

CERTIFICATE OF SERVICE

I, Charles F. Helsten, an attorney, certify that I have served the attached **Motion for Reconsideration of PCB Opinion and Order** on the named parties below by electronic service and by depositing the same in the U.S. mail at 100 Park Avenue, Rockford, Illinois 61101, at 5:00 p.m. on May 26, 2016.

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/s/Charles F. Helsten

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WILL COUNTY, ILLINOIS)

Petitioner,)

v.)

VILLAGE OF ROCKDALE, BOARD OF)
TRUSTEES OF VILLAGE OF ROCKDALE)
and ENVIRONMENTAL RECYCLING AND)
DISPOSAL SERVICES, INC.,)

Respondents.)

PCB No. 2016-054
(Pollution Control Facility
Siting Appeal)

MOTION FOR RECONSIDERATION OF PCB OPINION AND ORDER

NOW COMES the Petitioner, WILL COUNTY, ILLINOIS, by and through its attorneys HINSHAW & CULBERTSON, LLP, pursuant to 35 Ill. Admin. Code 101.520 and moves this Honorable Board to reconsider its Order of April 21, 2016. In support thereof, Will County states as follows:

A. Legal Standard

The rules of the Pollution Control Board ("PCB") permit a Motion for Reconsideration under Section 101.520. Such a Motion must be filed within 35 days after the date of receipt of the Order in question. 35 Ill. Admin. Code 101.520(a). The PCB's Opinion and Order was filed on April 21, and received by counsel for Will County on April 27, and April 28, 2016 (respectively). This Motion is therefore timely.

"In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Admin. Code. 101.902. "The purpose of a motion to reconsider is to bring to the [PCB's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 626 (1991).

Because the PCB erroneously applied the law on review of the Village Board's siting approval, it should reconsider its Opinion and Order and reverse the Village Board.¹

B. PCB's Role on Review

The Illinois Supreme Court has made it clear that the PCB has a duty to conduct a hearing, during which the Board must "make factual and legal determinations on evidence." *Town & Country Utilities, Inc. v. PCB*, 225 Ill. 2d 103, 121 (2007). The Board is required to apply its "technical expertise in examining the record to determine whether the record supported the local authority's conclusions." *Id.* at 123. Although the PCB does not "reweigh" the evidence, it must examine the record, using its own technical expertise, to ensure that the decision was not against the manifest weight of the evidence. *Id.* This review is obviously more than a rubber stamp of a local authority's decision. Indeed, in *Town & Country*, the PCB reversed the siting authority's decision because, on its review of the evidence, the Board found that one of the criterion had not been satisfied. *Id.* at 109 ("The Pollution Control Board must consider all of the criteria, although a negative decision as to one of the criteria is sufficient to defeat an application . . .").

It is particularly telling that in *Town & Country*, as in the present case, the siting authority's decision as to one of the criterion was not definitive, but required submittal of additional information during the construction permitting process. *Id.* at 124. The Supreme Court noted that the siting authority's request for "additional assurances" undermined the permittee's contention that the evidence "overwhelmingly demonstrated" that the criterion was met, such that the siting authority's decision was not against the manifest weight of the evidence.

¹ This Motion for Reconsideration focuses on the PCB's errant review of the Village Board's decision on the siting criteria. Will County does not, by this Motion, waive its challenge to jurisdiction, improper amendment of the Application a second time, or unlawful "conditional approval" of the Application.

Id. Although there was evidence in support of the siting authority's decision on this criterion, there was *also* significant evidence that the application did not meet the criterion. Therefore, the Supreme Court upheld the PCB's decision to overturn the siting authority, made using its technical expertise to review the siting authority's decision. *Id.*

Town & Country is the law of this state regarding the PCB's role on review. That case has seemingly been ignored by the PCB, however. The vast majority of cases cited by the PCB in its discussion on the standard of review are prior to *Town & Country*. The PCB summarily cites *Town & Country* without any discussion of the role of the PCB's own technical expertise on review. *Town & Country* actually sets forth a much less deferential process by which the PCB is to review the siting authority's decision. The Supreme Court made it clear that the Board's role is not simply an irrelevant, interim review, and that "final authority as to technical decisions" rests with the *PCB*, not with the local siting authority. *Id.* at 122-23 (noting that "plac[ing] authority as to technical decisions in local hands" likely violates the purpose of the Illinois Environmental Protection Act and that the PCB instead is to conduct a hearing based on the record made before the local authority, applying the PCB's own technical expertise to determine whether that record supports the local authority's decision).

C. The PCB Did Not Fulfill Its Role on Review

As to each of the challenged statutory criteria – here, criteria I, II, V, and VIII – the PCB spent pages recounting each party's argument before summarily affirming the Village Board's decision. *See* Opinion and Order at 33, 37-38, and 40. The PCB stated with respect to each Criterion that "the Village's decision is supported by evidence in the record." *See, e.g.,* Opinion and Order at 34 (Criterion I); 37 (Criterion II, stating that "[t]he Board does not reweigh the evidence; therefore, the Board affirms the Village's decision"). The PCB did not, however, independently apply its own technical expertise to determine whether the Village Board's

decision was against the manifest weight of the evidence. Further, the PCB did not discuss the gaping holes in the Applicant's submittal, acknowledged by the Village Board itself throughout its findings.

As noted above, *Town & Country* makes it clear that the Board's role is not simply to assess whether there is *some* evidence in the record to support the decision by the local government. While the Board may not "reweigh" the evidence, it must use its "technical expertise in *examining the record* to determine whether the record supported" the Village Board's findings. *Town & Country*, 225 Ill. 2d at 123 (emphasis added). This clearly involves more than a mere review to determine whether there is any evidence, no matter how thin, to support the Village Board's determination. This is particularly true where, as here, the siting authority's decision as to various technical issues was not definitive, but required significant additional assurances in order to determine that the facility would meet the criteria. *See id.* at 124. On almost every criterion, the Village Board "conditionally approved" the application pending submittal of significant additional information. The PCB should have, but did not, address these gaps in information, applying its own technical expertise to the issues raised thereby.

The PCB simply did not examine the record in the manner laid out in *Town & Country*. For example, with respect to Criterion I, the PCB did not even address Will County's contention that the Applicant did not provide information on, nor did the Village Board assess, the available transfer station capacity in the service area. Will County Opening Br. at 17. The PCB noted that "ERDS also provided *a discussion* in the application regarding transfer stations in the area" and "provided information on *some* of [the transfer stations outside the service area]." Opinion and Order at 34 (emphasis added). This was clearly not an assessment of available transfer station capacity.

The PCB had an obligation to use its technical expertise to review the record to determine whether the Applicant had provided such information. The PCB did not perform such a review, and had it done so, it would have necessarily concluded that there is sufficient existing transfer station capacity such that Criterion I was not met. The PCB should therefore reconsider its Order, review the record and apply its own technical expertise regarding available transfer station capacity, and reverse the Village Board's siting approval.

Similarly, with respect to Criterion II, the PCB simply noted that there was conflicting expert testimony and, without meaningful analysis, affirmed the Village Board's finding that Applicant's witness "was the more thorough and credible." Opinion and Order at 37. The PCB did not even address the fact that the Village Board made apparently conflicting findings on this criterion. The Village Board, through adoption of the Hearing Officer's findings as to Criterion II, found that "[t]he Applicant bears the burden to demonstrate that the design of the facility and the storm water management plan is sufficient to safeguard the public from leachate leaving the premises. The present state of the Application does not satisfy this concern. Indeed, the risk of unmanaged leachate is quite high." Ordinance 1026 at 3 & Sec. 4.A; Hearing Officer Report at 16. The Village Board also found "that many final design details are missing from the Application." *Id.* The Village Board nonetheless found that the facility "is designed, located, and proposed to be operated so that the public health, safety, and welfare will be protected," provided the adoption of certain conditions. Ord. 1026 at Sec. 4.A.

Despite these conflicting findings, and despite the fact that additional information will be required in order to actually determine whether the facility meets the criteria, the PCB summarily affirmed the Village Board's finding. The PCB was required to give the record a "hard look", (as it did in *Town & Country*), applying its technical expertise, to determine whether the Village

Board's findings were against the manifest weight of the evidence. There is no indication that the PCB conducted the type of thorough, technical review required by *Town & Country*. The PCB should reconsider its order, conduct a technical review of the record on Criterion II, and reverse the Village Board.

The PCB's review of Criterion V was even more cursory. The Board stated that Applicant's expert testified that the design met Criterion V, while the objectors' expert disagreed. Opinion and Order at 38. The PCB did not even address the fact that the *Village Board* also found that the Applicant did not meet Criterion V. The Village Board adopted the Hearing Officer's findings as to Criterion V, *see* Ord. 1026, and one of those findings was that "the plan of operations has not been designed to minimize the danger from operational accidents arising out of on-site traffic movements." Hearing Officer Rpt. at 18.

Pursuant to *Town & Country*, the PCB's role on review is far more than to simply determine whether "the Village's decision has support in the record." Opinion and Order at 38. Rather, the PCB must apply its own technical expertise to a thorough review of the record. Particularly in a case such as the present, where the local decision maker requires the submittal of additional information to bolster its findings that the facility meets the statutory criteria, the PCB's "technically qualified members [must] conduct a 'hearing'" and "make factual and legal determinations on the evidence." *Town & Country*, 225 Ill. 2d at 120. The Illinois Supreme Court is clear that "authority as to technical decisions" is in the PCB's hands, not the local authority's.

The PCB should reconsider its Order and fulfill its role as the final arbiter on technical decisions. Such a review will necessarily lead to the conclusion that the Applicant has not met the statutory criteria of Section 39.2(a). *See* Will County Opening Brief at 15-23. The PCB

should therefore overturn the Village Board's decision to grant siting approval for the Moen Transfer Station.

Dated: May 26, 2016 Respectfully submitted,

On behalf of WILL COUNTY, ILLINOIS

/s/ Charles F. Helsten

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