IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EASTERN SHORE ENVIRONMENTAL, INC.,	:	
	:	
Plaintiff,	:	C.A. No. 02A-11-001WLW
	:	
v.	:	
	:	
DELAWARE SOLID WASTE AUTHORITY; DOVER AIR FORCE BASE; ADRIENNE HEGMAN; ENVIRONMENTAL APPEALS BOARD; and DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	:	
	:	
Defendants.	:	

Submitted: November 19, 2003
Decided: February 26, 2004

OPINION AND ORDER

Upon Appeal of a Decision of the Environmental Appeals Board. Remanded.

William E. Manning, Esquire and Richard A. Forsten, Esquire of Klett Rooney Lieber & Schorling, Wilmington, Delaware and John W. Paradee, Esquire, of counsel, Prickett Jones & Elliott, P.A., Dover, Delaware; attorneys for the Plaintiff.

Jeremy W. Homer, Esquire of Parkowski Guerke & Swayze, P.A., Dover, Delaware; attorneys for Defendants Adrienne Hegman and Delaware Solid Waste Authority.

Douglas McCann, Esquire, Assistant United States Attorney, Wilmington, Delaware and George J. Konoval, Captain, USAF, of counsel, Dover Air Force Base, Delaware; attorneys for Defendant Dover Air Force Base.

Kevin P. Maloney, Esquire, Department of Justice, Wilmington, Delaware; attorneys for Defendant Department of Natural Resources and Environmental Control.

Kevin R. Slattery, Esquire, Department of Justice, Wilmington, Delaware; attorneys for Defendant Environmental Appeals Board.

WITHAM, J.

Introduction

Before this Court is Eastern Shore Environmental's ("Eastern Shore") appeal of a decision by the Environmental Appeals Board ("the Board" or "EAB") finding that the permit application previously approved by the Department of Natural Resources and Environmental Control ("DNREC") was insufficient. Dover Air Force Base ("DAFB") has answered the appeal and filed a cross-appeal. The Delaware Solid Waste Authority ("DSWA") and Adrienne Hegman have answered the appeal and filed a cross-appeal. DNREC has answered the appeal.

Background

Procedural History

This case arises from a permit modification granted by DNREC on June 30, 2000, allowing the Eastern Shore waste transfer station in Kent County, Delaware, to process municipal solid waste ("MSW")[1] in addition to the dry[2] waste already processed there.

Eastern Shore acquired the waste transfer station in November 1999 when it purchased 100% of the stock of the previous owner, Michael J. Bandurski, Inc.

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[1] Municipal solid waste is defined in § 3 of the Delaware Regulations Governing Solid Waste as, "household waste and solid waste that is generated by commercial, institutional, and industrial sources and is similar in nature to household waste."

[2] Dry waste is defined in § 3 of the Delaware Regulations Governing Solid Waste as, "wastes, including but not limited to, plastics, rubber, lumber, trees, stumps, vegetative matter, asphalt pavement, asphaltic products incidental to construction/demolition debris, or other materials which have reduced potential for environmental degradation and leachate production.

Originally the transfer station was permitted by DNREC to handle "dry" waste, but Eastern Shore sought modification of the permit to allow the handling of MSW. Eastern Shore filed their application with DNREC to modify the permit on February 15, 2000. DNREC issued the modification permit on June 30, 2000, after Eastern Shore made various improvements required by DNREC.

On July 19, 2000, Ms. Hegman filed a statement of appeal to the Environmental Appeals Board, alleging that Eastern Shore's application for permit modification was insufficient in that the necessary zoning approvals had not been obtained by Kent County and the application lacked a topographical survey, an engineering report, and a hydrogeological survey. She requested that the Board reverse the decision of the Secretary of DNREC and revoke the permit. On August 14, 2000, Eastern Shore filed a motion to intervene in Ms. Hegman's appeal to the EAB. DSWA filed a motion to intervene on August 18, 2000, and DAFB filed its motion to intervene on January 18, 2002.

The Board conducted a hearing to decide motions presented by each of the parties on March 12, 2002. Following the hearing, the Board issued its opinion on May 15, 2002, concluding that Ms. Hegman had standing to appeal the issuance of the permit and that DSWA and DAFB could intervene in the appeal. In addition, the Board decided to allow DAFB to raise the issue of flight safety in the hearing on the appeal, although it was not mentioned in the statement of appeal filed by Ms. Hegman.

Finally, the Board conducted a hearing on the appeal spanning four days.[3] The parties presented numerous witnesses, including various experts who testified regarding the impact of the transfer station on the activities of DAFB. The testimony concentrated heavily on the issue of whether the transfer station processing MSW would attract more birds to the area, thereby increasing the risk of a bird colliding with an airplane causing a crash.

The Board issued its decision on October 21, 2002, concluding that DNREC's review of the application was "inconsistent with its regulations and its prior practices."[4] As a result, the Board remanded the matter to the Secretary of DNREC with specific instructions as to how the Secretary was to review the permit application. Specifically, the Board concluded that DNREC must review the application in light of the bird hazard/flight safety risk and, if the modification is permitted, the Board required DNREC to impose certain conditions on the permit, such as continued monthly bird studies and regular policing of the facility to ensure a trash and litter-free environment. Finally, the Board concluded that while the matter was on remand and the permit application was being reviewed, DNREC must impose conditions on the facility to reduce the risk posed by hazardous wildlife. The Board recommended the current cap of 2000 tons per month and the continuance of other conditions previously imposed in the Secretary's order dated

[3] The hearing was held on June 11, 2002, June 18, 2002, June 25, 2002, and July 23, 2002.

[4] Final Order and Decision of the Environmental Appeals Board, October 21, 2002, p. 75.

June 13, 2002.[5]

Parties' Contentions

On November 20, 2002, Eastern Shore filed its notice of appeal with this Court. Cross-appeals were filed by DAFB and DSWA and Ms. Hegman. DNREC answered the appeal. In its brief, Eastern Shore contends that the Board erred in concluding that Ms. Hegman had standing to bring the appeal before the Board. Specifically, Eastern Shore argues that the Board erred when it failed to consider the affidavits submitted by the parties and simply accepted the allegations in Ms. Hegman's statement of appeal as true. Further, Eastern Shore challenges the Board's decision to permit intervention by DAFB and DSWA, based upon the allegation that Ms. Hegman lacked standing and because DAFB and DSWA intervened after the expiration of the 20 day appeals period. In addition, Eastern Shore claims that the Board improperly considered matters not raised in the original appeal and incorrectly held that DNREC required proof of zoning compliance to be in writing. Finally, Eastern Shore argues that the Board's factual and legal conclusions with respect to the bird safety issue, whether the facility is enclosed or partially enclosed, and the traffic issue were not supported by substantial evidence

[5] On June 13, 2002, the Secretary of DNREC Issued Order No. 2002-A-0037 regarding an Application for a Stay of Amendment of ESE Permit 99-SW-03 filed by DAFB and DSWA and Ms. Hegman. In his Order, the Secretary recommended that MSW handling volumes be capped at 2000 tons per month, that monthly bird surveys be continued in the area, that bird deterrents be added to the facility and that trash patrols around the facility and entrance road be conducted at a minimum of twice per day.

and wrong as a matter of law.

DSWA and Ms. Hegman answered Eastern Shore's appeal, contending that the Board's factual conclusions were supported by substantial evidence and should be affirmed. However, DSWA and Ms. Hegman assert that the Board erred in permitting Eastern Shore to continue processing MSW at a rate of 2000 tons per month while the matter was on remand to the Secretary of DNREC.

DAFB also answered the appeal and indicated its approval of the Board's factual conclusions, but claims that the Board erred when it permitted Eastern Shore to continue its operation at the aforementioned rate.

Discussion

Ms. Hegman's Standing

Ms. Hegman resides in the town of Little Creek, Delaware, and lives approximately 1.7 miles from the Eastern Shore facility. In her Statement of Appeal filed on June 19, 2000, with the EAB, she alleges that her home is in close proximity to the transfer station and that her interests will be substantially and adversely affected by the issuance of the permit. The Statement goes on to indicate that the increase in noise, traffic, odor and pollution would diminish her enjoyment of her property. She further alleges that the requirements of the Regulations Governing Solid Waste were not satisfied, nor were the Kent County zoning regulations. In this appeal, Eastern Shore contends that the Board erred when it treated the issue of standing as a motion to dismiss, thus treating each of the

allegations in Ms. Hegman's Statement of Appeal as true. Without considering the affidavits submitted by the parties or hearing any testimony regarding the issue, the Board concluded that Ms. Hegman's allegations in her Statement of Appeal sufficiently established that she had standing to bring the appeal. This was error, and must be remanded to the Board for a decision regarding Ms. Hegman's standing to appeal the Secretary of DNREC's decision to issue the permit.

Title 7, section 6008 of the Delaware Code provides that any person whose interest is substantially affected by any action of the Secretary of DNREC may appeal to the Board within 20 days of the Secretary's decision. The party invoking the jurisdiction of the court, or the Board, bears the burden of proving that he or she has standing to bring the action. The Supreme Court addressed the issue of standing in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.,*[6] in which the Court adopted the test established in *Association of Data Processing Service Organizations, Inc. v. Camp*,[7] concluding that in order to satisfy the "substantially affected" standard in the statute, the party is required to show that he or she has suffered an injury in fact and that such injury is within the zone of interest sought to be protected. In *Dover Historical Society v. City of Dover Planning Commission*,[8] the Supreme Court stated that an injury in fact "is an invasion of a legally protected

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[6] 636 A.2d 892, 904 (Del. 1994).

[7] 397 U.S. 150 (1970).

[8] 838 A.2d 1103, 1110 (Del. 2003).

interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."

The issue of standing is a mixed question of law and fact. The Court must first determine whether the Board has properly interpreted the statute and then must determine whether the Board's decision is supported by the evidence. The Board here identified the proper legal standard to establish standing when it referred to *Oceanport*. However, the Board erred in treating Eastern Shore's pre-hearing motion as a motion to dismiss and, thus, not considering the affidavits submitted by the parties regarding the issue of standing. The Board based its decision solely on the allegations set forth in the complaint, treating each allegation as true.[9] Thus, the issue before this Court is whether the Board properly considered only the allegations in the complaint, or whether the Board should have considered the affidavits in determining whether Ms. Hegman had standing to bring the appeal.

In *Lujan v. Defenders of Wildlife*, the United States Supreme Court stated that because the elements establishing standing are an essential part of the plaintiff's case, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof."[10] At the pleading stage, general factual allegations may suffice, but in response to a motion for summary judgment,

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[9] Decision and Order of the Environmental Appeals Board, Appeal No. 2000-10, May 15, 2002, p.19.

[10] 504 U.S. 555, 561 (1992).

the plaintiff must set forth specific facts by affidavit or other evidence.[11] At the final stage, the facts must be supported adequately by evidence presented at trial.[12]

Superior Court Civil Rule 12(c) provides that a motion for judgment on the pleadings will be treated as one for summary judgment if matters outside the pleadings are presented to the Court.[13] In this case, Eastern Shore's motion was accompanied by affidavits and letters in support of its position. Therefore, this was a motion for summary judgment, rather than a motion to dismiss. As such, the Board should have considered the affidavits submitted by the parties and viewed the evidence in a light most favorable to the non-moving party in making its decision.

Ms. Hegman submitted an affidavit stating that she lives one block from Main Street in Little Creek, Kent County, Delaware. She stated that she has seen more than six trucks each day traveling to or from the Eastern Shore facility, and that she can also hear the trucks as they pass. In addition, she states that aircraft from Dover Air Force Base fly near or over her house.

The affidavit submitted by Eastern Shore's vice-president, Marc Shaener, states that none of the trucks transporting municipal solid waste to the facility travel through the town of Little Creek; only dry waste trucks travel through the town. In addition, he states that the amount of truck traffic through the town will not change

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[11] *Id.* at 561.

[12] *Id.*

[13] *See Vasquez v. Department of Correction,* 1995 Del. Super. LEXIS 641.

whether or not the facility processes municipal solid waste. In addition, numerous other affidavits were submitted by Little Creek residents who contend that they cannot see, hear, or smell the Eastern Shore facility at their homes.

This Court is not to be considered as a fact finder when addressing an appeal from an administrative agency. Here, the EAB did not make proper findings of fact regarding Ms. Hegman's standing. Therefore, this matter is remanded to the Environmental Appeals Board to determine, based on the affidavits and evidence presented, whether Ms. Hegman had standing to bring the appeal.

Intervention by DAFB and DSWA

On August 18, 2000, the Board granted DAFB's motion to intervene, concluding that DAFB had a substantially affected interest in the matter.[14] However, as a basis for their decision, the Board concluded that Ms. Hegman had perfected a valid appeal before the Board. As this Court previously concluded, Ms. Hegman's appeal may not have been valid because she may not have had standing to bring the appeal. If Ms. Hegman lacked standing, then an appeal was not perfected within the 20 day time period required by 7 Del. C. § 6008(a). Therefore, it would not have been appropriate for the Board to allow the intervention.

The Superior Court has dealt with a similar issue in *Association of Citizens*

[14] Decision and Order of the Environmental Appeals Board, Appeal No. 2000-10, May 15, 2002, p.21.

of North of Dover, Inc. v. Regional Planning Commission of Kent County,[15] in which the Court stated that if the original appellant lacked standing, no action exists in which the intervenors could intervene. In making this statement, the Court relied upon a Third Circuit Court of Appeals decision which stated,

> It is well settled that since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main course of action, intervention will not be permitted to breathe life into a "nonexistent" lawsuit.[16]

While the Court of Chancery has reached a different conclusion when a derivative suit is involved, it is important to note that a derivative suit is an entirely different matter than this case. In *In re Maxxam*,[17] the Court draws a distinction between a case which involved a partnership, *McClune v. Shamah*,[18] and *Maxxam* which involved a shareholder derivative suit. Because the derivative claim does not belong to the shareholder who brought the action, but instead is for the benefit of the corporation, the fact that the original shareholder did not have standing to bring the original suit did not bar the later shareholders from intervening. As the corporation is the real party in interest, "the identity of the shareholder plaintiff is

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[15] 1990 Del. Super. LEXIS 125, *6.

[16] *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965).

[17] 698 A.2d 949, 957 (Del. Ch. 1996).

[18] 593 F.2d 482 (3d Cir. 1979).

not a paramount concern."[19]

In this case, Ms. Hegman brought the appeal on her own behalf. She was the real party in interest. Therefore, it was crucial for her to possess standing to bring the appeal. If she is found to not have standing, then no appeal exists. This Court has previously concluded that an appellant cannot bring an appeal before the Board after the 20 day appeal period has expired, as the Board would lack jurisdiction to hear the appeal.[20] The later intervention of DAFB and DSWA cannot breathe life into a nonexistent lawsuit.

On the other hand, if the Board finds that Ms. Hegman was substantially affected by the issuance of the permit and does have standing, then DAFB and DSWA could intervene. Although their intervention was not within the 20 day appeals period, the Superior Court previously has permitted interventions after the appeals period has run.[21] In *Riedinger*, the court permitted the property owners who had obtained a variance from the Board of Adjustment to constructively intervene, after the appeals period had run, in an appeal brought by a neighbor in the Superior Court. The Court found that the property owners became parties to the appeal because they had actively challenged procedural aspects of the case, as well as the merits of the appeal. Even though the property owners had not filed a motion to

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[19] *Id.* at 956.

[20] *See Clark v. Pearson,* 1992 Del. Super. LEXIS 231.

[21] *Riedinger v. Board of Adjustment of Sussex County*, 2000 Del. Super. LEXIS 473.

intervene with the Court and had not participated in the appeal during the appeals period, the Court concluded that it was proper to allow them to intervene.

Requiring all parties to file motions to intervene within the appeals period would lead to an absurd result, that is no parties would be able to intervene. If, as in this case, the original appellant did not file a notice of appeal until the last day of the appeals period, it would be impossible for any party to intervene in an appeal. Therefore, as long as Ms. Hegman is found to have standing and DSWA and DAFB can establish that they were substantially affected by the modification permit, then DSWA and DAFB should be permitted to intervene in the appeal.

Conclusion

In summary, the Court finds that the Board failed to consider necessary evidence in determining the issue of Ms. Hegman's standing. Therefore, this matter is remanded to the Board to determine, based upon the affidavits submitted by the parties and in a manner consistent with this opinion, whether Ms. Hegman has established that she was substantially affected by the issuance of the modification permit. In addition, the question of whether DAFB and DSWA properly intervened in the action is also remanded to the Board for a decision consistent with this opinion. The other matters raised in the appeal are not yet ripe for determination

and this Court will not address them at this time.

IT IS SO ORDERED.

/s/ William L.Witham, Jr.

J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File