2012 IL App (2d) 110474-U
No. 2-11-0474
Order filed May 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MILL CREEK WATER RECLAMATION DISTRICT, Plaintiff-Appellant, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and GRAND PRAIRIE SANITARY DISTRICT, Defendants-Appellees.	)	Appeal from the Circuit Court of Kane County. No. 10-CH-3864 Honorable Thomas E. Mueller Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justice Schostok concurred in the judgment.
Justice McLaren specially concurred.

ORDER

Held: Trial court correctly dismissed for lack of jurisdiction appellant's complaint for writ of *certiorari* where the Illinois Pollution Control Board previously found that appellant had no standing to raise the substantive claims contained therein. Appellant could not raise the same substantive claims in a different forum (*i.e.*, a court rather than an administrative agency); rather, appellant was required to properly appeal before the appellate court the Board's finding that it did not have standing to raise the claims.

¶ 1 Plaintiff, Mill Creek Water Reclamation District, appeals the trial court's section 2-619

dismissal of its complaint for writ of *certiorari* (735 ILCS 5/2-619(a) (West 2010)). We affirm.

¶ 2 I. BACKGROUND

¶ 3 This case concerns the trial court's section 2-619 dismissal of Mill Creek's complaint for writ of *certiorari*. We affirm the trial court's dismissal because it did not have jurisdiction where Mill Creek was required to appeal before the appellate court the Illinois Pollution Control Board's (Board) finding that, under the circumstances, Mill Creek had no standing to challenge the issuance of permits to its rival, Grand Prairie Sanitary District (codefendant-coappellee). However, to provide context, we also discuss the facts pertaining to the substance of Mill Creek's complaint.

¶ 4 On the merits, Mill Creek challenges the authority of the Illinois Environmental Protection Agency (IEPA) (codefendant-coappellee) to issue construction and operating permits for a "wastewater treatment plant and spray irrigation"[1] system to Grand Prairie. Mill Creek argues that the IEPA failed to secure proof that the "municipality's governing body" approved the siting of the facility following a public hearing, as is required for all "pollution control facilities" under section 39(c) of the Environmental Protection Act (Act). 415 ILCS 5/39(c) (2010).

¶ 5 A. Issuance of the Grand Prairie Permits

[1] The parties debate the categorization of the proposed facility. This matters only because Mill Creek's substantive argument depends on the categorization of the facility as a "pollution control facility," governed by section 39(c) of the Act. 415 ILCS 5/39(c) (West 2010). Grand Prairie, in contrast, calls the facility a "sewage works" facility, governed by section 39(a) of the Act. 415 ILCS 5/39(a) (West 2010). The subject line of the actual permit refers to the facility as a "WWTP & Spray Irrigation," or a "Wastewater Treatment Plant and Spray Irrigation," hence the terminology in our order.

¶ 6 Mill Creek and Grand Prairie each operate sewage treatment facilities in Kane County. In 2006, Mill Creek, along with several real estate owners and developers, petitioned the Chicago Metropolitan Agency for Planning (CMAP) to include the specific geographic area at issue in this case (*i.e.*, a 1,247-acre parcel known as "Settlements of LaFox") in the "Mill Creek Facility Planning Area" (FPA).[2] Grand Prairie, however, represents that the Settlements of LaFox was *its* territory, and it was not given notice of the petition for inclusion in the FPA, which CMAP ultimately granted.

¶ 7 In 2006 and 2007, Mill Creek sought and obtained permits from the IEPA to provide wastewater treatment to the Settlements of LaFox. However, the permits contained two conditions that were not satisfied: (1) that the Settlements be properly annexed into Kane County; and (2) that the sewers be constructed within two years. Prior to the expiration of the permits, Mill Creek completed numerous infrastructure improvements in preparation for serving the Settlements of LaFox, at a cost of over $500,000.[3]

¶ 8 In April 2009, Grand Prairie sought permits from the IEPA to install a wastewater treatment facility that would serve the Settlements of LaFox. Grand Prairie sought to provide essentially the

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[2] FPA's are a means of organizing development under the Illinois Water Quality Management Plan and the federal Clean Water Act. See, *e.g.*, 40 C.F.R. 35.917-2(a) (West 2010); 35 Ill. Admin. Code 399.20 (West 2010). The title of the FPA at issue is historical and is merely for identification purposes; Mill Creek does not have authority over the FPA just because the title is "Mill Creek Facility Planning Area."

[3] A staff report by CMAP states that Mill Creek spent $500,000. However, both a property owner of the Settlements and Mill Creek's attorney testified before CMAP that the *owners* expended $500,000, not Mill Creek.

same service to the Settlements that Mill Creek had earlier attempted to provide. The IEPA delegated Grand Prairie's permit request to CMAP for initial investigation and review. CMAP opened the proposal to a 45-day public comment period, in which Mill Creek participated.

¶ 9 Following the public comment period, CMAP compiled a staff report, which made a *non-binding* recommendation of "non-support" to its own voting body of four. The staff report noted Mill Creek's objection, Mill Creek's IEPA permits to serve the Settlements, and Mill Creek's $500,000 investment in the project. Despite the report's recommendation, CMAP's voting body of four deadlocked, and it was, therefore, unable to make a firm recommendation to the IEPA.

¶ 10 CMAP forwarded to the IEPA all of its supporting documentation on the matter, including papers submitted by Grand Prairie and Mill Creek in support of their respective positions. The IEPA did not hold further public hearing. On February 19, 2010, the IEPA issued the permits to Grand Prairie.

¶ 11 B. Mill Creek Seeks Review by the Illinois Pollution Control Board

¶ 12 On March 25, 2010, Mill Creek petitioned for review to the Board. Mill Creek argued that the IEPA was without authority to issue the permits to Grand Prairie because, among other reasons, the IEPA did not comply with section 39(c) of Act (415 ILCS 5/39(c) (West 2010)). Section 39(c), by way of reference to section 39.2, requires an applicant seeking a permit to construct or operate a "pollution control facility" to submit proof to the IEPA that the municipality's governing body (here, the Kane County Board) has approved the facility's proposed location following at least one public hearing. 415 ILCS 5/39(c), 39.2 (West 2010). In Mill Creek's view, the public comment period conducted by CMAP was not sufficient because it was not conducted by the Kane County Board concerning the siting of the facility.

¶ 13 Grand Prairie and the IEPA each moved for the Board to dismiss Mill Creek's petition. As is relevant to this appeal, they argued that: (1) Mill Creek, as a third-party, non-applicant, did not have standing before the Board to challenge the issuance of the permits (415 ILCS 5/40(a)(1) (West 2010)); and, on the merits, (2) section 39(c) of the Act did not apply because the facility at issue was a "sewage works facility," not a "pollution control facility," and, therefore, the IEPA did not need proof that the Kane County Board approved the site following a public hearing.

¶ 14 Mill Creek replied that it *did* have standing before the Board, pursuant to section 40.1(b) of the Act. 415 ILCS 5/40.1(b) (West 2010). Section 40.1(b) allows for third parties who participated in the public hearing to challenge before the Board the siting decision made by the municipality's governing body. *Id*.

¶ 15 The Board dismissed Mill Creek's petition. The Board agreed with defendants that Mill Creek, as a third-party, non-applicant, did not have standing to challenge the issuance of the permit. The Board rejected Mill Creek's argument that it had standing under section 40.1(b), because section 40.1(b) pertained to *siting decisions* made by *the municipality's governing body*, not the *permitting decisions* made by *the IEPA*. The Board did not address the merits of Mill Creek's argument. The Board concluded: "Section 41(a) of the [Act] provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a)(2010); see also 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. ***."

¶ 16 C. Trial Court's Ruling

¶ 17 Despite the Board's instructions to appeal directly to the appellate court, Mill Creek filed a complaint for writ of *certiorari* with the *trial court*. Mill Creek again argued that the permits should be set aside because, pursuant to section 39(c), the IEPA was without authority to issue the

permits to Grand Prairie because it did not secure proof of the governing body's siting approval following a public hearing. Grand Prairie and the IEPA moved to dismiss the complaint, arguing that the trial court lacked jurisdiction because Mill Creek was required to file its petition for administrative review in the appellate court, not the trial court. 415 ILCS 5/41(a) (West 2010). The trial court agreed and dismissed the complaint. 735 ILCS 5/2-619 (West 2010). This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Mill Creek appeals the trial court's section 2-619 dismissal of its complaint for writ of *certiorari*. 735 ILCS 5/2-619 (West 2010). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises affirmative matters that act to defeat the claim. *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 274 (2007). One of the enumerated grounds for dismissal pursuant to section 2-619 is that the court lacks jurisdiction over the complaint, as the trial court found here. 735 ILCS 5/2-619(a)(1) (West 2010). We review section 2-619 dismissals *de novo*. *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006 (2010). For the reasons that follow, we affirm the trial court's dismissal.

¶ 20 Here, the Board found that Mill Creek had no standing before it (the Board) to challenge the IEPA's issuance of the Grand Prairie permits because, as a third party, non-applicant, the Act did not provide remedy. The Act limits such challenges to the permit applicant: "If the [IEPA] refuses to grant or grants with conditions a permit under Section 39 of this Act, the *applicant* may, within 35 days after the date on which the [IEPA] served its decision on the applicant, petition for a hearing before the Board to contest the decision." 415 ILCS 5/40(a)(1) (emphasis added). In contrast, the Act separately identifies other circumstances (not applicable here) in which a third party may appeal

IEPA permitting decisions to the Board. See, *e.g.*, 415 ILCS 5/40(b) (West 2010) (if the [IEPA] grants a permit for a hazardous waste disposal site, a third party, other than the permit applicant or [the IEPA], may within 35 days after the date on which the [IEPA] issued its decision, petition the Board for a hearing to contest the issuance of the permit); 415 ILCS 5/40(e)(1) (West 2010) (incorporating aspects of section 40 (b)); and 415 ILCS 5/40.1(b) (West 2010) (a third party may appeal siting decisions made by a municipality's governing body).

¶ 21 Illinois law authorizes administrative bodies, such as the Board, to make threshold determinations regarding standing and jurisdiction. See, *e.g.*, *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 673-74 (2010) (standing); *Dozoretz v. Frost*, 203 Ill. App. 3d 231, 236 (1990) (jurisdiction). Though both standing and jurisdiction are threshold issues relating to the ability of an adjudicative body to consider disputed matters, the questions of standing and jurisdiction are distinct and separate. See, *e.g.*, *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010). Therefore, it is possible that a party's lack of standing may result in the adjudicative body not having "jurisdiction" to consider the other matters raised in an action. *In re Guardianship of K.R.J.*, 405 Ill. App. 3d 527, 535 (2010).[4] However, even where the Board has no authority to entertain a petition for review of an agency's decision, such as when the petitioning party has no standing, the Board still has jurisdiction to enter a final order dismissing the action. *Citizens Against the Randolph Landfill v. Pollution Control Board*, 178 Ill. App. 3d 686, 693 (1988).

¶ 22 To appeal a Board's determination of no standing, section 41(a) of the Act applies. Section

[4] This does *not* mean, as Mill Creek suggests, that the adjudicatory body did not have jurisdiction to consider the limitations of the issued permit if raised by the party with standing (*i.e.*, the applicant).

41(a) of the Act mandates the use of the Administrative Review Law and states in pertinent part:

> "Any [party] adversely *affected by a final order or determination of the Board*, *** *may obtain judicial review*, by filing a petition within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the party affected by the order or other final Board action complained of, under the provisions of *Administrative Review Law*, ***, except that review shall be afforded directly *in the Appellate Court* for the District in which the cause of action arose and *not in the Circuit Court*." (Emphases added.) 415 ILCS 5/41(a) (West 2010).

¶ 23 The Administrative Review Law eliminates *certiorari* and other common law actions as a means of reviewing agency decisions. See *Outcom, Inc. v. Illinois Department of Transportation*, 233 Ill. 2d 324, 333 (2009). In some instances, however, the enabling statute does not adopt the Administrative Review Law and provides no method for reviewing the agency's decisions. *Id*. In such instances, the writ of *certiorari* survives as an available method for review. *Id*. However, the writ of *certiorari* may *not* be used where there is a statutory bar to review of the agency's decisions in general. *Id*.

¶ 24 In other words, the trial courts do not possess greater authority to review the merits of an agency's decision than when statutory proceedings under the Administrative Review apply. The writ of *certiorari* before the trial court merely allows for review of agency decisions where the enabling legislation (here, the Illinois Environmental Protection Act), does not adopt the Administrative Review Law and provides no method for reviewing the agency's decisions. Here, the Act does adopt the Administrative Review Law (in section 41(a)), and it provides a method for reviewing the agency's issuance of a permit (in section 40(a)(1)); according to the Board, the Act simply excludes

third party, non-applicants from petitioning for review. Moreover, because Mill Creek was required to appeal the Board's finding of no standing directly to the appellate court (and not the trial court), within 35 days, the trial court was without jurisdiction to consider the complaint. We therefore affirm the trial court's section 2-619 dismissal.

¶ 25 We reject Mill Creek's argument that, because the IEPA allegedly acted outside its statutory authority when it issued the permits for a "pollution control facility" without a siting hearing, Mill Creek was not required "to exhaust administrative remedies" (*i.e.*, to appeal the IEPA's decision to the Board) and could seek immediate redress in the trial court. *Millennium Park Joint Venture LLC v. James M. Houlihan*, 241 Ill. 2d at 281, 298 (2010) (when an administrative agency exceeds its statutory authority, an injured party may seek redress in the trial court); *County of Knox v. Highlands, LLC*, 188 Ill. 2d at 546, 552 (1999) (same). First, we note that Mill Creek *did* seek review by the Board, and it did not properly appeal the Board's finding of no standing. As stated above, this is dispositive. Even if Mill Creek never appealed to the Board (and, therefore, was not bound by the Board's finding that it did not have standing to challenge the IEPA's authority), Mill Creek would not be able to seek judicial review of the IEPA's permitting decision directly with the trial court. Generally, as discussed above, the Act only authorizes judicial review of *Board* permitting decisions, not *IEPA* permitting decisions. 415 ILCS 5/41(a) (West 2010); see also *City of Elgin v. County of Cook*, 169 Ill.2d 53, 61 (1996). Moreover, this court, in *City of Waukegan v. IEPA*, 339 Ill. App. 3d 963 (2003), rejected the argument that the IEPA acts outside its statutory authority when it issues a permit without proof of local siting approval. *Id*. at 974 (finding no "authority for the proposition that proof of local siting approval is a jurisdictional prerequisite for the issuance of a permit").

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, we affirm the trial court's dismissal.

¶ 28 Affirmed.

¶ 29 JUSTICE McLAREN, specially concurring:

¶ 30 I specially concur because I believe the majority addresses matters that are not justiciable. My analysis concerns itself with the appropriate manner to seek appellate review from any decision rendered by the Board. It does not concern itself with the merits of any argument raised before the trial court other than the proper avenue for judicial review of the Board's decisions.

¶ 31 I submit that Mill Creek failed to timely file an appeal in this court seeking administrative review, the only avenue of review open to it. Therefore, the filing of the petition for a writ of *certiorari* was an improper collateral attack contesting whatever findings of fact and determinations of law that were contained in the judgment of the Board. Although I agree that it is axiomatic that any body must determine standing when the issue is properly raised, that is immaterial to the analysis.

¶ 32 Whatever issues raised, whatever relief sought in the trial court was unavailing. Whether or not Mill Creek has or does not have standing in a different forum is not the issue we should be discussing, let alone, implicitly deciding. The failure of Mill Creek to appeal to this court is the *sine qua non*.

¶ 33 Once it was determined that the appropriate mode or manner to obtain judicial review of the decision of the Board was in this court, the trial court had no reason to inquire or elaborate further. The same analysis and result should be utilized herein. Since the majority holding and the majority analysis is unduly elaborate and *obiter dicta*, I specially concur to disassociate myself from the

interesting but nonessential aspects of the majority disposition.