ILLINOIS POLLUTION CONTROL BOARD
April 5, 2005

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Petitioner,	)	
v.	)	PCB 04-186
	)	(Pollution Control Facility
COUNTY BOARD OF KANKAKEE COUNTY,	)	Siting Appeal)
Respondent.	)	

HEARING OFFICER ORDER

On March 15, 2005, petitioner Waste Management of Illinois, Inc. (WMII) filed a motion to compel answers to questions it had posed in discovery depositions taken between June 22, 2004 and November 12, 2004. These questions related to reasons why certain members of the respondent County Board of Kankakee (County Board) had voted against the siting application at issue here. On March 30, 2005, the respondent filed its response in opposition.

For the reasons set forth below, the petitioner's motion is denied. Consistent with prior Board precedent, the integrity of the decision making process of the Kankakee County Board requires that the mental processes of the decision-makers be safeguarded here, where petitioner WMII has made no strong showing of bad faith or improper behavior to justify any inquiry into the decision making process. *See, e.g.*, Rochelle Waste Disposal, L.L.C. v. City Council of the City of Rochelle, Illinois, PCB 03-218 (April 15, 2004).

Procedural Status of the Case

This case involves WMII's second application to the Kankakee County Board for approval to expand its existing 179-acre landfill in unincorporated Kankakee County. The expansion would increase the Kankakee Landfill site to 664 acres including a 302-acre disposal site. The expansion includes all of the existing 179 acres. To understand the procedural posture of this case, the circumstances of both applications is briefly described below.

WMII's 2002 Siting Application/County Board's 2003 Denial

On August 16, 2002, WMII filed its first siting application (2002 application) with the Kankakee County Board. The County Board held 11 days of hearing and granted siting approval on January 31, 2003. The City of Kankakee (City), Merlin Karlock (Karlock), Michael Watson (Watson), and Keith Runyon (Runyon) all filed separate petitions under Section 40.1(b) of the Act, asking the Board to review the County's decision. The petitions argued that the County lacked jurisdiction to consider the application, that the proceedings were fundamentally unfair,

and that the County decision was against the manifest weight of the evidence.

The Board vacated the County Board's decision on jurisdictional grounds, and so found no need to reach any of the other issues raised. The Board found the County lacked jurisdiction because WMII failed to notify a nearby landowner of its siting application in accordance with Section 39.2(b) of the Act. *See* County of Kankakee and Edward D. Smith, States Attorney of Kankakee County v. The City of Kankakee, Illinois, City Council, Town And Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. (PCB 03-31), Byron Sandberg v. The City of Kankakee, Illinois, City Council, Town and Country Utilities, Inc., and Kankakee Regional Landfill, L.L.C. (PCB 03-33), Waste Management of Illinois v. The City of Kankakee, Illinois, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. (PCB 03-35) (Cons.) (Jan. 9, 2003).

The Second District Appellate Court has recently affirmed the Board in a published decision. Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, County of Kankakee, County Board of Kankakee, City of Kankakee, Merlin Karlock, Keith Runyon, and Michael Watson, No. 3-03-0924 (February 4, 2005). WMII has filed a petition for leave to appeal in the Supreme Court.

WMII's 2003 Siting Application/County Board's 2004 Denial

On April 22, 2004, the petitioner filed a petition for review of the County Board's March 17, 2004 denial of siting approval to WMII's September 26, 2003 application (2003 application). WMI asserts that the County Board's proceedings were fundamentally unfair, and that the County Board's findings that criteria 1, 3, and 6 of Section 39.2 of the Environmental Protection Act (Act) had not been met were against the manifest weight of the evidence.

WMII began deposing members of the Kankakee County Board in this case on June 22, 2004 and concluded in January 2005. These County Board members refused to answer questions about their reasons for disapproving the 2003 application, even though they had approved the 2002 application.

On March 2, 2005, hearing in this case was set to begin April 6, 2005. On March 15, 2005, WMII filed its motion to compel answers to the unanswered deposition questions. The decision deadline in this case is currently June 16, 2005, pursuant to WMII's waiver received February 16, 2005 .

Petitioner WMII's Motion To Compel

The petitioner's motion to compel seeks an order allowing discovery as to the reasons certain members of the County Board denied the petitioner's sitting application they had previously approved. *See* County of Kankakee and Edward D. Smith, States Attorney of Kankakee County v. The City of Kankakee, Illinois, City Council, Town And Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. (PCB 03-31), Byron Sandberg v. The City of

Kankakee, Illinois, City Council, Town and Country Utilities, Inc., and Kankakee Regional Landfill, L.L.C. (PCB 03-33), Waste Management of Illinois v. The City of Kankakee, Illinois, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. (PCB 03-35) (Cons.) (Jan. 9, 2003).

Petitioner WMII makes three main arguments:

1) The petitioner first agues that since there was no administrative findings by the County Board explaining their reasons to deny the petitioner's siting application, the mental process and/or the deliberative process privileges do not apply, and the County Board members should be compelled to explain the basis for their changes of position.

2) The petitioner next argues that the mental process and/or deliberative process privileges do not apply when circumstances indicate bad faith or improper behavior in the decision making process. Petitioner alleges that the mere fact that the County Board voted to deny the petitioner's application, without explanation, implies bad faith or improper behavior sufficient to overcome the mental process and/or deliberative process privileges.

3) Finally, the petitioner argues that post-decisional conversations are not protected by the mental process and/or deliberative process privileges. Here, WMII asserts that that Michael Van Mill, the County's planning director, testified at a deposition that he had discussed the County Board's vote on the second application with Culver James Vickery, a County Board member, after the County Board rendered its decision to deny the application. The County Board's attorney objected and the substance of the post-decisional conversations were not disclosed. WMII contends that it is now entitled to have the question answered.

The Respondent Count Board's Response In Opposition

Prior to answering WMII's arguments in turn, the respondent County Board first urges that the petitioner's motion to compel should be denied on the grounds that it was untimely. The respondent cites a number of reasons why allowing discovery would be prejudicial here, where WMII waited four months to compel answers to discovery questions County Board members refused to answer at depositions between June 22, 2004 and January 2005.

As to WMII's specific arguments, in summary the County Board responds that:

1) The respondent contends that the County Board's final administrative findings in its written March 17, 2004 decision are sufficient under Section 39.2 of the Illinois (Act), and therefore prohibits the petitioner from invading the mental process and/or deliberative process of the County Board.

2) Next, the respondent argues that the mere fact the County Board voted to deny the petitioner's 2003 siting application (second application) when it had previously approved the earlier 2002 application (first application), petitioner has failed to establish either a strong showing of bad faith or improper behavior that would overcome the mental process and/or deliberative process privilege recognized by the Board. The respondent also challenges WMII's

conclusion that the two applications and records of proceeding were "substantially identical". The County Board notes that new and different information, particularly as to criteria 1,3 and 6 was presented by the petitioner to the County Board regarding the 2003 siting application that was denied in 2004.

3) Finally, the respondent argues that a decision-maker cannot waive the mental process and or deliberative process privilege, even in a post-decisional context.
See Response, and cases cited at pp.18-21.

Discussion

On appeal of a municipality's decision to grant or deny a siting application, the Board generally confines itself to the record developed by the municipality. 415 ILCS 5/40.1 (b) (2004). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record. Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E. 2d 188, 194 (3d Dist. 2000). The Board has previously held that the integrity of the decision making process requires that the mental processes of the decision-makers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made. Rochelle Waste Disposal, L.L.C. v. City Council of the City of Rochelle, Illinois, PCB 03-218 (April 15, 2004). Public officials, however, should be considered to act without bias. E & E Hauling, Inc. v. PCB, 107 Ill. 2d 33, 42, 481 N.E.2d 664, 668 (1985). The presumption of the impartiality of the actions of a public official will be overcome only where it is shown by clear and convincing evidence that the official has an unalterably closed mind in critical matters. *See* A.R.F. Landfill, Inc. v. Lake County, PCB 87-51 (Oct. 1, 1987).

First, respondent's argument that the County Board failed to explain its reasons for denial in its decision fails. The Board and courts have held that "the County Board need only indicate which of the criteria, in its view, have or have not been met." E & E Hauling, Inc., 481 N.E.2d at 609. The County's March 17, 2004 decision does so, and Section 39.2 of the Act requires no more.

Second, WMII's arguments fall far short of a sufficient of showing of bad faith or improper behavior sufficient to overcome the privilege generally given to a decision-maker's thought processes. Here, assuming for the sake of argument that the second application was "substantially" similar to the first application, as petitioner alleges, the mere fact that members of the County Board changed position between the first and second proceedings and voted "no" is insufficient to overcome the presumption of impartiality given to their actions. A change in position alone does not provide reason to invade the mental process and/or deliberative process privilege of the County Board members. Sam Dimaggio, Carl Piacenza, Dana Piacenza, Robert Nikolich, Houstoun M. Sadler, Linda Vukovich and William A. Wegner v. 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, PCB 89-138 (October 27, 1989. Further, there is reason to believe that the 2002 and 2003 applications were simply not "substantially" the same: the cover letter regarding the site location application from the petitioner's attorney to the County Board reveals that there was indeed additional or new

information regarding the second application where the letter states that "with the exception of updated information concerning ordinance requests, criteria 1, 3 and 8 reports, and new information relating to pre-filing notice, this application is the same as the one filed August 16, 2002." *See* Resp. Response, ex. B. The respondent also represents that there was additional information addressing the criteria heard by the County Board at the siting hearing.

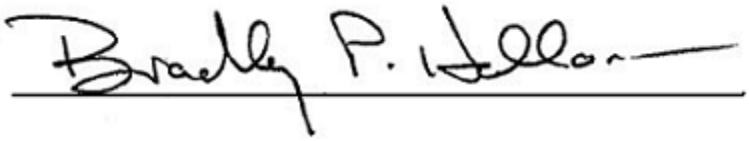
Third, petitioner fails to persuade that here the decision-maker's mental process and/or deliberative process privilege were waived during post-decisional conversations discussing the vote. It is noted that the petitioner represents first that the conversation between Mr.Van Mill, the County's planning director and County Board Member Vickery did not bear on any decision-making process and cites to the deposition transcript. *See* Pet. Mot. at 7. Later in the pleading, petitioner appears to represent that indeed the conversation between Van Mill and Vickery pertained to the reason why Vickery changed his vote. *See* Pet. Mot. at 10. The hearing officer was not supplied with the cited transcript.

In any event, and taking petitioner's later representation as to the nature of the conversation as true, any such conversation is irrelevant to these proceedings. The Board has held that the decision-maker cannot waive the mental process and/or deliberative process privilege. Land and Lakes Company, JMC operations, Inc., and NBD Trust Company of Illinois as Trustee Under trust No. 2624EG v. Village of Romeoville, PCB 92-25 (June 4, 1992). The hearing officer finds that for purposes of the mental process and/or deliberative process privileges, and based on the facts presented here, the privileges are not defeated or waived when a County Board member discusses his decision with another county employee after the County Board renders its decision.

Finally, the hearing officer agrees with the County Board's assessment that petitioner's motion could be dismissed due to its untimely filing. It appears that petitioner first became aware of this mental process and/or deliberative process issue during the deposition of a County Board member in the summer of 2004. It also appears that petitioner decided not to file its motion to compel until the last of the County Board member's deposition was completed in January 2005. The hearing officer finds no valid reason for petitioner waiting to March 15, 2005, 3 weeks before the hearing, to file its motion. However, due to the time constraints of this siting appeal, the hearing officer addressed the motion to compel, and did not dismiss it as untimely, in the interest of "development of a clear, complete, and concise record for timely transmission to the Board." *See* 35 Ill. Adm. Code 101.610.

For all of these reasons, petitioner WMII's motion to compel discovery is denied.

IT IS SO ORDERED.



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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order was mailed, first class, on April 5, 2007, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 5, 2007:

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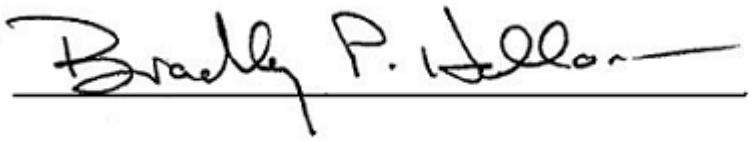

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