TOPICS:

summary judgment

license

revocation

waiver

ratification

septic

reissue

renewal

inspection

vehicle

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: Lori Kyle Endris IDEM: Robert Keene

ORDER ISSUED:

December 13, 2000

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

STATE OF INDIANA)) SS:	_	RE THE INDIANA OFFICE OF RONMENTAL MANAGEMENT
COUNTY OF MARION)		
IN THE MATTER OF:)	
)	
PETITION FOR ADMINISTRATIVE REVIEW)	
AND REQUEST FOR STAY)	CAUSE NO. 99-W-J-2370
LARGURA INC /ACTION SEWER & SEPTIC		j	

FINDINGS OF FACT. CONCLUSIONS OF LAW AND FINAL ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

This constitutes notice that on October 30, 2000, Permittee/Petitioner, Largura, Inc., d/b/a Action Sewer & Septic ("Largura"), by counsel, filed a Motion for Summary Judgment, Memorandum in Support, Affidavit of Tino Largura, and Designation of Evidence. The Indiana Department of Environmental Counsel, by counsel, filed no response.

The Chief Administrative Law Judge considered the Motion and the attendant documents and hereby finds:

- 1. The Office of Environmental Adjudication has jurisdiction over decisions of the Indiana Department of Environmental management pursuant to Ind.Code §4-21.5-7.
- 2. The Administrative Order and Procedures Act, Ind.Code §4-21.5-3-23(b) provides that "[t)he judgment sought shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit and testimony, if any, show that a genuine issue of material fact does not exist and that the moving party is entitled to judgment as a matter of law."
- 3. The facts relevant to Petitioner's revocation of permit and license are as follows:

Largura has been in the sewer and septic business for 29 years. During calendar year 1999, Largura operated his one vehicle pursuant to Permit No. 304 and Vehicle License 45-201.

On July 20, 1999, Robert Lamprecht, a Solid Waste Compliance Section Inspector with the IDEM documented illegal dumping by one of Largura's employees into the Twin Lakes Utilities, Inc. sewer system. Until 1999, Largura operated his business without any regulatory violations. Thereafter, on August 6, 1999, the IDEM, by Dennis Lasiter, Land Use Section, Office of Solid and Hazardous Waste, issued a Revocation of Wastewater Management Permit No. 304 and Vehicle License 45-021 to Tino Largura, owner and proprietor of Largura. On August 20, 1999, Largura, by counsel, filed a timely petition for administrative review and request for stay.

Subsequently, on November 10, 1999, the same Robert Lamprecht conducted an inspection of Largura's original truck in order that Largauu could apply for its renewals. On or about February, 2000, Largura reapplied for its permit renewal. On March 23, 2000, the IDEM, by Jerome Rud, chief Solid Waste Permits Section, Office of Land Quality, reissued both Largura's Wastewater Management Vehicle License and its Permit.

On July 25, 2000, Largura applied for a permit and license for a second vehicle. On August 11, 2000, the IDEM granted Largura's Application.

- The purpose of summary judgment is to terminate litigation of issues for which there can 4. be no factual dispute and which can be determined as a matter of law. Ad Craft. Inc. v. Area Plan Comm'n of Evansville and Vanderburgh County, 716 N.E.2d 6, 16 (Ind.Ct.App. 1999). "[W]here material facts are not in dispute, the issue is the application of the law to the facts." Fidelity Financial Services v. Sims, 630 N.E.2d 572, 574 (Ind.App. 1994); Halbe v. Weinberg, 646 N.E.2d 995, 997 (Ind.App. 1995). Moreover, "a fact is 'material' for summary judgment purposes of it bears on the ultimate resolution of relevant issues." Fortmeyer v. Summit Bank, 565 N.E.2d 1118, 1120 (Ind.App. 1991). "When the pleadings present no material issues of fact, and the facts shown by the pleadings clearly entitle a party to judgment, a motion for judgment on the pleadings is appropriate." Mirka v. Fairfield of America, Inc., 627 N.E.2d 449,450 (Ind.App. 1994). Where the facts are not in dispute, summary judgment is inappropriate only when the fact finder may reasonably draw conflicting inferences from the undisputed facts. Kaghann's Korner. Inc. v. Brown & Sons Fuel Co., Inc., 706 N.E.2d 556, 565 (Ind.Ct.App. 1999), clarified on reh'g on other grounds, 711 N.E.2d 1286(1999).
- 5. The IDEM has waived the revocation of Largura's permit and license. Waiver has been defined by Indiana Courts as the "intentional relinquishment of a known right involving both knowledge of the existence of the right and intention to relinquish it." v. Methodist Hosp. of Indiana, Inc., 642 N.E.2d 531,533 (Ind.Ct.App. 1994) citing Indianapolis v. Twin Lakes Enterprises, 568 N.E2d 1073, 1077 (Ind.Ct.App. 1991), transferied. Waiver has been further characterized as the election to forego some advantage that might otherwise have been insisted upon. Salem Community School Corp. v.Richman, 406 N.E.2c1 269 (Ind.App. 1980). The existence of waiver is ordinarily determined from the conduct of the party making it. Id..
- 6. While the existence of facts necessary to constitute waiver is ordinarily a question of fact, the question of what facts are necessary to constitute waiver is a matter of law. Pohle v. Cheatham, 724 N.E.2d 655, 658 (Jnd.Ct.App. 2000) *citing* Jackson v. DeFabis, 553 N.E.2d 1212, 1217 (Ind.Ct.App. 1999). The Court in Pohle further stated,

When only the inferences and legal conclusions to be drawn from the facts are argued, the question of waiver is proper for the court to consider as a matter of law on summary judgment. (citation omitted). Finally, when the material designated by the parties is conclusive, summary judgment may be appropriate even if the dispositive issue turns on intent.

724 N.E.2d 655, 658, citing Manly v. Van Keppel, 714 N.E.2d 707, 709 (Ind.Ct.App. 1999).

- 7. The facts here are not in dispute and the intent of the IDEM to reissue Largura's permit and license is not in dispute.
- 8. Following its issuance of the revocation of Largura's permit and license, the IDEM, in turn, reissued an identical permit and license for the same vehicle. To reissue Largura's renewal, it was first necessary for the IDEM to inspect Largura's vehicle. That inspection was conducted by the same IDEM employee who found Largura had violated its 1999 permit and license, which was the basis for which the IDEM had revoked Largura's permit and license. As the inspection showed no problems, the IDEM thereafter reissued Largura's permit and license. In sum, because the same employee was involved in both the events leading to the revocation and the renewal inspection, there is no question of fact here that the IDEM knew of the revocation and that its actions in reissuing Largura's permit and license constitute waiver.
- 9. Moreover, there is no question of fact regarding the IDEM's intent to reissue the permit and license on Largura's vehicle. Lastly, the IDEM again inspected and renewed Largura's operation for the purposes of issuing a second permit and license for a subsequently purchased vehicle. The original license was amended to include this second vehicle thereby ratifying it a second time. Clearly, the IDEM elected to forego the revocation that it might otherwise have pursued. See Salem supra.

IT IS THEREFORE ORDERED that the Petitioner/Permittee's Motion is hereby GRANTED.

You are further notified that pursuant to the provisions of S.E.A. 156 (P.L. 4 1-1995 amending Ind.Code § 4-21.5-7), which became effective on July 1, 1995, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative reviews of decisions of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with the applicable provisions of Ind.Code § 4-2 1.5. Pursuant to Ind.Code § 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 of this notice is served.

Dated this 13th day of December, 2000.

Wayne Penrod Chief Administrative Law Judge