

ILLINOIS POLLUTION CONTROL BOARD  
October 7, 1993

LEONARD CARMICHAEL, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 93-114  
 ) (Landfill Siting Review)  
 BROWNING-FERRIS INDUSTRIES )  
 OF ILLINOIS, INC. AND OGLE )  
 COUNTY BOARD, FOR AND ON )  
 BEHALF OF THE COUNTY OF OGLE, )  
 STATE OF ILLINOIS, )  
 )  
 Respondents. )

KIM D. KRAHENBUHL APPEARED ON BEHALF OF PETITIONER, LEONARD CARMICHAEL;

FRED C. PRILLAMAN APPEARED ON BEHALF OF RESPONDENT, BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC.; and

GLENN C. SECHEN APPEARED ON BEHALF OF RESPONDENT OGLE COUNTY BOARD.

OPINION AND ORDER OF THE BOARD (by C. A. Manning):

This matter is before the Board on a petition for review filed on June 16, 1993, by Leonard Carmichael, pursuant to Section 40.1(b) of the landfill siting section of the Environmental Protection Act (Act). (415 ILCS 5/40.1(b) (1992).) The petition for review seeks the Board's review of the County of Ogle's (County) May 10, 1993 siting approval of the expansion of Browning-Ferris Industries' (BFI) regional pollution control facility pursuant to Section 39.2 of the Act. (415 ILCS 5/39.2 (1992).) A hearing was held before Hearing Officer Todd S. Parkhurst on August 23, 1993 in Oregon, Illinois. The hearing was attended by members of the public.

The Hearing Officer briefing schedule ordered petitioner's brief to be filed with the Board on September 2, 1993, and answer briefs be filed by September 16, 1993. In addition, the petitioner was allowed to file a reply brief on September 23, 1993. The petitioner filed a reply brief on September 22, 1993, raising a new argument that was not raised in its brief or the answer briefs. On October 1, 1993, BFI filed a motion to strike portions of the reply brief that concerned this new argument, or alternatively leave to file a supplemental brief instanter to address this argument. This matter is to be decided by the Board before October 7, 1993 pursuant to Section 40.1 of the Act. (415

ILCS 5/40.1 (1993).) As a result, pursuant to 35 Ill. Adm. Code 101.241(b) the Board will grant the motion to strike within the seven (7) day response time. We find that undue delay and material prejudice to the Board's decision-making process would result if we withhold ruling on the motion. The Board grants the motion to strike those portions of the reply brief which raise new arguments concerning the Forcible Entry and Detainer Act.

The Board's responsibility in this matter arises from Section 40.1 of the Act. The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the local siting approval provision for new regional pollution control facilities, set forth in Section 39.2 of the Act.

#### FACTS

On November 13, 1992, BFI filed with the County an application for site location approval for an expansion of a pre-existing regional pollution control facility located in Ogle County. (County Hearing Record at 3220.)<sup>1</sup> The BFI facility has a service area which would encompass all of Ogle County. (C. Rec at 3223.)

Public hearings were held before the County on February 17, 18, 19, and 25, 1992. On May 10, 1993, the County Board granted the approval of the landfill siting request at a special meeting and on May 20, 1993, the County entered its written decision approving the landfill expansion. The County found that it had jurisdiction over the application and that BFI established compliance with the applicable criteria. (C. Rec. at 3223.)

At the County hearing, BFI introduced registered mail "green cards" which were postmarked October 27, 1992, for Mr. Pfab, an adjacent landowner to the landfill, and Senator Harlan Rigney whose legislative district at that time encompassed the landfill. (BFI's Exhibit 1 at 5,11.) Those same registered mail "green cards" are signed as received by Mr. Pfab on November 3, 1992, and as agent by Rebecca Hansen for Senator Rigney on November 2, 1992. (BFI's Exhibit 1 at 5,11.) BFI's request for approval was received by the County on November 13, 1992.

On May 10, 1993, the County held a meeting to vote on the BFI application for the expansion of the landfill. Pursuant to their obligation to make findings on each of the nine (9) separate criteria required by Section 39.2(a) of the Act the

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<sup>1</sup> The County Hearing Record will be referenced as "C. Rec."

County Board discussed and voted on each criterion.<sup>2</sup> (415 ILCS 5/39.2(a) (1993).) The County Board vote on the need criterion initially resulted in a tie. A motion for reconsideration was made and conversations between the board members and the County's lawyers and consultants took place. (C. Rec. at 3219 at 134). After these conversations, another vote was taken finding by a vote of 14 to 10 that the expansion was needed. The County approved the landfill siting by a vote 15 to 9. (C. Rec. 3219 at 138.)

Issues on appeal before the Board are Carmichael's allegations that the County did not have jurisdiction to proceed on BFI's application, and that the conversations between the initial vote and the reconsideration vote were fundamentally unfair. (Petitioners Post Hearing Brief at 1.) In addition, Carmichael's petition alludes to BFI's failure to demonstrate compliance with the criteria set forth in Section 39.2 of the Act. However, Carmichael has not addressed these claims and did not raise these issues in his post-hearing brief.

#### ANALYSIS

The notice requirements of Section 39.2(b) are jurisdictional prerequisites to the local decision-makers power to hear a siting proposal. The issue of jurisdiction may be interposed at any time in the course of the proceedings. (Concerned Citizens, Inc. v. M.I.G. Investments, Inc. (2nd Dist. 1986), 144 Ill.App.3d. 334, 98 Ill.Dec. 253, 494 N.E.2d 180.) The fact that Carmichael raised the issue at the Board hearing held on August 26, 1993, does not preclude a determination by the Board on this issue. Due to the jurisdictional nature of the notice requirements of Section 39.2 of the Act, whether or not actual prejudice was shown to have resulted from failure to meet the notice requirements, the county lacks jurisdiction to act on the siting request if the notice requirements are not met. (Id. at 807). The appellate court has stated that it is appropriate for any person to raise the issue of jurisdiction. (Concerned Citizens, Inc. v. M.I.G. Investments, Inc. (2nd Dist. 1986), 144 Ill.App.3d. 334, 98 Ill.Dec. 253, 494 N.E.2d 180.) The notice requirements of Section 39.2 are to be strictly construed as to timing, and even a one-day deviation in the notice requirement renders the county without jurisdiction. (Browning-Ferris Industries of Illinois, Inc. v. IPCB (5th Dist. 1987), 162

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<sup>2</sup> Section 39.2(a) of the Act requires the unit of local government that is making the determination on the request for landfill siting to decide if the applicant has demonstrated compliance with certain criteria. One such criterion is that the landfill facility to accommodate the waste needs of the area it is intended to serve, referred to as the "need" criterion.

Ill.App.3d 801, 516 N.E.2d 804.)<sup>3</sup>

Section 39.2(b) provides, in relevant part, as follows:

- b. **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 of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located.**

**Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located. (Emphasis added.)**

A plain reading of the Act places a burden on the applicant to serve written notice (either in person or by registered mail) no later than 14 days prior to a request for location approval. It is undisputed that BFI filed a request for landfill expansion with the County on November 13, 1992, and that written notice was received by Mr. Pfab on November 3, 1992 and by Senator Rigney's office on November 2, 1992, 11 and 12 days prior to that request.

"Service" clearly means receipt unless otherwise stated.<sup>4</sup> Considering the language of Section 39.2(b), notice was perfected when Mr. Pfab and Senator Rigney (by agent Rebecca Hansen) signed

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<sup>3</sup> See also Kane County Defenders, Inc. v. Pollution Control Board, (2nd Dist. 1985) 139 Ill.App.3d 588, 487 N.E.2d 743, where failure to publish the appropriate newspaper notice 14 days prior to the request for site approval resulted in the court's vacating the county board's decision and the PCB's affirmation of that decision. The court applied the reasoning of Illinois Power Company v. Pollution Control Board, (4th Dist. 1985) 137 Ill.App.3d 449, 484 N.E.2d 898, which found that the PCB's failure to publish notice as required by Section 40(a) of the Act divested it of jurisdiction.

<sup>4</sup> "Service" is defined by Black's Law Dictionary to be the "exhibition or delivery of a writ, summons and complaint, criminal summons, notice, order, etc., by an authorized person, to a person who is thereby officially notified of some action or proceeding in which he is concerned, and is thereby advised or warned of some action or step..." Black's Law Dictionary 1227 (5th Ed. 1971).

the "green cards" as received. The Board has held that the date of mailing is not the date of service. (Wabash and Lawrence County Taxpayers and Water Drinkers Assoc. v. County of Wabash, (December 3, 1987), PCB 87-122.) Taking Section 39.2(b) alone, service as defined in the Illinois landfill siting sections of the Act was not perfected.

While the Board's procedural rules do not apply to the County's proceedings, the Board has in the past looked to its own procedural rules as persuasive authority in some landfill siting cases. The Board's general procedural rules at 35 Ill. Adm. Code 101.144(c) create a rebuttable presumption that service is complete four days after mailing by First Class mail, and 35 Ill. Adm. Code 101.144(b) states that service is complete for registered or messenger mail on the date specified on the registered mail receipt or messenger mail receipt. Even looking to the Board's procedural rules and prior cases,<sup>5</sup> the prior notice requirement of Section 39.2(b) of the Act was not met.

In City of Columbia v. County of St. Clair, April 3, 1986, PCB 85-223(Consolidated), a case very similar to the instant case, the applicant filed a request for siting approval 13 days after newspaper publication of the intent to file, rather than the 14 days required by statute, and initiated service of notice to adjacent landowners 15 days prior to filing the request for siting approval with the county. The Board held that the initiation of service by registered mail 15 days in advance of the filing date of the request with the county did not meet statutory requirements, was unreasonable and therefore, created defective notice in violation of Section 39.2(b) of the Act. The action was dismissed by the Board as the County of St. Clair lacked jurisdiction to hear the request for the siting approval. (Id. at 19.)

In another case, Waste Management of Illinois v. Village of Bensenville, (August 10, 1989), PCB 89-28,<sup>6</sup> the applicant filed the request for siting approval on July 22, 1988, thereby making

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<sup>5</sup> City of Columbia, et. al. v. County of St. Clair, (April 3, 1986), PCB 89-223 (Consolidated), Browning-Ferris Industries of Illinois, Inc. V. Illinois Pollution Control Board, 162 Ill. App. 3d. 801 (1987), Waste Management of Illinois, Inc., v. Village of Bensenville, (August 10, 1989), PCB 89-28, DiMaggio v. Solid Waste Agency of Northern Cook County, (January 11, 1990), PCB 89-138.

<sup>6</sup> Waste Management of Illinois v. Village of Bensenville was appealed on other grounds where the Appellate Court reversed the Board and then the Supreme Court affirmed the Board. (201 Ill. App. 3d 614, 558 N.E.2d 1295, 146 Ill. Dec. 961, (1st Dist. 1990) Board reversed, 145 Ill. 2d. 345, 585 N.E.2d 606, 165 Ill. Dec. 875, (Sup. Ct. 1991) Board affirmed.)

the 14-day notice deadline July 8, 1988. On July 1, 1988, the applicant initiated notice by registered mail service. On July 6, 1988, the applicant left a notice under the door of the adjacent landowner. When the notice was left on July 6, 1988, the individual attempting to serve the adjacent landowner noticed a sign saying that the he was on vacation and would return on July 11, 1988. The registered mail receipt was signed on July 11, 1988. The Board held that mailing by registered mail 21 days prior to the date of filing of the request was sufficient to expect receipt of notice and thus notice was not defective. The Board in its reasoning stated that it was not going to allow the process to be frustrated by individuals who refuse service or are absent, and therefore will look to the reasonableness of the service process. Thus, in the special circumstances of that case, the Board held that the notice requirements of Section 39.2(b) of the Act were fulfilled.

Here, BFI's request for approval was received by the County November 13, 1992. Therefore the 14-day deadline for notice pursuant to Section 39.2(b) of the Act was October 30, 1992. BFI initiated notice by registered mail on October 27, 1992, 17 days prior to the filing of the siting request. Mr. Pfab and Senator Rigney signed the "green cards" as received on November 2, 1992 and November 3, 1992, 11 and 10 days prior to the filing of the request for siting approval. We find that notice was not properly given pursuant to Section 39.2(b) of the Act. In addition, it is unreasonable to expect that service has been perfected when notices were mailed 17 days prior to filing the request for siting approval. Therefore, the notice requirement pursuant to Section 39.2(b) of the Act was not fulfilled and the County lacked jurisdiction to hear the request for siting approval for the expansion of the landfill.

The courts and the Board have held that lack of jurisdiction at the local level is dispositive of the case which makes it unnecessary to review any additional requirements. (Kane County Defenders, Inc. v. Pollution Control Board, (2nd Dist. 1985) 139 Ill. App. 3d 588, 487 N.E. 2d 743, Concerned Citizens of Williamson v. Bill Kilber Development Corp., (May 20, 1993), PCB 92-204, LeRoy Brown and Sons, Inc. v. County Board of McDonough County, (February 4, 1993), PCB 92-132.) Therefore, we will not address the issues of fundamental fairness raised by Carmichael. Further, we make no findings regarding the criteria claims which were mentioned Carmichael's petition but not addressed at hearing or in the briefs.

This opinion constitutes the Board's finding of fact and conclusions of law.

#### ORDER

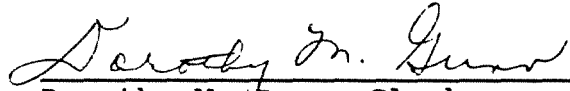
For all the foregoing reasons, the County of Ogle's May 10, 1993, decision granting siting approval to Browning Ferris

Industries of Illinois is vacated, on the grounds that the County lacked jurisdiction to hear the application due to BFI's failure to provide notice as required by Section 39.2(b) of the Act.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 7<sup>th</sup> day of October, 1993, by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board