BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC., and KENDALL LAND and CATTLE, L.L.C.	)	
Petitioners,	)	No. PCB 09-43
vs.	)	(Pollution Control Facility Siting Appeal)
COUNTY BOARD OF KENDALL COUNTY, ILLINOIS,	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on April 24, 2009, we filed with the Illinois Pollution Control Board, via electronic filing, **PETITIONERS' RESPONSE TO MOTION TO DISMISS PORTIONS OF AMENDED PETITION** in the above entitled matter, which is attached hereto and herewith served upon you**.**

WASTE MANAGEMENT OF ILLINOIS, INC.
and KENDALL LAND and CATTLE, L.L.C.

By: /s/Lauren Blair
One of Their Attorneys

Donald J. Moran
Lauren Blair
PEDERSEN & HOUPT
161 North Clark Street
Suite 3100
Chicago, Illinois 60601
(312) 641-6888
Attorney Registration No. 1953923

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC., and KENDALL LAND and CATTLE, L.L.C.	)	
Petitioners,	)	No. PCB 09-43
vs.	)	(Pollution Control Facility Siting Appeal)
COUNTY BOARD OF KENDALL COUNTY, ILLINOIS,	)	
Respondent.	)	

PETITIONERS' RESPONSE TO MOTION
TO DISMISS PORTIONS OF AMENDED PETITION

Petitioners, WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), and KENDALL LAND and CATTLE, L.L.C. ("KLC") (collectively "Petitioners"), by and through their attorneys, PEDERSEN & HOUPT, P.C., respond to the Motion to Dismiss Portions of Amended Petition for Hearing to Contest Site Location Denial ("Motion to Dismiss") filed by Respondent, COUNTY BOARD OF KENDALL COUNTY, ILLINOIS ("County Board") pursuant to Section 2-619(a) of the Illinois Code of Civil Procedure ("Code") and Section 101.506 of the Illinois Pollution Control Board "(Board") Rules, as follows:

INTRODUCTION

The County Board filed a 2-619(a) Motion to Dismiss seeking a "dismissal, with prejudice, of paragraphs 10 and 11" of Petitioners' Amended Petition for Hearing to Contest Site Location Denial ("Amended Petition"). (*See* Motion to Dismiss, ¶3.) The Motion to Dismiss should be denied because it is procedurally defective and substantively deficient. The purpose and scope of Section 2-619 of the Code is to dismiss "claims" based on defects of defenses that

defeat the claim, and thus does not authorize the dismissal of "allegations," which is the relief the County Board seeks. Moreover, the County Board has not presented any "affirmative matter" that negates Petitioners' claim of fundamental unfairness. Therefore, due to the County Board's failure to meet the standards of Section 2-619(a), the Motion to Dismiss should be denied.

BACKGROUND

On or about March 24, 2009, Petitioners filed their Amended Petition in response to the County Board's Demand for Bill of Particulars requesting additional allegations to support Petitioners' claims that the denial of criteria (ii) and (iii) of Section 39.2(a) of the Illinois Environmental Protection Act ("Act") was fundamentally unfair, unsupported by the record and against the manifest weight of the evidence. Paragraphs 10 and 11 of the Amended Petition, which the County Board now seeks to dismiss with prejudice, allege as follows:

> 10. The hearing officer improperly struck the public comment filed October 28, 2008 by WMII, in violation of Section 39.2(c) of the Act and of Articles 6 and 7 of the Amended and Restated Kendall County Site Approval Ordinance for Pollution Control Facilities ("Ordinance No. 08-15").
>
> 11. The hearing officer improperly struck a portion of the written findings of the County Board's legal counsel, in violation of Sections 8.4 and 9.2 of Ordinance No. 08-15.

At the local siting proceedings, the hearing officer, Patrick M. Kinnally, took the extraordinary action of striking the public comment filed October 28 by Waste Management of Illinois, Inc. ("WMII Public Comment"), and portions of the written findings submitted by the *County Board's own local siting counsel*, Michael Blazer ("County Counsel"). The portions struck contained the reports of the *County Board's own consultants*, Mr. Stuart H. Russell and Ms. Laura Swan, PG, of Hard Hat Services ("Consultant's Reports"), and all references to the

Consultants Reports contained in Mr. Blazer's written findings. The stated bases for striking said information were that the Consultant Reports (i) constitute "late-filed evidence" and "good cause" was not offered as to why the purported "evidence" could not have been offered at the hearing; and (ii) were untimely and Mr. Russell and Ms. Swan should have been called as witnesses during the hearing. (*See* 11/13/08 Kinnally Order, p. 2.)

Petitioners objected to the erroneous November 13, 2008 Order on the grounds that: (i) the hearing officer lacked authority to strike the WMII Public Comment and the County Counsel's written findings, or any portion thereof; and (ii) the WMII Public Comment and the Consultant Reports were not evidence, and therefore, not subject to any "late-filed evidence" or "good cause" standard.

LEGAL ARGUMENT

I. The County Board Cannot Seek to Dismiss Allegations Pursuant to a Section 2-619(a) Motion.

The starting point for the analysis of a motion to dismiss is that pleadings are to be liberally construed to work substantial justice between the parties. *Abbott v. Amoco Oil Corp.*, 249 Ill. App. 3d 774, 778, 619 N.E.2d 789, 793 (2d Dist. 1993). Dismissal is a drastic punishment that is proper only when no set of facts could be proved under the pleading that would entitle the plaintiff to relief. *City of Elgin v. All Nations Worship Center*, 369 Ill. App. 3d 664, 667, 860 N.E.2d 853, 856 (2d Dist. 2006).

A motion to dismiss brought under section 2-619(a)(9) is proper only when an affirmative matter is raised that completely negates the plaintiff's cause of action or refutes critical conclusions of law or unsupported conclusions of material fact. *Waterford Executive Group, Ltd. v. Clark/Bardes, Inc.*, 261 Ill. App. 3d 338, 343 (2d Dist. 1994). Section 2-619(a) motions

typically raise affirmative matter such as lack of standing, *Hermes v. William F. Meyer Co.*, 65 Ill. App. 3d 745, 747, 382 N.E.2d 841, 843 (2d Dist. 1978), immunity, *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill. 2d 475, 479, 763 N.E.2d 756, 759 (2002), and laches. *Summers v. Village of Durand*, 267 Ill. App 3d 767, 771, 643 N.E.2d 272, 275-76 (2d Dist. 1994).

By its terms, Section 2-619(a) limits the filing of "a motion for dismissal of the action" or other appropriate relief directed at the "claim" asserted. *See* 735 ILCS 5/2-619(a). Nothing in Section 2-619(a) indicates that is intended to allow the dismissal of allegations, as opposed to the dismissal of a claim.

Ostensibly, the County Board has mistaken the application of Section 2-619(a) for Section 2-615 of the Code, which encompasses motions seeking to strike defective portions of a pleading. *See* 735 ILCS 5/2-615. Under Illinois law, although the legal concepts "strike" and "dismiss" are often incorrectly used interchangeably, there is a difference, namely that a cause of action may be dismissed, while a pleading may be stricken in whole or in part. *Bejda v. SGL Industries, Inc.*, 82 Ill. 2d 322, 328, 412 N.E.2d 464, 466-67 (1980).

Even if the County Board had sought to strike paragraphs 10 and 11 of the Amended Petition pursuant to Section 2-615 of the Code, the Board should deny such a request. As stated above, pleadings are liberally construed in Illinois. A Section 2-615 motion should be denied if facts essential to the claim appear by reasonable implication. *Central States, Southeast & Southwest Areas Pension Fund v. Gaylur Products, Inc.*, 66 Ill. App. 3d 709, 713, 384 N.E.2d 123, 126 (1st Dist. 1978). Moreover, the County Board's request for a "dismissal, with prejudice" is counter to the well-established principle that, even if a 2-615 motion is granted, plaintiffs are

granted an opportunity to amend the pleadings. *Sinclair v. State Bank of Jerseyville*, 226 Ill. App. 3d 909, 910, 589 N.E.2d 862, 863 (4th Dist. 1992).

In short, the County Board's 2-619(a)(9) Motion to Dismiss is procedurally defective, and the Board should deny the Motion on this basis.

II. The County Board Has Not Presented Any Affirmative Matter Showing that Paragraphs 10 and 11 Should Be Dismissed.

Petitioners have raised claims in the Amended Petition that the denial of criteria (ii) and (iii) of Section 39.2(a) of the Act was fundamentally unfair, unsupported by the record and against the manifest weight of the evidence. The allegations in paragraphs 10 and 11 are made in furtherance of said claims, and the County Board has not presented any affirmative matter showing how those allegations are legally insufficient.

Instead, the County simply argues that the hearing officer's decision striking the County Board's Consultant's Report was right. In essence, the County Board is prematurely moving for summary judgment on the issue of the correctness of the hearing officer's ruling. The Motion to Dismiss is without legal basis.

III. The County Board's Substantive Arguments Concerning the Correctness of the Hearing Officer's Decision to Strike the Consultant Reports Lack Merit.

Although the legal issue of the correctness of the hearing officer's ruling is not properly considered on a Motion to Dismiss, nothing in the plain language of the Act or the Ordinance grants the hearing officer the authority to strike the WMII Public Comment or portions of the County Counsel's written findings. On the contrary, the Act specifically authorizes the filing of written comment by any person which must be considered by the County Board if received within 30 days of the last public hearing. 415 ILCS 5/39.2(c). In addition, the Ordinance specifically provides that, if the County Counsel prepares written findings, those findings *must* be

made a part of the record. Section 8.4 of the Ordinance provides:

> 8.4 The State's Attorney, or an assistant, shall serve as legal advisor for the County Board. The County Board, with the advice of the State's Attorney, shall engage outside counsel to serve as legal advisor for the County and County staff. Such outside counsel shall be responsible for evaluating the application and advising the County and County staff throughout the application and hearing process, including any appeals or remand hearings. Said counsel shall be entitled to examine witnesses, and otherwise to participate in the Hearing as counsel to the County. At the conclusion of the public hearing and after consideration of all timely-filed written comments, said outside counsel may submit draft written findings to the County Board. *A copy of any such submittal shall be filed with the County Clerk.*

(emphasis added.)

Furthermore, Section 9.2 provides:

> 9.2 The record *shall* consist of the following:
>
> *** *** *** *** *** ***
>
> 10. Written findings provided by outside counsel for the County.

(emphasis added.)

Finally, Section 10.1 provides that in making its siting decision, the County Board "shall consider the record of the public hearing, the findings of fact, and the proposed findings of outside counsel for the County..." (emphasis added).

Therefore, based on the plain language of the Act and the Ordinance, the hearing officer lacked authority to strike the WMII Public Comment and the Consultant Reports attached to the County Counsel's written findings, and all references to the Consultant Reports contained therein.

WHEREFORE, WASTE MANAGEMENT OF ILLINOIS, INC., and KENDALL LAND and CATTLE, L.L.C. respectfully request that the Board deny the County Board's Motion to Dismiss, and grant such other and further relief as the Board deems appropriate.

Respectfully Submitted,

WASTE MANAGEMENT OF ILLINOIS, INC., and KENDALL LAND and CATTLE, L.L.C

By: _____
One of Their Attorneys

Donald J. Moran
Lauren Blair
PEDERSEN & HOUPT, P.C.
161 North Clark Street
Suite 3100
Chicago, Illinois 60601
(312) 641-6888

CERTIFICATE OF SERVICE

I, Lauren Blair, an attorney, on oath certify that I caused to be served the foregoing, **PETITIONERS' RESPONSE TO MOTION TO DISMISS PORTIONS OF AMENDED PETITION,** to be served upon the following parties listed below electronically on this 24th day of April 2009.

James F. McCluskey
James S. Harkness
Momkus McCluskey, LLC
1001 Warrenville Road, Suite 500
Lisle, IL 60532
E-mail: jfmccluskey@momlaw.com
jharkness@momlaw.com

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
E-mail: hallorab@ipcb.state.il.us

Eric C. Weis
Kendall County State's Attorney
807 West John Street
Yorkville, IL 60560
E-mail: eweis@co.kendall.il.us

George Mueller
Mueller Anderson, P.C.
609 E. Etna Rd.
Ottawa, IL 61350
george@muelleranderson.com

Charles Helsten
Hinshaw & Culbertson
100 Park Ave.
P.O. Box 1389
Rockford, IL 61105-1389
chelsten@hinshawlaw.com

Daniel J. Kramer
Law Office of Daniel J. Kramer
1107 S. Bridge St.
Yorkville, IL 60560
dkramer@dankramerlaw.com

s/Lauren Blair
Lauren Blair