BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	)	**PCB 03-125 (Third-Party Pollution Control Facility Siting Appeal)**
MERLIN KARLOCK, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	)	**PCB 03-133 (Third-Party Pollution Control Facility Siting Appeal)**
MICHAEL WATSON, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	)	**PCB 03-134 (Third-Party Pollution Control Facility Siting Appeal)**
KEITH RUNYON, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC. Respondents.	)	**PCB 03-135 (Third-Party Pollution Control Facility Siting Appeal)**

MERLIN KARLOCK'S OBJECTION AND RESPONSE TO WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION TO RECONSIDER

Now comes Petitioner, Merlin Karlock, by his attorney, George Mueller, P.C., and in opposition and response to Waste Management of Illinois, Inc.'s Motion To Reconsider the Board's decision of August 7, 2003, states as follows:

The Motion To Reconsider Does Not Set Forth Sufficient Grounds For Reconsideration By The Board

General procedural rule 101.902 states, "In ruling upon a Motion For Reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." This standard exists in order to prevent parties from simply rearguing issues and legal principles that the Board has already fully addressed in its opinion. It is clear that something more is required for the Board to reconsider its previous rulings than a mere reworking of arguments already made. This higher standard in ruling on Motions To Reconsider has been approved by the Appellate Court in Turlek v. Pollution Control Board, 274 Ill.App.3rd 244, 653 N.E.2d 1288 (1st Dist. 1995). The Motion of Waste Management of Illinois to reconsider does not allege any new evidence, it does not allege any change in the law. It does not even allege any factual errors in the Board's decision. The arguments in that Motion are therefore best made in a Brief to the Appellate Court contesting the correct decision of this Board.

The Service Requirements Of Section 39.2 Are Mandatory And Jurisdictional

The portion of the statue in question states,

> "No later than 14 days prior to a request for location approval, the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners ..." 415 ILCS 5/39.2 (b)

Contrary to Respondent's assertion that the legislature did not intend that personal service and registered mail service would be the only means by which notice may be caused to be served, the Courts of this State have consistently held that this service requirement is mandatory because it is

jurisdictional. Respondent discusses legislative intent and asserts without authority that the legislature's intent in enacting 415 ILCS 5/39.2 was to allow multiple other forms of constructive or substitute service. Respondent does not cite any of the legislative history, but correctly points out that the first way one ascertains legislative intent is to look at the plain meaning of the words in the statute. When the word "shall" is used in a statute, such language generally evidences the legislature's mandatory intent. Jones v. Dodendorf, 190 Ill.App.3rd 557, 546 N.E.2d 92 (1989). Additionally, substantial compliance with mandatory statutory requirements is typically not sufficient. Wollan v. Jacoby, 274 Ill.App.3rd 388, 653 N.E.2d 1305 (1995). This would be particularly true when the statutory requirement is jurisdictional in nature as is the case here. The Illinois Supreme Court has long taken the position that notice and timeliness requirements, when property or procedural rights are involved, need to be strictly adhered to. An excellent discussion is found in Andrews v. Foxworthy, 71 Ill.2d 13, 373 N.E.2d 1332 (1978).

The possibility of additional burden to a party required to give notice, and the possibility of what Respondent calls "absurd results" do not give this Board a basis to disregard clearly established legislative intent, particularly when that intent has been verified in multiple Appellate Court opinions.

Respondent argues that this Board and the Appellate Courts have consistently refused to strictly construe Section 39.2 (b) when doing so would contravene its true purpose. Respondent's support for this argument comes from dicta in various opinions rather than from the holdings of the Board and the Appellate Courts. Some of Respondent's authority for this proposition is inapplicable. For example, Respondent cites Doubs Landfill, Inc. v. Pollution Control Board, 166 Ill.App.3rd 778, 520 N.E.2d 977 (5th Dist. 1988). Section 39.2 (b) requires

that the notice shall state the "location of the proposed site." In Doubs the Appellate Court correctly ruled that this language did not invalidate a notice which contained an erroneous legal description, but otherwise accurately and correctly described the location of the site. This holding is therefore inapplicable to the specific service requirement at issue here.

To the extent that this Board's previous holdings in DiMaggio v. Solid Waste Agency of Northern Cook County (PCB 89-138) and City of Columbia v. County of St. Clair (PCB 85-177) support the proposition that receipt of actual notice is not required when there is proof of timely and diligent attempts to obtain service of notice, those holdings were effectively overruled by the Appellate Court in Ogle County Board v. Pollution Control Board, 272 Ill.App.3rd 184, 649 N.E.2d 545 (2nd Dist. 1995). This is actually pointed out by the Board in its decision in ESG Watts, Inc. v. Sangamon County Board, (PCB 98-2, June 17, 1999). Interestingly, Respondent cites ESG Watts for the proposition that constructive service may be permitted, when the Board, in that case, strictly construed the service of notice requirements as to every landowner whose notice was at issue. Ogle County remains good law and binding despite the fact that this Board, in its decision in the instant case, found that it had been partially overruled only as to when certified mail is completed by our Supreme Court's decision in People Ex. Rel. Devine v. $30,700 U.S. Currency, 199 Ill.2d 142, 766 N.E.2d 1084 (2002), which held that certified mail service is deemed completed upon deposit at the post office.

All of Respondent's arguments suggesting that Mrs. Keller was constructively served must fail by reason of Ogle County Board's holding that a service defect is available to all participants to argue. Accordingly, a party on whom proper service was not effected does not even have the power to waive the defect.

No Court has ever ruled directly on whether constructive service would apply in light of a finding that a landowner was actively attempting to frustrate the notice process by avoiding service. Certainly, the Ogle County Board decision left open that possibility, but it becomes irrelevant in light of the fact that there is no evidence in this record that Mrs. Keller attempted to frustrate service, nor is there any finding in that regard by the Kankakee County Board in this case. In fact, Respondent erroneously argues that constructive service should be found based upon the timeliness and diligence of service attempts. This proposition is not supported by any Appellate Court decision.

Respondent argues that Mrs. Keller, on whom no certified mail service was attempted, should be deemed to have actually received notices purportedly served by regular mail and posting on her front door. The fact that these methods are not approved by the legislature in this case and that this Board is not authorized to contravene the legislative intent by designating alternative service methods has been argued thoroughly in the Briefs of the parties. Respondent relies on the fact that the Board and the Courts now accept certified mail service even though the statute calls for registered mail. However, this ignores the well established line of cases which find that registered and certified mail are legally interchangeable and functionally identical for service purposes. With regard to regular mail, Respondent argues that the reliability of the same has been established in Montalbano Builders, Inc.v. Rauschenberger, 794 N.E. 2d 401 (3rd Dist. 2003). Montalbano Builders is an inapplicable precedent, a discovery sanctions case where the Court held that regular mail must be assumed to be received in those situations where the service of discovery requests by regular mail is authorized by statute.

Additionally, if the County Board lacked jurisdiction, should its finding on the issue be given any weight at all?

What Respondent misses in this Board's decision of August 7th is that this Board found that the Kankakee County Board lacked jurisdiction as a matter of law. This Board found that Waste Management failed to attempt certified mail service on Brenda Keller and failed to complete personal service on her. Those facts are not in dispute. The remaining facts regarding the number of service attempts, the posting on the door, the regular mail, and when Mrs. Keller was home are extraneous. This Board made a finding as a matter of law on undisputed facts. Accordingly, the correct standard has been applied, and Respondent's argument that it should apply a different standard in deciding this issue has no merit.

Conclusion

For the foregoing reasons, the Motion of Waste Management of Illinois, Inc. to reconsider should be denied.

Merlin Karlock,

BY: George Mueller
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