

ILLINOIS POLLUTION CONTROL BOARD
October 7, 2004

JANIS ROSAUER and BATAVIA ILLINOIS)
RESIDENTS OPPOSED TO SITING OF)
WASTE TRANSFER STATION,)
)
Petitioners,)
)
v.) PCB 05-1
) (Third-Party Pollution Control Facility
ONYX WASTE SERVICES MIDWEST, INC.) Siting Appeal)
and CITY OF BATAVIA, ILLINOIS,)
)
Respondents.)

ORDER OF THE BOARD (by T.E. Johnson):

For the reasons provided in this order, the Board grants the motion for summary judgment of siting applicant Onyx Waste Services Midwest, Inc. (Onyx). The third-party petitioners, Janis Rosauer and “Batavia Illinois Residents Opposed to Siting of Waste Transfer Station,” do not meet the standing requirements of the Environmental Protection Act (Act) (415 ILCS 5 (2002)). Because the third-party petitioners lack standing to appeal the City of Batavia’s (City) decision granting siting approval to Onyx for a waste transfer station, the Board lacks jurisdiction and therefore dismisses this appeal.

Below, the Board will first describe the procedural history of this case before discussing and ruling on Onyx’s motion for summary judgment.

PROCEDURAL HISTORY

On July 12, 2004, a petition was filed with the Board on behalf of an organization called “Batavia Illinois Residents Opposed to Siting of Waste Transfer Station” (Batavia Residents), asking the Board to review a pollution control facility siting decision made by the City. The petition was filed by one Batavia resident, Janis Rosauer, and includes a list of Batavia resident signatures supporting the petition. In the City’s June 7, 2004 siting decision, the City granted Onyx’s application to site a waste transfer station in Batavia, Kane County.

In a July 22, 2004 order, the Board found that the petition was timely because it was filed within 35 days after the City’s action to approve siting. However, the Board held that it could not accept the petition for hearing at that time because of several procedural deficiencies with the petition. Specifically, the petition did not state the statutory prerequisites for third-party standing to bring a siting appeal, nor did the petition state all of the grounds for appeal. Additionally, the petition was filed by an individual, Ms. Rosauer, who was not identified as an attorney. The Board stated that under its procedural rules, though an individual may represent himself or

herself, a non-attorney cannot represent an organization or other persons in an adjudicatory proceeding before the Board.

The Board granted Ms. Rosauer leave to file an amended petition by August 23, 2004, to cure the identified deficiencies. The Board further held that the amended petition must be filed either (1) by an attorney on behalf of the organization or on behalf of Ms. Rosauer, or (2) by Ms. Rosauer solely on her own behalf. In addition, the Board noted that the filing of an amended petition would restart the 120-day statutory period for the Board to decide the appeal.

On August 23, 2004, based on the original petition, Onyx filed a motion for summary judgment or, alternatively, a motion to reconsider the July 22, 2004 order of the Board. Also on August 23, 2004, through an attorney, Ms. Rosauer and Batavia Residents filed an amended petition to contest the City's grant of siting. On September 2, 2004, to address the amended petition, Onyx filed an amended motion for summary judgment or, alternatively, a motion to reconsider the July 22, 2004 order. To date, neither Ms. Rosauer nor Batavia Residents has filed a response to either of Onyx's motions.¹

DISCUSSION

The Board first gives background on pollution control facility siting under the Act. The Board then discusses the amended petition and the amended motion for summary judgment before ruling on the motion.

Statutory Framework

Under the Act, before the Illinois Environmental Protection Agency can issue a permit to develop or construct a new pollution control facility, such as a waste transfer station, the permit applicant must obtain siting approval for the facility from the local government (*i.e.*, the county board if in an unincorporated area or the governing body of the municipality if in an incorporated area). Section 39.2 of the Act (415 ILCS 5/39.2 (2002)), commonly referred to as "S.B. 172" for the originating legislation, provides the process through which the local government must decide, based on nine statutory criteria, whether to approve or disapprove a request to site a new pollution control facility.

To receive siting approval, the siting applicant must demonstrate to the local government that the proposed facility meets all nine criteria. *See* 415 ILCS 5/39.2(a)(i)-(ix) (2002). The criteria include whether the proposed facility is designed, located, and proposed to be operated to protect public health, safety, and welfare; and whether it is located so as to minimize incompatibility with the character of the surrounding area. *See* 415 ILCS 5/39.2(a)(ii), (iii) (2002). If the local government denies or conditionally grants siting, the applicant may appeal the decision to the Board. *See* 415 ILCS 5/40.1(a) (2002). If the local government approves siting, certain third parties may appeal the local government's decision to the Board. *See* 415 ILCS 5/40.1(b) (2002); 35 Ill. Adm. Code 107.

¹ The Board cites the third-party petitioners' amended petition as "Am. Pet. at _" and Onyx's amended motion as "Am. Mot. at _."

Section 40.1(b) of the Act (415 ILCS 5/40.1(b) (2002)) addresses third-party appeals. That Section provides:

If the county board or the governing body of the municipality . . . grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality may, within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the approval of the county board or the governing body of the municipality. Unless the Board determines that such petition is duplicative or frivolous, or that the petitioner is so located as to not be affected by the proposed facility, the Board shall hear the petition 415 ILCS 5/40.1(b) (2002).

The Board's procedural rules likewise provide:

Section 107.200 Who May File Petition

The following persons may file a petition for review of a decision concerning siting of a new pollution control facility pursuant to Section 40.1 of the Act:

- b) Other persons. Any person who has participated in the public hearing conducted by the unit of local government and is so located as to be affected by the proposed facility may file a petition for review of the decision to grant siting. Associations that file a petition before the Board must be represented by an attorney 35 Ill. Adm. Code 107.200.

Amended Petition of Ms. Rosauer and Batavia Residents

In this case, on June 7, 2004, the City granted Onyx's application to site a waste transfer station in Batavia, Kane County. Through the amended petition filed on August 23, 2004, Ms. Rosauer and Batavia Residents seek to contest the City's siting decision before the Board. The amended petition states that Ms. Rosauer "participated in the public hearing conducted by the City of Batavia by submitting a written comment after the close of the public hearing within the time period allowed for submission of written comments." Am. Pet. at 1.

The amended petition describes Batavia Residents as an "unincorporated citizens' group of at least 200 residents, various members of which participated in the siting proceeding." Am. Pet. at 1. According to the amended petition:

At least sixty (60) members of Batavia Residents submitted written comments opposed to the siting approval after the close of the public hearing but within the time period allowed for the submission of written comments. Eleven (11) members of Batavia Residents appeared personally at the public hearings and offered questions and/or comments. *Id.* at 1-2.

Onyx's Amended Motion for Summary Judgment

In its amended motion for summary judgment, Onyx argues that there is “no genuine issue as to the dispositive fact that neither Petitioner participated in the public hearing in this matter, and Illinois law bars them from challenging the City’s decision.” Am. Mot. at 1. Alternatively, Onyx moves the Board to reconsider its July 22, 2004 order, arguing that the Board lacks the authority (1) to allow an amended petition to be filed on Ms. Rosauer’s behalf after the 35-day appeal period and (2) to have the filing of an amended petition serve as the starting point for the Board’s statutory 120-day decision period. *Id.* at 8-10.

The City’s amended motion for summary judgment is supported by the affidavit of Randy Recklaus, Assistant City Administrator of the City of Batavia.² According to the affidavit, a pollution control facility committee (PCF Committee) consisting of seven Batavia City Council members conducted a public hearing on the Onyx siting application from April 12 through April 16, 2004. Affid. at 1-2. After the public hearing and subsequent public comment period, the PCF Committee recommended approval of Onyx’s siting request. The City Council followed the PCF Committee’s recommendations and approved, with conditions, Onyx’s siting application on June 7, 2004. *Id.* at 2.

In his affidavit, Mr. Recklaus states that he attended the entire public hearing, with the exception of a 15 to 20-minute period during which an individual named Greg Popovich was commenting. Affid. at 2. According to Mr. Recklaus:

No individual who participated in the Public Hearing identified him- or herself as a member or representative of “Batavia, Illinois Residents Opposed To Siting Of Waste Transfer Station.” *** No individual who participated in the Public Hearing identified herself as Janis Rosauer or as a representative of Janis Rosauer.
Id.

Mr. Recklaus further states that he reviewed the transcript of the local siting hearing. Affid. at 2. According to Mr. Recklaus, the transcript confirms that no member or representative of Batavia Residents participated in the hearing and that neither Ms. Rosauer nor any representative of Ms. Rosauer participated in the hearing. *Id.* at 1-2.

Based on Mr. Recklaus’ affidavit, Onyx argues that neither petitioner “participated” in any phase of the City’s public hearing within the meaning of Section 40.1(b) of the Act so as to confer standing. Am. Mot. at 4. Onyx maintains that the amended petition provides no valid basis for the Board to exercise subject matter jurisdiction. *Id.* at 3. As for Ms. Rosauer, Onyx notes that the amended petition simply states that she filed a written comment “after the close of the public hearing.” *Id.* at 5. According to Onyx, the Act makes clear that such written comments are not part of the public hearing, quoting Section 39.2(c) of the Act (415 ILCS 5/39.2(c) (2002)), which authorizes the submittal of public comments up to “30 days after the date of the last public hearing.” *Id.*

² The Board cites the affidavit as “Affid. at _.”

Onyx also argues that the amended petition provides no basis for the Batavia Residents organization to have standing for this appeal. That certain of the group's members may have participated at hearing fails to establish standing for the group, according to Onyx, because:

Petitioners have pointed to nothing suggesting that any Group member represented or acted on behalf of the Group at the Public Hearing. In fact, there is nothing in the Amended Petition demonstrating that the Group even existed at the time of the Public Hearing. Am. Mot. at 6.

Onyx concludes that it is entitled to summary judgment because there is no genuine issue of material fact that petitioners failed to participate in the City's public hearing on the siting application and "[t]his failure is a complete bar to challenging the City's siting approval under [Section 40.1(b) of the Act]." Am. Mot. at 7.

Board Analysis and Ruling

Onyx has moved the Board for summary judgment, alleging that the third-party participants lack standing to bring this appeal of the City's siting approval. Whether the third-party petitioners are "so located" as to be "affected" by Onyx's waste transfer station is not at issue for purposes of ruling on Onyx's motion. 415 ILCS 5/40.1(b) (2002). Nor has Onyx challenged the petition as "duplicative or frivolous." *Id.* What is at issue now is whether Ms. Rosauer and Batavia Residents "participated" in the City's siting hearing. *Id.*

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." *Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing *Putrill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment." *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994). Neither Ms. Rosauer nor Batavia Residents has filed a response to Onyx's amended motion for summary judgment. Petitioners therefore waive any objection to the Board granting the motion. *See* 35 Ill. Adm. Code 101.500(d).

Section 40.1(b) of the Act allows a third party to challenge a local government's grant of siting approval for a pollution control facility only if, among other things, the third party "participated in the public hearing conducted by the county board or governing body of the municipality." 415 ILCS 5/40.1(b) (2002). The Board has held that the filing of a public comment after the close of public hearing does not constitute participation in the local hearing

under Section 40.1(b) so as to give standing. In Valessares v. County Board of Kane County, PCB 87-36 (July 16, 1987), the Board interpreted the meaning of “participated in the public hearing”:

By its plain language, this statutory phrase limits the universe of potential petitioners to those persons who physically attended the public hearing or were present by a duly authorized representative. The Act uses the terms “public hearing” and “public comment” in different contexts within Section 39.2, which provides the relevant procedures for county board action. Appeal rights established in Section 40.1(b) only use the term “public hearing.” Consequently, the Board holds that simply submitting a public comment after the close of the public hearing does not constitute an adequate basis for standing to seek review. Valessares, PCB 87-36, slip op. at 4; *see also* Nelson v. Kane County Board, PCB 94-51, 94-58 (consol.) (Apr. 21, 1994) (finding lack of standing where third party only filed public comment).

There is no indication in the record that Ms. Rosauer or anyone representing her attended the City’s public hearing. Ms. Rosauer has presented no factual basis that would arguably entitle her to judgment. On this record, the Board finds that there is no genuine factual question that Ms. Rosauer only filed a written public comment after the local hearing. Even construing the pleadings against Onyx, the Board finds that Onyx is entitled to judgment as a matter of law. Because Ms. Rosauer did not participate in the local hearing, she lacks standing under the Act to appeal the City’s siting decision. The Board therefore grants Onyx’s motion for summary judgment with respect to Ms. Rosauer.

The Board has held that mere attendance at a local hearing is sufficient to constitute participation under Section 40.1(b) of the Act. *See, e.g., Valessares*, PCB 87-36, slip op. at 6 (“the Board holds that personal attendance at a county board hearing is adequate participation to meet this element of standing.”); *see also Zeman v. Village of Summit*, PCB 92-174, PCB 92-177 (consol.) (Dec. 17, 1992). However, to confer third-party appeal standing on a citizens organization or group, there must be some indication in the record that members or representatives of that group were attending the local siting hearing *on behalf of* the group.

The Board addressed this issue in Slates v. Illinois Landfills, Inc., PCB 93-106 (July 22, 1993). In that case, a citizens group, C.A.R.E., argued that it had standing to appeal a local siting approval because the organization “appeared at the public hearing through [four] members.” Slates, PCB 93-106, slip op. at 2. However, the siting applicant argued that “none of these four individuals indicated at the hearing in any way that they were affiliated with C.A.R.E. [and] no person at the public hearing made any reference to C.A.R.E.” *Id.* The Board found that the citizens group lacked standing:

[T]he Board finds no evidence that any individual participated in the public hearing on behalf of C.A.R.E. None of the testimony or comments made by [any of the four members of the group] mention C.A.R.E. or refer to any type of group. The sign-in sheet for the public hearing also does not show any indication that anyone was appearing on behalf of C.A.R.E or any other group. [citation

omitted] Because there is no evidence in the record that any individual participated in the hearing on behalf of C.A.R.E., we find that C.A.R.E. as a group does not have standing under Section 40.1 to appeal [the local government's siting] decision. Thus, C.A.R.E. is dismissed as a petitioner. *Id.* (the Board also held that each of the four members of C.A.R.E. who attended the local hearing, and who were named individually as party petitioners, had standing to appeal as individuals); *see also Citizens Against Landfill Expansion v. American Disposal Services of Illinois, Inc.*, PCB 03-236 (July 24, 2003) (finding that citizens group had standing where record showed that individual at local hearing referred to group she was representing).

There is no indication in the record that anyone attended the City's siting hearing on behalf of the group Batavia Residents. Batavia Residents has presented no factual basis that would arguably entitle it to judgment. On this record, the Board finds that there is no genuine factual question that nobody attended the local hearing on the group's behalf. Even construing the pleadings against Onyx, the Board finds that Onyx is entitled to judgment as a matter of law. Because Batavia Residents did not participate in the local hearing, the group lacks standing under the Act to appeal the City's siting decision. The Board therefore grants Onyx's motion for summary judgment with respect to Batavia Residents.

CONCLUSION

After carefully reviewing the pleadings, the Board finds that there is no evidence in this record that either Ms. Rosauer or the group Batavia Residents participated in the City's public hearing on Onyx's waste transfer station siting application. Therefore, neither third-party petitioner has standing under Section 40.1(b) of the Act to appeal the City's grant of siting. The Board accordingly does not have jurisdiction over this appeal. The standing requirements of the Act are very specific and the Board has no discretion to waive them if they are not met.

Because there is no genuine issue of material fact and Onyx is entitled to judgment as a matter of law, the Board grants Onyx's amended motion for summary judgment and dismisses this appeal. Having granted Onyx's amended motion for summary judgment, finding that the Board lacks jurisdiction here, the Board further finds that Onyx's alternative motion to reconsider the Board's July 22, 2004 order is moot and as such the Board denies it.

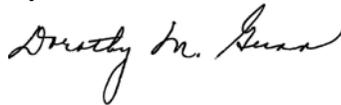
ORDER

1. The Board grants Onyx's amended motion for summary judgment because Ms. Rosauer and Batavia Residents lack standing under the Act to appeal the City's siting decision.
2. The Board denies as moot Onyx's alternative motion to reconsider the Board's July 22, 2004 order.
3. The Board dismisses this appeal.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 7, 2004, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board