

ILLINOIS POLLUTION CONTROL BOARD
September 5, 1996

ANNE SHEPHARD, JAMES VERHEIN)	
and JEROLD LECKMAN,)	
)	
Complainants,)	PCB 96-206
)	(Enforcement - Noise, Citizen)
v.)	
)	
NORTHBROOK SPORTS CLUB,)	
)	
Respondent.)	

ORDER OF THE BOARD (by E. Dunham):

This matter comes before the Board on a motion to dismiss filed on April 9, 1996 by respondent. Complainants filed a response to the motion to dismiss on June 6, 1996. Respondent filed a reply to complainants' response on July 18, 1996.

BACKGROUND

The complaint in this matter was filed on March 28, 1996. Northbrook Sports Club (NSC) is a private, exclusive club with restricted membership located in Hainesville, Illinois. The club was established in 1944 and relocated from Northbrook in 1987 to its present location. The complaint alleges that gunfire from the club causes noise pollution in violation of Section 23 and 24 of the Act and 35 Ill. Adm. Code 900.102.

The complainants filed a complaint (PCB 94-2) on December 31, 1993 before the Board alleging that respondent's gunfire violated the Act and Board regulations. On May 5, 1994 the Board dismissed the complaint finding that the complained of activity is an "organized amateur or professional sporting activity" and is therefore exempt from the Board's noise standards. (Shephard v. Northbrook Sports Club, PCB 94-2, (May 5, 1994).) The complainants appealed the Board's dismissal of the complainant to the Appellate Court. The Appellate Court affirmed the dismissal of the complainant finding that NSC was exempt from the Board's noise standards and that Sections 25 and 3.25 are not unconstitutional. (Shephard v. Pollution Control Board, 272 Ill. App. 3d 764, 651 N.E. 2d 555, (2nd Dist. 1995).)

MOTION TO DISMISS

Respondent asserts that the complained of activity is an "organized amateur or professional sporting activity" as defined in Section 3.25 of the Environmental Protection Act (Act) (415 ILCS 5/3.25) and is therefore exempt from the Board's regulatory jurisdiction pursuant to Section 25 of the Act. Respondent maintains that the complaint is frivolous to the extent that it asks the Board to rule on the constitutionality of the Act and the Premises

Liability Act (740 ILCS 130/1 *et. seq.*). Respondent argues that the constitutionality of the Act has already been addressed by the Appellate Court in Shephard. Respondent contends that ruling on the constitutionality of the Premises Liability Act is beyond the Board's authority. Respondent argues that the change in law does not affect the rights of the parties. In its reply, respondent argues that the present action is barred by *res judicata* and collateral estoppel.

Complainants argue that recent changes in the Environmental Protection Act (Act) and the Premises Liability Act foreclose rights that the parties had to access the courts for a remedy at law. They argue that as such, the changes enacted in P.A. 88-598 are unconstitutional. Complainants argue that the exemption from the Board's regulations and the amendments to the Premises Liability Act remove any remedy for any amount of noise arising out of the normal use of the firearm range. Complainants contend that the amendments to Section 3.25 of the Act and the Premises Liability Act as adopted by P.A.88-598 created new issues on the constitutionality of the Act that were not before the Appellate Court in Shephard. Complainants raised these issues to the appellate court, but the court did not reach the merits of this issue since these amendments occurred after the Board issued its decision dismissing the complaint.

The complainants maintain that the Board has the authority to decide constitutional issues effecting its jurisdiction. Complainants present an interpretation of the Act that would apply the exemption for an "organized amateur or professional sporting activity" only to the Board's numerical noise limitations and not to general nuisances cases. Complainants argue that this interpretation eliminates any conflict with the requirements of the Illinois constitution.

LEGAL FRAMEWORK

Section 24 of the Act provides as follows:

No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act.
(415 ILCS 5/24 (1994).)

Section 25 of the Act provides, in part:

The Board shall, by regulations under this Section, categorize the types and sources of noise emissions that unreasonably interfere with the enjoyment of life, or with any lawful business, or activity, and shall prescribe for each such category the maximum permissible limits on such noise emissions.

* * *

No Board standards for monitoring noise or regulations prescribing limitations on noise emissions shall apply to any organized amateur or professional sporting activity except as otherwise provided in this Section.
(415 ILCS 5/25 (1994).)

Section 3.25 of the Act defines "Organized Amateur or Professional Sporting Activity" as:

"ORGANIZED AMATEUR OR PROFESSIONAL SPORTING ACTIVITY" means an activity or event carried out at a facility by persons who engaged in that activity as a business or for education, charity or entertainment for the general public, including all necessary actions and activities associated with such an activity. This definition includes, but is not limited to, (i) rifle and pistol ranges, licensed shooting preserves, and skeet, trap or shooting sports clubs in existence prior to January 1, 1994, (ii) public hunting areas operated by a governmental entity, (iii) organized motor sports, and (iv) sporting events organized or controlled by school districts, units of local government, state agencies, colleges, universities or professional sports clubs offering exhibitions to the public. (415 ILCS 5/3.25 (1994).)

Section 5(b) of the Premises Liability Act provides:

(b) An owner or operator of a firearm range in existence on January 1, 1994, is immune from any criminal liability arising out of or as a consequence of noise or sound emissions resulting from the normal use of the firearm range. An owner or operator of a firearm range is not subject to any action for public or private nuisance or trespass and no court in this State shall enjoin the use or operation of a firearm range on the basis of noise or sound emissions resulting from the normal use of the firearm range. (740 ILCS 130/5(b) (1994).)

DISCUSSION

The doctrine of res judicata provides that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to subsequent action involving the same claim, demand or cause of action. (Matchett v. Rose, 36 Ill. App. 3d 636, 34 N.E. 2d 770, 779 (1st Dist. 1976).) Res judicata also prevents relitigation of those issues actually raised in the first proceeding, as well as any issue that might have been raised. (Rein v. David A. Noyes and Company, 271 Ill.App.3d 768, 649 N.E.2d 64 (2nd Dist. 1995).) The proper test to determine the application of the doctrine is whether the actions are based upon a common core of operative facts, or whether the same evidence would sustain both actions. (Horton v. Caterpillar, Inc., 260 Ill.App.3d 150, 632 N.E.2d 1061 (3rd Dist. 1994).)

Complainants base this new action on the amendments in P.A. 88-598 to Section 3.25 of the Act and the Premises Liability Act effective on August 31, 1994. These amendments were not before the Appellate Court when it affirmed the Board's dismissal of the prior action. The amendment to Section 3.25 added additional activities to those activities specifically designated as "organized amateur or professional sporting activity". P.A. 88-598 also changed the date for which such activities need to be in existence from January 1, 1975 to January 1, 1994. Section 5 was added to the Premises Liability Act by P.A. 88-598.

According to Black's Law Dictionary, an *ex post facto* law is “[a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such act or deed.” (emphasis added). In this case, the change in law complained of made no change in the rights or responsibilities of the parties whatever. The Board lacked jurisdiction in this case before the General Assembly changed the Act (Shephard v. Pollution Control Board, 272 Ill. App. 3d 764, (2nd Dist. 1995)) and the Board lacks jurisdiction to hear this case after the change in the Act, by its plain language. The simple clarification of the language by the legislature did nothing to modify the rights of the complainants. The change in the Act cannot therefore be deemed an *ex post facto* law as invalidated by the Constitution of the United States or of the State of Illinois.

This action is identical to the action previously filed with the Board except that the complainants attempt to advance new arguments. The amendments to Section 3.25 did not effect the applicability of the definition to NSC. NSC would be considered an “organized amateur or professional sporting activity” under the prior definition and the definition as amended. The amendments to Section 3.25 expanded the activities exempted from the Board’s noise regulations by specifying additional activities.

An administrative Agency is “a creature of statute,” and any power or authority claimed by it must find its source within the provisions of the statute by which it is created. (Granite City Div. of National Steel Co. v. Pollution Control Board, 155 Ill. 2d 149, 171, 613 N.E. 2d 719, 729 (1993).) Section 5(b) of the Environmental Protection Act empowers the Board to determine, define and implement the environmental control standards applicable in the State of Illinois. (415 ILCS 5/5(b).) Review of the constitutionality of the Premises Liability Act is beyond the authority granted to the Board. While the Premise Liability Act does prohibit nuisance actions for noise emissions from firing ranges it is not an environmental control standard of which the Board has the authority to review.

The Board finds that the complaint is barred under the doctrine of res judicata. The complaint is identical to the complaint filed in R94-2. The Board issued a final judgment in R94-2 on May 5, 1994 that was affirmed by the Appellate Court. The complaint is hereby dismissed and the docket is closed.

IT IS SO ORDERED.

Board Member M. McFawn concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (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 order was adopted on the _____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board