

ILLINOIS POLLUTION CONTROL BOARD  
January 21, 1988

GERTRUDE GUERRETTAZ, EUNICE SCHACKMANN, )  
MICKIE BUNTON, KATE BERGBOWER, )  
RUTH BERGBOWER, SANDRA SCHACKMANN, )  
MADONNA SCHACKMANN, WAYNE BERGBOWER, )  
SCOTT BERGBOWER, BROWNIE BERGBOWER, )  
ROSEMARY BERGBOWER, TOM BERGBOWER, )  
TIM MC DONALD, GLORIA MC DONALD, )  
KENNY BERGBOWER, CHUCK BERGBOWER, )  
JIM DHOM, CLOYCE BUNTON, LARRY CASEY, )  
BILL MENKE, JOE SCHACKMANN, KEITH )  
SCHACKMANN, BRYAN BERGBOWER, LISA )  
BERGBOWER, AUDREY MENKE, SUSAN BERGBOWER, )  
CHRISTINE LITZELMAN, ANDY DHOM, )  
SHARON DHOM, ED YAGER, CAROL YAGER, )  
DEBBIE YAGER, GENEVA DHOM, TERESA DHOM, )  
BRIAN DHOM, GENE SCHACKMANN, JANE CASEY )  
and A.C. DHOM, )  
 )  
 )  
Petitioners, )  
 )  
v. ) PCB 87-76  
 )  
 )  
JASPER COUNTY, ILLINOIS and )  
LENA RICHARDSON and BERGBOWER )  
LANDFILL, INC., )  
Respondents. )

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes to the Board on a June 2, 1987, Petition for Review filed by Gertrude Guerrettaz, Eunice Schackmann, Mickie Bunton, Kate Bergbower, Ruth Bergbower, Sandra Schackmann, Madonna Schackmann, Wayne Bergbower, Scott Bergbower, Brownie Bergbower, Rosemary Bergbower, Tom Bergbower, Tim McDonald, Gloria McDonald, Kenny Bergbower, Chuck Bergbower, Jim Dhom, Cloyce Bunton, Larry Casey, Bill Menke, Joe Schackmann, Keith Schackmann, Bryan Bergbower, Lisa Bergbower, Audrey Menke, Susan Bergbower, Christine Litzelman, Andy Dhom, Sharon Dhom, Ed Yager, Carol Yager, Debbie Yager, Geneva Dhom, Teresa Dhom, Brian Dhom, Gene Schackmann, Jane Casey and A.C. Dhom (hereinafter "the Citizens"). That petition challenges the action of the Jasper County Board (hereinafter "the County") on an application by Lena Richardson and the Bergbower Landfill (hereinafter "the Applicant") for site location suitability approval for a regional pollution control facility under Section 39.2 of the Environmental Protection Act (hereinafter "the Act"). A hearing was held by the Board on July 27, 1987. At that hearing, the Citizens appeared and presented one witness. Neither the County

nor the Applicant appeared at the hearing. On August 26, 1987, Citizens filed their brief. On September 14, 1987, the Applicant filed a one page letter with the Board.

The proceedings under Section 39.2 of the Act have particular notice and service requirements which the Courts have interpreted as jurisdictional prerequisites. The Citizens have raised jurisdictional issues as one of their arguments. They argue that one of the persons required to be served by the statute was, in fact, not served. Consequently, this Board must first determine whether jurisdiction before the County Board was appropriate. The notice and service requirements at issue are contained in Section 39.2 (b) of the Act, and require certain actions by the landfill applicant prior to filing an application with the County Board:

- b. No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirements; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.

Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located. Such notice shall state the name and address of the applicant, the location of the proposed site, the nature and size of the development, the nature of the activity proposed, the probable life of the proposed activity, the date when the request for site ap-

proval will be submitted to the county board, and a description of the right of persons to comment on such request as hereafter provided.

The provisions of the statute relating to notice were first interpreted in City of Aurora v. Kane County Board, et al., 139 Ill.App.3d 588, 487 N.E. 2d 743 (1985). In the Kane County case, the Elgin Sanitary District (ESD) filed its application August 11, 1983. Newspaper notice was not published until August 10. However, as this notice stated only that the application would be filed "within 14 days," ESD published a new notice on August 20 which stated the date the application was filed, the last date of the comment period, and the date of the public hearing. The petitioners in that case argued that the 14-day notice provision of paragraph 1 of Section 39.2(b) (individual notice to land owners) applied to paragraph 2 (newspaper notice), and that ESD violated the notice provisions, "thereby substantially shortening the length of the comment period available to the general public." The Board takes administrative notice of the fact that, had notice been published 14 days in advance of a specified filing date, the public would have had 44 days to consider and to formulate written comments. Because notice of the filing date, from which the comment period ran, was not published until August 20, the period was effectively reduced from 44 to 22 days.

The Appellate Court for the Second District held that "ESD's failure to publish appropriate newspaper notice and notice of the date it filed the site location request rendered the Kane County Board hearing invalid for lack of jurisdiction," finding the notice requirements of Section 39.2(b) to be "jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal." In reaching this result, the court applied the reasoning employed by the Third District Appellate Court in Illinois Power Co. v. IPCB, 137 Ill.App.3d 449, 484 N.E.2d 898 (1985). In Illinois Power, in a situation where the Board had failed to give both the 21-day notice to individuals and the newspaper notice to the general public required by Section 40(b), the court found that the statutory notice requirement were jurisdictional, given the statutes' use of the mandatory term "shall," and the general principle that an administrative agency derives power solely from its enabling statute.

In Kane County, the Second District asserted the Illinois Power rationale applied "even more strongly" because:

"This broad delegation of adjudicative power to the county board clearly reflects a legislative understanding that the county board hearing, which presents the only opportunity for public comment on the proposed

site, is the most critical stage of the landfill site approval process. We find support for this view also in the statutory notice requirements themselves, which are more demanding at the county board phase of the process. In view of the significance of this critical stage, we apply the reasoning of the Illinois Power Company court, which recognized jurisdictional safeguards at the review stage of site approval proceedings, to the county board proceedings. The notice requirements contained in Section 39.2(b) of the Environmental Protection Act (Ill.Rev.Stat. 1983, ch. 111-1/2, par. 1039.2(b)) are jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal (citations omitted).

This Board first applied the Kane County rationale in City of Columbia, et al., v. County of St. Clair, et al., PCB 85-177, 220, 223 (April 3, 1986) (hereinafter "Columbia"). In Columbia, the Board found that a one day deficiency in notice directives rendered the application deficient. The Second District has applied the Kane County decision to a factually similar situation involving a one-day deficiency in notice. Concerned Boone Citizens v. M.I.G. Investments, 144 Ill.App.3d 334, 494 N.E.2d 180 (June 4, 1986). The Fifth District recently issued the fifth appellate court opinion to cite this rule with approval in Browning-Ferris Industries of Illinois v. PCB (Case No. 5-86-0292, Slip Opinion November 18, 1987):

We find the reasoning of Kane County Defenders to be persuasive and, accordingly, follow the rule set forth in that decision. Like the Kane County Defenders court, we find the 14-day pre-filing notice requirement stated in the first paragraph of Section 39.2(b) to be applicable to the second paragraph concerning newspaper publication as well. (Accord Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc.) Since the notice requirements of Section 39.2(b) are jurisdictional, even the one day deviation from the requirement of newspaper publication here was not de minimus but, rather, rendered the County without jurisdiction to consider BFI's request. (Cf. Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc.: county board lacked jurisdiction to act on request filed 13 days after notice of request was published.) Similarly, because of the jurisdictional nature of these requirements,

the County was without authority to hear BFI's request whether or not actual prejudice was shown to have resulted from BFI's failure to come within the statutory time limits. (Id., at 8)

Thus, the law seems well established that the notice requirements of Section 39.2 (b) are jurisdictional prerequisites because the statutory language articulating those requirements is phrased in terms of "The notice shall".

The Illinois Power court, and the court opinions interpreting the notice requirements of Section 39.2 (b) as jurisdictional prerequisites, have all placed special emphasis on the statutory use of the term, "shall". The Board believes that the articulated legal theories which apply to one use of the word "shall" in a Section of the Act should be equally applicable to other uses of the word "shall" in the same Section. The language of Section 39.2 (b) states in the first sentence of the first paragraph that, "[T]he applicant shall cause written notice of such request to be served..." That sentence continues by describing who must be served with notice. Based on the rationale articulated in the preceding cases, and particularly the Browning-Ferris court, this Board holds that the obligation to serve notice, "on the owners of all property within 250 feet..." of the subject property is a jurisdictional prerequisite and that a one person deficiency in notice, just as a one day deficiency in notice, is not de minimus, whether or not actual prejudice is shown to have resulted. This is the rule the Board must apply to the facts of this case to determine whether jurisdiction exists.

The facts upon which the Citizens rely to demonstrate a lack of service of notice come exclusively from the hearing before this Board and the only witness to testify at that hearing:

HEARING OFFICER DAVIS: Mr. Bergbower, do you still want to be heard? If you would come up and take this seat. If you would just identify yourself and your address.

MR. BERGBOWER: My name is Mark Bergbower. I live on Route Five.

HEARING OFFICER DAVIS: In Jasper County?

MR. BERGBOWER: Jasper County.

HEARING OFFICER DAVIS: Illinois?

MR. BERGBOWER: Yes.

HEARING OFFICER DAVIS: What would you like to say?

MR. BERGBOWER: Well, yes, I do own ground 250 feet from the landfill, and I say right here is my taxes that show that I paid for it, and I wasn't notified about it, and that's about it. (R. 24-25)

Neither the landfill applicant nor the County Board were present at that hearing to question Mr. Bergbower or provide contradicting evidence. Therefore, Mr. Bergbower's statements under oath are unrebutted.

In an effort to gain further insight on this issue, the Board has reviewed the record filed by the County Board to see if it sheds light on who was served with notice and who appears on the "authentic tax records of the County". The County Board record does contain a document described as "letter of notification" (County Board Record, Volume A, pp. 5-6). However, that document leaves the name of the recipient blank, and appears to be included in the landfill application as an example of the content of the notices sent, rather than as proof of service on any one individual. The County Board record, and the landfill application itself, contains no proof of service on any landowner. The application filed with the County Board also contains a document called "Location Map" (County Board Record, Volume A, p. 4), which appears to represent the location of the facility and appears to represent various surrounding tracts of land with individual names written in the tracts. However, there is no indication that the document represents a current and accurate copy of the "authentic tax records of the County" (the terminology used by the Statute), there is no indication of scale on the map so that the Board might determine what constitutes 250 feet, and many of the parcels shown on that map have the name Bergbower written in the parcel.

Based on the foregoing, the Board finds that the undisputed evidence shows that Mr. Mark Bergbower does own property within 250 feet from the subject property, that he does appear on the tax records of the County, and that he was not served with notice of filing of the landfill application. Consequently the Board holds that the Jasper County Board lacked jurisdiction to entertain the proceeding, and their action on the proceeding must be vacated.

The Board notes that on September 14, 1987, the Landfill Applicant filed a letter with this Board which states in its entirety:

1. The Jasper County Board's decision should be affirmed.

2. Mark Bergbower was present at the Bergbower Landfill hearing at the Jasper County Court House on March 17, 1987. He was seen there by Tom Shamhart and Dirinda Bergbower.

Assuming that this unverified information is accurate, it would at most go to the issue of how much actual prejudice Mr. Mark Bergbower might have suffered by the failure of notice. The Browning-Ferris court informs the Board that such an issue is not appropriate for consideration.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

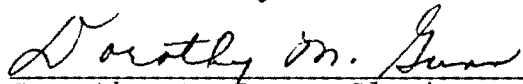
The action of the Jasper County Board on the application for landfill siting approval filed by Lena Richardson and Bergbower Landfill Inc., is hereby vacated for lack of jurisdiction.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985, ch. 111-1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

J. D. Dumelle and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of January, 1988 by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board