ILLINOIS POLLUTION CONTROL BOARD
July 16, 1987

JOHN ASH, SR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 87-29
	)	
IROQUOIS COUNTY BOARD,	)	
	)	
Respondent.	)	

SUPPLEMENTAL OPINION (by J. Anderson):

While I supported the majority opinion insofar as it went, I believe that the opinion should have included a finding of lack of fundamental fairness due to the County Board's members' failure to consider the evidence, even to a degree sufficient to meet the Homefinders standard. While there is a substantial body of case law that supports the proposition that one cannot inquire into the mind of the decision-maker, in this case the members did in fact put this information into the record. The County's admission that ten of its members neither attended any of the hearings nor read any of the transcripts is a matter of record in this case and should not have been ignored by the Board.

The County argues that all of its members were exposed to enough of the evidence to warrant a finding that the County as a whole "considered" the record. In support of this contention, the County asserts that all of the members who voted considered the evidence because each received: 1) letters from Ash and his associate Mike Watson discussing their rationale for why the application should be granted, 2) legal briefs submitted by Ash's counsel and counsel for a group of citizens who objected to Ash's application, and 3) a 1 1/2 hour, point-by-point briefing on the resolution drafted by the committee. Board R. at 194-196.

Central to this issue is the definition of "consider". It is defined in Black's Law Dictionary (1979) as:

> To fix the mind on, with a view of careful examination; to examine; to inspect. To deliberate about and ponder over. To entertain or give heed to.

Given the myriad variations which can occur in landfill siting proceedings, let alone other proceedings, I am not asserting that this Board can or should attempt to give overall definitive guidelines for what steps must be taken to assure that consideration of the evidence has been undertaken. However, I

believe that where no individual, independent scrutiny of the evidence has occurred at all, the Board can conclusively determine under this definition that consideration has not taken place.

In this case, where a majority of the County Board had not heard or read any of the evidence, relying instead on how others felt the evidence should be weighed, I believe that the Board, whose will is expressed by a majority, did not consider the record. In other words, the Board did not consider the record, it considered only what others said about the record. I also note that the committee's 1 1/2 hour presentation occurred just before the vote, a vote that could not be postponed because of the decision deadline. Thus, the County Board members had no real opportunity, even if anyone had wanted to, to review the record in light of what they had just heard.

I wish to emphasize that I am not suggesting that those who briefed the record were not being conscientious. However, when the majority of the members who cast votes openly assert that they have no real first-hand knowledge of the evidence as presented over nine days of hearing, it is inconceivable that they have "examined", "inspected", "pondered over", or "given heed to" the evidence, let alone fixed their mind on the evidence "with a view to careful examination". The county has therefore clearly not properly exercised it's responsibility to give a fair hearing in the case brought before it by Mr. Ash. The same would hold true if the county had voted to approve.

I appreciate the difficulty that elected local officials, who are most often part-time and are accustomed to making decisions in a legislative mode, have in coping with quasi-judicial, record-based mandates. However, in the unique SB172 proceedings, the courts have consistently ruled that the county and municipal boards cannot use their traditional way of interacting legislatively with each other, with the public, or with their committees.

The court has held that both the hearings and the decision are quasi-judicial, not legislative.

In the usual legislative setting, local board members are accustomed to making their own determination as to what information they choose to independently consider and upon whom they choose to rely. In this case that is exactly what they did. However, if no more is required than this in making a quasi-judicial determination, then I see no distinction at all regarding consideration of the record.

The Appellate Court has held that SB172 doesn't require the County Board members to attend all the hearings. I do not construe the Court's language as suggesting that the board

members can totally rely on a minority of county or municipal board members designated to attend the hearings and review the evidence (or whomever else they may designate, if they designate anyone at all) for their information. I feel also, that such an interpretation is contrary to the language of Sec. 39.2 and Sec. 40.1 of the Act.

I also note that, when the County Board voted, it failed to take separate votes on each of the criteria. The Board in a single vote, unanimously denied approval based on a rejection of all of the criteria. In considering questions of fairness one often needs to look at a series of events. While this vote, taken alone, would not suggest fundamental unfairness, I feel that this action, taken in context with the decision-making pattern in this case, may be indicative of the deference of a majority to a minority.

I wish also to note that it is tempting to defer to the county's "traditional" reliance on its committee system in this csse. But where does this type of reasoning lead us? Does this mean that a commission county that appoints, say, one of its members as a "committee of one" to attend the hearings can totally rely on that one person's summation? Does this mean that total reliance can be placed on a committee whose members may or may not attend all, or even most of the hearings? Are we suggesting that it is all right as long as a committee or someone presents a summation, regardless of its quality? Or will we review the quality of the summation? How could we do this without getting into the merits?

Are we suggesting that a county or municipality that sets up a "non-traditional" pattern to handle SB172 hearings would have a lesser ability to defer? It has not been uncommon in SB172 proceedings for an urban county to assign record analysis and even recommendations to its professional staff. Whether or not this is "traditional" for that county, can a majority of individual board members rely solely on this staff analysis? There are substantial dissimilarities among and within units of local government in the manner in which they procedurally organize and in the dynamics of their decision-making processes. I do not believe that weight should be given to any alleged or assumed "traditional" pattern as a basis for determining whether there is a lack of fundamental fairness.

In this case one need only to see that the lack of <u>any</u> personal record review by a majority of the County Board members, while a preogative in a legislative context, is not fundamentally fair in an SB172 proceeding. I believe that such a holding by the Pollution Control Board would not only have been correct, but also would have been helpful in giving more direction to the counties and municipalities who are understandably having difficulty coping with SB172.

Joan G. Anderson
Board Member

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion was adopted on the 31st day of July, 1987.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board