

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

STATE OF OHIO, ex rel.
BETTY D. MONTGOMERY,
ATTORNEY GENERAL OF OHIO
30 East Broad Street
Columbus, Ohio 43215-3428

Plaintiff,

v.

JOHN NELL and
NELL HOMES COMPANY
3668 Lovell Drive
Medina, Ohio 44256

Defendant.

CASE NO:

98 CIV 0885

JUDGE: JUDITH A. CROSS

CONSENT ORDER

COMMON PLEAS COURT
98 NOV 30 AM 9:51
FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURTS

The Complaint in the above-captioned matter having been filed herein, and the Plaintiff State of Ohio by its Attorney General Betty D. Montgomery and Defendants John Nell and Nell Homes Company having consented to the entry of this Order,

NOW THEREFORE, without trial of any issue of fact or law, and upon consent of the parties hereto, and without admission of fact or liability by Defendants, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the parties and the subject matter of this case, pursuant to R.C. Chapter 3704 and the regulations adopted thereunder. The Complaint states a claim upon which relief can be granted against Defendants under R.C. Chapter 3704, and venue is proper in this Court.

II. PARTIES

2. The provisions of this Consent Order shall apply to and be binding upon the parties to this action, and, in accordance with Ohio R. Civ. Procedure 65(D) their officers, successors, and assigns and those person in active convert or participation with them who receive actual notice of this Consent Order whether by personal service or otherwise.

III. SATISFACTION OF LAWSUIT

3. Plaintiff alleges in its Complaint that Defendants open burned in violation of the open burning laws and rules of the State of Ohio. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendants for all violations under such laws alleged in the Complaint. Nothing in this Order shall be construed to limit the authority or the State of Ohio to seek relief for violations not alleged in the Complaint, including violations which occur after the entry of this Consent Order.

IV. PERMANENT INJUNCTION

4. Defendants John Nell and Nell Homes Company agree to refrain and are permanently enjoined from violating R.C. Chapter 3704 and the rules adopted thereunder. Specifically, Defendants agree to refrain from and are permanently enjoined from open burning unless such activities are carried out in full compliance with R.C. Chapter 3704 and Ohio Admin. Code Chapter 3745-19. Ohio Admin. Code Chapter 3745-19 is attached as "Attachment A".

V. CIVIL PENALTY

5. For violations of R.C. Chapter 3704 and the regulations adopted thereunder, Defendants shall pay a civil penalty of three thousand dollars (\$3,000). This amount shall be paid by delivering a certified check to Jena Suhadolnik, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43125, payable to the order of "Treasurer, State of Ohio" within thirty (30) days of the entry of this Order.

VI. STIPULATED PENALTIES

6. In the event that Defendants fail to comply with any of the requirements imposed by paragraphs 4 and/or 5 of this Consent Order, the Defendants shall, immediately and automatically, be liable for and shall pay a stipulated penalty according to the following payment schedule. For each day of failure to meet a requirement, up to thirty (30) days-- five hundred dollars (\$500.00) per day for each requirement not met. For each day of failure to meet a requirement, from thirty-one (31) to sixty (60) days--one thousand dollars (\$1,000.00) per day for each requirement not met. For each day of failure to meet a requirement over sixty days--one thousand five hundred dollars (\$1,500.00) per day for each requirement not met.

VII. RETENTION OF JURISDICTION

7. The Court will retain jurisdiction of this action for the purpose of enforcing this Consent Order. Both the Plaintiff and Defendants hereby reserve their rights under Ohio R. Civ. Procedure 60(B).

VIII. TERMINATION

8. In the event that the Defendant complies with the requirements and injunctions set forth in this Consent Order for a period of three (3) years from the date of the entry of this Consent Order, this Consent Order may be terminated by motion of the Defendant and a subsequent order of this Court. Termination shall be made only upon demonstration (or agreement by both parties) that the requirements of this Consent Order have been satisfied.

IX. COSTS

9. Defendants John Nell and Nell Homes Company are hereby ordered to pay the costs of this action.

X. ENTRY OF CONSENT ORDER AND JUDGMENT BY CLERK

10. Pursuant to Ohio R. Civ. Procedure 58, upon the signing of this Consent Order by the Court, the clerk is directed to enter it upon the journal. Within three days of entering the judgment upon the journal, the clerk is directed to serve upon all parties notice of the judgment and its date of entry upon the journal in the matter proscribed by Ohio R. Civ. Procedure 5(B) and note the service in the appearance docket.

IT IS SO ORDERED

ENTERED THIS 30TH DAY OF November, 1998.

14 Judith A. Cross

JUDGE _____
MEDINA COUNTY
COURT OF COMMON PLEAS

APPROVED:

JOHN NELL and
NELL HOMES COMPANY

STATE OF OHIO,
ex rel. BETTY D. MONTGOMERY
ATTORNEY GENERAL OF OHIO

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Columbus, Ohio 43215
(614) 466-2766
Counsel for Plaintiff

John Nell

JOHN NELL, personally and on behalf
of Nell Homes Company

ATTACHMENT "A"

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3745 ENVIRONMENTAL PROTECTION AGENCY - ADMINISTRATION AND DIRECTOR
Chapter 3745-19 Open Burning Standards

OAC Ann. 3745-19-01 (Anderson 1998)

3745-19-01 Definitions.

As used in Chapter 3745-19 of the Administrative Code:

(A) "Agricultural waste" means any matter generated by crop, horticultural, or livestock production practices, and includes such items as bags, cartons, structural materials, and landscape wastes that are generated in agricultural activities, but does not include land clearing waste; buildings; garbage; dead animals; motor vehicles and parts thereof; nor economic poisons and containers therefor, unless the manufacturer has identified open burning as a safe disposal procedure.

(B) "Economic poisons" include but are not restricted to pesticides such as insecticides, fungicides, rodenticides, miticides, nematocides and fumigants; herbicides; seed disinfectants; and defoliant.

(C) "Garbage" means any matter resulting from the handling, processing preparation, cooking and consumption of food or food products.

(D) "Landscape waste" means any plant matter, except garbage, including trees, tree trimmings, branches, stumps, brush, weeds, leaves, grass, shrubbery, yard trimmings, and crop residues.

(E) "Land clearing waste" means plant matter which is removed from land, including plant matter removed from stream banks during projects involving more than one property owner, for the purpose of rendering the land useful for residential, commercial, or industrial development.

(F) "Ohio EPA" means the Ohio environmental protection agency director or agencies delegated authority by the director of the Ohio environmental protection agency pursuant to section 3704.03 of the Revised Code or the chief of any Ohio environmental protection agency district office.

(G) "Open burning" means the burning of any materials wherein air contaminants resulting from combustion are emitted directly into the ambient air without passing through a stack or chimney. Open burning includes the burning of any refuse or salvageable material in any device not subject to or designed specifically to comply with the requirements of rule 3745-17-09 or 3745-17-10 of the Administrative Code.

(H) "Residential waste" means any matter, including landscape wastes, generated on a one-, two- or three-family residence as a result of residential activities, but not including garbage.

(I) "Restricted area" means the area within the boundary of any municipal corporation established in accordance with the provisions of Title 7 of the Revised Code, plus a zone extending one thousand feet beyond the boundaries of such municipal corporation having a population of one thousand to ten thousand persons and a zone extending one mile beyond any such municipal corporation having a population of ten thousand persons or more according to the latest federal census.

(J) "Unrestricted area" means all areas outside the boundaries of a restricted area as defined in paragraph (I) of this rule.

Eff. 6-21-76; 10-30-87; 12-20-88

RULE PROMULGATED UNDER: RC Chapter 119.

RULE AUTHORIZED BY: RC 3704.03

RULE AMPLIFIES: RC Chapter 3704.

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3745 ENVIRONMENTAL PROTECTION AGENCY - ADMINISTRATION AND DIRECTOR
Chapter 3745-19 Open Burning Standards

OAC Ann. 3745-19-02 (Anderson 1998)

3745-19-02 Relations to other prohibitions.

(A) Notwithstanding any provision in Chapter 3745-19 of the Administrative Code, no open burning shall be conducted in an area where an air alert, warning, or emergency under Chapter 3745-25 of the Administrative Code is in effect.

(B) No provisions of Chapter 3745-19 of the Administrative Code, permitting open burning, and no permission to open burn granted by the Ohio EPA, shall exempt any person from compliance with any section of the Revised Code, or any regulation of any state department, or any local ordinance or regulation dealing with open burning.

Eff. 9-21-73; 10-20-87

RULE PROMULGATED UNDER: RC Chapter 119.

RULE AUTHORIZED BY: RC 3704.03

RULE AMPLIFIES: RC Chapter 3704.

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3745 ENVIRONMENTAL PROTECTION AGENCY - ADMINISTRATION AND DIRECTOR
Chapter 3745-19 Open Burning Standards

OAC Ann. 3745-19-03 (Anderson 1998)

3745-19-03 Open burning in restricted areas.

(A) No person or property owner shall cause or allow open burning in a restricted area except as provided in paragraphs (B) to (D) of this rule or in section 3704.11 of the Revised Code.

(B) Open burning shall be allowed for the following purposes without notification to or permission from the Ohio EPA:

(1) Cooking for human consumption;

(2) Heating tar, welding, acetylene torches, highway safety flares, heating for warmth of outdoor workers and strikers, smudge pots and similar occupational needs.

Fires allowed by paragraphs (B) (1) and (B) (2) of this rule shall not be used for waste disposal purposes and shall be of minimum size sufficient for their intended purpose; the fuel shall be chosen to minimize the generation and emission of air contaminants.

(C) Open burning shall be allowed for the following purposes with prior notification to the Ohio EPA:

(1) Prevention or control of disease or pests, with written or verbal verification to the Ohio EPA from the local health department, cooperative extension service, Ohio department of agriculture, or U.S. department of agriculture, that open burning is the only appropriate disposal method.

(2) Ceremonial fires provided the following conditions are met:

(a) The ceremonial fires shall be less than five feet by five feet in dimension and shall burn no longer than three hours;

(b) The ceremonial fires shall not be used for waste disposal purposes; and

(c) The fuel shall be chosen so as to minimize the generation and emission of air contaminants.

(D) Open burning shall be allowed for the following purposes upon receipt of written permission from the Ohio EPA provided that any conditions specified in the permission are followed:

(1) Disposal of ignitable or explosive materials where the Ohio EPA determines that there is no practical alternate method of disposal;

(2) Instruction in methods of fire fighting or for research in the control of fires;

(3) In emergency or other extraordinary circumstances for any purpose determined to be necessary by the Ohio EPA; and

(4) Recognized horticultural, silvicultural, range, or wildlife management practices.

Eff. 6-21-76; 10-30-87; 12-20-88

RULE PROMULGATED UNDER: RC Chapter 119.

RULE AUTHORIZED BY: RC 3704.03

RULE AMPLIFIES: RC Chapter 3704.

Research Aids

Open dumping and burning:

O-Jur3d: Envirn Pro @@ 109, 113

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3745 ENVIRONMENTAL PROTECTION AGENCY - ADMINISTRATION AND DIRECTOR
Chapter 3745-19 Open Burning Standards

OAC Ann. 3745-19-04 (Anderson 1998)

3745-19-04 Open burning in unrestricted areas.

(A) No person or property owner shall cause or allow open burning in an unrestricted area except as provided in paragraphs (B) to (C) of this rule or in section 3704.11 of the Revised Code.

(B) Open burning shall be allowed for the following purposes without notification to or permission from the Ohio EPA:

(1) Cooking for human consumption;

(2) Heating tar, welding, acetylene torches, highway safety flares, heating for warmth of outdoor workers and strikers, smudge pots and similar occupational needs.

Fires allowed by paragraphs (B) (1) and (B) (2) of this rule shall not be used for waste disposal purposes, and shall be of the minimum size sufficient for their intended purpose; the fuel shall be chosen to minimize the generation and emission of air contaminants.

(3) Disposal of residential waste or agricultural waste generated on the premises if the following conditions are observed:

(a) The fire is set only when atmospheric conditions will readily dissipate contaminants;

(b) The fire does not create a visibility hazard on the roadways, railroad tracks, or air fields;

(c) The fire is located at a point on the premises no less than one thousand feet from any inhabited building not located on said premises;

(d) The wastes are stacked and dried to provide the best practicable condition for efficient burning; and

(e) No materials are burned which contain rubber, grease, asphalt or liquid petroleum products.

(4) Ceremonial purposes, if the following conditions are met:

(a) The ceremonial fires shall be less than five feet by five feet in dimension and shall burn no longer than three hours;

(b) The ceremonial fires shall not be used for waste disposal purposes; and

(c) The fuel shall be chosen so as to minimize the generation and emission of air contaminants.

(C) Open burning shall be allowed for the following purposes upon receipt of written permission from the Ohio EPA provided that any conditions specified in the permission are followed:

(1) Disposal of ignitable or explosive materials where the Ohio EPA determines that there is no practical alternate method of disposal;

(2) Instruction in methods of fire fighting or for research in the control of fire;

(3) In emergency or other extraordinary circumstances for any purpose determined to be necessary by the Ohio EPA;

(4) Disposal of land clearing waste if the following conditions are observed:

(a) The fire is set only when atmospheric conditions will readily dissipate contaminants;

(b) The fire does not create a visibility hazard on roadways, railroad tracks, or air fields;

(c) The fire is located at a point on the premises no less than one thousand feet from any inhabited building not located on said premises; and

(d) An air curtain destructor or other device or method determined by the director to be at least as effective is used to curtail release of air contaminants; and

(5) Recognized horticultural, silvicultural, range, or wildlife management practices.

(6)

(D) Open burning shall be allowed for the prevention or control of disease or pests with written or verbal verification to the Ohio EPA from the local health department, cooperative extension service, Ohio department of agriculture, or U.S. department of agriculture, that open burning is the only appropriate disposal method.

Eff. 6-21-76; 10-30-87; 12-20-88

RULE PROMULGATED UNDER: RC Chapter 119.

RULE AUTHORIZED BY: RC 3704.03

RULE AMPLIFIES: RC Chapter 3704.

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3745 ENVIRONMENTAL PROTECTION AGENCY - ADMINISTRATION AND DIRECTOR
Chapter 3745-19 Open Burning Standards

OAC Ann. 3745-19-05 (Anderson 1998)

3745-19-05 Permission to individuals and notification to the Ohio EPA.

(A) Permission:

(1) An application for permission to open burn shall be submitted in writing at least ten days before the fire is to be set. It shall be in such form and contain such information as required by the Ohio EPA.

(2) Such applications shall contain, as a minimum, information regarding:

(a) The purpose of the proposed burning;

(b) The nature and quantities of material to be burned;

(c) The date or dates when such burning will take place;

(d) The location of the burning site, including a map showing distances to residences, populated areas, roadways, air fields, and other pertinent landmarks; and

(e) The methods or actions which will be taken to reduce the emissions of air contaminants.

(3) Permission to open burn shall not be granted unless the applicant demonstrates to the satisfaction of the Ohio EPA that open burning is necessary to the public interest; will be conducted in a time, place, and manner as to minimize the emission of air contaminants; and will have no serious detrimental effect upon adjacent properties or the occupants thereof. The Ohio EPA may impose such conditions as may be necessary to accomplish the purpose of Chapter 3745-19 of the Administrative Code.

(4) Permission to open burn must be obtained for each specific project. In emergencies where public health or environmental quality will be seriously threatened by delay while written permission is sought, the fire may be set with oral permission of the Ohio EPA.

(5) Violations of any of the conditions set forth by the Ohio EPA in granting permission to open burn shall be grounds for revocation of such permission and refusal to grant future permission, as well as for the imposition of other sanctions provided by law.

(B) Notification:

(1) Notification shall be submitted in writing at least ten days before the fire is to be set. It shall be in such form and contain such information as

shall be required by the Ohio EPA.

(2) Such notification shall inform the Ohio EPA regarding:

- (a) The purpose of the proposed burning;
- (b) The nature and quantities of materials to be burned;
- (c) The date or dates when such burning will take place; and
- (d) The location of the burning site.

(3) The Ohio EPA, after receiving notification, may determine that the open burning is not allowed under Chapter 3745-19 of the Administrative Code and the Ohio EPA shall notify the applicant to this effect.

Eff. 9-21-73; 10-30-87

RULE PROMULGATED UNDER: RC Chapter 119.

RULE AUTHORIZED BY: RC 3704.03

RULE AMPLIFIES: RC Chapter 3704.