ILLINOIS POLLUTION CONTROL BOARD
August 26, 1991

LAND AND LAKES COMPANY, JMC OPERATIONS, INC., and NBD TRUST COMPANY OF ILLINOIS AS TRUSTEE UNDER TRUST NO. 2624EG,	)	
Petitioners,	)	
v.	)	PCB 91-7 (Landfill Siting)
VILLAGE OF ROMEOVILLE,	)	
Respondent,	)	
COUNTY OF WILL, and PEOPLE OF THE STATE OF ILLINOIS,	)	
Intervenors.	)	

DISSENTING OPINION (by J.D. Dumelle):

I dissent in this case because I am of the opinion that Land and Lakes failed to comply with section 39.2(b) of the Act in that the company did not notify all property owners within 250 feet of the subject property. Ill. Rev. Stat. 1989, ch. 111-1/2, par. 1039.2(b). Consequently, I would hold that the Village of Romeoville was without jurisdiction to render a decision on the merits of Land and Lakes' application. The Kane County Defenders, Inc., PCB, County Board of Kane County, Illinois Sanitary District of Elgin and City of Aurora, 139 Ill. App. 3d 588 (2nd Dist. 1985). Additionally, assuming that the majority's Section 39.2(b) analysis is correct, I would find that failure to notice the legislators in accordance with Section 39.2(d) is not jurisdictional, but rather directory, such that this procedural defect does not render the proceedings void.

In today's case, the majority found that "the evidence clearly indicates that Land and Lakes did not notify that two property owners of its intent to file its site location." (PCB 91-7 at 10). The majority also found that these property owners were located directly across the street from parcel B. For some reason, the majority chose to distinguish between parcels A, B and C even though all three parcels were submitted as part of Land and Lakes' application. The question then posed by the majority was whether parcels B and C are part of the subject property as that phrase in used in section 39.2(b) of the Act.. (PCB 91-7 at 10).

The majority opinion then states:

> Land and Lakes argues that the subject

site referred to in Section 39.2(b) is limited to the actual sanitary landfill which, in this instance, is confined to Parcel A. (Pet. Br. pp. 18-21; Reply Br. pp. 6-9). In support of its position, Land and Lakes cites to the definition of the term "regional pollution control facility" that is found in Section 3.32(a) of the Act. (Pet. Br. p. 18). That section defines a regional pollution control facility as:

...any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility or waste incinerator....

We agree with Land and Lakes that the definition of "regional pollution control facility" equates the term "subject property" with a "sanitary landfill". Section 3.42 of the Act defines "sanitary landfill" as follows:

> ...a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act...and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or by such other methods and intervals as the board may provide by regulation.

The above definition indicates that we must look to the activities taking place at each parcel in order to determine which parcels contain the sanitary landfill and thus, the subject property. There is no question that Parcel A contains the existing landfill and proposed expansion, and was so identified throughout these proceedings. Thus, it is a part of the subject property for Section 39.2(b) notice purposes. Although one may argue that Parcels B and C should be considered as part of the diversion and/or borrow purposes, it would be difficult to construe (and we do not so construe) these

> non-contact, ancillary activities as part of the definition of "sanitary landfill" in Section 3.42 of the Act.
>
> Based on the above, we conclude that only Parcel A contains the regional pollution control facility. The scope of Romeoville's siting authority in Section 39.2(a) of the Act is expressly limited to the regional pollution control facility. In other words, the subject property for notice purposes is the property (or properties), as legally recorded, that encompassed the regional pollution control facility. The 250 foot notice is to be computed from the lot line of that property. As a result, Land and Lakes was not required to notify the two property owners in question of its application because their properties are more than 250 feet from the "subject property".

(PCB 91-7 at 11-12).

I am unable to see why the majority equates "subject property" with a "regional pollution control facility. Nor am I able to understand how "subject property" is likened to a "sanitary landfill". The majority has apparently made this analogy without the benefit of any authority.

If the legislature intended the term "subject property" to be akin to "regional pollution control facility", it would have used that term. Had the legislature intended to restrict the notice requirement to those persons within 250 feet of a "regional pollution control facility" or the "sanitary landfill", it would not have used a broader term such a "subject property". The purpose of Section 39.2(b) is to notify all landowners within 250 feet of the "subject property" that a company is proposing to use the land as a garbage dump. If notice is restricted to only that land used as a sanitary landfill, it is entirely possible that an applicant could position the sanitary landfill in such a way that notice would not be required to any adjacent landowners. In other words, an operator could simply buffer its actual landfill with surrounding land which would not be a "sanitary landfill" per se, thereby avoiding the notice requirements of Section 39.2(b). Such a result could not possibly be the intent of Section 39.2(b).

Moreover, the majority's analysis fails when it equates the "subject property" to a sanitary landfill. Section 3.42 of the Act defines a sanitary landfill as "a facility permitted by the Agency..." One need go no further than this because Section 39.2(b) relates to the notice of landowners by a company which is requesting site approval. If a "sanitary landfill" is defined by

statute as a permitted entity, I fail to see how it can be equated with the "subject property" which, by its very nature, is unpermitted. Indeed, the operator of the subject property is precluded from applying for a permit until it has received site approval pursuant to Section 39.2.

Finally, the Board has specifically considered the language at issue in prior cases. In Madison County Conservation Alliance, et al. v. Madison County and Environmental Control Systems, Inc., PCB 90-239, April 11, 1991, the Board held that notice by the petitioner was deficient and vacated the decision of Madison County. In a similar issue concerning distinct parcels and notice requirements, we held that "the Board cannot interpret the Section 39.2(b) language 'lot line of the subject property' to mean that only certain portions of the subject property are relevant". (PCB 90-239 at 8). It is the applicant, by its application, who defines the "subject property". The Board cannot say that, for purposes of notice, parcel A, at the exclusion of the remaining parcels, constitutes the "subject property". Nor can it grant siting approval for parcel A only. Land and Lakes petitioned for siting approval of parcels A, B and C. Either all three parcels, or none, are granted site approval. Likewise, all landowners within 250 feet of Land and Lakes application must be noticed. Accordingly, I would hold that Land and Lakes' notice was defective. Consequently, the Village of Romeoville did not have jurisdiction to enter its decision on the application. Wabash and Lawrence Counties Taxpayers and Water Drinkers Association v. The County of Wabash and K/C Reclamation, Inc, 144 Ill. Dec. 562 (5th Dist 1990). As such, Romeoville's decision should have been vacated.

* * *

In addition to the latter issue, I disagree with the majority's ruling as it pertains to the interpretation of Section 39.2(d). Section 39.2(d) states:

> ...At least one public hearing is to be held by the county board or governing body of the municipality no sooner than 90 days but no longer than 120 days from receipt of the request for site approval, such hearing to be preceded by published notice in a newspaper of general circulation published in the county of the proposed site, and notice by certified mail to all members of the General Assembly from the district in which the proposed site is located and to the Agency. The public hearing shall develop a record sufficient to form the basis of appeal of the decision in accordance with Section 40.1 of this Act.

Ill. Rev. Stat. 1989, ch. 111-1/2, par. 1039.2(d)

Based on this provision, the majority held that the Village of

Romeoville had a duty to notify the members of the General Assembly and that Romeoville's failure to do so amounted to a jurisdictional defect which caused Land and Lakes application to be granted by operation of law. See, Ill. Rev. Stat. 1989, ch. 111-1/2 par. 1039(e).

To reach this conclusion, the majority relies upon Illinois Power Company v. PCB, 137 Ill. App. 3d 449 (4th Dist. 1985). In that permit appeal case, the court held that the failure of the Board to provide Section 40 notice of its hearing to the public and the General Assembly was a jurisdictional defect which rendered the Board's decision invalid.

While both Illinois Power and the instant case present an issue of statutory construction, Illinois Power is distinguishable from the case at bar. Section 40, which was at issue in Illinois Power, imposes a duty upon the Board to notify the public. Section 39.2(d), the disputed subsection in the case mandates that the lcoal governing body (i.e. Romeoville) publish notice in the paper and notify these members of the General Assembly whose constituency will be affected. As in Illinois Power, the question posed by today's case is whether the duty imposed by Section 39.2(d) is mandatory (i.e., jurisdictional) or directory (i.e., procedural). Should it be held to be mandatory, any failure to adhere to the requirements would be fatal because jurisdiction would not attach. Should it be deemed directory, however, the deficiency would only amount to a procedural defect and the Board need only analyze the harm incurred by Romeoville's failure to perform its statutory duties.

In Illinois Power, the court emphasized that Section 40 of the Act provides that "the Board shall give 21 days notice...and shall publish notice" in concluding that the notice requirements of Section 40 are mandatory. Here, the statute at issue does not use the word "shall". I recognize that the use of the word shall is not dispositive; there are many cases which hold that despite use of the word "shall", statutes or a part thereof were directory. People v. Ponter, 141 Ill. Ap. 3d, 208 (1st Dist. 1986); People's Independent Party v. Petroff, 191 Ill. App. 3d. 706 (5th Dist. 1989), Bartholomew v. U.S., 740 F. 2d 526 (7th Dist. 1984). However in construing a provision as mandatory or directory, courts look to the legislative intent as well as the consequences which would result from a given construction. Board of Library Trustees of Frankfort Public Library Dist. v. Board of Library Trustees of Mokena Public Library Dist., 158 Ill. App. 3d 830 (3rd Dist. 1987); Shipley v. Stephenson County Electoral Board, 130 Ill. App. 3d. 900 (2nd Dist. 1985); Ballentine v. Bardwell, 132 Ill. App. 3d, 1033 (1st Dist. 1985). Such an analysis is lacking in both the majority's opinion and the Illinois Power decision.

Looking at the aforementioned cases, it is clear that courts weigh the injury caused by noncompliance with the statute in

conjunction with the effect of that noncompliance. These factors are considered equitably in order to reach a conclusion vis-a-vis the directory or mandatory nature. In the case at bar, there was no injury caused by Romeoville's failure to notify the legislators. Indeed, there were 13 public hearings. On appeal, the petitioner, the Village of Romeoville, the Will County State's Attorney and the Attorney General have all participated. In short, the public participated at great length in the process of this case and therefore the intent of Section 39.2(d) was satisfied.

On the other hand, the majority's construction of 39.2(d) causes the landfill to issue by operation of law. In so doing, the merits of the county board decision are not even considered. In fact, as a matter of law, there was no decision. Given the extreme consequences of this decision, I am unable to join the majority. I would have held that Section 39.2(d) is directory and then addressed the merits.

In conclusion, I wish to emphasize that I would have never reached the Section 39.2(d) issue. Pursuant to the first part of this dissent, I would have held Land and Lakes application to be deficient in regards to the mandate of Section 39.2(b).

For these two reasons, I respectfully dissent.

Jacob D. Dumelle, P.E.

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Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 3rd day of September, 1991.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board