ILLINOIS POLLUTION CONTROL BOARD
October 27, 1989

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| 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. | ) | |

DISSENTING OPINION (by J.D. Dumelle):

I dissent from the majority Order adopted October 27, 1989, affirming the decision of the Hearing Officer in which subpoenas for the deposition of the Mayor and Aldermen of the City of Rolling Meadows were quashed. I believe that the Environmental Protection Act (Act) and the record of this proceeding support Petitioners' request to take the depositions of the Mayor and Aldermen on the limited issue of _ex parte_ contacts and Open Meetings Act violations.

As the majority Order sets out a thorough description of the procedural history, I will not repeat the facts here. I would note that Section 5(e) of the Act states as follows:

> In connection with any hearing pursuant to subsection (b) or (d) of this section the Board may subpoena and compel the attendance of witnesses and the production of evidence _reasonably necessary to resolution of the matter_ under consideration. _The Board shall issue such subpoenas upon the request of any party to a proceeding under subsection (d) of this section_ or upon its own motion. (Emphasis added.)

Subsection (d) of Section 5 states in relevant part:

> The Board shall have the authority to conduct hearings *** upon other petitions for review

> of final determinations which are made pursuant to the Act or Board rule and which involve a subject which the Board is authorized to regulate; and such other hearings as may be provided by rule.

I believe that there is no question but that the testimony of the individuals sought to be deposed is "reasonably necessary to resolution of the matter under consideration;" these individuals played an active role in the proceedings below and suggested on the record that there were some kind of communications that occurred off the record.[1] Because Section 5(e) uses the word "shall" in the context of issuing a subpoena for such an individual in these and other specified types of proceedings, I believe that the Board is mandated to issue the subpoenas in this proceeding. I therefore believe that the Hearing Officer's Order should be reversed and that the subpoenas should be issued consistent with the clear legislative directive of Section 5(e). Consistent with this belief, I do not agree with the majority that there is a minimum amount of information which must be alleged before the subpoena will issue.

While I generally agree with the majority and Mr. Justice Frankfurter that "the mind of the decisionmaker should not be invaded," I do not believe that the majority's reliance on U.S. v. Morgan, 313 U.S. 409 (1941), is appropriate in this context. The inquiry here is not why did you vote a certain way. Rather, the inquiry is upon what did you rely in making your decision? Section 39.2 of the Act makes it quite clear that the decisionmakers are to base their decisions solely on the record that is created with respect to the criteria set forth in subsection (a). Because

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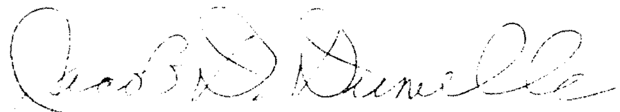
[1] See, e.g., the testimony of Alderman Ball at C-1387, wherein he states:

> 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.)

Section 39.2 specifically limits the area of inquiry, I believe it is appropriate for a third party petitioner to ask limited questions of the decisionmaker regarding what sources of information he relied upon in making his decision so as to ensure that the decision was properly based upon the record, i.e., public information subject to cross-examination. This is a simple question of fact; in this limited respect, the question is not an invasion of the thought processes of the decisionmaker.

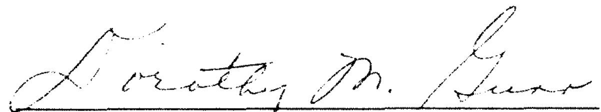
Finally, I would note that Section 40.1(a) requires the Board to include in its review the fundamental fairness of the procedures used by the county board or governing body of a municipality. Ex parte contacts certainly fall within the domain of fundamental fairness of the procedures used by the decisionmaker and, as such, constitute a required inquiry by the Board as it reviews the proceeding. As a policy matter, the majority's decision here to deny depositions on the nature and the extent of ex parte contacts may well delay the ultimate resolution of this proceeding. The ex parte contacts, those that were alleged in Petitioner's motion and those that appear in other parts of the record, must be explored for a proper examination of their effect upon the outcome. Because the majority did not allow such an examination at this time, the Board will be required to revisit the issue when it adopts its final decision. And if, based on the information that currently exists, the Board believes that there may have been inappropriate ex parte contacts, the Board may well remand the proceeding with instructions to review only the existing record and make a decision thereon. However, were the majority to permit the depositions now, the testimony might clarify that the ex parte contacts were not related to the decision, and the matter might not need to be remanded. In this event, the additional expenditure of time and money in the remand proceedings could be avoided.

For these reasons, I dissent.



Jacob D. Dumelle
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 3/rd day of October, 1989.



Dorothy M. Gunn, Clerk,
Illinois Pollution Control Board