

NOV 07 2005

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS, }
 }
 Complainant, }
 }
 -v- }
 }
 4832 S. VINCENNES, L.P., an Illinois }
 limited partnership, and BATTEAST }
 CONSTRUCTION COMPANY, INC., }
 An Indiana corporation, }
 }
 Respondents. }

No. 04-7
(Enforcement – Air)

**RESPONDENT'S MEMORANDUM IN OPPOSITION TO COMPLAINANT'S
MOTION FOR SUMMARY JUDGMENT**

Respondent, 4832 S. Vincennes, L.P., submits the following memorandum response in opposition to Complainant's Motion for Summary Judgment.

INTRODUCTION

The Complainant, PEOPLE OF THE STATE OF ILLINOIS, through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, seeks summary judgment for its complaint for alleged violations of the ENVIRONMENTAL PROTECTION ACT without any evidence that it is entitled to judgment as a matter of law. The complaint alleges that the Respondent, 4832 S. Vincennes, L.P., an Illinois limited partnership committed violations for Air Pollution and Failure to Inspect and follow the proper emission control procedures when asbestos was discovered.

COUNTER STATEMENT OF FACTS

The Complainant is well aware that prior to the beginning of the renovation of this project a Phase I environmental assessment was performed (Miller 2004 Dep. P. 31-32) with no indication that asbestos was present.

Further that the premises were boarded up and secure (Miller 2004 Dep. P. 35). When the Respondent, through its representative, Gregory Miller, was first informed that there was a *suspicion* of the presence of asbestos, Mr. Miller, who had no experience with asbestos, (Miller 2005 Dep. P. 11) differed to the knowledge and experience of the contractor to do whatever was necessary and required under the circumstances (Miller 2005 Dep. P. 11 13).

The contractor, Batteast Construction Company, apparently did contract with Hygieneering, Inc., a Professional Asbestos consulting and Testing Service (Exhibit A), but never informed Mr. Miller that Hygieneering, Inc., had been hired. None of the correspondence, contracts, invoices, tests results, etc. between Hygieneering, Inc., and Batteast Construction Company were forwarded to, nor shared with Mr. Miller. Minutes of the construction meetings (Group Exhibit B) indicate that a testing for asbestos in the basement area had been done on December 18, 2001 and results were expected in "3-5 days" (Group Exhibit B). Each of the construction meetings include a list of persons present. None of the attendance lists include the name of Mr. Miller. In addition the affidavit of MARGARET GUIDARELLI-PELLETIER clearly states that the firm Hygieneering, was contact by Batteast Construction on December 10, 2001 and that all of the firm's proposals and billings for services went to Batteast Construction, it indicates no correspondence or contact with Mr. Miller or 4832 S. Vincennes. Additionally, her affidavit does not state that she is an expert, or what expert, if any, will testify that asbestos was found on the premises. In answer to Respondent's 2nd set of Interrogatories the Complaint states that no expert has been identified at this time and that the investigation continues (See Complainant's Answer to Respondent's 2nd set of Interrogatories

No. 12). The January 2, 2002 Construction Meeting clearly states in “topic of discussion” No. 4 that Batteast would close down the job” as a result of the positive test results for asbestos. The January 16, 2002 meeting indicates that abatement contractors had been requested to make proposals and the January 30, 2002 meeting indicates that the job site would “close down” all interior work. Significantly, none of the Construction Meeting Minutes make reference to any work in progress, and the affidavit of Mr. Zappa refers to January 31, 2002, the day *after* the Construction Meeting notation to “close down” the work site.

The core of this dispute, therefore, is a factual one. Despite the Complainant’s allegations that the Respondent did not properly inspect the premises before commencing renovation or failing to stop work when asbestos was discovered, the record demonstrates that Respondent, 4832 S. Vincennes has raised genuine issues of material fact concerning the adequacy of the pre-renovation inspection and a factual dispute as to when asbestos was actually discovered.

The supporting affidavit of Joseph W. Zappa does not establish that there are no disputed issues of material fact. Paragraph 8 of the Zappa affidavit states that Mr. Miller refused to stop work on January 31, 2002, where in fact the affidavit does not affirmatively state the Mr. Zappa or anyone else, ever spoke with Mr. Miller on January 31, 2002. Actually Mr. Zappa merely left his cell phone number with an employee of Batteast Construction with no indication of his official capacity. He did not display any credentials of his position as an Inspector for the Illinois Environmental Agency, he was not driving a vehicle with the State of Illinois insignia and left a mere verbal notice

that the work site would have to be shut down (Miller 2004 Dep. P. 46). A written Stop Work order was received by Mr. Miller on February 5, 2002 (Exhibit C). On the same day, an Inspector F. Roseman from the City of Chicago Department of Environment visited the site and was given assurance by the security personnel that on-site security would be maintained (Exhibit D).

ARGUMENT

Summary judgment is appropriate only if the pleading, admissions on file and affidavits show there are no issues of material fact and the moving party is entitled to judgment as a matter of law. Wilder Bindingco -v- Oak Park Trust and Savings Bank, 135 Ill. 2d 121, 130 (1990). In making this determination, courts construe the pleadings, admissions, exhibits and affidavits strictly against the movant and liberally in favor of the opponent and grant summary judgment “only when the right of the moving party is clear and free from doubt” Id. Citing Purtill -v- Hess, Ill. 2d 229, 240 (1986). Additionally, the non-movant is entitled to have all reasonable inferences resolved in its favor. Certified Mechanical Contractors -v- Wright & Co., Inc., 162 Ill. App. 3d 400 (2d Dist. 1987).

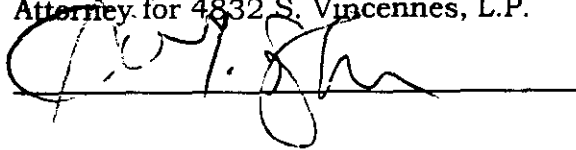
In this case the pleadings on file and exhibits submitted in opposition to the Motion for Summary Judgment establish that genuine issues of fact remain as to whether the Respondent failed to inspect and to follow proper emission control procedures when asbestos was discovered. These disputed facts preclude summary judgment in favor of the Complainant.

CONCLUSION

For the reasons set forth above, 4832 S. Vincennes, L.P., an Illinois limited partnership respectfully requests that the Hearing Officer deny the Complainant's Motion for Summary Judgment.

Respectfully submitted,

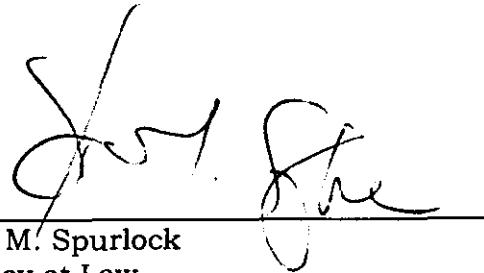
OLIVER M. SPURLOCK
Attorney for 4832 S. Vincennes, L.P.

A handwritten signature in black ink, appearing to read "O. M. Spurlock", is written over a solid horizontal line.

CERTIFICATE OF SERVICE

I, Oliver M. Spurlock, attorney, do certify that we caused to be served this 1st day of November, 2005, the Respondent's Memorandum in Opposition to Complainant's Motion Summary Judgment, to the persons named below by placing the same in overnight mail with U.P.S. postage prepaid, at 9415 South State Street, Chicago, Illinois 60619.

***Paula Becker Wheeler
Assistant Attorney General
188 W. Randolph, 20th Floor
Chicago, IL 60601***



Oliver M. Spurlock
Attorney at Law
9415 South State Street
Chicago, Illinois 60619
(773) 660-4300

RECEIVED
CLERK'S OFFICE

NOV 07 2005

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS, }

Complainant, }

-v- }

4832 S. VINCENNES, L.P., an Illinois
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An Indiana corporation, }

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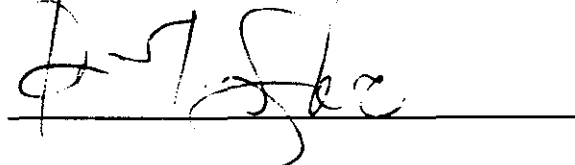
NOTICE OF FILING

To: Paula Becker Wheeler
Assistant Attorney General
Environmental Bureau
188 W. Randolph Street, 20th Floor
Chicago, Illinois 60601

PLEASE TAKE NOTICE that we have today, November 7, 2005, filed with the office of the Clerk of the Illinois Pollution Control Board an original and four copies of our Respondent's Memorandum in Opposition to Complainant's Motion for Summary Judgment, a copy of which is attached herewith and served upon you.

Respectfully submitted,

OLIVER M. SPURLOCK
Attorney for 4832 S. Vincennes, L.P.





Hygieneering, Inc.

industrial hygiene, safety and environmental consulting services

7575 Plaza Court, Willowbrook, IL 6052

(630) 654-2550 ■ FAX: (630) 789-381

December 10, 2001

Ms. Valerie Batteast-Fleming
Batteast Construction
430 E. LaSalle
South Bend, IN 46617

4/60-EMW via Fax: 219-289-2270

RE: To identify the services and fees associated with the Professional Asbestos Consulting and Testing Services for work associated with the property at 4832 S. Vincennes (Mayfair Apartments).

Scope of Work

To support the above referenced project, Hygieneering will perform an on-site inspection of the property located at 4832 S. Vincennes to identify asbestos containing materials. Samples will be collected of suspect asbestos containing building materials. Bulk samples collected will be analyzed by Polarized Light Microscopy (PLM) in a NVLAP accredited laboratory. A project report of will be submitted within three weeks of the project completion.

Associated fees

The fixed fee for the on-site inspection, report generation and analysis for up to 3 PLM bulk samples is \$1,210.00.


If additional PLM bulk sampling is necessary, \$20.00 per bulk sample will be charged. Additional bulk sampling will not be conducted unless approved by Batteast Construction Representative.

A shift is defined as up to 8 consecutive working hours. Additional time spent will be billed at a rate of \$75.00 per hour.

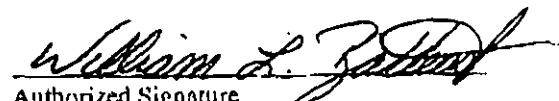
This document has been sent to clarify project scope and associated fees, if there are any questions please contact me at Hygieneering, Inc. We will schedule this work accordingly with Batteast Construction to meet the projects needs accordingly.

Thank you for this opportunity to assist Batteast Construction in meeting the legal and ethical standards as they apply to safety and environmental health.

Acceptance of Proposal



Authorized Signature
Hygieneering, Inc.
Date: 12/13/01

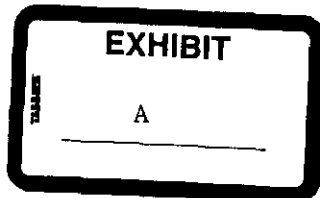


Authorized Signature
Batteast Construction
Date: 12/13/01

To Confirm scheduling of this work, please review the following Terms & Conditions, sign, date and fax a copy of this document to:

Jacqueline M. Cadwallader
Hygieneering, Inc.
FAX: 630-789-3813

CC: Brad Karich, Hygieneering, Inc.
Proposal 259



**Batteast Construction
Company, Inc.**

**430 East LaSalle Avenue
South Bend, IN 46617**

CONSTRUCTION MEETING No. 3
Mayfair Apartments, Chicago, IL

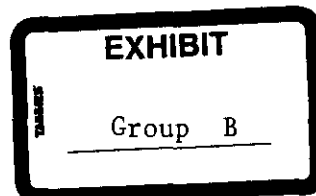
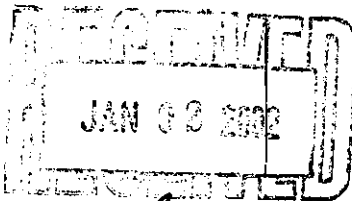
A meeting was held at the job site at 10:00 am Wednesday December 19, 2001 with the following present:

Mr. Mark Thompson	CAVS Sheet Metal
Mr. Mike Coney	Community of Israel
Mr. Robert Smith	S & S Plumbing and Sewer
Mr. Sam Suarez	Suarez Roofing
Ms. Alice Schuler	Dearborn Associates
Mr. Anthony Akindele	Nia Architects, Inc.
Mr. Bill Batteast	Batteast Construction Co., Inc.
Mr. Percy Gutmore	Batteast Construction Co., Inc. (BCCI)
Mr. Doyle Baum	Batteast Construction Co., Inc. (BCCI)

The topics of discussion were as follows:

1. The minutes of Meeting No. 2 were approved as written
2. Doyle reminded Subcontractors to post bulletins, safety posters, accident reports, etc. on bulletin board and to maintain MSDS manuals, etc. for OSHA, etc. in Batteast's field office.
3. There was a general discussion about the schedule and sequence of construction. A Preliminary Schedule dated December 5, 2001 is attached and will be developed as the Project Schedule.
4. Batteast anticipates starting to install windows within the next 2-3 weeks in the north wing which will require about 4 weeks to complete. The south wing windows will follow immediately.
5. Bill reported the site temporary fence has been installed.
6. Batteast anticipates providing temporary heat in the north wing after the building is dry and enclosed.
7. Batteast has provided a locked storage box on site for tools and equipment storage.
8. Bill reported the testing of materials from the basement for asbestos was done Tuesday and results are expected in 3-5 days.
9. Batteast has replaced the framing contractor on the project.
10. Bill confirmed with the Owner it has full coverage of Builder's Risk Insurance.
11. Anthony confirmed the windows are to be glazed with thermal panes with LoE glass on the #2 surface per the specifications.
12. Anthony asked Batteast to verify the submittal of electrical equipment to his office.
13. Doyle reported three outstanding RFI's awaiting the Architect's directions.
14. Contractors may secure one full set of construction documents at no cost by contacting Imperial Blue Print, 338 Harrison St., Oak Park, IL, Telephone 708-848-1030.
15. Meeting adjourned at 10:35 am. The next meeting will be on site at 10:00 am, Wednesday Jan. 2, 2002 in the job office.
16. These Minutes represent the understanding of this writer, Doyle Baum. Please advise in writing within seven (7) days of any discrepancies or changes.

Copies: OM, Nia, Subcontractors, PG, WLB, LaSalle, DOH, Dearborn



*ASB 5/10/02
705777*
Check to contractor for new

**Batteast Construction
Company, Inc.**

**430 East LaSalle Avenue
South Bend, IN 46617**

CONSTRUCTION MEETING No. 4
Mayfair Apartments, Chicago, IL

A meeting was held at the job site at 10:00 am Wednesday January 2, 2002 with the following present:

Mr. Mark Thompson
Mr. Andrew Jones
Mr. AJ Townsend
Mr. Bill Batteast
Mr. Percy Galmore
Mr. Doyle Baum

CAVS Sheet Metal
RCH Delta Electric
RCH Delta Electric
Batteast Construction Co., Inc.
Batteast Construction Co., Inc. (BCCI)
Batteast Construction Co., Inc. (BCCI)

The topics of discussion were as follows:

1. The minutes of Meeting No. 3 were approved as written
2. CAVS Sheet Metal and RCH Delta Electric reported they will not be on the site until the Owner pays all outstanding invoices for the project.
3. Batteast anticipates starting to install windows within the next 2-3 weeks in the north wing which will require about 4 weeks to complete. The south wing windows will follow immediately.
4. Bill reported the testing of materials from the basement for asbestos tested positive. Abatement is expected to take 2-3 weeks to complete during which time Batteast will close down the job.
5. Percy's job telephone number is 773-268-2220
6. Meeting adjourned at 10:35 am. The next meeting will be on site at 10:00 am, Wednesday Jan. 16, 2002 in the job office.
7. These Minutes represent the understanding of this writer, Doyle Baum. Please advise in writing within seven (7) days of any discrepancies or changes.

Copies: GM, Nia, Subcontractors, PG, WLB, LaSalle, DOH, Dearborn

1-2-02

**Batteast Construction
Company, Inc.**

**430 East LaSalle Avenue
South Bend, IN 46617**

02 JAN 23 PM 1:55

CONSTRUCTION MEETING No. 5
Mavfair Apartments, Chicago, IL

A meeting was held at the job site at 10:00 am Wednesday January 16, 2002 with the following present:

Mr. Robert Smith	S & S Plumbing, Inc.
Mr. Michael L. Sabas	Grinnell Fire Protection
Mr. Michael Coney	Community of Israel, Corp
Mr. Jack Scibek	Certified Window Co.
Mr. Percy Galmore	Batteast Construction Co., Inc. (BCCI)
Mr. Doyle Baum	Batteast Construction Co., Inc. (BCCI)

The topics of discussion were as follows:

1. The minutes of Meeting No. 4 were approved as written
2. Certified is starting to install 117 windows today in the north wing in the common brick area, will receive 147 single hung windows tomorrow and will hold off on delivery of the 84 windows for the face brick areas in the north wing until the lintels are installed. The south wing windows will be delayed until the mason replaces the lintels as required. Jack states Certified could install all the windows, if required, in about one week after all the lintels are replaced.
3. Abatement contractors have been requested to make proposals for asbestos abatement. To date no proposals have been received.
4. Grinnell has some concerns about soffits on the 4th floor which it will work out with Percy. It will start sprinkler piping in about two weeks.
5. HOI will apply the strippable masking agent to the windows, as specified, before washing the brick. HOI will return to work as soon as it is current with its pay requests.
6. S & S discussed the change to the water service which will require a change to the sprinkler contractor's work. Grinnell has the backflow preventer for the sprinkler water supply.
7. There was no review of the construction schedule since all subcontractors have pulled off the site. The schedule will be updated once the trades return to work.
8. Percy's job telephone number is 773-268-2220
9. Meeting adjourned at 11:00 am. The next meeting will be on site at 10:00 am, Wednesday Jan.30, 2002 in the job office.
10. These Minutes represent the understanding of this writer, Doyle Baum. Please advise in writing within seven (7) days of any discrepancies or changes.

Copies: GM, Nia, Subcontractors, PG,WLB, LaSalle, DOH, Dearborn

**Batteast Construction
Company, Inc.**

**430 East LaSalle Avenue
South Bend, IN 46617**

02 FEB -6 PM 4:14

CONSTRUCTION MEETING No. 6
Mayfair Apartments, Chicago, IL

A meeting was held at the job site at 10:00 am Wednesday January 30, 2002 with the following present:

Mr. Anthony Akindele	Nia Architects, Inc.
Mr. Kaiser Moleboge	Nia Architects, Inc.
Ms. Alice Schuler	Dearborn Associates
Mr. Wayne Pietras	Dept. of Housing
Mr. Robert Smith	S & S Plumbing, Inc.
Mr. Michael L. Sabas	Simplex Grinnell Fire Protection
Mr. Michael Coney	Community of Israel, Corp
Mr. Alphonso Townsend	R.C.H. Delta Electric
Mr. Bill Batteast	Batteast Construction Co., Inc. (BCCI)
Mr. Percy Galmore	Batteast Construction Co., Inc. (BCCI)
Mr. Dovic Baum	Batteast Construction Co., Inc. (BCCI)

The topics of discussion were as follows:

1. The minutes of Meeting No. 5 were approved as written
2. Certified has installed windows in the common brick areas of the north wing.
3. Abatement contractors have been requested to make proposals for asbestos abatement. Proposals are expected next week. BCCI expects the work to commence within ten days and will close down the all interior work during the abatement work.
4. Grinnell has some concerns about soffits on the 4th floor. It will submit by Feb. 4th a drawing for each apartment with a proposed piping layout for the Architect's approval. It will start sprinkler piping by Feb 11th ..
5. S & S discussed the change to the water service. Simplex Grinnell will provide S & S with a drawing of the fire sprinkler system for its permit application.
6. Apartment E kitchen has been mirrored per the attached drawing due to an existing chimney.
7. Anthony requested each subcontractor bring a schedule of values to the next payment walk-thru. Subcontractors will not be included in the payment request if it doesn't have a schedule of values at the walk-thru. This walk-thru meeting will be on Wednesday Feb. 27th at 10:00 AM.
8. There was a brief review of the construction schedule and BCCI expects to updated the current schedule be will expect the project to be substantially complete by Dec. 31st '02. The scheduled sequence starting at the North wing tier A-N will be followed with Work finishing in the South wing
9. Percy's job telephone number is 773-268-2220.
10. Meeting adjourned at 11:30 am. The next meeting will be on site at 10:00 am, Wednesday Feb. 13, 2002 in the job office.
11. These Minutes represent the understanding of this writer, Doyle Baum. Please advise in writing within seven (7) days of any discrepancies or changes.

Copies: GM. Nia, Subcontractors, PG.WLB, LaSalle, DOH, Dearborn



City of Chicago
Richard M. Daley, Mayor

Department of Housing

John G. Markowski
Commissioner

318 South Michigan Avenue
Chicago, Illinois 60604
(312) 747-9000
(312) 747-1670 (FAX)
(312) 744-1691 (TTY)
<http://www.ci.chi.il.us>

February 5, 2002

Mr. Gregory Miller
9415 South State Street
Chicago, Illinois 60619

Re: **Stop Work Order**
4832 South Vincennes

Please be advised that the City of Chicago, Department of Housing, Construction Administration Division is issuing a **Stop Work Order** for the above referenced rehabilitation project. It has come to our attention that during the demolition phase of this project, A.C.M.'s (Asbestos Contained Materials) were found on heating supply pipes in the basement areas.

Your general contractor, Batteast Construction must cease all construction activity immediately. It is imperative that the following steps be taken at once.

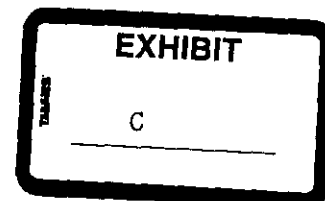
- The material in question must be removed by a licenced and bonded asbestos abatement contractor.
- The contaminated material shall be removed in accordance with all Local, State and Federal Guidelines.
- The ACM's shall be taken to an approved Hazardous Material dump site and the Department of Housing shall receive copies of the dump tickets.
- An air quality test of the building shall be conducted after the ACM removal. No construction work may continue until the air quality meets all Local, State and Federal Standards.
- The Department of Housing shall also receive the following documentation.
 - Proposal from your abatement contractor.
 - State License.
 - Insurance.
 - Air quality test results.

If you have any questions regarding this directive, please contact me at (312) 747-6713. Thank you for your cooperation and I look forward to working with you toward the resolution of this matter.

Very truly yours,

Patrick J. Curtin

Patrick J. Curtin
Deputy Commissioner
Construction Administration Division



CITY OF CHICAGO
DEPARTMENT OF ENVIRONMENT
NARRATIVE

12 MAR 2002 J
3/13/02

Date: 2-5-02
Site: 4832 S. VINCENTES
Site Code: RENOVATION

Time: 4:30-7:40 AM
Inspector: F. ROSEMAN
County: Cook/Chicago

I WENT TO THE SITE AS DIRECTED BY JOHN KRYL. THE SITE (A RENOVATION) IS UNDERGOING ASBESTOS ABATEMENT. I WAS DISPATCHED TO CHECK SITE SECURITY: ADEQUATE FENCING & OFFSITE SECURITY SHOULD BE IN PLACE.

I INSPECTED THE PERIMETER; 2 ALLEY-SIDE BASEMENTS ARE UNSECURED, ALLOWING ACCESS TO THE SITE.

(TASK FORCE) SECURITY IS POSTED OFFSITE (OFFICERS DEAN & CAFF). THEY HAVE BEEN INFORMED OF THE UNSECURED AREAS AND ENSURE THEY WILL MAINTAIN SITE SECURITY.

ALAN ROWNER & JOHANA POTHOFF HAVE BEEN INFORMED OF THE DETAILS. A DAY INSPECTOR WILL BE DISPATCHED FOR FOLLOW-UP. SEE ATTACHMENTS.

