

ILLINOIS POLLUTION CONTROL BOARD
February 4, 1988

RODGER DIAMOND,)
)
 Complainant,)
)
 v.) PCB 84-64
)
 THE CENTER FOR THE)
 REHABILITATION AND TRAINING)
 OF THE DISABLED,)
)
 Respondent.)

MR. RODGER DIAMOND APPEARED PRO SE; AND

MR. PAUL FINNEL APPEARED ON BEHALF OF RESPONDENT

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board upon a formal complaint filed April 26, 1984, by Rodger Diamond (hereinafter "Diamond") against the Center for the Rehabilitation and Training of the Disabled (hereinafter "the Center"). Diamond alleges that buses which load and unload students in a driveway located between Diamond's property and a building owned by the Center be estopped from allowing buses to utilize the driveway for loading and unloading.

Hearing was held on December 10, 1986, at the State of Illinois Center, Chicago, Illinois. Only the parties and the Board's hearing officer were in attendance.

FACTS

Diamond owns a multi-story commercial-residential building located at 6040 North California Avenue, Chicago, Illinois. The building houses six apartments and two businesses. The building is approximately 60 years old (R. 4).

The Center is a private, non-profit, charitable social service organization. It owns and leases a number of facilities. The facility at issue consists of a two-story building located at 6050 North California Avenue, Chicago, Illinois, which is known as the Byron Center. The Byron Center was constructed in 1957 and offers a variety of services for the disabled, including both day-students and residential students.

Diamond's property and the Byron Center are separated by an alley which has an approximate 9-foot width. Twice daily, five

days a week, at approximately 9:00 a.m. and again at approximately 2:30 p.m. (R. 18), two to three small buses/vans (R. 31) enter the alley and stop adjacent to an entry/exit which opens from the Byron Center onto the alley. There the buses/vans discharge students during the morning period and load students during the afternoon period. The buses/vans remain in the alley for approximately 5 to 10 minutes during the morning period and for an average of 15 minutes during the afternoon period (R. 27-28).

Diamond alleges that the buses/vans, when stopped in the alley with their engines running, produce exhaust which enters his building through windows and vents on the alley-side of his building.

DISCUSSION

The burden of proof in an enforcement action before the Board is clearly specified in the Environmental Protection Act ("Act"), Ill. Rev. Stat. 1985, ch. 111^{1/2}, par. 1033(c):

In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board or permit or term or condition thereof.

The complainant, Mr. Rodger Diamond, therefore, has the burden of showing that the Center has caused or threatened to cause air pollution or that the Center has violated or threatens to violate some provision of the Act or Board rules or regulations. The Board finds that the Diamond has failed to carry this burden and the Board will accordingly dismiss the complaint.

The Board is aware that Diamond is not an attorney and, that for this reason, he might not be expected to present a case in as reasoned a form as would be professional in the field. Nevertheless, the Board finds that the showings which would be necessary for the Board to find in Diamond's favor are absent in the instant matter.

The Board has reviewed the testimony at hearing and believes two concepts are important in discussing that testimony. First, the Board is required to accept, as true, the uncontroverted factual statements offered at hearing. Second, the Board is not required to accept as true, any conclusory opinions offered as testimony, where the underlying rationale and facts supporting the opinion is lacking. The great difficulty with the transcript

in this proceeding is the paucity of facts to support Diamond's position. The record discloses a surplus of unsupported conclusory opinions. As an example, Diamond testified that:

They come in with their buses. They stand there 10-15 minutes. And all the garbage from their exhaust pipes comes into our building, with the vents, with the bedroom windows. We got children sleeping there. We have people sleeping there when they come in with their buses. (R. 5)

From this uncontroverted factual statement, the Board can determine that for 10-15 minutes some exhaust fumes from the buses enter the Diamond's building through vents and windows at a time when children and adults are sleeping somewhere within the apartment building. It is not clear which vents or windows provide the pathway to the fumes in the alley. The location of the sleeping adults and children in relation to the portions of the building that experience fume problems is also unclear, as is the level of interference.

However, the above factual statements must be distinguished from the large quantity of conclusory opinions offered as testimony:

So, what point does he make that these children have to be in? Why does he have to kill us? We're next door. He's killing us normal people to save retarded people.

I believe in saving retarded people. But I don't believe in making money to kill normal people in the process. You see my point? Why kill people, normal people in the process of trying to save retarded people?

I'm willing to save retarded people and do everything for them, you know. But don't kill me in the process. That's all I'm saying. (R. 13)

The Board cannot conclude that the exhaust fumes present a danger of imminent mortality to the individuals in Diamond's building without some factual foundation for that conclusion. Diamond has presented no credentials to demonstrate his skill in the health effects of internal combustion engine exhaust fumes and has presented no rational theoretical basis for the conclusion of mortality. Additionally, the few facts presented indicate, at most, a short-term exposure of an unquantified number of people to some unquantified amount of fumes. This limited exposure does not support Diamond's bald assertions and opinions regarding the degree of interference.

Despite the repeated statements about "killing" (R. 13, 16), the Board cannot conclude, based on this record, that mortality is a reasonably anticipated consequence of the brief exposure to exhaust fumes.

When stripped of its emotional content, the Board finds the following facts: for 5-10 minutes in the morning and 10-15 minutes in the afternoon, small buses park adjacent to Diamond's property. While they are parked there, the exhaust pipes from the buses are approximately 12 inches from Diamond's building. While they are parked there, certain exhaust fumes from the buses enter Diamond's building through vents and windows. During the period the buses are parked, the fumes preclude Diamond from using the bathroom (R. 6, 16). During the period the buses are present, the fumes cause some unquantified level of interference with Diamond's use of the building.

Thus, the Board concludes that for a total of 15-30 minutes a day, Monday through Friday, exhaust fumes preclude Diamond from using the bathroom and cause some unquantified level of interference with other uses of the building.

The standard for finding a violation of Section 9(a) of the Environmental Protection Act ("Act") as a general nuisance claim is whether the activity in question causes an unreasonable interference with the enjoyment of life. Prior to reaching that conclusion, the Board must consider the factors in Section 33(c) of the Act:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and
4. the technical practicability and economic reasonableness of reducing or eliminating

the emissions, discharges or deposits resulting from such pollution source.

There is substantial testimony in the record regarding the social and economic value of the pollution source. The representative of the respondent testified on the following description of the center:

The Center for the Rehabilitation and the Training of the Disabled is a private, non-profit, charitable social service organization.

The Center provides rehabilitative services to individuals with disabling conditions. We have been doing this since 1919 and at this particular site since 1957.

At the site in question, we provide services to a variety of disabilities. The building was constructed in 1957 as a school for retarded children. And indeed we still are serving children with disabling conditions as well as adults with disabling conditions.

The children who are being served are children who have been excluded from the Chicago public schools. And they have been excluded because of the fact that they are behaviorally disordered, meaning they are prone to outbursts, uncontrollable behavior, running away, doing things that perhaps could not be predicted or dealt with in a normal fashion.

We provide specialized training and specialized staff for them so that they can learn to control their behaviors and perhaps someday be readmitted to the public school system and mainstreamed into society.

The Center, as it was stated, has been at the location since 1957. When the building was constructed, it was constructed with a side drive at the south end of the property which abuts the property that the Complainant represents or owns.

The school was constructed in such a way as to allow loading and unloading at that south end of the building so as to provide for a sheltered and protected way for these

disabled children to get into and out of the buses on a daily basis. (R. 9-11)

There was also testimony from respondent's representative on why use of the side drive was necessary.

The behaviorally disordered children, however, do not have any mobility problems. Perhaps their mobility problems might be in the other direction, in that they're too mobile. And they have a tendency to run outdoors, take off, act uncontrollably perhaps at times. So, they are loaded and unloaded using the side drive.

* * * *

There is a reason for our using the side drive. Our reason is that, as I stated, the children who are loaded using the side drive are the children who have in the past exhibited and continue to exhibit behavioral problems, outbursts and are difficult to control.

Our experience in loading these children out on the street or in the alley is that they can tend to run away, run out into traffic. And we feel that from a safety standpoint we're better off using that side drive for loading and unloading. That's what the side drive was designed for. (R. 23, 31-32)

Consequently, based on this factual testimony, the Board finds there is great social value to the Center's activities in general and to the use of the side drive for loading the behaviorly disordered children in particular.

In sum, the Board finds that for the very brief periods of time involved and the minimal factually proven interference to Diamond's use of property does not outweigh the social value of the Center's use of the side drive. Consequently, the Board finds that Diamond has failed to prove a violation of Section 9(a) of the Act and this matter is dismissed.

This Opinion constitute the Board finds of fact and conclusions of law in this matter.

ORDER

1. There is insufficient evidence in the record to show that respondent, The Center for the Rehabilitation and Training of

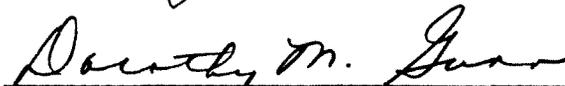
the Disabled, has violated the Environmental Protection Act or rules and regulations of the Illinois Pollution Control Board.

2. This proceeding is hereby dismissed.

IT IS SO ORDERED.

Board Members J.D. Dumelle, J. Anderson and J. Marlin dissented.

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 February, 1988, by a vote of 4-3.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board