

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on September 10, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a REPLY TO PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUPPLEMENTAL AWARD OF LEGAL COSTS, a copy of which is attached hereto and herewith served upon you.

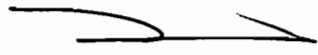
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____


Thomas Davis, Chief
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: September 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that I did on September 10, 2012, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and REPLY TO PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUPPLEMENTAL AWARD OF LEGAL COSTS upon the persons listed on the Service List.



Thomas Davis, Chief
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

Fred C. Prillaman
Mohan, Allewelt, Prillaman & Adami
One North Old State Capital Plaza, Ste. 325
Springfield, IL 62701

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRIME LOCATION PROPERTIES, LLC,)	
)	
Petitioner,)	
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v.)	PCB NO. 09-67
)	(UST Appeal)
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ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
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REPLY TO PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUPPLEMENTAL AWARD OF LEGAL COSTS

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY in reply to the Memorandum of Law filed by the Petitioner, PRIME LOCATION PROPERTIES, LLC, in support of its Motion for Supplemental Award of Legal Costs, and states as follows:

BACKGROUND

The Board issued its final order in this permit appeal on November 5, 2009. The Petitioner had prevailed in this proceeding and, upon the motion of the Petitioner, the Board awarded \$10,088.18 in legal fees and costs pursuant to Section 57.8(l) of the Act. The Board order was affirmed upon appeal through a Rule 23 order on March 2, 2012 in *Illinois EPA v. Illinois Pollution Control Board and Prime Location Properties, LLC*, 2012 IL App (5th) 100072-U. The Fifth District Appellate Court affirmed the Board's rulings that the filing of a petition for review does not constitute the practice of law under the Environmental Protection Act. The court also held that the Board did not abuse its discretion in awarding attorney fees to Prime Location.

The appellate order is not an opinion of the court and does not have any precedential effect. See Supreme Court Rule 23(e)(1). This Rule provides that such an order “may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case.” The Petitioner was obligated to furnish a copy of the order as the law of the case but failed to do so when filing its Motion for Supplemental Award of Legal Costs.

The Motion seeks an additional award to reimburse Prime Location for its expenditures of \$12,501.15 during the appeal but fails to cite to any legal authority regarding the Board’s ability to consider this supplemental request. Moreover, the Petitioner incorrectly asserted [at ¶ 6] that on April 11, 2012 “the mandate was issued and the appeal remanded to the Illinois Pollution Control Board.” Petitioner also failed to submit the April 11th mandate with the Motion to support this representation.

The Illinois EPA’s Response was filed on May 18, 2012 and thereby provided a copy of the Rule 23 order. As we noted in objecting to the Motion, and in questioning the Board’s subject matter jurisdiction, the appellate order does *not* contain any language to support Petitioner’s assertion of any remand to the Board for any reason. As a prelude to our arguments, we further note that Petitioner now concedes that the April 11th mandate (still not provided by the movant) was issued with “no remand order.” Memo of Law at page 6.

The Board issued an order on July 12, 2012 directing the parties to brief the threshold question of whether it has jurisdiction to consider the Motion for an additional award of fees and costs incurred during appeal. The parties cannot confer jurisdiction upon the Board and the Board cannot exercise any jurisdiction over a new matter simply because a party to a previous matter has filed a request for relief. The ultimate issue is properly framed by the Board in its July 12th

order: “whether Section 57.8(l) . . . authorizes the Board to award, to a petitioner who prevailed before the Board, legal fees and costs incurred *during the Appellate Court’s administrative review affirming the Board.*” July 12, 2012 order; emphasis in original. However, the Board may not reach this issue unless it first determines it has jurisdiction to do so.

The appellate court’s order is part of the law of the case and provides the legal context within which the Board’s jurisdiction must be determined. The lack of any remand as Prime Location had initially claimed is an important *procedural* matter and may be sufficient to defeat the underlying claim that the Board may award further expenses. More importantly, the court has set forth the *substantive* matters that control the exercise of jurisdiction: “the LUST fund does not have a broad remedial purpose due to the fact that it has limited resources. [citation omitted] Thus, statutes allowing for recovery of any costs are to be construed narrowly. [citation omitted] The Environmental Protection Act explicitly provides that the attorney fees of the prevailing party in a petition for review are among the costs that can be reimbursed from the fund, although other legal costs are not. [citation omitted].” *Ibid.* at ¶ 26. Therefore, the legal context requires careful analysis and narrow construction, and justifies the denial of the requested relief.

ARGUMENT

The Illinois Environmental Protection Act does not authorize the Board to award attorney fees incurred in opposing an action for direct administrative review in the appellate court of the Board’s decision awarding costs of corrective action where an owner or operator seeks reimbursement from the LUST fund. The Board should therefore deny the motion for a supplemental award of legal costs that the petitioner filed after the appellate court issued its mandate. Even if the petitioner is correct that the appellate court mandate did not preclude a

subsequent award of attorney fees incurred in litigating the action for direct administrative review, the Board lacks statutory authority to award such fees.

Unlike a court, an administrative agency does not have any general or common law powers because it is solely a creature of statute. *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill. 2d 108, 113 (1976); *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1064 (2d Dist. 2009). An administrative agency's authority is therefore limited to that set forth in the statute that created the agency. *Granite City Div. of Nat'l Steel Co. v. Ill. Pollution Control Bd.*, 155 Ill. 2d 149, 171 (1993); *City of Chicago*, 65 Ill. 2d at 112-13; *Illinois Ayers Oil Co. v. Ill. Pollution Control Bd.*, PCB No. 03-214 (June 16, 2005). Thus, an administrative agency may award attorney fees to a party in a contested matter only if the statute that created the agency authorizes the agency to do so. *City of Chicago*, 65 Ill. 2d at 113.

The Act created the Board (*see* 415 ILCS 5/5 (2010)), so the Board's authority, including its power to award attorney fees, is limited to that prescribed in the Act. *Granite City*, 155 Ill. 2d at 171; *City of Chicago*, 65 Ill. 2d at 113. The Board's authority to award attorney fees in an action for corrective costs from the LUST fund is set forth in section 57.8(l) of the Act, which states:

Corrective action does not include legal defense costs.
Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees.

415 ILCS 5/57.8(l) (2010). This provision authorizes the Board to award attorney fees incurred in proceedings before the Board, but it does not mention or authorize payment of legal fees incurred in proceedings before the appellate court. Therefore, section 57.8(l) does not authorize

attorney fees incurred in defending actions for administrative review in the appellate court of Board decisions awarding costs of corrective action from the LUST fund. *See Crider v. State of Ill.*, 174 Ill. App. 3d 163, 165-67 (1st Dist. 1988); *Johnson v. Human Rights Comm'n*, 173 Ill. App. 3d 564, 570 (1st Dist. 1988); *Alexander v. Human Rights Comm'n*, 166 Ill. App. 3d 515, 518-19 (1st Dist. 1988) (each holding that relevant statutory provisions of the Illinois Human Rights Act, which were later amended, did not authorize the Commission to award attorney fees incurred in litigating actions for administrative review of Commission decisions in favor of complainants).

The relevant statutory provisions in *Crider*, *Johnson* and *Alexander* stated that the Human Rights Commission may “[p]ay to the complainant all or a portion of the costs of the action, including reasonable attorney fees and expert fees” and “[t]ake such action as may be necessary to render the individual complainant whole.” Ill. Rev. Stat. ch. 68, ¶ 8-108(G),(J) (1985). The courts noted that the above provisions contained no language indicating that they were intended to authorize attorney fees for anything other than proceedings before the Commission, and there was no language expressly authorizing attorney fees for administrative review proceedings in the courts. *Crider*, 174 Ill. App. 3d at 166; *Johnson*, 173 Ill. App. 3d at 570; *Alexander*, 166 Ill. App. 3d at 518-19. The *Alexander* court further noted that the Human Rights Act provision authorizing administrative review of Commission decisions (*see* Ill. Rev. Stat. ch. 68, ¶ 8-111 (1985)), contained no language authorizing the Commission to award attorney fees incurred in such proceedings. 166 Ill. App. 3d at 518.

Similarly, section 57.8(l) of the Act contains no language indicating that it was intended to apply to legal costs incurred in defending administrative review actions filed to challenge

Board decisions awarding costs of corrective action from the LUST fund to owners and operators. And section 41 of the Act, which authorizes the filing of actions for direct administrative review in the appellate court of final decisions of the Board, contains no language authorizing the Board to award attorney fees incurred in such proceedings. 415 ILCS 5/41 (2010). Accordingly, the Board does not have statutory authority under the Act to award attorney fees incurred in the appellate court proceedings in this matter. *See Crider*, 174 Ill. App. 3d at 165-67; *Johnson*, 173 Ill. App. 3d at 570; *Alexander*, 166 Ill. App. 3d at 518-19.

The cases cited by petitioner in which circuit court awards of attorney fees incurred in appellate court proceedings were upheld are all distinguishable because those cases originated in the circuit court rather than an administrative agency. *See Maschhoff v. Kockenhoffer*, 343 Ill. App. 3d 500 (5th Dist. 2003); *Coldwell Banker Havens v. Renfro*, 288 Ill. App. 3d 442 (5th Dist. 1997); *Stein v. Spainhour*, 196 Ill. App. 3d 65 (4th Dist. 1990). Unlike circuit courts, however, administrative agencies such as the Board do not have general or common law powers. *City of Chicago*, 65 Ill. 2d at 113; *Estate of Pellico*, 394 Ill. App. 3d at 1064. Therefore, as stated above, an administrative agency's authority is limited to that provided in the statute that created the agency. *Granite City*, 155 Ill. 2d at 171. The Act does not confer upon the Board authority to award attorney fees incurred in direct administrative review actions in the appellate court, so the Board does not have the authority to award the attorney fees sought by the petitioner.

Additionally the *Maschhoff* court relied in part upon the broad remedial purpose of the statutory provision at issue in holding that it authorized the circuit court to award attorney fees incurred on appeal, and upon the fact that the statute used the mandatory term "shall" in the attorney fee provision. *See Maschhoff*, 343 Ill. App. 3d at 505. In contrast, the LUST fund has the

narrow purpose of alleviating damage caused by leakage from underground storage tanks and the Act's provisions concerning the fund should therefore be construed narrowly. *Twp. of Harlem v. Env't'l Protection Agency*, 265 Ill. App. 3d 41, 44 (2d Dist. 1994). Furthermore, unlike *Maschhoff*, the attorney fee provision at issue here contains the permissive term "may." 415 ILCS 5/57.8(1) (2010) ("the Board may authorize payment of legal fees.").

In sum, the Board does not have statutory authority to award attorney fees incurred in an action for direct administrative review in the appellate court of a Board decision awarding corrective costs from the LUST fund. Any such award would also be inconsistent with the principle that the Act's provisions regarding the LUST fund should be construed narrowly due to the Fund's narrow purpose. For these reasons, the Board should deny the petitioner's motion for a supplemental award of legal costs.

WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Motion for Supplemental Award of Legal Costs filed by the Petitioner be DENIED for want of jurisdiction and authority.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 

THOMAS DAVIS
Environmental Bureau
Assistant Attorney General

500 South Second Street
Springfield, Illinois 62706
217/782-9031
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