

ILLINOIS POLLUTION CONTROL BOARD
September 4, 1997

KEITH F. BOYER,)	
)	
Complainant,)	
)	
v.)	PCB 96-151
)	(Enforcement - Land - Citizens)
)	
FELECIA HARRIS, a/k/a FELECIA)	
DAWKINS, and CHICAGOLAND)	
MORTGAGE CORPORATION,)	
)	
Respondents.)	

KEITH F. BOYER APPEARED *PRO SE*; and

MILES D. OKOKUMURA APPEARED ON BEHALF OF RESPONDENT FELECIA DAWKINS.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

On January 2, 1996, petitioner Keith F. Boyer (Mr. Boyer) filed this citizen's enforcement action with the Board. Mr. Boyer alleges in his "Formal Complaint" that respondent Felecia Harris, now known as Felecia Dawkins (Ms. Dawkins), violated Sections 21(a), 21(e), and 21(m) of the Environmental Protection Act, 415 ILCS 5/1 *et seq.* (1996) (Act), by abandoning hazardous and nonhazardous waste on a property which she owned, and then transferring her interest in the property without informing the buyer. Although Chicagoland Mortgage Corporation is named as a respondent, the allegations in the complaint refer only to Ms. Dawkins, and the record indicates service of the complaint was made only on Ms. Dawkins. This case will be dismissed as to respondent Chicagoland Mortgage Corporation.

The property in question is located at 9150 S. Avalon Avenue in Chicago, Illinois. Mr. Boyer alleges that there is hazardous lead-based paint throughout the entire structure, peeling from the walls and ceiling and scattered as chips and fine particles. He has also alleged that there is a high concentration of lead in the soil surrounding the structure, and that white goods and garbage litter the area. A hearing was held on September 18, 1996, in Chicago before Hearing Officer Deborah L. Frank. (The transcript of this hearing is cited herein as "Tr.") After considering the evidence submitted at the hearing, the Board concludes that Mr. Boyer has not established a violation of any of the aforementioned sections of the Act by Ms. Dawkins.

RELEVANT LAW

Mr. Boyer has alleged violations of Sections 21(a), 21(e), and 21(m) of the Act. Section 21(a) of the Act (415 ILCS 5/21(a) (1996)) provides that no person shall “[c]ause or allow the open dumping of any waste.” Section 21(e) of the Act (415 ILCS 5/21(e) (1996)) provides that no person shall

Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

Section 21(m) of the Act (415 ILCS 5/21(m) (1996)) provides that no person shall

Transfer interest in any land which has been used as a hazardous waste disposal site without written notification to the [Illinois Environmental Protection] Agency of the transfer and to the transferee of the conditions imposed by the Agency upon its use under subsection (g) of Section 39.

Each section of the Act which Ms. Dawkins is alleged to have violated involves “waste,” a term with a specific definition under the Act.¹ In a “Motion to Strike and Dismiss” filed on September 18, 1996, and again in “Respondent’s Memorandum and Brief,” filed on October 29, 1996, Ms. Dawkins challenges Mr. Boyer’s complaint on the basis that the material allegedly abandoned by Ms. Dawkins is not waste. Waste is defined in Section 3.53 of the Act (415 ILCS 5/3.53 (1996)), which provides:

“WASTE” means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows, or coal combustion by-products as defined in Section 3.94, or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977

¹ “Hazardous waste disposal site,” as used in Section 21(m), is defined in terms of “waste.” Section 3.16 of the Act (415 ILCS 5/3.16 (1996)) defines “hazardous waste disposal site” as “a site at which hazardous waste is disposed;” Section 3.15 of the Act (415 ILCS 5/3.15 (1996)) defines “hazardous waste” as “waste, or a combination of wastes,” with certain characteristics.

(P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.

“White goods” are defined in Section 22.28(c)(1) of the Act (415 ILCS 5/22.28(c)(1) (1996)) as including “all discarded refrigerators, ranges, water heaters, freezers, air conditioners, humidifiers and other similar domestic and commercial large appliances.”

“Garbage” is defined in Section 3.11 of the Act (415 ILCS 5/3.11 (1996)) as “waste resulting from the handling, processing, preparation, cooking, and consumption of food, and wastes from the handling, processing, storage and sale of produce.”

EVIDENTIARY ISSUES

At the hearing, in addition to his own testimony, Mr. Boyer introduced into evidence a letter from a laboratory technician setting forth the results of analyses of paint chips and soil from the property (Complainant’s Exhibit 1) and a number of photographs of the interior of the house (Complainant’s Exhibit 2). At the hearing, Ms. Dawkins’ attorney objected to admission of the letter and photographs, which objections were reasserted in the “Respondent’s Memorandum and Brief,” based on the claimed failure of Mr. Boyer to lay a proper foundation for admission of the documents. The Board concludes that Complainant’s Exhibits 1 and 2 were properly admitted into evidence by the hearing officer, and affirms the hearing officer’s rulings on admission of both exhibits.

Complainant’s Exhibit 1 is a letter from laboratory technician Alesha Strong setting forth the results of a test of paint chips from the house and soil from the yard outside the house. Mr. Boyer testified that the letter was provided to him by the firm that tested paint chips from the house. Tr. at 9. Although the letter is hearsay, 35 Ill. Adm. Code 103.204(a) provides a limited exception to the hearsay rule, at the option of the hearing officer, for evidence which is “material, relevant, and would be relied upon by reasonably prudent persons in the conduct of serious affairs[.]” The nature of the paint would have been relevant and material to the issue of whether the Avalon Avenue property was a site at which hazardous waste had been disposed. The letter is, the Board believes, the type of document which would be relied upon by reasonably prudent persons in the conduct of serious affairs. Consequently, the letter was admissible into evidence.

The Board’s conclusion that under the circumstances here the paint at the Avalon Avenue property is not “waste” (see below) obviates the need for an inquiry into the chemical nature of the paint. Under 35 Ill. Adm. Code 103.204(b), however, “[w]hen the admissibility of evidence depends upon an arguable interpretation of substantive law, the Hearing Officer shall admit such evidence.” Thus, inasmuch as the question of whether the paint was “waste” had not been determined at the time of the hearing, it was proper for the hearing officer to admit the letter.

Mr. Boyer testified that the photographs which constitute Complainant’s Exhibit 2 were taken by him in September of 1995, that they accurately depicted the state of the Avalon

Avenue property at that time, and that he had not done any work on the interior of the property since he purchased it. Tr. at 28-30. The Board concludes that this testimony establishes that the photographs were both material and relevant to the matters before the Board in this case at the time of the hearing and consequently are admissible.

FINDINGS OF FACT

Based on the testimony at the hearing and the exhibits discussed above, the Board makes the following findings of fact: In April of 1993, Mr. Boyer purchased a house located at 9150 S. Avalon Avenue in Chicago, Illinois, from Ms. Dawkins. Tr. at 13. Ms. Dawkins, a mortgage broker at the time, held title to the property for less than a day, purchasing it from a nonprofit organization and transferring it on the same day to Mr. Boyer. Tr. at 23. Some time after September of 1995, Mr. Boyer learned that the house contained lead paint, making renovation of the house for resale economically impractical. Tr. at 8-9, 11; Complainant's Exhibit 1. The paint is peeling from the walls and ceiling. Complainant's Exhibit 2. There is a refrigerator in the house. Complainant's Exhibit 2.

ANALYSIS

Lead Paint as Waste

In order to find a violation of any of the aforementioned sections of the Act, the Board must first find that the lead paint is "waste" as defined in Section 3.53, quoted above. The lead paint is clearly not garbage; nor is it sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility. Thus, the lead-based paint can only be "waste" for the purposes of the Act if it qualifies as "other discarded material."

On the evidence before it, the Board cannot find that the paint has been discarded. Paint is the type of material which, once applied to a structure, is typically included with that structure when sold, for use by the new owner. Paint could be transferred as part of a real property transaction many times without any intention to "discard" the paint through the transaction. The Board acknowledges that the paint involved in this case is peeling and chipped, but does not find that mere peeling or chipping of paint renders that paint "discarded material."

Having found no discarding of the paint at the Avalon Avenue property by Ms. Dawkins, the Board finds that the paint is not waste, and therefore no violation of Sections 21(a), 21(e), or 21(m) can be predicated on the presence of the paint at the property.

White Goods

The only evidence regarding white goods is a photo submitted by Mr. Boyer showing a refrigerator in the house. For the reasons set forth above in the discussion of the paint at the property, the Board cannot find on the record before it that the refrigerator shown in the photograph submitted by Mr. Boyer is "waste." A refrigerator is, like paint (although perhaps not to the same degree), the type of item which may be included in the sale of a house for use

by a subsequent owner. We have no evidence that the refrigerator was discarded by the prior owner of the property. The Board therefore finds that the refrigerator is not “waste,” and consequently no violation of Sections 21(a), 21(e), or 21(m) can be predicated on the presence of the refrigerator at the property.

Garbage

Although Mr. Boyer alleged in his complaint that garbage littered the Avalon Avenue property, no evidence was submitted at the hearing as to the presence of garbage at the property during Ms. Dawkins’ ownership. The Board consequently cannot find that Ms. Dawkins violated the Act based on the presence of garbage at the property.

Soil Contamination

Mr. Boyer has also raised the issue of lead present in the soil at the Avalon Avenue property. The presence of lead in the soil is insufficient by itself to establish a violation of Sections 21(a), 21(e), or 21(m) of the Act. The Board thus cannot find that Ms. Dawkins violated any of these sections of the Act based on lead present in the soil.

CONCLUSION

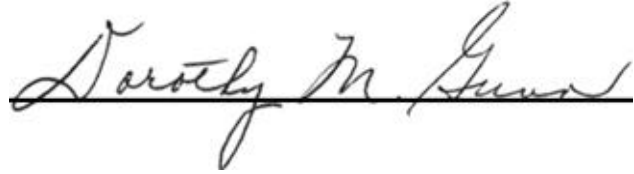
This case is dismissed as to respondent Chicagoland Mortgage Corporation due to the complainant’s failure to serve that party. Because the Board finds that the lead paint and the refrigerator at the Avalon Avenue property are not “waste,” and because there is no evidence on the record establishing the presence of garbage at the property during Ms. Dawkins’ ownership, the Board finds no violation of Sections 21(a), 21(e), or 21(m) by Ms. Dawkins. This docket is hereby closed.

This opinion constitutes the Board’s findings of fact and conclusions of law in this matter.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 4th day of September 1997, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board