

ILLINOIS POLLUTION CONTROL BOARD
October 6, 1988

RICK MOORE, LEONARD MORRIS)
and EDITH SIMPSON,)
)
Petitioner,)
)
v.) PCB 86-197
)
WAYNE COUNTY BOARD and)
DAUBS LANDFILL, INC.,)
)
Respondents.)

DISSENTING OPINION (by J.D. Dumelle):

I dissent from the majority decision denying Petitioner's motion to vacate the Board's June 2, 1988, Opinion and Order. For the reasons set forth below, I would have granted Petitioner's motion to vacate that order for lack of jurisdiction.

On June 2, 1988, the Board adopted an Opinion and Order upholding the decision of the Respondent Wayne County Board granting site approval to Daubs Landfill Inc. On July 7, 1988, Petitioners Rick Moore and Leonard Morris filed a motion to vacate the June 2, 1988 Order alleging that a landowner required to be served with notice of the siting approval application was in fact not served, thereby defeating the jurisdiction of the Wayne County Board to review the application and, further, of this Board to review the decision of the County. Attached to Petitioners' motion as "Exhibit A" was a Certification of Tax Record Ownership of Property,* signed by the Supervisor of Assessments of Wayne County. This Certification states that the owner of two parcels of property within the subject site, as shown by the authentic tax records for 1986, was the Wayne County Bank & Trust Company. Petitioners allege, and the record does not contradict, that the Wayne County Bank & Trust Company was not served with notice of the application as required by Section 39.2 of the Environmental Protection Act. Section 39.2(b) states:

* The argument has been advanced that this Certification was not part of the County record upon which the Board must render its decision, therefore the Board cannot consider it. I do not agree. The Certification is intimately associated with the notice requirement aspect of the application, which is part of the record. I do not know how better to evidence a jurisdictional defect than by such a Certification. However, I would require that such Certifications be notarized.

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 and 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, ...

Petitioners argue that failure to serve the Wayne County Bank constitutes a jurisdictional defect, which may be raised at any time, "divesting" the County Board and this Board of jurisdiction.

On August 4, 1988, the Board issued an order requesting additional information with respect to this jurisdictional issue. In response, Petitioners submitted their brief on August 25, 1988, and Respondent submitted its brief on September 14, 1988. Petitioners cited cases to support the proposition that the right to assert a jurisdictional issue exists at any time and in any proceeding, directly or collaterally. Respondent cited cases which stand for the proposition that although subject matter jurisdiction maybe contested at any time, jurisdiction of the subject matter does not mean simple jurisdiction of the particular case, but jurisdiction of the class of cases to which the individual case belongs. Further, Respondent cites, and the majority reiterates, People ex rel. Person for the proposition that where the subject matter of the litigation is within the general jurisdiction of the tribunal, the claim of want of jurisdiction by reason of special circumstances cannot be raised for the first time on appeal. Although the majority correctly recognizes that these cited cases involve proceedings before a trial court and not an administrative agency, the majority relies on these cases to support its view that it is now too late to consider such a jurisdictional claim. The majority indicates that the appropriate time to raise such a claim is before the County Board or in a petition to this Board for review of the siting approval.

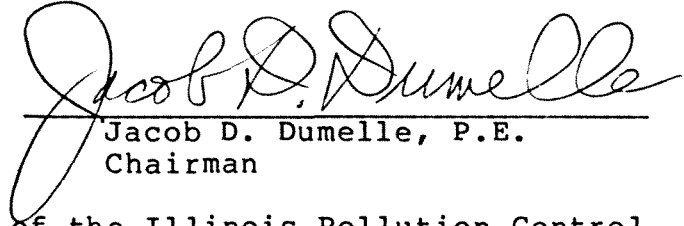
With respect to the facts of this case, I do not agree. Section 39.2(b) of the Act sets forth the notice requirements of a site location suitability application. These requirements have been held to be jurisdictional. Wabash and Lawrence Counties Taxpayers and Water Drinkers Association and Kenneth Phillips v. The County of Wabash and K/C Reclamation, Inc., PCB 87-192 (December 3, 1987), citing Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2nd Dist. 1985); Browning-Ferris Industries, Inc. v. Illinois

Pollution Control Board, No. 5-86-0292, ___ Ill. app. 3d ___, N.E.2d ___ (5th dist. 1987). Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 344, 494, N.E.2d 180 (2nd Dist. 1986); The Village of Lake in the Hills v. Laidlaw Waste Systems, Inc., 143 Ill. App. 3d 285, 492 N.E.2d 969 (1986); See also McHenry County Landfill, Inc. v. Environmental Protection Agency, 154 Ill. App. 3d 89, 506 N.E.2d 372 (2nd Dist. 1987). Kane County Defenders clearly states that the notice requirements of the Act must be met before jurisdiction is vested with the County. In Wabash County, the Board found the County to be without jurisdiction where written notices of the application were sent, but service of the notices was accomplished one day late, i.e., 13 days before the application was filed. Consistent with the strict interpretation of the notice requirements as jurisdictional requirements articulated in the above-cited cases, I believe that if indeed the Wayne County Bank was the owner of parcels of the subject site, as evidence by the authentic tax records of the County, and the Wayne County Bank was not served with notice, then the Wayne County Board was without jurisdiction to hear the application and grant its approval thereon. Likewise, this Board is without jurisdiction to review the Wayne County approval. In other words, I would hold that the County's action on the application is void ab initio.

The majority, however, does not address the merits of the jurisdictional challenge. Rather, the majority opts to decide that it is now too late to advance such a challenge. This seems to me like putting the cart before the horse. If notice was defective, the Board is without jurisdiction not only to review the application but also to determine that it is too late to contest jurisdiction. In other words, if jurisdiction never vested with the County Board and then with this Board, all of the County Board's and this Board's actions are null and void for lack of jurisdiction, the majority's decision today included. The majority cannot now find jurisdiction where it did not previously exist.

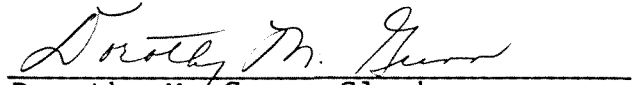
In arriving at this conclusion, I am not unsympathetic to the majority's position that a motion to vacate filed nearly two years after the County Board's decision is untimely. I recognize that at some point after the siting approval process is complete, jurisdictional challenges may need to be cut off. But in this case, it is not enough to say that the motion to vacate is untimely because it was filed nearly two years after the County decision. This ignores the fact that the Board's review period had not yet expired. The Board rendered its decision on June 2, 1988. Section 103.240 of the Board's Procedural Rules (35 Ill. Adm. Code 103.240) permits motions subsequent to entry of final orders within 35 days after the adoption of a final order. The Petitioner's motion was filed with that 35 day period. I believe Petitioner's motion to vacate was therefore timely filed. Had it been filed after the 35 day period permitted by Section 103.240, I might believe differently.

I, therefore, would have held that the motion to vacate was not untimely filed. Further I would have requested, at a minimum, a notarized Certification from the Wayne County Supervisor of Assessments and would have considered scheduling a hearing to permit Respondent to cross-examine such Supervisor, if such was requested by Respondent. Once the record was complete, I would have vacated the June 2, 1988 Order and dismissed. For these reasons, I respectfully dissent.



Jacob D. Dumelle, P.E.
Chairman

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 13th day of October, 1988.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board