

ILLINOIS POLLUTION CONTROL BOARD  
February 4, 1993

LERoy BROWN & SONS, INC.,            )  
  )  
    Petitioner,                         )  
  )  
    v.                                    )  
  )  
  )  
COUNTY BOARD OF McDONOUGH         )  
COUNTY, ILLINOIS,                    )  
  )  
  )  
    Respondent.                        )

PCB 92-132  
(Landfill Siting Review)

FRED C. PRILLAMAN, OF MOHAN, ALEWELT, PRILLAMAN, & ADAMI,  
APPEARED ON BEHALF OF THE PETITIONER;

WILLIAM E. PONCIN, STATE'S ATTORNEY McDONOUGH COUNTY, AND JOHN J.  
McCARTHY, ESQ., APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

This matter is before the Board on a September 14, 1992, petition for review of the August 19, 1992, denial by the County Board of McDonough County (McDonough County) of siting approval to LeRoy Brown & Sons, Inc. (LeRoy Brown). Petitioner had sought McDonough County's approval for an expansion of a regional pollution control facility in McDonough County, Illinois. Pursuant to Section 40.1 of the Illinois Environmental Protection Act (Act) (Ill. Rev. Stat. ch. 111 1/2, par. 1040.1 [415 ILCS 5/40.1]), LeRoy Brown petitioned the Board to review the siting denial by McDonough County, and issue an order granting site location approval for petitioner's proposed expansion. The Board held a public hearing on this matter on November 5 and 6, 1992, at the McDonough County Courthouse, Macomb, Illinois.

PROCEDURAL HISTORY

The Resource and Waste Management Committee of the McDonough County Board (Committee) held a public hearing on the LeRoy Brown application on April 13, 1992, April 14, 1992, April 16, 1992, and April 27, 1992, pursuant to Section 39.2(d) of the Act. (C. at 1-660.)<sup>1</sup> The Committee reviewed and considered the

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<sup>1</sup>The County record will be cited as "C. at \_\_\_". County exhibits will be cited as "C. Exh. \_\_\_". Applicant's exhibits contained in the county record will be cited as "Appl. Exh. \_\_\_". The Hearing transcript will be cited as "Tr. at \_\_\_". Petitioner's exhibits will be cited as "Pet. Exh. \_\_\_". Petitioner's brief and

0139-0051

application by LeRoy Brown, the transcript of the public hearing, and the written comments filed with the County Clerk of McDonough County (County Clerk) on June 23, 1992, June 25, 1992, June 30, 1992, July 2, 1992, and July 8, 1992. (C. at 1228-1268 and 1430-1536.) Each of these deliberation sessions lasted several hours. The Committee found that the new application did not meet all the criteria set forth in Section 39.2(a) of the Act. (C. at 1463-1466.) The Committee decided that the facility was not necessary to accommodate the waste needs of the area it was intended to serve; the facility was not so designed, located and proposed to be operated that the public health, safety and welfare would be protected; and the traffic patterns to and from the facility were not designed to minimize the impact on existing traffic flows. (C. at 1463-1466.)

Thereafter, McDonough County reviewed and considered the application, the transcripts of the public hearings, the written comments filed with the County Clerk, and the decision of the Committee. McDonough County found that the application did not meet all of the criteria set forth in Section 39.2(a) of the Act. (C. at 1459-1467.) On August 19, 1992, McDonough County unanimously adopted a resolution denying the application of LeRoy Brown for site approval of a regional pollution control facility in McDonough County, Illinois. (C. at 1459-1467.)

As previously stated, LeRoy Brown filed its petition for siting decision review with the Board on September 14, 1992. On October 2, 1992, respondent, McDonough County, filed with the Board a motion to dismiss LeRoy Brown's petition for landfill siting review. On October 14, 1992, LeRoy Brown filed with the Board a motion to declare siting to be deemed approved, or, alternatively, a motion to strike, or alternatively, a motion to take with the case. The Board denied the motions by both parties on October 16, 1992, but indicated that the parties were free to reintroduce these issues at hearing on this matter. On December 1, 1992, petitioner filed a waiver of decision deadline from January 12, 1993, to February 5, 1993. On December 14, 1992, LeRoy Brown filed a motion with the Board for leave to file an errata sheet instanter, which was granted by the Board on December 17, 1992. On January 8, 1993, petitioner filed a motion to supplement the record with Applicant's Exhibit 5. The Board granted the motion to accept Applicant's Exhibit 5 on January 21, 1993.

#### FACTS

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reply will be cited as "Pet. Br. at \_\_\_" and "Pet. Reply at \_\_\_", respectively. Respondent's exhibits will be cited as "Res. Exh. \_\_\_". Respondent's brief will be cited as "Res. Br. at \_\_\_".

A key issue in this proceeding involves the facts surrounding the filing with McDonough County of the original application as well as additional materials filed later by LeRoy Brown in the landfill application process. The following is a recitation of the undisputed facts. On or about May 20, 1991, the Petitioner mailed written notices of its request for site approval for the location of a regional pollution control facility in McDonough County, Illinois, to the owners of all property within 250 feet in each direction of the lot line of the subject property and to the members of the General Assembly from the legislative district in which the proposed facility would be located. (Appl. Exh. 2, Attachment 12.) The notices were sent by certified mail, return receipt requested. (Appl. Exh. 2, Attachment 12.) On May 20, 1991, May 27, 1991, and June 3, 1991, a notice of intent to request regional pollution control siting approval from McDonough County pursuant to Section 39.2(b) of the Act was published in the Macomb Journal, a newspaper of general circulation published in McDonough County, Illinois. (Appl. Exh. 2, Attachment 12.) The notices stated that the petitioner's request for site approval would be submitted to McDonough County on or after June 20, 1991. (Appl. Exh. 2, Attachment 12.)

An application was filed with the County Clerk in June of 1991. Also undisputed is the fact that a filing of additional material was accepted by McDonough County on December 19, 1991.

In dispute are two key facts in this proceeding. The first is whether the original application was filed on June 20, 1991, or on June 24, 1991. The second is whether the December 19, 1991, filing was an amendment to the application or a new application. These disputed facts and their bearing on the case will be determined at appropriate points in the discussion which follows.

#### MOTION TO DISMISS

McDonough County reintroduced the issues raised in its motion to dismiss at public hearing on November 5, 1992 (Tr. at 6-8). McDonough County maintained that the notice requirements of Section 39.2(b) of the Act had not been met. Therefore, in respondent's view, this action was not properly before the McDonough County for lack of jurisdiction (Res. Br. at 9-11).

The petitioner maintains that its original application should be deemed approved pursuant to Section 39.2(e) of the Act. Section 39.2(e) states: "If there is no final action by the county board or governing body of the municipality within 180 days after the filing of the request for site approval the applicant may deem the request approved". In the alternative, LeRoy Brown argues that the subsequent filing of additional materials should be considered an amendment to the original

application. (Pet. Br. at 9-10; Pet. Reply at 10-11.)

Statutory Notice Requirements

Section 39.2(b) of the Act states as follows:

"No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirements; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.

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."

Application Filing Date

LeRoy Brown maintains that it filed the application with McDonough County on June 20, 1991. (Pet. Br. at 10.) McDonough County, however maintains that the petition was not filed until June 24, 1991 (Res. Br. at 2, Tr. at 456). The significance of the filing date is linked to the December 19, 1991, filing. If the petition was filed on June 20, then the application for siting approval was not acted on within 180 days as required by Section 39.2(e), and petitioner may deem the application approved. If however, the application was filed on June 24, 1991, then the December 19, 1991, action was taken on the original petition within 180 days, and the deemed approved

0139-0054

provision of Section 39.2(e) would not arise.

In support of petitioner's position, LeRoy Brown cites to the respondent's motion to dismiss wherein the respondent's attorney refers to the application as being filed on June 20, 1991. LeRoy Brown maintains:

It is axiomatic, of course, that "[a]dmissions of fact binding upon a party may be made by an attorney in a pleading." Baker-Wendell, Inc. v. Edward M. Cohon & Associates, Ltd., 100 Ill. App. 3d 924, 928 n. 1 (1st Dist. 1981) (citing Merritt v. Greves, 82 Ill. App. 3d 863, 866 (1st. Dist. 1980)). Such admissions are binding if they are "deliberate; relate to concrete facts; and not amount to matters of opinion, estimate, appearance, inference or uncertain summary." Baker-Wendell Inc. v. Edward M. Cohon & Associates Ltd., 100 Ill. App. 3d at 929.

LeRoy Brown also maintains that the June 20, 1991, filing was complete pursuant to Section 39.2 of the Act. (Pet. Reply at 7.) Therefore, according to petitioner, the County Clerk "unlawfully refused to accept the application" on June 20, 1991. (Pet. Reply at 6.) McDonough County argues in its brief that June 24, 1991, was the filing date for the application. According to McDonough County, on June 20, 1991, LeRoy Brown attempted to file an application for expansion of its facility in McDonough County, Illinois. (Tr. at 455.) This application consisted of one (1) bound volume. (Pet. Exh. 2.) The application was not accompanied by the agreed upon filing fee. The application and insufficient check were returned to petitioner (Tr. at 456). On June 24, 1991, the Petitioner filed the application with the County Clerk together with the agreed upon filing fee. (Tr. at 456.) On June 24, 1991, the County Clerk issued a receipt to the Petitioner for the application and the filing fee. (Tr. at 456-458; Res. Exh. 2.) On September 10, 1991, the County Clerk sent a second receipt to the Petitioner for the original application at the direction of the Committee. (Tr. at 458-459; Res. Exh. 1 and Res. Exh. 3.) This second receipt was intended to indicate that the original application had been received by McDonough County and was complete. (Tr. at 379-382, 464.)

The Board will first address the argument put forth by LeRoy Brown regarding the admission of a fact by an attorney. This argument is without merit. The reference to a June 20, 1991, filing date echoes the date used by LeRoy Brown in its petition for review. Further, the application is not date stamped as to when it was received. The Board noted (October 16, 1992) in its

0139-0055

response to the motion to dismiss, that the Board lacked "sufficient information" at that time, as the original motion to dismiss was not supported by affidavit. Only at hearing, was the dispute over the filing date (June 20th or June 24th) fully heard. Therefore, the Board believes that the use of the June 20, 1991, date in the respondent's motion to dismiss was not "deliberate" or relating to concrete fact.

The Board finds that June 24, 1991, is the appropriate filing date in this matter. According to Section 39.2(k) of the Act, the governing body considering a landfill siting may charge a reasonable fee. In 1983, McDonough County passed an ordinance which said, "The County Clerk shall accept no application for filing unless said fee has been paid". (C. Exh. 5 at 17) The Board also notes that according to the hearing transcript (Tr. at 455-458), no copies of the application were left with the County Clerk on June 20, 1991. The County Clerk was not in actual possession of the application copies until June 24, 1991, when the agreed upon fee was also paid (Tr. at 456). Since the Board finds that June 24, 1991, is the filing date, the December 19, 1991, acceptance of the new material and withdrawal of the original petition by McDonough County is within the 180 day decision deadline specified by Section 39.2(e) of the Act. Therefore, petitioner's argument that the application should be deemed approved (Tr. at 508-509) is without merit and the Board denies the petitioner's request to deem the application approved.

#### December 19, 1991 Filing

According to the respondent, LeRoy Brown withdrew the original application and filed a second application for site approval for the location of a regional pollution facility in McDonough County, Illinois, pursuant to Section 39.2 of the Act. (Tr. at 465-472; C. Exh. 1.) This application consisted of two (2) bound volumes. (Tr. at 472; Pet. Exh. 2 and Pet. Exh. 3.) Respondent maintains that the "new application" was submitted to McDonough County on December 19, 1991, and the original application was withdrawn on December 19, 1991. (Tr. at 465-472; C. Exh. 1)

LeRoy Brown maintains in its brief that the materials submitted on December 19 were an "amendment" to its application. In support of its position LeRoy Brown maintains that the June 1991 application was "full and complete within the statutory requirements". (Pet. Reply at 7.) LeRoy Brown further maintains that the materials submitted were "legally irrelevant to the siting requirements" of the Act (Pet. Reply at 7) and that "at all times the substantive portion of Petitioner's application has remained identical". (Pet Reply at 10.)

LeRoy Brown also maintains that its use of "new application"

was "with respect to reasons wholly unrelated to notice or jurisdictional issues". (Pet. Reply at 10.) LeRoy Brown argues that the reference to a "new application" was a means of assuring that the filing of the "irrelevant material would not subsequently preclude Petitioner" from filing a "bona fide amendment to the petition". (Pet. Reply at 10.) Finally, LeRoy Brown maintains that the "County's argument sifts down to the suggestion that an applicant must provide an absolute date upon which he intends to file his application, upon pain of having the application dismissed for failure to meet jurisdictional requirements". (Pet. Reply at 11.)

The question of whether or not the filing by LeRoy Brown on December 19, 1991, was a new application, or an amended application is important because of a provision at Section 39.2(e) of the Act which states: "... the applicant may file not more than one amended application ....". Therefore, if LeRoy Brown filed a new application on December 19, 1991, it retained the right to make an amendment during the application process. If the application was an amendment to the June 24, 1991, application, then there would be no more opportunities to amend the application.

Petitioner, in an attempt to preserve an opportunity to further amend its proposal, specifically referred to the December 19 filing as a "new application" in two letters, dated December 2 and December 5, 1991, to respondent. (C. Exh. 1.) In fact, the December 2, 1991, letter (C. Exh. 1) from LeRoy Brown responded to a letter dated November 15, 1991 from McDonough County (C. Exh. 1) in which McDonough County referred to the filing as an amendment; LeRoy Brown clearly indicated that the combination of new materials from December 19, 1991, and old materials from June 1991 should be treated "as a new application" (C. Exh. 1). In addition, the December 5, 1991, letter from LeRoy Brown stated that petitioner understood that, "unless we have left unanswered any of your questions, the McDonough County Board, at its next regularly scheduled meeting, will accept the new materials as complete, at which time the presently-pending application will automatically be withdrawn and replaced by the new application, with the new filing date being the date of acceptance". (C. Exh. 1) Petitioner now argues that the materials were an amendment. The Board is persuaded that the correspondence between LeRoy Brown and McDonough County in December 1991 clearly shows that the filing should be treated as a new application. The Board believes that to hold otherwise would defeat the clear intent of 39.2 that there is only one "amendment" to a siting application.

Since the December 19, 1991, filing was a new application, LeRoy Brown should have met the notice requirements for this new application. The notice requirements of Section 39.2(b) are jurisdictional prerequisites to the local county board's power to hear a landfill proposal. The lack of jurisdiction at the county

board level made it unnecessary to review petitioners' other arguments in Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E. 2d 743 (2nd District, 1985). 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 and the PCB decision upholding the county board. The court applied the reasoning of Illinois Power Company v. Pollution Control Board, 137 Ill. App. 3d 499, 484 N.E. 2d 898 (4th District 1985), which found that the PCB's failure to publish notice as required by Section 40(a) of the Act divested it of jurisdiction.

Thus the courts have held that the notice requirements of Section 39.2 are to be strictly construed as to timing, and even slight deviation, such as one day, in the notice requirement renders the county without jurisdiction. In the instant matter the timing of the notice is less significant than the fact that no notice was given for a new application. Although the public did have proper notice of the first application, the subsequent filing of a new application must be noticed. Therefore, the Board finds that McDonough County lacked jurisdiction to hear this matter.

#### CONCLUSION

As previously stated, the courts have held that lack of jurisdiction at the county board level make it unnecessary to review petitioner's remaining arguments. Therefore, the Board will not review LeRoy Brown's arguments concerning the constitutionality or the criteria of Section 39.2 of the Act.

The Board will vacate the McDonough County Board's denial of siting approval for expansion of LeRoy Brown's facility, as the McDonough County Board lacked jurisdiction to hear the application.

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

#### ORDER

The Board finds that McDonough County lacked jurisdiction to hear the application for expansion of landfill because LeRoy Brown failed to provide proper notice pursuant to Section 39.2(b) of the Act. The McDonough County decision denying siting approval is vacated.

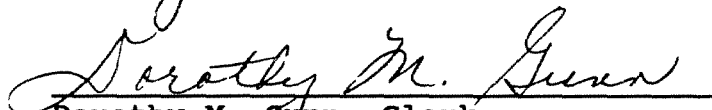
IT IS SO ORDERED.

0139-0058



Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Casteneda v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 4<sup>th</sup> day of February, 1993, by a vote of 6-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board