BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT,	)	
Complainant,	)	Site Code:0316485103
	)	AC: 2006-040
v.	)	(CDOE No. 06-03-AC)
JOSE R. GONZALEZ,	)	
Respondent.	)	

NOTICE OF FILING

TO: Mr. Bradley P. Halloran
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

Ms. Jennifer A. Burke, Senior Counsel
City of Chicago, Dept. of Environment
30 North La Salle Street, 9th Floor
Chicago, Illinois 60602

PLEASE TAKE NOTICE that we have this day filed with the Clerk of the Illinois Pollution Control Board, Respondent's **Post-Hearing Brief** and **Motion for Leave to File Post-Hearing Brief Instanter.** Dated at Chicago, Illinois, this 6th day of August, 2007.

JEFFREY J. LEVINE, P.C.
Attorney for Respondent
JOSE R. GONZALEZ

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PROOF OF SERVICE

The undersigned, being first duly sworn on oath, deposes and says that he served a copy of the Notice together with the above mentioned documents to the person to whom said Notice is directed by hand delivery, this 6th day of August, 2007.

JEFFREY J. LEVINE, P.C.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT, Complainant, v. JOSE R. GONZALEZ, Respondent.	)	Site Code:0316485103 AC: 2006-040 (CDOE No. 06-03-AC)

MOTION FOR LEAVE TO FILE POST-HEARING BRIEF INSTANTER

Now comes the Respondent, JOSE R. GONZALEZ, by and through its counsel Jeffrey J. Levine, P.C., and for its Motion for Leave to File Post-Hearing Brief Instanter, states and asserts as follows:

1. Respondent's brief was due on Friday, August 3, 2007, and counsel for Respondent sought to complete and file all pleadings in all the related matters by that date.

3. Counsel could not complete all pleadings by that date, as he was required to prosecute for a municipality on Friday afternoon. Said counsel did not wish to file the pleadings in part. Respondent therefore seeks to file his Post-Hearing Brief and the related pleadings instanter.

4. Counsel for Complainant has no objection to the instant Motion as long as adequate time for the filing of the Reply is provided.

Wherefore, for the above and forgoing reasons, Respondent Speedy Gonzalez Landscaping, Inc., prays that it be granted leave to file its Post-Hearing Brief and other pleadings instanter and for such further relief as is just and equitable.

Respectfully Submitted,

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Attorney for Respondent
Jose R. Gonzalez

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT,	)	
Complainant,	)	Site Code:0316485103
	)	AC: 2006-040
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JOSE R. GONZALEZ,	)	
Respondent.	)	

JOSE R. GONZALEZ'S POST HEARING BRIEF

Now comes the Respondent, JOSE R. GONZALEZ, by and through it's counsel Jeffrey J. Levine, P.C., and for his Post Hearing Brief, states and asserts as follows:

Introduction

1. Respondent Jose R. Gonzalez works as a minority contractor in Chicago. He runs Speedy Gonzalez Landscaping, Inc., and has acquired an interest in property located at 1601-1759 East 130th Street. When he acquired the property is was loaded with junk. The waste was an issue in purchase negotiations. May 17, 2007, Tr. 102. The property sits next to the CID landfill. He seeks to develop the property, build buildings on the land and lease the property to the Ford Motor Company. May 17, 2007, Tr. 102. He has already performed extensive testing on the property, particularly to determine whether there was a gas station tank on the property. Also, tests were performed as to whether the landfill was leaching waste into the property.

2. On March 22, 2006, with Investigator Raphael Macial at the wheel, a carload of city attorney's and investigators drove onto the property. Although Mr. Macial said that the gate was open, Mr. Antonopoulos testified that an E. King employee opened the gate and that an E. King truck was being loaded up with debris and waste. May 17, 2007, Tr. 19-20. Mr. Antonopoulos testified

that the gate was secured with a combination lock. May 17, 2007, Tr. 8, 17, 27. With no warrant and no complaints pending, Macial stated he saw smoke coming from the site. Macial knew Mr. Gonzalez growing up.

3. Although Investigator Macial testified (May 9, 2007, Tr. 9, Manzo transcript), that he just happened upon the site, it is clear from testimony that he had previously viewed the site two weeks before (May 9, 2007, Tr. 80-1) and knew that it was connected to Jose Gonzales, an individual he previously had dealings with. Macial testified that he was on the top of the CID landfill every month and from the top of the landfill, he could see the property in question. May 9, 2007, Tr. 107-10. A truck parked on the property had the name of Mr. Gonzalez's company painted on it. May 9, 2007, Tr. 110. Mr. Gonzalez was not on site when the investigators appeared after indicating seeing smoke.

4. Another investigator, Chris Antonopoulos testified that Mr. Maciel had prior dealings with Mr. Gonzalez. May 17, 2007, Tr. 25-6. (In Respondent's Post-Hearing Brief regarding Speedy Gonzalez Landscaping Inc., AC 2006-39, evidence is presented that Macial had previously asked Gonzalez for a bribe and was threatened when he did not pay). Also see: Motion to Dismiss Actions.

Investigation

5. An investigator's job is to determine where waste came from. May 17, 2007, Tr. 20. The investigation never learned the identity of individual involved in the burning. No attempts were made by the Department of Environment to photograph any of the workers or learn their names. May 17, 2007, Tr. 31-5. Investigators had a meeting on site and interviewed individuals from E. King whose trucks were on site, as well as representatives of the CTA and Paschen Construction. May 9, 2007, Tr. 44-5; May 17, 2007, Tr, 31- 2. Mr. Macial testified that he did not understand why the information was not in his report, but then admitted that he had not put it in there. May 9, 2007, Tr. 37.

6. No mention was made in the investigation report that Elaine King was present on site discussing the agreement. May 9, 2007, Tr. 44-9. Mr. Macial, at one point stated that "we didn't have that information probably at the time of writing the state report" but then admitted that he knew her from a previous incident. See: May 9, 2007, Tr. 48-53. Macial testified that he selectively excluded information in drafting his investigation report, and that he had been taught to conduct investigations in this manner. May 9, 2007, Tr. 48-52.

7. Investigator Mr. Antonopoulos testified that a more through investigation should have been performed because the Department of Environment didn't have all the facts. He further testified that he did not feel comfortable charging individuals and entities when an adequate investigation had not been performed. He believed that he would be remiss in his duties if he had performed the type of investigation performed in the instant case. May 17, 2007, Tr. 24-5.

8. Even Mr. Macial agreed that the investigation was not thorough. May 9, 2007, Tr. 78. Macial testified that he just assumed that Mr. Gonzalez "was doing something illegal." May 9, 2007, Tr. 83. Antonopoulos agreed that a ticket cannot be written without proof of a violation. May 17, 2007, Tr. 43. He concluded that "...it was easier to ticket Mr. Gonzalez than conduct an adequate investigation..." May 17, 2007, Tr. 95.

9. That debris was on the property is uncontested. However, Respondent Jose Gonzalez did not cause or allow the debris. Numerous photographs were taken of the site which revealed four separate types of debris which were identified on the site: 1). Debris from the CTA Brown Line; 2). trash that was constantly being fly-dumped; 3) tires, signs and material which was on the property when purchased; and 4). material that is in the soil.

<u>CTA Construction Debris</u>

10. Both investigators, Antonopoulos and Macial, testified regarding an agreement entered

into regarding what has been deemed the "suspect CTA waste" at the property in question. Mr. Antonopoulos described how the agreement was between Mr. Gonzalez, Paschen Construction, E. King and the CTA. The agreement called for CTA waste material from the Brown Line construction, to be stored in roll-off boxes over the weekend at the site in question. May 17, 2007, Tr. 31, 86-90; May 9, 2007, Tr. 44, 59-60.

11. Mr. Weber admitted that the waste was CTA material. May 9, 2007, Tr. 42. At the hearing Mr. Gonzalez also explained his agreement to store CTA waste in trucks or roll-offs over the weekend. May 17, 2007, Tr. 113-16 118-21. When the CID landfill opened, the roll-off boxes would be removed from the property and brought to CID. May 17, 2007, Tr. 31.

12. E. King needed a place to store it's trucks (or roll-off carriers), full of debris, over the weekend because the CID landfill next door was closed over the weekend. Gravel was also required to support the E. King trucks. In an effort to make the storage pay for the gravel road needed (in order to get the front-end loader and heavy trucks to the back of his land clean up the property), Mr. Gonzalez offered to rent the land to E. King. He stated that in order to clean the property, he had to purchase over twenty dump truck loads of gravel and construct a gravel road to gain access to the back of the property. May 17, 2007, Tr. 104-05. When the snow melted, the site was full of mud and water. May 17, 2007, Tr. 103-04. He stated that the gravel was also used to stop water from forming. May 17, 2007, Tr. 111. Mr. Gonzalez testified that he plans to develop the property and lease it out to the Ford Company. May 17, 2007, Tr. 102.

13. Complainant's investigation revealed that, either E. King or Paschen Construction didn't follow the agreement to store the waste in the roll-off trucks. Antonopoulos testified that an investigation would have revealed the specific entity that didn't follow the agreement and dumped the CTA debris at the site. May 17, 2007, Tr. 33. It was that entity who caused the CTA waste to

be deposited at the property in question. May 17, 2007, Tr. 49. Mr. Antonopoulos had no information that Mr. Gonzalez knew that the agreement was violated and materials were not kept in boxes. May 17, 2007, Tr. 76.

14. The investigators collected manifests (See: Respondents Exhibit A), at the site which indicate that the waste material came from the CTA at 567 West Lake Street. May 9, 2007, Tr. 33-6. E. King was the hauler on the manifests. May 9, 2007, Tr. 83-4. Mr. Antonopoulos testified that Mr. Maciel had the hazardous waste manifests on the day of the investigation. May 17, 2007, Tr. 44-5.

15. When it was disclosed to Mr. Gonzalez that E. King's trucks, working for Paschen Construction, had dumped CTA waste in his yard while hauling for Paschen Construction, contrary to the agreement to store the material in roll-off boxes, Mr. Gonzales immediately and vociferously demanded that the waste be cleared from the property. May 17, 2007, Tr. 115.

Fly dumping

16. Although surrounded by a mound and a locked gate fence, fly-dumpers regularly gain access to the property. Chris Antonopoulos testified that the gate to the site was secured with a combination lock. May 17, 2007, Tr. 8, 17, 27. Mr. Gonzalez testified that debris on his property is caused by fly-dumpers who are always attempting to gain access to the property. They have knocked down his gate, cut his locks and pulled the gate off the hinges. May 17, 2007, Tr. 107-08. Antonopoulos testified that numerous piles of debris on the site look like "classic fly dumping". Antonopoulos testified that if someone had fly dumped on the property, then the owner would not have caused or allowed the debris. May 17, 2007, Tr. 28-9.

17. When material is being fly-dumped, it is not segregated into different types of materials. Mr. Macial explained that if a load was sent to the CID landfill which contained copper, PVC tubing or railroad ties, the entire load would be rejected. May 9, 2007, Tr. 118-19. Antonopoulos also

testified that such loads would be rejected by the landfill. May 17, 2007, Tr. 50-2.

18. If an entity had discovered fly-dumped material on his property, Mr. Antonopoulos testified that the owner would be required to segregate the dumped material prior to taking it to a landfill or transfer station. Mr. Antonopoulos testified that the segregation of waste piles and moving of piles and loading of debris was consistent with an entity or individual cleaning up the site. May 17, 2007, Tr. 53-4. Mr. Antonopoulos concluded that, in the course of he investigation he had no information that segregation of material in the course of cleaning the site was not what was occurring at the site. May 17, 2007, Tr. 52. He further agreed that the photos in Exhibit A, pages 9-17, indicate fly dumping. May 17, 2007, Tr. 93-4.

Debris in soil and on site when purchased

19. A berm of dirt surrounds the property to keep out illegal dumpers. Antonopoulos didn't know where the berm came from, but noticed that it had vegetation growing on it, including a tree, and could have been there for years. May 17, 2007, Tr. 61, 63-4. While Antonopoulos believed the berm could contain waste (May 17, 2007, Tr. 11), Macial testified that construction and demolition material could have been in the soil as a result of prior construction or even the Chicago fire. May 9, 2007, Tr. 91-4. Mr. Gonzalez testified how the prior owner took the grade of the site down a foot and built the berm to stop fly dumpers. May 17, 2007, Tr. 122.

Charged party

20. Similar to the complaint charging Speedy Gonzalez Landscaping Inc., (AC 2006-39), the property in the instant case was not owned in Mr. Gonzalez's name. Throughout his testimony however, inspector Mr. Macial repeatedly identifies Respondent Jose Gonzalez as a property owner. See: May 9, 2007, Tr. 35, 39-40, 64, 87, 100, 125-27. The fact that Mr. Gonzalez is not the property owner, is conceded at page 1, of the City's Post-Hearing Brief. The charging of Mr. Gonzalez for

causing and allowing open dumping when contrasted with the failure to investigate the entities that actually committed the dumping of the debris, demonstrates the vindictive nature of these prosecutions.

Allegations

21. Respondent was charged with causing or allowing open dumping. The allegations also contained baseless allegations regarding securing the property, salt unloading operations, ACM or asbestos, waste next to residential homes and oil flowing into the sewer. These allegations are listed as attachment "B" in Complainant's Inspection Reports. See: Complainant's Exhibits. No evidence was presented to support the charges.

Discovery

22. Although Respondents issued subpoenas for all documents related to these matters, no field notes were produced at these hearings. See: May 9, 2007, Tr. 27; May 17, 2007, Tr. 16, 56-7. Complainants also failed to produce business cards from witnesses at the scene. May 9, 2007, Tr. 50.

Testimony

23. The only evidence of dumping was initially presented by Mr. Macial. However, he was impeached by his own testimony (See: AC 2006-039, Speedy Gonzalez Landscaping Inc.'s Post Hearing Brief at paragraphs 7-9), and by his investigation report which demonstrates that trucks were receiving loads and removing material from the site, not dumping loads. May 9, 2007, Tr. 67-73. He later testified that the E. King trucks were receiving loads and Macial told them not to remove the material from the site. May 9, 2007, Tr. 67-8. Macial later explained that by loading trucks, Respondent could have been "trying to get rid of the evidence". May 9, 2007, Tr. 71. Mr. Antonopoulos also testified that an E. King employee opened the gate and that an E. King truck was

loaded up with debris and waste. May 17, 2007, Tr. 19-20. Mr. Antonopoulos did not see trucks bringing waste to the property. May 17, 2007, Tr. 47. Nor did he have any knowledge or information that any material on the site was caused or allowed by Jose Gonzalez. May 17, 2007, Tr. 55, 93. He agreed that in order to bring a charge, further investigation would be required. May 17, 2007, Tr. 93. Mr. Gonzalez told Macial the trucks were hauling loads out of the yard and cleaning the property.

24. Mr. Macial testified that he sought to stop the site from being cleaned, by telling the drivers not to remove material from the site. May 9, 2007, Tr. 68-70. He sought to justify this action by stating that he would impound the trucks if they were found to be dumping waste. He then admitted that he did not impound the E. King trucks. He testified that he did not know who put debris on the site. May 9, 2007, Tr. 97. Nor did he know if Mr. Gonzalez caused or allowed waste to be put on the property. May 9, 2007, Tr. 98. Mr. Atonopolous also had no knowledge or information that any of the material on the site was caused or allowed by Jose Gonzalez. May 17, 2007, Tr. 55.

25. Mr. Macial testified that he was not aware whether Mr. Gonzalez caused or allowed open burning. May 9, 2007, Tr. 121-25. Macial had no information that Mr. Gonzalez caused or allowed open dumping at the site. May 9, 2007, Tr. 125-26. He was not aware whether Mr. Gonzalez caused or allowed illegal fly dumping, railroad ties or tires to be on the property. May 9, 2007, Tr. 126-27. Mr. Antonopoulos believed that the broken bricks on site were not the type of bricks used for landscaping. May 17, 2007, Tr. 36-7.

26. At the hearing Mr. Gonzalez explained that he never caused or allowed open dumping, scavenging, waste storage or treatment, the disposition of waste in standing water, open burning or the dumping of tires. May 17, 2007, Tr. 123. He stated that he did not cause or allow the fly dumped material, railroad ties, or construction debris on the property. May 17, 2007, Tr. 108-13. He

explained his agreement with E. King regarding the CTA construction debris (May 17, 2007, Tr. 113-19), and that he made sure the land was scraped clean. He was adamant that after May 22, 2006, no material was brought to the site. May 17, 2007, Tr. 119-21. The Complainant has the burden of proving the allegations after performing a competent and adequate investigation. The allegations were not proven. A competent investigation was not performed

Property was being Cleaned

27. Chris Antonopoulos also stated that the clean stone depicted in photograph 7, of the investigation report, was being spread on the property to get rid of standing water on the land. May 17, 2007, Tr. 38, 63. He stated that people are given time to clean up sites where they did not cause or allow the debris. May 17, 2007, Tr. 42. He testified that if a property owner has waste material dumped on his land, it is common for investigators to give the owner time to clean up the property. A person with a large amount of waste would be given more time than a person with less debris. May 17, 2007, Tr. 40-2.

28. Mr. Antonopoulos testified that the individuals on site were cleaning up the site, moving piles and dumping them into E. King trucks which left the site. May 17, 2007, Tr. 59-60. He stated that this was consistent with cleaning the site. May 17, 2007, Tr. 53-4. He also stated that heavy equipment would sink in the mud if stones weren't put down first. May 17, 2007, Tr. 73-May 17, 2007, Tr. 5. Mr. Gonzalez also testified that to access and clean the property, a gravel road consisting of 25-30 semis containing 20 tons of gravel apiece, had to be put in. May 17, 2007, Tr. 103-06. He has spent $30,000.00 in disposal fees alone cleaning the property. May 17, 2007, Tr. 123, 131-32. Mr. Gonzalez concluded that he was cleaning up the site on March 22 and 24, 2006, but was ticketed by Macial for cleaning the site. May 17, 2007, Tr. 110.

Scavenging

29. Mr. Antonopoulos testified that he saw one wire (Page 12 of Investigation Report), where the insulation was stripped to get copper. May 17, 2007, Tr. 12. He agreed however that since landfills don't accept wire, if the wire was segregated from a load to take it to a landfill, this would be legitimate activity. May 17, 2007, Tr. 69-72.

Complainant's Argument

30. Complainant's Post-Hearing Brief maintains that Mr. Gonzalez's caused or allowed open dumping because his control over the site make him responsible for "causing and allowing open dumping". However in *IEPA v. Cadwallader*, AC 03-13 (IPCB May 20, 2004), the individual did not remove debris over a two year period and new debris appeared on the property which was not secured. In this instance, Respondent secured the property and rather than causing or allowing open dumping, was cleaning refuse when ticketed. Mr. Gonzalez did not allow waste to remain on his property. Testimony at the hearing revealed that property owners are allowed time to remove waste. Rather than asserting the clean-up as a defense, the action of cleaning the property is evidence contrary to a violation.

31. Complainant's brief constantly refers to "Respondent's open dumping" when no evidence has been demonstrated. The assertion is contrary to the marginal and incompetent investigation conducted by the Department of the Environment inspectors and all evidence produced at the hearing. All evidence demonstrates that Mr. Gonzalez's efforts were directed toward securing the property from fly-dumpers and cleaning the garbage that was placed on the property by others. The evidence adduced at the hearing further demonstrates that Department of the Environment inspectors hindered clean-up efforts and failed to investigate the entities that actually caused and allowed the dumping of the CTA waste..

Legal argument

32. While the Environmental Protection Act does not require proof of knowledge or intent, it does not impose strict liability on an alleged polluter. *People v. A.J. Davinroy Contractors,* 249 Ill.App.3d 788, 618 N.E.2d 1282, 1286 (5th Dist. 1993); *Phillips Petroleum v. Illinois Environmental Protection Agency*, 72 Ill.App.3d 217, 390 N.E.2d 620, 623 (2nd Dist. 1979). In that case, the court found that the record did not indicate sufficient evidence that defendant exercised sufficient control over the source of the pollution in such a way to have caused, threatened or allowed the pollution.

33. Similarly, in the instant case, there is no competent evidence that Mr. Gonzalez exercised sufficient control over the source of the pollution in such a way to have caused, threatened or allowed the pollution. In determining whether alleged polluters have violated the Act, courts look to whether the alleged polluter exercised sufficient control over the source of the pollution. *People v. A. J. Davinroy Contractors,* 249 Ill.App.3d 788, 618 N.E.2d 1282, 1286 (5th Dist. 1993); *People v. Fiorini*, 143 Ill.2d 318, 346, 574 N.E.2d 612, 623 (1991).

34. In instances where others caused the pollution without the landowner's knowledge or consent, courts look to the record to establish if the landowner had taken any precautions to prevent the actions of others. See: *Perkinson v. Pollution Control Board*, 187 Ill.App.3d 689, 543 N.E.2d 901 (1989). In this instance, Respondent, a minority contractor, repeatedly secured the property, put down a gravel road and was in the process of cleaning the property for purposes of future development when the investigators stopped the removal of debris and charged Mr. Gonzalez for his efforts.

35. Respondent maintains that he and his companies were targeted in these matters after having a confrontation with Complainant's witness, Rafael Maciel. See: Speedy Gonzalez Landscaping Inc.'s Post Hearing Brief, AC 2006-039. This is demonstrated by baseless allegations, the charging of entities who were not the owners of the property, a biased and incomplete

investigation and investigation report, discovery abuses and the failure to respond to subpoenas at hearing. See: Motion to Dismiss Actions.

Wherefore, for the above and forgoing reasons, Respondent Jose Gonzalez prays that the Illinois Pollution Control Board dismiss Complainant's Administrative Citation and for such further relief as it deems just and equitable.

Respectfully Submitted,

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Attorney for Respondent
Jose R. Gonzalez

Dated: August 6, 2007

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