

**Objections to the Denial of Issuance of Solid Facility Permit,
Greenview Recycling & Disposal Facility (Greenview Landfill), Fountain County, Indiana.
2000 OEA 64 (95-S-J-1274)**

TOPICS:

summary judgment
real party in interest
indispensable party
landfill
solid waste
contract
permit
property right
option agreement
police powers
public policy
protection of environment
transfer
dismissal

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: Sue Shadley
Indispensable Third Party: George Pendencygraft, Donn Wray, Phillip Thompson
IDEM: Robert Keene

ORDER ISSUED:

November 17, 2000

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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On June 2, 1995, this office received a Petition For Review from Triple G (the person to whom notice was given that the permit was denied). Triple G was represented by Sue Shadley. Kathleen Mills appeared as counsel for the IDEM on July 3, 1995. On July 12, 1996, NJK Farms, Inc. (“NJK”), filed a Motion For Substitution Of Real Party In Interest.³ George Pendygraft appeared as counsel for NJK on a document filemarked July 16, 1996. On July 17, 1996, Triple G filed a Motion For Leave To Respond. Elizabeth Ziatos appeared for the IDEM on July 19, 1996. The Office of Environmental Adjudication (“OEA”), July, 23, 1996, entered an Order granting Triple G’s Motion for Leave to Respond.⁴ On October 7, 1996, NJK moved for Substitution of Real Party in Interest. On October 28, 1996, NJK requested that it be joined as an indispensable party.

The OEA on October 30, 1996, entered an Order joining NJK as an Indispensable Party with NJK captioned as successor in interest to Triple G.⁵ Donn Wray appeared as co-counsel for NJK on October 17, 1997. Margaret Felton appeared for the IDEM on August 3, 1998. Robert Keene appeared for the IDEM on August 27, 1999. On November 5, 1999, NJK filed a Motion for Summary Judgment.⁶ On March 27, 2000, the IDEM submitted an Answer Brief in opposition to the Motion for Summary Judgment. Orders from OEA continued to be directed to Triple G through its counsel. On May 19, 2000, NJK filed a Reply to the IDEM’s Reply Brief.

³ George Pendygraft signed the Motion on behalf of ‘George Pendygraft, P.C.’ According to NJK Farms, Inc.’s biennial filing with the Indiana Secretary of State, as of May 14, 1997, the mailing address for George W. Pendygraft, P.C. was 9100 Keystone Cr., Suite 800, Indianapolis, IN.

⁴ Despite Triple G’s statement of their intent to respond to the NJK Motion for Substitution of Real Party in Interest by August 15, 1996 (see Triple G’s Motion For Leave To Respond, July 17, 1996) and several Requests for Extension of Time to Respond (see Joint Status Report, August 5, 1996, requesting a ninety (90) day delay; and Motion For Extension Of Time To File Response To NJK Farms Inc.’s Motion For Substitution Of Real Party In Interest, August 15, 1996, requesting a thirty-one (31) day delay) and this court granting the extension of time to September 16, 1996 for Triple G to Respond (see Order Granting Joint Motion For Extension Of Time, August 22, 1996). No Response from Triple G was received.

Additionally, since August 22, 1996, Triple G has not responded to numerous Orders of this court requesting Status Reports (i.e., September 17, 1997; November 24, 1997; and May 14, 1998 (corrected May 26, 1998)).

⁵ NJK has repeatedly stated that in this case it is “the real party in interest” (e.g., Appearance, George W. Pendygraft, July 16, 1996; Footnote 7, Brief In Support Of Motion For Summary Judgment, November 5, 1999). Such a characterization is incorrect as OEA did not designate NJK “the real party in interest” in its Order.

⁶ In its Brief In Support Of Motion For Summary Judgment (November 5, 1999), NJK wrote in Footnote 7. “Petitioner recognizes that good character and financial assurance information may need to be updated in light of the reversion of Triple Gs interests to NJK Farms. . . . NJK Farms anticipates submitting good character and financial assurance information in conformity with IC 13-19-4-2, et seq., and IC 13-22-9-1, et seq., within a reasonable time after this Court determines that the Greenview Landfill permit application was improperly denied.”

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II. Issues for Summary Judgment as Represented by N.JK

- (1) Did IDEM err by denying the Greenview Landfill permit application under color of the unpromulgated “20-year rule”?
- (2) Did IDEM err by denying the Greenview Landfill permit when IDEM applied unascertainable standards concerning local and regional need?
- (3) Has IDEM unreasonably delayed and unlawfully withheld approval of the Greenview Landfill permit application?

III. Undisputed Facts

The Chief Administrative Law Judge finds the following facts undisputed:

- A. NJK and Triple G were in privity of contract (“option agreement”) regarding an option held by Triple G to purchase real estate located in Fountain County, Indiana, owned by NJK. The real estate was the proposed landfill site of Greenview Landfill.
- B. The option agreement, in part, provided:

If at any time any such monthly payment is past due sixty (60) days or more, at Owner’s [NJK’s] sole election the Option can be deemed null and void and of no legal effect. . . . [U]nder such circumstances, where Option Holder has not performed as required . . . Option Holder hereby agrees as settlement in full of any claims . . . that Owner might have against Option Holder to convey free and clear all of Option Holder’s right and interest that it has now in the application for a solid waste landfill permit now pending before the Indiana Department of Environmental Management (including all maps, studies, and any information related to such application or landfill).

- C. When Triple G failed to make certain required option payments, NJK notified Triple G of its failure and claimed ownership of the real estate and the permit application.

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IV. Findings of Fact and Discussion

A. NJK is an “indispensable party”.

NJK has described a contractual arrangement between Triple G (the option holder) and NJK (the owner of real estate in Fountain County, Indiana). Entered into by the parties on July 3, 1989, it was first amended July 3, 1991.⁷ On March 14, 1996, NJK informed Triple G of its failure to make required option payments. Pursuant to terms of the Second Amendment to their Option Agreement (dated July 2, 1993; later extended on August 26, 1994), NJK declared the Option null and void and of no legal effect.

On July 12, 1996, NJK filed a Motion for Substitution of Real Party in Interest. In its Motion, NJK asserted:

Triple G’s interest in the proposed site of the Greenview Landfill accordingly no longer exists. Triple G’s option interests have accordingly reverted to NJK Farms, Inc.’s, [sic] the owner of the real estate and now the owner of the permit application.

The IDEM responded that “NJK did not file a petition for review of IDEM’s denial of Triple G’s application for a solid waste facility permit within the jurisdictional time limits set forth in IC 4-21.5-3-7(a).”⁸ The IDEM further stated:

IDEM has had no opportunity under the present permit application to determine the good character of NJK pursuant to IC 13-7-10.2-3 (recodified as IC 13-19-4-2, IC 13-19-4-3, and IC 13-19-4-5) or to request a financial net worth showing from NJK pursuant to IC 13-7-22-2 (recodified as IC 13-20-2-1 et.seg. [sic]) because NJK did not sign the permit application.

NJK, in part, responded:⁹

By claiming that Triple G’s permit application has not reverted to NJK, IDEM tortiously [sic] interferes with the contract rights of NJK in its contract with Triple G and tortiously [sic] attempts to take NJK’s property rights. When Triple G failed to maintain its option, Triple G’s rights, including the permit application, reverted to NJK.

⁷ Copies of the original option agreement and the first amendment to the option agreement were not offered to the court as designated materials with the Motion for Summary Judgment, and were not previously supplied to the court. (On July 12, 1996, NJK provided copies of the March 14, 1996, Lapse of Option Agreement letter, and the August 26, 1994 extension of the option agreement. On October 7, 1996, NJK provided a copy of the July 2, 1993, Second Amendment To Option Agreement document.)

⁸ IDEM’s Response in Opposition to Motion for Substitution of Real Party in Interest. August 16, 1996.

⁹ Motion of NJK Farms, Inc. to (1) Grant Its Uncontested [sic] Motion for Substitution of Real Party in Interest, and (2) Strike IDEM’s “Response and Opposition to Motion for Substitution of Real Party in Interest”, October 7, 1996.

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On October 20, 1996, the OEA Ordered that NJK be joined as an indispensable party. The court noted that NJK's Motion had not been opposed by Triple G.

B. Does NJK have a legally protected right to the permit application?

The NJK/Triple G option agreement, in part, provided:¹⁰

If at any time any such monthly payment is past due sixty (60) days or more, at Owner's [NJK's] sole election the Option can be deemed null and void and of no legal effect. . . . [U]nder such circumstances, where Option Holder has not performed as required . . . Option Holder hereby agrees as settlement in full of any claims . . . that Owner might have against Option Holder to convey free and clear all of Option Holder's right and interest that it has now in the application for a solid waste landfill permit now pending before the Indiana Department of Environmental Management (including all maps, studies, and any information related to such application or landfill).

Indiana courts have long established a powerful basis regarding a citizen's right to enforce a contract. The Indiana Court of Appeals renewed this principle in 1999 when they wrote:¹¹

Our supreme court has recently confirmed its commitment to advancing the public policy in favor of enforcing contracts. Indiana courts recognize that it is in the best interest of the public not to unnecessarily restrict person's freedom to contract. Thus, as a general rule, the law allows competent adults the utmost liberty in entering into contracts which, when entered into freely and voluntarily, will be enforced by the courts. Nevertheless, despite the very strong presumption of enforceability, courts have refused to enforce private agreements that contravene statute, clearly tend to injure the public in some way, or are otherwise contrary to the declared public policy of Indiana. [References omitted.]

Therefore, unless the NJK/Triple G option agreement contravenes statute, clearly tends to injure the public in some way, or would otherwise be contrary to the declared public policy of Indiana, an appropriate court should strive to enforce the contract.

¹⁰ *Id.*, Exhibit A.

¹¹ Peoples Bank & Trust Co. v. Price, 714 N.E.2d 712, 716 (Ind.App. 1999).

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C. Does NJK have a property right in the permit application?

The Indiana Supreme Court, in writing that there was no contractual right in a wholesale liquor dealer's permit, stated "[t]he permit then is strictly a creature of statute, and the rights of the permittee are such, and such only, as the statute gives."¹² More recently, another Indiana court wrote regarding an alcoholic beverage permit, "[p]roperty interests are created and defined by state law."¹³ According to 329 IAC 2-8-7(a)(1),¹⁴ regarding the effect of permit issuance by the Solid Waste Management Board, "[t]he issuance of a permit does not[] convey any property rights of any sort, or any exclusive privileges".

We can legally infer that since there is no property right in a landfill permit, that there is no property right in a landfill permit application.¹⁵ That is not to say there might not be some other "private interest"¹⁶ that NJK may recover from Triple G in a court of competent jurisdiction. This court, however, need not address any such cognizable interest for purpose of disposing of this proceeding.

The Indiana Supreme Court, in 1889, wrote:¹⁷

A license issued under the law regulating the sale of intoxicating liquors has neither the qualities of a contract nor of property, but merely forms a part of the internal police system of the state. No one can acquire a vested right in a mere statutory privilege so as to bind the state, or to prevent a change of policy as the varying interests of society may require. [References omitted.]

This very principle, in these exact words, was reiterated by the Court fifty-six years later.¹⁸

¹² State ex rel. Indiana Alcoholic Beverage Commission v. Superior Court of Marion County, 122 N.E.2d 9, 10 (Ind. 1954).

¹³ Eagles Nest. Inc., Matter of., 57 B.R. 337, 339 (Bkrtcy.N.D.Ind. 1986).

¹⁴ Indiana Administrative Code. 1992 ed.

¹⁵ I.e., modus tolens (if $P \rightarrow Q$, and Q is false, then infer $\sim P$).

¹⁶ According to the NJK/Triple G option agreement, NJK claims rights to "Option Holder's right and interest that it has now in the application for a solid waste landfill permit now pending before the Indiana Department of Environmental Management (including all maps, studies, and any information related to such application or landfill)", from Motion Of NJK Farms, Inc. to (1) Grant Its Uncontested [sic] Motion for Substitution of Real Party in Interest and (2) Strike IDEM's "Response and Opposition to Motion for Substitution of Real Party in Interest", Exhibit A, October 7, 1996. The work product of the permit application, the maps, studies and information collected for the application would be possible examples of NJK's private interest.

¹⁷ Moore v. City of Indianapolis, 22 N.E. 424, 427 (Ind. 1889).

¹⁸ State ex rel. Zeller v. Montgomery Circuit Court, 62 N.E.2d 149, 151 (Ind. 1945).

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The State can only recognize a property right in an alcoholic beverage license or permit through legal enactment in exercise of its police powers (the State's overriding interest to preserve public health, safety, and general welfare). Likewise, the State's basis in granting a landfill permit flows from its police powers.

Without another legal basis to mitigate or circumvent the police powers of the State, the lack of a property interest in a landfill permit will prevent this court from conceding a property interest in a landfill permit application. Such a conclusion is consistent with the Price decision in that a contract agreement that stood in opposition to interests promulgated under the police powers of Indiana would clearly tend to injure the public.¹⁹

D. What if Indiana's environmental laws are not a clear manifestation of public policy?

The Indiana Supreme Court has recently clarified three distinct situations where courts have refused to enforce private agreements on public policy grounds:^{20 21}

¹⁹ It may be asked whether NJKs freedom to contract preserves its ability to transfer an otherwise incognizable interest in a landfill permit application. It is inherent in the subject matter of the NJK/Triple G contract, that we are dealing with a highly regulated arena where there exists the potential for great harm to the public; where the legislature has responded to a societal necessity for expansive regulation. As mentioned herein, the "Indiana courts recognize that it is in the best interest of the public not to unnecessarily restrict person's freedom to contract. Thus, as a general rule, the law allows competent adults the utmost liberty in entering into contracts which, when entered into freely and voluntarily, will be enforced by the courts." Peoples Bank & Trust Co. v. Price, 714 N.E.2d 712, 716 (Ind.App. 1999). The Indiana Supreme Court has written, "[n]otwithstanding the general rule of construction favoring the interpretation of statutes as constitutional, we cannot ignore the clear mandate of our state constitution limiting the power of legislation to impair the obligation of contracts. If the police power exception is construed too broadly, it would operate to eviscerate the constitutional protection [of the Indiana contract clause]. Virtually every legislative enactment could arguably be related to order, safety, health or welfare as a justification for legislative interference with pre-existing contractual rights and duties." Clem v. Christole, Inc., 582 N.E.2d 780, 783 (Ind. 1991).

The Clem court, in citing Dept of Financial Institutions v. Holt, 108 N.E.2d 629, 634 (Ind. 1954), identified the following elements to determine whether legislation violated constitutional restraints: (1) The law must not be arbitrary, unreasonable or patently beyond the necessities of the case. (2) The legislature may not under the guise of protecting public interests arbitrarily interfere with private business or impose unnecessary restrictions upon lawful occupations. (3) If the law prohibits that which is harmless in itself, or if it is unreasonable and purely arbitrary, or requires that to be done which does not tend to promote the health, comfort, morality, safety or welfare of society, it is an unauthorized exercise of power.

The Clem court provided further guidance by writing, "[o]nly those statutes which are necessary for the general public and reasonable under the circumstances will withstand the contract clause. It is only this latter necessary police power, rather than the general police power, which provides the exception to the contract clause." Clem at 784. It is beyond the jurisdiction of this court to determine whether the statutes which establish the environmental management laws concerning solid waste landfills are constitutional. The presumption of constitutionality leads this court to find that such rules were based on the State's necessary police powers and that there is no conflict between this case and Indiana's contract clause.

²⁰ Continental Basketball Ass'n, Inc. v. Ellenstein Enterprises, Inc., 669 N.E.2d 134, 139 (Ind. 1996).

²¹ These three situations were cited by Price (Ind.App. 1999) as quoted herein.

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(i) agreements that contravene statute; (ii) agreements that clearly tend to injure the public in some way; and (iii) agreements that are otherwise contrary to the declared public policy of Indiana.

In this situation, for the first of the Continental Basketball situations, the various applicable statutes are silent on the issue of the transferability of a pending permit application.²²

However, for the second of the Continental Basketball situations, the presence of statutes that protect the public from improper operation of solid waste disposal facilities (*see generally*, IC 13-19 through IC 13-26)²³ provide ample evidence of the legislatively recognized injury to the public from the transfer of a permit application to a party that had not satisfied these requirements. The NJK/Triple G contract agreement stands in opposition to interests promulgated under the police powers of Indiana and would, therefore, clearly tend to injure the public.²⁴ The second of the Continental Basketball situations appears to be met in this circumstance.

Further, regarding the third of the Continental Basketball situations, the Indiana Supreme Court has established, in the absence of declared public policy, that:²⁵

Where public policy is not explicit, we look to the overall implications of constitutional and statutory enactments, practices of officials and judicial decisions to disclose the public policy of this State. Where there is not a clear manifestation of public policy we will find an agreement void only if it has a tendency to injure the public, is against the public good or is inconsistent with sound policy and good morals.

One well-established public policy of this State is protecting the welfare of children. Expressed by all three branches of Indiana government, this policy is of the utmost importance. [Emphasis added. References omitted.]

²² Here, the permit application has been denied and the denial is the subject of the Petition for Review filed by Triple G on or about November 7, 1991.

²³ E.g., specific statutes require (1) the demonstration of need for solid waste management facilities (IC 13-7-10-1.5; recodified as IC 13-20-1-2); (2) the demonstration that parties building and operating landfills are financially sound (IC 13-7-22-2(c); recodified as IC 13-20-2-1) and. (3) impose good character requirements for solid waste management permits (IC 13-7-10.2-3; recodified as IC 13-19-4-2, IC 13-19-4-3, and IC 13-19-4-5).

NJK acknowledged the need to provide good character and financial assurance information when it wrote, "NJK Farms anticipates submitting good character and financial assurance information in conformity with IC 13-19-4-2, *et seq.*, and IC 13-22-9-1, *et seq.*, within a reasonable time after this Court determines that the Greenview Landfill permit application was improperly denied. (*See* footnote 7, NJK's Brief in Support of Motion for Summary Judgment, November 5, 1999).

²⁴ Failure to meet the legislatively established requirements for obtaining a solid waste management permit would subject the public to unreasonable risks.

²⁵ Straub v. B.M.T. by Todd, 645 N.E.2d 597, 599 (Ind. 1994) (holding that a preconception agreement purporting to absolve the father of liability was void and unenforceable as against public policy).

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Analogous to the Straub case, another well-established public policy of this State is protecting the environment. As in Straub, all three branches of Indiana government have expressed the importance of protecting Indiana's environment. The General Assembly, through the Indiana Code provides, among other things, that a person who intentionally, knowingly, or recklessly violates environmental management laws commits a Class D felony (IC 13-30-6-1 (a)(1)). The Indiana Court of Appeals, in discussing the intent of the General Assembly in adopting IC 13-7-22-2(c), wrote:²⁶

The obvious purpose of the statute is to protect the citizens of Indiana by ensuring that landfill operators have certain financial stability to be able to maintain and operate a landfill responsibly.

Lastly, the Indiana Department of Environmental Management provides and coordinates a wide range of air, water and solid waste management and enforcement services for the citizens of Indiana (see IC 13 *et seq.*). The third of the Continental Basketball situations also appears to be met in this circumstance.

Thus, it appears clear in this situation that this court should refuse to enforce the terms of the NJK/Triple G contract as it pertains to the transfer of the permit application for the Greenview Landfill on public policy grounds as established by the Continental Basketball court.

E. What of Triple G?

Triple G stated their intent to respond to the NJK Motion for Substitution of Real Party in Interest by August 15, 1996.²⁷ This court granted Triple G's requested Extension of Time to Respond to September 16, 1996. No Response from Triple G was received.

Additionally, since September 16, 1996, Triple G has not responded to numerous Orders of this court requesting Status Reports (i.e., September 17, 1997; November 24, 1997; and May 14, 1998 (corrected May 26, 1998)) in spite of being afforded the opportunity to be a participant in this cause. Triple G had failed to pursue its interest in this cause.

According to the Indiana Secretary of State's office, Triple G Landfills, Inc. was administratively dissolved as a recognized Indiana corporation on March 3, 1999.

F. Findings made above which constitute a Conclusion of Law material to this final determination are herein incorporated as such.

²⁶ Prosser v. J.M. Corp., 629 N.E.2d 904, 909 (Ind.App. 4 Dist. 1994).

²⁷ Triple G's Motion for Leave to Respond, July 17, 1996.

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V. Conclusions of Law

The Chief Administrative Law Judge (“CALJ”) concludes as a matter of law, based on the foregoing Undisputed Facts, Findings of Fact and Discussion, that (1) the Office of Environmental Adjudication has jurisdiction over the subject matter and parties to this proceeding.

Further, the CALJ concludes as a matter of law (2) that NJK: (a) may have a recoverable private interest in work product materials produced by Triple G during the permit application process; (b) may not enforce, as opposing interests promulgated under the police powers of Indiana, the terms of the NJK/Triple G contract as it pertains to the transfer of the permit application for the Greenview Landfill; (c) in the alternative, may not enforce, as a matter of public policy, the terms of the NJK/Triple G contract as it pertains to the transfer of the permit application for the Greenview Landfill; and (d) is not a real party in interest or successor in interest with a justiciable right that falls within the subject matter jurisdiction of this court.

Furthermore, the CALJ concludes as a matter of law, (3) that Triple G: (a) has failed to pursue its interests in this cause; and (b) was administratively dissolved as a recognized Indiana corporation by the Indiana Secretary of State on March 3, 1999.

VI. Order

The Chief Administrative Law Judge hereby **DENIES** NJK’s Motion for Summary Judgment. **FURTHERMORE**, this court *sua sponte* **DISMISSES** Triple G’s Petition for Review and **DISMISSES** NJK’s claim as an Indispensable Party, Real Party in Interest, and Successor in Interest. Any other pending Motions are hereby **DENIED**. The parties are hereby notified that this order fully disposes of this matter. No further proceedings are necessary.

VII. Appeal Rights

You are hereby notified that pursuant to IC 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 IDEM. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review 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 in Indianapolis, Indiana this 17th day of November, 2000.

Wayne Penrod,
Chief Administrative Law Judge