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Administrative Agency Reconsideration of Decision
§ 8 M.R.S.A. § 344-5

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

MEMORANDUM

TO: Henry E. Warren, Commissioner, Department of Environmental Protection
FROM: Philip Ahrens, Assistant Attorney General
SUBJECT: Petition for Reconsideration; Westbrook Sludge Composting Site
DATE: September 12, 1978
~~_____~~

You have asked if the Board can consider a Petition for Reconsideration filed by the Pride's Corner Concerned Citizens Association and others more than 9 months after the Board approved a sludge composting site. Our answer is that because (1) the statutory 30-day reconsideration period has long since passed and (2) the case is on appeal before the Law Court, the Board does not have authority to consider the Petition for Reconsideration. However, the Board does have the statutory authority to modify its approval, after the case is removed from court jurisdiction, if the Board finds there has been a change in any condition or circumstances that requires such modification.

The pertinent facts as I understand them are as follows. The Pride's Corner Concerned Citizens Association ("Association") and 91 residents of the Pride's Corner area of Westbrook have petitioned the Board of Environmental Protection ("Board") to reconsider its Order dated October 26, 1977 which granted Site Location approval to the Portland Water District ("District") to operate a sludge composting site in Pride's Corner. The petitioners received notice of both the pending application and the subsequent Board approval but did not file a petition for reconsideration within 30 days as allowed by statute.^{1/} The Association and 93 area residents^{2/} filed suit in Superior Court, also as permitted

^{1/} See 38 M.R.S.A. §344(5).

^{2/} The 93 residents included all of the petitioners plus 2 individuals who have not been listed on the Petition for Reconsideration.

by statute 1/, alleging primarily that the Board's order was not supported by substantial evidence. The Superior Court upheld the Board's actions and that decision has been appealed by petitioners to the Law Court. 2/

Under a cover letter dated August 10, 1978 from their attorney, the petitioners have filed a "Petition For Reconsideration" asking that the Board reconsider its October 26, 1977 order. The 3 bases for the petition are: (1) there is substantial new evidence, not available as of the October 26, 1977 order, relating to air pollution in the vicinity of the sludge site; (2) there is substantial new evidence, not available as of the October 26, 1977 order, relating to a potential threat by the project to the health and welfare of individuals in the vicinity of the sludge site; and (3) there is evidence that the Portland Water District proposes substantial modifications to the design and construction of the project which would alter certain findings of fact and conclusions in the October 26, 1977 Board order.

Because the 30-day period allowed by statute for filing petitions for reconsideration has run, and because the case is pending in the Law Court, the Board Chairman has asked this office whether it has the authority to grant the August 10, 1978 petition for reconsideration.

QUESTION: Does the Board have jurisdiction to entertain a petition for reconsideration while appeal is pending?

The Maine Supreme Judicial Court has held that an administrative tribunal does not have the authority to modify its decision during the pendency of a judicial appeal.

...the filing of an appeal removes the cause from the administrative tribunal to the Superior Court. We hold that the appeal terminates the authority of the tribunal to modify its decisions unless the court remands the matter to the tribunal for its further action, thereby reviving its authority. Gagne v. Inhabitants of City of Lewiston, 281 A.2d 579, 583 (Me. 1971) (emphasis added).

The Court reaffirmed its position by adopting the above-quoted language in Ethyl Corporation v. Adams, 375 A.2d 1065, 1073 (Me. 1977) where the Court refused to consider a Board order, issued after appeal had been filed, which enumerated factual and legal reasons why Ethyl Corporation's applications for tax exemption had been denied.

1/ See 38 M.R.S.A. §346

2/ It should be noted that the Superior Court dismissed the action as to the Association and 85 residents; the Court found only 8 individuals had sufficient interest or injury to achieve standing.

Although the Court has made clear that the Board does not have the inherent authority to modify its decision while the appeal is pending, by analogy to a judicial Motion for a New Trial or a Motion for Relief From Judgment on the grounds of newly discovered evidence, it might be possible to request the Court to remand the case to the Board for further action.1/

It is important to point out that the Board's lack of authority to modify its order during the pendency of an appeal does not mean that a Board order is automatically stayed upon the filing of a notice of appeal. As long as no motion has been filed in Court for a stay 2/ the Board order appealed from remains in effect and further actions required by the order 3/ likewise remain in effect. No motion for a stay has been filed in the case at issue.

QUESTION: Does the Board have jurisdiction to entertain a petition for reconsideration filed more than 30 days after the applicant receives a Board order?

38 M.R.S.A. §344(5) states that any aggrieved person may file a petition for reconsideration "Within 30 days of the applicant's receipt of a board decision..." The wording of the statute is plain. The legislative history of the statute is silent and offers no suggestion that the statute has any meaning at variance with its clear language. It is the opinion of this office that the petitioners cannot avail themselves of §344(5) because more than 9 months passed between the applicant's

1/ If notice of appeal is given, the subsequent filing of a motion for a new trial, even if otherwise timely, is ineffective because jurisdiction of the case is no longer in the district court. The preferable procedure in that situation is to allow the motion to be filed in the district court. If the district court considers the motion favorably it then can ask that the case be remanded from the appellate court so that it may grant the motion. (footnotes omitted) Wright and Miller, Federal Practice and Procedure: Civil, §2821

See also Wright and Miller, §2873; Field, McKusick and Wroth, Maine Civil Practice, §73.11

2/ e.g. M.R.C.P. 80B (b)

3/ most commonly the submission of further plans for review and approval or schedules of completion dates.

receipt of the Board order and the petition filed on August 10, 1978.^{1/}

This is not to say, however, that the Legislature has provided no means by which the Board may amend its Orders to reflect changing circumstances. What once might be considered environmentally sound may be considered unsound at some later time.^{2/} Changing ideas and conditions and developing technologies are important tools in protecting our environment. The Legislature recognized the role of "fluid facts and shifting policies" ^{3/} by empowering the Board to

"...modify in whole or in part any license or issue an order prescribing necessary corrective action...whenever the board finds...(t)here has been a change in any condition or circumstances that requires....a temporary or permanent modification of the terms of the license...."
38 M.R.S.A. §347 (3)

- ^{1/} That the Board does not have the inherent authority to permit reconsideration was an issue addressed by the Court in Clark v. State Employees Appeal Board, 363 A.2d 735 (Me. 1976). The facts in Clark were similar to those at issue, except there was no statutory 30-day reconsideration period: Clark was dismissed from employment and in December, 1969 the State Employees Appeals Board denied him any relief. No further proceedings were taken until August, 1971 when Clark sought a rehearing on the basis of newly discovered evidence. The Court took notice that the Appeals Board was not authorized by statute to reopen and reconsider its decisions, which were intended to be final. Although it acknowledged a split of authority, the Court pointed to the public policy considerations of finality and avoidance of proliferation of litigation and decided to follow those jurisdictions which hold

...that administrative agencies created by legislative enactments are nonjudicial bodies and have no inherent powers of courts...in the absence of specific statutory authority to reopen and rehear on its merits a case in which a final order, decree or decision has been entered, administrative boards have no lawful authority to modify or set aside such final decisions in their exercise of functions of a quasi-judicial nature. Clark, 363 A.2d 735, 737, (emphasis added).

See also Johnson v. Kostis Fruit Co., 281 A.2d 318 (Me. 1971) where the Court reached the same result under similar facts.

- ^{2/} e.g. open burning, once an approved method of solid waste disposal, is now generally illegal.
^{3/} See Davis, Administrative Law Treatise, §18.01

Although the legislative history of §347 is silent, the statute appears to address directly the issues raised by petitioners: petitioners have alleged that evidence, unavailable at the time of the original Board order, indicates a change of condition or circumstances which requires the Board to modify its decision.

§347 allows the Board to modify the license but provides no framework for any person to bring a matter to the attention of the Board in order for the Board to modify a license. However, it is certainly reasonable to permit any person to petition the Board to exercise its §347 authority. Whether and how to act on such a petition is subject to the sound discretion of the Board.

CONCLUSION: (1) The Board does not have the authority to modify its decision, as requested in the petition for reconsideration, unless the Court remands the matter to the Board.

(2) The petitioners may not file a petition for reconsideration under 38 M.R.S.A. §344(5) because the time limit for filing such a petition has passed.

(3) After the Board reacquires its authority, it may modify its order, pursuant to 38 M.R.S.A. §347(3), if the Board finds there has been a change in any condition or circumstances that requires such modification.