BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MARTIN MAGGIO	)	
	)	
Petitioner,	)	
	)	
vs.	)	PCB 2013-10
	)	(Pollution Control Facility Siting Appeal)
COUNTY OF WINNEBAGO, WINNEBAGO COUNTY BOARD and WINNEBAGO LANDFILL COMPANY, LLC,	)	
	)	
Respondents.	)	

NOTICE OF FILING

TO: The Clerk of the Pollution Control Board and all parties of record:

PLEASE TAKE NOTICE that on this 23rd day of January, 2013, George Mueller, one of the attorneys for Winnebago Landfill Company, LLC, filed via electronic filing **Respondent Winnebago Landfill Company, LLC's, Post-Hearing Brief** with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

WINNEBAGO LANDFILL COMPANY, LLC

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Martin Maggio v. County of Winnebago, Winnebago County Board and Winnebago Landfill Company, LLC
PCB No. 2013-10

CERTIFICATE OF SERVICE

I, Mindy Espindola, a non-attorney, certify that I served a copy of the foregoing **Notice of Filing** with the attached **Respondent Winnebago landfill Company, LLC's, Post-Hearing Brief** to each of the persons listed below via U.S. Mail at Ottawa, Illinois, postage prepaid, before 5:00 p.m. on this 23rd day of January, 2013.

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SUBSCRIBED and SWORN to
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MARTIN MAGGIO Petitioner, vs. COUNTY OF WINNEBAGO, WINNEBAGO COUNTY BOARD and WINNEBAGO LANDFILL COMPANY, LLC, Respondents.	)	PCB 2013-10 (Pollution Control Facility Siting Appeal)

RESPONDENT WINNEBAGO LANDFILL COMPANY, LLC'S, POST-HEARING BRIEF

NOW COMES Respondent, Winnebago Landfill Company, LLC, ("WLC"), by its attorneys George Mueller and Charles Helsten, and for its Post-Hearing Brief, states as follows:

I. INTRODUCTION.

On January 17, 2012 Winnebago Landfill Company, LLC, filed an application pursuant to 415 ILCS 5/39.2 ("Section 39.2") seeking local siting approval from the Winnebago County Board ("County Board") for a lateral expansion of its existing municipal solid waste landfill located south of Rockford, in southern Winnebago County. The siting application consisted of over 6,000 pages of narrative, test results, engineering specifications and drawings and geologic drawings. A public hearing on the siting application commenced on April 23, 2012 and closed on April 30, 2012, after 5 days of evidence and public comment. The Village of New Milford, Illinois and Martin Maggio, a local businessman and real estate developer, appeared with counsel at the

hearing and participated actively as objectors. The Village of New Milford did not seek review of the local siting decision.

The County Board continued to receive public comment on the application until May 30, 2012. The hearing officer, Derke Price, subsequently submitted a report with recommended findings of fact and a single recommended condition of approval (Petitioner's Exhibit 5). The report and recommended findings consisted of 37 pages. The hearing officer found that the applicant met all the applicable siting criteria. On July 12, 2012, the Winnebago County board met, and by a 20 to 3 vote granted the application for local siting approval and adopted a resolution and order containing the necessary written findings required by Section 39.2(e) and adopting the report of the hearing officer (Petitioner's Exhibit 4).

Maggio subsequently filed his Petition for Review, first alleging lack of jurisdiction due to defective pre-filing notice and that the proceedings before the County Board were fundamentally unfair. He subsequently abandoned the fundamental fairness argument. Neither Maggio nor anyone else had raised a notice issue while this matter was before the County Board, and no person or entity has come forward to complain that they were not given timely notice of the proceedings.

It is noteworthy that Maggio has not challenged the substantive correctness of the local siting approval and makes no argument that the local decision was not supported by the evidence, nor has any other party.

II. ARGUMENT

The facts in this matter are not disputed. Those facts are set forth in the Stipulation of the parties submitted as Petitioner's Exhibit 1 and attached to Petitioner's

Brief. In the Stipulation, Maggio admits that WLC correctly identified all individuals and entities entitled to pre-filing notice pursuant to Section 39.2(b), and that proper certified mail notice to all these individuals and entities was mailed on December 27, 2011, 21 days prior to the filing of the siting application. Maggio does not challenge the content of the notices, the mailing, or the newspaper publication of the notice. All of these things were done properly and in a timely fashion. In all, 102 notices were sent out by WLC by certified mail 21 days prior to the filing of the siting application.

Maggio's only complaint is that the owners of a single parcel, the Hildebrand parcel, did not claim their certified mail, and that the owners of six other parcels did not sign for their certified mail until after January 3, 2012, the 14th day prior to the filing of the siting application. (These notices were claimed between January 4 and January 13, 2012).

Section 39.2(b) of the Act requires that, "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..." Since there is no question that WLC correctly identified the properties entitled to service and the owners of those properties, the only question is whether or not the service was proper. Initially, it is important to note that the statute identifies alternative means of providing service, those being either in person or by registered mail, return receipt requested. The statute does not state (or even imply) that failure to perfect service by one method requires use of the other. The statute also requires a redundant additional service in the form of a newspaper publication, which was done in this case.

Based solely on the Appellate Court's holding in *Ogle County Board v. Pollution Control Board*, 272 Ill. App. 3d 184, 649 N.E. 2d 545 (2nd Dist. 1995), Maggio argues that the words "return receipt requested" in the statute require actual physical receipt by the recipient of the mailing, as evidenced by a signed returned receipt (green card), 14 or more days prior to the filing of a siting application. Maggio's reliance on the *Ogle County* decision is misplaced.

As a threshold matter, it is well established that certified mail, as used here, is the functional equivalent of registered mail for purposes of establishing compliance with Section 39.2(b). *Environmentally Concerned Citizens' Organization v. Landfill, LLC*, PCB 98-98 (May 7, 1998), *County of Kankakee v. Pollution Control Board*, 396 Ill. App. 3d 1000, 955 N.E. 2d 1(3rd Dist. 2009). WLC's use of certified mail rather than registered mail is, therefore, not a problem.

Regarding the argument that the certified mailings have to be physically received in a timely manner, the PCB has consistently held, even before the *Ogle County* decision, that actual receipt of a certified or registered mailing is not required. Instead, the PCB has held that certified or registered mailing must be reasonably calculated to result in timely receipt. *City of Columbia v. County of St. Clair*, PCB 85-177 (April 3, 1986), *Waste Management v. Village of Bensenville*, PCB 89-28 (August 10, 1989).

The PCB has always been cognizant of the chaos and unjust results that would flow from letting an intended recipient of service control the outcome by deciding whether or not to claim a timely certified mailing. This is illustrated no better than in the PCB's discussion in the case underlying the *Ogle County* Appellate decision, *Carmichael v. Browning-Ferris Industries*, PCB 93-114 (October 7, 1993). In

Carmichael, certified mail by the applicant was attempted 17 days prior to the filing of the siting application, and the PCB correctly found that this timing was not reasonably calculated to lead to timely receipt, and, accordingly, the County Board lacked jurisdiction. In its discussion, the PCB contrasted the situation and timing in *Carmichael* with that in *Waste Management v. Village of Bensenville* and stated,

> "In another case, *Waste Management of Illinois v. Village of Bensenville*, the applicant filed the request for siting approval on July 22, 1988, thereby making the 14 day notice deadline July 8, 1988. On July 1, 1988 the applicant initiated notice by registered mail service. On July 6, 1988 the applicant left a notice under the door of the adjacent landowner. When the notice was left on July 6, 1988, the individual attempting to serve the adjacent landowner noticed a sign saying that he was on vacation and would return on July 11, 1988. The registered mail receipt was signed on July 11, 1988. The Board held that mailing by registered mail 21 days prior to the date of filing of the request was sufficient to expect receipt of notice and thus notice was not defective. The Board in its reasoning stated that it was not going to allow the process to be frustrated by individuals who refuse service or are absent, and therefore will look to the reasonableness of the service process. Thus, in the special circumstances of that case, the Board held that the notice requirements of Section 39.2(b) of the Act were fulfilled." (Slip Opinion at pp. 5, 6).

The Appellate Court decision in the *Ogle County* case affirmed the Pollution Control Board without really commenting on the aforesaid reasoning. The language in the *Ogle County* decision that actual notice must be physically received in a timely fashion in all instances is arguably *dicta*, since that reasoning is not necessary to the outcome. Additionally, the appellate majority in *Ogle County* expressly qualified its holding concerning actual physical service by stating, "we express no opinion whether a potential recipient who refuses to sign a receipt of notice may be held to be in constructive receipt of the notice for the purposes of the statute." (at 649 N.E. 2d 554).

Lastly, there is the scathing dissent in *Ogle County* by Justice McLaren, who observed that the clear meaning of the words in the statute is that the 14 day notice

requirement relates to the mailing of the registered mail, an analysis that is undoubtedly a pre-curser to the Supreme Court's subsequent decision in *People of the State of Illinois ex rel. Devine v. $30,700 U.S. Currency*, 199 Ill. 2d 142, 766 N.E.2d 1084 (2002). In that regard, as discussed in considerable detail below, it is important to note that the notice provision of Section 39.2 in issue in this case calls for "return receipt requested"; not "return receipt required".

Maggio, in his brief, takes particular exception to a previous statement by the PCB in *City of Kankakee v. County of Kankakee*, PCB 2003-125 (August 7, 2003), that, "the Board is convinced that the Supreme Court's decision in *$30,700 U.S. Currency* effectively overrules the Appellate Court's decision in *Ogle County*." Maggio mistakenly misconstrues this statement in the PCB's decision to mean that the PCB overruled the decision in *Ogle County*, as he subsequently argues that the PCB does not have the power to either ignore or overrule controlling appellate precedent. However, the PCB is charged with identifying and applying controlling case law to the facts in the cases before it, and this process necessarily requires analysis. The PCB in *City of Kankakee* did nothing more than what it does routinely and is charged by law to do: analyze conflicting authorities submitted by competing parties and determine which one is applicable and controlling.

The PCB's comparison and analysis of *Ogle County* and *$30,700 U.S. Currency* was, and is, correct. *Ogle County* is the earlier case, and in that case the appellate majority determined that the legislature's use of the words "return receipt requested" indicated an intent to require actual physical delivery. However, the appellate majority's opinion was based on an incorrect analysis of the Supreme Court's earlier decision in

Avdich v. Kleinert, 69 Ill. 2d 1, 370 N.E. 2d 504 (1977). The Court in *Ogle County* stated,

> "Our Supreme Court has interpreted the inclusion of the "return receipt requested" language in the "context of a forcible entry and detainer to clearly indicate a legislative intent that service of a notice by certified mail is not to be considered complete until it is received by the addressee."
>
> The *Avdich* Court specifically noted that, "If mere mailing of a...notice (were) sufficient service, then proof of mailing would be all that was required to show service and there would be little reason to require a returned receipt."" (at 69 Ill. 2d 9).

In *$30,700 U.S. Currency*, the Supreme Court elected to clarify its holding in *Avdich* by pointing out a small but controlling difference in the language of the various statutes construed. *$30,700 U.S. Currency* construes the notice requirement in the Drug Asset Forfeiture Procedure Act (725 ILCS 150/1 *et seq.*). That Act requires notice of a pending forfeiture to be given by either personal service or mailing a copy of the notice by "certified mail, return receipt requested." (Emphasis added). Therefore, both the Drug Asset Forfeiture Procedure Act and the Environmental Protection Act contain the same "return receipt requested" language in their notice requirement. In *$30,700 U.S. Currency*, the Supreme Court squarely agreed with the dissent in *Ogle County* by finding that the "return receipt requested" language does not evidence a legislative intent to require physical delivery and return of a signed receipt to the sender.

In support of that finding the Supreme Court painstakingly reviewed its holding in *Avdich*, pointing out how the legislature can expressly condition service upon actual physical receipt if it chooses to do so, and how the inclusion of "return receipt requested" language in fact actually evidences the opposite intent by the legislature:

> "*Avdich* is not authority for the proposition that all enactments which contain the "return receipt" requirement demand return of the receipt to

> perfect service. In fact, *Avdich*, like the enactments previously referred to, illustrates our legislature's ability to *expressly* condition service upon receipt of the signed receipt. In *Avdich*, we considered the notice requirement under the forcible entry and detainer statute. See *735 ILCS 5/9-211* (West 2000). As in the instant matter, the parties in *Avdich* disputed whether the mere mailing of notice by certified mail constituted service or whether the statute required receipt of the return receipt in order to complete service. The forcible entry and detainer statute states that "any demand may be made or notice served *** by sending a copy of said notice to the tenant by certified or registered mail, with a returned receipt from the addressee." *735 ILCS 5/9-211* (West 2000). Based upon this language, we held that the "statute clearly indicates a legislative intent that service of a notice by certified mail is not to be considered complete until it is received by the addressee." *Avdich, 69 Ill. 2d at 9.* However, the forcible entry and detainer statute conditions effectiveness of notice upon "a *returned* receipt from the addressee." By contrast, the Act only requires "with a return receipt *requested*." If we afford the language in each provision its plain and ordinary meaning, one demands the return of the receipt while the other merely demands a request." (at *766 N.E. 2d 1090*). (Emphasis added).

In simple terms, the appellate majority in *Ogle County* missed the critical distinction between the legislative requirement of a returned receipt and a return receipt requested. Therefore, *$30,700 U.S. Currency,* as a later decision by a higher court, expressly overrules *Ogle County*, and the PCB's prior finding to that effect is completely correct.

Moreover, it is of no small degree of concern that Maggio's brief fails altogether to mention the fact that another Appellate Court has expressly agreed with the PCB's interpretation of *$30,700 U.S. Currency,* and has also held that certified mail notice for purposes of compliance with Section 39.2(b) is complete upon delivery of the certified mail to the post office. In *Waste Management of Illinois, Inc. v. Pollution Control Board*, 356 Ill. App. 3d 229 (3rd Dist. 2005), the Appellate Court stated,

> "The Petitioner argues that strict adherence to the language of the statute would allow the landowners to avoid service by refusing to sign the return receipt and therefore deny the county board jurisdiction. All that is

> required by the statute is that notice is sent by registered mail, return service requested. Jurisdiction is not premised on the recipient's actions, once the letter is received but on the form of the sending of the letter; jurisdiction will exist as long as the letter is sent by the prescribed method." (at 356 Ill. App. 3d 234). (Emphasis added).

Clearly, this is the only interpretation of 415 ILCS 5/39.2(b) that makes any sense. To hold otherwise would empower undisclosed opponents to obstruct the entire siting process by simply refusing or delaying acceptance of timely mailed notices; a result that could never have been the legislature's intent. The intentional omission by Maggio of the *Waste Management* case then leads to the erroneous suggestion that the PCB's ruling in *City of Kankakee* is some unsupported aberration. To the contrary, it is the established law on the issue.

Maggio then argues, without authority, that actual physical receipt of the mailed notice should be required because the notice requirement is jurisdictional and because the public hearing on the application, as the most critical stage in the siting process, simply requires that everyone get actual notice. While this argument obviously (and it appears deliberately) departs from determination of the legislative intent by resorting to general case law citations concerning how important the process is, the argument also misses the fact that the legislative insertion of a secondary redundant notice requirement by way of publication provides an additional guarantee that actual notice, in some form, is likely to be received by all those who are entitled.

Maggio also attempts to distinguish the forfeiture statute construed in *$30,700 U.S. Currency* from the notice requirement of the Environmental Protection Act. He talks about the Forfeiture Act being remedial in nature and makes other unsupported arguments suggesting that the notice called for in the Environmental Protection Act is

somehow more important than the notice called for in the Forfeiture Act, but he misses the fact that the notice requirements in both acts are jurisdictional, and that they both contain the identical "return receipt requested" language. Most importantly, however, Maggio misses the fact that the Forfeiture Act invokes constitutional due process rights not present in Section 39.2(b) notices, because the Forfeiture Act contemplates an actual deprivation or property by state action. On the other hand, a non-applicant who participates in a local pollution control facility siting hearing has no property interest at stake entitling him to the protection afforded by the constitutional guarantee of due process. *Southwest Energy Corp. v. Pollution Control Board*, 275 Ill. App. 3d 84, 655 N.E.2d 304 (4th Dist. 1995), *Land and Lake Company v. Illinois Pollution Control Board*, 319 Ill. App. 3d 41 (3rd Dist. 2000). Similarly, the possible harmful effects on a proposed landfill expansion on citizens' property rights do not give individual citizens any due process rights. *E&E Hauling, Inc. v. Pollution Control Board*, 116 Ill. App. 3d 585 (2nd Dist. 1983). If anything, as a matter of public policy and in recognition of the constitutional rights impacted by forfeiture, notice requirements under the Forfeiture Act should be construed more strictly in favor of guaranteeing actual physical receipt of notice. The fact that the Courts have not chosen to make such a construction is all the PCB needs to know to confirm that its past construction of the 39.2(b) notice requirement is correct.

Maggio's argument that the *$30,700 U.S. Currency* Court recognized that a property forfeiture case with constitutional implications warrants a more permissive interpretation of the notice requirement is squarely backwards.

Even the United States Supreme Court has rejected the requirement of actual receipt of notice in forfeiture proceedings. In *Dusenbery v. United States*, 534 U.S. 161 (2002), the Court explained how notice in all contexts ought to interpreted and evaluated: "the fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis added). In this case, WLC correctly identified all individuals and entities entitled to pre-filing notice, and WLC sent notice to all said individuals and entities by certified mail 21 days prior to the filing of its siting application. In the absence of any specific complaint by any specific individual or entity that they did not receive timely notice, Maggio truly cannot, in good faith, argue that WLC's efforts were not reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Moreover, as discussed in detail herein, all persons entitled to notice (Maggio and otherwise) were provided notice as prescribed by the statute.

III. CONLCUSION.

For the foregoing reasons, WLC respectfully prays that the near unanimous decision of the Winnebago County Board approving the expansion of the Winnebago Landfill be affirmed and adopted as the decision of the Pollution Control Board.

Respectfully Submitted,

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