

ILLINOIS POLLUTION CONTROL BOARD  
May 20, 1993

CONCERNED CITIZENS OF )  
WILLIAMSON COUNTY, and )  
R.S. BLAKELY and MAX )  
STUCKER, as members of )  
Concerned Citizens of )  
Williamson County, )  
 )  
Petitioners, )  
 )  
v. ) PCB 92-204  
 ) (Landfill Siting Review)  
 )  
BILL KIBLER DEVELOPMENT )  
CORP., a/k/a KIBLER )  
DEVELOPMENT CORP., and the )  
WILLIAMSON COUNTY BOARD OF )  
COMMISSIONERS, )  
 )  
Respondents. )

KENNETH A. BLEYER APPEARED ON BEHALF OF PETITIONERS;

THOMAS J. IMMEL APPEARED ON BEHALF OF RESPONDENT BILL KIBLER DEVELOPMENT CORP.; AND

LISA BEATY APPEARED ON BEHALF OF RESPONDENT WILLIAMSON COUNTY BOARD OF COMMISSIONERS.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a December 14, 1992 petition for review, filed by Concerned Citizens of Williamson County, and R.S. Blakely and Max Stucker as members of Concerned Citizens of Williamson County (collectively, Citizens). In response to a Board order, Citizens filed an amended petition on January 27, 1993. Citizens seeks review of a November 13, 1992 decision of respondent Williamson County Board of Commissioners (County Board) granting site approval to respondent Bill Kibler Development Corporation (Kibler) for a new regional pollution control facility. A public hearing on the petition for review was held on April 2, 1993, in Marion, Illinois.

For reasons articulated below, the Board finds that a defect in the newspaper notice required by Section 39.2(b) of the Environmental Protection Act (Act) (415 ILCS 5/39.2(b)) is a jurisdictional defect, and vacates the county board's decision.

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### PROCEDURAL HISTORY

On April 25, 1992, Kibler published a "public notice" in the Southern Illinoisan, a newspaper of general circulation, which stated that "in 14 days from the date of this publication", Kibler would submit an application for site approval for a new regional pollution control facility. (C0020.) The notice stated that Kibler proposes to develop a recycling center, transfer station, and landfill disposal site within a single solid waste management facility. On May 19, 1992, 24 days after publication of the newspaper notice, Kibler filed its application for site approval with the Williamson County Clerk. (C0030-C0121.) The County Board held public hearings on the application on September 10, 11, and 14, 1992. (C0402-C0903.) On November 13, 1992, the County Board issued its decision granting Kibler's request for site approval. (C1248-1249.) Citizens filed the instant petition for review with the Board on December 14, 1992, and filed an amended petition on January 27, 1993.

### STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. Only if the local body finds that all applicable criteria have been met by the applicant can siting approval be granted.

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592; E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.) Additionally, the Board must review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, 451 N.E.2d at 562.) Citizens raise four claims of procedural error, including a jurisdictional claim. Because jurisdiction is a threshold issue, we will address that claim first.

### JURISDICTION

The notice requirements of Section 39.2(b) are jurisdictional prerequisites to the local county board's power to

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hear a landfill proposal. On this basis, the lack of jurisdiction at the county board level made it unnecessary to review petitioners' other arguments in Kane County Defenders v. Pollution Control Board (2d Dist. 1985), 139 Ill.App.3d 588, 487 N.E.2d 743, 93 Ill.Dec. 918. In that case, 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. The appellate 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, 92 Ill.Dec. 167, which found that the Board's failure to publish notice as required by Section 40(a) of the Act divested the Board of jurisdiction.

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 v. Pollution Control Board (5th Dist. 1987), 162 Ill.App.3d 801, 516 N.E. 2d 804, 114 Ill.Dec. 649; Concerned Boone Citizens, Inc. v. M.I.G. Investments (2d Dist. 1986), 144 Ill.App.3d 334, 494 N.E.2d 180, 98 Ill.Dec. 253.)

Citizens argues that the newspaper notice published by Kibler is void. Citizens points to Section 39.2(b) of the Act, which states in part:

No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served \*\*\* on the owners of all property \*\*\* within 250 feet in each direction of the lot line of the subject property \*\*\*

Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located. Such notice shall state the name and address of the applicant, the location of the proposed site, the nature and size of the development, the nature of the activity proposed, the probable life of the proposed activity, the date when the request for site approval will be submitted, and a description of the right of persons to comment on such request as hereafter provided.

415 ILCS 5/39.2(b) (1992).

Citizens maintains that the newspaper notice did not state any date on which the application would be submitted, and that the implication that the application would be filed 14 days after publication was not followed. Citizens states that although the

newspaper notice, which stated that the application would be submitted "in 14 days" was published on April 25, the application was not filed until May 19.<sup>1</sup> Citizens argues that because the application was submitted more than 14 days after publication of the newspaper notice, the notice is void and does not meet the requirements of the Act. Citizens cites several appellate court cases for the proposition that failure to properly give notice under Section 39.2 is jurisdictional. (Kane County Defenders, 139 Ill.App.3d 588; Browning-Ferris Industries, 162 Ill.App.3d 801; Concerned Boone Citizens, 144 Ill.App.3d 334.) Citizens maintains that a jurisdictional defect requires no showing of prejudice, and thus contends that the siting procedure at the local level is void.

In response, Kibler argues that filing an application after 14 days has passed is not error. Kibler acknowledges that case law establishes that an application cannot be submitted less than 14 days after notice is given, but contends that the cases cited by Citizens do not hold that filing an application after the 14 day statutory period has passed creates a jurisdictional defect. Thus, Kibler maintains that the Board should reject Citizens' argument.

Initially, the Board notes that the parties seem to be arguing different issues. Citizens contends that the jurisdictional defect arises from the discrepancy between the newspaper notice (which stated that the application would be submitted "in 14 days") and the actual date of filing, 24 days after notice was published. On the other hand, Kibler views the issue as whether it is error to submit an application more than 14 days (the minimum notice period established by Section 39.2) after notice is given. After reviewing the record and the cases cited, the Board believes that the issue in this case is properly stated as: where a newspaper notice states that an application will be submitted "in 14 days", but the application is submitted 24 days after publication, does that notice comply with the provision of Section 39.2(b) that the notice include "the date when the request ... will be submitted"? In sum, the statutory provision at issue here is not the minimum 14 day notice period, but the requirement that the notice include the date when the request will be submitted.

The text of the notice clearly includes the statement that the application was to be submitted "in 14 days from the date of

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<sup>1</sup> In both its initial brief and its response brief, Citizens refers to the date of filing of the application as April 19. The record clearly reflects that the application was filed on May 19. The Board assumes that the reference to April is a typographical error.

this publication." (C0020.) The Board finds that this statement is sufficient to fulfill the statutory requirement that the notice include "the date when the request for site approval will be submitted". (415 ILCS 5/39.2(b) (1992).) It is easy to calculate the anticipated date of submittal from that information. However, the problem in this case is that the application was not submitted on the date given in the newspaper notice. The record clearly shows that the application was submitted to the county clerk on May 19, 24 days after the newspaper notice was published. (C0030.) In other words, the notice did include a date when the application was to be submitted, but the application was not submitted on that date.

After reviewing the case law established on the issue of notice pursuant to Section 39.2(b), the Board finds that Kibler's failure to submit its application on the date included in the newspaper notice renders that notice void. We believe that the requirement that the notice include the date on which the application will be submitted is intended to allow interested persons to easily ascertain when the local decisionmaking procedure, with its statutory deadlines for hearings, public comments, and final decision, will begin. This allows interested persons to begin to prepare to participate in the procedure. A situation, such as this, where an applicant includes the required date in the notice, but then fails to follow that date, does not fulfill that purpose. Thus, although the text of the notice may have complied with the requirements of Section 39.2(b), the applicant did not comply with the representations made in that notice. Thus, the Board finds that because Kibler's subsequent actions in submitting the application did not comport with the information in the notice, the newspaper notice is void.<sup>2</sup>

The case law is quite clear that failure to follow Section 39.2(b) notice procedures is a jurisdictional defect, such that a local decisionmaker is not vested with jurisdiction to hear an application for siting approval. (Kane County Defenders, 139 Ill.App.3d 588; Browning-Ferris Industries, 162 Ill.App.3d 801; Concerned Boone Citizens, 144 Ill.App.3d 334.) As the court stated in Kane County Defenders:

The notice requirements contained in section 39.2(b) of the Environmental Protection Act [citation] are jurisdictional prerequisites which must be followed in

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<sup>2</sup> For example, if an administrative agency, such as the Board, published notice stating that a public hearing that was to be held on January 1, but the hearing was not held until January 12, that notice would also be void. The notice itself might comply with the applicable statutory requirements, but the representations made in that notice were not carried out.

order to vest the county board with the power to hear a landfill proposal. [Citations.] Thus, [the applicant's] failure to publish appropriate newspaper notice and notice of the date it filed the site location request rendered the county board hearing invalid for lack of jurisdiction. (Kane County Defenders, 93 Ill.Dec. at 921-922.)

Therefore, we find that the Williamson County Board did not have jurisdiction to consider Kibler's request for site approval, because the newspaper notice published prior to the submittal of that application was void.

The Board notes that Kibler argues that Citizens did not claim any prejudice and did not suffer any prejudice. However, as Citizens points out, the issue of prejudice is not relevant to a jurisdictional inquiry. The applicable notice requirements must be met in order to confer jurisdiction on the local decisionmaker, regardless of whether any party is, or claims to be, prejudiced by a failure to meet the notice provisions. Additionally, the Board notes that Kibler has not raised any contention that it was prevented, in some way, from submitting its application on the date included in the newspaper notice. An applicant has complete control over when an application is submitted to a local decisionmaker.

#### CONCLUSION

In sum, the Board finds that because Kibler did not submit its application on the date contained in the newspaper notice, that notice was void. Thus, the County Board lacked jurisdiction to consider the Kibler's application for site approval. As previously stated, the courts have held that lack of jurisdiction at the local level makes it unnecessary to review any additional arguments. (Kane County Defenders, 93 Ill.Dec. at 922.) Thus, we will not address Citizens' three other contentions.

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

#### ORDER

The Board finds that the Williamson County Board of Commissioners lacked jurisdiction to hear Bill Kibler Development Corporation's application for site approval, because the newspaper notice was void. Therefore, the November 13, 1992 decision of the Williamson County Board of Commissioners, granting site approval, is vacated.

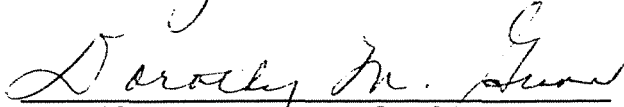
IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS

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5/41) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 20<sup>th</sup> day of May, 1993, by a vote of 6-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board