

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

CITY OF CHICAGO DEPARTMENT )  
OF ENVIRONMENT, )  
 )  
Complainant, )  
 )  
v. )  
 )  
JOSE GONZALEZ & 1601-1759 EAST )  
130<sup>TH</sup> STREET, LLC., INC., ET AL. )  
 )  
Respondents. )

Site Code:0316485103  
AC: 2006-039  
AC: 2006-040  
AC: 2006-041  
AC: 2007-025 - Consolidated


**RECEIVED**  
CLERK'S OFFICE  
AUG 13 2009  
STATE OF ILLINOIS  
Pollution Control Board

**NOTICE OF FILING**

TO: Mr. Bradley P. Halloran  
Illinois Pollution Control Board  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

Ms. Jennifer A. Burke, Senior Counsel  
City of Chicago, Dept. of Environment  
30 North La Salle Street, 9<sup>th</sup> Floor  
Chicago, Illinois 60602

PLEASE TAKE NOTICE that we have this day filed with the Clerk of the Illinois Pollution Control Board, Respondent's **Reply to City of Chicago's Response to Motion to Reconsider or Modify Final Order**. Dated at Chicago, Illinois, this 13<sup>th</sup> day of August, 2009.

  
JEFFREY J. LEVINE, P.C.  
Attorney for Respondents  
Jose Gonzalez, and  
1601-1759 East 130<sup>th</sup> Street, LLC.

Jeffrey J. Levine, P.C. #17295  
20 North Clark Street, Suite 800  
Chicago, Illinois 60602  
(312) 372-4600

**PROOF OF SERVICE**

The undersigned, being first duly sworn on oath, deposes and says that he served a copy of the Notice together with the above mentioned documents to the person to whom said Notice is directed by hand delivery or U.S. Mail, this 13<sup>th</sup> day of August, 2009.

  
JEFFREY J. LEVINE, P.C.

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

|  |   |                                    |
|--|---|------------------------------------|
| CITY OF CHICAGO DEPARTMENT                   | ) |                                    |
| OF ENVIRONMENT,                              | ) |                                    |
|  | ) | Site Code:0316485103               |
| Complainant,                                 | ) |                                    |
|  | ) | AC: 2006-039                       |
| v.   | ) | AC: 2006-040                       |
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| JOSE GONZALEZ & 1601-1759 EAST               | ) | <b>AC: 2007-025 - Consolidated</b> |
| 130 <sup>TH</sup> STREET, LLC., INC., ET AL. | ) |                                    |
|  | ) |                                    |
| Respondents.                                 | ) |                                    |

**REPLY TO CITY OF CHICAGO'S RESPONSE TO MOTION TO RECONSIDER OR  
MODIFY FINAL ORDER**

Now come Respondents Jose Gonzalez, and 1601-1759 East 130<sup>th</sup> Street, LLC, by and through their attorney, Jeffrey J. Levine, P.C., and for their Reply to the City of Chicago's Response to the Motion to Reconsider or Modify the June 4, 2009 Final Order, state and assert as follows:

1. The City of Chicago, in its Response to the Motion to Reconsider or Modify the June 4, 2009 Final Order ("Response"), seeks to justify the judgment against Respondent Jose Gonzalez by mis-characterizing the facts and law. The site of the incident was owned by Respondent 1601-1759 EAST 130<sup>TH</sup> STREET, LLC., INC., an Illinois corporation in good standing. No evidence presented at the hearing indicates that the site was owned by any other entity. Respondent Jose Gonzalez is a shareholder and agent of that corporation. Petitioner City of Chicago offered no evidence that would provide any valid basis for what amounts to the piercing of the Respondent corporation.

2. Respondent Jose Gonzalez, as an agent for the Respondent Corporation appeared at the site subsequent to the occurrence of the dumping. Upon his arrival, he sought to supervise cleanup operations at the site. The evidence demonstrated that the City sought to stop cleanup work at the site, contrary to Mr. Gonzalez's direction. The City twists these facts and argues at page 2 of its

Response that Mr. Gonzalez exercised “control over the site where the violations of the Act were observed...” In fact, no witness presented maintains that Mr. Gonzales was at the site or controlled the site when the pollution occurred.

3. The City next argues, at page 3 of its Response, that Respondent 1601-1759 East 130<sup>th</sup> Street, LLC., is liable for not promptly removing waste when the site was acquired in January of 2005, and that said Respondent failed to prevent others from dumping on the site. See: Response at p. 3. This argument is moot as the Board’s final Order did not hold Respondents responsible for fly dumped materials.

4. The City’s Response, at page 4, demonstrates the inherent failure of its position. The City argues that; “A complainant must show that the alleged open dumper had control over the source or site of the pollution.” Initially, Respondents were not the alleged open dumper.

5. The City argues that liability can attach if the open dumper had control over the source or site of where the pollution occurred. In this instance, the source of the pollution was the City’s Transportation Authority (CTA). The individuals who were the alleged open dumpers were the employees of the sub-contractors (E. King), working for the CTA’s Contractor (Paschen), working on the CTA’s Brown Line renovation.

6. Mr. Gonzalez was not on site when the investigators first appeared and attempted to stop the clean-up work, he arrived soon thereafter and assumed control over the property for purposes of cleaning the site. No evidence was presented at the hearing that Respondent Jose Gonzalez was present or had any control over the site when the dumping by the City’s agents occurred.

7. If Respondent Jose Gonzalez had control over the site when the sub-contractors started dumping the loads out of the containers, it would have stopped immediately. Respondent Jose Gonzalez came to the site and was directing the cleanup of the City’s waste. Respondent Jose

Gonzalez neither caused nor allowed the dumping at the site and worked immediately to rectify the mistake made by the City's agents. It is difficult if not impossible to explain what exactly Respondent Jose Gonzalez did wrong for the Board to punish. Both of the City's investigators testified that individuals are allowed time to clean up property. No explanation was given as to why Mr. Gonzalez was not allowed time to clean the site and was ticketed for his actions cleaning up the City's mess.

8. The City argues, at pp.4-5 of its Response that Mr. Gonzalez assumed responsibility for securing, maintaining, developing and renting the site. There is no evidence that he did not do so as an agent of the Respondent corporation.

9. Further, as an agent and shareholder for Respondent 1601-1759 EAST 130<sup>TH</sup> STREET, LLC., INC., an Illinois corporation, Respondent Gonzalez testified that he sought to secure the property from fly dumping, and develop the property. This plan is contrary to the causing or allowing debris to be dumped there. In this instance the property was neither the source nor site of the pollution.

10. Finally, the City argues that it did nothing wrong in ignoring respondent's valid discovery requests. See: Response pp. 5-6. The City argues that the identity of on scene witnesses was not important as the Act does not require that the City "issue administrative citations to every possible respondent for every given occurrence." The City then argues that its failure to provide the discovery was within its "prosecutorial discretion." See: Response p. 5. This argument is the height of arrogance.

11. The City's premise is that, the only purpose of providing discovery, was to issue citations. Respondents however, sought the identity of said on scene witnesses, in part, to substantiate Respondents claim of Investigator Macial's attempts to solicit a bribe. These types of bribes are

regularly sought by City employees. Already almost two dozen people have been charged in Operation Crooked Code, a joint operation by federal authorities and the City Inspector. Respondents were denied the legitimately requested discovery, and then admonished by the Board for not offering conclusive proof that the bribe had occurred. See: March 19, 2009 Order, p. 9.

12. The Board cannot fail to punish the City for discovery abuses and simultaneously, hold that Respondents failed to provide evidence regarding the bribe solicitation where the identity of witnesses may have demonstrated the bribe solicitation. All the witnesses who were not identified were involved in the cleanup effort and would have contradicted Inspector Macial's testimony relied upon by the Board in holding Respondents liable. Rather than cure the failure to provide discovery, upon realizing that Respondents subpoena's were ignored, the City's attorneys have now continued the deception by failing to correct the wrong and arguing that its failure to provide the discovery was within its "prosecutorial discretion." See: Response p. 5. Counsel for Complainant have failed to comply with their continuing duty to provide discovery.

13. City counsel further seeks to avert blame for their clients failure to respond to the discovery arguing that Respondents were given ample opportunity to cross examine Complainant's witnesses. Said counsel apparently argues that rather than having an ethical obligation to respond to discovery, it was Respondent's obligation to obtain the testimony of unknown individuals whose business cards were collected and maintained by the City inspectors.

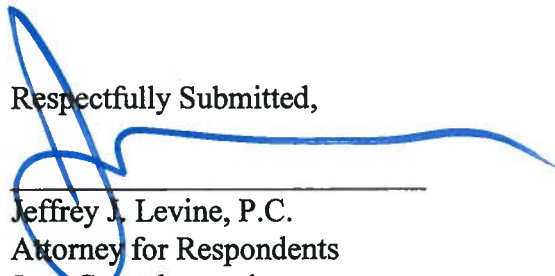
14. The City concludes that it is not required to comply with discovery as long as Respondents are allowed to cross examine the witnesses it presents. The City contends that this renders all due process concerns moot. Illinois allows relaxed discovery rules for administrative hearings. However, in this instance, liability was imposed after a hearing that provides for discovery. The Boards Order determined that the failure to comply therewith, to be harmless error. The City

relies on *Mahonie v. Edgar*, 131 Ill.App.3d 175, 476 N.E.2d 474 (1<sup>st</sup> Dist. 1985). In *Mahonie*, plaintiff argued that hearsay was allowed in her hearing where no objection was made as to its introduction. That is not the case in this instance. Respondents legitimately sought the discovery and sought sanctions when the material was not provided.

15. The Board cannot conclude that the discovery omissions were harmless without knowing what information was withheld. Such a conclusion is arbitrary and capricious and demonstrates an impartiality in ruling.

Wherefore, for the above and forgoing reasons, Respondents Jose Gonzalez, and 1601-1759 East 130<sup>th</sup> Street, LLC, pray that this Board reconsider and/or modify its final Order and for such further relief as is just and equitable.

Respectfully Submitted,



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Jeffrey J. Levine, P.C.  
Attorney for Respondents  
Jose Gonzalez, and  
1601-1759 East 130<sup>th</sup> Street, LLC.

Dated: August 13, 2009

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