

ILLINOIS POLLUTION CONTROL BOARD
March 3, 2016

ENVIRONMENTAL RECYCLING AND)	
DISPOSAL SERVICES, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 16-76
)	(Third-Party Pollution Control Facility
WILL COUNTY, ILLINOIS; WILL COUNTY)	Siting Appeal)
BOARD; AND WASTE MANAGEMENT OF)	
ILLINOIS, INC.,)	
)	
Respondents.)	

ORDER OF THE BOARD (by J.D. O’Leary)

On January 19, 2016, Environmental Recycling and Disposal Services, Inc. (ERDS) filed a petition (Pet.) asking the Board to review a December 17, 2015 decision of the Will County Board. The Will County Board approved an application by Waste Management of Illinois, Inc. (WMI) for approval of expansion of the Laraway Recycling and Disposal facility, located at 21101 W. Laraway Road, Elwood, Will County. On February 4, 2016, the Board accepted the petition for hearing.

Respondents have filed motions to strike and dismiss. ERDS filed a single response to the motions. For the reasons below, the Board denies the motions.

In this order, the Board first provides the procedural background before summarizing the motions to strike and dismiss and ERDS’s response. The Board then provides the legal background, discusses the issues, and reaches its conclusion.

PROCEDURAL BACKGROUND

On July 10, 2015, WMI filed an application with the Will County Board for approval of the site of an expansion of the Laraway Recycling and Disposal facility. Pet. at 1 (¶2); *see* County Mot. at 1 (¶1); WMI Mot. at 1 (¶1); *see also* 415 ILCS 5/39.2(a) (2014). Public hearing on the application took place during October 2015. Pet. at 1 (¶3); *see* County Mot. at 1 (¶2); WMI Mot. at 1 (¶2). On December 17, 2015, the Will County Board approved the application with conditions. Pet. at 2 (¶5); Pet. Exh. A (resolution); *see* County Mot. at 2 (¶4); WMI Mot. at 2 (¶4).

On January 19, 2016, ERDS filed a petition for review of the Will County Board’s decision. On February 4, 2016, the Board accepted the petition for hearing.

On February 17, 2016, Will County, Illinois (Will County) and the Will County Board (County Board) filed a combined motion to strike or, in the alternative, dismiss the petition for review (County Mot.). Also on February 17, 2016, WMI filed a motion to strike and dismiss the petition (WMI Mot.). On February 25, 2016, ERDS filed a single response to the two motions (Resp.).

MOTIONS TO STRIKE OR DISMISS

Summary of County Motion

The County Motion notes ERDS's allegation that proceedings before the Will County Board were "fundamentally unfair." County Mot. at 2; *see* Pet. at 2 (¶7). The County Motion states that ERD's allegation consists entirely of the following: "the Will County Board prejudged the application, Will County Solid Waste Planning and Land Use staffs had improper *ex parte* contact with the Applicant and improperly influenced the Will County Board. The Will County Board was biased in favor of the Applicant and did not render an impartial decision based upon the evidence." Pet. at 2 (¶7); *see* County Mot. at 2.

The County Motion states that the petition must include "a specification of the grounds for the appeal, including any allegations for fundamental unfairness. . . ." County Mot. at 3 (¶11), citing 35 Ill. Adm. Code 107.208(c). The motion further states that "Illinois is a fact pleading State" and argues that ERDS "is required to specify facts that support its claim and mere conclusions that are unsupported by allegations of specific facts are insufficient." County Mot. at 4 (¶14) (citations omitted). The motion asserts that ERDS's petition "does not contain any facts whatsoever" regarding prejudgment of the application, *ex parte* communications, improper influence, or bias. *Id.* at 3-4 (¶12). The County Motion acknowledges that ERDS "is not required to plead all facts in its Petition." *Id.* at 4 (¶14), citing Sierra Club and Jim Bensman v. City of Wood River and Norton Env't'l., PCB 98-43 (Nov. 6, 1997). However, the motion argues that ERDS's allegations lack facts providing sufficient notice of its fundamental fairness claims. County Mot. at 4 (¶14).

The County Motion argues "that broadly generalized allegations may be so factually deficient as to be frivolous" under the Act. County Mot. at 4 (¶15), citing Winnetkans Interested in Protecting the Env't. (WIPE) v. IPCB, 55 Ill. App. 3d 475, 370 N.E.2d 1176 (1977). The motion asserts that ERDS's allegations "are mere conclusions, and are, as a matter of law, insufficient to satisfy the pleading requirements of the Rules of the Illinois Pollution Control Board." County Mot. at 4 (¶13). The County Motion further argues that "allegations of fundamental unfairness must be proven by clear and convincing evidence (an extremely high standard of proof under Illinois law)." *Id.* at 5 (¶15), citing Stop the Mega-Dump v. County Bd., 2012 IL App (2d) 110579; Fox Moraine, LLC v. United City of Yorkville, 2011 Ill. App. 2d 1017, 960 N.E.2d 1144 (2nd Dist. 2011). The County Motion also asserts that an allegation of *ex parte* contact "must specify" facts supporting such the allegation. County Mot. at 5 (¶16) (emphasis in original).

Finally, the County Motion states that ERDS's allegations of improper *ex parte* contacts and improper influence on the Will County Board are based on a theory of conspiracy. County

Mot. at 5 (¶17). The motion argues that ERDS must “plead with particularity the specific facts which constitute any such conspiracy.” *Id.*, citing Fritz v. Johnson, 209 Ill. App. 2d 302, 217 (2004).

The County Motion requests that the Board dismiss ERDS’s petition for review or, in the alternative, strike the allegations claiming a denial of fundamental fairness. *Id.* at 6.

Summary of WMI Motion

WMI cites the Board’s procedural rules (WMI Mot. at 3 (¶10)) and notes ERDS’s allegations regarding fundamental unfairness (*id.* at 2 (¶5)). WMI also states that “Illinois is a fact pleading state” in which “legal conclusions unsupported by allegations of specific facts are insufficient.” *Id.* at 2 (¶9).

WMI argues that ERDS’s claim that the County Board prejudged the application does not include supporting facts and “therefore amounts to nothing more than a bare conclusion.” WMI Mot. at 3-4 (¶14), citing Pet. at 2 (¶7). WMI further argues that ERDS “must identify specific evidence that members of the siting authority were actually biased.” WMI Mot. at 3 (¶12), citing Stop the Mega-Dump v. County Bd. of DeKalb County, 2012 Ill. App. (2d) 110579. WMI concludes that ERDS fails to specify required grounds for this claim and that it “should be struck as legally insufficient.” WMI Mot. at 4 (¶14).

WMI notes ERDS’s claim that Will County staff has improper *ex parte* contact with WMI “and improperly influenced the Will County Board.” WMI Mot. at 4 (¶15), citing Pet. at 2 (¶7). WMI argues that “[a] petition alleging improper *ex parte* contacts must specify the facts supporting the allegation, including the dates on which such contacts occurred.” WMI Mot. at 3 (¶12), citing Stop the Mega-Dump v. County Bd. of DeKalb County, 2012 Ill. App. (2d) 110579 at ¶56. WMI further argues that ERDS did not identify any person who had contact of that nature or the substance of any such communication. WMI Mot. at 4 (¶15). WMI also asserts that “ERDS fails to allege that such communications took place after the filing of the Application, so as to qualify as ‘*ex parte* communications.’” *Id.*, citing Stop the Mega-Dump v. County Bd. of DeKalb County, 2012 Ill. App. (2d) 110579 at ¶55. WMI concludes that ERDS’s allegations of *ex parte* communication do not satisfy the Board’s procedural rules and should be struck as “legally insufficient.” WMI Mot. at 4 (¶15).

WMI also addresses ERDS’s allegation that County staff members improperly influenced the Will County Board. WMI Mot. at 4 (¶16); *see* Pet. at 2 (¶7). WMI argues that, to the extent this claim alleges a conspiracy to influence the County Board’s decision, “ERDS is required to plead with particularity the specific facts regarding such conspiracy.” WMI Mot. at 4 (¶16), citing Fritz v. Johnson, 209 Ill. App. 2d 302, 217 (2004). WMI asserts that, because ERDS failed to allege facts supporting this allegation, “the Petition is frivolous, and should be stricken.” WMI Mot. at 4 (¶16).

WMI addresses ERDS’s allegation that the Will County Board was biased in favor of WMI “and did not render an impartial decision based upon the evidence.” WMI Mot. at 5 (¶17),

citing Pet. at 2 (¶7). WMI argues that ERDS has not supported this allegation with specific grounds or facts and that it should be struck as legally insufficient. WMI Mot. at 5 (¶17).

WMI concludes that ERDS's petition "falls well below" the requirements of Section 107.208. WMI Mot. at 5 (¶18), citing 35 Ill. Adm. Code 107.208. WMI argues that failure to comply with those requirements warrants dismissal of the petition as "frivolous." WMI Mot. at 3 (¶11), 5 (¶18).

SUMMARY OF ERDS'S RESPONSE

ERDS states that the Board's procedural rules do "not contain a requirement that the petitioner include the specific facts relied upon." Resp. at 2 (¶3), citing 35 Ill. Adm. Code 107.208. ERDS argues that a petition stating "[c]onclusory statements or ultimate facts would seem to satisfy the plain meaning of the language of section 107.208, especially because allegations of bias and improper contacts tend by their very nature to be vague until more fully developed in discovery." Resp. at 2 (¶4).

ERDS states that Section 107.502 provides the grounds on which the Board may dismiss a petition for review of local siting decisions. Resp. at 2 (¶4), citing 35 Ill. Adm. Code 107.502. ERDS argues that these grounds "do not include failure to plead sufficient facts." Resp. at 2 (¶4). ERDS adds that "[t]he reason for this is clear, because the determination of the factual sufficiency of a petition is made by the Board, when it initially decides whether to accept the petition for hearing." *Id.*

ERDS discounts respondents' argument that Illinois is a fact-pleading state. ERDS argues that this "irrelevant" because this case involves a statutory petition for review and is not an original complaint in the Circuit Court. Resp. at 1 (¶2), 2 (¶5). ERDS cites the Board's procedural rules, which state that, "[e]xcept when the Board's procedural rules provide otherwise, the provisions of the Code of Civil Procedure . . . do not apply to proceedings before the Board." Resp. at 2 (¶5), citing 35 Ill. Adm. Code 100.100(b).

ERDS disputes authorities cited by respondents. ERDS argues that, in Sierra Club v. Wood River, the Board did not strike specified paragraphs of the petition addressing fundamental fairness because they were inadequately pled. Resp. at 2 (¶8). The Board noted that the petition itself stated that "[p]etitioners have chosen to not raise the issue of fundamental fairness" and determined that the issue had been waived. Sierra Club and Jim Bensman v. City of Wood River and Norton Env't'l, PCB 98-43, slip op. at 1 (Nov. 6, 1997). ERDS also distinguishes WIPE, arguing that that case "was not a petition to review a local siting decision" and "generally was about failure to allege a cause of action." Resp. at 3 (¶7); see WIPE v. IPCB, 55 Ill. App. 3d 475, 481. ERDS argues that this case involves a statutory cause of action and that Section 40.1 of the Act directs the Board to consider the fundamental fairness of the Will County Board. Resp. at 3 (¶7), citing 415 ILCS 5/40.1 (2014). Finally, ERDS also challenges respondent's position that Stop the Mega-Dump requires a petition alleging *ex parte* contacts to specify the supporting facts. ERDS asserts that the Appellate Court addressed "the proofs required to prevail and not the contents of the initial petition for review." Resp. at 3 (¶8), citing Stop the Mega-Dump v. County Bd. of DeKalb County, 979 N.E.2d at 527-38.

Finally, ERDS suggests that respondents cannot claim surprise or that any alleged inadequacy of the petition provides insufficient notice of the fundamental fairness claims. Resp. at 3 (¶9). ERDS states that it raised this issue on the first day of the local hearing. *Id.* In addition, ERDS argues that the petition “is in fact like many filed with the Board and routinely allowed to proceed to hearing.” *Id.*

ERDS concludes by requesting that the Board deny the motions to strike and dismiss. Resp. at 4.

DISCUSSION

Legal Background

In deciding a motion to dismiss, the Board considers all well-pled facts contained in the pleadings as true and draws all inferences from the facts in favor of the non-movant. American Disposal Services of Illinois, Inc. v. County Board of McLean County, et al., PCB 11-60, slip op. at 33 (Feb. 16, 2012), citing Veolia ES Zion Landfill, Inc. v. City Council of the City of Zion, PCB 11-10, slip op. at 2 (Nov. 4, 2010) (citations omitted). “[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.” Timber Creek Homes, Inc. v. Village of Round Lake Park, et al., PCB 14-99, slip op. at 10-11 (Mar. 20, 2014), citing Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

Section 107.208 of the Board’s procedural rules provides requirements for a petition appealing a local authority’s decision to approve the site of a pollution control facility. Section 107.208 provides in its entirety that,

[i]n addition to the requirements of 35 Ill. Adm. Code 101.Subpart C [Computation of Time, Filing, Service of Documents, and Statutory Decision Deadlines] the petition must also include:

- a) A copy of the local siting authority's written decision or ordinance;
- b) A statement as to how the filing party is a proper petitioner under Section 107.200 of this Part; and
- c) In accordance with Section 39.2 of the Act, a specification of the grounds for the appeal, including any allegations for fundamental unfairness or any manner in which the decision as to particular criteria is against the manifest weight of the evidence. 35 Ill. Adm. Code 107.208.

Motions to Strike and Dismiss

Respondents argue that allegations regarding fundamental fairness in ERDS's petition are conclusory, fail to satisfy the Board's rules, and are insufficient to state a proper claim. County Mot. at 5-6, WMI Mot. at 5. As noted above, the petition addresses this issue by alleging that "[t]he proceedings before the Will County Board on the application were fundamentally unfair, in that the Will County Board prejudged the application, Will County Solid Waste Planning and Land Use staffs had improper *ex parte* contact with the Applicant and improperly influenced the Will County Board. The Will County Board was biased in favor of the Applicant and did not render an impartial decision based upon the evidence." Pet. at 2 (¶7).

In assessing the adequacy of pleadings in a recent third-party appeal of a pollution control facility site approval, the Board stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Am. Disposal Servs. v. County Bd. of McLean County, et al., PCB 11-60, slip op. at 34 (Feb. 16, 2012), citing Loschen v. Grist Mill Confections, PCB 97-174, slip op. at 4 (June 5, 1997). "Fact pleading does not require a complainant to set out its evidence: '[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" Am. Disposal Svcs., slip op. at 34-35, citing People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981). The Board stated that allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." Am. Disposal Svcs., slip op. at 35, citing People ex rel. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).

In American Disposal Services, the third-party petition for review addressed the issue of fundamental fairness by alleging that "the local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair due to, at a minimum, the unavailability of the public record. ADS reserves its rights to incorporate additional fundamental fairness issues during the course of this proceeding." Am. Disposal Svcs. (Mar. 22, 2011) (petition for review). The Board addressed a motion arguing that, on issues including fundamental fairness, the petition was factually insufficient and made only conclusory allegations. The Board first stated that it took all well-pled allegations as true and drew all reasonable inferences from them in favor of the non-moving party. Am. Disposal Svcs., slip op. at 35. Based on its review of the pleadings and authorities including those cited above, the Board found that the petition sufficiently pled allegations including fundamental fairness and denied the motion to dismiss on the basis of factual insufficiency. *Id.*

More recently, in Timber Creek Homes, Inc. v. Village of Round Lake Park, et al., PCB 14-99, the third-party petition for review addressed the issue of fundamental fairness by alleging that

[t]he local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair in at least two respects. First, members of the Village Board prejudged the Application and were biased in favor of Groot. Second, the Hearing Officer, appointed to oversee the hearing process and render proposed findings and conclusions, usurped the authority of the Village Board by making determinations that were beyond the scope of his authority and that were solely the province of the Village Board. The Village

Board in turn failed in its statutory duty to make those determinations. Timber Creek Homes, PCB 14-99 (Jan. 10, 2014) (paragraph 7 of petition for review).

The Board addressed motions arguing that, on the issue of fundamental fairness, the petition was factually insufficient and made only conclusory allegations. Timber Creek Homes, slip op. at 2-3, 4, 5-6. The Board noted that the petition listed two ways in which the petitioner claimed the proceedings had been unfair. Timber Creek Homes, slip op. at 11. Comparing the petition to that in American Disposal Services, the Board did not agree that it was vague or conclusory and found that it provided “sufficient facts to allow respondent to prepare a defense.” *Id.*, citing 35 Ill. Adm. Code 107.208.

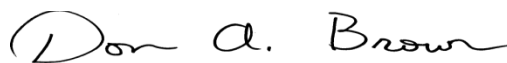
In ruling on the motions to strike and dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of ERDS. The Board has reviewed ERDS’s petition for review and the arguments raised in the motions to strike and dismiss. In light of that review and authorities cited above including recent cases, the Board finds that ERDS’s petition sufficiently pleads allegations relating to fundamental fairness. The petition sets out ultimate facts to be proved and allows respondents to prepare a defense. Accordingly, the motions to strike and dismiss are denied.

CONCLUSION

After reviewing the motions and response and considering authorities including recent cases, the Board denies the motions to strike and dismiss.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 3, 2016, by a vote of 5-0.



Don A. Brown, Assistant Clerk
Illinois Pollution Control Board