

STATE OF INDIANA)
)
COUNTY OF MARION)

IN THE MARION COUNTY SUPERIOR COURT
CAUSE NO: 49F12-1104-MI-15814

KILLBUCK CONCERNED CITIZENS)
ASSOCIATION, INC., WILLIAM)
KUTSHCERA, and DANIEL B. SPALL,)

Petitioners,)

vs.)

COMMISSIONER, INDIANA DEPARTMENT)
OF ENVIRONMENTAL MANAGEMENT and)
J.M. CORPORATION,)

Respondents.)

FILED

MAR 16 2012 (232)

Elizabeth J. White
CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter comes before the Court on a Petition for Judicial Review filed by the Killbuck Concerned Citizens Association, Inc. (“KCCA”), William Kutschera, and Daniel B. Spall. The Petitioners sought Judicial Review of a decision by the Office of Environmental Adjudication (“OEA”) upholding the renewal of Solid Waste Facility Permit 48-06 (“the Permit”) for Respondent J.M. Corporation (“JMC”) by the Indiana Department of Environmental Management (“IDEM”). The Court expresses its gratitude to the parties for their able advocacy in prosecuting this matter.

Findings of Fact

1. “In 1981, Madison County zoning authorities granted a special use permit to J.M. Corporation (“JMC”) to establish a landfill... The battle between the parties in this case has raged for over thirty years.” *KCCA v. J.M. Corporation*, 2011 Ind. LEXIS 70 (Ind. 2011).

2. In 1988, IDEM issued a solid waste operating permit to JMC. The permit authorized the operation of the Mallard Lake Landfill (“Landfill”) located in Madison County at 3823 East 300 North, Anderson, Indiana, as a municipal solid waste landfill (Agency Record at 3).

3. On May 3, 1996, JMC notified the Federal Aviation Administration and the Anderson Municipal Airport that the Landfill would be located within a five mile radius of an airport runway. The Landfill is located more than 11,000 feet from the Anderson Municipal Airport.

4. After protracted litigation, JMC’s operating permit became effective on July 2, 1998, pursuant to an order by OEA’s Chief Environmental Law Judge Wayne Penrod. Although Judge Penrod’s order did not specify an expiration date, according to 329 IAC 10-13-3, a permit “must be issued for a fixed term not to exceed five (5) years in accordance with IC 13-15-3-2.”

5. In early 2003, IDEM informed JMC that the Permit would expire in 2003 unless a renewal application was filed. JMC submitted its renewal application to IDEM on March 4, 2003. In response, IDEM notified JMC in writing that the application was not complete, specified certain deficiencies, and requested additional information. JMC submitted supplemental materials to IDEM in support of its renewal application.

6. IDEM denied JMC’s application to renew the Permit, and JMC appealed the denial to the OEA. KCCA intervened in the appeal, making it a party to the OEA action. The OEA issued an order on October 20, 2004, directing IDEM to review the application to renew the Permit.

7. JMC worked with IDEM to finalize its permit, submitting additional information to IDEM on April 9, 2007, and December 20, 2007. (Record at 123)

8. On February 11, 2010, IDEM renewed the Permit to operate a municipal solid waste landfill, stating:

This renewal application, the April 9, 2007, RAI response, and subsequent responses and submittals received have been reviewed and certified as meeting the requirements of IC 13-15-1-3 and 329 IAC 10-11. This permit renewal applies to the municipal solid waste landfill located at 3283 East 200 North in Madison County, Indiana, which contained approximately 13.0 acres approved for filling. The permittee or operator shall operate this facility according to the terms and requirements of this renewal permit letter and enclosures and the applicable statutes and regulations in effect on the effective date of this renewal. This facility permit renewal FP 48-06 will expire February 1, 2015. This permit renewal allows J.M Corporation to update the facility design to comply with current rules and allows operations at the facility subject to the terms of this letter and the enclosed requirements...

9. On February 26, 2010, KCCA filed their petition for administrative review before the OEA, and other petitioners who are not parties to this case filed other petitions. The OEA conducted the administrative review and a final hearing on November 17-18, 2011.

10. During the hearing, the OEA's Environmental Law Judge ("ELJ") took judicial notice of the fact that JMC was a corporation in good standing in Indiana on March 4, 2003, pursuant to IC 4-21.5-3-26(f). Indiana Rule of Evidence 201(a) provides a court may take judicial notice of a fact that is not subject to reasonable dispute in that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."

11. After the hearing, the OEA issued its Findings of Fact, Conclusions of Law, and Final Order on March 23, 2011, dismissing all the Petitions for Review, including KCCA's petition. (Agency Record at 1-11.)

12. No party presented evidence the Landfill has ever accepted waste for disposal, although the Indiana Supreme Court concluded JMC's facility included a container collection system that had received waste for storage.

13. KCCA subsequently appealed the OEA's Order to this Court. The Petitioners allege the Permit should have been denied for failing to comply with the renewal application deadline, failing to submit a complete application that included a Certificate of Existence, and failing to comply with siting requirements concerning the Anderson Municipal Airport.

Conclusions of Law

14. KCCA requested that this Court reverse and vacate the final order of the OEA from March 23, 2011. This Court may disturb or modify the OEA's order if it is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

IC 4-21.5-5-14; *Ind. Dept. of Env'tl. Mgmt. v. Lake County Solid Waste Management District*, 847 N.E.2d 974, 981 (Ind. Ct. App. 2006). An agency's action is "arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision." *Id.* at 983.

15. Before proceeding to the merits of KCCA's argument, the Court must evaluate whether KCCA's claims are timely. The Court concludes they are not. The proper time to raise the issue of timeliness and completeness of the permit renewal was during the 2003 litigation before the OEA.

16. Claim preclusion applies when "(1) the former judgment was rendered by a court of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies." *Dawson v. Estate of Ott*, 796 N.E.2d 1190, 195 (Ind. App. 2003), citing *Collard v. Enyeart*, 718

N.D.2d 1156, 1161 (Ind. Ct. App.1999). In this case, a judgment on the merits was issued to the identical parties to this matter by the OEA under *In Re: Objection to Denials for Extension Period, Renewal of Permit for Mallard Lake Landfill*, 2004 OEA 82. Although the timeliness of the initial renewal application was not expressly at issue in that case, KCCA should have addressed any concerns about the timeliness of the application in that matter and is bound by the findings of the OEA. “When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action.” *Dawson* at 1195. In addition, this Court determined in *In Re: Objection to Denials for Extension Period, Renewal of Permit for Mallad Lake Landfill*, 2004 OEA 82, that IDEM was required to give JMC additional time to respond to its Request for Additional Information to allow JMC to submit a complete renewal application. That ruling rested in part on the finding that “in early 2003, the IDEM contacted [JMC] to inform it that the Permit for the Mallard Lake Landfill would expire...unless a renewal application was filed on or before March 5, 2003... [JMC] filed the renewal application on March 4, 2003.” *In Re: Objection to Denials for Extension Period, Renewal of Permit for Mallard Lake Landfill*, 2004 OEA 82, 84-5. If KCCA wanted to challenge the timeliness of JMC’s renewal application, it should have done so before the OEA in 2003. To the extent KCCA failed to do so, it waived those arguments, and its claim is precluded by the final order. KCCA is bound by the OEA’s finding that IDEM was required to give JMC additional time to submit a complete application to renew its permit.

17. Even if KCCA’s claim of timeliness was not precluded, the Court is unconvinced that KCCA has met their burden in demonstrating the application was late. It is not sufficient for KCCA to show there are alternative ways to interpret the law in light of the facts. KCCA must demonstrate to this Court that IDEM’s interpretation and OEA’s affirmation were erroneous as a

matter of law and that their conclusions were arbitrary and capricious based on the facts under IC 4-21.5-5-14. KCCA has not done so.

18. The reviewing court should give deference to an agency's interpretation of the laws and rules it is charged with enforcing. *Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dept. of Env'tl. Mgmt.*, 820 N.E.2d 771, 777 (Ind. Ct. App. 2005). "If a statute is subject to different interpretations, the agency's interpretation is entitled to great weight." *Id.* KCCA has not shown their reading of the computation of time controls or that IDEM's reading and the OEA's reading are erroneous.

19. KCCA also should have raised the argument concerning the completeness of the application in the 2004 litigation, and that argument is no longer timely. Even if the objection was permissible, the ELJ acted properly in taking judicial notice of the Secretary of State's web site. OEA reviews IDEM's decisions *de novo*, and ELJ Gibbs availed herself of the procedures established by the Legislature under IC 4-21.5-3-26(f) and by Indiana Rule of Evidence 201(a). The ELJ was directed to the web site by IDEM's prehearing brief and by JMC's witness at the hearing (Agency Record at 395 and 645-652, respectively).

20. The Court agrees with the ELJ that the Indiana Secretary of State's web site is "a source whose accuracy cannot be reasonably questioned" under Indiana Rule of Evidence 201 for the purpose of determining if a corporation is in existence and good standing to do business in Indiana. There is nothing in the record disputing the fact that JMC was a corporation in good standing at the time it submitted its application to renew the permit.

21. Although the applicant has an obligation to submit a complete application to renew a permit, the Legislature gave IDEM the responsibility to review applications for completeness and to notify applicants of any deficiencies under IC 13-15-4-9. IDEM certified

the application was complete, even though the renewal application did not include the Certificate of Existence for JMC required by 329 IAC 10-11-2.1(e). Once the deficiency came to light, the proper procedure would have been for IDEM to request the missing information, not for it to deny the permit renewal, particularly for an applicant that all parties agree existed in good standing to do business in Indiana on the application date.

22. KCCA also claims that because the Landfill is within six miles of the Anderson Municipal Airport, IDEM should have denied the permit renewal pursuant to 329 IAC 10-16-1. If this argument is timely, it still fails because the Landfill is not a new Municipal Solid Waste Landfill (MSWLF). JMC received its permit in 1988, and 329 IAC 10-16-1 imposes different requirements on newer landfills than on older ones. In fact, 329 IAC 10-16-1(b) applies to “applicants for new MSWLFs and lateral expansions that are applying for a permit under this article,” while 329 IAC 10-16-1(c) applies to “MSWLFs permitted under 329 IAC 1.5, which was repealed in 1989, or 329 IAC 2, which was repealed in 1996.” The Permit for the Landfill issued in 1988, and for that reason it is not a “new MSWLF” for purposes of 329 IAC 10-16-1.

23. KCCA has not met its burden of demonstrating IDEM or the OEA erred in finding JMC complied with the siting requirements.

24. Because the Landfill is not a new MSWLF and is more than ten thousand (10,000) feet from the Anderson Municipal Airport, JMC is only required to send “notification to the affected airport and the Federal Aviation Administration (‘FAA’) of the intent to site a solid waste land disposal facility.” JMC complied with the notification requirement of 329 IAC 10-16-1 on May 3, 1996.

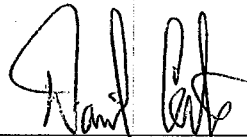
25. KCCA argues the Court should consider the Landfill a new “MSWLF Unit” under 329 IAC 10-2-117 or 329 IAC 10-2-119 rather than a MSWLF under 329 IAC 10-2-116.

However, the Solid Waste Management Board adopted different definitions for these entities and uses them differently in its rules. The Court concludes the Landfill is, in fact, a MSWLF facility, while each constituent part of a landfill is a MSWLF unit, defined as “a discrete area of land or an excavation” within a facility that is permitted to accept solid waste for disposal. The Court agrees with the OEA that any restrictions applying to new MSWLFs or new MSWLF units under 329 IAC 10-16-1, including the prohibition against locating within six (6) miles of certain airports, do not apply to the Landfill, which received its permit in 1988.

ORDER

KCCA failed to demonstrate that IDEM erred in renewing the Permit or that OEA erred in affirming the renewal. Because KCCA’s claims are untimely and because they have not met the burden of demonstrating IDEM and OEA acted unlawfully, the Court DENIES the Petition for Judicial Review in all respects.

SO ORDERED this 16th day of March, 2012.



Hon. David Certo
Marion Superior Court, Environmental Division F12

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