

ILLINOIS POLLUTION CONTROL BOARD
November 4, 2010

VEOLIA ES ZION LANDFILL, INC.,)
)
 Petitioner,)
)
 v.) PCB 11-10
) (Pollution Control Facility
CITY COUNCIL OF THE CITY OF ZION,) Siting Appeal)
)
 Respondent.)

ORDER OF THE BOARD (by G. T. Girard):

On September 29, 2010, the City Council of the City of Zion (Zion), filed a motion to dismiss this landfill siting appeal (Mot.). On October 18, 2010, Veolia ES Zion Landfill, Inc. (Veolia) timely filed response to the motion (Resp.). For the reasons discussed below the Board denies the motion to dismiss.

BACKGROUND

On September 2, 2010, Veolia filed a petition asking the Board to review an August 3, 2010 decision of Zion concerning Veolia’s proposed expansion of the existing landfill encompassing approximately 317.9 acres in Zion, Lake County. The Board accepted Veolia’s petition for hearing on September 16, 2010.

In this case, Zion granted with conditions Veolia’s application to expand Veolia’s facility. Veolia appeals on the grounds that Condition of Approval 2.2 is: 1) unsupported by the record, 2) against the manifest weight of the evidence, 3) standardless, 4) vague, 5) not within the authority of Zion to impose, 6) not reasonable and necessary to accomplish the purposes of Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2 (2008)), 7) potentially in conflict with permit conditions imposed by the Illinois Environmental Protection Agency, and 8) inconsistent with regulations promulgated by the Board.

MOTION

Zion argues that the petition for review should be dismissed under the Board’s procedural rules at Section 101.506 (35 Ill. Adm. Code 101.506) because Veolia expressly granted consent to the imposition of the contested condition during the public comment period. Mot. at 1-2. Zion argues that the “form of Condition of Approval 2.2 . . . is materially and substantially identical to the form of Condition of Approval 2.2” that was adopted by Zion when granting siting approval. Mot. at 2. Zion asserts that Veolia did not object to the final form of Condition of Approval 2.2 either orally or in writing to Zion. *Id.* Thus, Zion maintains that Veolia has waived any argument regarding the condition. Mot. at 3, citing generally to Board of Managers of Hidden Lake Townhome Owners Ass’n v. Green Trails Imp. Ass’n, 2010 WL 3331368

(Ill.App.2.Dist); Atanus v. American Airlines, Inc., 2010 WL 2486746 (Ill.App.1.Dist.); Palm v. 2800 Lake Shore Drive Condominium Ass'n, 401 Ill. App. 3d 868, 929 N.E.2d 641 (1st. Dist 2010); Lazenby v. Mark's Const., Inc., 236 Ill. 2d 83, 923 N.E.2d 735 (2010).

Zion argues that Veolia's consent to Condition of Approval 2.2 is an admission by Veolia that the condition is reasonable. Mot. at 3. Zion asserts that because of this, Veolia cannot contest the condition on appeal. *Id.*, citing People v. Whitney, 46 Ill. App. 3d 708, 361 N.E.2d 131 (3rd Dist. 1977) and R.B. Hayward Co. v. Lundoff-Bicknell Co., 365 Ill. 537, 7 N.E.2d 289 (1937).

Zion also argues that the doctrine of judicial estoppel should be applied to Veolia to prevent the appealing Condition of Approval 2.2. Mot. at 3. The doctrine of judicial estoppel prevents a party from taking one position at trial and a different position on appeal. *Id.* Furthermore, Zion asserts that Veolia should be estopped from "cherry-picking from the local siting approval only the condition which it finds objectionable." *Id.* Zion asserts that a litigant cannot avail himself of those parts of the judgment favorable to him and seek reversal of those parts unfavorable to him. *Id.*

RESPONSE

Veolia argues that the motion to dismiss is not allowed under the Board's rules for siting appeals at Section 107.502 (35 Ill. Adm. Code 107.502) and is based on "a tortured analysis of the facts and an extreme misapplication of case law." Resp. at 1. Veolia argues that under Section 107.502 the only grounds for dismissal of a petition for review of a siting decision are that the appeal was untimely, failed to include the filing fee and other information, or that petition was not properly filed or served. Resp. at 2. Veolia maintains that Zion has not cited any of those factors in the motion. *Id.*

Veolia also argues that objection to Condition of Approval 2.2 was not waived as the version of the condition adopted by Zion was substantially different from the text provided during the public comment period. Resp. at 2. Furthermore, Veolia opines that the cases relied upon by Zion are not landfill siting cases and are cases which having nothing to do with landfill siting or the issues in this case. Resp. at 4.

Veolia notes that the final version of the condition was adopted by Zion when making the final siting decision. Resp. at 4. Thus, Veolia had no opportunity to object to the final condition. *Id.* Veolia maintains that in any event there is no requirement that a party to a siting proceeding must object to a condition in order to file an appeal. *Id.*

DISCUSSION

When ruling on a motion to dismiss, the Board must take all well-pled facts contained in the pleadings as true, and must draw all inferences from those facts in the light most favorable to the non-movant. People v. Stein Steel Mills Svcs., Inc., PCB 02-1 (Nov. 15, 2001); Nash v. Jiminez, PCB 7-97 (Aug. 19, 2010); Chicago Coke v. IEPA, PCB 10-75 (Sept. 2, 2010). Zion has set forth three arguments in support of the motion to dismiss. Those three arguments are that

Veolia consented to the condition and conceded that the condition is reasonable, that Veolia should be estopped from challenging the condition, and that Veolia should not be allowed to “cherry-pick” the conditions. The Board finds none of these arguments persuasive.

Accepting the facts as plead as true and viewing in a light most favorable to Veolia, the Board cannot find that the condition, as adopted by Zion, was identical to the wording in the proposed conditions provided to Veolia during the public comment period. Further, the language of the condition was not adopted until the final siting approval. Thus, the Board is not persuaded that Veolia could have objected to the condition that was adopted by Zion and the Board declines to dismiss the petition for review based on the waiver argument.

Likewise accepting the facts as plead as true and viewing in a light most favorable to Veolia, the Board is not persuaded by Zion’s estoppel argument. The record is not clear that Veolia’s position has changed from the siting proceeding to the position before the Board. Therefore, the Board cannot find sufficient support in the record to apply the doctrine of judicial estoppel.

As to Zion’s argument that Veolia cannot “cherry-pick” the conditions, the Board finds the argument without merit. Section 40.1 of the Act (415 ILCS 5/40.1 (2008)) specifically allows an applicant to appeal siting conditions. Thus, the petition for appeal of a siting condition is consistent with the Act.

Based on the pleadings, the Board finds that there are insufficient grounds to support the motion to dismiss. Therefore, the Board denies the motion to dismiss.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 4, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board