ILLINOIS POLLUTION CONTROL BOARD
July 21, 1982

VILLAGE OF HANOVER PARK,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 82-69
	)	
COUNTY BOARD OF Du PAGE, THE Du PAGE COUNTY FOREST PRESERVE COMMISSION AND E & E HAULING, INC.,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by J. Anderson):

On July 15, 1982, the County Board of Du Page (County) and the Forest Preserve District of Du Page County (District) petitioned the Board to review the Hearing Officer's orders concerning discovery in this matter: a written Order of July 6, 1982 (and petitioner's July 7, 1982 written Interrogatories propounded thereunder) and the oral rulings of the Hearing Officer on July 9, 1982 "denying the Respondents' objections to almost all of the Interrogatories set forth in Exhibit B." Specifically the County and the District object to interrogatories propounded to their members concerning political campaign contributions and "ex-parte" contacts (H.O. Order II), presence at the public hearing and whether transcripts were reviewed (H.O. Order III). The Village of Hanover Park (Village) filed its opposition thereto on July 19, 1982.

Interrogatory answers were ordered to be filed July 14, 1982. No answers having been filed, on July 15 the Village moved the Board for an Order compelling compliance. The Village additionally requested that the Board find that, by their failure to timely respond to or appeal the Hearing Officers' Order, the County and the District had waived the 90-day statutory decision deadline. On July 16, 1982, E & E Hauling responded to the latter request, stating that it believed the decision deadline could not be entended without its consent. On July 19, 1982 the Village filed a memorandum in support of its motion. The County and District filed their response on July 21, 1982.

Finally, on July 19 the Village requested that the Board issue a number of hearings subpoenae which include document demands relating to the campaign contribution and "ex-parte" issues. It also requested that deposition subpoenae be issued, a request which had been stayed by the Hearing Officer pending

answers to the interrogatories complained of. The Village asserts that emergency consideration should be given to these requests, as the required public hearing in this matter has been scheduled for August 2, 1982. The County and District filed their response on July 21, 1982.

Currently, decision in this matter must be rendered by the Board on August 19, 1982.

Section 40.1(a) of the Act charges the Board, in an SB-172 siting decision appeal, to consider "the fundamental fairness of the procedures used by the county board...in reaching its decision". Section 39.1 establishes some of the procedural requirements to be met by the county in the process of reaching its decision: written notice of public hearing, a public hearing itself, a written decision based on statutory criteria, and so on. Other statutes impose other procedural requirements, such as the reaching of decisions at open meetings, quorum requirements, and so forth. Whether such requirements have been met are the proper subject of Board review. It is the Board's opinion that the Section 40.1(a) directive that it not hear "new or additional evidence in support of or in opposition to any finding, order, determination, or decision of the appropriate county board" does not bar discovery of and introduction at hearing of evidence relating to the meeting of these procedural requirements. The record of a "public" hearing might not, by way of extreme example, reveal on its face that some or most members of the public were purposefully excluded from participating in a hearing, and a written decision of a county board might not on its face reveal that it was arrived at during a meeting at which a voting quorum was not present. Such facts must naturally be made available for Board consideration if its "fundamental fairness" review is to have any meaning.

These motions raise, for the first time in this type of appeal, the issue of whether the Board is charged to review the motives of the county board members in reaching their decision. If so, the questions which seek to discover whether board members received things of value from E & E Hauling, arguably in exchange for a favorable vote, are relevant and should be answered; if not, not. The Board has long held in the context of its review of Agency permitting decisions that the motives per se of the decisionmaker were not within the scope of its review, and so finds in this context as well. The Board does not believe that, in the 90 days allotted to it for review of these siting decisions, that the legislature has charged it to go behind the record and to essentially conduct a mini-investigation into the possibility of corrupt practices or bad faith on the part of the elected officials making the decision. Other, and more appropriate, forums exist for an investigation and redress for any such illegal actions.

The Board also finds the "ex parte" contacts questions to be improper. As the County and the District point out, as co-applicants with E & E, the District members may necessarily have had contact with E & E concerning the Districts' application, which, in their capacity as County Board members, they were later to render an SB-172 siting decision upon. As the Board indicated in its June 10, 1982 Order, the issue of whether the Act itself has created a fundamentally unfair procedure by which an individual in his or her capacity as member must adjudicate an application made by that individual in another official capacity is a proper subject for Board review; in the factual context of the instant appeal, "ex parte" contact is a meaningless term.

The Board finds that, while questions concerning Board members' attendance at the public hearing is a relevant and discoverable concern, general questions concerning their reading of the hearing transcripts are not. A "fundamental fairness" review may properly concern itself with whether the decisionmaker had an opportunity to review evidence either by a) in person attendance at hearing or by b) review of transcripts physically available to that individual prior to the making of the decision; it is inappropriate to query that individual as to whether every word of a transcript was read as it would be to query whether attention was paid to every word spoken at hearing.

In sum, Point II of the Hearing Officer's Order is reversed in whole, and Point III is reversed as it relates to reading of transcripts.

Given the Board's finding that only questions relating to presence at hearing need be answered, the motion to issue deposition subpoenaes is denied, as the purpose for taking depositions would appear to be inquiry into matters not properly discoverable. The motion for issuance of hearing subpoenae is denied on the same ground. This ruling does not foreclose direction to the Hearing Officer of motions for issuance of subpoenae which seek, for articulated reasons, to compel testimony on relevant subjects.

The remaining issue is the effect of the Village's failure either to timely answer discovery requests or to timely appeal the Hearing Officers' production order. The Board agrees with its Hearing Officer that "assertions of timely, thoughtful [discovery] objections...do not constitute a waiver" of the 90 day decision deadline (H.O. Order V). However, the Board finds that failure to take any timely appropriate action does constitute such a waiver, as to hold otherwise would allow respondents--who alone can extend the decision period--to deprive petitioners of meaningful Board review by willful failure to respond to legitimate orders. In response to E & E's argument that it has not been party to this delay, the Board finds that, in this sort of appeal, delay of one respondent may be properly attributed to all to avoid any possibility of collusive prejudicing of petitioners' rights.

As the Hearing Officer, in his verbal order of July 9, 1982 gave the County and District 5 days to respond to discovery, the Board gives these respondents 5 days to respond as well. As the pendency of this appeal has delayed this proceeding 7 days, the Board finds that the decision period has been waived for 7 days plus the number of days actually taken for discovery production pursuant to this Order.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 22nd day of July, 1982 by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board