

IN THE COURT OF COMMON PLEAS  
PICKAWAY COUNTY, OHIO

JAMES M. DEAN  
CLERK OF COURTS  
PICKAWAY COUNTY

2008 SEP 12 PM 3:23

EWING-COMM-PLFAS

State of Ohio, ex rel.  
Rogers, Attorney General,

:

Plaintiff,

:

No. 2007-CI-547

Vs.

:

Philip Delp.

:

**DECISION AND ENTRY**

Defendant.

:

(Final Appealable Decision)

**KNECE, P. RANDALL, JUDGE:**

This matter came on for consideration on September 11, 2008 on plaintiffs' claim for a civil penalty due to defendant's violation of R.C. §6111.07. The court previously granted plaintiff summary judgment on its claim for a permanent injunction against defendant's discharging raw sewage from the waste water treatment works at Logan Lodge. Plaintiff presented testimony and exhibits and rested. Defendant, appearing pro se, testified in his own defense. The Court took the matter under advisement.

The State of Ohio is asking for a \$46,000.00 civil penalty pursuant to R.C. §6111.09, which states in part that:

“(A) Any person who violates Section 6111.07 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars per day of violation...”

The determination of the amount of penalty, authorized by R.C. §6111.09, to be imposed, is left to the “informed discretion” of the trial court based on the totality of the evidence in each case. *State ex rel. Brown v. Howard* (1981) 3 Ohio App.3d 189, 444 N.E.2d 469.

The General Assembly intended to use an economic sanction to deter violations of R.C. Chapter 6111, and thereby to promote the goal of clean water in the state of Ohio, when it provided for a penalty of up to \$10,000.00 per day for a violation of R.C. §6111.07.

Per *Howard*, to be an effective deterrent to violations, civil penalties should be large enough to hurt the offender. When determining the appropriate amount of a civil penalty, a trial court should consider the following factors: 1) the harm or threat of harm posed to the environment by the person violating R.C. §6111.07; 2) the level of recalcitrance, defiance, or indifference demonstrated by the violator of the law (also referred to in case law as the defendant's good or bad faith); 3) the economic benefit gained by the violation; and, 4) the extraordinary costs incurred in enforcement of R.C. §6111.07. *Mentor v. Nozik* (1993), 85 Ohio App.3d 490, 494, 620 N.E. 2d 137.

This court does not believe that defendant should pay a \$46,000.00 civil penalty. Defendant, a retired school psychologist, testified that he bought the property known as Logan Lodge in 2001, unaware that the sewer system was noncompliant with Ohio law. Thereafter, in 2002, defendant was made aware of the sewage system problem. Defendant testified that he paid \$120,000.00 for the property and has a \$60,000.00 mortgage on it. He also testified that between 10 and 12 people are currently living there as tenants.

Defendant was faced with apparently two unpleasant options to correct the sewage system. His first option was the installation of a "package plant" at a cost of \$30,000.00 to \$40,000.00, and annual maintenance of approximately \$2,500.00.

Defendant testified that his research revealed that the second option of hooking into the Scippo Sewer District was even more expensive than installing a package plant system. This is because there currently is no access to the Scippo Sewer District line at 29020 U.S. Route 23 South, Circleville, Ohio.

Defendant testified that he will now be forced to sell Logan Lodge due to his inability to pay for an acceptable semi public sewage system. In lieu of facing future contempt proceedings, this is probably not a bad idea. However, it is nevertheless clear that defendant has violated R.C.§6111.07 and must now pay a civil penalty.

Contrary to the State's position, the court does not believe that defendant acted in bad faith. Defendant's demeanor at trial was not that of a recalcitrant person. If anything, defendant appeared to have been negligent in his handling of this matter. Rather than taking complete charge of the situation, defendant elected to delegate his responsibilities to his employees. This was obviously a critical mistake. The court is satisfied that defendant now appreciates the gravity of his inattention to the correcting of this problem. It is anticipated that defendant will comply with the Court's August 14, 2008 Order and "refrain from discharging raw sewage from the wastewater treatment works at Logan Lodge into waters of the State without a permit and to comply with Chapter 6111 of the Ohio Revised Code and all rules promulgated thereunder."

While having raw sewage pooled on the top of the ground obviously does not create a healthy environment, there was no direct evidence of any actual environmental damage. *United States v. Papercraft* [C.A. 3, 1976], 540 F.2d 131. Any threat of harm posed to the environment is mitigated by the fact that plaintiff waited over five years to

file this lawsuit against defendant. Five years seems rather lengthy if there is an immediate danger of harm or threat of harm to the environment.

Plaintiff presented testimony that defendant gained an economic benefit by his noncompliance. It is impossible, however, for this court to calculate the precise amount of economic benefit defendant gained by his noncompliance. For instance, it would be helpful to know the cost of compliance in terms of practical capital cost, avoided operations of maintenance costs, cost estimate dates, compliance dates, and non-compliance dates to calculate the economic benefit gained from non-compliance. In the case sub judice, much of this type of evidence is merely speculation since defendant's two options for compliance are not economically feasible for a property costing \$120,000.00. In any event, it is clear that defendant gained some economic benefit from his noncompliance. For example, defendant apparently continued to receive rental income from the property while he was non-compliant.

The State of Ohio failed to present any evidence regarding any extraordinary costs incurred in the enforcement of R.C. §6111.07 against defendant.

For the foregoing reasons, the Court orders defendant to pay a civil penalty of \$21,450.00 which represents a penalty of fifty dollars (\$50.00) per day for a total of 429 days from the filing of the complaint until the day of hearing.

Defendant shall also pay the court costs.

This is a final appealable order and within three (3) days of the entering of this Judgment upon the Journal, the Clerk of this Court shall serve the parties as provided for

in Civil Rule 5(B) with notice of the filing of a final appealable order and note such service upon the appearance docket pursuant to Civil Rule 58.

  
**P. RANDALL KNECE, JUDGE**  
*September 12, 2008*

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