

ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CLERK'S OFFICE

DEC - 4 2002

STATE OF ILLINOIS
Pollution Control Board

COUNTY OF KANKAKEE, ILLINOIS,)
and ED SMITH, KANKAKEE COUNTY)
STATE'S ATTORNEY,)

Petitioner,)

v.)

THE CITY OF KANKAKEE, ILLINOIS)
CITY COUNCIL, TOWN AND COUNTRY)

UTILITIES, INC. and KANKAKEE)
REGIONAL LANDFILL, L.L.C.,)

Respondents.)

No.: PCB 03-31
(Third-Party Pollution Control Facility
Siting Appeal)

BYRON SANDBERG,)

Petitioner,)

v.)

THE CITY OF KANKAKEE, ILLINOIS)
CITY COUNCIL, TOWN AND COUNTRY)

UTILITIES, INC. and KANKAKEE)
REGIONAL LANDFILL, L.L.C.,)

Respondents.)

No.: PCB 03-33
(Third-Party Pollution Control Facility
Siting Appeal)

WASTE MANAGEMENT OF ILLINOIS,)
INC.,)

Petitioners,)

v.)

THE CITY OF KANKAKEE, ILLINOIS)
CITY COUNCIL, TOWN AND COUNTRY)

UTILITIES, INC. and KANKAKEE)
REGIONAL LANDFILL, L.L.C.)

Respondents.)

No. PCB 03-35
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NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on December 4, 2002, we filed with the Illinois Pollution Control Board, the attached **WASTE MANAGEMENT OF ILLINOIS, INC.'S REPLY BRIEF** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____

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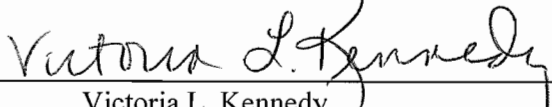
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WASTE MANAGEMENT OF ILLINOIS, INC.'S
REPLY BRIEF

Petitioner, WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), by and through its

attorneys Pedersen & Houpt, submits this brief to reply to the following matters raised in Applicant's Brief.

A. The February 19, 2002 Meeting Was A Hearing At Which the City Council Prejudged Town & Country's Siting Application

On February 19, 2002, Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. ("T&C"), through its principal, Thomas Volini and Attorney George Mueller, presented documentary evidence and expert witnesses to the Kankakee City Council in support of T&C's application for siting approval of its proposed 400-acre sanitary landfill. The meeting was referred to by Mayor Green as a "special presentation" for which he requested the City Council's "special indulgence". City Council 2/19/02 Tr. at 5. In fact, the meeting was conducted as a hearing to consider the T&C application.

The Mayor presided over the T&C presentation as if he were a hearing officer. He introduced the T&C siting request, stated that any member of the City Council could ask questions, and turned the floor over to Mr. Volini. City Council 2/19/92 Tr. at 6. Mr. Volini discussed T&C, its qualifications and experience. City Council 2/19/02 Tr. at 7. He introduced T&C's siting team, including its lawyer, Mr. Mueller, and its expert witnesses. City Council 2/19/02 Tr. at 7-8. He offered a set of documents in support of the siting request, and later explained them. City Council 2/19/02 Tr. at 8, 15-18. He told the City Council that "(w)e're on trial" and "(y)ou're on trial." City Council 2/19/02 Tr. at 8. He then had Mr. Mueller talk about the legal setting and the siting process. City Council 2/19/02 Tr. at 8-9.

Mr. Mueller made an opening statement. He described the siting process and Section 39.2 of the Illinois Environmental Protection Act. He told the City Council that they are the jury,

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and perform a quasi-judicial role. He stated that the evidence which will be presented supports the 10 criteria, and that the decision must be made on the evidence. City Council 2/19/02 Tr. at 9-10. He pointed out that if the City Council finds that T&C has established the statutory criteria, the proposal still has to be reviewed by the Illinois Environmental Protection Agency. City Council 2/19/02 Tr. at 10.

Two expert witnesses made presentations. Mr. Devin Moose, T&C's principal witness at the siting hearings that commenced June 17, gave expert opinion on each of the nine statutory criteria and explained how T&C satisfied those criteria. City Council 2/19/02 Tr. at 11-14. Ms. Jamie Simmon warned the City Council about "landfill opponents" and "environmentalists" who will quote from outdated reports in an effort to show that "all landfill liners eventually will leak." City Council 2/19/02 Tr. at 15. To defeat this controversy and confusion, she urged the City Council understand the science and hear the evidence in making its decision. City Council 2/19/02 Tr. at 15.

After Mr. Volini explained the submitted documents, Mayor Green allowed the City Council members to ask questions. City Council 2/19/02 Tr. at 18. During the course of the questioning, Mayor Green at one point interceded and decided to answer a question himself. In response to an inquiry from Alderman Williams, he stated that "we're not just proposing a landfill..." City Council 2/19/02 Tr. at 26 (emphasis supplied).

Mayor Green concluded the presentation made by T&C by thanking Mr. Volini and T&C, and stated that "it was very important that we lay all these issues out on the table..." City Council 2/19/02 Tr. at 28.

As demonstrated by the conduct of the February 19 meeting, T&C's siting request was presented and argued to the City Council. The purpose of the presentation was to inform the City Council about the siting process and the merits of the siting request. The intent was to create a favorable impression of T&C and its siting request. In such circumstances, one is compelled to conclude that T&C intended to persuade the City Council of the application's merits.

In addition, Mayor Green not only presided over the presentation, but he also became an advocate for the proposal before the City Council. His power and influence as chief executive officer of the City was evident and undeniable. He encouraged the City Council's review and consideration of the T&C siting request at February 19 meeting. He declined to inform the City Council that they should not decide the request until after all the evidence at the subsequent public hearings could be considered. He did not warn them against prejudging the facts. By his words and actions at the February 19 meeting, he left the clear impression that favorable consideration of the T&C request that "we're proposing" would be appropriate.

T&C argues that the record is totally devoid of any evidence of actual prejudgment. Applicant Brief at 15. It states that there is no evidence that any City Council member based his or her decision or anything other than the evidence presented at the siting hearing. Applicant Brief at 15. T&C's argument is unavailing.

It is true that there is no evidence in this record of a City Council member admitting that he or she favorably decided the siting request on February 19, 2002, or at any time prior to the submission of evidence. WMII is unaware of any reported instance in local siting act

jurisprudence where a decisionmaker made such an admission. However, the lack of such an express admission does not foreclose the inquiry on prejudice of the application.

Circumstantial or indirect evidence of prejudice is allowed. In the absence of an express admission, a party should be permitted to present evidence from which the existence of prejudice can be inferred. See E & E Hauling v. Pollution Control Board, 116 Ill.App.3d 586, 451 N.E.2d 555, 565 (2d Dist. 1983), aff'd 107 Ill.2d 33 (1985) (standard for determining prejudice is whether a disinterested observer might conclude that decisionmaker had in some measure adjudged the facts and the law before hearing the case) (emphasis supplied); Residents Against A Polluted Environment v. Illinois Pollution Control Board, 293 Ill.App.3d 219, 687 N.E.2d 552, 555 (3d Dist. 1997) (allowing inference of bias as an appropriate standard to evaluate fundamental fairness); see also In Re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 654-55 (7th Cir. 2002) (in action alleging illegal agreement to fix prices, plaintiff may present circumstantial or indirect evidence from which existence of such agreement may be inferred).

The evidence supporting the conclusion that the City Council members favorably prejudged the siting request is substantial:

1. The February 19 meeting is directed by Mayor Green, who serves as both presiding officer and advocate by telling the City Council that "we're not just proposing a landfill, "but "(w)e're proposing a landfill and an industrial park." City Council 2/19/02 Tr. at 26.

2. T&C presents its siting request at the February 19 meeting through (a) its principal, Mr. Volini, (b) its attorney, Mr. Mueller, (c) two expert witnesses and (d) a document package and related exhibits. City Council 2/19/02 Tr. at 6-28.
3. T&C answered questions from City Council members at the February 19 meeting, including a question asked by Alderman Williams and answered by Mayor Green. City Council 2/19/02 Tr. at 26.
4. T&C presented, explained and answered questions about its siting request at the February 19 meeting without participation or objection from the public or interested parties.
5. The City Council, in its August 19 decision, chose to agree with Mr. Moose, a civil engineer, who spoke at the February 19 meeting and has no training or credentials as a hydrogeologist, that the Silurian dolomite under the proposed site is an aquitard, when the overwhelming evidence presented at the hearing, including scientific reports, well water data and statements from four hydrogeologists, conclusively established that the Silurian dolomite under the proposed site is an aquifer.
6. The City Council chose to accept Mr. Moose's stated reliance on selected pages from a Significant Modification Permit Application, filed by WMII with the Illinois Environmental Protection Agency in 1994 concerning the existing Kankakee Landfill, as support for his characterization of the Silurian dolomite as an aquitard, when, in fact,

those pages did not characterize the bedrock as an aquitard but, rather, included conservative assumptions for the purpose of running the groundwater model for the existing landfill as required by the IEPA. See infra p. 9.

7. The City Council agreed that the T&C proposal was consistent with the Kankakee County Solid Waste Management Plan, as amended, when the plain and unequivocal language in the County Plan clearly provides for a single landfill in the County and that this landfill is the expanded Kankakee Landfill. Only in the event the expansion of the Kankakee Landfill is not approved could the T&C proposal possibly be deemed consistent with the County Plan. The expansion of the Kankakee Landfill has not, to date, been disapproved.

8. The City Council voted unanimously (13-0, with one abstention) to approve T&C's siting request.

Based upon these facts and the undisputed actions of Mayor Green and the City Council, a disinterested observer may conclude the members of the City Council had prejudged the T&C siting request in advance of hearing it. E & E Hauling, 451 N.E.2d at 565. The February 19 presentation was the means and opportunity for the City Council to prejudge the request. The City's August 19 written decision confirms the fact of the Council's prejudgment.

T&C also asserts that elected officials are presumed to act objectively. Applicant's Brief at 15-16. This is true, as is T&C's statement that a minimal showing of bias must be made to warrant a remand. Applicant's Brief at 15-16. The presumption may be overcome by showing

that the proceedings contained an unacceptable risk of bias. Goodwin v. McHenry County Sheriff's Office, 306 Ill.App.3d 251, 713 N.E.2d 818, 823 (2d Dist. 1999).

Here, the risk of prejudgment permeated the proceedings. The February 19 meeting set the tone for the official siting process commencing with the filing of the siting application on March 13, 2002. Indeed, the circumstances were propitious for favorable review and decision. The application was presented to and considered by the City Council on February 19 under the mayor's direction and without objection. The mayor conveyed his approval of the request by aligning himself with T&C ("we're proposing a landfill"). The City Council was not advised against prejudgment by the mayor.

The fact of prejudgment became clear with the City's granting of siting approval on August 19. In the face of compelling and overwhelming evidence to the contrary, the City Council unanimously found in T&C's favor on criteria two and eight. Based upon the substantial evidence described above, it is appropriate to conclude that the City's August 19 decision was effectively made February 19. Such prejudgment is fundamentally unfair and the siting approval should be reversed.

B. The Public Was Denied the Right to Attend and Participate in the Public Hearing.

T&C admits at least fifty (50) people did not get into the hearing room on the first night of the hearings, June 17. Applicant Br. at 24. These individuals did not hear any announcement that people could sign up to participate. IPCB 11/4/02 Tr. at 80, 107. Many left because they could not get into the hearing room. IPCB 11/4/02 Tr. at 66, 108. Most did not return because of their experience that evening. IPCB Tr. at 66, 108.

The public hearing is the most critical stage of the site approval process. American Bottom Conservancy v. Village of Fairmont City, No. PCB 00-200, slip op. at 6 (October 19, 2000). The public hearing must include the right to appear and the opportunity to be heard. Daly v. Pollution Control Board, 264 Ill.App.3d 968, 970, 637 N.E.2d 1153, 1155 (1st Dist. 1994).

At least 50 people were deprived of their right to appear and be heard on June 17. Many left, never to return, because they were denied access to the initial public hearing. This denial was fundamentally unfair, and requires reversal of the siting approval

C. The City's Finding That T&C Satisfied Criterion Two Is Against the Manifest Weight of the Evidence.

T&C argues that WMII's assertion that T&C inaccurately characterized the Silurian dolomite "displays a profound misunderstanding of the overwhelming evidence that the specific geologic characteristics of the site are well understood..." Applicant's Brief at 26. T&C's argument is fatuous. Not only does T&C ignore all of the scientific information, water well data (including data contained in its own siting request) and the statements of four hydrogeologists regarding the proper characterization of the bedrock, it also purports to rely on information contained in selected pages of a Significant Modification Permit Application prepared in 1994 by WMII ("Significant Modification") for the existing Kankakee Landfill. Such reliance is misplaced, because the selected portions of the Significant Modification were not intended to characterize the dimensions of the geologic units at the Kankakee Landfill site.

As stated by its authors, the Significant Modification clearly characterizes the bedrock as an aquifer, not an aquitard. The assumption that the aquifer was 10 feet thick was made for

groundwater modeling purposes. IEPA guidance states that 10 feet should be assumed. This input value is conservative and represents a condition that will most likely cause failure of the model. Public Comment, Letter dated July 25, 2002 by Joan Underwood, Hydrogeologist. In fact, Ms. Underwood stated that the Silurian Dolomite is an aquifer under the T&C site.

Mr. Moose's testimony cannot overcome, much less refute, the exhaustive scientific data and evidence that contradicts it. The City's favorable finding on Criterion Two, based upon this erroneous conclusion, is clearly, plainly and obviously wrong and, therefore, is against the manifest weight of the evidence.

D. The City's Finding that the T&C Proposal Was Consistent With the Kankakee County Solid Waste Management Plan Is Against the Manifest Weight of the Evidence.

T&C cites to the testimony of Dr. Allen Shoenberger in support of its contention that Criterion Eight was satisfied. Applicant Brief at 35-37. However, the Hearing Officer struck most of Dr. Shoenberger's testimony regarding the validity of the County and City Plans and the City's authority to exercise siting jurisdiction, and "precious little remained." Applicant Brief at 25.

T&C then attempts to rely on the testimony of Mr. Moose in response to a question on plan consistency from the City staff. Mr. Moose was not disclosed or identified as a witness on plan consistency, nor was he qualified to give an opinion on the issue. Nonetheless, the Hearing Officer denied a motion to strike and allowed the testimony to stand, notwithstanding the inability of any participant or member of the public to cross examine Mr. Moose because the

answer was provided in response to a question from City staff. Based upon his lack of qualifications and the procedural unfairness, Mr. Moose's testimony is entitled to no weight and should be disregarded.

The plain language of the County Plan provides for one landfill in Kankakee County. The expansion of the existing facility is the preferred alternative. Only if and when the existing landfill is denied authority to expand, may it be possible to find that the T&C proposal is consistent with the County Plan. The mere fact that the siting request to expand the Kankakee Landfill was not approved at the time the City considered the T&C request is not legally or logically sufficient to justify a finding of plan consistency for the latter. At a minimum, a final disapproval of the Kankakee Landfill expansion would have been required before any finding of consistency with the County Plan could have been made.

WMII agrees with Petitioner County of Kankakee that the proper standard of review of the City's finding on Criterion Eight is de novo. Based upon the plain meaning of the County Plan, however, WMII submits that, under either standard of review, the City's finding on Criterion Eight is clearly erroneous and against the manifest weight of the evidence.

T&C next argues that the County of Kankakee cannot preclude the City from exercising its siting jurisdiction, that the Illinois Constitution and statutes protect the City's siting authority, and that the County of Kankakee's amendments to its Plan are invalid. Applicant Brief at 38-43.

These arguments require this Board to construe and apply the Illinois Constitution and the cited statutes to the Illinois Environmental Protection Act and the Kankakee County Solid Waste Management Plan. The Board lacks this authority. Land and Lakes Company v.

Randolph County Board of Commissioners, No. PCB 99-69, slip op. at 32 (September 21, 2000).

The Board may review the City decision and whether the T&C proposal is consistent with the County Plan as written pursuant to Section 40.1(a) of the Act. 415 ILCS 5/40.1 (2000).

However, the Board is not authorized to review or determine the validity of the County Plan.

Land and Lakes Company, slip op. at 32.

CONCLUSION

The City of Kankakee's August 19, 2002 grant of local siting approval should be reversed on the grounds that the local siting process was fundamentally unfair and that the City's findings on Criteria Two and Eight are against the manifest weight of the evidence.

Respectfully submitted,

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