

ILLINOIS POLLUTION CONTROL BOARD
January 21, 1982

AMERICAN FLY ASH CO., et al.,)
)
Petitioner,)
)
v.) PCB 81-188
)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by J. Anderson):

American Fly Ash (AFA) applied for a permit for a solid waste management site which the parties have impliedly assumed is an SB 172, (P.A. 82-0682)* "new regional pollution control facility". Application was made July 27, 1981 and the permit was granted by the Agency on October 27, 1981. This matter is before the Board on the appeal of only one condition of that permit, requiring "written evidence that the applicant and Tazewell County have an agreement relative to road maintenance and load limits."

In ZYX-Dixon v. IEPA, PCB 81-167 (December 3, 1981) the Board noted the chronological legislative history of SB 172. Briefly, again, SB 172 was passed by the legislature and consequently referred for gubernatorial review and action, if any, on July 1, 1981. The Governor issued an amendatory veto message on September 24, 1981. The changes suggested in the amendatory veto were accepted by the Senate October 15 and by the House October 28, 1981. The changes were thereafter certified by the Governor November 12, 1981.

In ZYX, for reasons there stated and incorporated herein by reference, the Board determined that SB 172 was a procedural statute legislatively intended to have retroactive application in a situation where a) the permit for what has been defined by SB 172 as a "new regional pollution control facility" was initially

* In pertinent part, SB 172 amends Section 39(c) of the Environmental Protection Act to provide that "no permit for the development or construction of a new regional pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of said facility has been approved by the County Board...if [the facility is to be located in] an unincorporated area." New Section 3(t) defines a "new regional pollution control facility" as one "initially permitted for development or construction after July 1, 1981."

applied for after July 1, 1981, and b) was denied by the Agency prior to November 12, 1981, the effective date of SB 172. The ZYX action was dismissed, the Board holding that both it and the Agency would lack statutory authority at this time to cause issuance of a permit where county approval had not been received.

Before this appeal can proceed, the threshold question is whether there exists a validly issued permit over which the Board can exercise jurisdiction, or whether SB 172 retroactively applies to invalidate this permit. As the Agency in its December 24, 1981 brief, and AFA in its December 29 brief correctly point out, a retrospective application of SB 172 could invalidate all landfill development and construction permits issued by the Agency in the "gap" between July 1, 1981 and November 12, 1981.

The Board has not discovered direct evidence of legislative consideration of the effect of SB 172 on permits issued during the "gap". However, in House debate immediately prior to House passage of SB 172 on July 1, 1981, Rep. Breslin perhaps indirectly addressed the issue during her presentation of the bill. In response to a question by Rep. Kelley as to whether persons could receive permits without local approval "if they hadn't done so by the first", Rep. Breslin stated that

"If EPA has not granted them a permit by the time this Bill is signed then the siting provisions of this Bill will apply to them." (Transcription Debate, 82nd Ill. General Assembly. House of Representatives, July 1, 1981 at 3).

On the other hand, the Board again notes that the Governor's amendatory veto message of September 24, 1981 specifically referred to this date in stating that "Only those new sites seeking first-time approval after July 1, 1981 should be included." The Board continues to find the legislature's acceptance of the amendatory veto to be more compelling evidence that a retroactive effect was intended. To construe the statute as not having retroactive application is to render meaningless the July 1, 1981 permit issuance deadline solely for "new regional pollution control facilities." The statute does not make exceptions, or otherwise contain a savings clause for such facilities not possessing a permit on or before July 1, 1981.

AFA and the Agency argue that SB 172 should not be given a retroactive effect in this case, even putting aside the question of legislative intent, on the ground that to do so would deprive AFA of a vested property right. The Agency points out that Hogan v. Bleeker, 29 Ill. 2d 181, 193 N.E.2d at 848, upon which the Board relied in ZYX, goes on to hold that

"However, even procedural or remedial statutes are not construed retroactively where to do so would deprive one of a vested property right [entitled to constitutional protection]." 193 N.E.2d at 849.

AFA has drawn the Board's attention to numerous cases involving the retroactive effect of legislation which changes prior zoning. In the case most nearly on point Deer Park Civic Assn. v. City of Chicago, 347 Ill.App.346, 106 N.E.2d 823 (1st App. Dist. 1952) the court refused to issue a judicial declaration that a building permit, previously issued, had been revoked by an amendatory ordinance changing the zoning from manufacturing to family dwelling. The general rule stated there that

"any substantial change of position, expenditures, or incurrence of obligations under a building permit entitle the permittee to complete the construction and use the premises for the purpose authorized irrespective of subsequent zoning or changes in zoning" (106 N.E.2d at 825).

This general rule has been subsequently embraced and applied by the Supreme Court e.g. Pioneer Trust and Savings Bank v. County of Cook, 71 Ill.2d 510, 377 N.E.2d 21 (1978).

In Exhibit A to AFA's brief, and the affidavit of AFA Operations/Products Manager Mitchell L. Nowicki, AFA details the 1980 and 1981 month by month expenditures made in selection of the Tazewell County site, preparation of the permit application, and participation in a public hearing concerning that application held in Pekin on October 1, 1981. A total of approximately \$96,000 was expended, \$49,000 by AFA and the remainder by Commonwealth Edison Co. (The AFA site is to receive fly ash and wet bottom boiler slag generated by Commonwealth Edison.) AFA's expenditures were all made prior to June, 1981. Between July and October, 1981 Commonwealth Edison expended in excess of \$34,000. Between November 1-12, it expended an additional \$4,800. AFA contends that the expenditure of these funds has given AFA a vested property right in the October 27, 1981 permit.

The Agency does not refer to this body of zoning law. It does, however, draw the Board's attention to cases in which the Agency and the Board have been held to be equitably estopped from revoking sewer construction permits granted by the Board's predecessor Sanitary Water Board, where the developers had expended substantial sums of money and incurred heavy liabilities in reliance upon the issuance of these permits Wachta v. PCB, 8 Ill. App.3d 436, 289 N.E.2d 484 (1972), Bederman v. PCB, 22 Ill. App.2d 31, 316 N.E.2d 785 (1974), Kaeding v. PCB, 22 Ill. App.3d 36, 316 N.E.2d 788 (1974). Finally, the Agency refers to Martell v. Mauzy, 511 F. Supp. 729 (N.D. Ill. 1981), holding that the Agency's denial of an operating permit for a sanitary landfill on the basis of unadjudicated charges of prior misconduct was impermissible. Expenditure of substantial sums in reliance on a developmental permit was found to have created a legitimate claim of entitlement to an operating permit, a possessory interest in real estate, and a liberty interest deserving of constitutional protection.

As balanced against the Board's finding of legislative intent that SB 172 be given retroactive application, the Board finds that AFA's allegations and evidence are of insufficient weight to "save" its permit by means of an equitable estoppel. The gravamen of Wachta et al. was the permittee's expenditure of substantial sums in reasonable reliance on issued permits. The \$4,800 spent in November, 1981 arguably in reliance on the issued permit was expended by Commonwealth Edison, not AFA. AFA made no expenditures later than June, 1981. It cannot here claim estoppel based on actions taken by another entity, not party to this action.

The Board must observe that the reasonableness of Edison's reliance on the permit in making even this insubstantial expenditure is highly questionable. The permit was issued well after the Governor's amendatory veto message of September 24, 1981 and only one day before final legislative action was taken on SB 172 on October 28, 1981 accepting the Governor's veto-suggested amendments. Under these circumstances, the reasonable person would be lead to believe at the very least that there was a "cloud" over the permit. In addition, the initial legislative passage of SB 172 on July 1, 1981 makes the reasonableness of Edison's \$34,000 expenditure between July and October, 1981 similarly questionable, in view of the "risk" of gubernatorial acquiescence to the bill as passed July 1, 1981.

Given the Board's findings on the equitable estoppel issue, the Board need not exercise any authority it may possess to adjudicate the constitutional "vested property rights" claims, although the Board notes that the zoning cases' tests for concluding if and when property rights have vested are nearly identical to those in the environmental cases regarding application of equitable estoppel.

This appeal is dismissed. Giving SB 172 retroactive effect, the Board finds that no valid permit exists over which the Board can exercise jurisdiction. While the Board agrees that this might be considered a harsh result, it believes that it is the result intended by the legislature.

IT IS SO ORDERED.

I, Christian L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 21st day of January, 1982 by a vote of 4-0.

Christian L. Moffett
Christian L. Moffett, Clerk
Illinois Pollution Control Board