

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY, ILLINOIS

HELPING OTHERS MAINTAIN)
ENVIRONMENTAL STANDARDS,)
An Illinois Not For Profit)
Corporation, Leroy Behrens,)
Laurel Behrens, Mary Jo)
Burke, Juanita Cropper,)
Jeffrey Graves, Dean Hicks,)
Kathleen Hicks, Steve)
Holesinger, Will Libberton,)
Lori Runkle, and Richard Runkle,)

Plaintiffs,)

vs.)

A.J. Bos, Tradition Investments,)
LLC, an Illinois Limited)
Liability Company, and the)
Illinois Department of Agriculture,)

Defendants.)

FILED

DEC 15 2009

Sharon Wand
CLERK OF THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY ILLINOIS

CASE: 2008 CH 42

JUDGMENT

THIS CAUSE CAME BEFORE THIS COURT from November 23, 2009 through December 10, 2009 for bench trial. The Plaintiffs appearing in open Court by their attorneys, David Albee and Paula Rieghns, and the Defendants appearing through their attorneys, Donald Manning and Thomas Nack. The Court, hearing evidence and arguments of the parties, reviewing exhibits, and being otherwise fully advised in the premises,

FINDS:

1. The Court has jurisdiction over the parties and the subject matter hereof.

2. Plaintiffs proceeded on Counts I - IV of their Second Amended Complaint, filed June 11, 2009.

3. Count I alleges prospective Public Nuisance, Count II alleges prospective Private Nuisance, and Count III alleges prospective Continuing Trespass. Each of these counts requests Declaratory Judgment. In Count IV the Plaintiffs request a Permanent Injunction prohibiting Defendants from constructing and operating a livestock management facility.

4. A public nuisance is the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public.

Village of Wilsonville v. SCA Services, Inc., (Ill., 1981), 86 Ill.2d 1, 426 N.E.2d 824, 55 Ill.Dec. 499

5. A private nuisance is a substantial invasion of another's interest in the use and enjoyment of his or her land. The invasion must be: substantial, either intentional or negligent, and unreasonable. The standard for determining if particular conduct constitutes a nuisance is the conduct's effect on a reasonable person.

In re Chicago Flood Litigation, (Ill., 1997), 680 N.E.2d 265, 176 Ill.2d 179, 223 Ill.Dec. 532 (internal citations omitted)

6. A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it.

In re Chicago Flood Litigation, *Id*

7. In order to be entitled to a permanent injunction, the party seeking the injunction must demonstrate: (1) a clear and ascertainable right in need of protection; (2) that he or she will suffer irreparable harm if the injunction is not granted; and (3) that there is no adequate remedy at law.

In re Marriage of Seffren, (Ill.App. 1 Dist., 2006), 366

8. A prospective nuisance is a fit candidate for injunctive relief.

Wilsonville, 86 Ill.2d at 25

9. A defendant may be restrained from entering upon an activity where it is highly probable that it will lead to a nuisance, although if the possibility is merely uncertain or contingent he may be left to his remedy after the nuisance has occurred.

Wilsonville, 86 Ill.2d at 26, 55 Ill.Dec. at 511, 426 N.E.2d at 836

10. In order to obtain the requested relief Plaintiffs must prove, by a preponderance of the evidence, it is highly probable that the operation of Defendants' livestock management facility will lead to a public nuisance, a private nuisance, or a trespass.

11. The Plaintiffs presented the expert opinion testimony of: Sam Panno, (geology, groundwater contamination, karst, and hydrology), Dr Peter Huettl, (soil science), Dr Marc Gorelick, MD, (pediatric emergency medicine), and Dr Michael Netzel, MD, (pulmonology and allergies). The transcript of the expert opinion testimony of Lester Johnson (resource conservation and soil classification) from the August 15, 2008 preliminary injunction hearing herein was also admitted into evidence. Dr Pius Weibel (geology) testified in rebuttal.

12. Plaintiffs Steve Holesinger, Leroy Behrens, Jeff Graves, Mary Jo Burke, Dean Hicks, Kathleen Hicks, Rich Runkle, Will Libberton, and Jim Francis (as a member of HOMES, NFP) testified.

13. The Defendants presented the expert opinion testimony of: Brett Naugle (geology), David Trainor (geology, hydrogeology, and environmental engineering), and Robert Pofahl (agricultural engineering and hydrogeology).

14. Terry Feldmann, engineer with Maurer Stutz, also testified for Defendants.

15. The Complaint alleges, and the Plaintiffs who did testify expressed concern, that, when operated, the facility will emit noise, odor, dust, other airborne particulates, and light, and will generate traffic, so as to constitute a nuisance or trespass. Although Plaintiffs' allegations and concerns may be understandable, they are not competent evidence of prospective nuisance or trespass and do not contribute to overcoming the burden of proof.

16. The competent evidence presented by Plaintiffs showed that the gist of their claims is that, because the site of the proposed facility is underlain by karst, the waste containment pond liners are inadequately designed, and contaminants will therefore leak into surface water, ground water, and an underlying aquifer, and move into Plaintiffs' wells and public waterways.

17. This evidence came primarily from Mr Panno and Dr Huettl. Plaintiffs presented numerous exhibits to show that Dr Huettl relied heavily on Mr Panno's opinions in forming his own opinions.

18. On cross-examination Mr Panno admitted that there were a number of tests which could have been performed which would provide a more definitive indicator of the presence of karst, including ground water chemistry evaluation, well monitoring, and dye tracing. These tests were not performed because of their expense. Mr Panno also admitted that he never examined the rock corings from the site and never

sought bacterial well data for the area. He admitted that these things were not prohibitively expensive, he could have done them, and he should have done them as they would have been informative as to the question of karst.

19. Mr Panno also admitted that site specific investigation is necessary for a thorough geological assessment of a parcel of real property.

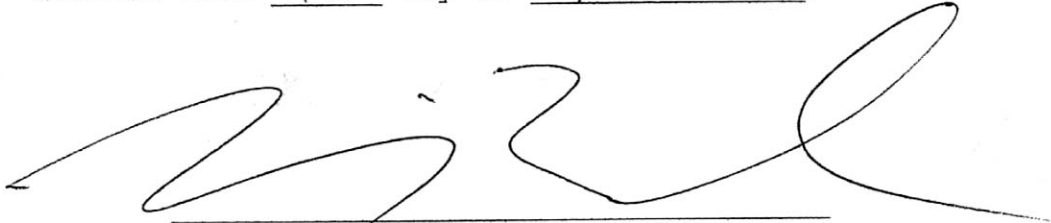
20. Plaintiffs' evidence was otherwise vague and lacked clarity as to the specific types, concentrations, or mechanisms of release of alleged contaminants. The means or likelihood of contaminant exposure to Plaintiffs, their properties, or the public was left largely to inference.

21. The expert opinion testimony presented by Defendants was based on regional and site specific investigations. As part of their investigations Mr Trainor and Mr Naugle both examined the rock corings and Mr Trainor also considered well data. Mr Naugle concluded that there was no evidence of karstified carbonate bedrock at the site. Mr Trainor concluded there were no karst features at the site, the facility design would protect the environment, and any releases from the ponds would be minimal and would not migrate.

22. Considering all of the evidence in totality, for the foregoing reasons, the evidence of Defendants should be accorded greater weight and quality and, as such, Plaintiffs did not prove, by a preponderance of the evidence, that it is highly probable that the operation of Defendants' livestock management facility will lead to a public nuisance, a private nuisance, or a trespass, and judgment should be entered for Defendants.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Plaintiffs' requests for Declaratory Judgment and Permanent Injunction are denied, and that judgment enter for Defendants, A.J. BOS and TRADITION INVESTMENTS, LLC, and against Plaintiffs, HELPING OTHERS MAINTAIN ENVIRONMENTAL STANDARDS, NFP, LEROY BEHRENS, LAUREL BEHRENS, MARY JO BURKE, JUANITA CROPPER, JEFFREY GRAVES, DEAN HICKS, KATHLEEN HICKS, STEVE HOLESINGER, WILL LIBBERTON, LORI RUNKLE, AND RICHARD RUNKLE, all costs taxed to Plaintiffs.

ENTERED this 15 day of DEC, 2009.



Kevin J. Ward
Associate Judge