ILLINOIS POLLUTION CONTROL BOARD
January 11, 1990

SAM DiMAGGIO, CARL PIACENZA, DANA PIACENZA, ROBERT NIKOLICH HOUSTOUN M. SADLER, LINDA VUKOVICH, and WILLIAM A. WEGNER,	)	
Petitioners,	)	
v.	)	PCB 89-138 (Landfill Siting Review)
SOLID WASTE AGENCY OF NORTHERN COOK COUNTY; CITY OF ROLLING MEADOWS, A MUNICIPAL CORPORATION, AND CITY OF ROLLING MEADOWS CITY COUNCIL, A BODY POLITIC AND CORPORATE,	)	
Co-Respondents.	)	

MESSRS. RICHARD G. FLOOD AND ANDREW T. FREUND, ZURKOWSKI, ROGERS, FLOOD & McARDLE, APPEARED ON BEHALF OF PETITIONERS;

MESSRS. THOMAS R. BURNEY, MATTHEW M. KLEIN AND GLENN C. SECHEN, SCHAIN, FIRSEL & BURNEY, LTD, APPEARED ON BEHALF OF CO-RESPONDENT, SOLID WASTE AGENCY OF NORTHERN COOK COUNTY; AND

MR. DONALD M. ROSE AND MS. KATHLEEN ROSS, ROSE & ROSS, LTD, APPEARED ON BEHALF OF CO-RESPONDENTS, CITY OF ROLLING MEADOWS AND CITY OF ROLLING MEADOWS CITY COUNCIL.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a third-party appeal filed September 7, 1989 by Sam DiMaggio, Carl Piacenza, Dana Piacenza, Robert Nikolich, Houstoun M. Sadler, Linda Vukovich, and William A. Wegner ("Petitioners"). Petitioners contest the decision of the City of Rolling Meadows and City of Rolling Meadows City Council ("City"), in which the City granted approval pursuant to Section 40.1 of the Illinois Environmental Protection Act ("Act") for a regional pollution control facility. Co-respondent Solid Waste Agency of Northern Cook County ("SWANCC") was the applicant to the City. Petitioners seek to have the Board reverse the City's decision on the basis that the City lacked jurisdiction because of notice defects and that the proceedings were fundamentally unfair.

Procedural History

Petitioners' third-party appeal of September 7, 1989 was in response to the site location approval granted on August 8, 1989 to SWANCC by the City. Hearing was held November 1, 1989. Petitioners filed their brief on November 13, 1989. Co-Respondent, SWANCC, filed its brief on November 27, 1989. Co-Respondent City also filed its brief on November 27, 1989. On December 1, 1989, Petitioners filed two briefs: one in reply to SWANCC's brief and one in response to the City's brief.

Background

The applicant, SWANCC, is a municipal joint action agency, created in 1988 under Section 3.2 of the Inter-governmental Cooperation Act. Ill. Rev. Stat. 1987, ch. 741 et seq. Its membership consists of 28 north and northwest suburban municipalities, including the City of Rolling Meadows. Its purpose is to implement a solid waste management plan in Northern Cook County. (R. 92-94)* The City has one director on the SWANCC Board, who may cast one vote. The City appointed its mayor, William D. Ahrens, to act in that capacity. (City Br. at p. 10)

The facility proposed by SWANCC is to be located on approximately 6.67 acres at 3851 Berdnick Street, Rolling Meadows, Illinois. A $12 million regional transfer station is contemplated. This property, along with another proposed site, would be a transfer point for solid waste, which ultimately would be compressed and delivered to a balefill in unincorporated Hanover Township, Cook County, Illinois. The subject property is presently used for the packaging and transfer of the City's garbage and for salt storage. (R. 3, 327 & 1407)

SWANCC's application, filed February 15, 1989, included building and landscaping plans, architectural renderings, and engineering and traffic studies. The structure provides for all operations to be conducted indoors, which SWANCC believes will minimize blowing papers and odors. (SWANCC brief at p. 3) A negative air pressure system and charcoal filtering system are planned to eliminate odors.

SWANCC originally proposed that the facility function as a transfer point for 14 communities. (R. 332 & 421) As approved by the City on August 8, 1989, the facility would be a transfer site for up to six communities. (R. 1363, 1364 & 1404)

* Citations to the record before the City will be referred to as (R. ____); citations to the Pollution Control Board hearing transcript will be referred to as (Tr. ___).

Public hearings on the SWANCC application were held on May 30 and 31, 1989. The City voted to deny the application on July 25, 1989 by a 4-3 vote. (R. 1284) Pursuant to its own procedural rules governing reconsideration, the City reconsidered the application on August 8, 1989 and voted to approve the application subject to modifications raised by various council members. (R. 1362) The mayor did not vote on the matter in accordance with the City's standard procedures, which allow the mayor to vote only under special circumstances.

Introduction

Public Act 82-682, commonly known as SB-172, is codified in Sections 3.32, 39.2 and 40.1 of the Act. It vests authority in the county board or municipal government to approve or disapprove the request for each new regional pollution control facility. These decisions may be appealed to the Board, which derives its authority to review the landfill site location decisions of local governments from Section 40.1 of the Act. The Board's scope of review encompasses three principal areas: (1) jurisdiction, (2) fundamental fairness of the county board's site approval procedures, and (3) statutory criteria for site location suitability. Pursuant to Section 40.1(a) of the Act, the Board is to rely "exclusively on the record before the county board or the governing body of the municipality" in reviewing the decision below. However, with respect to the issue of fundamental fairness, the Illinois Supreme Court has affirmed that the Board may look beyond the record to avoid an unjust or absurd result. E&E Hauling, Inc. v. PCB, 116 Ill.App.3d 587, 594, 451 N.E.2d 555 (Second District, 1983), aff'd 107 Ill.2d 33, 481 N.E.2d 664 (1985).

Jurisdiction

The notice requirements of Section 39.2(b) are jurisdictional prerequisites to the local county board's power to hear a landfill proposal. The lack of jurisdiction at the county board level made it unnecessary to review petitioners' other arguments in The Kane County Defenders, Inc. v. The Pollution Control Board, County Board of Kane County, Illinois, Sanitary District of Elgin and City of Aurora, 139 Ill.App.3d 588, 487 N.E.2d 743 (Second District, 1985). In that case, failure to publish the appropriate newspaper notice 14 days prior to the request for site approval resulted in the court's vacating the county board's decision and the PCB decision upholding it. The court applied the reasoning of Illinois Power Company v. Pollution Control Board, 137 Ill.App.3d 449, 484 N.E.2d 898 (Fourth District, 1985), which found that the PCB's failure to publish notice as required by Section 40(a) of the Act divested it of jurisdiction.

The notice requirements of Section 39.2 are to be strictly construed as to timing, and even a one day deviation in the notice requirement renders the county without jurisdiction. Browning-Ferris Industries of Illinois, Inc. v. IPCB and County of St. Clair, Illinois, 162 Ill.App.3d 801, 516 N.E.2d 804 (Fifth District, 1987).

Fundamental Fairness

The county board or local governing body must employ procedures, in reaching its siting decision, which are "fundamentally fair." Section 40.1(a) of the Act. Due process considerations are an important aspect of fundamental fairness.

> Administrative proceedings are governed by the fundamental principles and requirements of due process of law. [Citation.] Due process is a flexible concept and requires such procedural protections as the particular situation demands. [Citation.] In an administrative hearing, due process is satisfied by procedures that are suitable for the nature of the determination to be made and that conform to the fundamental principles of justice. [Citation.] Furthermore, not all accepted requirements of due process in the trial of a case are necessary at an administrative hearing. [Citation.] *** Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation.
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> Waste Management of Illinois, Inc. v. PCB, 175 Ill.App.3d 1023, 1036-37, 530 N.E.2d 682 (Second District, 1988).

Thus, the manner in which the hearing is conducted, the opportunity to be heard, the existence of ex parte contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness.

As a starting point, each member of the county board or governing body must have an opportunity to review the record before voting. McLean County Disposal Company, Inc. v. The County of McLean, PCB 87-133, May 25, 1989; Ash v. Iroquois County Board, PCB 87-29, July 16, 1989. Furthermore, in voting, local authorities will not be held to be biased simply because of a financial benefit which the county or municipality might derive from site approval. "County boards and other governmental agencies routinely make decisions that affect their

revenues...." "Public officials should be considered to act without bias." E&E Hauling, supra, at 481 N.E.2d 664, 667, 668.

The decision to grant or deny SB-172 siting approval has clearly been held to be an adjudicative function and not a legislative action. E&E Hauling, Inc. et al. v. PCB and The Village of Hanover Park, 116 Ill.App.3d 587, 451 N.E.2d 566 (Second District, 1983); and Town of Ottawa v. IPCB, 129 Ill.App.3d 121, 472 N.E.2d 150 (Third District, 1984). In their adjudicatory role, the decisionmakers are entitled to protection of their internal thought processes. This principle of not invading the mind of the administrative decisionmaker has been articulated in Ash v. Iroquois County Board, supra; in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) and in United States v. Morgan, 313 U.S. 409 (1941).

The recognized remedy for a lack of fundamental fairness is for the Board to remand to the county board to allow them an opportunity to cure this procedural deficiency. City of Rockford v. Winnebago County Board, PCB 87-92, November 19, 1987. This takes the siting decision back to the local authorities, who pursuant to Section 39.2(a) have been given this decisionmaking authority.

Statutory Criteria

Section 39.2 of the Act presently outlines nine criteria for site suitability, each of which must be satisfied if site approval is to be granted. In establishing each of the criteria, the applicant's burden of proof before the local authority is the preponderance of the evidence standard. Industrial Salvage v. County of Marion, PCB 83-173, 59 PCB 233, 235, 236, August 2, 1984. On appeal, the PCB must review each of the challenged criteria based upon the manifest weight of the evidence standard. See Willowbrook Motel, supra and Waste Management of Illinois, Inc. v. IPCB, 122 Ill.App.3d 639, 461 N.E.2d 542 (Third District, 1984). This means that the Board must affirm the decision of the local governing body unless that decision is clearly contrary to the manifest weight of the evidence, regardless of whether the local board might have reasonably reached a different conclusion. See E&E Hauling v. PCB, 116 Ill.App.3d 586, 451 N.E.2d 555 (Second District, 1983); City of Rockford v. IPCB and Frink's Industrial Waste, 125 Ill.App.3d 384, 465 N.E.2d 996 (Second District, 1984); Steinberg v. Petra, 139 Ill.App.3d 503, 487 N.E.2d 1064 (First District, 1985); Willowbrook Motel v. PCB, 135 Ill.App.3d 343, 481 N.E.2d 1032 (First District, 1985); Fairview Area Citizens Task Force v. Village of Fairview, PCB 89-33, June 22, 1989.

In this case, petitioners do not dispute the decision of Rolling Meadows, whereby each of the criteria were found to be

satisfied. Therefore, the Board will not review any of the site suitability criteria. The Board's review is limited to jurisdictional and fundamental fairness issues raised by petitioners.

In their petition and reply briefs, Petitioners request that "the cause be sent back to the City of Rolling Meadows with directions to prohibit the siting of the transfer station at its present location." (Pet. Br. at 39) This Board will not do so. As previously stated, if the procedures below were fundamentally unfair, the recognized avenue of relief to be granted by the Board is to remand to the local government. City of Rockford v. Winnebago County Board, supra. Section 39.2(a) of the Act specifically mandates that the local governing body shall have the authority to make the siting decision based on statutory criteria. The suitability criteria are not here in dispute and the Board has no authority to prohibit the City from again finding that the suitability criteria have been satisfied. Section 40.1(b) allows the Board to review the decision below upon petition by a third party but does not authorize the Board to act as Petitioners request.

Discussion

Petitioners raise two main arguments as to why the Board should reverse the City's site location approval: (1) that Rolling Meadows lacked jurisdiction to hear the application because statutory notice was deficient and (2) that the City's procedures in granting approval were fundamentally unfair. Petitioners argue that jurisdiction was lacking because: (1) an owner within 250 feet (the railroad) was not notified; (2) receipts for notice were signed by other than the record owners; and (3) three attempts at personal service were defective. Fundamental fairness arguments are raised with respect to (1) alleged bias stemming from financial interests and the City's membership in SWANCC and (2) ex parte communications and (3) the alleged amendment of the application. Petitioners also raise an argument regarding locating the facility within 1,000 feet of personal dwellings. These assertions are addressed separately below.

Jurisdictional Issues

Petitioners claim that the City lacked jurisdiction because:

1. Applicant, SWANCC, did not attempt to serve the Chicago and Northwestern Railroad Company;

2. SWANCC gave notice by registered letters which were not signed for by the record owners; and

3. SWANCC did not personally serve Charles E. Neal/Charles Neal Realty Company, Hollis M. Floberg or Palatine Welding Company.

The notice requirements of Section 39.2(b) of the Act are jurisdictional prerequisites to the local government's authority to hear a site location application. Section 39.2(b) provides as follows:

> No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirements; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.
>
> Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located. Such notice shall state the name and address of the applicant, the location of the proposed site, the nature and size of the development, the nature of the activity proposed, the probable life of the proposed activity, the date when the request for site approval will be submitted, and a description of the right of persons to comment on such request as hereafter provided.

Issue No. 1 - Petitioners argue that the C&NW was entitled to service of notice because it is an owner within 250 feet of the proposed site, and its identity was ascertainable from the county's authentic tax records. Petitioner defines those records as those which "include, but are not limited to, those records

which are required or allowed to be kept by the Revenue Act of 1939." (Pet. Br. at 8 [emphasis added]). Petitioner further asserts that the owner could have been discovered readily since the "Cook County Treasurer may maintain a tax map with the permanent index numbers" (Pet. Br. at 8 [emphasis added]) and such a map was available, which identified the C&NW. Also, Petitioner notes that the "county assessor may maintain a cross-index system" (Pet. Br. at 10 [emphasis added]) with permanent index numbers matched with legal descriptions. Petitioner found such a record system was kept in the assessor's office and it discloses the C&NW as an owner according to an index card from there. Petitioner's theory is that "[a]s it is a record which is permitted to be kept under the Revenue Act, it is an authentic tax record of Cook County." (Pet. Br. at 10)

The Act, as cited above, defines owners as "being such persons or entities which appear from the authentic tax records of the county." As co-respondent SWANCC notes, this definition does not result in "an infallible means for identifying property owners." (SWANCC Br. at 14, 15) Yet, the legislature requires that notice be given according to these particular records. The statutory burden is not to identify and notify every actual current owner, although ideally this would be achieved.

The county clerk's office maintains the county records, as required by Ill. Rev. Stat. ch. 35, section 9. At hearing, Barbara Gorrell identified herself as an official of the Clerk of the County of Cook. She testified that the clerk's office keeps the "authentic tax records of the county" and the clerk's records do not reveal the owner of the railroad trackage. (R. 94 & 98). The Appellate Court, First District, has held that:

> an interpretation of a statute or ordinance made by the agency or body charged with administering the statute constitutes an informed source of guidance for ascertaining the intent of the lawmaking body. (citations omitted)
>
> Katz v. City of Chicago, 177 Ill.App.3d 305, 532 N.E.2d 322 (First District, 1988).

The Board is persuaded that this testimony refutes Petitioners' claim regarding notice to the C&NW. Petitioners have not demonstrated that SWANCC failed to notify "persons or entities which appear from the authentic tax records of the county" as required by Section 39.2 of the Act.

The Board finds that Petitioners assertion that additional records should be searched is not in keeping with the straight-forward, statutory directive concerning notice. The statute does not require searches of records from the treasurer's and

assessor's offices, but, rather, the authentic tax records which, as noted, are held by the county clerk. SWANCC's failure to notify C&NW is not a basis for denying the City's jurisdiction. Assuming for purposes of argument that notice is defective, this is not a case "where a defective notice is exclusively the fault of the applicant ... (for which it should be) held to the letter of the law regarding notice." Everett Allen v. City of Mt. Vernon, 71 PCB 26, 31 (PCB 86-34, July 11, 1986 [emphasis added]).

Issue No. 2 - Petitioners claim that, because eleven registered letters sent by the applicant were received by other than the record owner, notice was deficient and the City, therefore, lacked jurisdiction. Petitioners question whether applicant's efforts at notice met the statutory requirement that:

> ...applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested...
>
> Section 39.2(b) of the Act.

As Petitioners note, the Board has previously addressed this issue. In City of Columbia, et al. v. County of St. Clair and Browning-Ferris Industries of Illinois, Inc., 69 PCB 1 (PCB 85-223, 85-177, and 85-220 consolidated, April 3, 1986) aff'd, 162 Ill.App.3d 801, 516 N.E.2d 804 (Fifth District, 1987), the Board specifically found that service was not defective when someone other than the addressee signed for and accepted the notice. The Board feels this case is dispositive of Petitioners' argument. The notices were timely mailed, 26 days in advance of filing the request (SWANCC Br. at 8), and the City's jurisdiction is not affected by who acknowledged receipt of notice.

Issue No. 3 - Petitioners also allege that the City lacked jurisdiction on the basis that Charles E. Neal/Charles Neal Realty Company; Hollis M. Floberg; and Palatine Welding Co. were not properly served. The record reveals the following on this matter: (1) registered mail was sent separately to Charles E. Neal and Charles Neal Realty Company, but no return was made. Personal service was made but the occupant of the premises refused to identify himself or to sign a receipt for the notice. (R. 8). (2) Registered mail was sent also to Hollis M. Floberg, but a return receipt was not received from Ms. Floberg. The notice was returned marked "refused??" and "moved left no forwarding address." (R. 285) Later, Susan McCall was served personally as a current resident of the premises. (R. 11) (3) Registered notice was sent to the post office box listed on the authentic tax records for Palatine Welding Company. When no return receipt was received, Carl Piacenza, a petitioner and vice-president of Palatine Welding Company, was served personally at the company's offices.

It is clear from the record that a diligent effort was made to secure service of notice. Furthermore, it appears that SWANCC's efforts at service were, in fact, successful. Thus, the Board rejects Petitioners' claim that service of notice was defective.

To accept Petitioners' contentions would be "effectively conferring upon absent or opposing neighbors the power to frustrate perfection of service...." Waste Management of Illinois, Inc. v. Village of Bensenville, ___ PCB ____ (PCB 89-28, August 10, 1989). The rights of third parties do not extend this far in an SB-172 proceeding. The above instance of a person refusing to sign a receipt for notice does not constitute failure of service in the context of a proceeding of this type. Likewise, the Board finds that personal service on Susan McCall and Carl Piacenza gave adequate notice to the third party property owners. Timely and diligent attempts to obtain service of notice should allow the local government to obtain jurisdiction to decide the landfill siting application. This standard has not been violated given the facts, here, which show that SWANCC made multiple service attempts, at least 26 days prior to filing its application. The Board here concludes that the City did have jurisdiction to hear SWANCC's application.

Fundamental Fairness

Petitioners dispute the fundamental fairness of the procedures used by the City in reaching its decisions. The City's alleged unfairness relates to issues of (1) bias, as a result of potential financial gain and of its membership in SWANCC; (2) ex parte communications; and (3) "amendment" of SWANCC's application.

Issue No. 1: Bias

Petitioners charge that the local hearing was fundamentally unfair because the City has an alleged financial interest in the outcome. This interest is the sales proceeds from the intended sale of city-owned property to SWANCC, so that SWANCC could construct the transfer facility. Petitioners' theory is that the potential sale, which is contingent on siting approval, prevented the City from engaging in impartial, fundamentally fair decisionmaking. Petitioners state that the facts of E&E Hauling, Inc. v. PCB, 107 Ill.2d 33, 481 N.E.2d 664 (1985) can be distinguished on the basis of how much more significant the revenue would be for the City of Rolling Meadows.

The Board must reject Petitioners' contentions for several reasons. First, any financial benefit here is not personal to the decisionmakers themselves. The financial benefit, which may result, accrues to the City. As noted in the introduction above, the Illinois Supreme Court has already concluded that such

circumstances are routine. E&E Hauling, Inc., supra. "[T]he board should not be disqualified as a decisionmaker simply because revenues were to be received by the county.... It does not seem unusual that a landfill would be proposed for location on publicly owned property." E&E Hauling, Inc., supra, 481 N.E.2d at 667, 668.

Secondly, the dollar amounts in E&E Hauling, Inc., supra, are not the central focus of the Illinois Supreme Court's holding, as Petitioners would imply. Furthermore, even if the measure of financial benefit were critical to the issue of bias, Petitioners have not introduced evidence to prove that the sales price, which according to the record has not even been established (R. 1-5), may be a crucial part of the City's budget. The Board embraces the analysis of the Third District where it stated as follows:

> The plaintiffs argue that there is more bias in this case because there is $8,000,000 at stake here compared to $6,120,000 in E&E Hauling. It is not the difference in money or benefit that established a bias or predisposition to act in a certain way.
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> Woodsmoke Resorts, Inc. v. City of Marseilles, 174 Ill.App.3d 906, 529 N.E.2d 274, 276, 277 (Third District, 1988). See also, Peter Valessares et al v. County Board of Kane County and Waste Management, PCB 87-36, July 16, 1987.

Thus, the Board concludes that Petitioners have not proved that the City's proceedings were fundamentally unfair due to financial interest.

Petitioners also argue that the hearing was fundamentally unfair because the City is a member of SWANCC and the City's regular attorneys advised the City in the hearing process. As co-respondent SWANCC stated in its brief, participation in a Municipal Joint Action Agency is explicitly authorized by statute. Ill. Rev. Stat. ch. 127, par. 741 et seq. Also, the Local Solid Waste Disposal Act provides for disposal of solid waste within the local government's jurisdictions, either individually or jointly. Ill. Rev. Stat. ch. 85, par. 5901.1. That the City, therefore, may participate in waste disposal with other communities on a site within its jurisdiction is to be expected given such legislative endorsement. The circumstances of the Rolling Meadows site were in fact mentioned in the Senate Debates of June 16, 1988, which are excerpted in Exhibit A to SWANCC's brief. Furthermore, given that the City holds only one of 28 votes, the Board cannot accept that the City and SWANCC interests were so overlapping that the City could not provide a

fundamentally fair hearing. The Second District has held that a county board member, who was also the supervisor of a township which was an objector to the landfill siting, was not unduly biased despite the dual roles played. Or generally stated, dual membership alone does not constitute undue bias. Waste Management of Illinois, Inc. v. Pollution Control Board, 175 Ill.App.3d 1023, 530 N.E.2d 682 (Second District, 1988). Similarly, the Board finds that the City's membership in SWANCC does not amount to bias, which would result in the City's losing its jurisdiction to hear a landfill siting application for land within its borders.

As to Petitioners proposition that the City should have retained an unrelated third party to act as hearing officer, the Board finds no merit in this argument. The City conducted its own hearing as Section 39.2 of the Act provides.

Issue No. 2 - Ex Parte Contacts

> [C]onsidering off-record evidence of procedural unfairness at the county board level applies with particular force to the matter of ex parte contacts, which, by definition, take place outside of the administrative hearing and record.
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> E&E Hauling, Inc. et. al v. PCB, 116 Ill.App.3d 587, 451 N.E.2d 555, 602 at note 2 (Second District, 1983)

Because the Board looks closely at the possibility and consequences of ex parte communications, Petitioners' allegations are described in detail in four sections below. Statements, which Petitioners believe are indicative of ex parte contacts, are quoted below in their entirety from petitioners' brief. Later, respondents briefs and the record are referenced in order to more fully develop the issues raised by Petitioners.

(1) Petitioners ask the Board to infer that since, on July 25, 1989, the City voted to deny SWANCC's application, and then, on August 8, 1989, the City voted to approve the application, the facts "strongly suggest that ex parte contacts occurred between SWANCC and the City." (Pet. Br. at 27).

(2) Petitioners assert that the following two statements at the August 8, 1989, City Council meeting suggest ex parte communications. (Where council members' names are used, they will be prefaced by "Councilman" or "Alderman.")

Councilman William Ball's statement:

> So I was stuck in a situation where we have to find a solution, but I don't want this to stick the community and we came up with a proposal of -- a proposal was made for six communities and I sat and I talked with the business community, I talked with Mr. Baigh and talked with Mr. Katlin*, and we all went through everything that has gone on. And you know each one of those two gentlemen had the courage to listen to the arguments being made, each of them uses common sense, definitely they both used a lot of critical thinking, there are probably a lot of nights that they didn't sleep thinking through this proposal and I am sure along with several other members of the city council. And both of them came in the direction of compromise. (Emphasis added.) (R. 1387) (Pet. Br. at 27).

Petitioners raise questions as to (1) who made the above referenced proposal reducing the number of communities to be served and (2) how the City knew SWANCC would accept the reductions.

Councilman Menzel's statement:

> The other thing that I am a little bit upset about is the compromise that went on and I didn't know about, other than (Councilman) Bob Taylor calling me and (Councilman) Ball and having some discussions on it. I was kind of left out of the process and I kind of take some offense to it. I wasn't brought into that process in terms of evaluation of the compromises, the internal process that went through. I guess there is no use of my worrying about that now, but I think it would have been nice to be up front with me -- well. (R. 1396) (Pet. Br. at 28).

Petitioners assert that the compromise referred to by Councilman Menzel must have been between the council members and SWANCC and not among the council members alone.

(3) Janet DiMaggio, testified at hearing regarding conversations she had with two council members after the August

* Spelling of this name appears to vary according to phonetic interpretation. Katlin is used at R. 1387 and Catelain is used in the PCB hearing transcript referred to below.

8, 1989, meeting. Mrs. DiMaggio testified as follows with respect to Councilman Ball:

> Q. Did (Councilman) Ball tell you what he talked about with Mr. Catelain?*
>
> A. Yes, he did.
>
> Q. What did he say?
>
> THE WITNESS: He told me that he told Mr. Catelain* that they had the votes to pass the transfer station, that (Councilman) Taylor would make the motion and that he would second it. (Tr. 71) (Pet. Br. at 28)

Concerning Councilman Menzel, Mrs. DiMaggio testified:

> Q. What did you say to Councilman Menzel and what did Councilman Menzel say to you during your conversation of October 31st 1989?
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> A. He told me that, which I knew, that he was subpoenaed but it was quashed; that he felt that he was probably being subpoenaed because of his statement about back door politics that he made during the August 8 meeting.
>
> He said that statement referred to the meeting that Mayor Ahrens had with Alderman Taylor and Alderman Ball immediately before the meeting of the reconsideration vote occurred. (Tr. 74-75) (Pet. Br. at 29)

Petitioners claim that the above circumstances and record support a finding that approval was granted due to ex parte contacts and "the City's secret meetings" (Pet. Br. at 29) and that "Petitioners did not have a chance to counter the input made by SWANCC, and SWANCC was able to change the City's collective mind." (Pet. Br. at 29.) Petitioners conclude that the proceedings were thus fundamentally unfair.

(4) Petitioners next argue that the alleged fundamental unfairness was compounded by the hearing officer's and Board's decision denying the deposition of the mayor and council members

* Catelain is the spelling found in PCB hearing transcript and refers to a founding member of a local citizen's group. See Tr. at 63.

and by the hearing officer's denial of Petitioners calling the mayor and councilmen as witnesses at hearing. This Board fully addressed the matter of deposing the mayor and council members in its Order of October 27, 1989. The Board pointed out that the Petitioners could pursue other means of developing its ex parte contacts arguments, such as interrogatories. The Board here fully rejects Petitioners' comments in its brief at page 33 claiming that time constraints prevented the use of interrogatories, and that "the use of interrogatories, as a practical matter, would be like issuing a road map to the City. It would allow the City to coordinate their stories and present a unified front." The Board also notes that Petitioners rejected the City's suggestion that SWANCC officials could provide the same sought-after information, if such existed. This part of Petitioners' fundamental fairness argument will not be reviewed further.

Respondents argue that the SWANCC application was revisited on the City's own motion and initiative pursuant to the City's own procedural rules. Co-respondent SWANCC urges the Board to consider the above statements of Councilman Ball and Councilman Menzel in context. SWANCC points out that Mr. Baigh and Mr. Catelain*, referred to by Councilman Ball, are, respectively, a local business owner, who spoke in opposition of the application at the May 31, 1989 hearing, and the leader of a citizens group, who opposes the siting. (R. 1062 and Tr. 63 & 66). SWANCC argues that the only ex parte contacts which were proved are those by the local opposition, including Mrs. DiMaggio, and not by SWANCC. Further, SWANCC also asks the Board to consider the comments of Alderman Werling, Alderman Couve, and Alderman Jacobsen concerning extensive phone calls from their constituents (including a violent threat) in opposition to the landfill and considerable misinformation disseminated by the citizens group. (See SWANCC Br. at 31 citing R. 1323-1328, 1392-93, 1398).

SWANCC also directs the Board's attention to comments of Councilman Menzel in the record. Councilman Menzel praised Councilman Taylor's origination of many of the restrictions made. Councilman Menzel also noted that Councilman Ball made other changes and that Councilman Menzel, himself, initiated one accepted modification (R. 1374-79).

Conclusion

First, the Board finds the possible inference of ex parte contacts on the basis of a change in the City's vote to be an inadequate basis for finding that ex parte contacts took place. Given the lack of evidence and the fact that the City of Rolling

* Spelling according to PCB hearing transcript.

Meadows reconsidered its decision according to its own procedural rules, the Board will not infer that ex parte contacts of a fundamentally unfair nature must have occurred.

Second, ex parte contacts have not been shown to have occurred with SWANCC based on the above quoted statements of Councilmen Ball and Menzel and Mrs. DiMaggio. Councilman Ball's statement only suggests ex parte contacts with the opposition. Councilman Menzel's statement refers to discussions among council members, as does Mrs. DiMaggio's statement. The mere suggestion of an improper contact does not constitute proof that it occurred.

The Board recognizes that ex parte communications may certainly arise in the SB-172 context. However, petitioners must also prove that ex parte contacts occurred which resulted in prejudice to Petitioners. Any ex parte communications, demonstrated in this record to the Board, were in opposition of the siting and would have operated, if at all, on behalf of Petitioners. If ex parte contacts with SWANCC may have occurred, the prejudicial effect and the useful purpose of remand should have been shown by Petitioners.

The Second District decision in E&E Hauling, Inc., supra, which was also cited by the Third District in Town of Ottawa, supra, describes the standard by which ex parte contacts must be evaluated. The Second District cited the following federal court opinion for the proposition that the ex parte contacts must seriously distort the decisionmaking process and that remand must serve a useful purpose:

> (A court must consider) whether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment unfair, either to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for a new hearing would serve a useful purpose.

PATCO v. Federal Labor Authority, 685 F.2d 547, 564-5 (emphasis added).

The Second District then added that "a court will not reverse an agency's decision because of improper ex parte contacts without a showing that the complaining party suffered prejudice from these contacts." E&E Hauling, Inc., supra at 451 N.E.2d at 571.

Petitioners argue that they suffered prejudice in the nature of a lack of an opportunity to respond to any new arguments allegedly put forth by SWANCC, which lead to subsequent site approval. There is no evidence of any arguments put forth by SWANCC through ex parte communications. The record shows that the City's hearings were well attended and much public comment was made. Petitioner Sadler, in fact, testified at the Board's November 1, 1989 hearing that he addressed the City Council for one hour and ten minutes on May 31, 1989 (Tr. at 127). As mentioned above, the council members entertained extensive discussions with their constituents, including Mrs. DiMaggio. The Board finds, therefore, that Petitioners have not proved that ex parte contacts occurred which harmed Petitioners. Furthermore, Petitioners have not shown what useful purpose remand would serve, particularly in light of the City's already finding that all statutory criteria have been satisfied by the applicant.

The Board finds that Petitioners have not proved that ex parte communications took place which so harmed Petitioners that remand to the City for a new hearing would serve a useful purpose.

Issue No. 3 - Alleged Amendment of the Application

Petitioners argue that Section 39.2(m) of the Act prevented the City's reconsideration of SWANCC's application once the City voted on July 25, 1989 to deny the application. The section in question provides:

> An applicant may not file a request for local siting approval which is substantially the same as a request which has been disapproved pursuant to a finding against the applicant under any of criteria (i) through (ix) of subsection (a) of this Section within the preceding 2 years. (Emphasis added.)
>
> Section 39.2(m) of the Act.

The Board rejects Petitioners' factual conclusions and interpretation regarding this section. There is no evidence in the record that the applicant filed a second request.

The Board has previously approved reconsideration by the local government. The Third District affirmed the Board's finding that where the county reconsidered its vote, fundamental fairness was not violated. Town of Ottawa, 129 Ill.App.3d 121, 472 N.E.2d 150 (Third District, 1984). In that case, the court sanctioned reconsideration, stating as follows:

> [T]he question becomes whether fundamental fairness was violated by the allowance of reconsideration. We believe that it was not. It was known at all times that the County Board proceeded under Robert's Rules of Order, which allows suspension of procedural rules by a two-thirds vote. Such a vote was taken with counsel for the municipalities present, but not objecting on the grounds cited above. More importantly, administrative bodies should be free to reconsider their decisions. This is part and parcel of the preference for exhaustion of remedies at the administrative level. (Illinois Bell Telephone Co. v. Allphin (1975), 60 Ill.2d 350, 326 N.E.2d 737.) As the Pollution Control Board itself has recognized, "the prejudice to the public by an incorrect decision *** transcends any possible prejudice" to the opponents. (Waste Management, Inc. v. Board of Supervisors of Tazewell County (1982), PCB 82-55, rev'd on other grounds (3rd Dist. 1983), 117 Ill.App.3d 673, 72 Ill.Dec. 682, 452 N.E.2d 1378.) (Emphasis added)

Next, Petitioners argue that reconsideration violates Section 39.2(g) of the Act, which provides:

> The siting approval, procedures, criteria and appeal procedures provided for in this act for new regional pollution control facilities shall be exclusive siting procedures and rules and appeal procedures for facilities subject to such procedures.

As the Third District found in Town of Ottawa, supra, local governments may operate according to their own procedural rules and reconsider their decisions. The Act does not speak to every detail of the decisionmaking process. The appeal procedures referenced in Section 39.2(g) do not prohibit reconsideration. As the Second District found in Waste Management of Illinois v. PCB:

> The Act does not provide specific procedures for conducting the local hearing itself. It does establish procedures for the application process and for standards which must be applied. The language of Section 40.1(a) recognizes that specific procedures as to the conduct of the local hearings may be established by a county board and also requires that those procedures be fundamentally fair. Thus, the Act does not prohibit a county board from establishing its own rules and procedures governing conduct of a local siting hearing so long as those rules and procedures are not inconsistent with the Act and are fundamentally fair.
>
> Waste Management of Illinois v. PCB, 175 Ill.App.3d 1023, 530 N.E.2d 682, 692-93 (Second District, 1988) (emphasis added).

Petitioners' last argument is that improper amendments were made to SWANCC's application in violation of Section 39.2(e) of the Act. That section provides that:

> At any time prior to completion by the applicant of the presentation of the applicant's factual evidence and an opportunity for cross-questioning by the county board or governing body of the municipality and any participants, the applicant may file not more than one amended application upon payment of additional fees pursuant to subsection (k); in which case the time limitation for final action set forth in this subsection (e) shall be extended for an additional period of 90 days.

Petitioners contend that the modifications to SWANCC's original application occurred after the close of the hearings on May 31, 1989. They also argue that these changes are actually amendments, made by SWANCC, which were not timely made.

In contrast, co-respondents SWANCC and the City characterize the alterations as "conditions," specifically authorized by Section 39.2(e) of the Act, which were initiated and authored by various council members, particularly Alderman Taylor. This, in fact, is what the record supports. The various modifications are referred to in the record as being restrictions which the council members proposed and debated. (R. 1374-79 & 1394.) Petitioners have failed to prove that SWANCC amended its application contrary to Section 39.2(e).

Section 22.14: 1,000 Feet Set Back Requirement

Petitioners claim that, independent of jurisdictional and fundamental fairness issues, the proposed siting would violate Section 22.14 of the Act. That section provides that a regional transfer station may not be located within 1,000 feet of residentially zoned property. However, there are certain exceptions to that rule, including one for "any non-regional transfer facility operating on January 1, 1988 which becomes a regional transfer station." Section 22.14(b) of the Act. Petitioner argues that although the City's facility may have been in use at that time*, it was not "operating" since it did not have a permit. The Board cannot accept Petitioners' interpretation of the statutory language. The legislature did not limit the exception to only permitted facilities. Furthermore, as referred to earlier, co-respondent SWANCC's brief at Exhibit "A" excerpts part of the Senate debates of June 16 and 22, 1988, which mention Rolling Meadows as an intended site for a regional transfer station for which an exception to the 1,000 feet rule should be made. The Board concludes that Petitioners have failed to show that locating a regional transfer station at the Rolling Meadows site would violate Section 22.14 of the Act.

This Opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The August 8, 1989 decision of the City of Rolling Meadows granting site location suitability approval to Solid Waste Agency of Northern Cook County is hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987, ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

* The record at R. 108 indicates that the City has operated its own transfer station on the subject property since 1978.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 11th day of January, 1990, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk