

ILLINOIS POLLUTION CONTROL BOARD
February 19, 1987

RICK MOORE, LEONARD MORRIS)
and EDITH SIMPSON,)
)
Petitioners,)
)
v.) PCB 86-197
)
WAYNE COUNTY BOARD and)
DAUBS LANDFILL, INC.,)
)
Respondents.)

JAMES YOHO, ESQ., APPEARED ON BEHALF OF THE PETITIONER;

STEPEHN SWOFFORD, ESQ., STATES ATTORNEY, APPEARED ON BEHALF OF
RESPONDENT, WAYNE COUNTY BOARD; AND

THOMAS J. IMMEL, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF
RESPONDENT, DAUBS LANDFILL, INC.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on a November 6, 1986, petition to contest granting of site location approval, filed by Rick Moore, Leonard Morris and Edith Simpson (hereinafter "the Citizens"). That petition seeks review of a September 30, 1986, decision of the Wayne County Board (hereinafter "Wayne County") granting approval to a site location suitability request filed by Daubs Landfill, Inc. (hereinafter "Daubs"). A hearing was held December 30, 1986. Final briefs were filed by Daubs on January 20, 1987, and by the Citizens on February 2, 1987.

The threshold issue raised in this petition for review is whether Wayne County, and subsequently this Board, has jurisdiction to entertain this proceeding. These proceedings were conducted pursuant to Section 39.2 of the Environmental Protection Act ("Act") and are commonly referred to as "SB172" proceedings. The Citizens argue that due to a defect in the description of the location of the proposed site, Daubs failed to satisfy the notice requirements of Section 39.2(b) of the Act by providing an inaccurate legal description of the proposed site in the notice of application. The legal theory that compliance with the notice requirements of Section 39.2(b) is a jurisdictional prerequisite was first articulated by the Second District Court in The Kane County Defenders, et al. v. The Pollution Control Board, et al., 139 Ill. App. 3d 588, 487 N.E.2d 743, (December 30, 1985). The Kane County court found that a failure to provide adequate notice deprived the county board and the Pollution Control Board of jurisdiction.

In the instant case, Daubs' newspaper notice of application and registered mail service of notice of application contained, in addition to a general narrative description of the site location, a legal description that provided the wrong Township (the facility is actually in Township 2 South, the notice listed it as being in Township 1 South). The error would place the noticed site location at least six miles north of the actual site.

In response, Daubs argues that the typographical error in the legal description of the property is not a jurisdictional defect. Daubs asserts that: (1) a legal description of the property is not required by statute, thus, the legal description is mere surplusage; (2) the location of the proposed site was adequately and accurately described in the narrative which followed the legal description in the notice which was published on March 30, 1986; (3) the public notices provided by Wayne County provided the correct legal description of the location of the proposed facility; and (4) no harm or prejudice has been demonstrated to result from the error and in the absence of a showing of harm, the error should be ignored.

To properly evaluate the respective positions, it is appropriate to review the statutory requirements and the relevant facts. Because of the nature of the case, the particular timing and content of the notice and publication efforts become crucial to an ultimate decision. It is therefore appropriate to review the prehearing record in great detail.

The notice requirements which are placed on the applicant are described in Section 39.2(b) of the Act:

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

No arguments have been raised about the manner of service, publication, or timeliness of the notice. Therefore, the Board must conclude that all appropriate persons were served in a timely and proper manner. The issue presented is whether the incorrect legal description in the notice of application published in the newspaper and served on the required individuals renders the notice defective and divests the county board and this Board of jurisdiction.

The process below began when Daubs prepared a "Notice of Request for Site Location Approval...." That notice was published in a local newspaper to satisfy the publication requirements of Section 39.2(b) and the same notice was sent, by registered mail, to legislators and adjacent property owners to satisfy the service requirements of Section 39.2(b). The notice contained an incorrect legal description of the property (Township 1 South, rather than Township 2 South), although the narrative description closely described the location. The relevant descriptions from the notice stated:

Be it known that on the 8th day of April, 1986, Daubs Landfill, Inc., 203 Jessup, Carmi, Illinois 62821, will request site location approval, pursuant to the Illinois Environmental Protection Act, from the Wayne County Board for a regional pollution control facility on the following described lands, to-wit: E-2 NE-4; E-2 W-2 NE-4; NW-4 SE-4; E-2 NE-4 SW-4; all in Section 5, Township 1 South, Range 7 East of the 3rd Principal Meridian, Wayne County, Illinois, located approximately 1/2 mile North of Illinois State Highway 15 West of Fairfield, Wayne County, Illinois, and approximately 2 miles West of U.S. Highway 45 North of Fairfield, Wayne County, Illinois, and being approximately 2 1/2 miles West of the

West city limits of the City of Fairfield, Wayne County, Illinois. The proposed use of the facility will be for a non-hazardous residential and industrial general solid waste disposal landfill.

The next chronological item in the record below is the April 8, 1986, Request for Approval filed with Wayne County by Daubs. That request for approval again provided an incorrect legal description of the location of the proposed facility:

On behalf of my client, Daubs Landfill, Inc., 203 Jessup, Carmi, Illinois 62821, I am hereby formally requesting site location approval for a site for a non-hazardous residential and industrial general waste landfill from the Wayne County Board for the following described lands, to-wit:

T1S R7E

Section 5: E/2 NE/4; E/2 W/2 NE/4;
NW/4 SE/4; E/2 NE/4 SW/4,
Wayne County, Illinois

pursuant to Illinois Revised Statutes, ch. 111¹/₂, Sec. 1039.2

From the record, it appears that the request for approval included the above-quoted paragraph, a copy of the Notice of Request published March 10, 1986, cover letters and return receipts for those individuals required to be served pursuant to Section 39.2(b) and a 3¹/₂ page letter describing Wayne County's options for future land disposal, encouraging Wayne County to select the option allowing Daubs to operate a landfill, and promising to provide technical information as soon as it was available from the registered professional engineer. In a May 15, 1986, letter to the Attorney for Citizens, the Wayne County State's Attorney recounted certain decisions reached by the Wayne County Board, including a requirement that Daubs file a detailed proposal concerning the landfill not later than June 1, 1986. That letter first raises the discrepancy regarding the incorrect legal description in the notice:

At the May 13 meeting, Mr. David Williams appeared to point out to the County Board an apparent error in the applicant's request for site approval. The request described the location as T1S R73 (sic; should be R7E), Section 5, E/2 NE/4; E/2 W/2 NE/4; NW/4 SE/4; E/2 NE/4 SW/4. Mr. Williams indicated that in fact the request for approval is for T2S R7E, Section 5, E/2 NE/4; E/2 W/2 NE/4; NW/4 SE/4;

E/2 NE/4 SW/4. His position is that this was merely a scrivener's error, not jurisdictional, and that actual notice has been given. You may wish to raise objection in writing and file it with the Wayne County Clerk at least 21 days before the commencement of public hearings and serve a copy upon Mr. Williams. If this objection is filed, I would anticipate it being considered and argued on July 15.

On May 22, 1986, Counsel for the Citizens responded to the State's Attorney's letter regarding the error in description:

With respect to the question of the error in the legal description in the applicant's notice, I will not raise the issue in the manner that you suggest because I believe that the County Board must, nonetheless, hear the matter as it would under ordinary circumstances. If I should ask the County Board to determine that the error voids jurisdiction and the County Board should agree and, as a result, stop the proceedings, at the end of 180 days the applicant presumably would claim that the request is "deemed approved" by operation of law. I simply will proceed as I would have without the error. It is the applicant's problem to assure that all jurisdictional prerequisites have been met. Apparently the applicant has determined that the error is not jurisdictional. Whether this is correct must be determined on appeal; certainly I do not in any way waive the issue and neither do I believe I am required to object as you have suggested to preserve the issue.

On June 2, 1986, Daubs filed extensive material with Wayne County, including: a partially completed application for an Illinois Environmental Protection Agency solid waste management permit, letters from Illinois Department of Energy and Natural Resources, State Geological Survey and Illinois Department of Transportation regarding site conditions, various United States Geological Survey maps and survey plats and the resume of the registered professional engineer. The filing letter also indicates that results of the soil and water analysis would be filed not later than June 15, 1986. The partially completed IEPA application and the maps correctly show the location of the proposed facility as Township 2 South.

On June 16, 1986, Wayne County provided notice by certified mail of the location of the proposed facility and the time of the

public hearings. That notice provided a correct legal description of the property and set public hearings to begin on July 15, 1986, at 7:00 p.m., with hearings to be continued as necessary.

This notice appears to be responsive to the requirements of Section 39.2(d) of the Act which places certain notice and hearing requirements on the County Board:

At least one public hearing is to be held by the county board or governing body of the municipality no sooner than 90 days but no later than 120 days from receipt of the request for site approval, such hearing to be preceded by published notice in a newspaper of general circulation published in the county of the proposed site, and notice by certified mail to all members of the General Assembly from the district in which the proposed site is located and to the Agency. The public hearing shall develop a record sufficient to form the basis of appeal of the decision in accordance with Section 40.1 of this Act.

The record discloses copies of the certified mail receipts but contains no reference to the publication in a newspaper of general circulation. Since no party has raised the publication issue, the Board presumes that publication was properly effectuated.

On June 12-16, 1986, Daubs caused a second "Notice of Request..." concerning the same site to be published and served on the appropriate individuals. This notice was identical to the original March 7 notice with two exceptions. First, the error in the legal description had been corrected, and, second, the notice states that an application for site location approval will be filed on July 8, 1986. On July 8, 1986, Daubs filed a second "Request for Site Location Approval." This second request was composed of a cover letter that provided a correct legal description of the proposed site, as well as copies of the June "Notice of Request..." and proof of publication and service. These two documents, according to all parties, are not a legitimate part of this record.

At the hearings, which began July 15, 1986, Wayne County clarified that the June "Notice of Request..." and July, "Request for Site Location Approval" were inadvertently included in this record. The second notice and request constituted a separate and distinct proceeding filed by Daubs. This second proceeding would not be decided by Wayne County based on this record. All parties were in agreement on this interpretation (County Transcript, pp. 83-84). The Board has not been informed of the disposition of

this second proceeding before Wayne County. Since the parties are in agreement that the second "Notice" and "Request" are not properly a part of this record, they will not be considered in the Board's decision.

In summary, the Board finds that in March, 1986, Daubs caused notice to be published and to be served on all required individuals in a timely and proper manner. However, that notice contained an error in the legal description of the location of the proposed site. The notice did contain an accurate narrative description of the proposed site. The Board finds that the April 8, 1986, request for site location approval also contained an incorrect legal description, but contained a correct narrative description. The Board finds that Wayne County fully complied with Section 39.2(d) in that notice was timely, proper and accurate in all respects. From the perspective of those to whom notice is due, the Board finds that the adjacent property owners described in paragraph one of Section 39.2(d) were never served in this proceeding with an accurate legal description of the property and that publication of notice with an accurate legal description first occurred with the Wayne County notice under Section 39.2(d).

The Developing Law

There are no appellate court opinions that directly discuss the consequences of an error in the notice regarding the location of the proposed site. Consequently, the Board must evaluate the general principles of law articulated by the courts relating to Section 39.2(b) notice and apply those general precepts, and any other related law, to the facts of this case. The provisions of the statute relating to notice were first interpreted in City of Aurora v. Kane County Board, et al., No. 84-940 (Ill. App. Second District, December 30, 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 $\frac{1}{2}$, 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 recently 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, No. 85-309, 144 Ill. App. 3rd

334, 494 N.E.2d. 180 (June 4, 1986). Thus, the law seems well established that even a one-day error in publication or service of notice of intent to file a site location suitability request constitutes a fatal error removing jurisdiction from the county board.

This Board's first extension of the Kane County rationale beyond the timing issue occurred in Everett Allen v. City of Mt. Vernon, PCB 86-34 (July 11, 1986). The site location approval process began when Everett Allen prepared a notice of intent to file a site location suitability approval application. That notice was mailed, by certified mail, to the adjacent property owners on July 25, 1985. The legal notice was published in the Mt. Vernon Register-News on July 29, 1985. The actual application was filed with the City of Mt. Vernon on August 12, 1985. Both the notice to adjacent property owners and the newspaper notice contained the following language:

...The City Council of the City of Mount Vernon shall consider any comment received or postmarked not later than 30 days from the date of receipt of the request in making its final determination. Additionally, at least one public hearing is to be held by the City Council of the City of Mount Vernon within 60 days of receipt of the request for site approval....

While this notice was published and mailed in a timely manner, it did not accurately describe the right of persons to comment on the request. At all times relevant to the proceeding, the statute, which had been amended, provided for a public hearing to be held not less than 90 days nor more than 120 days from filing the application and provided that comments postmarked not later than 30 days after hearing must be accepted.

In Allen, the Board found that the error regarding public participation constituted a substantial and material failure to state "... a description of the right of persons to comment on such request as hereinafter provided" (Section 39.2(b) of the Act). The Board also found that the error could not be corrected by a second notice, which correctly described the opportunity to comment, where Allen published that second notice about 90 days after the request was filed. Based on prior holdings, it is clear that even a one-day error in the timing of the notice will be fatal; however, as discussed below, a defect in the content of the notice will only be fatal where that error is substantial and material.

The Environmental Protection Act is not the only statutory guidance of significance to the issues presented today. Chapter 100, I.R.S. (Publication of Notices in General) governs notices

required by law. Of particular relevance is paragraph 8.1, Section 9, which provides:

8.1 Description of real property

§ 9. When any notice required by law sets forth the legal description of real property, the notice shall also designate the street address of the property, or, if there is no street address applicable to the property, shall describe the property with reference to location, ownership or occupancy or in some other manner that will reasonably identify the property to residents of the neighborhood. In the event of a conflict between the legal description and any other description required by this Section, the legal description shall control. No notice under this Section is invalid if the legal description is correct...(Emphasis added)

It would appear that this provision is controlling on one aspect of the issue presented in this proceeding. The March "Notice of Request for Site Location Approval..." prepared by Daubs is a notice required by law. That notice set forth a legal description of the real property and a narrative description. There is a conflict between the legal description and the other description in that the legal description references Township 1 South which is about 6 miles north of the narrative description. Consequently, Paragraph 8.1, Section 9, requires the Board to conclude that the legal description in the March notice was controlling. Paragraph 8.1, Section 9 states that a notice is not "invalid if the legal description is correct." This implies that notice is invalid where, as here, the legal description is incorrect.

In addition to the previous statutory provision, the Board reviewed the case law relating to errors in legal description. Only one case appeared relevant, Gard v. Bosch, 4 Ill. App. 3d 828, 281 N.E.2d 788 (Third District, 1972). In Gard, the Village of Bellevue attempted to annex an 80-acre tract of land to the Village pursuant to procedures established at Ill. Rev. Stat. 1969, Ch. 24, Section 7-1-5*, which provides:

7-1-5. Action by municipal council

7-1-5. After the clerk receives the certified copy of the order of the court, the

* Article 7 of Chapter 24 was significantly amended in 1980.

corporate authorities of the annexing municipality shall proceed to consider the question of the annexation of the described territory. A majority vote of the corporate authorities then holding office is required to annex. The vote shall be by "ayes" and "noes" entered on the legislative records. Except as is otherwise provided in Section 7-1-1, this decision shall be effective after the expiration of 30 days, unless a referendum thereon is ordered by the corporate authorities or unless a petition for such referendum is filed.

Within 30 days after the Village of Bellevue made its annexation decision, a petition for referendum was presented to the corporate authorities. The Gard court found the error in legal description in the petition was not fatal:

Next the appellants argue that the petition described the wrong property and hence was an insufficient basis to require submission of the annexation question to a referendum. The caption of the petition admittedly describes the property correctly. However in the body of the petition the legal description contains the reference to "Southwest Quarter" rather than "Northwest Quarter".

As a general rule the precision required of a legal description of real estate depends upon purpose of the document, the risk of harm and the likelihood that the parties dealing with such document will be misled, injured or prejudiced. Descriptions of municipal boundaries do not require the same specificity as may be required in deeds. People ex rel. Cameron v. New, 215 Ill. 287, 73 N.E. 362. The mistake is patent and the erroneous reference in the body does not even describe property contiguous to the Village. When the description in the body of the petition as well as that in the captions are considered in connection with the annexation ordinance there can be no doubt as to what property was intended and there is additionally no showing that there was any reliance on such mistake to anyone's detriment. People ex rel. Village of Worth v. Ihde, 23 Ill.2d 63, 177 N.E.2d 313.

In reaching that decision, the court made particular note that the referendum proceeding was not a new, separate or

independent action; it related to a decision on the annexation of property which had been made within the last 30 days by the corporate authorities to whom the petition must be delivered.

The process in Gard involved filing a petition with one entity (the corporate authority), which knew the precise legal description based on their prior municipal action. The Board cannot apply the Gard rationale regarding errors in legal description to a notice process which is intended to inform the public at large (publication) and various described individuals (service) of a new and unexpected proceeding.

As a consequence, the Board finds the notice provisions of I.R.S., Ch. 100, paragraph 8.1, Section 9, persuasive and holds that the error in legal description of the property in question constitutes a substantial and material failure to state the location of the proposed site as required by law. As the notice was defective, the Kane County rationale requires the Board to find, and it so finds, that Wayne County lacked jurisdiction to proceed. Accordingly, the decision of the Wayne County Board is vacated.

The Board notes that today's proceeding does not present the issue of whether a legal description is necessary, "to state... the location of the proposed site." Today's proceeding involves a notice where the legal description was used, but the legal description was inaccurate. The Board emphasizes that its determination in this case should not be construed as discouraging the use of a legal description. On the contrary, a correct legal description could arguably be a safeguard against claims that the narrative description in the notice lacked sufficient precision.

This Opinion constitutes the Board's finding of facts and conclusion of law in this matter.

ORDER

The September 30, 1986, decision of the Wayne County Board is hereby vacated.

IT IS SO ORDERED.

Chairman J.D. Dumelle and Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 19th day of February, 1987, by a vote of 4-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board