ILLINOIS POLLUTION CONTROL BOARD
May 4, 1995

MEDICAL DISPOSAL SERVICES, INC.,	)	
Petitioner,	)	
v.	)	PCB 95-75
	)	PCB 95-76
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(Permit Appeals - Air, Land) (Consolidated)
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by M. McFawn):

Before the Board in this permit appeal are several filings: a motion for summary judgment, supporting memorandum, and statement of uncontested facts submitted by petitioner Medical Disposal Services, Inc. (MDS) on March 31, 1995, and a cross-motion for summary judgment, response to petitioner's motion for summary judgment, and response to petitioner's statement of uncontested facts submitted by respondent Illinois Environmental Protection Agency (Agency) on April 25, 1995. On April 28, 1995, MDS filed a response to the Agency's cross-motion for summary judgment and a motion to strike the responsive pleadings of the Agency. On April 25, 1995, the Human Action Community Organization (HACO) filed a petition to intervene, in this proceeding. MDS filed a response to the petition to intervene on April 28, 1995. The City of Harvey (Harvey) also filed a brief in support of respondent's motion for summary judgment on April 25, 1995. Harvey's April 17, 1995 petition to intervene, to which MDS had filed a response on April 18, 1995, is also still pending.

MDS filed its initial permit appeals in PCB 95-75 (air) and PCB 95-76 (land) on March 3, 1995, seeking review of the Agency's January 31, 1995 denial of MDS's construction permit applications for the construction of a medical waste treatment facility. Each appeal cites six arguments in support of the requested relief. The six arguments are: 1) compliance with Section 39(c) of the Act; 2) fundamental fairness; 3) past Agency practice; 4) unconstitutional taking of property; 5) estoppel; and 6) equitable tolling. The appeals were consolidated by order of the Board on March 9, 1995. In its March 31, 1995 motion, MDS seeks summary judgment on its first ground for relief: whether it properly obtained S.B. 172 siting approval. MDS asserts that it is entitled to summary judgment on this issue, arguing that the siting approval obtained by Industrial Fuels & Resources/Illinois, Inc. (Industrial Fuels) by reason of the Illinois Appellate Court decision in Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board, 227

Ill. App.3d 533, 592 N.E.2d 148 (1st Dist. 1992) was transferred to MDS, and therefore satisfies the requirement for proof of local siting approval contained in Section 39(c) of the Act. (Petitioner's Motion for Summary Judgment at 3.)

In its cross-motion for summary judgment and response, the Agency states that summary judgment is appropriate as to petitioner's first ground for relief, since there are no issues of material fact in dispute. (Agency Cross-Motion for Summary Judgment at 2.) The Agency asserts that it is entitled to summary judgment on this ground, since MDS did not properly obtain siting approval for the facility for which MDS seeks construction permits.

BACKGROUND

In this action, MDS is seeking review of the Agency's denial of its application for construction permits for the construction of a medical waste treatment facility at a site located at the northeast corner of Center Avenue and 167th Street, in the City of Harvey, Cook County, Illinois (site). The Agency's denial of the permits was based solely on the grounds that MDS failed to obtain proper siting approval from the local siting authority pursuant to Section 39.2 of the Environmental Protection Act (Act).

MDS asserts that proper siting approval was transferred to it from Industrial Fuels. Industrial Fuels had originally petitioned the City of Harvey for siting approval for the construction of a facility at the site which would blend hazardous liquid and solid organic wastes for off-site use as fuel, extract solvents from contaminated soils, and incinerate medical wastes. On March 12, 1990, subsequent to the local siting proceedings, the City of Harvey denied Industrial Fuels' siting application by Ordinance No. 2647. Industrial Fuels appealed that decision to this Board on April 12, 1990, which appeal was docketed as PCB 90-53. On September 27, 1990 the Board issued an order affirming Harvey's denial of Industrial Fuel's siting application. (Industrial Fuels & Resources/Illinois, Inc. v. City Council of the City of Harvey, PCB 90-53 115 PCB 97 (September 27, 1990).) Industrial Fuels appealed the Board's decision to the Appellate Court, and on March 19, 1992, the Appellate Court reversed the decision of the Board. (Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist. 1992).)

On remand, the Board issued an order which stated in part:

> We construe the appellate court's mandate to mean that the site location of [Industrial Fuels] is considered approved and that no further action by this Board or

> the City Council of the City of Harvey is necessary. The presentation of this Order to the Agency shall suffice for purposes of Section 39(c) of the Act. Industrial Fuels is therefore free to proceed forward with the permitting process.

(Industrial Fuels & Resources/Illinois, Inc. v. City Council of the City of Harvey, PCB 90-53, 134 PCB 291 June 25, 1992).)

Subsequently, MDS entered into an installment sales contract for the purchase of the site from Industrial Fuels. (Petitioner's Statement of Uncontested Facts at 2.) Pending closing, MDS entered into a lease for the Harvey site. (Id.) MDS submitted its applications for air and land permits to construct a medical waste treatment facility at the site, which would be based upon substantially the same terms, technical requirements and characteristics as the facility proposed by Industrial Fuels. On January 31, 1995, the Agency issued permit denials to MDS, wherein it denied MDS applications for air and land construction permits on the sole ground that MDS did not provide proof of local siting approval. (Exhibits M & L to Petitioner's Permit Appeals.)

Summary judgment is appropriate where there are no genuine issues of material fact to be considered by the trier of fact and the movant is entitled to judgment as a matter of law. (Waste Management of Illinois, Inc. v. IEPA (July 21, 1994) PCB 94-153; ESG Watts v. IEPA (August 13, 1992), PCB 92-54; Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 22, 1991), PCB 91-112.) Because we find there are no genuine issues of material fact, we find that summary judgment is appropriate on the issue of whether MDS properly obtained siting approval for the construction of the medical waste treatment facility. We will therefore rule on both MDS's motion for summary judgment and the Agency's cross-motion for summary judgment.

Section 39.2 of the Act gives county and municipal governments a limited degree of control over the siting of new solid waste disposal sites within their boundaries. (*See* M.I.G. Investments, Inc. v. IEPA, 119 Ill.Dec. 533, 535; 523 N.E.2d 1 (Ill. 1988).) Under this provision, local county and municipal boards must determine whether the applicant for a new pollution control facility satisfies the nine statutory criteria set out in Section 39.2. A "new pollution control facility"[1] is defined to include newly developed or constructed facilities, expansions

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[1] Effective as of December 22, 1994, pursuant to P.A. 88-681, the definition of a "regional pollution control facility" has been amended, deleting the word "regional". Therefore, this opinion will use the term "pollution control facilities."

beyond the boundary of currently permitted pollution control facilities, and receipt of special or hazardous waste for the first time. (Section 3.32(b) of the Act.) Thus, the need for siting approval only applies to "new" pollution control facilities; siting approval need not be obtained for permitted facilities, except as specified above.

When determining whether to grant a permit for the development or construction of a new pollution control facility, the Agency must determine whether that proposed new facility has obtained proper siting approval from the local siting authority. Section 39(c) of the Act provides in relevant part:

> [N]o permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of said facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area in which the facility is to be located in accordance with Section 39.2 of this Act.

That Industrial Fuels was granted siting approval by order of the appellate court is undisputed. MDS purports to have purchased the siting approval for the Harvey site obtained by Industrial Fuels, and seeks to rely on that approval in seeking its construction permits from the Agency. MDS asserts that siting approval pursuant to Section 39(c) of the Act is location-specific only, not applicant-specific or facility-specific, and that such approval is freely transferable. (Petitioner's Motion for Summary Judgment at 3; *see also* Petitioner's Memorandum in Support of Summary Judgment at 7.) In contrast, the Agency asserts that siting approval is not only location-specific, but also applicant-specific and facility-specific, and that MDS therefore failed to obtain proper siting approval for its proposed facility. (Agency Cross-Motion and Response at 10-11.) The question whether MDS properly obtained siting approval for the facility for which it seeks construction permits thus turns on whether siting approval is applicant-specific, or is transferable from the applicant to another person.[2]

DISCUSSION

The issue before the Board is whether a person other than the original siting applicant can seek a developmental permit for a new pollution control facility. While the Act does not directly address this question, case law and recent legislative amendments to Section 39.2 of the Act, provide guidance. Based

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[2] For the purposes of this opinion, "person" is as defined at Section 3.26 of the Act.

upon the following analysis, the Board concludes that the General Assembly vested the local government with the authority to determine whether or not a specific applicant meets the criteria set forth in Section 39.2 of the Act so that such applicant may seek the necessary permits to develop a new pollution control facility within that local government's jurisdiction. Since that decision requires the weighing of factors specific to the applicant before it, and for reasons set forth more specifically below, we find that local siting cannot be transferred from Industrial Fuels, which had the hearing before the local government, to MDS, which did not.

In support of its position that siting approval is transferrable, MDS cites Christian County Landfill, Inc. v. Christian County Board, PCB 89-92, October 18, 1989 (Christian County). In Christian County, the county board included a condition on its siting approval requiring that any buyer or subsequent owner of the Christian County Landfill request the approval of the county before it could use the site. Because the Board found that this condition addressed a future occurrence which was not contemplated by any of the criteria, the Board found that the county board had exceeded its statutory authority in imposing this condition.

We find that the situation in Christian County is distinguishable from the present case. In Christian County, the condition imposed on the siting approval would have allowed the local siting authority to reopen the issue of siting at a point later in time, most importantly, including after issuance of the permits necessary for a pollution control facility. This would have infringed on the Agency's permitting authority. (*See* Christian County at 8.) Moreover, the condition proposed by the Christian County Board would have allowed the county to exceed its statutory authority by allowing it to impose a siting condition which could have subjected a permitted facility to the siting process for a reason other than the two statutorily authorized, i.e., expansion beyond its permitted boundaries or receipt of special or hazardous waste for the first time.

In the present case, the Agency's denial of the construction permits does not result in the issue of siting being reopened at a point in time after the permits have been issued. Instead, the Agency's denial precedes any permits having been issued for the development of the facility for which Industrial Fuels obtained siting approval. Rather, the Agency denied the permits because MDS did not provide proof that it had obtained local siting approval along with the applications as required pursuant to Section 39(c) of the Act.

Furthermore, the Agency was correct in its denial of the construction permits. Section 39.2(f) the Act provides in pertinent part that the applicant has two years from the date

upon which siting approval is obtained in which to make application to the Agency for permits to develop the site. If the siting applicant does not do so, the siting approval expires. Industrial Fuels made no such application, and no permits have yet been issued to the siting applicant, i.e., Industrial Fuels.

In further support of its position that siting approval is transferrable, MDS cites Concerned Citizens v. County of Marion, PCB 85-97 (November 21, 1985). (Petitioner's Motion for Summary Judgment at 3; Petitioner's Memorandum in Support of Summary Judgment at 10.) In that case, the Board held that sale of the facility did not render the underlying siting proceeding before the Marion County Board fundamentally unfair. In so doing, the Board cited its decision in Watts Trucking Service, Inc. v. City of Rock Island, PCB 83-167, March 8, 1984. In Watts Trucking Service, the Board reviewed the S.B. 172 provisions of the Act in effect at that time to determine the scope of review afforded the local siting authority. Having examined criterion No. 2 at Section 39.2(a) of the Act among other provisions, the Board found that the criterion did not include the sale of the facility to a new operator.

The Agency argues that central to the Board's holdings in Watts Trucking and Concerned Citizens was the fact that operator experience and enforcement history were not part of Section 39.2(a) at that time; therefore, the Board was correct in concluding that the local siting authority did not have the statutory authority to review operator skill and past violations. However, Section 39.2(a) of the Act has been amended in critical part since Concerned Citizens and Watts Trucking Service were decided. (Agency Cross-Motion for Summary Judgment at 24.) Given this amendment, the Agency is correct that these decisions are of no precedential value in support of MDS's argument that siting approval is transferable.

As originally adopted in S.B. 172, Section 39.2(a) of the Act sets forth the nine criteria which the county board or the governing body of a municipality must consider when reviewing a siting application for a new pollution control facility, including the following:

> 2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
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> . . .
>
> 5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents;

In 1988, Section 39.2(a) was amended to further provide that:

> The county board or the governing body of the municipality may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section.

Thus, as amended, Section 39.2 creates an express statutory right for the local siting authority to consider the operating experience and history of the applicant when considering criteria 2 and 5 when ruling on a siting application for a new pollution control facility. To allow the transference of siting approval to a different person would defeat the legislative intent to grant to local authorities this express statutory right. We therefore find that siting approval cannot be transferred from an applicant to another person.

As argued by the Agency, this outcome is supported by Kane County Defenders v. Pollution Control Board, 139 Ill. App.3d 588, 487 N.E.2d 743 (2d Dist. 1985) wherein the court stated:

> The broad delegation of adjudicative power to the county board clearly reflects a legislative understanding that the county board hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the landfill site approval process.

Allowing siting approval to be transferred from an applicant to someone else would allow that person to bypass the scrutiny of the hearing process at the local level, and would deprive the local siting authority of its statutorily defined right to consider an applicant's operational history and experience when ruling on criteria 2 and 5. Siting approval must therefore be considered applicant-specific.[3]

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[3] We note that in the decision of the appellate court in Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist. 1992) the court stated:

> The experts who testified on behalf of Industrial carried impressive credentials including extensive experience with similar facilities. Their opinions were based on facts and reasonable assumptions. Industrial operates other, similar facilities in different locations and therefore has a track record.

This demonstrates that the appellate court's reversal was based in part upon Industrial Fuel's prior operating record.

CONCLUSION

We find that Section 39.2 creates an express statutory right for the local siting authority to consider the operating experience and history of the applicant when considering criteria 2 and 5 when ruling on a siting application. To allow the transference of siting approval to a different person would defeat the legislative intent to grant to local authorities this express statutory right, allowing a person other than the applicant to bypass the local siting process. We therefore find that siting approval must be considered applicant-specific, and that it cannot be transferred from the applicant to another person.

Because MDS did not proceed through the siting process, but rather sought to rely on the siting approval which Industrial Fuels obtained, we hold that MDS failed to obtain proper siting approval for the new pollution control facility for which it sought construction permits. MDS's motion for summary judgment is hereby denied, and the Agency's cross-motion for summary judgment is hereby granted. The Agency's January 31, 1995 denial of MDS's applications for land and air construction permits for the construction of a medical waste treatment facility is hereby affirmed.

We further find that our determination on the transferability of siting is dispositive of all claims for relief in this matter. The City of Harvey has a statutory right to review a siting application from MDS, and any representations made by the Agency to MDS do not extinguish this right. Furthermore, we find that MDS has no property right in a permit application based on siting approval granted to Industrial Fuels. One seeking a permit has no vested right in the permit until a final conclusive determination is made as to the issuance of the permit. (County of LaSalle v. Illinois Pollution Control Board, 100 Ill.Dec. 284, 288, 497 N.E.2d 164 (3d Dist. 1986).)

Because we find our determination on the Agency's cross-motion for summary judgment to be dispositive of all issues in this case, we find that there is no need for the hearing officer to reconvene the hearing which was continued on the record on April 1, 1995 until April 11, 1995. The hearing officer is therefore directed to cancel that hearing. Furthermore, we find that our decision renders moot the petitions for intervention filed by Harvey and HACO. Finally because this matter is being decided solely on the basis of a legal issue and no hearing will be held, we find that no prejudice has resulted to MDS from the Agency's failure to timely file the record. Accordingly, MDS's motion to strike responsive pleadings is hereby denied.

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

ORDER

1. Petitioner Medical Disposal Services, Inc.'s motion for summary judgment is hereby denied.

2. Respondent Illinois Environmental Protection Agency's cross-motion for summary judgment is hereby granted, and the Agency's January 31, 1995 denial of MDS's air and land construction permit applications for the construction of a medical waste treatment facility is hereby affirmed.

3. The hearing on this matter, which was continued on the record on April 1, 1995 until April 11, 1995, is hereby cancelled.

IT IS SO ORDERED.

Board members E. Dunham and J. Theodore Meyer dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. 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 4th day of May 1995, by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board