ILLINOIS POLLUTION CONTROL BOARD
February 19, 2015

ROXANA LANDFILL, INC., Petitioner, v. VILLAGE BOARD OF THE VILLAGE OF CASEYVILLE, ILLINOIS; VILLAGE OF CASEYVILLE, ILLINOIS; and CASEYVILLE TRANSFER STATION, L.L.C., Respondents.	)	PCB 15-65 (Third-Party Pollution Control Facility Siting Appeal)
VILLAGE OF FAIRMONT CITY, ILLINOIS, Petitioner, v. VILLAGE OF CASEYVILLE, ILLINOIS, BOARD OF TRUSTEES and CASEYVILLE TRANSFER STATION, L.L.C., Respondents.	)	PCB 15-69 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

OPINION AND ORDER OF THE BOARD (by J.A. Burke):

The Village Board of the Village of Caseyville (Village), pursuant to Section 39.2 of the Illinois Environmental Protection Act (Act), granted approval to Caseyville Transfer Station, L.L.C. (CTS) for siting a municipal solid waste transfer station in Caseyville, St. Clair County. *See* 415 ILCS 5/39.2 (2012). Roxana Landfill, Inc. (Roxana) and the Village of Fairmont City (Fairmont City) filed petitions asking the Board to review the Village's siting approval. On December 18, 2014, the Board affirmed the Village's decision approving CTS's application for siting approval (Application).

On January 22, 2015, Roxana (Rox. Mot.) and Fairmont City (Fairmont Mot.) filed separate motions to reconsider the Board's December 18, 2014 opinion and order (Board Order). Respondents filed a joint response to the motions on February 5, 2015 (Resp.). For the reasons below, the Board denies petitioners' motions to reconsider the Board's December 18, 2014 opinion and order (Board Order).

SUMMARY OF THE BOARD'S DECEMBER 18, 2014 OPINION AND ORDER

Roxana and Fairmont City appealed the Village's decision approving CTS's Application to locate a transfer station in Caseyville. A petitioner has the burden of proof on appeal to the Board. 415 ILCS 5/40.1(b) (2012). Petitioners presented various challenges to the Village's approval. Specifically, petitioners argued: the Village lacked jurisdiction because there was no evidence that the Application was filed on the correct date; the Village hearing was fundamentally unfair; and the Village's decision on Criteria 1, 2, 3, 6, and 8 was against the manifest weight of the evidence. Board Order at 15.

The Board found that petitioners failed to establish that the Village lacked jurisdiction to hear CTS's siting application, or that the Village's siting procedures were fundamentally unfair. Board Order at 19, 20-22. The Board further found that petitioners failed to demonstrate that the Village's decision on Criterion 1, 2, 3, 6, or 8 was against the manifest weight of the evidence. *Id.* at 22-35. The Board therefore affirmed the Village's decision approving CTS's Application. *Id.* at 36.

PETITIONER'S MOTIONS TO RECONSIDER

Roxana's Motion

Local Government Jurisdiction

Roxana contends that, from the plain language of Section 39.2(b) and (c), jurisdiction over a siting application vests with a local government "when the siting application is filed by the siting applicant and received by the local government." Rox. Mot. at 4. Roxana asserts that "filed" and "received" mean "when a document is deposited with and passes into the exclusive control and custody of the Village Clerk." *Id.*, citing Gietl v. Commissioners of Drainage District No. 1, 384 Ill. 499, 501-02 (1943) (holding that a document is filed when "deposited with and passes into the exclusive control and custody of the clerk, who understandingly received the same in order that it may become a part of the permanent records of his office), and Wilkins v. Dellenback, 149 Ill. App. 3d 549, 554 (2d Dist. 1986) (finding that the filing date for a petition for review in circuit court is when the petition is received and stamped by the clerk's office). Roxana continues that

> [b]y the Board holding that "based on evidence in the record, the Application was submitted to the Village on February 10, 2014 . . ." the Board is creating a rule of law that is inconsistent with the plain language of the Act and Illinois case law, contrary to the plain meaning of the words "filed" and "received," and inconsistent with public policy. Rox. Mot. at 5, citing Board Order at 17.

Roxana further contends that the Board's holding "relies solely on the self-serving testimony from John Siemsen [the owner of CTS] during the Board's public hearing that he delivered CTS's siting application to the Village on February 10, 2014." Rox. Mot. at 5. Further, Roxana states that "it is uncontested that the Village of Caseyville has absolutely no evidence that CTS's siting application was filed or received on February 10, 2014" and that the Village Clerk testified

that "I don't think [the siting application] was [received on] the February 10th." *Id.*, citing Deposition of Robert Watt, page 8 (attached to Roxana Post-Hearing Brief as Exhibit B (Nov. 7, 2014)). Roxana argues that "delivering a banker's box to a village hall, without evidence of receipt by the village clerk's office, cannot be considered a filing." Rox. Mot. at 6. Roxana states that the Board's ruling was in error because it "does not rely on the statutory language of 'filed' and 'received'; rather, it relies on CTS's alleged 'submittal' of the siting application." *Id.*

Testimony from Applicant

Roxana contends that the Board erred when it held that "[t]here is no requirement in the statute or case law that an applicant must testify or subject itself to cross-examination." Rox. Mot. at 6. Roxana cites Sections 39.2(d) and (e) of the Act which provide:

> [at] least one public hearing is to be held by the county board or governing body . . . . 415 ILCS 5/39.2(d) (2012)
>
> [a]t any time prior to completion by the applicant of the presentation of the applicant's factual evidence and an opportunity for cross-questioning by the county board or governing body of the municipality and any participants . . . . 415 ILCS 5/39.2(e) (2012). Rox. Mot. at 6.

Roxana contends that, under the plain language of the Act, "the Village of Caseyville was required to hold a 'public hearing' at which CTS, the siting applicant, presented factual 'evidence' and the local government and participants were able to 'cross-question' CTS on that 'evidence.'" Rox. Mot. at 6. Roxana states that the Illinois Supreme Court has defined a public hearing "to mean a proceeding where parties have a right to appear and give evidence and also the right to hear and examine witnesses whose testimony is presented by opposing parties." *Id.* at 7 (citations omitted).

Roxana further contends that, notwithstanding the plain language of the Act, "the legislative history supports and assumes as its foundation that a siting applicant shall testify, under oath, and be subject to cross-examination at the Section 39.2 public hearing." Rox. Mot. at 7. Roxana cites to Public Act 84-1320, which among items, amended Section 39.2 of the Act to add Section 39.2(k) providing that the local siting authority can charge applicants a reasonable fee to cover the review and hearing costs. *Id.* at 7-8, citing PA 84-1320 (SB 2117), Senate Transcript, p. 114 (July 1, 1986) ("As you know, in order to determine whether a . . . a dump should be located, a decision has to be made about where it's going to be, testimony has to be taken about why it's in that area, sometimes geological surveys have to be taken, that's very expensive."). Roxana states that the Board erred in its opinion because the Board's holding "is contradictory to the plain language of the Act and the intent of the legislature that the public hearing be the place where the applicant presents its evidence – sworn testimony – and the local siting authority and public participants have an opportunity to cross-question that testimony." Rox. Mot. at 8.

Fairmont City's Motion

Cross-Examination of Witnesses

Fairmont City states that participants in local siting proceedings "have the right to cross-examine adverse witnesses." Fairmont Mot. at 2. Fairmont City continues that, "[b]y permitting the applicant to 'testify' only through public comment, Caseyville denied the nonapplicant participants their right to cross-examine and, thereby, rendered the local siting fundamentally unfair." *Id.* at 2-3, citing Land & Lakes Co. v. PCB, 319 Ill. App. 3d 41, 47-48 (3d Dist. 2000). Fairmont City states that "[t]here can be no question that Roxana and Fairmont City participated in the local siting proceeding and, therefore, have a right to a fundamentally fair hearing, including the right to cross-examine adverse witnesses." Fairmont Mot. at 3. Fairmont City continues that "Caseyville shielded Siemsen from cross-examination by permitting him to present unsworn public comment only – an unprecedented procedural device that rendered Roxana's and Fairmont City's right to cross-examine meaningless." *Id.* at 4.

Fairmont City states that "[f]acts are developed in adjudicatory, adversarial hearings through cross-examination." Fairmont Mot. at 5, citing People v. Safford, 392 Ill. App. 3d 212, 224 (1st Dist. 2009). Further, the Act "not only delegates adjudicatory power to the local decisionmaker, it also requires the decisionmaker to conduct a public hearing on the siting request." Fairmont Mot. at 5, citing 415 ILCS 5/39.2(d) (2012); Kane County Defenders, Inc. v. PCB, 139 Ill. App. 3d 588 (2d Dist. 1985). Fairmont City also contends that the express purpose of the public hearing is to "develop a record sufficient to form the basis of appeal of the decision in accordance with Section 40.1 of the Act." Fairmont Mot. at 5, citing Kane County Defenders, 139 Ill. App. 3d at 592; Waste Management of Illinois, Inc. v. PCB, 123 Ill. App. 3d 1075 (2d Dist. 1984). Fairmont City continues that the public hearing "must be conducted in accordance with the minimum standards of procedural due process: the right to present witnesses and introduce evidence, the right to cross-examine witnesses and the right to impartial rulings on the evidence." Fairmont Mot. at 5 (citations omitted).

Fairmont City contends that, without cross-examination, "the local decisionmakers are unable to perform their adjudicatory functions of weighing the evidence, assessing witness credibility, and resolving conflicts in the evidence." Fairmont Mot. at 6, citing Stop the Mega-Dump v. County Board of DeKalb County, et al., PCB 10-103, slip op. at 2, 55 (March 7, 2011). Fairmont City states that,

> [i]f the Board permits applicants for local siting to 'testify' solely through public comment, the local siting hearing will no longer be an adversarial, adjudicatory process. Every applicant – and every objector, for that matter – will speak only through public comment and, thereby, shield him or herself from cross-examination. Fairmont Mot. at 6.

Fairmont City states that a hearing without sworn evidence, testimony and cross-examination "is no longer adjudicatory, but merely legislative, and any record based on such a hearing is not capable of being reviewed under a manifest weight of the evidence standard." Fairmont Mot. at 6-7.

Unsworn Statements

Fairmont City contends that "Caseyville's determination that the application satisfied Section 39.2(a)'s first, second, third, sixth and eighth criteria, at a minimum, is against the manifest weight of the evidence." Fairmont Mot. at 7. Fairmont City further contends that "Siemsen's unsworn statements are not sufficient, absent additional evidence, to overcome contradictory, sworn expert testimony." *Id.*

Fairmont City states that "[a] local body can only grant siting . . . if it finds that the applicant meets all nine criteria by a preponderance of the evidence." Fairmont Mot. at 7, citing American Bottom Conservancy v. Village of Fairmont City, PCB 01-159 (Oct. 18, 2001). Fairmont City continues that, "[w]hile unsworn public comments are considered 'evidence' in the context of a local siting proceeding, they 'are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination." Fairmont Mot. at 7, citing Landfill 33, Ltd. v. Effingham County Board, PCB 03-43 (Feb. 20, 2003). Fairmont City states that the Board "has rejected such unsworn testimony entirely in earlier decisions." Fairmont Mot. at 8, citing Industrial Salvage, Inc. v. County Board, PCB 83-173 (Aug. 2, 1984). Fairmont City contends that, in this case, the Board "accorded equal weight to the unsworn statements of Mr. Siemsen and the sworn expert testimony of Ms. Smith and Mr. Reichmann." Fairmont Mot. at 8. Fairmont City argues that "sworn testimony may be insufficient to prove compliance with the statutory criteria if it consists solely of 'generalized statements' for which the witness 'has not cited . . . specific evidence." *Id.* Fairmont City states that the generalized statements and public comments offered by Mr. Siemsen in support of Criteria 1, 2, 3, and 6 were insufficient to satisfy CTS's burden of proof. *Id.* at 9-11.

Fairmont City contends that the Board "applied an incorrect legal standard" in its review of Criterion 8. Fairmont Mot. at 11. Fairmont City states that, in determining whether Caseyville properly determined that the proposed transfer station was consistent with the county solid waste management plan, the Board "must construe the plan so as to ascertain and effectuate the intent of the County." *Id.* Fairmont City argues that here, the Board "merely look[ed] for any interpretation of the plan that supports Caseyville's decision." *Id.* Fairmont City states that the Board "does not have interpretive license to simply choose one of a number of possible meanings that happens to support Caseyville's decision." *Id.*, citing County of Kankakee, et al. v. PCB, 396 Ill. App. 3d 1000, 1022-23 (3d Dist. 2009). Fairmont City argues that "the only reasonable interpretation [of the plan] that would reflect the meaning of the plan and carry out its purpose is that a solid waste transfer station is simply not an approved or necessary part of the county's solid waste management system." Fairmont Mot. at 11.

THE VILLAGE'S AND CTS'S RESPONSE

Respondents contend that petitioners "simply rehash the same arguments that were duly considered and rejected by the Board." Resp. at 2. Respondents continue that petitioners "cite no new evidence and or changes in the law, nor do they identify any error in the Board's application of existing law." *Id.*

Response to Roxana's Motion

Respondents state that Roxana's assertion that CTS's Application for local siting approval was not "filed" on February 10, 2014, was "raised by Roxana and fully considered by the Board." Resp. at 5, citing Board Order at 15-17. Respondents note Mr. Siemsen's testimony at the Board hearing that he delivered the Application on February 10, 2014, and there is no evidence that it was delivered on any other date. Resp. at 5, citing Board Order at 17. Respondents further note the Board's conclusion "that there is no statutory requirement that the Village date stamp the application or that an applicant maintain a written receipt of the filing date." *Id.*

Respondents contend that Roxana's arguments regarding the Act's public hearing requirements were already made in prior pleadings before the Board. Resp. at 5, citing Board Order at 19. Respondents argue that Roxana's motion should be denied because "Roxana merely repeats arguments already made to the Board, and identifies no new facts or changes in the law." Resp. at 6, citing State of Illinois v. Community Landfill Co., PCB 97-193 (June 21, 2012).

Response to Fairmont City's Motion

Respondents contend that the Board duly considered Fairmont City's argument regarding the right to cross-examination. Resp. at 3, citing Board Order at 20. Further, the cases relied principally upon by Fairmont City were all considered by the Board in its consideration of petitioners' fundamental fairness arguments. Resp. at 3, citing Board Order at 20-22. Respondents state that Fairmont City "cites no new evidence or a change in the law, but instead merely repeats the same cross-examination argument that was already fully considered by the Board." Resp. at 4.

Respondents summarize petitioners' arguments regarding Mr. Siemsen's unsworn statements as "essentially that the Board should reweigh the evidence, giving more weight to evidence favored by the Petitioners." Resp. at 4. Respondents state that the local siting authority weighs the evidence, assesses witness credibility, and resolves conflicts in the evidence. *Id.*, citing Board Order at 23; Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 576 (5th Dist. 1997). Respondents contend "[t]he Board applied the correct legal standard of review which requires that 'the Board may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority.'" Resp. at 4, citing Board Order at 23, Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 550 (3rd Dist. 1990). Respondents contend that Fairmont City "cites no new facts or changes in the law and should be denied." Resp. at 5.

BOARD DECISION

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to determine whether the Board's decision was in error. 35 Ill. Adm. Code 101.902. A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence that was not available at the time of hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill

v. County Board of Whiteside, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627 (1st Dist. 1992). The Board may also reconsider evidence in the record that was overlooked. *See* People v. Packaging Personified, Inc., PCB 04-16, slip op. at 16 (March 1, 2012).

Petitioners ask the Board to reconsider its December 18, 2014 opinion and order on the basis that there is no evidence that the application was filed and received on February 10, 2014. Rox. Mot. at 5. Petitioners also contend that a siting applicant should be required to testify under oath and be subject to cross-examination at a Section 39.2 public hearing seeking local siting approval. *Id.* at 7; Fairmont Mot. at 6-7. Petitioners contend that the evidence presented by CTS on Criteria 1, 2, 3, and 6 was insufficient to satisfy CTS's burden of proof. Fairmont Mot. at 9-11. Finally, petitioners argue that the Board applied an incorrect legal standard in its review of Criterion 8. *Id.* at 11.

Section 39.2(b) of the Act requires notice of a local siting application to state "the date when the request for site approval will be submitted." 415 ILCS 5/39.2(2012). The Board found that the Application was submitted in person by CTS on February 10, 2014. Board Order at 17. The Application was therefore "filed" with and "received" by the Village on February 10, 2014. 415 ILCS 5/39.2(b), (c) (2012). Petitioners present no new evidence for the Board to conclude that its previous decision was in error.

Similarly, petitioners present no new evidence that the Board's decision regarding the fundamental fairness of the Village hearing was in error. "The Act does not prohibit a county board from establishing its own rules and procedures governing conduct of a local siting hearing so long as those rules and procedures are not inconsistent with the Act and are fundamentally fair." Board Order at 21, citing Waste Management, 175 Ill. App. 3d at 1036. The Act does not require that the siting applicant testify and be subject to cross-examination. 415 ILCS 5/39.2(e) (2012); Board Order at 21. Petitioners contend that they had a right to cross-examine CTS, but the Board found this right was not infringed upon because "CTS presented no witness to testify at the Village hearing." *Id.* The Board also found that petitioners "presented no evidence that they were unable to submit public comment or testimony in opposition to the Application." *Id.* The Village hearing was therefore fundamentally fair.

Regarding the siting criteria, the Board "may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority." Board Order at 23 (citations omitted). A local siting authority's decision is against the manifest weight of the evidence "if the opposite result is clearly evident, plain, or indisputable from a review of the evidence." *Id.* at 22, citing Land and Lakes, 319 Ill. App. 3d at 53. It is the job of the local siting authority, not the Board, to weigh the evidence, assess witness credibility, and resolve conflicts in the evidence. Board Order at 23 (citations omitted). Petitioners present no new evidence or a change in the law that the Board's ruling was in error. Rather, petitioners ask that the Board reevaluate its finding on the weight of the evidence before the Village. The Board denies petitioners' motions to reconsider the Board's previous finding on the siting criteria.

Finally, petitioners contend that the Board applied an incorrect legal standard in its assessment of Criterion 8. Petitioners argue that, in determining whether Caseyville properly

determined that the proposed transfer station was consistent with the county solid waste management plan, the Board "must construe the plan so as to ascertain and effectuate the intent of the County." Fairmont Mot. at 11. As with the other criteria, the Village's decision is tested under the manifest weight standard, and that standard is satisfied as long as an opposite conclusion is not "clearly evident, plain or indisputable." Board Order at 22, citing Land and Lakes, 319 Ill. App. 3d at 53. The Village applied the county solid waste management plan to the proposed facility and determined that the application was drafted in such a way as to be consistent with the plan. The opposite conclusion was not "clearly evident, plain or indisputable." The Board found that petitioners failed to establish that the Village's decision on Criterion 8 was against the manifest weight of the evidence. Board Order at 35. Further, while petitioners argue that the Board erred in its application of existing law, the petitioners' arguments "are repetitive of the prior arguments which have been duly considered and rejected by this Board." *See* City of Geneva v. Kane County, et al., PCB 94-58, slip op. at 2 (Oct. 6, 1994).

Petitioners' arguments are rooted in arguments articulated in their petitions seeking reversal of the Village's siting decision. The Board carefully considered these arguments in making its December 18, 2014 determination to uphold the Village's local siting approval. Petitioners present no new evidence, change in the law, or error in the Board's previous application of existing law for the Board to reconsider its December 18, 2014 opinion and order. The Board therefore denies petitioners' motions for reconsideration.

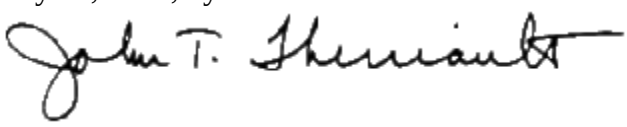
CONCLUSION

The Board denies Roxana's and Fairmont City's motions to reconsider the Board's December 18, 2014 Board opinion and order.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 19, 2015, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board