



**BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

PRIME LOCATION PROPERTIES, LLC,	)	
Petitioner,	)	
	)	
v.	)	PCB No. 09-67
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

**MOTION FOR SUPPLEMENTAL AWARD OF LEGAL COSTS**

NOW COMES Petitioner, PRIME LOCATION PROPERTIES, INC. (hereinafter “Prime”), by its undersigned counsel, and pursuant to Section 57.8(1) of the Illinois Environmental Protection Act (415 ILCS 5/57.8(1)), petitions the Illinois Pollution Control Board (hereinafter “the Board”) for an order authorizing payment of legal costs, and in support thereof states as follows:

1. On August 20, 2009, the Board reversed the Illinois Environmental Protection Agency (hereinafter “the Agency”) determination herein. The Board directed Prime to file a statement setting forth the amount of litigation costs claimed, as well as arguments for the Board’s exercise of discretion in awarding litigation costs. (Opinion, at p. 34)

2. On September 17, 2009, Prime filed its Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action, seeking reimbursement of \$10,803.18 in legal costs expended as of July 31, 2009 in this matter. The supporting affidavit stated that the legal costs being sought did not include those being incurred in seeking legal fees and would not be sought “unless for some unexpected reason, this becomes a protracted dispute.”

3. On November 5, 2009, the Board directed the Agency to provide Prime with

reimbursement from the LUST Fund for legal fees and costs in the amount of \$10,088.18.

4. The Agency appealed this decision to the Illinois Appellate Court, Fifth District, seeking to reverse the Board's decision on the merits, as well as the award of legal fees.

5. On March 2, 2012, the Fifth District of the Illinois Appellate Court affirmed the Board's decision in toto. Ill. EPA v. Ill. Pollution Control Bd., 2012 Ill. App. Unpub. LEXIS 462 (5th Dist. 2012). In doing so, the Illinois Appellate Court approved the award of legal costs and held that the evidence submitted was consistent with existing practice where attorney fees are awarded under statute. Id. ¶27.

6. On April 11, 2012, the mandate was issued and the appeal remanded to the Illinois Pollution Control Board.

7. Where a statute authorizes an award of attorney fees, those fees incurred on appeal are also awardable. Citizens Organizing Project v. IDNR, 189 Ill. 2d 593, 599 (2000); see also McNiff v. Mazda Motor of Am., 384 Ill. App. 3d 401, 408 (4th Dist. 2008) (allowing attorney fees incurred on appeal furthers purpose of statutory award); Berlak v. Villa Scalabrini Home for the Aged, 284 Ill. App. 3d 231, 243-244 (1st Dist. 1996) (finding trial court erred in refusing to consider plaintiff's supplemental petition for legal costs covering the period from the end of the previous petition through subsequent appeal and remand).

8. Section 57.8(l) of the Act precludes an award of "legal costs for seeking payment under this Title *unless* the owner or operator prevails before the Board." (415 ILCS 5/57.8(l) (emphasis added)) Attached hereto are the legal costs for seeking payment that arose after July 31, 2009. (Affidavit of Shaw) By its express language, the Act does not limit the legal costs to those incurred solely in proceedings before the Board. Instead, the award of *all* legal costs for

seeking payment from the LUST Fund are awardable, on the condition that the owner or operator prevails before the Board.

9. There would not appear to be any grounds for disputing that Prime prevailed before the Board. While there appears to be no specific Board precedent dealing with appeals of Board orders, the case of Dickerson Petroleum v. IEPA, PCB Nos.09-87 & 10-5 (Sept. 2, 2010) provides some insights. In that LUST appeal, the owner/operator was successful in persuading the Board to remand the matter for issuance of a new denial letter. Whether or not this was a pyrrhic victory or strategic breakthrough was unclear at the time of the Board's decision, but within 30 days of remand, the Agency issued a new decision approving the payment sought. There are two points that can be drawn from this decision. First, the Board determined whether the owner/operator prevailed before the Board not solely based upon the events before the Board, but also based upon events occurring after the Board's order. The owner/operator prevailed partly before the Board in finding the decision letter insufficient and prevailed substantially upon remand by obtaining the ultimate relief sought. Second, the owner/operator was awarded legal costs that arose after remand, including discussions with the Agency. A successful remand is comparable to a successful appeal in that they both relate to a Board action, while technically not occurring before the Board. Consistent with Dickerson, the Board should be willing to approve legal costs incurred in a subsequent appeal of the Board's decision in which the owner/operator prevailed.

10. Once it is determined that Prime prevailed, the next issue is whether the Board should exercise its discretion in awarding legal costs. The LUST Fund is a unique feature of Illinois environmental law. The Fund acts as public insurance, not merely for the benefit of the

owner of the tanks, but for the neighboring property owners, as well as communities that benefit from contaminated properties being returned to economic use. The Board has previously recognized that the adjudication of contested cases is an essential element in the formation of the policies that govern the UST reimbursement program. Platolene 500 v. IEPA, PCB 92-9, at 12-14 (May 7, 1992). By prevailing before the Board, as well as helping affirm the Board's decision on appeal, Prime's legal costs helped formulate policies that will benefit other parties in the future.

11. Awarding legal costs incurred by a prevailing party on appeal furthers the purpose of granting the original attorney fee award. Whatever policies formulated by this adjudication would have been nullified had the Appellate Court reversed the Board's decision. Furthermore, in cases like this, the owner/operator's interest is primarily pecuniary and site-specific, while the appeal to the Appellate Court raised significant implications for the entire program, particularly as to the unauthorized practice of law issues which might have nullified numerous Board adjudications over the year. The Illinois Supreme Court has explained with respect to a different attorney-fee statute, that the purpose of awarding fees can be to discourage regulatory enforcement and give those subject to regulation an incentive to oppose regulatory enforcement "where compliance would otherwise be less costly than litigation." Citizens Organizing Project v. IDNR, 189 Ill. 2d 593, 598-99 (2000). The possibility of an award of fees from the appeal in this case certainly provided an incentive to expend additional litigation costs to oppose the Agency on appeal where it might have been less costly to do nothing.

12. Attached hereto is the Affidavit of Patrick D. Shaw, documenting the legal costs in this matter since August 1, 2009, which are \$12,501.15. This figure is the sum of

the attorney fee billable time (\$11,962.50) and costs (\$538.65). This affidavit is modeled on the one previously provided in this case on the basis of which \$10,088.18 was previously awarded. The total award sought of \$22,589.33 is less than the Board has awarded in other LUST appeal cases which were not appealed to the Illinois Appellate Court and should be considered reasonable costs given the nature of the litigation and the complexity of the issues. See Zervos Three v. IEPA, PCB No. 10-54 (June 2, 2011) (\$73,347.88); Dickerson Petroleum v. IEPA, PCB 09-87 (Sept. 2, 2010) (\$53,019.29); Illinois Ayers v IEPA, PCB No. 03-214 (Aug. 5, 2004) (\$44,456.49).

WHEREFORE, Petitioner, PRIME LOCATION PROPERTIES, LLC requests that this Board authorize the payment from the leaking underground storage tank fund the amount of \$12,501.15 in legal costs to PRIME LOCATION PROPERTIES, LLC, pursuant to 415 ILCS 5/57.8(1).

Respectfully submitted,

PRIME LOCATION PROPERTIES, LLC,  
Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,  
Its attorneys

BY: /s/ Patrick D. Shaw

MOHAN, ALEWELT, PRILLAMAN & ADAMI  
1 N. Old Capitol Plaza, Suite 325  
Springfield, IL 62701-1323  
Tel: (217) 528-2517  
Fax: (217) 528-2553

STATE OF ILLINOIS            )  
  ) ss.  
COUNTY OF SANGAMON )

**AFFIDAVIT OF PATRICK D. SHAW**  
**VERIFYING ATTORNEY FEES**

Affiant, Patrick D. Shaw, being first duly sworn, states as follows:

1. The statements made herein are based upon my personal knowledge, and I am competent to testify hereto.

2. I am an attorney duly licensed to practice law in the State of Illinois; and I am the attorney of record for Petitioner, Prime Location Properties, LLC in the case entitled Prime Location Properties, LLC v. Illinois Environmental Protection Agency, PCB 09-67.

3. I represent Prime Location Properties, LLC solely in matters concerning the appeal of the Agency's Denial Letter, dated January 27, 2009. I represent it on no other matters.

4. The Board's initial decision in this matter was received by this office on August 24, 2009, and in response I began preparing an petition affidavit in support of legal costs. At the time the affidavit was being prepared, the most recent final invoice was for legal work performed through July 31, 2009, so it did not include any requests for payment of legal costs incurred seeking legal costs. Further, it was not anticipated at the time that the Agency would ask the Board to review and reconsider its own precedent in this area, resulting in substantial briefing by reply. From August 1, 2009 until December 13, 2009 when the case was appealed to the Appellate Court, \$4,213.98 in legal costs were performed largely in relationship to preparing and defending the attorney fee issue.

5. The remainder of the legal costs primarily arose in the months of September 2010 when I prepared the response brief (\$5,219.92) and February 2011 when I prepared and attended oral argument (\$1,785.15).

6. Prime Location continues to incur legal expenses in seeking reimbursement of these legal costs. However, since those legal costs are somewhat of a moving target, being incurred as these document are being prepared, the Petitioner is not seeking reimbursement of those costs unless for some unexpected reason, this becomes a protracted dispute.

7. Attached hereto as Exhibit 1 is an accurate summary of the legal work performed and the legal fees incurred with respect to this matter from August 1, 2009 to the most recent final invoice, March 31, 2012. This summary has been taken from the actual invoices and thus reflects actual work performed and fees incurred. The summary reveals the date the work was performed, the description of the work performed, the amount of time spent, and the total fees incurred. The hourly rates charged are commensurate with the prevailing rates for environmental legal services in Springfield, Illinois for 2009 to 2012 and represent the rates charged to all

EXHIBIT

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clients of the respective attorneys.

8. I have been the primary attorney in this case and have been assisted by my partner, Fred C. Prillaman. My hourly rates have increased twice in the last three years:

- 2009 Shaw: \$165.00 per hour
- 2009 Prillaman: \$220.00 per hour
- 2010 Shaw: \$175.00 per hour
- 2012 Shaw: \$185.00 per hour

FURTHER AFFIANT SAYETH NOT.

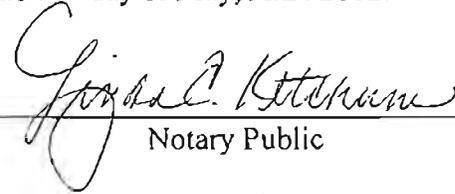


Patrick D. Shaw

STATE OF ILLINOIS        )  
   ) SS.  
 COUNTY OF SANGAMON )

The undersigned, a Notary Public in and for said County, in the State aforesaid, does hereby certify that Patrick D. Shaw, personally known to me to be the same person whose name is subscribed to the above instrument, appeared before me today in person and acknowledged that he signed and delivered that instrument as his free and voluntary act, for the uses and purposes set forth.

Given under my hand and official seal, this 11<sup>th</sup> day of May, A.D. 2012.



Notary Public

Patrick D. Shaw  
 MOHAN, ALEWELT, PRILLAMAN & ADAMI  
 1 N. Old Capitol Plaza, Suite 325  
 Springfield, IL 62701  
 Tel: (217) 528-2517  
 Fax: (217) 528-2553



*Electronic Filing - Received, Clerk's Office, 05/11/2012*

Mohan, Alewelt, Prillaman & Adami  
1 North Old State Capitol Plaza  
Suite 325  
Springfield, IL 62701-1323

Invoice submitted to:  
Prime Location Properties, LLC  
P.O. Box 242  
Carbondale, IL 62903

May 09, 2012

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
<u>August 2009</u>		
8/14/2009 Tel conf w/Duane Keebler.	0.20 220.00/hr	44.00
8/24/2009 Receive & review Board opinion	0.60 165.00/hr	99.00
8/27/2009 Tel conf w/Duane Keebler.	0.10 220.00/hr	22.00
SUBTOTAL:	[ 0.90	165.00]
<u>September 2009</u>		
9/14/2009 Telephone D. Keebler	0.30 165.00/hr	49.50
9/15/2009 Research and draft motion for attorney's fees;	3.00 165.00/hr	495.00
9/16/2009 Revise motion; draft affidavit; email docs to client for review	6.00 165.00/hr	990.00
9/17/2009 File atty fee motion and affidavit	0.50 165.00/hr	82.50

EXHIBIT

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Prime Location Properties, LLC

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	<u>Hrs/Rate</u>	<u>Amount</u>
9/30/2009 Review objection to atty fees	0.30 165.00/hr	49.50
Rec & rev Notice of Filing and Respondent's Objection to Attorney's Fees.	0.10 220.00/hr	22.00
 SUBTOTAL:	 [ 10.20	 1,688.50]
<u>October 2009</u>		
10/1/2009 Research and draft reply to objection to atty's fees	3.50 165.00/hr	577.50
10/2/2009 Research and draft reply to objection to atty's fees	2.50 165.00/hr	412.50
10/5/2009 Revise and file reply	4.00 165.00/hr	660.00
10/7/2009 Draft ltr to Duane Keebler transmitting motion, response and reply	0.50 165.00/hr	82.50
 SUBTOTAL:	 [ 10.50	 1,732.50]
<u>November 2009</u>		
11/9/2009 Receive & review Board order;	1.00 165.00/hr	165.00
11/10/2009 Draft ltr transmitting Board order	1.30 165.00/hr	214.50
 SUBTOTAL:	 [ 2.30	 379.50]
<u>December 2009</u>		
12/14/2009 Receive & review notice of filing and petition for review of board order	0.20 165.00/hr	33.00
Draft ltr to Duane Keebler; tel Keebler	2.50 165.00/hr	412.50

Prime Location Properties, LLC

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	<u>Hrs/Rate</u>	<u>Amount</u>
12/21/2009 Telephone client re appeal/legal cost issues	0.70 165.00/hr	NO CHARGE
SUBTOTAL:	[ 3.40	445.50]
<u>January 2010</u>		
1/7/2010 Receive & review notice of filing and entry of appearance	0.10 165.00/hr	16.50
1/19/2010 Receive & review Agency's motion to transfer appeal	0.20 165.00/hr	33.00
SUBTOTAL:	[ 0.30	49.50]
<u>March 2010</u>		
3/22/2010 Receive & review motion for extension of time	0.20 175.00/hr	35.00
SUBTOTAL:	[ 0.20	35.00]
<u>April 2010</u>		
4/26/2010 Receive & review motion for extension of time to file brief	0.20 175.00/hr	35.00
SUBTOTAL:	[ 0.20	35.00]
<u>June 2010</u>		
6/1/2010 Receive & review motion for more time	0.10 175.00/hr	17.50
SUBTOTAL:	[ 0.10	17.50]
<u>July 2010</u>		
7/6/2010 Receive & review motion for extension of time	0.10 175.00/hr	17.50

Prime Location Properties, LLC

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	<u>Hrs/Rate</u>	<u>Amount</u>
SUBTOTAL:	[ 0.10	17.50]
<u>August 2010</u>		
8/2/2010 Receive & review motion for extension of time	0.20 175.00/hr	35.00
8/23/2010 Receive & review notice of filing brief and appendix of IEPA	0.10 175.00/hr	17.50
SUBTOTAL:	[ 0.30	52.50]
<u>September 2010</u>		
9/14/2010 Draft ltr transmitting IEPA Brief to client	0.10 175.00/hr	17.50
9/20/2010 Review IEPA's brief, draft fact section; research legislative history of LUST program through federal antecedents	5.60 175.00/hr	980.00
9/21/2010 Draft legislative history arguments for brief; review waiver law and facts	4.90 175.00/hr	857.50
9/22/2010 Research and draft legal representation section of brief; begin drafting evidentiary section of brief	6.80 175.00/hr	1,190.00
9/23/2010 Receive & review Board's brief; revise brief in light of Board brief; research and draft argument on attorney's fees	6.30 175.00/hr	1,102.50
9/24/2010 Revise and finalize brief; draft ltr transmitting same to client	5.20 175.00/hr	910.00
9/28/2010 Receive & review ltrs from App. Ct.	0.10 175.00/hr	17.50
SUBTOTAL:	[ 29.00	5,075.00]
<u>October 2010</u>		
10/14/2010 Receive & review motion for extension of time	0.10 175.00/hr	17.50
10/27/2010 Receive & review court order extending deadlines	0.10 175.00/hr	17.50

Prime Location Properties, LLC

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	<u>Hrs/Rate</u>	<u>Amount</u>
SUBTOTAL:	[ 0.20	35.00]
<u>November 2010</u>		
11/4/2010 Receive & review motion for extension of time from IEPA	0.10 175.00/hr	17.50
11/17/2010 Receive & review order granting extension of time	0.10 175.00/hr	17.50
11/24/2010 Receive & review reply brief	0.40 175.00/hr	70.00
SUBTOTAL:	[ 0.60	105.00]
<u>December 2010</u>		
12/10/2010 Draft ltr transmitting recent brief to client	0.10 175.00/hr	17.50
SUBTOTAL:	[ 0.10	17.50]
<u>January 2011</u>		
1/10/2011 Receive & review notice of oral argument setting	0.10 175.00/hr	17.50
1/26/2011 Telephone Marie Tipsord re oral argument; draft ltr to Clerk notifying intent to argue	0.40 175.00/hr	70.00
SUBTOTAL:	[ 0.50	87.50]
<u>February 2011</u>		
2/3/2011 Receive & review order from Ct.	0.10 175.00/hr	17.50
2/4/2011 Receive & review motion to continue; rec notice of oral arg. schedule	0.10 175.00/hr	17.50
2/25/2011 Review file and prepare for oral argument	3.00 175.00/hr	525.00

Prime Location Properties, LLC

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	<u>Hrs/Rate</u>	<u>Amount</u>
2/28/2011 Attend oral argument in Mt. Vernon	7.00 175.00/hr	1,225.00
 SUBTOTAL:	 [ 10.20	 1,785.00]
<u>March 2011</u>		
3/4/2011 Receive & review order allowing motion to cite add'l authority	0.10 175.00/hr	17.50
 SUBTOTAL:	 [ 0.10	 17.50]
<u>March 2012</u>		
3/5/2012 Receive & review Court order	0.40 185.00/hr	74.00
3/15/2012 Draft ltr forwarding decision and motion to publish to client (sent 3/16)	0.40 185.00/hr	74.00
3/21/2012 Telephone conference Duane Keebler re status	0.40 185.00/hr	74.00
 SUBTOTAL:	 [ 1.20	 222.00]
For professional services rendered	70.40	\$11,962.50
Additional Charges :		
<u>September 2009</u>		
9/30/2009 Lexis charges for September 2009.		99.75
Postage for September 2009.		1.56
Photocopying for September 2009.		4.80
 SUBTOTAL:		 [ 106.11]
<u>October 2009</u>		
10/31/2009 Lexis charges for October 2009.		126.99

Prime Location Properties, LLC

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	<u>Amount</u>
10/31/2009 Postage for October 2009.	2.78
Photocopying for October 2009.	12.60
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SUBTOTAL:	[ 142.37]
<u>December 2009</u>	
12/31/2009 Lexis charges for December 2009.	7.08
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SUBTOTAL:	[ 7.08]
<u>September 2010</u>	
9/24/2010 Check #26369 to 5th District Appellate Court, re File Fee	15.00
9/30/2010 Postage for September 2010.	26.32
Photocopying for September 2010.	103.60
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SUBTOTAL:	[ 144.92]
<u>December 2010</u>	
12/31/2010 Postage for December 2010.	1.73
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SUBTOTAL:	[ 1.73]
<u>January 2011</u>	
1/31/2011 Telephone charges for January 2011.	1.62
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SUBTOTAL:	[ 1.62]
<u>February 2011</u>	
2/28/2011 Telephone charges for February 2011.	0.15
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SUBTOTAL:	[ 0.15]

Prime Location Properties, LLC

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	<u>Amount</u>
<u>March 2011</u>	
3/11/2011 Check #26638 to Patarick Shaw re miles to/from Mt. Vernon 2/28/11.	134.64
SUBTOTAL:	[ 134.64]
<u>March 2012</u>	
3/31/2012 Telephone charges for March 2012.	0.03
SUBTOTAL:	[ 0.03]
Total additional charges	<u>\$538.65</u>
Accounts receivable transactions	