

BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

APPEALS OF: )  
HOWARD RICHARD AND )  
PATRICK J. & CAROLYN P. BRESLIN) Appeal Nos. 92-20, 92-21  
AND PETER L. & ANITA M. BRESLIN) Consolidated  
)

FINAL ORDER

The Environmental Appeals Board ("Board") has scheduled a hearing on the above appeals for November 23, 1993. Edward A. Tarlov, Esquire, attorney for Howard Richard, has filed a Motion to Dismiss which the Board reviewed at its October 26, 1993 meeting. The Board members present were Clifton H. Hubbard, Jr., Chairman; Joan Donoho, Ray K. Woodward, Robert S. Ehrlich, Diana Jones, Charles Morris and Robert I. Samuel. Steven C. Blackmore, Deputy Attorney General, advised the Board. The Secretary of the Department of Natural Resources and Environmental Control ("DNREC") is represented by Jeanne L. Langdon, Deputy Attorney General. Joseph S. Yucht, Esquire, represents the Breslins.

These consolidated appeals involve Cease and Desist Order No. 91-SW-03 ("Order") and Findings under 7 Del. C. §6016 issued by DNREC on August 21, 1992 ("Findings"). The subject matter involves a parcel of commercial property sold by Howard Richard to the Breslins which contained improperly buried construction site waste (tree stumps). The decomposition of buried items resulted in the build-up of methane. The documents and correspondence indicate that the Breslins appealed DNREC's



failure in the Findings to order Howard Richard to reimburse the Breslins for their expenses in removing the buried waste and the failure to order the remaining waste to be removed or to take further enforcement action. The Breslins argue that DNREC has failed to address an on-going violation of the statute. The Findings state that Howard Richard violated 7 Del. C. c. 60 by disposing of solid waste without a permit. The Findings also state that "additional enforcement action may be taken to secure further clean-up of the site if necessary by [DNREC]." Findings at 8. DNREC has not ordered additional enforcement action apparently since any remaining waste or methane is not a safety concern and the buildings at issue are located in a commercial area with slab bases.

Mr. Richard appealed from the determination that he is personally responsible for the improper dismissal. However, he will withdraw his appeal with prejudice if the Breslins' appeal is dismissed. DNREC supports the Motion to Dismiss the Breslins' appeal. DNREC states that the Findings against Mr. Richard will be conclusive (once Mr. Richard withdraws his appeal) and binding against Mr. Richard in any future enforcement action, although no enforcement action is presently anticipated. DNREC contends that it has no jurisdiction to order reimbursement of the Breslin clean-up expenses and that an enforcement action or an order to remove any remaining debris is within the discretion of the Secretary and not appealable to this Board.

The Cease and Desist Order required Mr. Richard to cease and

desist from violating 7 Del. C. §6003(a) and required remediation of the waste. Mr. Richard was also required to submit a work plan for DNREC approval for removal of all buried solid waste in the area. The Order also stated that it does not preclude additional enforcement action. The Order was issued pursuant to 7 Del. C. §6018 which contains a thirty (30) day expiration period. Therefore, the Order expired on March 1, 1991 and any appeal based upon this Order is now moot since there is no live controversy to discuss before the Board. This conclusion does not appear to be disputed.

The present dispute involves the Findings and an alleged omission by DNREC. The Findings indicate that Howard Richard committed a violation of 7 Del. C. c. 60. He was ordered to cease violating chapter 60 and apparently he has. The Order also required Howard Richard to remediate the buried wastes, however, apparently the Breslins were the ones who removed a portion of the buried waste and the associated potential health and safety danger. The Breslins appealed to this Board because they believe DNREC should order Howard Richard to reimburse them for their remediation expenses. The Breslins do not appeal the content of the findings. Rather, they want the Findings to include additional requirements. However, the Breslins have filed a civil suit in Delaware Superior Court seeking reimbursement.

It is an open issue whether DNREC has the authority to require reimbursement of the Breslins' expenses. Under 7 Del. C. §6005(c) DNREC is entitled to compensation for its remediation

expenses, including State employees' time and materials. DNREC may impose civil penalties but these payments would be appropriated to DNREC. See §6005(d). Further, under §6005(b)(1) & (c), jurisdiction for violations in which civil monetary penalties are sought lies in Supreme Court, not with the Board. These statutes indicate that DNREC does not have authority to order reimbursement of the Breslins' expenses. Even assuming that DNREC has the authority to order reimbursement, it has chosen not to issue such an Order here and the Board generally defers to DNREC to initiate enforcement actions and expend funds in the areas which it considers to be priorities. Here, the methane threat has passed and DNREC has turned its attention elsewhere.

There is apparently no dispute that the Findings are supported by substantial evidence. The Breslins wanted DNREC to take additional action to benefit their personal interest. However, the remaining controversy involves a monetary dispute between private parties. The remaining issues do not involve health or safety concerns. See Exhibit B to the Motion to Dismiss. Therefore, the Board should abstain in favor of the Superior Court which will decide the reimbursement issue. The Delaware Superior Court will review the contractual and real estate issues involved in reimbursement. Superior Court is the most appropriate forum and the Board will defer to the Superior Court's conclusion. In the event that DNREC orders further clean-up or additional enforcement, such actions may be appealed

to the Board.

Accordingly, the Board grants Howard Richard's Motion to Dismiss and dismisses the Breslins' appeal. The Board also accepts Howard Richard's Motion to Dismiss voluntarily with prejudice his appeal. Therefore, the hearing presently scheduled for November 23, 1993 is cancelled and these cases are closed. The following Board members concur in this decision.

Clifton H. Hubbard 11/1/93  
Clifton H. Hubbard, Jr.  
Chairman

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Joan Donoho

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Ray K. Woodward

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Robert S. Ehrlich

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Diana Jones

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Charles Morris

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Robert I. Samuel

DATE: November , 1993

to the Board.

Accordingly, the Board grants Howard Richard's Motion to Dismiss and dismisses the Breslins' appeal. The Board also accepts Howard Richard's Motion to Dismiss voluntarily with prejudice his appeal. Therefore, the hearing presently scheduled for November 23, 1993 is cancelled and these cases are closed. The following Board members concur in this decision.

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Chairman

  
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Joan Donoho

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Ray K. Woodward

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Robert S. Ehrlich

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Diana Jones

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Charles Morris

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Robert I. Samuel

DATE: November , 1993

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Joan Donoho

  
Ray K. Woodward

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Robert S. Ehrlich

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Diana Jones

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Charles Morris

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Robert I. Samuel

DATE: November , 1993



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Clifton H. Hubbard, Jr.  
Chairman

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Joan Donoho

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Ray K. Woodward

*Robert S. Ehrlich*  
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Robert S. Ehrlich

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Diana Jones

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Charles Morris

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Robert I. Samuel

DATE: November 3, 1993

to the Board.

Accordingly, the Board grants Howard Richard's Motion to Dismiss and dismisses the Breslins' appeal. The Board also accepts Howard Richard's Motion to Dismiss voluntarily with prejudice his appeal. Therefore, the hearing presently scheduled for November 23, 1993 is cancelled and these cases are closed. The following Board members concur in this decision.

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Ray K. Woodward

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Robert S. Ehrlich

  
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Diana Jones

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Charles Morris

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Robert I. Samuel

DATE: November 2, 1993

to the Board.

Accordingly, the Board grants Howard Richard's Motion to Dismiss and dismisses the Breslins' appeal. The Board also accepts Howard Richard's Motion to Dismiss voluntarily with prejudice his appeal. Therefore, the hearing presently scheduled for November 23, 1993 is cancelled and these cases are closed. The following Board members concur in this decision.

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Clifton H. Hubbard, Jr.  
Chairman

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Joan Donoho

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Ray K. Woodward

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Robert S. Ehrlich

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Diana Jones

*Charles Morris*  
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Charles Morris

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Robert I. Samuel

DATE: November 1, 1993

to the Board.

Accordingly, the Board grants Howard Richard's Motion to Dismiss and dismisses the Breslins' appeal. The Board also accepts Howard Richard's Motion to Dismiss voluntarily with prejudice his appeal. Therefore, the hearing presently scheduled for November 23, 1993 is cancelled and these cases are closed. The following Board members concur in this decision.

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Chairman


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Joan Donoho

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Ray K. Woodward

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Robert S. Ehrlich

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Diana Jones

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Charles Morris

  
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Robert I. Samuel

DATE: November / , 1993