ILLINOIS POLLUTION CONTROL BOARD
October 27, 1989

SAM DiMAGGIO, CARL PIACENZA, DANA PIACENZA, ROBERT NIKOLICH HOUSTOUN M. SADLER, LINDA VUKOVICH, and WILLIAM A. WEGNER,	)	
Petitioners,	)	
v.	)	PCB 89-138
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.	)	

ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board upon an October 24, 1989 Emergency Motion to Review Decision of Hearing Officer filed by Sam DiMaggio, Carl Piacenza, Dana Piacenza, Robert Nikolich, Houstoun M. Sadler, Linda Vukovich and William A. Wegner ("Petitioners"). Petitioners move the Board to review the Order of the Hearing Officer dated October 19, 1989 in which subpoenas for the deposition of the Mayor and Aldermen of the City of Rolling Meadows were quashed. Petitioners were seeking information with respect to ex parte contacts and Open Meetings Act violations.

Procedural History

This case involves a September 7, 1989 third-party petition for hearing to contest the decision of Rolling Meadows by which site location approval was granted for a regional pollution control facility to co-respondent, Solid Waste Agency of Northern Cook County ("SWANCC"). Petitioners challenge the fundamental fairness and the conduct of the hearing process.

On October 5, 1989 subpoenas were issued to and notice of depositions served on the following members of the City Council of Rolling Meadows, Thomas F. Menzel, William L. Ball, Robert D. Taylor and William D. Ahrens, its mayor. Depositions were to be held October 19, 1989 and all writings which did not become part of the record relating to Rolling Meadows' decision of August 8, 1989 were subpoenaed. On October 10, 1989, a pre-hearing conference was held. On October 10, 1989, the City of Rolling

Meadows and the City of Rolling Meadows City Council filed a motion to quash notice of deposition and subpoena duces tecum. On October 16, Petitioners filed a response to the motion to quash. On October 18, 1989, Rolling Meadows and its city council filed their reply to petitioners response to motion to quash. On October 23, the hearing officer entered an order to quash subpoenas directed to the aldermen and mayor, above, and the adjunct notice of depositions. On October 24, 1989, Petitioners filed the subject emergency motion to review decision of hearing officer. October 25, 1989, co-respondent, SWANCC, filed their motion to quash subpoena on the same matters referenced above. On October 27, 1989, City of Rolling Meadows and Council filed a motion to strike petitioners' emergency motion to review decision of hearing officer. On October 27, 1989, SWANCC filed an answer to emergency motion to review decision of the hearing officer.

Because of the particular facts of this case and because failure to address the issue of the depositions would be tantamount to denial, (since the hearing is scheduled for November 1, 1989), the Board grants the Petitioners' motion to review the decision of the hearing officer.

Discussion

The motion of the City of Rolling Meadows and the City Council to quash the notice of deposition and subpoena asked that the Rolling Meadows officials not be deposed for several reasons:

1. The hearing before the Pollution Control Board should "be based exclusively on the record before the ... governing body of the municipality" (Ill. Rev. Stat. ch. 111½, par. 1040.1(a));

2. The record was timely filed without objection by the Petitioners as to its accuracy or completeness;

3. The mayor was not entitled to vote on the site location approval and did not do so;

4. The city council exercised its function according to Ill. Rev. Stat. ch. 111½, par. 1039.2(a) and determined that the nine prerequisite conditions were met and the record notes those determinations;

5. Legislative action carries the presumption of validity, without reviewing motives;

6. Depositions of the council members should not be taken without showing their motives were improper; and

7. This form of discovery should not be permitted unless denial would cause prejudice or injustice to petitioners.

In response, Petitioners argued the following:

1. In issues relating to fundamental fairness, the Board may look beyond the record;

2. Petitioners have not waived their right to raise the issue of fundamental fairness because they did not become aware of the alleged unfair conduct until after August 8, 1989, the date of the rehearing on the application. Further, the alleged conduct took place after the record was closed;

3. The mayor possesses information relevant to the proceedings, and in his capacity as a member of SWANCC, he has knowledge of contacts with SWANCC;

4. Petitioners do not question the council's motives but are seeking to determine whether the hearing was fundamentally fair concerning ex parte contacts and decisionmaking based on information outside the purview of the general public;

5. Case law does not preclude deposing these public officials;

6. Improper motive need not be established to justify deposing the council members;

7. Discovery by deposition of the public officials need only be relevant; it is not necessary to show a special need, prejudice or injustice; and

8. The council members are "the primary if not the only source of information relating to ex parte communications with SWANCC.

In reply to petitioners' response, Rolling Meadows and its city council made several other arguments:

1. Petitioners' own statements reflect that the council members may not be the only source of information; petitioners did not serve notices of deposition on any SWANCC members;

2. General principles of discovery and deposing members of a legislative body must be distinguished. In E&E Hauling (cited also by Petitioners), the court allowed:

> limited discovery on the issue whether the proceedings at the county board level satisfied statutory requirements of fundamental fairness. [Emphasis added.]
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> E&E Hauling, Inc. v. Pollution Control Board, 116 Ill.App.3d 586, 451 N.E.2d 555 at 593 (Secont Dist., 1983).

Furthermore, the "limited discovery" related to judicially noticeable matter. Similarly, in Waste Management of Illinois Inc. v. Illinois Pollution Control Board, 79 Ill.Dec. 415, 463 N.E.2d 969 (Ill.App.2d Dist. 1984), the discovery focused on a transcript of a meeting not the depositions of municipal legislators.

3. In conflict with petitioners denying that it questions motives, the allegations that the city acted improperly throughout the hearing suggest that petitioners do question the council members motives, which the Board has found not within the proper scope of its review;

4. The subpoenas should be quashed because petitioners have not articulated any reason why the depositions would result in relevant information. The Board denied a motion to issue subpoenas for depositions of county board members in The Village of Hanover Park v. County

Board of DuPage, et al., PCB 82-69, noting:

> This ruling does not foreclose direction to the hearing officer of motions for issuance of subpoena which seek, for articulated reasons, to compel testimony on relevant subjects. (Emphasis added.)

In both the petition and the response to motion to quash, Petitioners did not establish any factual basis to substantiate the allegation of ex parte contacts. Nor were affidavits offered nor depositions of SWANCC officials used to establish a reason for the deposition;

5. Petitioners have waived the right to object to the fundamental fairness of the hearing, since they could have objected before the ordinance was passed; and

6. Since the mayor did not vote, no prejudice can result; his testimony would be irrelevant. Also, the mayor has provided an affidavit that he is not a member of SWANCC, but is the city's delegate to SWANCC.

In reviewing the order of the hearing officer, (1) the absence of a factual basis to support the proposition that deposing the city officials might lead to discovery of facts showing fundamental unfairness of the hearing process and (2) the deference which must be accorded to administrative decisionmaking were clearly key considerations in granting the motion to quash.

The hearing officer acknowledged that petitioners' position is that the action taken by the city council was fundamentally unfair because members "entertained evidence outside the hearing process through ex parte communication ... and negotiated the conditional approval in private without input from or notification to the public..." However, the hearing officer found no facts in the record regarding "who participated in these alleged ex parte meetings, and when and where they were held, or what perhaps was said..." The hearing officer noted that (1) no affidavits were attached to the petition; (2) no response was made to any specifics when the pre-hearing conference was held; and (3) in petitioners' response to the motion to quash, no answer was made amplifying what these contacts may have been.

The hearing officer agreed with petitioners that limitedk discovery, beyond the record developed at the county board, may be appropriate to determine that the governing body satisfied the statutory requirement of fundamental fairness. (E&E Hauling, Inc. v. PCB, 116 Ill.App.3d 587, 451 N.E.2d 566 (Second Dist., 1983).

The Board fully adheres to the principles enunciated in E&E Hauling, below, directing the Board to look beyond the record, where appropriate, in matters concerning fundamental fairness. Petitioner has not provided the Board with an adequate basis for doing so in this case.

> "The Environmental Protection Act by its terms requires that a hearing on a petition for review be 'based exclusively on the record before the county...' (Ill. Rev. Stat., 1981, ch. 111½, par. 1040.1(a), but the spirit and purpose of an enactment will prevail over the literal language if necessary to avoid an unjust or absurd result. (Citation omitted.) To adopt petitioners' argument could visit unjust results on parties actually victimized by unfair or improper procedures not of record. To shielf off-record considerations from judicial review would frustrate the purposes of review since the statute directs the PCB to consider the fundamental fairness of the procedures at the County Board level. E&E Hauling, Inc. v. Pollution Control Board, 116 Ill.App.3d 587, 594." (Emphasis added.)

However, petitioners failed to provide sufficient facts to warrant taking the depositions of the city council members.

In paragraph 7D of their emergency motion, Petitioners state that the city council initially voted to deny site location approval and then, within two weeks and without further meetings, unanimously approved the application. Petitioner believes this strongly suggests ex parte contacts. Secondly, Petitioners quote councilman Menzel's August 8, 1989 statement concerning phonecalls between himself and Councilman Bob Taylor and Councilman William Ball. The quoted passage makes reference to the "internal process that went through" and makes no comment as to parties outside the city council. The Board cannot conclude that these facts lead to the conclusion that ex parte contacts may have occurred. The above mentioned quote is the only "fact" alleged, but it merely indicates that three city council members talked and then reached another conclusion. Despite at least three different opportunities noted by the hearing officer, the Petitioners did not present facts substantiating the requested depositions.

Furthermore, the Board cannot agree with Petitioners contention in paragraph 7B of their emergency motion that "the very nature of the incidents in question dictate that the detailed information required by the hearing officer would not be available until the depositions are taken." The information found deficient by the hearing officer was "who participated in these alleged ex parte meetings, and when and where they were held, or what perhaps was said." (Emphasis added.) If there was any basis to the claim of ex parte communication or meetings in violation of the Open Meetings Act, Petitioners should have presented that basic information or they could have developed it through the less invasive alternative of interrogatories. The Board finds the failure to propound such interrogatories significant.

In SWANCC's motion to quash filed October 25, 1989, SWANCC reiterated the occasions where Petitioners did not offer any facts to support their allegations. SWANCC also added that in interrogatories it posed to Petitioners concerning alleged ex parte communication or closed meetings. Petitioners stated:

> Specific information not presently available. Investigation continues. Statement by Councilman Ball on August 9th to Janet DiMaggio that they had the votes arranged before the reconsideration votes were taken on August 8, 1989. Councilman Manzel's statement on August 8, 1989, that he resented the "back-door politics" regarding the reconsideration vote. The fact that vote to deny site location approval had changed between July 25, 1989 and August 8, 1989, without any further public hearing or discussion in the interim. Investigation continues. Answer to Interrogatory Nos. 5 and 6.
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> and that:
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> Rolling Meadows should have retained independent counsel to conduct hearing, especially in light of fact that Rolling Meadows was both applicant and the hearing body. Investigation continues. Answer to Interrogatory No. 4

Without adequate facts warranting an inference that fundamental unfairness may have occurred in the hearing process, the Board will not unnecessarily invade the proper realm of the city councilmen and search beyond the record. The Illinois Supreme Court, in E&E Hauling, held that "public officials should be considered to act without bias." (E&E Hauling supra.) Similarly, the Board must presume that the city council acted without ex parte contacts in the absence of Petitioners' showing

some facts to the contrary. Absent such justification, the only basis for reversing the hearing officer and deposing these members of the city council would be to allow a probe of the mental processes of the city council members. This the Board will not do.

The Supreme Court of the United States clearly indicated that administrative officials are to be accorded the same deference as judicial officers in being free from interferences with their thought processes. In U.S. v. Morgan, 313 U.S. 409 (1941) [Morgan IV], the Supreme Court looked at whether the decisionmaking process of the Secretary of Agriculture should be examined. Mr. Justice Frankfurter stated the following, in finding that the mind of the decisionmaker should not be invaded:

> But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Morgan v. United States, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare Fayerweather v. Ritch, 15 U.S. 276, 306-7, so the integrity of the administrative process must be equally respected. See Chicago, B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. United States v. Morgan, 307 U.S. 183, 191.

The Board finds that in reasonable deference to the city council, their depositions should not be required, absent some greater showing of a factual basis for alleged ex parte contacts.

The Board notes that contrary to the suggestion of Rolling Meadows in their October 10, 1989 motion to quash (p. 3, par. 3D), 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 Dist., 1983); and Town of Ottawa v. IPCB, 129 Ill.App.3d 121, 472 N.E.2d 150 (Third Dist., 1984).

Today's decision only addresses the issue of depositions of the decisionmakers below. Nothing in this Order should be construed as limiting the Petitioners' right to develop information on ex parte contacts through testimony of other individiuals or by other means.

The Order of the Hearing Officer is hereby affirmed.

IT IS SO ORDERED

Board Members J.D. Dumelle and R. Flemal dissented and Board Member J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 27th day of October, 1989, by a vote of 4-2.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board