

ILLINOIS POLLUTION CONTROL BOARD
March 17, 1994

TOLLES REALTY COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 93-124
)	(UST Fund)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by E. Dunham):

This matter comes before the Board on a motion for summary judgment filed on January 14, 1994, by Tolles Realty Company (Tolles). The Illinois Environmental Protection Agency (Agency) filed a response to Tolles' motion instantter and a cross-motion for summary judgment on February 3, 1994. On March 1, 1994, Tolles filed its reply.

Tolles filed its petition for review on June 24, 1993. Tolles seeks review of the Agency's May 24, 1993 letter denying eligibility of four tanks. The May 24, 1993, letter by the Agency reversed the Agency's March 29, 1993 finding that Tolles was eligible for reimbursement from the fund. The Agency's reversal was the result of notification from the Office of the State Fire Marshal (OSFM) that four of the tanks were not registered. Tolles requested the Board to delay setting this matter for hearing while it pursued a review of the determination of registration of the tanks with the OSFM. The OSFM's review of registration is pending.

"Summary judgment is appropriate where there is no genuine issue of material fact based on the affidavits, admissions, pleadings, and other items in the record." (Williamson Adhesives, Inc. (August 22, 1991), PCB 91-112 (citing Caruthers v. B.C. Christopher & Co. (1974), 57 Ill. 2d 376, 380, 313 N.E. 2d 457, 459.) The Board defers ruling on the motions for summary judgment as a genuine issue of material fact is in dispute in this matter.

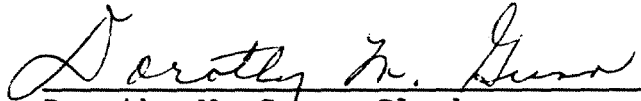
The OSFM's determination on the registration of the tanks is presently being reviewed by the OSFM. The Board believes that the issue of registration is an issue of material fact. This issue can only be resolved through a decision on the pending appeal before the OSFM. Therefore, the Board defers ruling on Tolles' motion for summary judgment and the Agency's cross motion for summary judgment until the issue of material fact is resolved by the OSFM.

Tolles also requests attorney fees under Section 57.8(1) of the Illinois Environmental Protection Act (Act). (415 ILCS 5/57.8(1).) Section 57.13(b) addresses the applicability of the amendment to the Act for releases reported prior to the effective date of the amendatory Act. (415 ILCS 5/57.13) Tolles has not established that the amendments to the Act are applicable or why the election process does not apply. Tolles made no election to proceed under the new amendments to the Act for application to the Fund. Furthermore, Tolles took no "corrective action" after the date of the amendatory statute. Finally, Tolles has not prevailed in this matter. Attorney fees are denied under Section 57.8(1).

IT IS SO ORDERED.

J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of March, 1994, by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board