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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000872-MR

ASTRO, INCORPORATED APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CI-01392

ENVIRONMENTAL AND PUBLIC PROTECTION CABINET APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: This matter involves an appeal of the Franklin Circuit Court upholding the Final Order of the Secretary of the Environmental and Public Protection Cabinet[1] regarding whether Appellant violated Kentucky Revised Statute (KRS) 224.40-305. Upon review, we hereby affirm.

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[1] This Cabinet was formerly known as the Natural Resources and Environmental Protection Cabinet.

I. FACTUAL BACKGROUND

Many of the underlying facts of this matter are undisputed. Appellant, Astro, Incorporated, is a Kentucky corporation that purchased property located at 15514 Dixie Highway in Jefferson County in 1988. It operates a nightclub on the premises. The property lies along the banks of the Ohio River and is within the regulatory floodway. The front two-thirds of the nightclub extending to the edge of Dixie Highway is in the floodplain. The floodway covers the rear one-third of the building extending to the Ohio River.

At the time Astro purchased the property, it had a significant amount of waste material described as construction/demolition debris with approximately one-foot diameter concrete blocks and rebar (metal in the concrete), which the Secretary referred to as "concrete fill." The height of the concrete fill is at least twenty to twenty-five feet high and extends some 200 feet in length. The depth of the fill is not known, but overall, it is estimated that there are at least 15,000 cubic yards of concrete fill on the property. The Cabinet acknowledges that this concrete fill was located on the property when Astro purchased it. Astro denies having participated in the placement of additional debris and trash onto the concrete fill but in its brief acknowledges responsibility for these additional materials, if only for having failed to prevent others from disposing of them. However, Astro's assertion before this Court that it did not add debris is contrary to stipulations Astro entered into before the hearing officer conceding that it had in fact added waste material to the site, but the amount of material and what type of material added are in

dispute. According to Astro, in its brief, the debris added to the concrete fill area included a few discarded appliances, some random carpeting, a few bags of garbage, gravel, and "a small amount of material used by Astro to create a buffer or berm at the rear of the parking lot."[2] Astro also stipulated before the hearing officer that it did not have a permit to add waste material to the concrete fill area or any other part of the property.

The record of the formal hearing held on December 10 and 11, 2002 and on April 15 and 16, 2003, illustrates that Astro contributed, or allowed to be contributed, more material to the concrete fill area than Astro acknowledges in its brief before this Court. At the formal hearing, evidence was introduced that on March 14, 2000, Division of Waste Management Inspector John Michels took photographs of the concrete fill area. On top of the concrete fill, he found a toilet, tires, a playpen, a stove door, and carpeting. Thereafter, on March 20 and 28, 2000, Division of Water Inspector Brad Trivette also visited the site. In addition to the concrete fill, he observed other debris including mattresses, refrigerators, and assorted garbage.

Evidence was also introduced at the hearing that Astro received a Notice of Violation (NOV) on April 6, 2000, citing it with violating KRS Chapter 151, specifically 401 KAR 4:060 § 4, for placement of fill material and other obstructions in the regulatory

[2] The purpose of this buffer is to prevent nightclub patrons from driving off Astro's property into the Ohio River.

floodway.[3] Astro was directed to immediately cease the placement of materials in the regulatory floodway and to remove all unpermitted material from the floodway.[4]

Inspector Trivette returned to Astro's property on June 29, 2000, and observed some new debris, including freshly cut logs, a piece of gym equipment, and a stack of magazines. On March 8, 2001, Astro received a second NOV citing it with violating KRS 224.40-100, KRS 224.20-305, 401 KAR 30:031(2), 401 KAR 30:031(14) and 401 KAR 40:010(3) for disposal of solid waste at an unpermitted waste site, operation or maintenance of a waste site without a permit, operation of a solid waste site or facility in the floodplain, operation of a solid waste site or facility in violation of provisions of KRS Chapter 224, and failure to comply with orders of the Cabinet. The Cabinet directed Astro to cease operating the waste site immediately, remove all debris from the floodway to a permitted facility, provide receipts for disposal, and refrain from future construction activity.

Inspector John Michels spoke with Ted Hayes, the property owner's son, regarding the NOV's. Mr. Hayes acknowledged that gravel material in the parking lot had come from another establishment owned by his father, where he had removed the gravel and put in a concrete parking lot.

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[3] "Regulatory floodway" means the stream channel and that portion of adjacent land area that is required to pass flood without raising the base flood crest elevation by more than one (1) foot. 401 KAR 4:060(20).

[4] Astro did not have a permit for any debris on its property.

A third NOV was issued to Astro on March 28, 2001, citing Astro with violations of 401 KAR 4:060 §4 for placement of material in the regulatory floodway. Astro was ordered to attend an administrative hearing regarding all of the violations.

Inspectors visited Astro's property the day before the formal hearing, December 9, 2002. They found that the trash and debris on top and around the concrete fill that were first observed in 2000 were still there. And, despite the fact that the second NOV directed Astro to refrain from further construction, Astro had poured a concrete driveway in the summer of 2001 in front of the nightclub.

A formal hearing was held on December 10 and 11, 2002, and on April 15 and 16, 2003. It is undisputed that Astro did not have a permit to add material, debris or other waste to the concrete fill or to construct the concrete driveway. Beyond the debris and trash noted above, the hearing officer found that some items in the debris pile were the same color of pink paint as the paint on the exterior of the lounge owned and operated by Astro's owner, as well as a discarded sign for the lounge business showing the hours of its operation.

The hearing officer determined that it could be inferred that household items in the debris were from the renovation of a rental house by Astro's owners next to the lounge. Astro does not presently dispute this.

Astro admitted at the hearing that the cited actions constitute a violation of 401 KAR 4:060 because the placement of the material was in the regulatory floodway. Astro does not presently dispute this.

Ghasem Pour-Ghasemi, an environmental engineer consultant with the Dam Safety and Floodplain Compliance, Division of Water, testified that the slope of the concrete fill and debris is almost a vertical wall that is being held back in some places by live trees. Because the unpermitted material is in the floodway, Pour-Ghasemi testified that the force of a 100-year or 50-year flood in the Ohio River would take the slope down and carry it downstream. He further testified that because the debris is not inert material, it would decompose over time and have a chemical reaction, resulting in degrading the waters of the Commonwealth and causing a hazard for human health and wildlife. Pour-Ghasemi's testimony was not contradicted by Astro.

Astro presented an estimate at the hearing that the cost of removal of the concrete fill and debris pile would be more than $1 million, which includes $681,250 for disposal in a recycling disposal of the concrete and steel, and $399,000 for material required to be disposed in landfill facilities, with an additional $5,000 for ground restoration and $2,500 for erosion and silt control. This estimate included an assumption that the volume of the debris would double with handling and disposal.

Pour-Ghasemi reviewed Astro's estimate. He disagreed with Astro's estimate that the volume of the debris would double with handling. Rather, it was his estimate that the volume would only swell five-to-fifteen percent with handling. It was his opinion that the increased volume would not be a factor in cost. He opined that Astro's estimate included cost based on doubling the original volume and then applying this estimate to the cost of removal based on weight. Pour-Ghasemi believed that using

Astro's estimate of $250 per truckload of removal of the debris, that it would only cost $272,500 instead of $681,250 to remove the debris. He further estimated that there were only approximately five truckloads of hazardous materials and concluded that Astro's estimate for the disposal of the hazardous material was overrated. It was Pour-Ghasemi's estimate that the cost of removal of the debris would only be $250,000 to $400,000.

In her Conclusions of Law, the hearing officer found that Astro was liable for violations of KRS 224.40-100, KRS 224.40-305 and 401 KAR 30:031(2) with regard to all waste except the concrete fill on its property. In doing so, the hearing officer concluded that under KRS 224.43-020, the Cabinet could not hold Astro liable for the violations related to the existing concrete fill. The hearing officer recommended as follows on this issue:

> The Cabinet **shall not** enforce statutory provisions relating to improper disposal of solid waste against an owner of property if the owner is not the generator or disposer of solid waste or has not knowingly allowed the disposal of solid waste *and* has made reasonable efforts to prevent the disposal of solid waste by other persons onto the property.
>
> Hence, KRS 224.43-202 prevents the Cabinet from taking enforcement action against Defendant with regard to improper disposal of the massive concrete fill material, which the aerial photos show pre-existed its lease or ownership of the property. There was no credible evidence that Defendant was the generator or disposer of the concrete fill, and thus, it could not have knowingly allowed the disposal of the concrete by others and would have no duty to make reasonable efforts to prevent the disposal of solid waste by other persons onto the property.

Regarding the water citations, KRS 151.250(1) and 401 KAR 4:060 §4(1), the hearing officer concluded that there is not an analogous statute to KRS 224.43-020

that would prevent the Cabinet from taking enforcement action against an owner of property who did not place the waste in the regulatory floodway or knowingly allow others to do so. Nonetheless, the hearing officer concluded that Astro could not be held liable for these violations because it did not originally discard the concrete fill. Ultimately, the hearing officer recommended a penalty of $27,000 for Astro's violations but did not recommend that Astro be ordered to remove the concrete fill.

After the Cabinet submitted exceptions to the hearing officer's conclusions regarding the concrete fill, the Secretary reviewed the recommended order of the hearing officer. By Final Order dated September 9, 2005, the Secretary did not find any of the findings of fact in error. The Secretary also agreed with the hearing officer's conclusions of law, with the exception of the recommendation by the hearing officer that KRS 224.43-020 provided a defense to Astro regarding the concrete fill. The Secretary concluded that

> KRS 224.43-020 is not available to Astro as a defense to a charge of maintaining an unpermitted waste site in violation of KRS 224.40-305 because the defense applies to provisions of Chapter 224 relating to improper disposal of solid waste. The protections afforded a landowner in KRS 224.43-020 relate to improper "disposal," but do not address a situation where, as in the particular fact circumstances of Astro, the Cabinet has proven that the Defendant has "maintained" the concrete fill, even after being directed to remove it by the Cabinet, and thus KRS 224.43-020 provides Astro no defense to this claim.

(Footnote omitted).

The Secretary also relied on the innocent landowner/purchaser defense in the Comprehensive Environmental Response, Compensation, and Liability Act

(CERCLA), 42 U.S.C. 9601 (35)(B), as a "useful corollary." The Secretary concluded that

> [t]o take advantage of this defense, a purchaser must show that it undertook, at the time of the purchase, "all appropriate inquiries" into the previous ownership and uses of the land "in accordance with generally accepted good commercial and customary standards and practices."
>
> In this case, the waste material was in plain view when Astro purchased the property. Astro knew or should have known that the waste site was on the property and was unpermitted. Astro failed to remove the illegal waste material after being directed to do so by the Cabinet and cannot now claim that it did not "maintain" a waste site in violation of KRS 224.40-305.

(Footnote omitted).

The Secretary also relied on common law nuisance, quoting *Louisville & N.R. Company v. Laswell*, 299 Ky. 799, 187 S.W.2d 732, 735 (1945) as follows:

> [t]he general rule is that a landowner is not liable for a nuisance on his premises, unless he creates it or it was created by some person for whose actions he is responsible, <u>or unless he neglects to abate it within a reasonable time after it becomes such, or if he had exercised reasonable care, ought to have become aware of its existence</u>. (Emphasis added).

(Citation omitted).

Based on this reasoning, the Secretary concluded that "Astro's knowledge of the unpermitted waste site and its decision to preserve or retain it, keeping the waste site in its existing state, would remove any good faith defenses under the common law of nuisance."

Concluding that the defense in KRS 224.43-020 was not available to Astro and that Astro had illegally maintained an unpermitted waste site, the Secretary ordered Astro to remove the entire waste site, including the concrete fill. However, the Secretary reduced the penalty recommended by the hearing officer to $17,000. The Secretary allowed Astro to leave any material necessary to support the parking lot, berm or building as certified by a professional engineer.

Astro filed a timely appeal to the Franklin Circuit Court. By Opinion and Order dated March 30, 2006, the circuit court held that the Secretary's findings and conclusions of law were correct and the penalty was not excessive.

Astro has now appealed that decision to this Court. Astro does not contest any of the findings of fact, conclusions of law, or violations found by the Secretary other than the conclusion that Astro is liable under KRS 224.40-305 for maintaining a waste site and consequently, the defense in KRS 224.43-020 did not therefore apply to Astro.

In its brief before this Court, Astro argues that the debris can be broken down into three distinct classes of offending materials: (1) the concrete fill; (2) small debris, such as a few discarded appliances, some random carpeting, and a few bags of what appears to be garbage; and (3) gravel added to the parking lot by Astro and a small amount of material used by Astro to create a buffer or berm at the rear of the parking lot. Astro concedes that it may be liable for any violations regarding the second and third classes of material but denies that it is liable for the first class of material. The Cabinet, on the other hand, argues that it matters not whether Astro placed the concrete fill debris

at the site or knowingly purchased the property with the debris. The Cabinet maintains that it is beyond dispute that Astro added more debris and therefore maintained the unpermitted waste site. The Court having thoroughly reviewed this matter, including the administrative record, hereby affirms the decision of the Franklin Circuit Court.

II. STANDARD OF REVIEW

This issue involves a determination of law regarding the proper construction of KRS 224.40-305 and KRS 224.43-020. This Court is authorized to review issues of law on a *de novo* basis. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-519 (Ky. App. 1998) (citing *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 458 (Ky. 1964)). "It is a fundamental rule that 'all statutes should be interpreted to give them meaning, with each section construed to be in accord with the statute as a whole.'" *Id.* (citing *Commonwealth, Transportation Cabinet v. Tarter*, 802 S.W.2d 944 (Ky. App. 1990)). "Statutes should not be construed such that their provisions are without meaning, whether in part or in whole." *Id.* (citing *George v. Scent*, 346 S.W.2d 784 (Ky. 1961)). "A court may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001).

One of the main principles of statutory construction is to use the plain meaning of the words used in the statute. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005); KRS 446.080(4). "[S]tatutes must be given their literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction

is required." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). We lend words of a statute their normal, ordinary, everyday meaning. *Id*. "We are not at liberty to add or subtract from the legislative enactment or discover meaning not reasonably ascertainable from the language used." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000). Other established rules of statutory construction are:

> (1) [t]hat it is the duty of the court to ascertain the purpose of the General Assembly, and to give effect to the legislative purpose if it can be ascertained; (2) that conflicting Acts should be considered together and harmonized, if possible, so as to give proper effect and meaning to each of them; and (3) that as between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand-the specific shall prevail over the general.

City of Bowling Green v. Board of Education of Bowling Green Independent School District, 443 S.W.2d 243, 247 (Ky. 1969). And, in the context of an agency's decision such as the one at hand, the agency position should be followed to the extent persuasive. *Scharpf v. AIG Marketing, Inc*., 242 F.Supp.2d 455, 465 (W.D.Ky. 2003) (citing *U.S. v. Mead Corp*., 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (citing *Skidmore v. Swift & Co*., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944))).

In this action, the Cabinet has the burden of going forward and the burden of persuasion to establish by a preponderance of the evidence its entitlement to the remedies it seeks. *500 Associates, Inc. v. Natural Resources & Environmental Protection Cabinet*, 204 S.W.3d 121, 128-29 (Ky. App. 2006) (citing 401 KAR 100:010 §12(4)). Astro has the burden of establishing any affirmative defenses. *Id*.

KRS 13B.150(2) provides, in pertinent part, that on review of the final order of an administrative agency, a court

> may reverse the final order in whole or in part, and remand the case for further proceedings if it finds the agency's final order . . . is: (a) In violation of constitutional or statutory provisions; . . . (c) Without support of substantial evidence on the whole record; [or] (d) Arbitrary, capricious, or characterized by abuse of discretion . . . .

III. ANALYSIS

A. DOES THE CONDITION OF ASTRO'S PROPERTY CONFORM TO THE STATUTORY DEFINITION OF A WASTE SITE?

Astro contends that the Secretary erred in determining that the condition on its property constituted a waste site. According to Astro's theory, "[t]he fact that a property's prior owner either deposited a large quantity of waste on the site or permitted others to do so does not transform the site into a 'waste site.'" We disagree. The definition of "waste site" is not quite so narrowly defined. A "waste site" is defined as

> any place where waste is managed, processed, or disposed of by incineration, landfilling, or any other method, but does not include a container located on property where solid waste is generated and which is used solely for the purpose of collection and temporary storage of that solid waste prior to off-site disposal, or a recovered material processing facility, or the combustion of processed waste in a utility boiler[.]

KRS 224.01-010(27).

The administrative regulations promulgated for environmental performance standards for KRS Chapter 224 provide in relative part as follows:

> NECESSITY, FUNCTION, AND CONFIRMITY: KRS Chapter 224 requires the cabinet to adopt administrative regulations for the

> treatment, storage, recycling and disposal of wastes. KRS 224.40-305 requires that persons engaging in the treatment, **storage**, recycling and disposal of waste obtain a permit. This chapter establishes the general administrative procedures that are applicable to 401 KAR Chapter 31 to 49.
>
> Section 1. Purpose, Scope and Applicability. The standards in this administrative regulation are for use under the waste management provisions of KRS Chapter 224 in determining which waste sites or facilities pose a reasonable probability of adverse effects on human health or the environment. **Waste sites or facilities failing to satisfy the requirements of this administrative regulation shall be considered open dumps, which are prohibited by KRS 224.40-100.** No owner or operator shall cause, suffer, or allow a waste site facility or any unit of a waste site or facility to violate any provision of this administrative regulation.
>
> Section 2. Floodplains. No waste site or facility shall restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or be placed in a manner likely to result in washout of waste, so as to pose a hazard to human health, wildlife, or land or water resources.

401 KAR 30:031 (emphasis added).

With this definition serving as the backdrop and based on the record evidence, we cannot say that the Secretary's decision that the condition on Astro's property constituted a waste site is arbitrary. The plain meaning of "waste site" is unambiguous and clearly entails conditions such as that on Astro's property. It is beyond dispute that waste was disposed and stored on the property, regardless of who originally put the waste materials on the site. After Astro acquired the property, with full knowledge that a large amount of waste was already located on the site, waste was then added to the pile. In fact, the type of waste site on Astro's property may better be referred to as an open dump pursuant to 401 KAR 30.031 §1. In any case, the Secretary's

determination that the condition constitutes a waste site is consistent with the plain statutory and regulatory language. Accordingly, we agree that a waste site exists on Astro's property.

B. DID THE SECRETARY PROPERLY INTERPRET THE RELEVANT SECTIONS OF KRS CHAPTER 224?

1. The Secretary properly construed KRS 224.40-305.

The Cabinet argues that the Secretary properly applied KRS 224.40-305, which provides that

> [n]o person shall establish, construct, operate, maintain, or permit the use of a waste site or facility without first having obtained a permit from the cabinet pursuant to this chapter and administrative regulations adopted by the cabinet.

Pursuant to the Secretary's interpretation, Astro is in violation of KRS 224.40-305 for "maintaining" an unpermitted waste site, irrespective of who the generator or disposer of the concrete fill was. The Secretary determined that where a landowner purchases property with an existing, unpermitted waste site and does not remove it, but instead adds, or allows waste to be added, this is a violation of KRS 224.40-305. Thus, the crux of the issue is whether the term "maintain" would include what has taken place on the property owned by Astro.

The Secretary used the plain meaning, consistent with statutory interpretation principles, of the term "maintain" by defining it according to the definition found in the *American Heritage Dictionary* (4th Ed). "Maintain" is defined "as keeping in an existing state; to preserve or retain." *Id.*

The Secretary's construction is also consistent with a prior construction of the term “maintain” by a former Secretary of the Cabinet. In *Natural Resources and Environmental Protection Cabinet v. Graveyard and Salvage, Inc.*, File No. DWM-19712-039, 2001 WL 798693 (May 23, 2001), the Secretary of the predecessor to the Cabinet of the Environmental and Public Protection Cabinet reviewed a matter wherein Graveyard Salvage purchased property that had been a site previously used as a paint manufacturing plant by the previous owner, and hazardous and non-hazardous waste were left on the site. Graveyard Salvage purchased the site with knowledge of the waste on the property. Because hazardous waste falls under a different level of culpability, the section of the Final Order dealing with that is not relevant to the case at hand. However, there was an amount of non-hazardous waste in the form of empty tanks and drums located in a courtyard on the property. The former Secretary found as to this waste “no release of a hazardous substance, pollutant or contaminant has been established by any of these tanks and they have not been shown to contain any hazardous waste.” *Id*. at *25. Regarding the courtyard area, the former Secretary, in his Conclusions of Law, determined that “[a]s of sometime before July 7, 1994, the Defendants maintained, and continue to maintain, a waste site or facility in the courtyard of the Graveyard site without a permit, in violation of KRS 224.40-305 and 401 KAR 47:100 Section 5, primarily because of the rusting, deteriorating, and unused drums being maintained there.” The foundation for this conclusion reads as follows:

> As of July 1994, there were several hundred, mostly empty, 55-gallon drums stacked in the courtyard. These were left over from the

> prior owner/operator of the facility when it was used for paint manufacturing. A few drums had some unknown contents, but those contents have never been tested or established. There are also some junked vehicles, which Defendants may be using for salvage parts and some miscellaneous wood debris. The drums show signs of deterioration and rusting and constitute discarded solid waste material. . . ."

Id.

The former Secretary did not categorize the junked cars or miscellaneous wood debris as unpermitted waste because Graveyard Salvage was in the junk business, and these items may have had value for the particular type of business engaged in by Defendants. Despite the fact that the former Secretary concluded that none of the non-hazardous waste, specifically including several hundred empty drums, was discarded by Graveyard Salvage, it was nonetheless fined because of this waste. More to the point of the case at hand, pursuant to KRS 224.40-100(3), the former Secretary ordered Graveyard Salvage to remove all of the solid waste, including the drums and tanks left by the former owner, from the courtyard of the site and dispose of it at a permitted waste site or facility. Consequently, the *Graveyard Salvage* case illustrates that the Secretary's present interpretation of "maintain" as contained in KRS 224.40-305 is consistent with the Cabinet's prior interpretation of this term.

We further note that the circumstances in the present case are even more egregious than the *Graveyard Salvage* case. In the *Graveyard Salvage* case, although additional materials were added to the site, the former Secretary found that these materials were not debris or waste, but rather materials that were of value to the Defendants. However, in the present case, it is undisputed that Astro either disposed of

additional waste materials (tires, appliances, carpeting, toilets, gym equipment, signs) or took no actions to stop others from doing so on the concrete fill waste site. Accordingly, it is beyond dispute that Astro continued to use or "maintain" the site as an unpermitted waste site or open dump. Thus, when Astro placed the first piece of debris on the concrete fill waste site or failed to stop others from doing so, it continued to treat the site as a waste site area or open dump, constituting a violation of KRS 224.40-305.

Even if we apply the definition urged by Astro of "maintain" as found in *Black's Law Dictionary* 953 (6th ed. 1990), our decision does not change. That definition also fits the condition located on Astro's property. Relying on *Black's* definition, Astro quotes as follows:

> The term is variously defined as acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition; bear the expense of; carry on; commence; continue; furnish means for existence or subsistence of; hold; hold or keep in an existing state or condition; hold or preserve in any particular state or condition; keep from change; keep from falling, declining or ceasing; keep in existence or continuance; keep in force; keep in good order; keep in proper condition; keep in repair; keep up; preserve; preserve from lapse, decline, failure to cessation; provide for; rebuild; repair; replace; supply with means of support; supply with what is needed; support; sustain; uphold.

According to Astro's theory, the above definition "compels a conclusion that a person does not 'maintain' a condition simply by suffering it to remain on his property. To the contrary, as the nuisance-specific definition suggests, maintaining something requires not one act, but a series of them."

Just as in the *Graveyard Salvage* case, the above definition fits what took place on Astro's property. Moreover, and again consistent with *Black's* definition, Astro kept the dump area in existence and continuance and kept it up or upheld it as a dump area by either adding debris or by failing to stop others from adding debris. Accordingly, even under the definition posed by Astro, we cannot say that the Secretary's conclusion that the conditions on Astro's property constituted maintenance of an unpermitted waste site, or in other words an unlawful open dump, is in error. Thus, we affirm on this issue.

2. Astro is not entitled to the defense in KRS 224.43-020.

Astro contends that the hearing officer correctly applied KRS 224.43-020, which provides that

> [t]he cabinet shall not enforce any provision of this chapter relating to improper disposal of solid waste against an owner, occupant, or person having control or management of any land if the owner, occupant, or person is not the generator of the solid waste or is not disposing or knowingly allowing the disposal of solid waste and has made reasonable efforts to prevent the disposal of solid waste by other persons onto the property.

The interpretations of the statute being an issue of law, our review is *de novo*. In interpreting KRS 224.43-020, the hearing officer determined that because Astro was not the generator or disposer of the concrete fill, it could not have knowingly allowed the disposal of the concrete by others and consequently would have no duty to make reasonable efforts to prevent the disposal of solid waste by other persons onto the property. In her review, the Secretary did not take issue with the interpretation given to KRS 224.43-020 but rather determined that the defense was not available because the

defense referenced the *disposal* of solid waste whereas the Secretary determined that Astro was liable for *maintaining* the waste site in violation of KRS 224.40-305.

While we agree with the Secretary that Astro violated KRS 224.40-305, we believe, however, that the defense in KRS 224.43-020 does not apply to Astro for other reasons. The hearing officer concluded that because Astro was not the generator or disposer of the concrete fill, it would have no duty to make reasonable efforts to prevent the disposal of solid waste by other persons onto the property. The hearing officer then divided up the waste site into subcategories, and under this premise, she applied KRS 224.43-020 to Astro. Thus, applying the hearing officer's interpretation, one could buy a parcel of property on which an unpermitted waste site is located and continue to operate it as a waste site, but only be liable for debris added after the purchase of the property. We do not find this reading of KRS 224.43-020 consistent either with statutory language or the intent of the General Assembly in enacting KRS Chapter 224.

Pursuant to KRS 224.43-020 there are two classes of persons against whom provisions relating to improper disposal shall not be enforced: (1) persons who are not the generators of the solid waste, with "generator" meaning "any person, by site, whose act or process produces waste"; and (2) persons who are not disposing or knowingly allowing the disposal of solid waste. However, to qualify for the defense <u>both</u> classes must meet the requirement of the conjunctive phrase: "**and** has made reasonable efforts to prevent the disposal of solid waste by other persons onto the property." (Emphasis added). Consequently, for the defense to apply, Astro must meet two conditions: (1)

Astro must not have been the generator or disposer of the concrete fill and (2) Astro must have made "reasonable efforts to prevent the disposal of solid waste by other persons onto the property." It is apparent that the hearing officer decided that the requirement joined by the conjunctive phrase applies only to the generator or disposer of waste because the hearing officer determined that "[t]here was no credible evidence that [Astro] was the generator or disposer of the concrete fill, and thus, it could not have knowingly allowed the disposal of the concrete by others and would have had no duty to make reasonable efforts to prevent the disposal of solid waste by other persons onto the property." This reading of the statute is illogical and moreover, flies in the face of the policy and purpose of KRS Chapter 224, which is to eliminate unpermitted waste sites operating as open dumps. The General Assembly stated its intent for the policy and purpose regarding solid waste management as "[i]t is the policy of the Commonwealth that existing illegal open dumps be eliminated and that new open dumps be prevented." KRS 224.43-010(5). An "open dump" means "any facility or site for the disposal of solid waste which does not have a valid permit issued by the cabinet or does not meet the environmental performance standards established under regulations promulgated by the cabinet[.]" KRS 224.01-010(38). Clearly, the condition on Astro's property was an open dump. *See* 401 KAR 30:031 §1.

Under the hearing officer's reading, so long as the current property owner is not the generator of the original debris at a waste site, it has no obligation to stop others from dumping illegally at an unpermitted waste site. This is contrary to the clear purpose

of 401 KAR 30:031§1 and KRS Chapter 224. Thus, for the defense to apply to Astro, even if it is not the originator of the concrete fill, it had an affirmative duty to make reasonable efforts to prevent disposal of solid waste by others onto the property. It is beyond dispute that it did not do so, and in fact, so admits. Thus, Astro cannot meet its burden of proof that the defense applies to it because it knowingly purchased a parcel of property with an existing illegal waste site; it then maintained the waste site and added waste to it, thereby compounding the problem. Accordingly, based on public policy and the clearly articulated legislative intent behind KRS Chapter 224, Astro is not entitled to the defense.

We conclude that KRS 224.40-305 and KRS 224.43-020 are not ambiguous. Accordingly, we need only to rely on the plain statutory language for our decision. Consequently, it is unnecessary, and indeed improper, under statutory construction principles to rely on ancillary sources such as CERCLA or common law nuisance to arrive at the meaning and legislative intent of the statutes under review. Thus, we properly limit this opinion to the plain meaning of KRS 224.40-305 and KRS 224.43-020 without relying on CERCLA or common law nuisance.

For the reasons stated, we hereby affirm.

ALL CONCUR.

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