BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BRICKYARD DISPOSAL & RECYCLING, INC.,	)	
Petitioner,	)	
v.	)	PCB No. 16-66
	)	(Permit Appeal—Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on December 23, 2016, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois RESPONDENT'S MOTION FOR RECONSIDERATION, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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Dated: December 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that I did on December 23, 2016, before 5:00 p.m., cause to be served by electronic mail, a true and correct copy of the following instruments entitled NOTICE OF FILING and RESPONDENT'S MOTION FOR RECONSIDERATION upon the following persons:

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RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent, the Illinois Environmental Protection Agency (Agency), under 35 Ill. Adm. Code 101.520, hereby requests the Illinois Pollution Control Board (Board) reconsider its final order of November 17, 2016 granting summary judgment for Petitioner, Brickyard Disposal & Recycling, Inc. (Brickyard), and denying summary judgment for the Agency.

INTRODUCTION

Brickyard submitted a permit application to expand waste disposal at its landfill. The Agency rejected the application as incomplete because it lacked (1) new siting approval for the expansion, and (2) a new or updated groundwater impact assessment (GIA) adequately reflecting the expansion proposed. Brickyard appealed, and the parties filed cross-motions for summary judgment. The Board denied the Agency's motion and granted summary judgment for Brickyard on both of the Agency's incompleteness points. The Agency now seeks reconsideration of the Board's order.

The Agency respectfully contends that the Board in its order misapplied existing law and overlooked facts in the record. First, the Board erred in *sua sponte* raising a new issue and basis upon which it summarily granted summary judgment for Brickyard. Second, the Board did not construe facts regarding the GIA in the Agency's favor, as was required by the summary judgment standard. Third, the Board overlooked facts contrary to its holding on the new issue it raised. Finally, the Board improperly resolved a genuine issue of material fact that was central to its holding on the issue of siting. These errors warrant reconsideration of the Board's order.

STANDARD OF REVIEW

Under Section 101.902 of the Board's rules, the Board may reconsider a final order. 35 Ill. Adm. Code 101.902. The Board may reconsider a decision that erred in applying existing law. *People v. Amsted Rail Co.*, PCB 16-61 (May 19, 2016), slip op. at 1. The Board may also reconsider a decision concerning "facts in the record which were overlooked." *Chatham BP, LLC v. Illinois Envtl. Prot. Agency*, PCB 15-173, slip op. at 2 (Nov. 5, 2015)).

ARGUMENT

I. The Board Acted Contrary to Existing Summary Judgment Law by Summarily Granting Summary Judgment on a New Ground It Raised *Sua Sponte*

The Board denied Brickyard's sole ground for summary judgment on the GIA issue. In its motion, Brickyard was required to state its position and the grounds on which it sought summary judgment. 35 Ill. Adm. Code

101.504; *see also City of Chicago v. Speedy Gonzalez Landscaping, Inc.*, PCB No. 06-39 (Mar. 19, 2009), slip op. at 8 (interpreting "grounds" to mean "reasons why" requested relief is appropriate). Brickyard stated only one ground in its motion: a new or updated GIA was not required because the proposed expansion was not a "new unit" under Section 810.103 of the Board's rules, 35 Ill. Adm. Code 810.103. *See* Pet'r's Mot. 21. The Board rejected that argument, finding that Brickyard, in fact, did propose a "new unit." Order 10. In so doing, the Board should have denied Brickyard's motion.

Instead, the Board summarily granted summary judgment on a new ground it raised *sua sponte*. The Board raised the issue of whether the GIA evaluation in Brickyard's application contained the information required to satisfy Sections 811.317(a)(1) and (c)(1) of the Board's rules, 35 Ill. Adm. Code 811.317(a)(1), (c)(1). For support, the Board cited to conclusions in Brickyard's permit application that neither party previously presented or addressed. The Board concluded that the Agency erred in determining Brickyard's application was incomplete without a new or updated GIA beyond Brickyard's existing GIA. The Board decided that the GIA evaluation Brickyard included in its application "complete[d]" the requirements of Sections 811.317(a)(1) and (c)(1). The Board thus granted Brickyard's motion for summary judgment.

The Board erred in summarily granting summary judgment on a *sua sponte* ground outside of Brickyard's motion. The Fourth District of the Illi-

nois Appellate Court reversed summary judgment in this very circumstance. In *Johnson v. Decatur Park District*, the trial court denied the movant's asserted grounds for summary judgment. 301 Ill. App. 3d 798, 801 (4th Dist. 1998). Rather than denying the motion, the court *sua sponte* raised a new ground to grant the movant summary judgment. *Id.* The appellate court found the trial court's initial findings against the grounds in the motion "should have resulted in a denial of the [movant's] motion." *Id.* at 811. The trial court further erred because entering summary judgment on its own *sua sponte* ground denied the nonmovant proper notice and opportunity to respond. *Id.* The Fourth District concluded it therefore "must reverse" the trial court's order. *Id.*

The holding in *Peterson v. Randhava* is also instructive. 313 Ill. App. 3d 1 (1st Dist. 2000). The trial court in *Peterson* denied a motion for sanctions; *sua sponte* transformed the denied motion into a summary judgment motion; and summarily granted summary judgment for the original movants. The appellate court held that Section 2-1005 of the Code of Civil Procedure, 735 ILCS 5/2-1005 (2014), "does not authorize the trial court to *sua sponte* summarily grant summary judgment." *Id.* at 11. Rather, the "basic principles of our system" require the nonmoving party have an opportunity to respond. *Id.* at 11–12. Like in *Johnson*, the *Peterson* court explained that, "[b]y its very nature, a *sua sponte* ruling deprives a party of notice and an opportunity to raise objections because the court acts on its own and without any warning."

Id. at 13. Because the trial court denied the nonmovant an opportunity to respond, the appellate court vacated the summary judgment order. *Id.* at 14.

The Board's holding is therefore contrary to existing law. As the Fourth District noted, "[s]ummary judgment does not call upon the trial court to weigh evidence and determine who wins a case, but instead, to determine whether the case should go to trial at all." *Essig v. Advocate BroMenn Med. Ctr.*, 2015 IL App (4th) 140546, ¶ 88. By denying Brickyard's ground for summary judgment on the GIA issue, the Board should have ended its inquiry as *Johnson* instructs, rather than deciding the case. In moving beyond the four corners of Brickyard's motion to dispose of the matter on a new summary judgment ground it raised *sua sponte*, the Board did exactly what the Illinois Appellate Court prohibited in *Johnson* and *Peterson*.[1]

Summary judgment law does not allow summarily granting summary judgment on *sua sponte* grounds that neither party raised or had an opportunity to address. The Board's misapplication of existing law in this manner denied the Agency an opportunity to respond to the facts and argument interjected by the Board in its order. The Agency respectfully requests that the Board revise its order to resolve only the grounds offered in the parties' motions, and, therefore, to deny Brickyard's motion on its GIA point.

[1] *See also Tyler Enter. of Elwood, Inc. v. Skiver*, 260 Ill.App.3d 742, 750 (3d Dist. 1994) (holding court's order disposing of issue not raised in summary judgment motion was "premature and erroneous"); *Wehde v. Reg'l Transp. Auth.*, 237 Ill. App. 3d 664, 672 (2d Dist. 1992) (holding it was "improper" to dispose of "a material issue of fact put in dispute *sua sponte* by the court" and not the pleadings).

II. The Board Misapplied Existing Summary Judgment Law by Misconstruing and Overlooking Evidence in the Record

Even if the Board could grant summary judgment on a new ground raised *sua sponte*, the Board's order would still conflict with the summary judgment standard. In pertinent part, the Board held:

> The Agency contends that a genuine issue of material fact exists because the parties dispute whether the GIA is sufficient to accommodate filling the wedge with waste. The Agency determination letter merely states that a new or updated GIA, with approved contaminant transport model, is required for the application to be complete. The Agency [made] no determination as to the technical sufficiency of the prior GIA or GIA Evaluation in the application. The Board finds that the Agency erred in determining the application was incomplete without a new GIA.

Order 10 (citations omitted). In so holding, the Board misconstrued evidence against the Agency to dismiss a genuine issue of material fact, and overlooked evidence contrary to the holding that also raised that issue. These misapplications of the summary judgment standard warrant reconsideration.

A. The Board Misconstrued the Agency's Letter to Disclaim the Existence of a Genuine Issue

On the GIA issue, the Board was required to construe all facts liberally in the Agency's favor. Brickyard was the only party to move for summary judgment on that point. As the Illinois Supreme Court has explained, "[i]n determining whether a genuine issue of material fact exists, we construe the [record] strictly against the moving party and liberally in favor of the opponent." *Carney v. Union Pac. R. Co.*, 2016 IL 118984, ¶ 25. Therefore, the

Board was required to give the Agency, as the nonmoving party, the benefit of the doubt when determining if a genuine issue existed. As discussed below, the Board did not do so.

A genuine issue of material fact exists regarding the adequacy of Brickyard's GIA to reflect the proposed expansion. Because Brickyard did not seek summary judgment on this ground, the Agency was not required to raise a genuine issue on this matter. The Agency nevertheless pointed to its incompleteness letter as evidence of a dispute about the GIA's adequacy. *See* Resp't's Reply 24, n. 6. The letter reveals a genuine issue of fact.

In relevant part, the Agency's letter states:

> [T]he [Agency] has reviewed, for purposes of completeness only, the [permit] application. . . . The application does not include a new/updated Groundwater Impact Assessment (GIA). Pursuant to . . . Section 811.317(a)(1), the facility is required to submit . . . a GIA which ***adequately represents the facility redesign/expansion***[,] including minimum design standards for slope configuration, cover, liner, leachate drainage and collection system. In accordance with Section 811.317(c)(1), the facility is required to have an approved contaminant transport model that ***represents groundwater flow under the proposed expanded facility***. Therefore, the applicant must submit a new/revised GIA as part of a complete permit application . . . .

R. at 47531 (emphasis added). The letter shows that the Agency did not perfunctorily demand an entirely new GIA without regard to the information Brickyard submitted. Instead, the Agency reviewed Brickyard's application, which concluded the GIA adequately modeled the expansion. Based on its re-

view, the Agency rejected Brickyard's conclusion and instead found the GIA did not "adequately represent[]" the proposed expansion. In support, the Agency identified specific elements of the GIA that Brickyard's submission failed to address adequately. Thus, Agency did not here baldly assert a general disagreement with Brickyard. Rather, the Agency cited to specific evidence that, under a fair reading, shows a genuine issue of material fact.

The Board, however, misconstrued the Agency's letter. The Board found that the letter "merely states that a new or updated GIA . . . is required for the application to be complete." Order 10. As explained, the letter does more than "merely state" a new or updated GIA was required.

The Board's misconstruction of the letter led it to reject the existence of a genuine issue. All that is required for a genuine issue is a dispute between the parties about a fact, and evidence to support the parties' position. *See Pekin Ins. Co. v. Adams*, 343 Ill. App. 3d 272, 275 (4th Dist. 2003). The Agency's letter provides the necessary modicum of evidence to support a genuine issue. Indeed, the letter provides as much evidence of the Agency's position as the conclusions the Board cited from Brickyard's application for its position. In either case, based on a review of the GIA evaluation, the party concluded the GIA either did, or did not, adequately reflect the proposed expansion. Therefore, the Board's failure to give the Agency's letter a proper construction—and under the summary judgment standard, a liberal one—led it to erroneously conclude there were no genuine issues of material fact.

The Board should therefore reconsider granting Brickyard summary judgment on the GIA rejection point. To be entitled to summary judgment, a movant's right to relief must be "clear and free from doubt." *Saline Cnty. Landfill, Inc., v. Illinois Envtl. Prot. Agency*, PCB 02-108 (April 18, 2002) (citing *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483 (1998)). The Board's misconstruction of the letter, and misapplication of the summary judgment standard, erased doubt that otherwise should have precluded summary judgment. Although the Agency was under no burden to raise a genuine issue about an argument Brickyard did not make when seeking summary judgment, the Agency nevertheless raised one. The letter the Agency cited disputes the conclusions the Board cited in Brickyard's application. The Board should have construed the letter in favor of the Agency's contention that a genuine issue existed. That the Board did not do so warrants reconsideration.

B. The Board Overlooked The Agency's Memorandum On Brickyard's Groundwater Impact Statement

The Board overlooked evidence contrary to its holding that creates a genuine issue. An Agency memorandum documents why Brickyard's GIA was inadequate. *See* R. at 47567–69. The permit reviewer rejected many of Brickyard's conclusions about its GIA that the Board relied on in its holding, finding the conclusions to be "not accurate." R. at 47568. The reviewer instead concluded that Brickyard "proposed [a] modification in the conceptual design of the facility which does not correspond with the approved contaminant transport models for the facility." *Id.* The Agency did not cite to this memo-

randum in its briefing on Brickyard's motion for summary judgment because Brickyard had not raised the adequacy of its GIA evaluation under Section 811.137 as a ground for summary judgment. Accordingly, it does not appear that the Board considered this memorandum. There is no reference to it in the order, and the Board found there to be no genuine issues of material fact.

If the Board did not consider the Agency's memorandum, there are two reasons for reconsideration. First, a general ground for reconsideration is to bring overlooked facts in the record to the Board's attention. *Chatham BP, LLC v. Illinois Envtl. Prot. Agency*, PCB 15-173, slip op. at 2 (Nov. 5, 2015). The Agency has done so here, bringing to the Board's attention facts that challenge the factual basis of its order. Second, in granting summary judgment, the Board was required to base its decision on the entire record. *See* 35 Ill. Adm. Code 101.516(b); *see also Village of Glenview v. Northfield Woods Water and Utility Co.*, 216 Ill. App. 3d 40, 46 (1st Dist. 1991) ("When ruling on a motion for summary judgment, the trial court must consider the entire record."). If the Board did not consider this document, its decision was not based on the entire record, which would be a misapplication of existing law. Reconsideration is therefore appropriate.

If, on the other hand, the Board did review the Agency's memorandum, reconsideration is still justified. Review of the memorandum should have revealed a genuine issue of material fact. The document directly disputes the conclusions in Brickyard's application that the Board cited to in support of its

holding. The Board's finding that there was no genuine issue of fact was therefore incorrect, warranting reconsideration.

III. The Board Misapplied Existing Summary Judgment Law by Resolving a Genuine Issue as to the Siting Approval's Scope

It is fundamental that "[t]he purpose of a summary judgment is not to try an [issue] of fact, but rather to determine whether a genuine issue of material fact exists." *Illinois Envtl. Prot. Agency v. Illinois Pollution Control Bd.*, 386 Ill. App. 3d 375, 391 (3d Dist. 2008). Summary judgment is thus inappropriate when there are genuine issues of material fact. *Saline Cnty. Landfill, Inc., v. Illinois Envtl. Prot. Agency*, PCB 02-108 (April 18, 2002). Therefore, "[a]n order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists." *Wehde v. Reg'l Transp. Auth.*, 237 Ill. App. 3d 664, 675 (2d Dist. 1992).

Here, the pleadings reveal that the parties dispute the scope of Brickyard's 1992 siting approval. The Vermilion County Board's approval resolution stated it approved a request from Brickyard for a lateral and a vertical expansion of its then-existing landfill. *See* R. at 47498. The Agency reads the resolution literally—approval was for waste disposal in those specified requested expansion areas. *See* Resp't's Mot. 2–4, 20–21. Brickyard takes a broader view, contending it received siting approval for "one large landform, with waste placement inside the entirety of the landform." Pet'r's Mot. 14; *see also* Resp't's Reply 16–18 (raising issue as to drawing Brickyard relies on). The Board has treated disputes about the scope of siting approval in permit

appeals as a question of fact. *See Saline Cnty. Landfill, Inc. v. Illinois Envtl. Prot. Agency*, PCB 02-108 (Apr. 18, 2002), slip op. at 16, 20, 23. Therefore, a question of fact exists as to whether the 1992 siting approval approved waste disposal in areas other than the requested lateral and vertical expansion areas, *i.e.*, in the then-existing landfill.

This issue is material to the Board's holding. The controlling issue is whether Brickyard has proposed a "new pollution control facility" under Section 3.330(b)(2) of the Illinois Environmental Protection Act, 415 ILCS 3.330(b)(2) (2014). That determination, according to the Board, turns on whether Brickyard seeks to dispose of waste in an area beyond the areas approved by the 1992 siting approval.[2] The scope of the approval then "has legal probative force as to the controlling issue," making the issue of its scope "material." *City of Quincy v. Illinois Envtl. Prot. Agency*, PCB 08-86 (June 17, 2010), slip op. at 31 (quoting *First of Am. Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 178 (1995)).

This issue is also genuine given the Board's finding that Brickyard satisfied its burden of production.[3] The Board found that Brickyard came forward with sufficient affirmative evidence from the record to support its whole-landform argument. For its part, the Agency pointed to (1) the 1992 siting approval resolution, which states the nature (an expansion) and extent

[2] The Agency respectfully disagrees with the Board's legal conclusion, and maintains, as it argued in briefing on the cross-motions, that a permit's waste boundaries are an operative "boundary" contemplated by Section 3.330(b)(2).

[3] The Agency respectfully maintains, as it argued in briefing on the cross-motions, that Brickyard failed to meet its burden of production.

(lateral and vertical) of the request approved; (2) the 1991 siting request and included public notice; and (3) drawings in the permit application showing the wedge's elevation. Record evidence thus supports the Agency's position, making the issue "genuine." *See Pekin Ins. Co. v. Adams*, 343 Ill. App. 3d 272, 275 (4th Dist. 2003).

The Board improperly resolved this factual issue as to the scope of the 1992 siting approval. Specifically, the Board found that "filling the wedge with waste would not extend waste beyond the boundaries set by the County Board." Order 6.[4] Thus, the Board appears to have weighed both parties' evidence and adopted Brickyard's viewpoint over the Agency's. The Board's particular finding, however, is not the reason the Agency seeks reconsideration.[5] Rather, it is the fact that the Board found anything at all—the Board tried a genuine issue on summary judgment.

The Board's resolution of the issue was improper. The absence of any genuine issue of material fact is a requirement for summary judgment. Here, the pleadings and record show a genuine issue of material fact as to the scope of the 1992 siting approval. The Board therefore misapplied the summary judgment standard in resolving that issue instead of denying the cross-motions. This error warrants reconsideration and, ultimately, denial of Brickyard's motion.

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[4] *See also* Order 7 ("removing the wedge requirement from the permit poses no inconsistency with the Vermilion County Board's siting approval"); *id.* at 8 ("filling the wedge with waste would not expand the landfill beyond the boundaries already approved by the County"); *id.* at 9 ("the lower portion of the wedge falls within the boundaries of the 1992 siting approval").

[5] Although the Agency respectfully disagrees with it, and waives no right to appeal it.

CONCLUSION

For the foregoing reasons, the Agency respectfully requests that the Board reconsider its order of November 17, 2016, granting summary judgment for Brickyard.

Respectfully submitted,

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