

**Objection to Denial of New Waste Tire Storage
Site Registration No. 046-P-00614 and
Objection to Denial of New Waste Tire Storage
Site Registration No. 046-P-00615
Hunt's Maintenance, Inc.
Cause No. 16-S-J-4918
Cause No. 16-S-J-4919**

OFFICIAL SHORT CITATION NAME: When referring to 2019 OEA 40, cite this case as **Hunt's Maintenance, 2019 OEA 40.**

Objection to Denial of New Waste Tire Storage Site Registration No. 046-P-00614, Hunt's Maintenance, Inc., Westville, LaPorte County, Indiana.

Cause No. 16-S-J-4918

And

Objection to Denial of New Waste Tire Storage Site Registration No. 046-P-00615, Hunt's Maintenance, Inc., Westville, LaPorte County, Indiana.

Cause No. 16-S-J-4919

TOPICS:

Waste tire processing
Waste tire storage
Pending enforcement action
Site ownership
Violation letter
Summary judgment
Statutory construction
Legislative intent
Clear language
Existing statutes
Basis for denial
timely and adequate notice
solid waste processing facility permit
prior resolved enforcement actions
pending enforcement actions
responsible party
good character requirement
property owner signature
Summary judgment
I.C. § 13-20-13-3(d)
I.C. § 13-11-2-67(a)

I.C. § 13-14-5-2, 3
I.C. § 13-20-13-12
I.C. § 13-19-4, et seq.

PRESIDING JUDGE:
Davidsen

PARTY REPRESENTATIVES:
Petitioner: Gregg J. Romaine, Esq.
Respondent IDEM: Kyle W. Burns, Esq.

ORDER ISSUED:
June 10, 2019

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

The application was submitted on behalf of Hunt's Maintenance, Inc. with Kimberly Casey listed as Business Owner. The Property Owner is listed as Shafer Properties Hunt's LLC. Public records related to both Hunt's Maintenance, Inc., and Shafer Properties Hunt's LLC show that Mr. Paul W. Shafer is affiliated with both entities. Mr. Paul Shafer is currently involved in pending enforcement cases with Rick's Auto Salvage (case number 2004-13979-H) and M&E Auto Sales (case number 2004-14397-H). Mr. Shafer has also been involved with enforcement actions to Paul's Auto Yard (2012-20950-H and 2010-19310-H, both resolved) and Indiana Auto Parts, Inc. (2005-14505-H and 2007-17338-H, both resolved). In November 2015, IDEM denied the waste tire storage application for Hunt's Maintenance, Inc. because of pending enforcement actions, the submittal of an incomplete application and failure to comply with Indiana's rules for waste tire processing (329 IAC 15).

6. Paul Shafer is President and the sole member of Shafer Properties – Hunt's LLC.²
7. Mr. Shafer was the President of Hunt's Maintenance, Inc.³ at the time of the Applications.
8. Mr. Shafer was involved with Rick's Auto Salvage, as shown by his signature on the Agreed Order (case number 2004-13979-H), effective January 29, 2013. Mr. Shafer was the President of Paul's Auto Yard and signed an Agreed Order resolving case number 2004-14397-H, effective on January 29, 2019.
9. On July 1, 2016, IDEM issued a Violation Letter to Hunt's Maintenance for violations of waste tire regulations, based on an inspection conducted on May 23, 2016.
10. IDEM filed for summary judgment on January 16, 2019. Hunt's filed its response and cross motion for summary judgment on February 15, 2019. IDEM filed its reply on March 4, 2019. IDEM filed its proposed findings of fact, conclusions of law and final order on March 18, 2019. Hunt's filed its proposed findings of fact, conclusions of law and final order on March 20, 2019.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615

² Exhibit 6, IDEM's Memorandum in Support of Motion for Summary Judgment, filed January 16, 2019.

³ Exhibit 3 & 4, IDEM's Memorandum in Support of Motion for Summary Judgment, filed January 16, 2019.

N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. 4-21.5-3-27(d). "*De novo* review" means that "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).

4. The OEA shall consider a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Trial Rule 56 states, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000).
5. Each party has requested summary judgment in this matter. "The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992) *see also*; *Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).
6. There is a question of statutory interpretation. "In statutory construction, our primary goal is to ascertain and give effect to the intent of the legislature. *Gray v. D & G, Inc.*, 938 N.E.2d 256, 259 (Ind. Ct. App. 2010). The first rule is that all words must be given their "plain and ordinary meaning unless otherwise indicated by statute." *Id.* "Furthermore, we presume that the legislature intended statutory language to be applied in a logical manner consistent with the statutes' underlying policies and goals. *Id.* However, we will not interpret a statute which is clear and unambiguous on its face; rather, we will give such a statute its apparent and obvious meaning. *Ind. State Bd. of Health v. Journal-Gazette Co.*, 608 N.E.2d 989, 992 (Ind. Ct. App. 1993), adopted, 619 N.E.2d 273 (Ind. 1993)." *United States Steel Corp., et al v. Northern Indiana Public Service Corp.* 951 N.E.2d 542, 552, (Ind. Ct. App. 2011). "It is not a proper function of this court to ignore the clear language of a statute and, in effect, rewrite the statute in order to render it consistent with a particular view of sound public policy." *T.B. v. Indiana Department of Child Services*, 971 N.E.2d 104, 110 (Ind. Ct. App. 2012), trans. denied. "There is a strong presumption that the legislature in enacting a particular piece of legislation is aware of existing statutes on the same subject. *Morgan County R.E.M.C v. Indianapolis Power & Light Co.*, 260 Ind. 164, 261 Ind. 323, 302 N.E.2d 776 (1973); *Chaffin v. Nicosia* 297 N.E.2d 904 (Ind. Ct. App. 1973)." *Indiana Alcoholic Beverage Commission v. Osco Drug, Inc.*, 431 N.E.2d 823, 833 (Ind. Ct. App. 1982)
7. IDEM asserts that it may deny an application if an enforcement action is pending against

the applicant and points to I.C. §13-20-13-3(d) as the basis for denying the applications. This statute states:

The department may deny an application for a certificate of registration under this chapter if:

- (1) the application is incomplete;
- (2) the applicant has failed to comply with the requirements of:
 - (A) this chapter;
 - (B) IC 13-20-14; or
 - (C) a rule adopted by the board under section 11 of this chapter or under IC 13-20-14-6; or
- (3) *an enforcement action is pending against the applicant.* (emphasis added)

8. I.C. §13-11-2-67(a) defines "Enforcement action", for purposes of I.C. §13-20-13 and I.C. §13-20-14, as:

- (1) a written notice of a violation or a commissioner's order issued under IC 13-30-3;
- (2) a letter identifying a violation; or
- (3) a court proceeding initiated by the:
 - (A) department;
 - (B) department of homeland security;
 - (C) state; or
 - (D) federal government;under an environmental protection law or other law concerning public health, safety, or the environment.

9. The Violation Letter was issued to Hunt's. It notes that Hunt's was operating without a proper registration and requires it to cease processing any waste tires. This clearly qualifies as an "enforcement action" under I.C. §13-11-2-67(a)(2). The Petitioner tries to argue that "a letter identifying a violation" is "more akin to letter from a citizen, a county health department or interested third party prompting the Agency to investigate an identified violation under IC 13-30-3-1"⁴ There is no basis in the statutory language for Petitioner's interpretation, especially in light of the provisions of I.C. § 13-14-5-2 and 3, which authorize IDEM to issue such letters after an inspection.

10. Based on the Violation Letters, summary judgment in IDEM's favor is appropriate. The Violation Letters suffice as the basis for denying the Applications, despite IDEM's lack of specific reference the July 1, 2016 Violation Letters as a reason for the denial in its August 30, 2016 Denial Letters. Although IDEM did not raise the Violation Letter as a denial reason until its motion for summary judgment, Petitioner has had notice of and an opportunity to be heard on this issue, therefore due process is served.⁵ In *Murphy v.*

⁴ Proposed Conclusion of Law #17, Petitioner's Proposed Findings (*sic*) of Fact, Conclusions of Law and Final Order, filed March 20, 2019.

⁵ *Pilot Travel Centers, LLC*, 2011 OEA 36; *Mystick Food Mart*, 2016 OEA 48.

Terrell, 938 N.E.2d 823, 827 (Ind. Ct. App. 2010), the Indiana Court of Appeals held that due process required certain minimum procedures. The United States Supreme Court, in *Goldberg v. Kelly*, 397 U.S. 254, 267-268, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), held “[t]he fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.” The 9th Circuit Court in *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 886 (9th Cir. 1972) held “[a]ctual litigation is often referred to in support of a holding that a party was not prejudiced by initially inadequate pleadings.” Summary judgment motions provide such an opportunity. As Petitioner has had the opportunity to fully brief the issue of whether the Violation Letters may support a basis for denying the Applications, due process rights have not been denied. Therefore, summary judgment in IDEM’s favor is appropriate.

11. IDEM argues that Mr. Shafer’s association with Hunt’s and Shafer Properties and his enforcement history provide a valid basis for denial. Under I.C. §13-19-4-2, IDEM may examine whether a person (a “responsible party”) associated with an applicant meets the good character requirements for solid waste facilities. However, I.C. §13-20-13-12 provides that waste tire facilities are not required to obtain a solid waste processing facility permit. Therefore, the standards expressed in I.C. §13-19-4-2 do not apply to this matter.
12. IDEM points to both pending and resolved enforcement actions as the basis for the denial. IDEM’s interpretation that it can use prior enforcement actions that have been resolved is not supported by the clear language of the statute. As shown by I.C. §13-19-4 *et seq.*, the legislature clearly knew how to include prior enforcement history as grounds for denial if it chose to. The violations related to Paul’s Auto Yard (2012-20950-H and 2010-19310-H, both resolved) and Indiana Auto Parts, Inc. (2005-14505-H and 2007-17338-H, both resolved) cannot be used to deny the Applications.
13. IDEM further argues that Mr. Shafer’s⁶ involvement with the companies with pending enforcement actions can be considered. However, in each of these instances, the enforcement actions were against the corporations, Rick’s Auto Salvage, M&E Auto Sales, and Paul’s Auto Yard. Again, the good character requirements for solid waste permits explicitly state that the enforcement history of “responsible party” may be considered in a decision to issue a permit. But I.C. §13-20-13-3(d) does not include this language. So, it can be assumed that the legislature would have permitted IDEM to examine the enforcement history of a “responsible party” for purposes of waste tire permits, if it had chosen to do so. IDEM’s interpretation is not supported by the statutory language.
14. IDEM argues that Mr. Shafer, as the property owner, should be considered an “applicant”. IDEM argues that because the property owner must sign the application, that makes the property owner an applicant in and of itself and subject to I.C. §13-20-13-3(d). It is true that the property owner must sign the application and certify that he is the owner and that

⁶ IDEM does not argue that Mr. Shafer is a “responsible corporate officer”.

he understands that he can be held liable for violations that occur on the property. But again, Mr. Shafer is not the owner; the owner is Shafer Properties - Hunt's LLC. Only the pending enforcement history of the corporate entity can be considered.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED summary judgment is appropriate. Judgment is entered in favor of the Indiana Department of Environmental Management. All further proceedings are **VACATED**.

You are further notified that pursuant to provisions of Ind. Code (I.C.) § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 10th day of June, 2019 in Indianapolis, IN.

Hon. Mary Davidsen
Chief Environmental Law Judge