

ILLINOIS POLLUTION CONTROL BOARD
May 24, 1990

DANIEL LORDEN AND HELEN LORDEN)
)
) Complainants,)
))
) v.) PCB 89-19
)) (Enforcement)
SHERIDAN SOUTH CONDOMINIUM)
ASSOCIATION,)
)
) Respondent.)

ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board on Sheridan South Condominium Association's ("Association's") Motion to Dismiss Petitioner's First Amended Complaint filed April 20, 1990. The motion seeks to dismiss the Lorden's First Amended Complaint for reason that the Association is not a proper party defendant. The motion incorporates by reference the Association's Answer to Petitioner's Motion to Compel as its supporting evidence and argument concerning its motion to dismiss. On May 9, 1990, the Lordens filed their Answer to Respondent's Motion to Dismiss Complainants' Amended Complaint. For reasons given below, the Association's motion is denied.

The Association asserts that it is not a proper party defendant to this citizen noise pollution enforcement case because it is not in control of the subject air conditioning units. In support of its claim that it has no control over the air conditioners complained of, the Association attaches the affidavit of Linn Joanis, President of the Association. That affidavit states in pertinent part:

3. That when the Association informed the individual unit owners of the same, the individual unit owners stated that "The Association does not have the authority to order the individual unit owners to turn on their air conditioning units, or, in this alternative, come into their individual units and turn on paid air conditioning units, since they are the property of the individual unit owners and not the property of the Association."

4. That the Association is not responsible for the repair, maintenance or replacement of any of the air conditioning units that are the subject of Petitioner's complaint.

Affidavit of Linn Joanis,p.2.

The Board notes that this is not the first attempt by the Association to be dismissed from this case. In each, the Association's argument has been that it lacks ownership and control over the air conditioning units in the individual members' properties. As such, the Association's motion to dismiss the First Amended Complaint is premised upon matters not apparent on the face of the pleadings. In order to prevail upon its motion to dismiss then, the Association's pleading must be supported by competent evidence in the form of an affidavit. 35 Ill. Adm. Code 101.242 (a). Here, however, the Association's affidavit is deficient in several respects, paragraph 3 contains the unsworn opinions of the individual unit owners that the Association may not compel them to turn on their air conditioning units or to enter their properties to turn on their units. These unsworn opinions do not rise to the level of "fact" for our purposes here, nor do the sworn statements contained in paragraph 4 curb these deficiencies. The substance of paragraph 4 does not conclusively determine that the Association lacks any measure of control over the air conditioning units in question. Certain responsibilities regarding the air conditioners assertedly fall to the unit owners, but not all. Given the status of the record before the Board at this time, we cannot say that the Association is not a proper party defendant. Therefore, the Association's Motion to Dismiss Petitioner's First Amended Complaint is denied.

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 20th day of July, 1990, by a vote of 7 1.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board