

ILLINOIS POLLUTION CONTROL BOARD
September 21, 2000

LAND AND LAKES COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 99-69
)	(Pollution Control Facility
RANDOLPH COUNTY BOARD OF)	Siting Review)
COMMISSIONERS,)	
)	
Respondent.)	

DISSENTING OPINION (by E.Z. Kezelis and S.T. Lawton, Jr.):

We respectfully dissent from the majority decision, because we believe the landfill siting proceedings before Randolph County were fundamentally unfair.

Landfill sitings are often highly controversial, emotionally charged, and locally divisive. Accordingly, the process established by the General Assembly years ago for landfill sitings is designed to balance several competing interests, including the continuing need for landfills and the preference of most people not to live near them. The siting process reserves to local government the crucial role of approving or rejecting siting applications, but tempers the process by prescribing basic ground rules and by providing for an appeal to this Board.

Among those ground rules are the specific criteria the local government must weigh in evaluating a siting application. Those are the nine criteria set forth in Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2 (1998)). Secondly, in recognition of the fact that the structure and procedures of county and municipal governments vary from jurisdiction to jurisdiction, the siting statute leaves procedural details to the local government. This local discretion, however, is again tempered by the Act, because it is left to this Board to determine on review whether the procedures employed by the local government were “fundamentally fair.” 415 ILCS 5/40.1(a) (1998).

The fundamental fairness of the procedures used by county boards and municipal governments is a critical question in the landfill siting process. If the procedures were not fundamentally fair, the decision falls. Accordingly, the elected officials who are charged with the statutory obligation to approve or disapprove landfill siting applications have an extraordinarily difficult burden. On the one hand, they best serve the terms of their elected office by being keenly attuned to the preferences and opinions of their constituents and by carefully taking them into account in voting on the matters before them.

On the other hand, once a siting application is made, the rules change. Even though they continue to serve legislative functions in the positions to which they were elected, an additional

role is thrust upon them: that of impartial adjudicator in a highly controversial proceeding which, nonetheless, must be conducted in a “fundamentally fair” manner.

Prior decisions of this Board and the appellate courts have developed a body of case law that explains what “fundamental fairness” really means in the context of landfill siting proceedings. See *e.g.*, Concerned Citizens for a Better Environment v. City of Havana (May 19, 1994), PCB 94-44, *aff’d* Southwest Energy Corporation v. PCB, 275 Ill. App. 3d 84, 655 N.E.2d 304 (4th Dist. 1995); E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555, *aff’d*, 107 Ill. 2d 33, 481 N.E.2d 664 (1985); City of Rockford v. Winnebago County Board (November 19, 1987), PCB 87-92, *aff’d*, 186 Ill. App. 3d 303, 542 N.E.2d 244 (2nd Dist. 1989). Among other things, fundamental fairness mandates that the decision-makers must be impartial and cannot engage in the types of contacts normally experienced in a legislative context. These contacts, which occur outside the record of a proceeding and which are aimed at influencing the decision of the elected official, are typically referred to as “*ex parte* contacts.” If *ex parte* contacts occur, and if the complaining party suffered prejudice from the improper *ex parte* contacts, the local government decision on the landfill siting application must be reversed. Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682, 698 (2d Dist. 1988). This is true regardless of whether the *ex parte* contacts favor the siting applicant or its opponents.

Based on the record before us, both the majority of this Board and the dissent conclude that numerous *ex parte* contacts occurred. The majority opinion sets forth the *ex parte* contacts in sufficient detail. It is the conclusions that we draw from those *ex parte* contacts that differ from the majority opinion. We believe that the character of the *ex parte* contacts, their cumulative effect, and the failure to place them on the record of the Randolph County Board was prejudicial to Land and Lakes in accordance with the standards set forth in E & E Hauling. Accordingly, we would vacate the decision of the Randolph County Board and remand for further proceedings

Briefly, the record discloses several distinct types of *ex parte* contacts. They can be characterized as falling in one of three types of categories: a) unsolicited telephone calls/personal visits/mail; b) threats and intimidation; and c) Randolph County Board meetings.

Unsolicited Telephone Calls/Personal Visits/Mail

All three Randolph County Board members and all four members of the Planning Commission received unsolicited mail and/or personal visits and/or telephone calls regarding Land and Lakes’ landfill siting application. In some instances, some of the mail was forwarded to the Randolph County Clerk for inclusion in the record. In other instances, it was not. As for the personal visits and telephone calls, which ranged from “one or two” to “two to three dozen,” their substance was not placed on the record before the Randolph County Board.

While all seven individuals generally testified that they did not consider the substance of those *ex parte* communications in making their determinations, the proper method of addressing them would have been to turn the letters over to the Randolph County Clerk for inclusion in the record, and to memorialize the personal visits and telephone calls by disclosing that they had occurred and by summarizing their substance on the record. City of Rockford v. Winnebago County Board, 542 N.E.2d at 252. They did not.

Moreover, unlike the majority, we believe the *ex parte* communications received by the Planning Commission were also significant. It was this entity that interpreted the County's solid waste plan so as to conclude that the 1 1/2 mile set back was an exclusionary factor within the plan.

Threats, Pranks, and Intimidation

At the time of Land and Lakes' siting application, Ron Stork was the chairman of the Randolph County Board. In addition to receiving the greatest number of unsolicited telephone calls, he was also the target of threats and attempts at intimidation. These incidents included vandalism at his construction business in the form of a warning telephone call and then four flat tires; a package of garbage in the mail; faked floral and furniture orders; and a fake telephone call claiming his wife would be paying the entire Chamber of Commerce's lunch tab. In addition, he received a personal visit from a customer for whom Stork's company had built at least ten construction projects. The purpose of the customer's visit was to tell Stork that he did not think it would be good for Stork's business if the landfill was approved. Tr. at 103-104. Because of his concern over these incidents, Stork went so far as to have a trace mechanism installed on his home and business telephones.

Most importantly, Stork testified that these events cumulatively "had an effect" on his ability to make a decision. He did not however, memorialize any of them on the record before the Randolph County Board.

Randolph County Board Meetings

In my opinion, two meetings of the Randolph County Board raise the issue of *ex parte* communications. The first took place on August 24, 1998. The second took place on October 5, 1998. Land and Lakes was not present at either meeting, and the landfill was not on the agenda for either meeting. At both meetings, however, opponents of the landfill were recognized and permitted to speak to the Board about their opposition to it.

Because Land and Lakes became aware of the October 5 meeting, it was given an opportunity to respond to statements at the next scheduled Randolph County Board meeting, which took place on October 19. In my opinion, even though that was the meeting at which the Randolph County Board voted to deny siting, it still provided a sufficient cure to the *ex parte* communications of October 5.


No similar cure was provided with respect to the August 24, 1998 Board meeting, however, because Land and Lakes did not learn of it until after the Randolph County Board's decision to deny siting. Land and Lakes' Reply Brief at 10-11. As we have previously held, where a party had no opportunity to respond to the *ex parte* communications, remand is an appropriate remedy. Concerned Citizens of Williamson County v. Bill Kibler Development (January 19, 1995), PCB 94-262.

Conclusion

The record before us makes clear that each of the Randolph County Board members strove to do their best to be fair and impartial. Case law, however, requires more. It also requires

disclosure of *ex parte* communications. Full disclosure did not occur. Furthermore, when those *ex parte* contacts are so extreme as to impact the decision-makers' ability to make a fair and impartial decision, then the fundamental fairness of the entire proceeding is in question. Accordingly, we would vacate the decision of the Randolph County Board and remand to that Board for further proceedings in accordance with well-established case law.

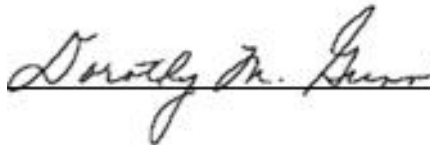
For these reasons, we respectfully dissent.



Elena Z. Kezelis
Board Member

Samuel T. Lawton
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that this dissenting opinion was submitted on the 25th day of September 2000.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board