ILLINOIS POLLUTION CONTROL BOARD
April 21, 1994

RODNEY B. NELSON, III, M.D., Petitioner, v. KANE COUNTY, KANE COUNTY BOARD, and WASTE MANAGEMENT OF ILLINOIS, INCORPORATED, Respondents.	)	PCB 94-51 (Landfill Siting Review)

CITY OF GENEVA, Petitioner, v. WASTE MANAGEMENT OF ILLINOIS, INC. and COUNTY BOARD, COUNTY OF KANE, STATE OF ILLINOIS, Respondents.	)	PCB 94-58 (Landfill Siting Review) (Consolidated)

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

The matters pending before the Board are consolidated third-party appeals wherein the petitioners are challenging the local landfill siting decision of the Kane County Board ("County Board") granting expansion of Settler's Hill Landfill in Geneva, Illinois. Rodney B. Nelson, III, M.D. ("Dr. Nelson") filed the first petition February 1, 1994 and the City of Geneva ("Geneva") filed the second on February 9, 1994.

These cases were consolidated by our order of February 17, 1994, as is our usual practice with multiple petitions challenging a local siting decision. In that order, we indicated Dr. Nelson's petition was insufficient to ascertain whether he has standing to prosecute a third-party appeal pursuant to Sections 40.1(b) of the Environmental Protection Act ("Act"). (415 ILCS 5/40.1(b).) We also set the consolidated cases for hearing and asked that all challenges to Dr. Nelson's standing be filed with the Board on or before March 1, 1994.

Consequently on March 1, 1994, co-respondent Waste Management of Illinois ("WMII"), the applicant for expansion of Settler's Hill, filed a motion to dismiss Dr. Nelson's petition relying on our decision in Valessares v. County Board of Kane County (July 16, 1987), 79 PCB 106, PCB 87-36. The motion

alleges Dr. Nelson lacks standing under Valessares because he did not attend the public hearings held by Kane County and by failing to do so, Dr. Nelson did not "participate" within the meaning of Section 40.1(b). In response, Dr. Nelson, Geneva and Kane County all request that we deny WMII's motion to dismiss and allow Dr. Nelson's petition for review to proceed. (Kane County's Motion in Support of Rodney B. Nelson's Standing, March 3, 1994; Nelson's [Response] to Standing Challenge, March 7, 1994; and Geneva's Response to WMII Motion to Dismiss and Other Matters, March 14, 1994.)

Thereafter, on April 4, 1994, Geneva filed a motion for summary judgment. Alleging an insufficient record, Geneva asks we grant summary judgment, or in the alternative, that we compel the County Board to supplement the record with, among other things, documentation demonstrating the jurisdictional prerequisites of Section 39.1(b) were satisfied below. The County Board filed a response on April 14, 1994 offering copies of pages already contained in the record (C-2318 and C-2360) evidencing the statutory jurisdictional requirements of Section 39.2(b) were in fact, met. We have also received, and we hereby grant, a motion for leave to file a reply in support of Geneva's motion for summary judgment on April 18, 1994, in addition to a reply to the County Board's response by Dr. Nelson on April 18, 1994, and a response to Geneva's motion for summary judgment from WMII on April 15, 1994.[1]

For reasons more fully explained below, we hereby grant WMII's Motion to Dismiss Rodney B. Nelson, III, M.D. By this order, we also deny Geneva's motion for summary judgement; however, we grant Geneva's request to compel the production of documentation.

MOTION TO DISMISS

We grant WMII's motion to dismiss and do so because we consider the language of Sections 40.1(b) and 39.2(d) to be plain and unambiguous. Section 40.1(b) provides in relevant part:

> If the county board *** 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 *** may petition the Board within 35 days for a hearing to contest the approval.... (415 ILCS 5/40.1(b).)

And, Section 39.2(d) provides:

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[1]All other motions filed in this matter are resolved by virtue of the entry of this order.

> At least one public hearing is to be held by the county board *** no sooner than 90 days but no later 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. *** 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.... (415 ILCS 5/39.2(d).)

Section 40.1(b) contains the requirement of "participation in a public hearing" and Section 39.2(d) more fully explains what the legislature meant by "public hearing." The legislature describes a public hearing as, "at least one public hearing", "such hearing to be preceded by published notice" and "the public hearing shall develop a record." When read together, Section 40.1(b) and 39.2(d) expressly grant a third party the right to bring a challenge to a local siting decision if he participated in the public hearing.

Our role is to effectuate the intent of the legislature and the first role of statutory interpretation is to examine the express language of the statute, giving that language its "plain and commonly understood" meaning. (Scadron v. City of Des Plaines, 153 Ill.2d 164, 606 N.E.2d 1154, 1163. We may look to legislative history when we consider issues of statutory construction. Even if we were to agree that an ambiguity is present in the statutory language, the legislative history supports our reading of the statute. On June 17, 1981 in debates before the Illinois House of Representatives, Representative Peg Breslin, one of the bill's sponsors, stated that appeal rights to the Board are given in this law to "any interested third party that participates in the hearing before the county board or the governing body of the municipality." (S.B. 172, 82nd General Assembly, House Transcript of Floor Debate on 3rd Reading, June 17, 1981, State Representative Peg Breslin, at 55-56.) Further, in the Illinois Senate debates on July 1, 1987, Senator Vince DeMuzio, the sponsor of SB 172 in the Senate, similarly stated that third parties have the right to appeal "if they are involved in the initial siting hearings." (S.B. 172, 82nd General Assembly, Senate Transcript of Floor Debate, Conf. Committee Report, July 1, 1981, Senator Vince DeMuzio.)

In Valessares v. County Board of Kane County (July 16, 1987), 79 PCB 106, PCB 87-36 and Slates v. Illinois Landfills, Inc., (July 2, 1993) __ PCB ___, PCB 93-106, we held that "participation" is more than submitting a public comment after the close of a public hearing. Here, there is no factual issue concerning Dr. Nelson's participation in the public hearings held on September 21, 1993 and October 6, 1993; it is undisputed that Dr. Nelson did not participate in the actual hearings and, further, was not even present at these public hearings. Rather, his "participation" before the County Board was limited to his

having filed a public comment after the hearing, pursuant to his statutory right under Section 39.2. The parties argue that the filing of this public comment, along with Dr. Nelson having taken sufficient time to "educate himself" concerning the issues, provides a sufficient factual basis to conclude that Nelson is a "third party who participated in the public hearing" pursuant to Section 40.1(b). We disagree.

Dr. Nelson, the County Board and Geneva essentially argue "public hearing" encompasses the entire "public process" and restriction of participation to attendees of the "public hearing" leads to the absurd conclusion that someone who attends only a small portion of one hearing or simply remains silent can file an appeal, but a citizen such as Dr. Nelson, who has educated himself and submitted a public comment held by the County Board, cannot. Although Section 39.2(c) allows any person to file comments concerning the appropriateness of the proposed site, we read Section 40.1(b) to clearly require participation at the siting hearing itself. While we have some degree of sympathy for the argument that Dr. Nelson may have been involved to a greater extent than someone who simply observed the hearing itself, the specific holding that mere attendance at a landfill siting hearing constitutes "participation" and therefore confers standing to appeal, is not an issue before us in this case. (See Zeman v. Village of Summit (December 17, 1992) ___ PCB ___, PCB 92-174 and PCB 92-177 (cons.).) Therefore, if any re-examination of that holding is necessary, it must occur under a more amenable set of facts.

In this case, the record submitted to us for review by the County Board contains no mention of Dr. Nelson, nor does it contain any arguments or comments made by him at hearing that were even arguably relied upon by the County Board in the decision which is before us for review. While Dr. Nelson, the County Board and Geneva argue for a broader interpretation of what it means to have "participated in the public hearing" than what this Board has already developed in Valessares, we cannot and will not do so in this context. Based upon Valessares, Dr. Nelson clearly did not participate in the public hearings since he did not even attend these hearings. Therefore, Dr. Nelson's petition for review is dismissed based upon his lack of standing to appeal.

Nonetheless, even though Dr. Nelson is no longer a petitioner in the landfill siting decision appeal (PCB 94-51 or PCB 94-58), as a member of the public, he is entitled to participate in the Board hearing which will be held concerning the petition for review properly filed by Geneva. Scheduled for April 26, 1994, this hearing will concern issues similar to those raised by Dr. Nelson himself. The extent of participation of a member of the public in Board hearings is set forth in our Board procedural rules which allow for members of the public to offer

reasonable oral testimony during the course of the hearing. (35 Ill. Adm. Code 103.203.)

MOTION FOR SUMMARY JUDGMENT

Geneva's April 4, 1994 motion for summary judgment asks that we reverse the County Board's siting decision granting expansion on the basis the record of decision is deficient. Alternatively, Geneva requests we compel the County Board to supplement the record of decision with documentation satisfying the deficiencies raised in the motion. By our order today, we hereby deny Geneva's motion for summary judgment although we grant a portion of Geneva's alternative relief as further explained below.

Geneva originally argued in its motion for summary judgment that the record of decision as submitted by the County Board failed to show the jurisdictional prerequisites of Section 39.2(b) were met because there was no evidence WMII had noticed the owners of the property located within the subject area no later than 14 days prior to filing the application. In its response, the County Board resubmitted pages C-2318 through C-2360 of the record showing service by registered mail. Subsequently, in Geneva's reply in support of its motion for summary judgment, filed on April 18, 1994 accompanied by a motion for leave to file, Geneva additionally argues that three of the registered mail certificates do not show a date of delivery (C-2325 and C-2329) and despite the showing of the registered mail service, the record remains jurisdictionally deficient on its face.

We find that there is a genuine issue of material fact which must be resolved at hearing. Our review of the original record does in fact show missing delivery dates on the registered mail receipts for Johnson Controls Battery (C-2325), Royce and Jacqueline Paydon (C-2329) and for an illegible addressee, with an article number R694 952 070. Pages C-2332 and C-2333 show a list of those who were personally served which includes Johnson Control Battery and the Paydons. However, Pages C-2335 through C-2358, which are the affidavits supporting service, contain no affidavit going to service on the Paydons or Johnson Control Battery. Thus, because there is a potential discrepancy and an issue of fact is present, the case must go to hearing on April 26 as scheduled.[2]

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[2]Geneva correctly raised the issue that the record of decision omitted "Exhibit 1", the County Board's Solid Waste Management Plan, which was offered during the public hearing before the County Board. Offering apology for a clerical inadvertence, the County Board filed Exhibit 1 as part of its response on April 14, 1994. We find no prejudice has resulted

Next, Geneva argues for summary judgment based on the County Board's landfill siting ordinance, 93-85, §IV(C)(1) equating it with Section 39.2(b)'s "statutory" jurisdictional prerequisites. Geneva argues that County Board did not meet the requirements of its own statute, and therefore, failed to satisfy the jurisdictional requirements. In response, both the County Board in its April 14, 1994 response and WMII, in its April 15, 1994 rsponse, argue that landfill siting procedure ordinances have been historically considered in the context of whether the procedures employed by the local siting authority were "fundamentally unfair" rather than whether the procedures are "jurisdictional." (See e.g. Daly v. Village of Robbins, (July 1, 1993) ___ PCB ___, PCB 93-52 and 93-54 (cons.).) Again, this issue is appropriate for hearing. The argument raises a mixed issue of fact and law sufficient to warrant denial of the motion for summary judgment.

Finally, Geneva requests that we compel the production of the closed session transcripts from meetings held by the County Board on July 13, 1994 and August 10, 1993. As best we can ascertain from the pleadings before us, the County Board (or a portion thereof) met on those dates. Concerning Geneva's request for production of the transcripts of the meetings, the County Board merely responds that it would be willing to provide Geneva minutes to these meetings in "discovery" and, if Geneva still believes those minutes should become a part of the record, "it can proceed with its motion at hearing". (County Board Response, at 6-7.)

The County Board's response misses the point, both in terms of Geneva's request and this Board's obligation to proceed expeditiously and fairly concerning all issues relevant in a landfill siting appeal. One of those issues is that the public siting process held by the governmental unit comports with basic standands of fundamental fairness. The gravamen of Geneva's argument is that a record of these meetings might well be relevant to its arguments regarding fundamental fairness and our review of those arguments. The County Board makes no claim regarding the inappropriateness of discovery or that the transcripts do not exist, and, in fact, attested to its willingness to provide Geneva with minutes of the meetings.

In that the hearing in this matter is scheduled for April 26, it is imperative that a determination on Geneva's request to compel be made forthwith. Therefore, we order that the County Board deliver to the City of Geneva, by noon on April 25, 1994, a clear transcription of any portions of these meetings that contain discussion concerning the Settler's Hill landfill. If no written transcription exists, the actual tape made by the Clerk

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from the late filing of this supplement to the record.

of the Kane County Board, if audible, will suffice.[3]

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 21st day of April, 1994, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

[3]While the pleadings seem to indicate that the County Board classified these executive sessions pursuant to the "litigation" exemption of the Open Meetings Act, this exemption "does not encompass deliberations of a public body acting in a quasi-judicial capacity on matters before it for decision." (1983 Ill. Att'y Gen. Op. 10.) Thus, any discussions concerning the County Board's concerns or interests in the landfill expansion and their upcoming public hearing concerning this expansion would not be precluded from discovery based upon an Open Meetings Act exemption.