

ILLINOIS POLLUTION CONTROL BOARD
November 6, 1997

SIERRA CLUB and JIM BENSMAN ,)	
)	
Petitioners,)	
)	PCB 98-43
v.)	(Pollution Control Facility Siting Appeal)
)	
CITY OF WOOD RIVER and NORTON)	
ENVIRONMENTAL,)	
)	
Respondents.)	

ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on an appeal filed pursuant to Section 40.1(b) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/40.1(b) (1996)) on September 22, 1997 by Jim Bensman, from the August 18, 1997 decision of the City of Wood River (City) granting local siting approval to Norton Environmental for a pollution control facility located in Madison County.

On October 14, 1997, Norton Environmental filed a motion to strike the September 22, 1997 petition. Norton Environmental requests that the Board strike the entirety of the petition, or at a minimum, paragraphs 2, 8 through 13, 16, and 20. On October 24, 1997, Mr. Bensman filed a response to the motion to strike and a motion for sanctions against Norton Environmental. On October 29, 1997, Norton Environmental filed a reply to the motion to strike and motion for sanctions, and a motion to dismiss.¹ On November 5, 1997, Mr. Bensman filed a reply to Norton's motion to dismiss and motion for additional sanctions against Norton.

MOTION TO STRIKE THE ENTIRE PETITION

Norton Environmental argues that Mr. Bensman's petition is vague and unclear, "replete with errors, surplusage, summary statements and conclusions, but void of meaningful factual allegations" (Mot. at 2) which "fails to plead anything but mere conclusions" (Mot. at 4). As a result, Norton Environmental claims it cannot prepare for hearing or present an adequate defense given the inadequacies of the petition. Furthermore, Norton Environmental

¹ Mr. Bensman's September 22, 1997 petition for review will be cited as "B. Pet. at"; Norton Environmental's October 14, 1997 motion to strike will be cited as "Mot. at "; Mr. Bensman's October 24, 1997 response and motion for sanctions will be cited as "Resp. at "; and Norton Environmental's October 29, 1997 reply will be cited as "Reply at ".

claims that it has secured a “property right in siting” and is entitled to not only fundamental fairness, but also procedural and substantive due process. Reply at 1. Norton Environmental argues that the petition is “sufficiently infirm as to deny the Board of Jurisdiction.” Reply at 2. Therefore, Norton Environmental requests that the Board grant its motion to strike and dismiss the petition.

Mr. Bensman argues that because the Board accepted his petition and found that it was not duplicitous or frivolous, the Board cannot grant the motion to strike. Mr. Bensman states that pursuant to 40 ILCS 5/40.1 (1996), the Board must hear the petition. Resp. at 2.

On October 2, 1997, the Board issued an order in this matter which found, among other things, that the complaint petition was neither duplicitous nor frivolous. Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental (October 2, 1997), PCB 98-43. After analyzing the petition as a whole, the Board found that it does not fail to state a cause of action upon which relief can be granted. As noted by Mr. Bensman, Section 40.1(b) of the Act requires, where the Board determines that a petition is not duplicitous or frivolous, that the Board hear the matter. 415 ILCS 5/40.1(b) (1996). The matter was accordingly set for hearing.

In ruling on the instant motion to strike the entire petition, or motion to dismiss, the Board must take all well-pleaded allegations as true and may not dismiss the petition unless it clearly appears that no set of facts could be proven which would entitle petitioner to relief. Illinois is a fact-pleading state and, as such, does not require petitioner to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action. LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297 (2d Dist. 1993), People ex. Rel. Fahner v. Carriage Way West, Inc., 88 Ill.2d 300, 430 N.E.2d 1005, 58 Ill. Dec. 754 (1981), Bernice Loschen v. Grist Mill Confections, Inc. (September 18, 1997), PCB 97-174. Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties. (Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E.2d 1167 (1st Dist. 1994).) However, case law is consistent in finding that pleading requirements for administrative review are less exacting than for other causes of action. (Mueller v. Board of Fire and Police Commissioners of the Village of Lake Zurich, 267 Ill. App. 3d 726, 643 N.E.2d 255 (2d Dist. 1994).)

Although there are specific paragraphs which are not properly pled in Mr. Bensman’s petition, which the Board today strikes, the petition itself is not devoid of meaningful factual allegations as alleged by Norton Environmental. The Board notes that Norton Environmental is incorrect in its statement that it has secured a property right in siting. The Appellate Court, First District, has recently held that “siting approval is not a property right.” Medical Disposal Services, Inc., v. PCB & IEPA, cite.

The Board finds that the petition is sufficiently pled to proceed to hearing. However, the Board reminds the parties that the burden of proof is on Mr. Bensman and the Sierra Club in this matter. 415 ILCS 5/40.1(b) (1996). Further, the Board finds that Norton Environmental can prepare a defense based upon the criteria alleged in the petition to have

been violated. The Board therefore denies Norton Environmental's motion to strike the petition in its entirety. However, the Board will independently address each of the paragraphs raised in Norton Environmental's motion to strike.

MOTION TO STRIKE PARAGRAPHS IN THE PETITION

Norton Environmental requests that the Board strike the following paragraphs of the petition: 2, 8 through 13, 16, and 20. First, Norton Environmental alleges that paragraph 2, referring to the Sierra Club members who live in "close proximity" to the facility, should be stricken because it is "vague, unclear and consists of mere conclusions." Mot. at 2. The Sierra Club has, in accordance with the Board's order (Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental (October 2, 1997), PCB 98-43), filed an amended petition for review (see supra p.4-5) which specifically addresses the Sierra Club's position in this matter. Paragraph 2 of Mr. Bensman's petition specifically refers to the Sierra Club's involvement in this matter. Because Mr. Bensman is prohibited from representing the Sierra Club, and by virtue of the fact that the Sierra Club has filed its own petition, the Board will strike paragraph 2 of Mr. Bensman's petition for review.

Second, Norton Environmental requests that the Board strike paragraphs 8 through 13 of the petition which address fundamental fairness. As Norton Environmental points out, Mr. Bensman's petition addresses the fundamental fairness of the hearing before the City of Wood River in paragraphs 8 through 13. Mot. at 3 citing B. Pet. at 3. However, Mr. Bensman states in paragraph 13 of his petition, "[p]etitioners have chosen to not raise the issue of fundamental fairness." B. Pet. at 3. Furthermore, Mr. Bensman later confirmed his intention and stated that "the petition only challenges the criteria." Resp. at 2. Mr. Bensman has thereby waived his ability to raise arguments at hearing relating to fundamental fairness.² Therefore, any arguments relating to the fundamental fairness of the hearing before the City of Wood River are irrelevant to the instant petition for review and are not appropriately before the Board in this matter. Accordingly, the Board hereby strikes paragraphs 8 through 13 of Mr. Bensman's petition.

Third, Norton Environmental argues that paragraph 16 of the petition is unclear, and cites a presumption which does not exist. Mot. at 3. Paragraph 16 states that the City's finding of bias and lack of credibility of the County's Environmental Committee Chair was against the manifest weight of the evidence because there is a "presumption that administrative officials are objective and capable of fairly judging a particular controversy." B. Pet. at 4. As the Board has noted above, the State of Illinois is a fact-pleading state, and Mr. Bensman is not required to plead all the facts specifically in his complaint. The Board believes, while acknowledging that Mr. Bensman could have pled more facts, that it is clear that he has included paragraph 16 to support his allegation that Norton Environmental did not demonstrate compliance with criterion #1 (415 ILCS 5/39.2(a) (1996)), and the City of Wood River erred in determining that criterion #1 was met. Mr. Bensman clearly included this argument under

² The Board notes that issues of fundamental fairness are similarly not raised in the Sierra Club's petition for review.

the section of the petition titled "Count I Criterion #1". B. Pet. at 4. The Board will not strike paragraph 16 of Mr. Bensman's petition.

Fourth, Norton Environmental requests that the Board strike paragraph 20 of Mr. Bensman's petition because it is unclear and misstates the statutory language of criterion 5. Mot. at 3. Paragraph 20 is placed under the section of Mr. Bensman's petition titled "Count III Criterion 5." B. Pet. at 5. The petition states that "Norton was required to 'demonstrate' that 'the facility is located so as to ...minimize the effect of the value of the surrounding land.' (Criterion 5.)" Pet. at 5.

Mr. Bensman incorrectly quoted the statutory language of Section 39.2(a)(5), which states an applicant must demonstrate that "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents." 415 ILCS 5/39.2(a)(5) (1996). Criterion #5 does not address the value of the surrounding land, which is referenced in criterion #3 (415 ILCS 5/39.2(a)(3) (1996)). Norton Environmental is correct that Mr. Bensman has misstated criterion #5. In Mr. Bensman's response he states that Norton Environmental did correctly point out this typo in his petition, "the citing of the language of Criterion III and referring to it as Criterion V." Resp. at 4. Mr. Bensman does not explicitly explain which criterion he is alleging was violated.

Criterion #3 states that the applicant must demonstrate that "the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property." 415 ILCS 5/39.2(a)(3) (1996). The Board believes, given the fact that Mr. Bensman's petition has quoted from criterion #3, that he mistakenly referred to criterion #3 as criterion #5. The Board will therefore interpret Count III of Mr. Bensman's petition, including paragraphs 19 and 20, as alleging a violation of criterion #3 (415 ILCS 5/39.2(a)(3) (1996)). The Board denies Norton Environmental's motion to strike paragraph 20.

MOTION FOR SANCTIONS

Mr. Bensman requests that the Board order sanctions against Norton Environmental in the amount of \$1000 for his cost in responding to Norton's October 14th motion to strike, and the costs for the Board hearing the motion. Mr. Bensman alleges that Norton Environmental's motion to strike is frivolous and designed to harass him and to waste the Board's time. Resp. at 1, 2, 3, and 4. Further, Mr. Bensman alleges that Norton Environmental's motion does not reference any law, regulation, Board policy, guidance, or case that supports the motion. Resp. at 1. Norton Environmental does not specifically address the motion for sanctions.

Mr. Bensman requests Norton be sanctioned an additional \$1000 for his time and expenses in responding to Norton's October 29th motion to dismiss. Mr. Bensman states several reasons including that it is a frivolous and harassing motion, untimely filed, and fails to cite legal authority.

The Board clearly has the ability to sanction parties. 35 Ill. Adm. Code 101.280 (1996); Grigoleit Co. v. IPCB, 245 Ill. App.3d 337 at 346, 613 N.E.2d 371 at 377 (1993)

citing EPA v. Celotex Corp., 168 Ill.App.3d 592, 522 N.E.2d 888 (1988). In determining whether to sanction a party, the Board will consider such factors as “the relative severity of the refusal or failure to comply, the past history of the proceeding, and the degree to which the proceeding has been delayed or prejudiced” (35 Ill. Adm. Code 101.280(b) (1996)). Norton Environmental’s motion to strike does not delay or prejudice this proceeding to such a degree as to warrant sanctions. In fact, the Board today grants a portion of the motion to strike. The Board denies Mr. Bensman’s requests for sanctions.

AMENDED PETITION FILED BY THE SIERRA CLUB

By order of October 2, 1997, the Board found, among other things, that pursuant to the provisions of the Attorney Act (705 ILCS 205/1 (1996)) and the Corporation Practice of Law Prohibition Act (705 ILCS 220/1 (1996)), Mr. Bensman, as a non-attorney, could not represent the Sierra Club in this action. Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental (October 2, 1997), PCB 98-43. The Board allowed the Sierra Club 30 days in which to retain an attorney and for that attorney to file an amended petition and appearance on behalf of the Sierra Club on or before October 31, 1997. On October 30, 1997, an attorney on behalf of the Sierra Club filed an appearance and amended petition for review. The Sierra Club filed its petition on its own behalf, not on behalf of Mr. Bensman. The Sierra Club challenges all of the Section 39.2(a) criteria. The Board hereby accepts the Sierra Club’s amended petition for review and also docketed that petition as PCB 98-43. Mr. Bensman’s September 22, 1997 petition and the Sierra Club’s October 30, 1997 petition, will be treated as consolidated matters and as such will proceed, for purposes of hearing and decision, as consolidated.

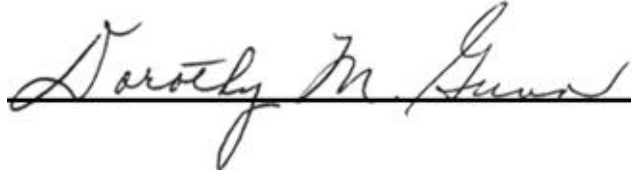
CONCLUSION

The Board hereby denies Norton Environmental’s motion to strike Mr. Bensman’s petition in its entirety. The Board grants Norton Environmental’s motion to strike paragraphs 2, 8, 9, 10, 11, 12 and 13 of Mr. Bensman’s petition for review. The Board denies Norton Environmental’s motion to strike paragraphs 16 and 20 of Mr. Bensman’s petition for review. The Board denies Mr. Bensman’s motions for sanction against Norton Environmental.

IT IS SO ORDERED.

Board Members G. Tanner Girard and J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 6th day of November 1997, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board