

IN THE DISTRICT COURT OF DAWES COUNTY, NEBRASKA

STATE OF NEBRASKA, ex. rel.,)
MICHAEL J. LINDER, Director)
DEPARTMENT OF ENVIRONMENTAL)
QUALITY,)
)
Plaintiff,)
)
vs.)
)
JOSEPH APPLGARTH,)
)
Defendant.)

Case No. CI 09-90

ORDER

FILED
FEB 14 2012
Sharon M. Harrison
CLERK OF THE DISTRICT COURT
DAWES COUNTY NEBRASKA

On this 19th day of January, 2012, this matter came on for trial to the Court. Plaintiff was represented by counsel, Kevin L. Griess, Assistant Attorney General. Defendant Joseph Applegarth appeared pro se. Evidence was offered and received. The parties were given time to submit written argument. The matter was taken under advisement.

Having considered the evidence and argument of the parties, the Court finds as follows:

The Plaintiff sued for an injunction. The object is to stop the defendant from pumping septic tanks without the proper certification.

There is no question that Mr. Applegarth possesses the knowledge and skills to be very successful in his chosen craft. Mr. Applegarth's thorough opening statement revealed a very commendable life and that Mr. Applegarth is a very upstanding citizen. Also clear from the evidence is that since December of 2005, Mr. Applegarth has not been certified to engage in his craft as required by law. (Ex. 66 and 67.) As a result, complaints from concerned citizens were made. The present lawsuit followed.

The Department of Environmental Quality is charged with the duty of exercising exclusive supervision, administration, and enforcement of the Environmental Protection Act. See Neb. Rev. Stat. § 81-1501 et seq. The Private Onsite Wastewater Treatment System Contractors Certification and System Registration Act provides that onsite systems shall be pumped and inspected by certified professionals. Title 124, Rules and Regulations for the Design, Operation and Maintenance of Onsite Wastewater Treatment Systems, chapter 20, section

DEPARTMENT OF JUSTICE

FEB 16 2012

STATE OF NEBRASKA

231



001 provides as follows:

[O]nly a certified professional, a professional engineer, a registered environmental health specialist, or a person under their direct supervision may engage in the inspection, pumping, siting, layout, construction, reconstruction, alteration, modification, repair, or otherwise changing of a on-site wastewater treatment system.

Id.

On February 8, 2008, Mr. Applegarth was issued a Notice of Violation for violations of Title 124. (Ex. 68.) Mr. Applegarth was presented with a number of corrective measures to take, including obtaining the proper certification which he once had. He refused. On April 8, 2008, an Administrative Order was issued from the Nebraska Department of Environmental Quality ordering Mr. Applegarth to cease all activities relating to pumping septic tanks. Pursuant to law, Mr. Applegarth was provided with 30 days to request a hearing. No request was made.

The evidence at trial established that Mr. Applegarth has failed and refused to comply with the administrative order. Although he once possessed the required certification, that certification expired on December 31, 2005. Log entries from the City of Chadron's wastewater lagoon indicate that Mr. Applegarth dumped septic tank waste at that facility from May 2008 to January 2009. (Exhibit 65.) In November of 2008, Mr. Applegarth pumped septic tank waste at 292 Beaver Valley Road in Dawes County, Nebraska. Mr. Applegarth's testimony at trial indicated that he continues to pump septic tanks at the present time.

Mr. Applegarth defends his actions by claiming that this Court does not have jurisdiction to hear this matter and by challenging the constitutionality of the statutes at issue. Both arguments fail as a matter of law.

Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action or proceeding before the court and the particular question which it assumes to determine. In re Estate of Hockemeier, 280 Neb. 420, 786 N.W.2d 680 (2010).

This Court clearly has subject matter jurisdiction over this matter. The Onsite Wastewater Act authorizes enforcement against anyone violating its provisions, and the Environmental Protection Act authorizes an action in District

Court for injunctive relief for any violation of an order of the Director of the Nebraska Department of Environmental Quality. See Neb. Rev. Stat. § 81-1508(2).

This Court also has personal jurisdiction over Mr. Applegarth. Mr. Applegarth is a resident of Chadron, Dawes County, Nebraska. He conducts business in this State and County. All actions at issue in this proceeding were conducted in Nebraska. Service was accepted in Nebraska. This Court clearly has jurisdiction.

Mr. Applegarth's constitutional challenge is also not well taken. When a legislative enactment is challenged on constitutional grounds, the issue is whether the two requirements of procedural due process are met (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement. Dykes v. Scotts Bluff Cty. Ag. Socy., 260 Neb. 375, 617 N.W.2d 817 (2000). In other words, due process requires that an enactment supply (1) a person of ordinary intelligence a reasonable opportunity to know what is prohibited; and (2) explicit standards for those who apply it. Id.

The statutes and regulations at issue meet the requirements of due process. It provides adequate notice to citizens that certification is required to pump septic tanks in this state. In fact, Mr. Applegarth himself had the proper certification up until December of 2005. It also contains sufficient standards for those who apply it. Mr. Applegarth was provided a Notice of Violation and an opportunity to mitigate his violations. He refused. He was then issued an administrative order which contained the required notice of opportunity to request a hearing. Again, he refused to comply.

Based on the evidence adduced at trial, the Court finds that Mr. Applegarth has violated the Compliance Order issued by the Nebraska Department of Environmental Quality on April 24, 2008, by pumping septic tanks without proper certification, in violation of the Onsite Wastewater Act and Title 124 of the Nebraska Administrative Code. An injunction is hereby issued, requiring Mr. Applegarth to obey the terms of the April 24, 2008 Administrative Order and enjoining him from further pumping activities until he receives proper certification.

IT IS SO ORDERED.

BY THE COURT:



Travis P. O'Gorman

Travis P. O'Gorman, District Judge

cc: Joseph Applegarth
Kevin L. Griess