

BEFORE THE ILLINOIS POLLUTON CONTROL BOARD

AMERICAN DISPOSAL SERVICES OF)
 ILLINOIS, INC.,)
)
 Petitioner,)
)
 vs.)
)
 COUNTY BOARD OF McLEAN COUNTY,)
 ILLINOIS, HENSON DISPOSAL, INC., and)
 TKNTK, LLC,)
)
 Respondents.)

No. PCB 11-60

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STATE OF ILLINOIS
Pollution Control Board

MOTION TO STRIKE AND DISMISS

Now comes the Respondent, HENSON DISPOSAL, INC. and TKNTK, LLC, by their attorney, Richard T. Marvel and in support of its motion to strike and dismiss pursuant to the Illinois Administrative Code Title 35, Section 101.506 states as follows:

I. Overview

Henson Disposal Inc., filed an Application for Siting Approval on August 9, 2010 with the County of McLean. In its Application, Henson Disposal, Inc., requested local siting approval for a construction debris and landscape waste treatment facility. At the proposed facility, Henson Disposal, Inc. intends to accept construction debris and then separate out those items that can be recycled from those items that must be treated as waste and sent to a local landfill.

On December 9, 2010, the Pollution Control Site Hearing Committee of McLean County (“the Committee”) conducted a public hearing on the siting application at which time Henson Disposal, Inc. presented evidence to the Committee. The Committee recommended siting

approval to the McLean County Board. The McLean County Board approved the Application for Siting on February 15, 2010.

On March 22, 2011, American Disposal Service of Illinois, Inc., filed a Petition for Review of the McLean County Board's decision to grant local siting approval. Said Petition for Review was filed pursuant to Section 39.2 and 40.1 of the Illinois Environmental Protection Act.

In the Petition for Review the Petitioner incorrectly asserts that the Respondent is intending to treat "single stream recycling" at this proposed location. Any information regarding single stream recycling, within the application or that was provided to the Committee was provided at the request of that Committee. Single stream recycling is not a part of this particular siting application.

II. ARGUMENT

I. The County of Mclean failed to take final action on the August 9, 2010 Application for Siting Approval within the statutorily mandated 180 days, and as such, the Siting Application was automatically granted on February 4, 2011.

The Illinois Environmental Protection Act ("the Act") mandates the local siting authority issue a final decision on an Application for Siting Approval within 180 days after the date on which it received the Application. *Peoria Disposal Co. v. Illinois Pollution Control Bd.*, 896 N.E.2d 460, 473 (Ill. App. 3d Dist. 2008). Henson Disposal filed its Application for Siting Approval on August 9, 2010. A final decision by the local siting authority was therefore due on or before February 4, 2011. The Mclean County Board did not approve the Siting Application until February 15, 2011.

While the public hearing on the Application was conducted within the 180-day time frame, the final decision of the siting authority was not made in a timely manner and no waiver

of that deadline was provided. Accordingly, the Application for Siting Approval is deemed “granted” effective February 4, 2011.

The statutory right to appeal the approval or denial of a Siting Application presupposes a decision by the local siting authority within the mandated timeframes. Without a decision made by the county board within the 180-day time frame, the siting is deemed approved, and the appeal rights provided in the Act are not triggered. The “action” that starts the time for filing the Petition for Review is the final decision of the Board within 180 days of the request for siting, or the failure of the Board to take action within 180 days. *35 ILAC § 107.204*.

Even if this Board concludes that the appeal rights still exist, the time frame in which an appeal must be filed would begin to run from the date approval is granted; in this case, automatically granted on February 4, 2011. See *35 ILAC § 107.204*. The appeal rights expired on March 11, 2011, 35 days following the siting approval on February 4, 2011. *35 ILAC § 107.204*. The Petition for Review was not filed until March 22, 2011. The Petition for Review filed by Petitioner herein is untimely and therefore subject to dismissal.

The basis for the appeal must be predicated on the Act and the requirements within the Act itself. The Act provides for the protection of fundamental fairness for the participants during the siting application processes at the local level. If the local siting authority fails to adhere to the decision deadlines, the statute provides protection for the Applicant and expressly deems the Application granted. This protects the Applicant from becoming a victim to circumstances, which lie outside of their control.

WHEREFORE, the Respondents, HENSON DISPOSAL, INC. and TKNTK, LLC. pray that the Petition be dismissed with prejudice.

II. American Disposal Services of Illinois, Inc., fails to establish the requisite content as required by Title 35 of the Illinois Administrative Code Section 107.208 “Petition Content Requirements”.

Board Rules require that the petitioning party include a copy of the local siting authority's written decision or ordinance; a statement as to how the filing party is a proper petitioner under Section 107.200, and in accordance with Section 39.2 of the Act, a specification of the grounds for the appeal; including any allegations of fundamental unfairness or any other manner in which the decision as to particular criteria is against the manifest weight of the evidence. *35 Ill Admin. Code §107.208*. The Board may entertain any motion permissible under the Act, other applicable law, Board rules, or the Illinois Code of Civil Procedure. *35 Ill. Admin. Code §101.500(a)*. The Petitioner's pleading fails to establish the necessary components and is facially defective pursuant to Illinois Code of Civil Procedure and Board Rules.

For example, the allegations of paragraph 4 of the Petitioner's pleading, allege only a general conclusory basis in trying to establish the Petitioner participated in the public hearing. Paragraph 4 merely asserts "ABS participated in and attended the local site location review public hearing" *See Petitioner's Petition ¶4*. Petitioner fails to plead facts and fails to adequately apprise the Respondent, or the Board as to the specific facts establishing this alleged participation.

Although a party may plead only ultimate facts rather than evidence upon which he relies, the words used must give the opponent sufficient information as to the character of the evidence to be introduced or the issues to be tried and if the words do not provide that information, the allegations may be deemed conclusory and stricken. *J. Eck & Sons, Inc. v. Reuben H. Donnelley Corp.*, 213 Ill.App.3d 510 (1991).

Fact, rather than notice pleading, is required in Illinois. Therefore, the petition reviewing the decision of a local siting authority must set out sufficient facts which would establish jurisdiction for the Board to review the decision. The Petitioner must allege facts sufficient to bring the claim within the required jurisdictional components of the Board Rules, particularly §107.200. The fact that pleadings are to be liberally construed does not relieve a Petitioner of a

duty to include substantial factual allegations in its complaint. *Campbell v. Haiges*, 152 Ill.App.3d 246, 251 (1987).

American Disposal's only "participation" in the public hearing was a verbal assertion that they were "participating"; no questions were asked, no exhibits offered, no statements made. This is insufficient to establish actual participation within the public hearing. The Merriam-Webster Dictionary defines participate as "to take part". The Petitioner fails to establish or allege any facts which establish actual "participation" in the public hearing. The Petitioner has confused participation with attendance, which merely means "to be present at". See *Merriam-Webster 2011*.

The allegations contained in paragraph 4 of the Petitioner's Petition alleging participation are conclusory and inadequate to meet both the jurisdictional requirements of the Board rules and the general pleading requirements of Illinois law. These allegations should be stricken and the Petition dismissed for failure to establish a necessary jurisdictional element.

WHEREFORE, the Respondents, HENSON DISPOSAL, INC. and TKNTK, LLC. pray that the Petition be dismissed with prejudice.

III. The Petition is void of any reference regarding how the Petitioner is "located as to be affected by the proposed facility" and as such should be dismissed with prejudice.

Board rules require, among other things, that a third party must establish they are "so located as to be affected by the proposed facility" in order to have standing to file a petition for review of the local siting decision. See *35 Ill Admin. Code §107.200(b)*. Other than a general allegation that the Petitioner conducts business in McLean County, the Petitioner fails to establish any facts regarding the location of the business, what the business does, how the business is impacted or any other allegations which the Pollution Control Board could consider

in establishing the Petitioner is so located as to be “affected”. *See Petition Paragraph 5*. As such the Petition is facially defective and inadequate and should be dismissed.

American’s assertion that they “do business in McLean County” is facially defective as it fails to plead any basis of how they are “affected”. If mere presence in McLean County is all that is required, then any business in McLean County would be affected, as would any individual residing in McLean County. The statute and decided case law requires more and therefore the Petition should be dismissed.

Although a party may plead only ultimate facts rather than evidence upon which he relies, the words used must give the opponent sufficient information as to the character of the evidence to be introduced or the issues to be tried and if the words do not provide that information, the allegations may be deemed conclusory and stricken. *J. Eck & Sons, Inc. v. Reuben H. Donnelley Corp.*, 213 Ill.App.3d 510 (1991).

Fact, rather than notice pleading, is required in Illinois. Therefore, the petition reviewing the decision of a local siting authority must set out sufficient facts which would establish jurisdiction for the Board to review the decision of the local authority. The Petitioner must allege facts sufficient to bring its claim within the required jurisdictional components of the Board rules, particularly §107.200.. The fact that pleadings are to be liberally construed does not relieve a Petitioner of a duty to include substantial factual allegations in its complaint. *Campbell v. Haiges*, 152 Ill.App.3d 246, 251 (1987).

Petitioner’s Petition for Review is factually insufficient at law insofar as it fails to include a factual basis upon which the Board could conclude that Petitioner is a third party that is “so affected” by the proposed facility as to give it standing to appeal the decision of the local siting authority. Since the Petitioner has not adequately demonstrated how it is “so affected” then it lacks standing and the Board must dismiss the Petition for Review.

WHEREFORE, the Respondents, HENSON DISPOSAL, INC. and TKNTK, LLC pray that the Petitioner's Petition be dismissed with prejudice.

IV. The Illinois Administrative Code requires the Petitioner to assert the grounds for the appeal including allegations for fundamental unfairness or any manner in which the decision as to particular criteria is against the manifest weight of the evidence. See 35 Ill Admin Code §107.208.

Allegations in paragraph 9 of the Petitioner's Petition plead only general conclusory allegations in trying to establish the criteria as required in Section 107.208(c). The Petitioner asserts only generally that the Public Notice was not accurate, was misleading, and was insufficient under the requirements of 39.2(b) of the Act. The Petitioner fails to allege any specific factual allegations which would give the Board or the Respondents sufficient information as to the character of the evidence to be introduced or the issues to be tried. No specific allegation is made regarding the manner in which the Public Notice was allegedly deficient.

Although a party may plead only ultimate facts rather than evidence upon which to rely, the words must give the opponents sufficient information as to the character of the evidence to be introduced or the issues to be tried and if the words do not provide that information, the allegations may be deemed conclusory and stricken. The Petitioner must allege facts sufficient to bring his claim within the required parameters under the Board rules and the Petition must therefore allege fact and not mere conclusions. The fact that pleadings are to be liberally construed does not relieve a Petitioner of the duty to include substantial factual allegations in its complaint. *Campbell v. Haiges*, 152 Ill.App.3d 246, 251 (1987).

A reading of the allegations contained in paragraph 9, 10, 11 and 12 of the Petition for Review reveals the inadequacy of these conclusory allegations. Petitioner fails to include any specific factual basis for its challenge to the local siting authority's decision and therefore the

Petition fails to meet the pleading requirements of both the Board's rules and Illinois law. The Petition for Review should be stricken as inadequate and conclusory and dismissed.

WHEREFORE, the Respondents, HENSON DISPOSAL, INC. and TKNTK, LLC pray that the Petitioner's Petition be dismissed with prejudice.

V. In the alternative, as a matter of law, the Petitioner failed to participate in the public hearing and therefore the petition should be dismissed.

In addition to the pleading being facially defective and insufficient, the Board can also find, as a matter of law that the Petitioner actually failed to participate in the local siting hearing. The record of the public hearing conducted contains only a comment by the Petitioner that they are "in attendance" and are "participating". See *Transcript of Public Hearing, attached here to as Exhibit A*. The Petitioner failed to raise any issues, present any evidence, ask any questions, or otherwise participate in the hearing in any meaningful respect other than merely listening to the public hearing.

The involvement of the Petitioner, a local competitor, at the public hearing fails to rise to a level of participation, which would entitle them to file an appeal of the local siting approval. In considering a third party's Petition for Review, the Board must find the third party actually participated in the local siting hearing in order to establish that the third party has standing. The IPCB has found participation to exist when the interested party has orally or in writing objected at the public meetings and has made their opposition clear as to the matter, however none of the IPCB cases have found that mere attendance is enough to establish participation. See *Stop the Mega-Dump the County Board of DeKalb County, IL and Waste Management of Illinois, Inc.*, 2010 WL 2547528 (2010) See *American Bottom Conservancy and Sierra Club, v. city of Madison Il., and Waste Management of Illinois, Inc.*, 2007 WL 812020 (Ill.Pol.Control.Bd.), *1+ (2007). In the present case, the Petitioner merely attended the public hearing. The record before the local siting authority is devoid of any actual participation by American at the public

hearing. As a matter of law, the Petitioner herein will be unable to prove actual participation in the local siting hearing and therefore, the Board lacks jurisdiction to hear this Petition and the Petitioner lacks standing to bring it. .

WHEREFORE, the Respondent, Henson Disposal, Inc. and TKNTK, LLC pray that Petitioner's Petition be dismissed with prejudice.

VI. In the alternative, the Petitioner cannot establish standing since, as a matter of law, they cannot establish they are "affected".

The only allegation attempting to establish the Petitioner is "affected" in the petition asserts that Petitioner "does business in McLean County". Exhibit A. The standing inquiry is governed by the express language of §40.1(b) of the Act. See *Ogle County Bd. On behalf of County of Ogle B. Pollution Control Bd.* 272 Ill. App. 3d 184 (2nd Dist, 1995). In Ogle the Petitioner, a third party to the local siting process, in the discovery deposition testified that he lived ten miles from the facility and was a shareholder for the farming corporation upon which he resides. He testified that he was director of an elevator corporation which purchases grain and supplies fertilizers and chemicals to a farm on which the applicant's proposed site is located. He also testified that the elevator corporation would lose crops from the land which would be used for the landfill. The third party Petitioner further testified that one of his own grain elevators is located on land which is 2.5 miles from the proposed landfill. *Ogle County Board on behalf of County of Ogle at 189*. He further testified that waste from the garbage dump dumpsters at his farm and elevator are currently taken to city owned landfills. *Id* at 191. He further speculated that the proposed landfill expansion could put the local landfill out of business forcing him to use the new landfill at "double the price". *Id*. He also testified that he is director and shareholder in a local bank and that from the bank's standpoint the landfill expansion would lower property value in the area. *Id*. Based on all of this evidence, the reviewing court was able to conclude

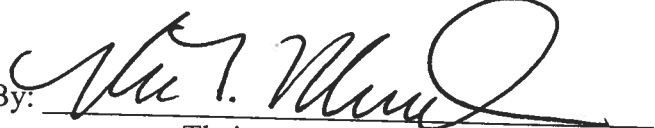
that this particular third party Petitioner was “so affected” as to enable him to file an appeal before the Board.

In the case at bar, the absence of any such allegation of “affectedness” is striking. The Petitioner has not and will not be able to establish that it is so located as to be affected by the approved facility. The legislature specifically included the requirement that a third party be “affected by” a proposed facility as a barrier to siting appeals by those persons or entities that are not actually affected by the facility. If all that is required is merely to reside or do business within the County, then the requirement that a third party actually be affected by the proposed facility is fundamentally meaningless. This pleading requirement is necessary in order to protect the integrity of the statute and the appeal process. The appeal process should not be a tool used by a competitor to suppress free competition.

The Petitioner, alleging nothing more than that it is an entity that conducts business in McLean County, fails to establish the appropriate standing as required in the statute to assert this claim and as a matter of law this petition should be dismissed with prejudice.

WHEREFORE, the Respondents, HENSON DISPOSAL, INC. and TKNTK, LLC, pray that the Petitioner’s petition be dismissed with prejudice

HENSON DISPOSAL, INC. and TKNTK, LLC

By: 
Their attorney

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the above ENTRY OF APPEARANCE was served upon:

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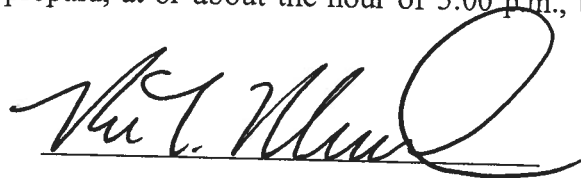
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by enclosing said document in an envelope, addressed as above, and depositing the envelope in the United States Mail, first class postage fully prepaid, at or about the hour of 5:00 p.m., this 18 day of April, 2011.



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POLLUTION CONTROL SITE HEARING COMMITTEE

REPORT OF PROCEEDINGS in the above-entitled
cause on Thursday, December 9, 2010, at 115 East
Washington Street, Room 400, Bloomington,
Illinois, before Cheryl L. Zeone, CSR, RPR,
commencing at the hour of 5:05 p.m.

BOARD MEMBERS:

- Matt Sorensen, Chairman
- Don Cavallini
- George Gordon
- Paul Segobiano
- Jim Soeldner
- George Wendt

ALSO PRESENT:

- Michael Brown, Director of Ecology Action Center
- Phil Dick, Director of Building & Zoning
- Hannah Eisner, State's Attorney
- Bill Wasson, Assistant County Administrator
- Members of the Public

ON BEHALF OF THE APPLICANTS:

- Thomas Kirk
- Timothy Kirk
- Aaron Hallead
- Rich Marvel



1 you -- that our Committee won't choose to mess
2 with that at the February 3rd meeting, but I
3 think at least if we came to that meeting with a
4 structured, nearly done kind of an agreement that
5 would be appropriate.

6 All right. Any other questions from the
7 Committee of Mr. Kirk or the Applicant?

8 (No response.)

9 CHAIRMAN SORENSEN: With that, I'm going
10 to invite anyone present who may have questions
11 of the Applicant to please make themselves known
12 to the Committee at this time.

13 All right, then.

14 JENNIFER SACKETT-POHLENZ: Mr. Chairman.

15 CHAIRMAN SORENSEN: I'm sorry. Please,
16 come. Please have a seat. If you would, please,
17 introduce yourself, name and address, and then we
18 shall swear or affirm you, whichever you prefer.

19 JENNIFER SACKETT-POHLENZ: Mr. Chairman,
20 I'm not here to testify. I just wanted to file
21 an appearance to show that we are participating
22 in the process, but we're not asking questions.

23 I'm an attorney. My name is Jennifer
24 Sackett-Pohlentz. I'm here representing American

1 Disposal Services of Illinois, and I just wanted
2 to file documentation showing that we're
3 participating.

4 CHAIRMAN SORENSEN: Perfect. Thank you.

5 MR. DICK: Could you spell your name,
6 please?

7 THE WITNESS: Certainly. It's Jennifer,
8 J-e-n-n-i-f-e-r, Sackett, S-a-c-k-e-t-t, Pohlenz,
9 P-o-h-l-e-n-z.

10 CHAIRMAN SORENSEN: Great. Thank you
11 very much.

12 JENNIFER SACKETT-POHLENZ: And who
13 takes --

14 CHAIRMAN SORENSEN: You can give that to
15 Phil. Make it part of the case file.

16 Thank you very much.

17 Anyone else present who would like to ask
18 questions or present testimony on the case?

19 (No response.)

20 CHAIRMAN SORENSEN: Anything else you'd
21 like to add, Mr. Kirk, this evening?

22 THOMAS KIRK: I just was going to read a
23 quote from the EPA. It says, The General
24 Assembly finds that the economic and population