BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, And BYRON SANDBERG	)	
Petitioners	)	
v.	)	
	)	PCB Nos 04-33, 04-34, 04-35
THE CITY OF KANKAKEE, ILLINOIS, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C. LIVINGSTON COUNTY, ILLINOIS	)	
Respondents	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that on December 9, I caused to be filed, with the Board's Clerk's Office, via fax, with permission, one copy of the attached RESPONSE TO THE COUNTY'S MOTION TO DISQUALIFY. I also placed, on December 9, 2003, in United States mail, copies of the attached RESPONSE to all those on the effective service list, as set forth in the attached PROOF OF SERVICE. I also placed, in United States overnight mail, on December 9, 2003, an original and nine (9) copies of this document, addressed as follows:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601-3218

Claire A. Manning, Attorney

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Respondents	)	

RESPONSE TO COUNTY'S MOTION TO DISQUALIFY

Now comes CLAIRE A. MANNING, of counsel to Posegate & Denes, P.C., and in response to the County's Motion to Disqualify ("Motion"), filed with Board Hearing Officer Bradley Halloran on December 1, 2003, provides the following.

As a preliminary matter, the County's Motion is unnecessary, in that it was preceded by a "Request Concerning Appearance" ("Request") which I myself filed with the Board on November 20, 2003, to which the County had already responded. While my Request was not styled a "motion," it nonetheless "moved" for a Board determination regarding the applicability of Board procedural Rule 101.112(b) (35 Ill Adm. Code 101.112(b)) to my continued appearance in this matter as counsel to Town and Country Utilities, Inc. As a question concerning the application of that procedural rule to my appearance in this matter had been raised, and could only be resolved through the Board's own processes, I sought the Board's determination on this matter and, clear from my request, would accept the Board's interpretation of this rule to these circumstances. Accordingly, there is and was no need for the County's Motion to Disqualify.

Nonetheless, since such motion was filed, I offer the following in response to the County's Motion, as well as to its "Response and Objections to Attorney Manning's Request Concerning Appearance" (County's Response) filed with the Board on November 25, 2003. Since the County's filings are replete with misrepresentations concerning the events that gave rise to my Request, this Response will also attempt to offer clarification and context to that Request.

First and foremost, regardless of the attempts of County's counsel to portray it otherwise, the Board is well aware that I am not seeking to appear in a proceeding that was pending while I was at the Board. Recognizing that my participation in most cases that were filed and docketed during my tenure as Chairman would be "personal and substantial," I have already determined that I will not appear in any proceeding that was docketed and pending while I was at the Board.

Thus, the Board's recent decision in *People v. Skokie Valley Asphalt Co., Inc.*, PCB 96-98 (October 16, 2003), while raised by the county and argued to be dispositive of the issue of my participation in this matter, is really not even relevant to the applicability of Rule 101.112(b) to the instant circumstances. In that case the Board disqualified former Board Attorney Assistant Joel Sternstein, now an Assistant Attorney General, from participating in that proceeding, as a representative of the People, because the case was docketed and pending while Mr. Sternstein was at the Board. The Board determined that, as an Assistant to a Board member, Mr. Sternstein's participation in any pending proceeding would have been "personal and substantial" and accordingly would require the application of Rule 101.112(b), which requires consent of all parties prior to participation:

> "No former Board Member or Board employee may represent any other person in any Board proceeding in which he or she participated personally and substantially as a Board Member or Board employee, unless the Board and, as applicable, all parties or

proponents in the proceeding consent in writing after disclosure of the participation." 35 Ill. Adm. Code 101.112

By its very language this rule only applies to the representation of a party in any "Board proceeding" in which the former Member or attorney participated "personally and substantially" while he or she was at the Board. Yet, the County uses the Board's determination in *Skokie Valley* to call for a Board determination as to whether my participation in the earlier proceeding was personal and substantial and, if it was, bootstrap the application of Rule 101.112(b) to the instant proceeding as well.

However, the Board's focus on my Request ought not to be whether my participation in a prior and different proceeding was personal and substantial as the Board interpreted that phraseology in *Skokie Valley*. Indeed, such argument puts the "cart before the horse" because Rule 101.112(b) only presumes conflict (and accordingly requires consent of the parties) in those proceedings that were pending while I was at the Board. Thus, since the instant PCB 04-33, 04-34, 04-35 (consolidated) is an entirely different docketed proceeding than PCB 03-31, 03-33 and 03-35 (consolidated), Board Rule 101.112(b) neither requires consent for my appearance in this proceeding nor prohibits that appearance.

The argument urged by the County not only fails to focus on the language of the rule itself, it urges a reading of the rule that expands it well beyond its intended prohibition. A review of the letter from Kankakee County State's Attorney Ed Smith to me dated October 28, 2003 (see Request, Attachment C), makes that expansion clear. It was, indeed, Mr. Smith's letter, and his application of *Skokie Valley* to the instant proceeding, that motivated me to file the Request so that the Board might clearly address the application of Rule 101.112(b) to this particular proceeding.

County's counsel, in its obvious zeal to preclude me from representing Town & Country in this matter, ignores the language of the rule itself and, regrettably and seriously, misinterprets the arguments I made in my Request. I did not indicate that Rule 101.112(b) would unduly restrict me in the practice of law (County Response, Paragraph 19), nor did I attempt to "draw this Board's attention away from [her] conflict of interest in this case by insinuating that some other attorney who has entered an appearance in this proceeding also has a conflict of interest." (County Response, Paragraph 17). Rather, my comments in paragraph 18, set forth verbatim below, were simply made in response to the County's attempts to broaden the intended application of Rule 101.112(b)'s restrictions to proceedings that, while not the same as the one at issue, nonetheless have a degree of commonality of issues and parties:

> "Since there is, quite often a similarity of issues and identity of parties in the practice of law, and especially so in a specialized practice, the Board should exercise great care in its interpretation of Rule 101.112(b). Specifically, to interpret the rule so broadly that it applies, and consent is required, whenever there is a similarity of issues and identity of parties would unduly restrict me, and others, in the proper and appropriate practice of law. As the Board knows, the environmental law community has a myriad of lawyers within its ranks that were once members or employees of the Illinois Pollution Control Board. Indeed, there is another attorney in this very proceeding, engaged by the county, who was an attorney assistant at the Board during the late 80's and 90's who, during her tenure, provided considerable input into the landfill siting decisions that today serve as the precedent for other landfill siting issues, some of which are relevant to the legal issues in this very proceeding." (Request, Paragraph 18)

Those comments were no more intended to impugn the integrity of an excellent former Board attorney, regardless of her actual status in this proceeding, than they were intended to impugn my own. The point is simply that rules are written so that those who practice before the Board know what their obligations and responsibilities are. Rule 101.112(b), on its face, requires that if a party desires to engage me to represent them in a proceeding that was pending while I was at the Board, I can only do so with the consent of all parties. For my own personal

reasons, I have determined never to represent any party in any proceeding that was pending while I was at the Board. Thus, issues concerning the nature of my participation in a proceeding that had been pending while I was Chairman should never be the focus of inquiry and "consent" to my participation generally should not be required.

The County asks the Board in this proceeding, however, to obscure that bright line. In a not so slight of hand County's counsel: ignores the language of the Board's rule; makes no argument concerning why these separate "proceedings" should be considered the same for purposes of Rule 101.112(b); obfuscates the fact that it was *I* who sought the Board's clarification of the application of Rule 101.112(b) to my appearance in this proceeding; and, generally, misconstrues the nature and intention of my Request. The Board should not be hoodwinked by such chicanery.

To get to the meat of this issue, there are several reasons why the Board, for purposes of Rule 101.112(b), should declare that this rule does not apply to my participation in the instant proceeding and that this proceeding, for purposes of Rule 101.112(b) is simply not the same proceeding as the earlier City of Kankakee landfill siting appeal. Those reasons are as follows:

(1) The rule uses the word "proceeding;" it does not use any other word or concept; a basic and general rule of statutory and regulatory construction is that words ought to be given their generally understood meaning;

(2) The generally understood meaning of "proceeding" in Board practice, and in the Board's definition contained in its procedural rules, is that a proceeding is an "action" (see 35 Ill. Adm. Code 101.202), docketed and numbered at the time of filing. While dockets may get consolidated, and then would constitute the same "proceeding," such is not the case here.

(3) The instant three cases, filed in September of 2003, and docketed into a single proceeding (PCB 04-33, 04-34, 04-35), constitute three separate appeals of a siting determination made by the City of Kankakee in August of 2003, pursuant to an application filed by Town and County in March of 2003, and a hearing held before the City on that application in June of 2003. All those actions occurred after I left the Board (December 31, 2002).

(4) The prior three cases, filed with the Board on September 20, 2002 and docketed into a single proceeding (PCB 03-31, 03-33, 03-35) constituted an appeal of an earlier siting determination made by the City of Kankakee, pursuant to a different application and, obviously, with an entirely different set of hearings.

(5) That proceeding was filed in my waning days as Chairman and I had the following role: (a) I authored and moved the Board's administrative "Set for Hearing Order"; (b) I authored and moved a Board order denying the County's Motion for Summary Judgment; (c) I assigned the matter to the authoring Board member.

(6) The summary judgment motion and order, referenced above, solely concerned the County's argument that the City's hearing, held in June of 2002, was fundamentally unfair. Certainly a rarity in a landfill siting appeal, the County's summary judgment motion, filed with the Board on October 23, 2003, itself stated that it was brought "on the sole issue of the failure to provide a public hearing, as such is a *per se* violation of fundamental fairness, and dispositive of the entire case." (October 23 Motion at p. 2) The order denied the motion, so that all substantive matters would be decided in the Board's final Opinion and Order concerning this appeal.

(7) The entirety of the substantive issues before the Board in PCB 03-31, 03-33, and 03-35 were decided by the Board in its Opinion and Order which was rendered after I left the

Board and in which I did not participate. Further, I did not participate in any of the deliberations or Board or staff discussions that led to the Board's decision on the issues in that proceeding.

Clearly, the County desires that the Board expand the scope of Rule 101.112(b), so that the issue of consent will preclude me from appearing in this matter. While I certainly appreciate that the rule was promulgated to serve as a watchdog for conflict, the rule should be interpreted as written. As I stated in my Request, when Town and Country approached me in October of 2003, I reviewed this rule, as well as the Rules of Professional Conduct for Attorneys. I was also, of course, aware of the degree of my participation, and non-participation, in PCB 03-31, 03-33 and 03-35. Obviously, I did not consider that my participation in that proceeding created a conflict in terms of my representation of Town and County in this proceeding. For the Board to broaden the scope of its rules, by analyzing the degree of my participation in an earlier, tangentially related proceeding, is to add unwritten requirements to Rule 101.112(b) – requirements that were not there when I agreed to serve as counsel to Town and County.

I appreciate the Board's attention in this matter and will, of course, abide by the consequences of its interpretation of Rule 101.112(b).

Respectfully submitted,

Claire A. Manning

Claire A. Manning, Attorney

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AFFIDAVIT OF CLAIRE A. MANNING

Now comes affiant, CLAIRE A. MANNING, of Posegate & Denes, P.C. and states that all of the facts set forth in the preceding document, entitled RESPONSE TO COUNTY'S MOTION TO DISQUALIFY are, to the best of my knowledge, true and accurate.

Furthereth, Affiant sayeth not.

Respectfully submitted,

Claire A. Manning, Attorney

State of Illinois)
) ss
County of Sangamon)

Subscribed and sworn to before me this 9th day of December, 2003.

OFFICIAL SEAL
DEBORAH D. COOPER
NOTARY PUBLIC, STATE OF ILLINOIS
COMMISSION EXPIRES 11-2-2006

Notary Public

PROOF OF SERVICE

The undersigned hereby under penalty of perjury under the laws of the United States of America, certifies that on December 9, 2003 she served a copy of the foregoing upon:

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by depositing a copy thereof enclosed in an envelope in the U.S. Mail at Springfield, Illinois, proper postage prepaid, before the hour of 5:00 p.m. addressed as above.

Claire A. Manning

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Carol Hansen Posegate
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Claire A. Manning
Of Counsel

FAX TRANSMISSION

DATE: 12-9-03

TO: Dorothy M. Gunn

FAX NO: 312-814-3669

FROM: Claire Manning

FAX NO: (217) 522-6184

RE: _____

MESSAGE:

NUMBER OF PAGES INCLUDING THIS SHEET: 12