

ILLINOIS POLLUTION CONTROL BOARD

July 18, 1996

RESIDENTS AGAINST A POLLUTED)	
ENVIRONMENT AND)	
THE EDMUND B. THORNTON FOUNDATION,)	
)	
Petitioners,)	PCB 96-243
)	(Pollution Control Facility Siting
v.)	Appeal-Landfill)
)	
COUNTY OF LASALLE AND)	
LANDCOMP CORPORATION,)	
)	
Respondents.)	
)	

ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on several pre-hearing pleadings filed by Residents Against A Polluted Environment and The Edmund B. Thornton Foundation (Residents) and respondents, County of LaSalle (County) and the LandComp Corporation (LandComp).

APPLICATION FOR NON-DISCLOSURE FOR VOLUME VII

On June 26, 1996 LandComp filed an "Application For Non-Disclosure for Volume VII" of its siting application to the LaSalle County Board. On July 8, 1996 Residents filed a response.

LandComp contends that Volume VII of its application contains confidential financial statements and copies of agreements containing the confidential financial terms of real estate purchase options. During the siting hearing before the County on February 1, 1996, Residents objected to the confidential treatment of Volume VII and requested that the volume be made available to the public. According to LandComp, after the hearing officer reviewed Volume VII in camera, he found it "does not in any way that I can see have any relationship to this, to the hearing on the nine statutory criteria or issues of fundamental fairness". The County filed the record the June 27th, at which time Volume VII was identified as non-disclosed material.

Pursuant to 35 Ill. Adm. Code 101.161(a)(4), income and earnings data when not an issue in the proceeding may be stamped "Not Subject to Disclosure" by the Board. LandComp asserts that the information in Volume VII is not at issue in this proceeding and therefore should be treated as confidential.

Residents assert that Volume VII is a required and integral part of the Application for Siting Approval. Residents argue that the County's hearing officer's ruling to prohibit the public from viewing Volume VII goes to the heart of their fundamental fairness claims and that the hearing officer "was nothing more than the Applicant's lackey". Residents claim that the financial solvency of the LandComp was very much at issue at the county hearing and that LandComp was financially unqualified.

The Board finds that it is not the content of Volume VII, but its unavailability which is at issue before the Board. It was the unavailability of the data in Volume VII which could make the proceedings before LaSalle County fundamentally unfair, not the data itself; the data could only be evidence reflective of the merit of LandComp's petition before the County. The Board will not now hear arguments which were not presented

below¹. The Board believes the information contained in Volume VII may remain confidential without limiting Residents' arguments as to the County proceeding being rendered fundamentally unfair.

The Board hereby grants LandComp's request to stamp Volume VII of the application before the County as non-disclosure material and designates Volume VII of the siting application as "Not Subject to Disclosure". The Clerk of the Board shall treat Volume VII as nondisclosable information under 35 Ill. Adm. Code 101.161.

MOTION TO STRIKE CERTAIN PORTIONS OF THE PETITION FOR
HEARING AND TO BAR DISCOVERY RELATED TO SAID PORTIONS

On July 1, 1996 the County filed a "Motion to Strike Certain Portions of the Petition for Hearing and to Bar Discovery Related to Said Portions". Additionally, on July 1, 1996 LandComp filed a motion in limine to prevent certain evidence from being presented at hearing. On July 15, 1996 Residents filed a response to these motions². On July 16, 1996 LandComp filed a "Motion to File Combined Reply in Support of Its Motion in Limine and Motion to Quash". That portion of LandComp's July 16 motion to file is hereby granted.

The County requests that the Board strike paragraph 8(w) of Residents' petition. Additionally, the County requests that the Board limit discovery relating to the adoption of the County Solid Waste Management Plan (Plan) or its amendments, the County's local landfill siting requirements, and the rules and regulations for the application for approval or any amendments.

Respondent LandComp requests that the Board bar testimony which supports allegations 8(e), (f), and (w) of the petition for review.

Sections 8(e), (f) and (w) of Resident's petition read:

8(e). Ex parte contacts between certain members of the County Board and the Respondent, LandComp Corporation, and its agents and representatives, rendered the County Board incapable of reaching a fair and impartial decision based solely upon the evidence.

8(f). That both before and after the filing of the Application there existed a conspiracy between certain County Board members and LandComp Corporation and its principal owner, Paul Degroot, to approve an Application for siting approval by LandComp Corporation regardless of applicable laws, procedures, regulations, ordinances, and rules which would warrant a contrary outcome and regardless of any facts which would warrant disapproval of the Application.

8(w). That the Respondent, LandComp Corporation, through its officers, agents, and employees, was improperly allowed to influence and dictate the development of amendments to the LaSalle County Solid Waste Management Plan, local conditions for siting approval, and the procedural rules (procedures) relating to the proceedings.

¹ See 415 ILCS 5/40.1(a): no new or additional evidence in support of or in opposition to any finding, order, determination or decision of the appropriate county board or governing body of the municipality shall be heard by the Board.

² A faxed copy of the response was received by the Board on July 11, 1996.

In support of its motion to strike paragraph 8(w) of the petition, the County observes that the Plan was revised in accordance with State law prior to November 1, 1995, the date on which LandComp filed its siting application with the County. Additionally, the County observes that the local siting procedures were also adopted and amended prior to November 1, 1995. The County contends that the Board's jurisdiction is limited to whether the statutory criteria are consistent with the Plan and whether the proceedings were fundamentally fair. Therefore, the County argues, that because paragraph 8(w) relates to actions that took place before the filing of the siting application and raises matters beyond the Board's authority for review, evidence pertaining to paragraph 8(w) should not be allowed at hearing.

LandComp also requests that all evidence pertaining to these issues be ruled inadmissible because its participation in the drafting of the County Solid Waste Management Plan and the County procedural ordinances are beyond the scope of the Board's review. LandComp states that if evidence is admitted pertaining to LandComp's participation in the Plan and procedures, the hearing would be an inquiry into the County's legislative functions, an inquiry which is outside of the Board's jurisdiction and one which belongs in the courts. In support of its argument, LandComp cites to Turlek v. Village of Summit, PCB 94-19, 94-21, and 94-22 (consolidated) May 5, 1994 (Turlek), where the Board noted that, "(fundamental fairness is only applicable to procedures before the local siting authority pursuant to Section 40.1". Turlek at 12.) Additionally, LandComp points to Citizens for a Better Environment v. City of Beardstown PCB 94-98 January 11, 1995 (Beardstown), and Concerned Citizens for a Better Environment v. City of Havana PCB 94-44 May 19, 1994 (Havana), to support its contention. Finally, LandComp points to a prior circuit court action by Residents seeking an injunction to prohibit the County from executing the Host Agreement as support for the contention that any inquiry into the County's legislative functions or the "selection of LandComp as the preferred vendor" belong in the circuit court and not before the Board.

LandComp also requests that the all evidence of ex parte contacts prior to the filing of the siting application be barred because the Board has in the past determined that contacts prior to the filing of the application are not improper. LandComp states that allegations of ex parte contacts prior to the filing of the application should not be heard at hearing because in Beardstown the Board ruled that such evidence was irrelevant.

In their response to the County and LandComp, Residents argue that they must be allowed to enter evidence of contacts between the "local siting municipality" and LandComp, even though the contacts occurred before the application for siting was filed. In support of this they argue that the evidence of LandComp's "degree of control" over the development of the local siting criteria and the amendments to the local solid waste management plan is relevant if it goes to prove "pre-judgment, undue influence, or other undermining of fundamental fairness". Residents allege that it is not the contact between the County officials and LandComp prior to siting which was the problem, it was the "nature of the ex parte contacts" which caused a pre-judgment of the adjudicative facts. Residents argue that they must be allowed to enter this evidence because, if a conspiracy to place LandComp as the owner/operator of the site existed prior to siting, it would be relevant to the fundamental fairness of the County's proceeding.

Motion to Strike and Request for Discovery Limitation and Motion in Limine Regarding Paragraph 8(w)

While Section 39.2(g) states that the statutory siting procedures provided for in the Act "shall be the exclusive siting procedures", the courts and this Board have held that the unit of local government may develop its own siting procedures so long as those procedures are consistent with the Act and supplement, rather than supplant, those requirements. (See Waste Management of Illinois v. PCB, (2nd Dist. 1988) 175 Ill. App. 3d 1023, 530 N.E.2d 682, 692-693) On review of the local government's decision, Section 40.1 of the Act requires that the Board consider the fundamental fairness of the procedures used by the local siting authority in reaching its decision. Various Board decisions have therefore analyzed local government siting procedures to determine whether those procedures comport with the standards of fundamental fairness. (See, for example Citizens for Controlled Landfills, et. al. v. Laidlaw Waste Systems, Inc. et al, PCB 91-89 and PCB 91-90 (September 26, 1991); Gallatin National Company v. The Fulton County Board et al, PCB 91-256 (June 15, 1992); Daly v. Village of Robbins, PCB 93-52 and PCB 93-54 (July 1, 1992).)

In paragraph 8(w), Residents do not allege that the County's Plan and amendment procedures were fundamentally unfair, nor do Residents claim that the County failed to follow its adopted procedures. Rather, Residents allege that actions taken by LandComp's officers, agents and employees improperly influenced the adoption of the County's Plan and procedures. However, this type of allegation is not proper for the Board to consider in a Section 40.1 landfill appeal. A reviewable Section 40.1 allegation would refer to the procedures employed by the County during the siting process and whether those procedures were followed and hence comport with standards of fundamental fairness.³ No such allegation is before the Board.

LandComp is correct in citing Beardstown as support for its contention that contacts prior to the siting application being filed are not impermissible contacts. In Beardstown, the applicant met with the mayor and members of the city council at a luncheon and reception prior to filing of the siting application. The Board found that the contact between the decision makers and the applicant prior to the application being filed was not an impermissible ex parte contact. Here, as in Beardstown, Residents have cited no authority which would apply ex parte restrictions prior to the filing of an application for siting approval.

The Board accordingly hereby grants the County's motion to strike paragraph 8(w), Residents may not introduce evidence in support of paragraph 8(w). LandComp's motion in Limine regarding paragraph 8(w) is also granted. The hearing officer shall allow discovery and testimony consistent with this order.

Motion in Limine Regarding Paragraphs 8(e) and 8(f)

Based on the Board's prior decision in Beardstown, the motion in limine requesting that the Board bar the introduction of evidence of ex parte contacts prior to the filing of the petition on November 1, 1995 is hereby granted. Such evidence shall be excluded at the hearing before the Board scheduled to begin on July 22, 1996.

MOTION TO QUASH SUBPOENAS

By its filing of July 16, 1996 LandComp requests that subpoenas served on several persons by Residents be quashed because any participation of the named persons in LaSalle County's landfill siting efforts terminated prior to the time that LandComp's application was filed with the County. The motion to quash is hereby directed to the Board's hearing officer for immediate disposition consistent with this order.

IT IS SO ORDERED.

³ See 415 ILCS 5/40.1(b), referencing 40.1(a), which requires that the Board review the procedures employed below by the local siting authority to determine whether they were "fundamentally fair".

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the ____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board