ILLINOIS POLLUTION CONTROL BOARD
May 4, 1995

MEDICAL DISPOSAL SERVICES, INC.,	)	
Petitioner,	)	
v.	)	PCB 95-75
	)	PCB 95-76
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Permit Appeals - Air, Land)(Consolidated)
Respondent.	)	

DISSENTING OPINION (by J. Theodore Meyer):

I respectfully dissent from the majority order in this matter because I believe siting approvals are freely transferable. Therefore, I would have granted petitioner's motion for summary judgment.

I do not believe Section 39.2(a) is the appropriate section on which to rule in this case. Even if it was, Section 39.2(a) as amended only gives a local siting authority the discretion to consider the operating experience and history of an applicant. In addition, Section 39.2(a) does not delineate prior bad acts as a criteria to consider, which seems to be at the heart of today's decision.

The pertinent section to this case is Section 39(c). Section 39(c) was not amended and refers only to proof of location approval, not applicant or facility approval. (415 ILCS 5/39(c)). Thus, I believe previous Board cases which hold that siting approval is location-specific, and therefore a transferable instrument, is still good law. (See Christian County Landfill, Inc. v. Christian County Board, PCB 89-92 (1989); Concerned Citizens Group, et al. v. County of Marion and I.S., Inc., PCB 85-97 (1985).

In Christian County Landfill, the Board rejected the county's placement of a subject condition on a siting approval which required any buyer or subsequent owner of the site to obtain another siting approval. (PCB 89-92). The majority in today's opinion narrowly construed Christian County Landfill to be applicable only to those sites which have already received permits, and thus distinguishable from the instant matter. I find no such restriction in the Christian County Landfill opinion. Indeed, in that case, the Board pointed out that Section 39.2 authorizes the local siting authority to grant siting approval "only if the proposed facility meets the criteria set forth therein", and that "[n]owhere in the criteria is there any reference to future transfer of ownership of the proposed site." (*See* Christian County Landfill at 7,8.)

The Board then interpreted the silence in Section 39.2 on this issue to mean "an intent by the General Assembly to limit the authority of a local unit of government only to reviewing the merits of the initial application." (*See* Christian County Landfill at 8.) Thus, a local government's siting authority is exhausted after it determines the criteria have been met, and the proper safeguard for reviewing any operational aspects of the facility will be provided by the Agency. (Id.) Therefore, "future transfer" must mean any transfer made after the siting approval has been determined by the local authority, including transfer of property with local siting approval and pending permit applications. To construe it any other way is to "create havoc in the state's system of waste disposal", exactly the situation the Board was trying to avoid. (Id.)

In Concerned Citizens Group, the Board found that the transfer of a local siting approval to a third party did not deprive the local siting authority or the public of fundamental fairness in reviewing the suitability of the transferee. (PCB 85-97). Since both cases treat the siting approval process as site-specific, and therefore transferable, I see no demonstrated reason to supplant our previous decisions.

The idea that a site-specific approval is transferable is well-grounded in the principle that an owner has the unrestricted right to transfer his property, including any covenants, easements and permits that run with the land. 73 C.J.S. Property §33. Illinois zoning law reflects this principle, where good faith reliance upon a building permit, or the probability of its issuance, results in a vested property right in the intended use of that property. (*See* Village of Palatine v. LaSalle National Bank, 112 Ill.App.3d 885, 445 N.E.2d 277 (1st Dist. 1983)).

Further, since a siting approval acts like a permit in that it is a required step in the construction of a pollution control facility, it should be treated as a permit and held to the principle that, "unless a specific completion time is required, most permits exist until the project for which they were issued is completed." (*See* In Re Island Club Marina, Ltd., 38 B.R. 847 at 851 (Bankr.Ill. 1984); McQuillan, The Law of Municipal Corporations, §25.152 (3rd Ed. 1983). The majority's attempt to consider a siting approval as anything but a permit is misguided, especially since it used Section 39, titled "Permits; procedures" as the basis for its reasoning.

Other areas of law such as bankruptcy, tax, corporations and patent law, treat permits as assets that are transferable, even if the instrument is pending. (*See* C.J.S. Bankr §106 ("[p]roperty is generally included in the estate notwithstanding the fact that it is intangible,... contingent,...or that it exists by the grace of the government"); In re Island Marina, Ltd., 83 B.R. 847(Chapter 11 debtor's pre-petition building

permits were property of the estate); Kenyon v. Automatic Instrument Co., 160 F.2d 878 (1947)(an assignment of patent is not invalidated because invention is assigned before the patent issues).

The majority's concern that a company could attempt to bypass the local siting authority's scrutiny is a possibility; however, I see many more unfavorable probabilities from today's decision, including both of the estate and shareholder scenarios presented by petitioner. (*See* petitioner's Memorandum in Support of Motion for Summary Judgment, p.13) For example, if a partnership obtains siting approval, but then dissolves due to a partner's death or withdrawal, the remaining partner will have to reapply for siting approval only because a new partnership or other entity had to be formed. One can imagine similar results for a corporation which, due to merger, consolidation or acquisition, changes its name and assets, but remains largely the same entity which originally applied for and received siting approval. Acquiring a bankrupt company's assets would become problematic where all assets are purchased with the intent of continuing the construction of the same facility on the same location, but suddenly minus the siting approval.

This decision also could hamstring a company's ability to obtain financing for a pollution control facility. If a financial institution cannot be assured that siting approval will remain effective for a certain property, then it will view the investment as pure speculation. At best, the property owner could only seek financing once air and land permits were in hand, a situation which could cripple a landowner due to substantial costs incurred between siting approval and permit issuances. On these legal and practical grounds, I find that siting approval is site-specific, and therefore transferable.

For these reasons, I respectfully dissent.

J. Theodore Meyer
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 18th day of May, 1995.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board