ILLINOIS POLLUTION CONTROL BOARD

August 7, 1975

BROWNING-FERRIS INDUSTRIES OF ROCKFORD, INC., Petitioner,	)	
v.	)	PCB 75-194
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

OPINION AND ORDER OF THE BOARD (by Dr. Odell)

On May 7, 1975, Browning-Ferris Industries of Rockford, Inc. (BFI), filed its Permit Appeal with the Illinois Pollution Control Board (Board). Petitioner alleged that the permit conditions in paragraph 5 and Standard Condition 4(c) in its developmental permit issued by the Illinois Environmental Protection Agency (Agency) on February 27, 1975, were void and invalid. The permit conditions in issue read as follows:

Special condition "5. Construction work and/or development of the proposed site is specifically prohibited until such site has been zoned, or has received a special use permit or is in compliance with all zoning laws for such intended purposes."

Standard condition "4. This permit . . . (c) does not release the permitee from compliance with other applicable statutes of the State of Illinois, or with applicable local laws, regulations or zoning ordinances."

The Petitioner requested that the language be stricken and that the permit be amended accordingly.

The Board set the case for hearing by its Order of May 22, 1975. On June 27, the County of Ogle sought intervention, stating that the proposed landfill would be located in Ogle County and that it would be adversely affected if the language in question were stricken from the Agency permit. The Agency filed its Answer to Petitioner's Permit Appeal on July 2 and requested the Board to affirm the Agency's right to impose conditions 4(c) and 5. On July 31, 1975, BFI filed with the Board a waiver giving additional time to August 15 for a decision.

The hearing was held on July 2, 1975, in Chicago, Illinois. At that time the counties of Ogle and Winnebago were granted leave to intervene. A Stipulation of Facts and Legal Issues (Stipulation) was entered into the record at the hearing. In pertinent part, the Stipulation stated:

"2. On the 27th day of February, 1975, the Agency issued BFI a developmental permit known as permit No. 1975-11-DE.

"3. In relevant portion, that permit provides as follows:

A. paragraph 5:
Construction work and/or development of the proposed site is specifically prohibited until such site has been zoned, or has received a special use permit or is in compliance with all zoning laws for such intented purposes.

B. Standard Conditions, paragraph 4(c)
This permit ... does not release the permittee from compliance with other applicable statutes of the State of Illinois, or with applicable local laws, regulations or zoning ordinances.

"4. By and through the issuance of that permit, the Agency has acknowledged the environmental suitability of the site and proposed facility, but is attempting to lodge ultimate authority to determine the propriety of the proposed site location to the County of Ogle, that local governmental unit within which the proposed site is located.

II

LEGAL ISSUES

"1. BFI challenges the Agency's authority to establish the conditions precedent to site development set forth in paragraph 5 of the Permit and Standard Condition 4(c) thereof on the basis of the following legal theories:

A. Said conditions precedent are void because they are beyond the purview of, and the authority given the Agency by, the Illinois Environmental Protection Act (hereinafter the 'Act').

B. Said conditions precedent are void as an arbitrary, capricious and unreasonable administration of the Act because said conditions add to the Act's and the Board's permit application procedures additional administrative proceedings, which proceedings substantially duplicate the Agency's own procedures and which,

therefore, unjustly increase the monetray cost and time necessary to develop sanitary landfills.

C. Said conditions precedent are invalid as an attempt to delegate rule and regulation making authority to units of local government and an effective attempt to remove such power from the Board.

"2. As to all issues set forth in the prior paragraph, BFI prays for entry and issue by the Board of a final order directing the Agency to amend the subject paragraph by deleting the following portions thereof:

A. paragraph 5;

B. that language in Standard Condition 4(c) which required BFI to comply 'with applicable local laws, regulations or zoning ordinances.'

"3. The Agency submits that the disputed portions of the permit are valid for the following reasons:

A. Said conditions precedent are within the purview of, and the authority given the Agency by, the Act, and are, therefore, a proper, constitutional exercise of its authority.

B. Said conditions precedent do not add additional administrative proceedings to the Act's and the Board's permit application procedures.

C. Said conditions precedent do not substantially duplicate the Agency's own procedures.

D. Said conditions precedent do not delegate rule-making authority to local entities but rather are a reliance on those local entities who alone presently have the requisite authority to decide zoning questions.

"4. As to all the issues set forth in the prior paragraph, the Agency prays that the Board dismiss this matter, or, in the alternative, enter an order affirming the right to impose the disputed conditions."

At the close of the hearing, all parties and intervenors were given until July 21, 1975, to submit briefs to the Board regarding the legal issues raised in the case.

Petitioner first argues that Respondent has no power or authority to impose the conditions in paragraphs 4(c) and 5 as part of its permit agreement. The Agency admits in its brief

that it does not have authority to establish standards for location of refuse disposal sites:

"The Environmental Protection Agency does not presently have the authority to resolve conflicting land use questions. The Agency derives its authority to act solely from the General Assembly through the Environmental Protection Act and from the Pollution Control Board through the heretofore adopted regulations. As noted above, Sections 22 and 27 of the Act gave the Board, not the Agency, the authority to establish standards *for the* location of refuse disposal sites. . . . Therefore, the Agency does not presently have the authority to resolve conflicting land use questions nor the standards necessary to govern its decisions regarding the same.

"If the Agency were to begin resolving land use questions now, it would be acting beyond the purview of its statutory grant of authority. It has often been said that the jurisdiction and powers of an administrative agency are determined solely by its creator. . . . The General Assembly has not granted the Agency the power to decide zoning and land use questions. It has given the Board the authority to establish standards for the location of refuse disposal sites."

Intervenors argue that since existing regulations do not contain considerations for zoning classifications, the Agency can exercise discretion under Section 39 of the Illinois Environmental Protection Act (Act) and "give deference to local zoning ordinances and local zoning bodies." Section 39 of the Act reads in part:

> ". . . In granting permits, the Agency may impose such conditions as may be necessary to accomplish the purposes of the Act, and as are not inconsistent with the regulations promulgated by the Board herewith."

To support its position that the Agency can include local zoning conditions in its permits, intervenors quote language from City of Chicago v. Pollution Control Board 59 Ill.2 44, 322 N.E.2 11 (1974) in which the Illinois Supreme Court stated:

"The State has legislated in this field by the adoption of the Environmental Protection Act, which did not express the intent that the State should exclusively occupy this field, but rather provided in section 2 (a) (iv) Illinois Revised Statutes, 1973, Chapter 111 1/2, par. 1002 (a) (iv) that it is the obligation of the State Government 'to encourage and assist local governments to adopt and implement environmental-protection programs consistent with this Act.' We conclude therefore that *a local governmental unit may legislate concurrently with the* General Assembly on environmental control. However, as expressed by that portion of the constitutional proceedings referred to above, such legislation by a local governmental unit must conform with the minimum standards established by the legislature."

We do not find intervenor's arguement persuasive because the Court's language does not state that the Agency can require compliance with local zoning ordinances; rather this language goes to the issue of whether a local governmental unit can regulate concurrently and independently in line with minimum standards established by the legislature.

We therefore conclude that the Agency has no independent rule making power to unilaterally adopt regulations independent of Board regulations or necessary Agency procedures to carry out the purpose of the Act.

Petitioner also argues that the Agency cannot incorporate or adopt local zoning limitations into its permit requirement because "by requiring compliance with paragraph five and standard condition four(c), the Environmental Protection Agency is attempting to delegate rule and regulation making authority to units of local government and effectively attempting to remove the same from the Pollution Control Board.

"By making compliance with local zoning procedures a condition precedent to sanitary landfill development, the Agency is in effect vesting local governmental units with a veto power over sanitary landfill location. Thus, no matter what the statutes, or rules, regulations or procedures adopted by the Board pursuant thereto provide, the ultimate determination of whether or not a particular sanitary landfill is appropriate will be made by local governments. This fact, if permitted to exist would effectively emasculate this Board and destroy the Environmental Protection Act insofar as it attempts to create a unified state-wide program for environmental protection as it relates to sanitary landfills. The Board, rather than having authority to 'determine, define and implement the environmental control standards applicable in the State of Illinois...' (Ill. Rev. Stat. 1973, ch 111 1/2 para. 1005) would be an advisory body only; its standards would be applicable only insofar as cities and counties fail to exercise their effective veto power."

The Agency responds by stating that neither the General Assembly nor Board have acted to effectively preempt the field now occupied by local zoning regulation. In the absence of action by the General Assembly or the Board, local authorities can continue to resolve land use questions. The Agency further argues that no delegation of authority issue is involved since the Agency, as it has already admitted, does not have authority to decide land use zoning questions:

"In relying on local entities to resolve land use and zoning questions, the Agency is not delegating authority over these questions to local entities, but relying on these local entities who alone clearly have the present authority to resolve these questions. . . . Since the Agency presently does not have the authority to decide zoning and land use zoning, it is not delegating its authority in this regard to local entities. . . . Section 39 of the Act gives the Agency the authority to grant permits and the authority in granting permits to 'impose such

conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder.' The Agency must effectuate the intent of the Act and the purposes of the legislature in passing the Act. The Agency, however, must for the time being rely on local entities, who have the requisite authority and standards to resolve land use questions and, thereby, effectuate the intent of the Act."

Petitioner refers to the case of Carlson v. The Village of Worth 25 Ill. App[3] 315, 322 N.E.[2] 852 (1974, appeal docketed No. 47334, Illinois Sup. Ct.) where facts similar to those in this case were presented for decision by the court:

"Defendant [Village of Worth] further argues that regardless of the field of sanitary landfill licensing and regulation being preempted, the Environmental Protection Agency, in the exercise of its statutory discretion, has legitimatized defendant's ordinance by conditioning plaintiff's permit upon compliance with applicable state statutes, local laws, regulations and zoning ordinances. . . . However, defendant's reliance on the restatement of the rule in plaintiff's permit is unfounded.

"In view of the effect of the Environmental Protection Act on local regulatory power, this condition could be considered as merely expressing the obvious, that a permittee is not exempt from observing local regulations left viable after the passage of the Act. . . . Moreover, if the condition were intended to authorize regulatory ordinances such as that enacted by defendant, it would be invalid for two reasons. It would constitute an improper attempt to expand the provisions of the Environmental Protection Act by rule to give local public units authority over areas which the legislature has decreed by the Act that they should not have. . . . It would also constitute an improper delegation of the discretion that the legislature vested in the Environmental Protection Agency, contravening the legislative intent that the decision on licensing refuse disposal facilities be made by that agency."

The Agency responded to the Carlson argument as follows:

"The Carlson Court did state that there was an 'implicit holding in the O'Connor [O'Connor v. City of Rockford 52 Ill.[2] 360, 288 N.E.[2] 432 (1972)] case that the Environmental Protection Act has preempted the field of sanitary landfill licensing and regulation. . .' The Carlson case further stated, 'It is clear from the Environmental Protection Act, its legislative history, and preceding legislation in the same area that the General Assembly intended to thereby exclude any authority of local political entities which could interfere with or frustrate the objective of establishing a unified state-wide system of environmental protection.' The Agency believes the O'Connor and Carlson cases can be distinguished from each other and from the case at hand. The Agency does have the authority to license (through the

permit procedure) and regulate (through surveillance, variance and enforcement activities) sanitary landfills. Therefore, after Carlson, local entities do not. However, as noted above, the Agency presently does not have the authority to resolve land use and zoning questions."

We agree with the logic of the Carlson court regarding Special Condition 5. The Agency cannot resolve zoning questions by incorporating local zoning regulations into its permits. While the Agency must carry out its duty under Section 39 of the Act, it cannot do so by delegating its authority to local entities. Therefore, Special Condition 5 is void and shall be stricken from Petitioner's permit. According to Sections 27 and 39 of the Act, factors such as "the existing physical conditions, the character of the area involved, including the character of surrounding land uses, (and) zoning classifications" should be considered in determining the environmental suitability of a sanitary landfill site and in issuing a permit thereto, but these factors should be considered directly by the Board and Agency, rather than this responsibility being delegated to a unit of local government.

Even though the Board and Agency rule on the environmental suitability of landfill sites on the basis of uniform state-wide Regulations and Agency permits are issued accordingly, local governmental units may have stricter requirements if they also meet the minimum standards established by the Board in providing for adequate disposal sites. Within this context, Standard Condition 4(c) need not be stricken since it only applies to "applicable local laws, regulations or zoning ordinances." We read 4(c) as the Carlson court did, i.e. "a permittee is not exempt from observing local regulations left viable after the passage of the Act." The condition was not intended to authorize regulatory ordinances which frustrate or interfere with implementation of a state-wide program. Rather, such a condition or statement is inserted to give the permittee notice that a permit does not relieve him of those ordinances or local controls still in force.

Intervenors argue that in O'Connor the Supreme Court "enjoined defendants from proceeding with their landfill 'until the said defendants shall obtain a permit granted by the Agency.'" The intervenors argue that since the Court was fully aware that Agency permits contained the disputed conditions and since the Court did not denounce such conditions, that the Court was in fact supporting such a procedure. We do not believe the Court expressed any viewpoint on the issue before us in this proceeding.

Petitioner's third issue, that conditions 4(c) and 5 are void as arbitrary and capricious will not be considered because of our rulings on other issues in this case.

This constitutes the findings of fact and conclusions of law of the Board.

ORDER

IT IS THE ORDER of the Pollution Control Board that:

1. Standard Condition 4(c) is valid and therefore is retained in Petitioner's permit No. 1975-11-DE.

2. Special Condition 5 is void and is hereby stricken from Petitioner's permit No. 1975-11-DE. This permit, as amended, shall in all other respects remain in full force and effect.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 7th day of August, 1975, by a vote of 5 to 0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board