the respondent is not guilty of violating the Act by open dumping causing litter because the Litter Control Act expressly permits the act of depositing the abandoned mobile homes on his own property, then the respondent also is not guilty of unlawfully depositing construction debris for placing these same items on his own land. This is not a case of open dumping of both kinds of materials, litter and construction or demolition debris, where two separate offenses properly is chargeable.

F. The respondent should be exonerated because he was prevented by uncontrollable circumstance from completing the disposal by the agreed date.

The Act contemplates and encourages the use of agreements to obtain compliance as a means of enforcement and the Board consistently has held that uncontrollable circumstances might constitute a defense when a respondent is charged with failure to meet the terms of a compliance agreement.

The respondent argued that the condition of the site on March 25, 2004 was due to uncontrollable circumstances in that he was prevented from complying with the agreement he reached in January 2004 with the complainant to remove and dispose of the materials from the site on or before February 13, 2004. (Resp. Memo, 26 – 28)

The complainant responds that there was no agreement. (Complainant's Post-Hearing/Closing Argument, 6)

The complainant seeks to avoid the defense of "uncontrollable circumstances" by denying that any agreement existed. But, the evidence palpably shows there was an agreement because it was stated that no administrative citation would have resulted if the material had been disposed of properly by the February 13, 2004 deadline. (Tr. 35 – 36) And, there was no evidence to contradict that presented by the respondent and one of the witnesses, Mr. McMurphy, with whom the respondent had contracted for the removal of the materials, that the removal was delayed by the weather and conditions at the site, both uncontrollable circumstances of the sort previously recognized by the Board in other cases.

G. The definition of "litter" and "open dumping resulting in the deposition of construction debris" urged by the complainant constitutes an abuse of discretion and exceeds the intended scope of the administrative citation process.

The respondent argued that since the Board has adopted the definition of "litter" used in the Litter Control Act, it would be unfair, an abuse of discretion, and a violation of due process of law to find an act in violation of the Pollution Control Act that did not violate the Litter Control Act because doing so would prevent a citizen, such as the respondent, from reasonably determining what is lawful conduct and what is not. (Resp. Memo, 29 – 30)

The complainant does not appear to address this argument, except to say that the Litter Control Act provisions do not apply to a case alleging a violation of § 21(p) of the Pollution Control Act and "the meaning of the word 'litter' is clearly understood by any person with common intelligence." (Complainant's Post-Hearing/Closing Argument, 5)

The Board has adopted the definition of "litter" as it is used in the Litter Control Act. That should mean that lawfulness and unlawfulness with respect to matters covered by both Acts are the same. Yet, the complainant urges the Board to hold, in effect, that it is easier to convict a landowner of pollution under the Pollution Control Act by littering than it is to convict the same landowner of simple littering under the Litter Control Act.

This is the result of the definition of open dumping causing litter urged by the complainant.

The placing or depositing of materials on one's own land, alone, is not unlawful under the Litter Control Act. But, the complainant urges that depositing materials on one's own land, alone, is unlawful under the Pollution Control Act.

This position goes well beyond the Board's precedents and the legislative intent of the Act's administrative citation procedure. It is unreasonable to expect a landowner, such as the respondent, to anticipate reasonably that while depositing the abandoned mobile homes on his own land for the purpose of recycling and reusing some of the materials and disposing of the rest was permissible under the Litter Control Act, it would be unlawful under the Pollution Control Act, especially where the Board has held that the Litter Control Act's definition of "litter" controls in administrative citation cases brought under the Pollution Control Act.

Surely, the legislature intended the Pollution Control Act to remediate and prevent damage to the environment, so definition of terms under the Act that result in finding a violation of the Act without a showing of damage or injury to the environment certainly exceeds the legislative intent and constitutes an abuse of discretion.

As a result, the administrative citation filed against the respondent should be dismissed.

H. If applied to the respondent as the complainant urges, the Act would be unconstitutionally vague in failing to give him reasonable notice of what constitutes creating an open dump on one's own land and what constitutes littering on one's own property.

A basic tenet of due process is that a citizen must be able to reasonably ascertain whether an act that he is contemplating is lawful or not.

The respondent argued the complainant's position, that depositing the abandoned mobile homes on one's own land, while lawful under the Litter Control Act, is unlawful "littering" under the Pollution Control Act even though the Pollution Control Act relies on the Litter Control Act for the definition of "litter, denies due process because it prevents a landowner, such as the respondent, from being able to reasonable ascertain whether his conduct is lawful or not. (Resp. Memo, 29 – 33)

The complainant responds that the definition of "litter" was upheld against vagueness challenge by the Court of Appeals for the Fourth Appellate District[7] and then, rather disingenuously, that the Pollution Control Act "pertains to littering in an open dumping context", where the complainant contends, "[p]roof of dumping is all that must be shown", while the Litter Control Act "speaks to other types of littering violations". (Complainant's Post-Hearing/Closing Argument, 5)

The interpretation urged by the complainant would render the Act unconstitutionally vague because the reasonable landowner would not be fairly apprised that his conduct, lawful under the Litter Control Act, was unlawful under the Pollution Control Act even though no discharge, emission or entry into the environment occurred. If "[p]roof of dumping is all that must be shown" to constitute a violation of the Pollution Control Act in the respondent's case, the statute is rendered vague and ambiguous because the reasonable landowner cannot reasonably ascertain what he may put on his own land and what or when he cannot do so.

I. The board must interpret "disposal site", "open dump" and/or "litter" in a way that does not ignore the notions of scattering freely or emitting into the environment and causing some harm to others, therefore, the evidence presented by the complainant does not establish a violation of the act by any conduct of the respondent.

Where the legislature has provided guidelines for determining what constitutes "litter", as it has in the Litter Control Act, the complainant is required to adhere to those guidelines. It is not free to determine for itself that the abandoned mobile homes moved from his mobile home

park, at the direction of the Illinois Department of Public Health, onto the site, also owned by the respondent and located about one mile away, constituted unlawful pollution.

The respondent argued that the legislature has provided clear guidelines and the complainant's use of the administrative citation process under the Pollution Control Act, if upheld by the Board, amounts to delegating to the executive branch, the complainant in this case, the authority to determine what constitutes unlawful pollution. (Resp. Memo, 29 – 34)

The complainant does not respond to this argument, except to say, again, that there are no legislative requirements that the material deposited at the site spread, scatter freely or be emitted into the environment and that "[p]roof of dumping is all that must be shown". (Complainant's Post-Hearing/Closing Argument, 5)

It has been shown already that the legislature intended that, to be an "open dump" the abandoned mobile homes at the site must also be placed in such a way that either the debris itself is free to enter into the environment, or that constituents of the materials may be emitted or discharged into the environment. Similarly, with respect to "litter", the legislature said that if it occurs only on the alleged offender's own private property, and the accusation is unlawful "dumping", the allegedly offending stuff must be shown to "create a public health or safety hazard, a public nuisance, or a fire hazard". And, alternatively, if the accusation is that the stuff is being unlawfully "accumulated", it must be shown that the stuff also constitutes a "public nuisance" or that it "may be blown or otherwise carried by the natural elements on to the real property of another person".

These criteria show clearly that the complainant is required to prove something more than merely that the respondent placed or deposited abandoned mobile homes on his own land. That something more, under the Pollution Control Act, is that pollution actually occurs as a result of the respondent's actions.

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[7] Miller v. Illinois Pollution Control Board, 267 Ill.App.3d 160 (4th Dist. 1994)

The record is not only devoid of evidence of any form of emission into or damage to the environment by the respondent's act of depositing the abandoned mobile homes on his own land, but the inspector's own testimony defies such a finding. (Tr. 24)

J. The complainant undermines the Administrative Citation process and, therefore, exceeds the limits of its discretion given by the legislature under the Pollution Control Act by bringing two (2) charges for the same act.

Under the Administrative Citation process, a single violation can only be given a single fine and allowing the complainant to charge multiple fines under the process for the single act of depositing the abandoned mobile homes on his own property, without more, exceeds the limits of discretion afforded by the legislature.

The respondent argued that the complainant's charging of multiple offenses in this case for the single act of depositing the abandoned mobile homes on his own property exceeds the authority and discretion afforded to the complainant by the legislature because the administrative citation procedure was designed to limit the fines that the Board could assess in these cases. (Resp. Memo, 35 – 36)

The complainant argues, "multiple charges for the same offense is acceptable and prior Board precedent has allowed it." (Complainant's Post-Hearing/Closing Argument, 6)

But, the complaint's position is untenable and represents an improper attempt to sustain two charges for the same act of placing the abandoned mobile homes on the site. This sort of punitive approach was the sort of thing the legislature surely intended to avoid when it established the administrative citation procedure for enforcing the Pollution Control Act. It should not be countenanced in this case.

K. The complainant's position in this case renders the Pollution Control Act constitutionally infirm under due process, separation of powers and vagueness principles.

The respondent incorporates expressly as though full set out here the arguments made in Respondent's Memorandum Supporting Petition to Contest Administrative Citation

concerning potential constitutional infirmities resulting if the Pollution Control Act is interpreted in this case in the manner urged by the complainant. (Resp. Memo, 33 –36)

Nothing contained in the complainant's Post-Hearing Brief/Closing Argument overcomes those arguments or cures the infirmities resulting from its positions.

IV

CONCLUSION

The administrative citation filed against the respondent in this case overreaches the Act and, unless repressed by dismissal by the Board, can foster nothing but disrespect for an important law.

The respondent did nothing more than move mobile homes that others had abandoned in his mobile home park one mile away onto the site, his own private property, isolated from residential properties, for the purpose of dismantling them, recycling the recyclable materials, reusing the re-usable materials, and discarding of the remainder to the local landfill. When the complainant's inexperienced inspector demanded removal of the materials from the site or face enforcement proceedings under the Act, the respondent complied as soon as practicable. It was not soon enough for the complainant, which filed an administrative citation against the respondent without bothering to find out why the material was not removed sooner. A clearer case of overzealousness is hard to imagine.

The greater weight of the evidence contained in the record does not support any finding that discharge into the environment occurred or that public nuisance, health, safety or fire hazard resulted from the respondent's activities. Finding that the respondent violated the Pollution Control Act, under the facts and circumstances of this case, is not support by the evidence and would constitute an abuse of discretion.

For all of the foregoing reasons, the administrative citation in this case should be dismissed.

Dated this 31st day of January, 2005.

EGON KAMARASY, Respondent

By _____
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ORIGINAL

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

I am over eighteen (18) years of age, employed in the County of Jackson, State of Illinois, in which county the within mailing occurred, and not a party to the subject cause. My business address is: 3200 Fishback Road, P. O. Box 1206, Carbondale, Illinois 62903-1206.

I served the following document, Respondent's Post-Hearing Brief (AC 04-63), of which true and correct copies thereof in the cause are affixed, by placing the original and four (4) copies thereof in an envelope addressed as follows:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street
Suite 11-500
Chicago IL 60601-3218

and one (1) copy in an envelope addressed as follows:

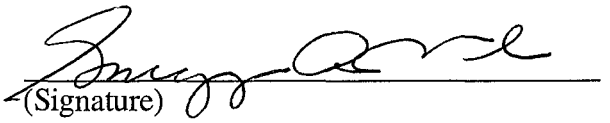
Jackson County State's Attorney
Jackson County Courthouse, 3d Floor
Murphysboro IL 62966

ATTN. Daniel Brenner, Assistant State's
Attorney

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Carbondale, Illinois, on January 31, 2005.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 31, 2005 at Carbondale, Illinois.



(Signature)

LAW OFFICES OF GREGORY A. VEACH
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January 31, 2005

Hon. Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street, Suite 11-500
Chicago IL 60601-3218

Re: County of Jackson v. Egon Kamarasy
In Proceedings before the Illinois Pollution Control Board
AC 2004-063

Dear Ms. Gunn:

Enclosed, please find for filing in the above-referenced matter an original and four (4) copies of the Respondent's Post-Hearing Brief, with attached Declaration of Service by Mail.

Please return one (1) copy, file-stamped, in the enclosed, return envelope.

Please call if there is any problem with this request.

Thank you for your consideration.

Sincerely,

Gregory A. Veach

enclosures
cc : Jackson County State's Attorney
GAV/mac