

ILLINOIS POLLUTION CONTROL BOARD

December 17, 1992

JOHN ZARLENGA and
JEAN ZARLENGA,

Complainants,

v.

PARTNERSHIP CONCEPTS,
HOWARD EDISON, BRUCE MCCLAREN,
COVE DEVELOPMENT COMPANY,
THOMAS O'BRIEN, BLOOMINGDALE
PARTNERS, an Illinois Limited
Partnership, and GARY LAKEN,

Respondents..

PCB 89-169
(Enforcement)

ORDER OF THE BOARD (by J. Anderson):

On December 7, 1992, John and Jean Zarlenga filed a motion for sanctions and penalties. On December 15, 1992, Partnership Concepts, Howard Edison, Bruce McClaren, Cove Development Company, Thomas O'Brien, and Gary Lakin (respondents) filed a response to the motion. The Board hereby denies the Zarlengas' motion.

In their motion, the Zarlengas ask the Board to impose sanctions and penalties (including those specified in Section 42 of the Environmental Protection Act, (Act) and 35 Ill. Adm. Code 101.280, as well as attorney fees, for respondents' failure to comply with the Board's July 30, 1992 final opinion and order in this matter. In that order, the Board directed respondents to:

1. remove and relocate the Zephyr unit and the clubhouse air conditioner to the other side of the building no later than 20 days from the date of the order,
2. replace the chassis and compressors on the individual air conditioners facing the Zarlengas' town home no later than 90 days from the date of the order,
3. furnish the Zarlengas with data generated by Shiner & Associates in the preparation of the noise abatement plan,
4. complete the noise abatement program completed by October 30, 1992, and
5. cease and desist from violations of Section 24 of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111½, par. 1024, and 35 Ill. Adm. Code 900.102

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effective upon attainment of compliance, but in no case later than October 30, 1992.

The Board also stated that failure to comply with the provisions of the order could subject respondents to civil penalties.

In support of their motion, the Zarlengas assert that one unit remains located outside of the swimming pool area and that six to ten individual air conditioners have not had their chassis and compressors replaced as directed by the Board. The Zarlengas include an inspection report from the Illinois Environmental Protection Agency, dated September 8, 1992, indicated that one unit had been removed and that ... "the older fans had been disconnected."

The Zarlengas also claim that respondents have misrepresented the repairs to the Board. Specifically, the Zarlengas note that respondents, in this case, alleged that the work was done on the individual air conditioners facing the Zarlengas townhome to reduce the noise emitted toward the townhome. The Zarlengas, however, claim that the repairs were done in response to complaints by the residents of One Bloomingdale Place. Specifically, the Zarlengas point to an arbitor's finding in In the Matter of the Arbitration between Bloomingdale Partners and Cove Development Company et al. Case No. 51-110.0491-90M. The arbitor in that case found:

[a]n issue arose in the testimony regarding the reason for insulating the units and installing the backdraft dampers. Field house suggested that noise reduction may have been another purpose for or benefit of the repair work. Based on the facts that the noise pollution complaint did not arise until the repair work had been bid out and involved different equipment, I find that the air infiltration problem was the sole proximate cause of the need for these repairs.

(Motion Ex. C p. 9.)

The Zarlengas state that the above information did not become available to them until late 1992. The Zarlengas also point to certain representations made by Mr. Edison during a deposition in the bankruptcy case as well as the purchase of a note from a creditor in the bankruptcy proceeding to support their allegation of misrepresentation. Finally, the Zarlengas argue that their request for relief is justified because respondents continue to violate Section 24 of the Act and 35 Ill. Adm. Code 900.102.

Respondents deny the Zarlengas' allegations and assert that they have complied with the Board's July 30, 1992 order. Specifically, respondents note that the Board directed them to "remove and relocated the Zephyr unit and the club house air

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conditioner to the other side of the building as proposed." Respondents note that their proposal was outlined in a letter, dated June 4, 1992, from Bruce McClaren to Superior Mechanical Industries (SMI) and was attached as an exhibit to their July 7, 1992 request to implement alternative noise reduction measures. That letter states that respondents propose to:

(i) relocat[e] the Zephyr pool dehumidifier, as opposed to just using baffles and/or a masonry wall to isolate this equipment; and (ii) relocat[e] the sound producing components (compressor and condenser) of the clubhouse air conditioner.

(Response Ex. A p. 1; see also July 7, 1992 Motion to Amend Ex. F.)

Respondents further assert that SMI installed a new Zephyr condenser unit and air conditioner unit, comprised of a condenser and compressor, on the other side of One Bloomingdale Place and were operational as of August 14, 1992. Respondents add that the original Zephyr unit was removed from its original site and the original club house air conditioner was disabled in place. Respondents claim that, as a result, the original air conditioner generates no noise. Respondents point to the affidavit of John J. O'Malley, Vice President of SMI and the September 8, 1992 inspection report of Greg Zak of the Illinois Environmental Protection Agency in support of their assertions. (Response Ex. B pars. 4, 5, Ex. C p. 3.)

As for the individual air conditioners, respondents point to Mr. O'Malley's affidavit in support of its assertion that replacement of the chassis and compressors servicing the units facing the Zarlangas' townhome were completed in the third week of September 1992. (Response Ex. B par. 6.)

In order for the Board to impose sanctions or penalties, it must find that respondents have failed to comply with the Board's order. The Board cannot come to such a conclusion in this case. As respondents correctly note, the Board directed them to "remove and relocate the Zephyr unit and the club house air conditioner to the other side of the building as proposed." Respondents' proposal was indeed outlined in a June 4, 1992 letter from Bruce McClaren to SMI. Moreover, the letter was attached as an exhibit to respondents' July 7, 1992 request to implement alternative noise reduction measures. The Board specifically considered the letter when issuing its order as evidenced by the "as proposed" language within the order.

In addition, respondents have included affidavits showing that the work on the pool units and individual air conditioners had been completed in accordance with the Board's July 30, 1992

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order. The Zarlengas, on the other hand, have included no affidavits in their motion to support their allegation that six to ten units have not been retrofitted even though they reference a November 12, 1992 conversation between Mr. Edison and Mr. Zarlenga in the presence of Mr. Norman Burger and Mr. Zak. In any event, the Board is at a loss to understand the Zarlengas' objection to the presence of the original club house air conditioner as long as it is disabled and can generate no noise.

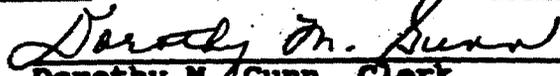
As for the Zarlengas' claim that respondents are operating in violation of Section 24 of the Act and 35 Ill. Adm. Code 900.102, the Board notes that the Zarlengas are relying on the same allegations that form the basis of their complaint in PCB 92-178. On September 17, 1992, in response to the Zarlenga's August 24, 1992 motion to reconsider the Board's July 7, 1992 order, the Board issued an order stating that the Zarlengas could file another complaint for any continuing noise problem. The Board reasoned that a new complaint would have to be filed because a finding of a continuing violation would be based on the Board's evaluation of new facts. Accordingly, because the allegations in PCB 92-178 are as yet unproven, they cannot form the basis of a claim for penalties or sanctions for respondents' alleged violation of the Act and regulations in this proceeding.

Finally, with regard to the Zarlengas' reference to proceedings in other forums, the Board notes that such references are irrelevant to the claims at issue herein and thus, cannot form a basis for the imposition of penalties or sanctions. For example, the Board notes that the installation of insulation and backdraft dampers, as discussed in relation to the arbitration case, has no bearing on the issue of whether respondents complied with the Board's directive to install chassis and compressors on the individual air conditioners.¹

Accordingly, for the foregoing reasons, the Board hereby denies the Zarlengas' motion.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of December, 1992, by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board

¹Because the Board declines to grant the requested relief, it need not address respondents' arguments on the issue of attorney fees.