

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

87
Hood
Lang
W.A. [unclear]
H. [unclear]

CITY OF MENTOR)	
Plaintiff,)	CASE NO. 87 CIV 0191
)	
)	
v.)	<u>OPINION AND JUDGMENT ENTRY</u>
)	
)	
ALBERT NOZIK, et al)	
Defendants.)	
)	

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Plaintiff City of Mentor sued Albert Nozik and Mentor Lagoons Marina [hereinafter "Nozik" and "Mentor Lagoons" respectively] for creating a nuisance by depositing solid waste, for violating the wildlife statute, R.C. 1531. and for constructing a road without a permit. Mentor prayed for compliance and permanent injunction.

Upon amendment, Lake County General Health District and the State of Ohio, Environmental Protection Agency [hereinafter "LCGHD" and "Ohio EPA" respectively] were joined as defendants. Ohio EPA crossclaimed against Nozik and Mentor Lagoons alleging violations of pollution, solid waste and open dumping statutes. Compliance, injunction and civil penalties were sought.

On May 13, 1987, a combined temporary restraining order and preliminary injunction was issued preventing further dumping and/or covering of existing debris at Mentor Lagoons during the action's pendency, absent court authorization.

Trial commenced on April 19, 1988 and concluded July 29, 1988.

Nozik is shareholder, director, President and Chief Executive Officer of Mentor Lagoons, Inc., operator of Mentor Lagoons, a private boating marina situated on 200 acres adjacent to Lake Erie in Mentor.

Beginning in 1952 or 1955 and continuing through the filing of this action, Nozik has deposited solid debris behind Mentor Lagoons bulkheads



commercial, agricultural, and community operations, excluding earth or material from construction, mining, or demolition operations, or other waste materials of the type that would normally be included in demolition debris, nontoxic fly ash, spent nontoxic foundry sand, and slag and other substances that are not harmful or inimical to public health, and includes, but is not limited to, garbage, tires, combustible and non-combustible material, street dirt, and debris. "Solid wastes" does not include any material that is an infectious waste or a hazardous waste.

R.C. 3734.01(E). Although unwieldy, the statute is comprised of three cohesive clauses.

The first commencing with "such unwanted residual solid" through "community operations" broadly defines solid waste as a by-product of either industry, agriculture, commerce or community activity. It is "unwanted" meaning it is "generated by an activity, entity or person who wishes to be rid of said substance." Ohio Adm. Code 3745-27-01(X).

The second clause defines what is excluded. It states that earth, construction material, mining material, demolition material or material normally included in demolition debris is excluded from the definition of solid waste. It further excludes nontoxic fly ash, spent nontoxic foundry sand and slag. The phrase "and other substances that are not harmful or inimical to public health" immediately following this list, contrary to defendants' claims, modifies the materials directly preceding it. Applying the principle of construction known as ejusdem generis, where an enumeration of specific items is followed by a general phrase, the latter is held to include only those things of the same general nature as those specified. State v. Stevens (Nov. 26, 1982), Trumbull App. No. 3089, unreported.

In this case, the quoted phrase does not exempt, nor was it the legislature's intent to exempt, all deposits of solid or semi-solid substances bearing no ostensible threat to public health, as Nozik claims. To interpret as such emasculates the import of Chapter 3734 while leading to the implausible conclusion that the legislature intended and indeed sanctions unregulated dumping of any and all

violations arising from exposed waste deposited post-1967.

Mentor and the Ohio EPA claim R.C. 3734.01(E) embraces every shred of debris exposed at Mentor Lagoons, notwithstanding the statutory exceptions, most notably the exception for materials associated with demolition debris. Ohio Adm. Code 3745-27-01(U) interprets this exception as,

those items affixed to the structure being constructed or demolished, such as brick, concrete, stone, glass, wall-board, framing and finishing lumber, roofing materials, plumbing, plumbing fixtures, wiring and insulation materials

Based on evidence, only the miscellaneous wood deposits, shingles, gutters and metal scraps could conceivably fall within the exception. Neither Mentor nor Ohio EPA established that these did not (nor could not) originate from structural demolition. Finding it equally probable that they did, they are not solid waste.

The contrary is true about the remaining footnoted items. They are unequivocally solid waste, as defined by either R.C. 3734.01(E) or Ohio Adm. Code 3745-27-01(U). The nature of the items, their location and the absence of any apparent connection with structural demolition confirms this conclusion. Agents of Mentor Lagoons under Nozik's direction deposited this waste at the marina without permit or authorization from Ohio EPA. This activity constitutes operation of a de facto solid waste disposal facility in violation of R.C. 3734.02(C).

II. Open Dumping Violations

Mentor and Ohio EPA contend the deposit of solid waste by Nozik and Mentor Lagoons violates R.C. 3734.03 which prohibits open dumping. Open dumping is defined at R.C. 3734.01(I) as,

the depositing of solid wastes into a body or stream of water or onto the surface of the ground at a site that is not licensed as a solid waste facility under section 3734.05 of the Revised Code.

state", i.e.: Lake Erie. These violations occurred after the statute's enactment and they exist today. A permit authorizing pollution was never issued to either Nozik or Mentor Lagoons. Assertions that the general public or surrounding environment suffers no tangible adverse effects from such waste bears not on the existence of a violation, but to the remedy. Having found pollution exists, the court decrees it constitutes a public nuisance.

IV. Nuisance

Mentor contends the depositing of solid waste by Nozik and Mentor Lagoons violates Sections 75 and 96 of the Mentor Ordinances.⁴ Mentor Ordinance 96.61 on nuisance states, in pertinent part,

[n]o owner or occupant of any premises shall maintain or permit to be maintained at or on the exterior property areas of such premises any of the following unless specifically authorized by a valid zoning or conditional use permit:

- (a) Broken or dilapidated . . . walls or other structures;
- (b) Out-of-use or nonusable appliances and automobile parts;
- (c) Broken, dilapidated or unusable furniture, mattresses or other household furniture, broken glass, plastic materials, paints, miscellaneous coverings and/or other materials . . . placed in such a manner as to be patently unsightly, grotesque or offensive to the senses;
- (d) Any unlicensed or junk vehicle;
- (e) More than one inoperative vehicle.

Chapter 96.72 places like duties upon owner and occupier to comply with this ordinance. The evidence substantiates that Mentor Lagoons is not in compliance with subsections (a) through (e). Neither valid zoning or conditional use permit was ever issued permitting deposit of this waste. Furniture, appliances, vehicles and trash (be it paper,

⁴ Chapter 75 addresses municipal parking violations. No evidence or argument was presented on this claim at trial. It is considered abandoned.

in the wrong"); United States v. Hodges X-Ray, Inc. (C.A.6, 1985), 759 F. 2d 557. This is particularly true when the violations affect the public health or safety. Id.

Here, it is unrefuted that Nozik, as President of Mentor Lagoons, proposed, authorized, and ordered each existing violation. But for his conduct, the marina's present condition would undoubtedly be different. The conduct of Nozik was, and remains, inseparable from that of Mentor Lagoons. For this reason, any judgment imposed herein must be jointly and severally imposed against both Mentor Marinas, Inc. and Nozik, personally.

Based on these findings, in accordance with R.C. 3734.13 and 6111.07, Nozik, Mentor Lagoons, Mentor Lagoons, Inc. and any agents, officers, servants, employees, associates or members of the same are from this date forward permanently enjoined from:

- 1) Depositing, disposing, placing or permitting others to dump, dispose or place solid waste or other waste as defined herein on any portion of the 200 acres comprising Mentor Lagoons;
- 2) Causing or causing to be placed any industrial waste, solid waste or other waste in any area of the Mentor Lagoons accessible by the natural flow of water from either the lagoon or Lake Erie;
- 3) From covering any exposed or partially exposed solid waste, industrial waste or other waste as stated herein, existing as of May 13, 1987, with any material whatsoever, except pursuant to court order;

All solid, industrial or other waste, as defined herein or by statute or applicable Ohio Adm. Code provision, excepting the previously enumerated wood deposits (excluding furniture), shingles, gutters and metal scraps normally associated with the structural demolition or construction, if exposed in any manner (to wit: is not subterranean), shall be removed. Also, solid waste excepted above which constitutes pollution, as herein defined provided the same is invaded by the lagoon waters shall be removed.

To facilitate orderly removal, given the magnitude of the clean-up, the court has divided Mentor Lagoons into four sectors, as seen in the attached aerial view. Removal shall commence with Sector 1 and continue

is not related or associated with the waste removal or pollution.

As previously noted, Mentor Lagoons patrons and guests contributed significantly to the accumulation of minor garbage (i.e.: empty bottles, cans and boating supply containers) which litter Mentor Marina. Reports of the LCGHD dating back to June 19, 1978 highlight the shortage garbage receptacles and the need for more frequent emptying.⁶ Not coincidentally, high concentrations of litter have been allowed to accumulate over the years near various docks. To curb this abuse, the marina shall provide and maintain, as required, covered waste receptacles (i.e.: garbage cans with lids) every 250 feet in areas accessible to either patrons or guests.

VII. Issue of Civil Penalty

R.C. 3734.13(C) states a trial court may impose civil penalties up to ten thousand dollars (\$10,000) for each day of each violation. Differing slightly, R.C. 6111.09 authorizes civil penalties of ten thousand dollars (\$10,000) for each day of violation.

Relevant factors as established by the civil penalty policy of the United States Environmental Agency, cited with approval in State ex rel. Brown v. Dayton Malleable, Inc. (1982), 1 Ohio St. 3, 151, 153, are: 1) the economic benefit gained by noncompliance; 2) the degree of recalcitrance, defiance or indifference of the violator to the law; 3) the harm or threat of harm to the environment; and 4) the extraordinary costs incurred in enforcement. See also State ex rel. Brown v. Howard (1981), 3 Ohio App. 3d 189, 191.

Over the past twenty years, Nozik and Mentor Lagoons generated substantial monetary savings by substituting inexpensive solid and other waste throughout the marina for statutory permissible, though more costly fill. Revenues were then increased by placing docks atop this illegal fill. The amount of monetary savings and added revenues is not precisely known. However, considering the scope of the abuse, the number of docks created and the period involved, the court can state

⁶ In a letter dated July 15, 1983, LCGHD wrote "some of the debris, E.G.(sic), papers and cans, is obviously due to carelessness of the users and guests" and requested more trash bins as required by Ohio Adm. Code 3701-35-05(B).

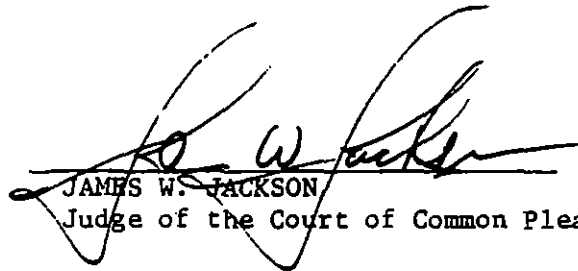
lack of proof of financial wherewithal and no resulting harm.

Pending completion, the court retains jurisdiction over this matter.

In accordance with foregoing, judgment is rendered for the City of Mentor on its complaint for nuisance and for the Ohio EPA on its crossclaim for violations of R.C. 3437.02(C), R.C. 3437.03 and R.C. 6111.04. A permanent injunction in conformity herewith is issued against Mentor Lagoons, Mentor Lagoons, Inc. and Nozik. Judgment is rendered for Mentor Lagoons, Inc. and Nozik as previously stated.

Costs are assessed against Mentor Lagoons, Inc. and Nozik.

IT IS SO ORDERED.


JAMES W. JACKSON
Judge of the Court of Common Pleas

Copies:

Daniel F. Richards, Esq.

Dominic C. Hanket, Assistant Attorney General

Michael Brown, Assistant County Prosecutor

Albert C. Nozik, Esq.

Sector 1 is yellow, Sector 2 is blue; Sector 3 is red; and Sector 4 is green.

