

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

NOTICE OF FILING AND PROOF OF SERVICE

TO: John T. Therriault, Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street
State of Illinois Building, Suite 11-500
Chicago, IL 60601

Carol Webb
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

Thomas Davis
Assistant Attorney General
500 S. Second Street
Springfield, IL 62706

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a MOTION FOR AUTHORIZATION OF PAYMENT OF ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 17th day of September, 2009.

BY: /s/ Patrick D. Shaw

MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 N. Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323
Tel: (217) 528-2517
Fax: (217) 528-2553

THIS FILING SUBMITTED ON RECYCLED PAPER

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

**MOTION FOR AUTHORIZATION OF PAYMENT OF
ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION**

NOW COMES Petitioner, PRIME LOCATION PROPERTIES, INC. (hereinafter "Prime"), by its undersigned counsel, and pursuant to Section 57.8(1) of the Illinois Environmental Protection Act (415 ILCS 5/57.8(1)), petitions the Illinois Pollution Control Board (hereinafter "the Board") for an order authorizing payment of legal costs, and in support thereof states as follows:

1. On August 20, 2009, the Board reversed the Illinois Environmental Protection Agency (hereinafter "the Agency") and its January 27, 2009 determination that the subject action constituted a new release, subject to an additional deductible and planning and budgeting approvals.

2. In addition, the Board recognized that Prime had requested reimbursement of legal costs in the event that it prevailed and directed Prime to file a statement setting forth its claim to the same, as well as arguments for the Board's exercise of discretion in awarding same.

(Opinion, at p. 34)

3. Under Section 57.8(1) of the Environmental Protection Act, the legal costs for

seeking payment under the Leaking Underground Storage Tank Program are reimbursable from the underground storage tank fund if the owner or operator prevails before the Board. (415 ILCS 5/57.8(1)).

4. Unquestionably, Prime has prevailed before the Board. “A prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit.” J.B. Esker & Sons, Inc. v. Cle-Pa’s Partnership, 325 Ill. App. 3d 276, 280 (5th Dist. 2001). The party need not necessarily succeed as to all issues. See Becovic v. City of Chicago, 296 Ill. App. 3d 236, 240 (5th Dist. 1998) (citing numerous cases in holding that party prevailed in obtaining \$2,750 judgment in suit seeking \$35,300).

5. The award of legal costs are discretionary with the Board. Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003). In Illinois Ayers Co. V. IEPA, PCB No. 03-214 (Aug. 5, 2004), petitioner urged the Board to follow federal precedents arising under public interest statutes, which assume that a prevailing party “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). While the Board made no express comment on this presumption, Board precedent appears to favor the exercise of discretion in favor of an award since an award appears to have authorized by the Board in every case in which the petitioner has prevailed. See Ted Harrison v. IEPA, PCB No. 99-127 (Oct. 16, 2003) (finding facts of the case justified award of \$19,421.75 in attorney fees); Illinois Ayers Co. V. IEPA, PCB No. 03-214 (Aug 5, 2004) (finding that “under the facts of this case awarding legal fees [of \$44,456.49] is appropriate”); Swif-T Food Mart v. IEPA, PCB No. 03-185 (Aug. 19, 2004) (finding that “[b]ased on the facts of this case . . . legal fees [of \$11,291.37] should be awarded); Webb & Sons, Inc. v. IEPA, PCB No. 07-24 (May 3,

2007) (finding award appropriate, but reducing claimed legal fees by 45 percent in light of petitioner's failure to obtain reimbursement for 55% of the reductions sought to be reversed).

6. The Board should continue to liberally award legal costs to prevailing parties in LUST appeals, though retain the statutory authority to reject claims that would create injustice. The LUST Fund is a unique feature of Illinois environmental law. The fund acts as public insurance, not merely for the benefit of the owner of the tanks, but for the neighboring property owners, as well as communities that benefit from contaminated properties being returned to economic use. The Board has previously recognized that the adjudication of contested cases is an essential element in the formation of the policies that govern the UST reimbursement program. Platolene 500 v. IEPA, PCB 92-9, at 12-14 (May 7, 1992). In challenging the Agency's decision, Petitioner has contributed to the body of law in which UST reimbursement decisions are based. Moreover, the benefits of this contribution are mostly to be appreciated by future Fund claimants that can look to Board precedent in shaping future decisions.

7. With respect to the specifics of this appeal, the Board should award reimbursement of fees for the same reason that legal fees were awarded in Swif-T Food Mart, which the Board found to be applicable precedent herein. There doesn't appear to be any relevant distinction between that case and this one, other than the fact that in Swif-T Food Mart, the Board had rejected similar arguments once before, and in this case, the Board had rejected similar arguments twice before.

8. In addition, the Agency, through the Attorney General's Office, raised an important issue of general applicability herein concerning the unauthorized practice of law. This was a difficult, potentially dispositive issue that had not been raised on numerous prior occasions

involving similarly situated petitioners, and unfortunately Prime was the “lucky” petitioner that was required to address this issue. Future petitioners (and future Boards) will presumably be the beneficiaries of Prime providing one side of the adversarial dialogue herein, and it would be unfair for Prime to solely bear those costs.

9. Prime brought this appeal, not merely to avoid payment of multiple deductibles, but with the hope that cleaning up the property within the context of the existing remediation project would be quicker and ultimately more economical than starting over from the beginning. Doing so will not only save money from the Fund, but promote public goals of a prompt clean-up.

9. Attached hereto as Exhibit A is an affidavit of Patrick D. Shaw, documenting the legal costs in this matter, which are \$10,803.18. This figure is the sum of the attorney fee billable time (\$10,257.50) and costs (\$1,123.18), after one afternoon of hearing preparation time is deducted (\$577.50) because the witness did not appear. This affidavit is modeled on the one this office provided in support of legal fees in the Illinois Ayers case, and which the Board found sufficient to meet petitioner’s prima facie burden of evidencing litigation costs.

WHEREFORE, Petitioner, PRIME LOCATION PROPERTIES, LLC requests that this Board authorize the payment from the leaking underground storage tank fund the amount of \$10,803.18 in attorney’s fees and litigation costs to PRIME LOCATION PROPERTIES, LLC, pursuant to 415 ILCS 5/57.8(1).

Respectfully submitted,

PRIME LOCATION PROPERTIES, LLC,
Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,
Its attorneys

BY: /s/ Patrick D. Shaw

MOHAN, ALEWELT, PRILLAMAN & ADAMI
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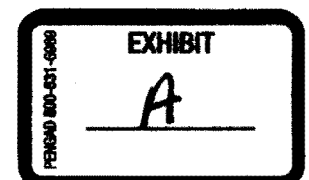
\\Patrick\Patrick Shaw\My Documents\lattyfeepet.wpd/crk 9/17/09 3:07 pm

STATE OF ILLINOIS)
) ss.
COUNTY OF SANGAMON)

AFFIDAVIT OF PATRICK D. SHAW
VERIFYING ATTORNEY FEES

Affiant, Patrick D. Shaw, being first duly sworn, states as follows:

1. The statements made herein are based upon my personal knowledge, and I am competent to testify hereto.
2. I am an attorney duly licensed to practice law in the State of Illinois; and I am the attorney of record for Petitioner, Prime Location Properties, LLC in the case entitled Prime Location Properties, LLC v. Illinois Environmental Protection Agency, PCB 09-67.
3. I represent Prime Location Properties, LLC solely in matters concerning the appeal of the Agency's Denial Letter, dated January 27, 2009. I represent it on no other matters.
4. My office specifically began working on this UST Appeal in April of 2009, after the Board directed Petitioner to obtain legal counsel.
5. On May 29, 2009, I received the Attorney General's Motion to Dismiss raising the issue of unauthorized practice of law as an incurable jurisdictional defect.
6. Subsequently, I prepared for hearing without the benefit of the Agency record that was weeks late. Two working days prior to the hearing I prepared by outlining the necessary evidence for post-hearing briefs. I also prepared at that time for testimony of a sponsoring witness familiar with the submittals in this case. The witness was not available at hearing, but the Agency brought the record to the hearing. In my opinion, no more than one of the two preparation days touched upon the intended testimony; otherwise, the preparation involved work that would have been done with or without a hearing. In this petition, Petitioner has agreed not to seek reimbursement for one of those days of hearing preparation, which resulted in \$577.50 in attorneys fees.
7. Following the hearing, I researched and prepared the post-hearing briefs and took no further action on this case until the Board's Order.
8. Prime Location continues to incur legal expenses in seeking reimbursement of legal costs. However, since those legal costs are somewhat of a moving target, being incurred as these document are being prepared, the Petitioner is not seeking reimbursement of those costs unless for some unexpected reason, this becomes a protracted dispute.
9. Attached hereto as Exhibit 1 is an accurate summary of the legal work done and the legal fees incurred with respect to this matter. This summary has been taken from the actual



invoices and thus reflects actual work performed and fees incurred. The summary reveals the date the work was performed, the description of the work performed, the amount of time spent, and the total fees incurred. The hourly rates charged are commensurate with the prevailing rates for environmental legal services in Springfield, Illinois for 2009 and represent the rates charged to all clients of the respective attorneys.

FURTHER AFFIANT SAYETH NOT.

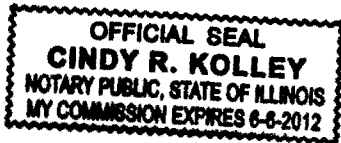


Patrick D. Shaw

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

The undersigned, a Notary Public in and for said County, in the State aforesaid, does hereby certify that Patrick D. Shaw, personally known to me to be the same person whose name is subscribed to the above instrument, appeared before me today in person and acknowledged that he signed and delivered that instrument as his free and voluntary act, for the uses and purposes set forth.

Given under my hand and official seal, this 17th day of September, A.D. 2009.





Notary Public

Patrick D. Shaw
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 N. Old Capitol Plaza, Suite 325
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 1 North Old State Capitol Plaza
 Suite 325
 Springfield, IL 62701-1323

Invoice submitted to:
 Prime Location Properties, LLC
 P.O. Box 242
 Carbondale, IL 62903

September 16, 2009

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
<u>April 2009</u>		
4/6/2009 Tel conf w/Mike Keebler (x2) re appeal.	0.40 220.00/hr	88.00
4/13/2009 Prepare Petition for Review and Entry of Appearance.	1.20 220.00/hr	264.00
4/20/2009 Review file and draft amended petition for review	2.50 165.00/hr	412.50
Prepare Notice of Filing and Proof of Service (x2), Amended Petition for Review and Entry of Appearance. Filed electronically.	0.50 220.00/hr	110.00
4/21/2009 Prepare Notice of Filing, Proof of Service and Entry of Appearance for FCP.	0.10 220.00/hr	22.00
SUBTOTAL:	[4.70	896.50]
<u>May 2009</u>		
5/4/2009 E-mail rec'd from Carol Webb.	0.10 220.00/hr	22.00
E-mail from Hrg Officer re acceptance of case	0.20 165.00/hr	33.00

Prime Location Properties, LLC

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	<u>Hrs/Rate</u>	<u>Amount</u>
5/12/2009 Telephone conf. w/ client; review court decision on applying deductible; email to client re same	3.40 165.00/hr	561.00
5/14/2009 Receive & review Board order	0.40 165.00/hr	66.00
5/18/2009 Receive & review notice of hearing officer and hrg officer order	0.60 165.00/hr	99.00
5/22/2009 Receive Notice, Appearance and Motion to Dismiss. Memo to PDS. Revise memo to PDS. Additional notes.	1.00 220.00/hr	220.00
5/29/2009 Draft ltr to Mike Keebler transmitting docs	0.80 165.00/hr	132.00
Receive & review motion to dismiss from A.G.; email to client re same	0.80 165.00/hr	132.00
SUBTOTAL:	[7.30	1,265.00]
<u>June 2009</u>		
6/3/2009 Research attorney representation law; prepare response to motion to dismiss	3.70 165.00/hr	610.50
6/4/2009 Revise response in oppositin to motion to dismiss and file	6.00 165.00/hr	990.00
E-mail to client regarding issues concerning late record	1.00 165.00/hr	165.00
6/12/2009 Receive & review ltr and docs from Keebler	0.90 165.00/hr	148.50
6/15/2009 Review docs; prepare and mark exhibits for hrg; e-mail to client reviewing issues for hrg	3.50 165.00/hr	577.50
6/16/2009 Prepare for hrg; email from client	3.50 165.00/hr	577.50
6/17/2009 Attend hrg	1.50 165.00/hr	247.50
6/19/2009 Receive & review Hrg Officer order, notice and agency record	0.30 165.00/hr	49.50

Prime Location Properties, LLC

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	<u>Hrs/Rate</u>	<u>Amount</u>
6/24/2009 Review administrative record; outline docs and begin preparing factual summary/ chronology	4.50 165.00/hr	742.50
6/25/2009 Draft statement of facts; continue review Agency record	5.50 165.00/hr	907.50
6/26/2009 Draft brief; email draft w/ permit notes to Mike	6.00 165.00/hr	990.00
6/29/2009 Revise and file brief	0.50 165.00/hr	82.50
 SUBTOTAL:	 [36.90	 6,088.50]
<u>July 2009</u>		
7/7/2009 Rec'd Notice, Response to Petitioners Post Hearing Brief.	0.10 220.00/hr	22.00
7/8/2009 Review Agency response brief; e-mail copy to client; tel conf. w/ client	1.30 165.00/hr	214.50
7/9/2009 Review and draft reply brief; e-mail draft to client	5.90 165.00/hr	973.50
7/13/2009 Revise and file reply	3.30 165.00/hr	544.50
7/17/2009 E-mail to client a copy of reply brief	0.30 165.00/hr	49.50
7/20/2009 Memo to PDS.	0.40 220.00/hr	88.00
7/21/2009 Revise memo to PDS (x2).	0.30 220.00/hr	66.00
 Draft motion for leave to file reply; draft waiver of decision deadline	 0.30 165.00/hr	 49.50
 SUBTOTAL:	 [11.90	 2,007.50]
 For professional services rendered	 60.80	 \$10,257.50

Prime Location Properties, LLC

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Additional Charges :

	<u>Amount</u>
<u>April 2009</u>	
4/30/2009 Postage for April 2009.	1.18
Photocopying for April 2009.	5.20
SUBTOTAL:	[6.38]
<u>May 2009</u>	
5/31/2009 Lexis charges for May 2009.	473.62
Photocopying for May 2009.	2.80
SUBTOTAL:	[476.42]
<u>June 2009</u>	
6/30/2009 Lexis charges for June 2009.	244.22
Photocopying for June 2009.	157.60
Postage for June 2009.	2.88
SUBTOTAL:	[404.70]
<u>July 2009</u>	
7/31/2009 Lexis charges for July 2009.	228.86
Photocopying for July 2009.	5.60
Postage for July 2009.	1.22
SUBTOTAL:	[235.68]
Total additional charges	\$1,123.18