ILLINOIS POLLUTION CONTROL BOARD
November 6, 1997

CITIZENS OPPOSED TO ADDITIONAL LANDFILLS and HARVEY PITT, individually and as a member of Citizens Opposed to Additional Landfills,	)	
Petitioners,	)	
v.	)	PCB 97-233
	)	(Pollution Control Facility
GREATER EGYPT REGIONAL ENVIRONMENTAL COMPLEX a/k/a GERE PROPERTIES, INC., and the PERRY COUNTY BOARD of COMMISSIONERS,	)	Siting Appeal)
Respondents.	)	

MR. KENNETH A. BLEYER, OF THE LAW OFFICE OF KENNETH A. BLEYER, APPEARED ON BEHALF OF THE PETITIONERS;

MR. JERRY B. SMITH APPEARED ON BEHALF OF GREATER EGYPT REGIONAL ENVIRONMENTAL COMPLEX; AND

MR. CHARLES F. HELSTEN, OF HINSHAW & CULBERTSON, APPEARED ON BEHALF OF THE PERRY COUNTY BOARD OF COMMISSIONERS.

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

On June 23, 1997, the petitioners, Citizens Opposed to Additional Landfills (C.O.A.L.) and Harvey Pitt, individually and as a member of C.O.A.L., filed a petition for review of a local siting decision pursuant to Section 40.1 of the Environmental Protection Act (Act). 415 ILCS 5/40.1 (1996). Specifically, petitioners are appealing the Perry County Board of Commissioners' (County) decision of May 27, 1997, to grant local siting approval for a pollution control facility to the Greater Egypt Regional Environmental Complex a/k/a Gere Properties Inc. (G.E.R.E.). Petitioners challenge the County's decision, arguing that (1) the County lacked jurisdiction; (2) the proceeding before the County was fundamentally unfair; and (3) the decision of the County was against the manifest weight of the evidence on all the siting criteria of Section 39.2 of the Act (415 ILCS 5/39.2 (1996)). For the following reasons, the Board finds that (1) the County had jurisdiction, (2) that the proceeding before the County

was fundamentally fair, and (3) that the decision of the County granting siting approval was not against the manifest weight of the evidence.

BACKGROUND

This petition for review arose from a previous case before the Board in which the Board remanded the proceedings to Perry County. See Citizens Opposed to Additional Landfills and Harvey C. Pitt v. Greater Egypt Regional Environmental Complex a/k/a Gere Properties, Inc., and the Perry County Board of Commissioners (December 5, 1996), PCB 97-29. On March 17, 1992, Laidlaw Waste Systems, Inc. (Laidlaw) filed an application for regional pollution control facility local siting approval with the Perry County Board. After hearings, the county board granted approval. On appeal, the Board affirmed the county board's decision (see C.O.A.L. (Citizens Opposed to Additional Landfills) v. Laidlaw Waste Systems, Inc. and Perry County Board of Commissioners (PCB 92-131), January 21, 1993). On appeal to the appellate court, the court reversed the Board's decision and remanded to the Board for further proceedings. On December 12, 1995, the Board remanded the matter to the county board to allow Laidlaw to withdraw its application.

Following remand to the Perry County Board, Laidlaw withdrew its application and elected not to pursue development of the landfill project. Laidlaw assigned permission to use the original application and the information contained therein to Philip L. Alvis. Mr. Alvis is the owner of the proposed landfill property and the sole stockholder in G.E.R.E. Mr. Alvis in turn assigned permission to use Laidlaw's application to G.E.R.E.

On January 23, 1996, G.E.R.E. filed its application with the Perry County Board using the data supplied by Laidlaw pursuant to the prior assignments. The G.E.R.E. application also supplied updated information. Hearings were held by the Perry County Board on the second application on April 25 and 26, 1996. The county board voted to grant siting approval to G.E.R.E. on July 9, 1996. An appeal followed to the Board on August 9, 1996, and a hearing was held on October 2, 1996, before a Board hearing officer. The Board issued a decision on December 5, 1996, and a clarification on January 17, 1997, remanding the matter to the Perry County Board for further proceedings to allow the public to learn the content of *ex parte* communications between attorneys for the county and the applicant and have the opportunity to comment. See C.O.A.L. *et al.* v. G.E.R.E. *et al.* (December 5, 1996), PCB 97-29, slip op. at 15.

Specifically, the Board determined that the Perry County Board members had instructed the Perry County State's Attorney to investigate conditions to be imposed upon G.E.R.E. as part of the siting approval. The Perry County State's Attorney in turn had conversations with the attorney for G.E.R.E. concerning the possible conditions. The Board found that these conversations were *ex parte* contacts and that the contacts affected the decision of the County. The *ex parte* contacts involved gathering information and drafting conditions to be imposed upon the applicant G.E.R.E. The matter was remanded in order to allow the County to conduct further hearings and place the nature of the discussions into the record.

The Board also thoroughly discussed the issue of jurisdiction and found that G.E.R.E. complied with Section 39.2(b) of the Act by relying on the County Treasurer's 1993 book when mailing notices. The Board further found that the County was not divested of jurisdiction by G.E.R.E.'s failure to notify a landowner who did not appear in the County Treasurer's 1993 books.

On January 23, 1997, the Board issued an order clarifying its December 5, 1996, order and required, at a minimum, that the County should:

1. Conduct one or more public hearings to place on the record the questions asked by the County and the answers provided by G.E.R.E., and any discussions that took place between them, and finally to allow a public comment period of at least 30 days. Specifically, at such hearings the County shall ask the applicant, G.E.R.E., the same questions which it asked that were the basis of the *ex parte* contacts and G.E.R.E. shall respond with the same answers it gave to the County when those questions were originally posed. Participants shall have the opportunity to respond to those questions and answer and present evidence concerning the added conditions requiring to: perform a feasibility study of increasing a roadway, raise the berm to fifteen (15) feet above the 100-year flood plain, develop a geotechnical study, perform measures to secure the slope stability on the west edge of the fill, take steps to address the compressibility of subsurface materials, perform monthly water sampling on the site, and require that vehicles exiting the site be cleaned before leaving; all of these concern the criteria of Section 39.2 of the Act;

2. Provide public notice of the hearing in accordance with the requirements of Section 39.2(d) of the Environmental Protection Act (415 ILCS 5/39.2(d));

3. Render a new decision based upon the record in this case which will include the information acquired during the public hearing and comment period; and

4. Vote and render its decision no later than 120 days after receipt of this order.

The Perry County Board held another hearing on April 23, 1997 (see C1 - C140),[1] and on May 27, 1997, the Perry County Board once again voted to grant siting approval (C313-

[1] References to the Perry County Board hearing will be cited as "C_." References to the Board's hearing in this matter will be cited as "R_." References to C.O.A.L.'s post-hearing brief will be cited as "Pet. Br.," and references to the County's brief will be cited as "Resp. Br."

C319). The instant appeal to the Board followed on June 23, 1997. A hearing before Chief Hearing Officer Michael L. Wallace was held on August 28, 1997. No evidence was presented at the Board's hearing on August 26, 1997. See R4-R5. Post-hearing briefs were filed by C.O.A.L. (Pet. Br.) and the County (Resp. Br.). G.E.R.E. did not file a brief.

In the present appeal, C.O.A.L initially challenges the siting decision on three grounds: (1) the Perry County Board failed to comply with the remand order; (2) the Perry County Board's decision was against the manifest weight of the evidence on all Section 39.2 criteria; and (3) the Perry County Board was involved in a secret meeting to discuss matters relating to the application, from which the petitioners were prohibited from attending. Pet. Br. at 2. C.O.A.L. also restates and reaffirms their objection on the issue of jurisdiction on the grounds that not all property owners within 250 feet each direction of the lot line of the subject property were given notice pursuant to Section 39.2(b) of the Act. Pet. Br. at 2-3. The Board will discuss each of the issues presented in turn. For the reasons explained below, we find that the procedures before the Perry County Board complied with the adjudicative due process standards of fundamental fairness and that the decisions of the Perry County Board on the challenged criteria were not against the manifest weight of the evidence.

ELEMENTS OF REVIEW

At the local level, the siting process is governed by Section 39.2 of the Act. 415 ILCS 5/39.2 (1996). Section 39.2 provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. Section 39.2(g) of the Act provides that siting approval procedures, criteria, and appeal procedures provided for in Section 39.2 shall be the exclusive siting procedures for new pollution control facilities. However, the local siting authority may develop its own siting procedures, so long as those procedures are consistent with the Act and supplement, rather than supplant, those requirements. See Waste Management of Illinois v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682, 692-93 (2nd Dist. 1988).

Section 40.1 of the Act requires the Board to review the proceeding before the local siting authority to assure fundamental fairness. In E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983), the appellate court found that although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. See Industrial Fuels & Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (4th Dist. 1992); see also Tate v. PCB, 188 Ill. App. 3d 994, 592 N.E.2d 148 (4th Dist. 1989). Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. Waste Management, 175 Ill. App. 3d at 1024, 530 N.E.2d at 693. The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163.

The Board's authority when reviewing a local decision regarding the siting of a pollution control facility is well established in the Act and case law. When examining local decisions on the nine criteria found in Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (1996)), the Board must determine whether the local decision is against the manifest weight of the evidence. The Board, on review, is not to reweigh the evidence and where, as here, there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. Fairview Area Citizens Task Force v. PCB, 198 Ill. App. 3d 541, 555 N.E.2d 1178, 1184 (3rd Dist. 1990); Tate, 188 Ill. App. 3d at 996, 544 N.E.2d at 1195; Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 543 N.E.2d 505, 507 (2nd Dist. 1989). Merely because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings. File v. D & L Landfill, Inc. (August 30, 1990), PCB 90-94, *aff'd*. File v. D & L Landfill, Inc., 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

DISCUSSION

Jurisdiction

C.O.A.L. initially raises the issue of whether the County had jurisdiction to grant the siting approval. Pet. Br. at 2-3. C.O.A.L. restates and reaffirms their objection that the County was without jurisdiction to have ruled on the siting application because not all of the owners of property within 200 feet of the lot line of the subject property were given notice under Section 39.2(b) of the Act. 415 ILCS 5/39.2(b) (1996). In support of their argument, C.O.A.L. relies on the evidence and briefs in the previous case. The Board found in PCB 97-29 that G.E.R.E. complied with Section 39.2(b) of the Act by relying on the County Treasurer's office 1993 book when mailing notices. See C.O.A.L. (December 5, 1996), PCB 97-29, slip op. at 9. Since C.O.A.L. presents no new arguments on this issue, the Board reaffirms its earlier decision on the jurisdictional issue.

Fundamental Fairness

C.O.A.L. initially raised as an issue in their September 16, 1997, post-hearing brief the conduct of the Perry County Board in its attempt to comply with the Board's remand order. Pet. Br. at 3. In its post hearing brief, C.O.A.L. has now waived this issue stating: "[i]t appears to petitioners after further review of the proceedings that no fault could be taken with the manner and substance of the presentation made by the County at the hearing below. It therefore serves no purpose to perpetuate this issue." Pet. Br. at 3-4. Since C.O.A.L. indicates that they have waived this issue, the Board sees no reason to address this issue on appeal.

C.O.A.L. does argue that the closed meeting held by the Perry County Board on April 14, 1997, one week before the hearing on the application, was fundamentally unfair. See Pet. Br. at 15-19. Neither C.O.A.L. nor G.E.R.E. attended this meeting. The stated purpose of

the closed meeting was to discuss the potential litigation in the siting approval. C.O.A.L. argues that such a meeting prevents the County from providing a fair proceeding. Pet. Br. at 15-19.

The County responds that Section 39.2(d) (415 ILCS 5/39.2(d) (1996)) does not prohibit it from holding a closed session concerning site approval. Resp. Br. at 8-13. The County continues that Section 39.2(d) actually anticipates a closed session by using the language "at least one public hearing is to be held." Resp. Br. at 8. The County further argues that closed meetings do not constitute a violation of fundamental fairness. Resp. Br. at 9-10. The County asserts that the doctrine of fundamental fairness is violated only where opponents are denied access to information or where there have been *ex parte* contacts which result in the exchange of information to which the opponents do not have access. Resp. Br. at 9.

Although the parties allude to this closed meeting in their post hearing briefs, there has been no evidence presented that indicates such a meeting took place. C.O.A.L.'s verified petition at the county hearing asserts that the closed meeting occurred and counsel for C.O.A.L. and the county argued the point before the county hearing officer at the county's April 23, 1997, hearing. C7-C20. Inasmuch as C.O.A.L. has made this an issue on appeal and relying on the county record filed with the Board, we will assume that such a closed meeting occurred on April 14, 1997. The stated purpose of the meeting was to allow the County to confer with the County's attorney concerning imminent litigation and neither C.O.A.L nor G.E.R.E. representatives nor members of the public were allowed to attend the closed meeting. C13. There have been no allegations or evidence of new *ex parte* communications in or surrounding this closed meeting. The closed meeting itself was unrelated to the remand hearing conducted on April 23, 1997.

The Board finds that the closed meeting held by the County standing alone does not violate the principles of fundamental fairness. The Board does not have the statutory authority to enforce the Open Meetings Act (5 ILCS 10/1 (1996)), and therefore, any such allegation does not, in and of itself, establish a violation of fundamental fairness. Rather, the relevant question is whether the local proceeding was fundamentally unfair as C.O.A.L. alleges. See C.O.A.L. v. Laidlaw Waste Systems, Inc. (January 21, 1993), PCB 92-13. From the record before the Board, the Perry County Board complied with the Board's orders of December 5, 1996, and January 23, 1997, by conducting the April 23, 1997, hearing. Perry County presented witnesses to discuss or explain the *ex parte* communications from the summer of 1996 and C.O.A.L. was allowed to cross-examine those witnesses. C.O.A.L. was allowed to call witnesses itself to challenge the conditions attached to the siting approval and citizens were allowed to make comments to the hearing officer and the Perry County Board. C.O.A.L. has not cited any authority that holding a closed meeting with its attorney would cause the process to be fundamentally unfair.

The Board finds that the closed meeting of the Perry County Board did not make the April 23, 1997, hearing fundamentally unfair. The Board's order directing an additional hearing was for the purpose of putting the *ex parte* contacts into the record and to allow for the

presentation of witnesses concerning the conditions imposed by the County Board. Section 39.1 only requires that parties before a local governing body be given the opportunity to present evidence and object to the evidence presented, but they need not be given the opportunity to cross examine opposing parties witnesses. See Southwest Energy Corp. v. PCB, 275 Ill. App. 3d 84, 655 N.E.2d 304 (4th Dist. 1995). An unrelated event such as the closed meeting standing alone and without any allegation of impropriety does not make the entire process unfair. See Daly v. PCB, 264 Ill. App. 3d 968, 637 N.E.2d 1153 (1st Dist. 1994) (a public rally held in the same auditorium prior to the public hearing was held not to be part of the hearing and did not cause the hearing to be fundamentally unfair).

In its post-hearing brief, C.O.A.L. additionally argues that a closed meeting conducted on June 25, 1996, rendered the proceedings in this matter fundamentally unfair. Pet. Br. at 16-17. As noted earlier, the Perry County Board rendered it first decision to grant local siting approval on July 9, 1996. That decision was appealed to the Board by C.O.A.L on August 9, 1996, on the ground that the county proceedings were fundamentally unfair. Because the June 25, 1996, meeting occurred during the previous siting proceedings, the Board does not consider the closed meeting of June 23, 1996, properly before it on this appeal. The June 23, 1996, meeting occurred in the siting approval of July 9, 1996, and should have been the subject of the appeal in C.O.A.L., PCB 97-29.

Siting Criteria

On May 27, 1997, the Perry County Board passed a resolution finding that the applicant G.E.R.E. had met all nine criteria. C313-C315. Additionally, the Perry County Board found that siting approval would be based on eight conditions and the siting approval was granted subject to those eight conditions. C315-C318.

C.O.A.L. argues broadly that the County's decision to grant siting approval was against the manifest weight of the evidence for criteria "i"-"ix" of Section 39.2 of the Act and take exception to certain of the conditions. Pet. Br. at 4-14.

First, C.O.A.L. argues that criteria Nos. 7, 8, and 9 are not applicable to this proposed landfill and C.O.A.L. believes it is incredible that the Perry County Board found in its written decision that sufficient evidence was presented for these three criterion. C.O.A.L. argues that it is illogical to find sufficient evidence for criteria that do not apply and that no evidence was offered. Pet. Br. at 4-9. Criteria Nos. 7, 8, and 9 read as follows:

> (G) CRITERION #7: IF THE FACILITY WILL BE TREATING, STORING OR DISPOSING OF HAZARDOUS WASTE, AN EMERGENCY RESPONSE PLAN EXISTS FOR THE FACILITY WHICH INCLUDES NOTIFICATION, CONTAINMENT, AND EVACUATION PROCEDURES TO BE USED IN CASE OF AN ACCIDENTAL RELEASE.

(H) CRITERION #8: IF THE FACILITY IS TO BE LOCATED IN A COUNTY WHERE THE COUNTY BOARD HAS ADOPTED A SOLID WASTE MANAGEMENT PLAN CONSISTENT WITH THE PLANNING REQUIREMENTS OF THE LOCAL SOLID WASTE DISPOSAL ACT OR THE SOLID WASTE PLANNING AND RECYCLING ACT, THE FACILITY IS CONSISTENT WITH THAT PLAN.

(I) CRITERION #9: IF THE FACILITY WILL BE LOCATED WITHIN A REGULATED RECHARGE AREA, ANY APPLICABLE REQUIREMENTS SPECIFIED BY THE BOARD FOR SUCH AREAS HAVE BEEN MET.

The County argues that the underlying application clearly indicates that the facility will not be treating, storing, or disposing of hazardous waste. The County argues that its affirmative vote on Criteria No. 7 indicates that the applicant had demonstrated in the record that it would not be handling hazardous waste and was therefore proper. Resp. Br. at 2-3.

The County further asserts that Criteria Nos. 8 and 9 are also not applicable. Perry County does not have a solid waste management plan nor is the facility to be located in a regulated recharge area. The wording of the county board's resolution indicates that the word "if " preceded each criteria and to the extent that each criterion was applicable, the applicant had met its burden of proof. Resp. Br. at 3-4.

The Board finds that the county board's vote on these three criteria does not conflict with the evidence. Paragraphs G, H, and I of the resolution deal with Criteria Nos. 7, 8, and 9 and are framed alternatively, *i.e*. "if the facility . . .". The Perry County Board voted that the applicant demonstrated compliance with these criteria. The County's engineer testified that Criteria Nos. 7, 8, and 9 did not apply to the application. The meaning is quite clear that the County Board found that the record established that the facility would not be handling hazardous waste. The Perry County Board is aware that it does not have a solid waste management plan and that the facility is not located in a regulated recharge area.

C.O.A.L. also argues that other criteria have not been met. Pet. Br. at 9-19. In its brief, C.O.A.L. discusses the three conditions attached by the County in its resolution of April 23, 1997. C.O.A.L. does not address, either through reference to the record or in its brief, any of the other criteria. Accordingly, not having any contrary evidence or argument, the Board does not find the challenged criteria against the manifest weight of the evidence. See Residents Against a Polluted Environment *et al*. v. County of LaSalle, *et al*. (June 19, 1997), PCB 97-139.

C.O.A.L. has challenged the conditions that were attached to the siting approval. The challenged conditions include:

(A) Increasing the elevation of the north-south roadway;
(B) Raising the berm around the landfill; and

(C) The geotechnical study and analysis of the groundwater protection, and slope design and stability considerations.

C.O.A.L. presented testimony at the April 23, 1997, hearing concerning these conditions. C79-C122. C.O.A.L. argues that the testimony of Mr. Edward Robinson and Mr. William Holt regarding these conditions demonstrates that the county board decision was against the manifest weight of the evidence. C.O.A.L. asserts that a geotechnical study should have been done before granting siting approval as the county board would not have any basis to grant approval on whether the facility was designed to minimize damages.

Neither G.E.R.E. nor the County offered any additional testimony concerning the conditions at the April 23, 1997, hearing. In its brief, the County generally argues that the record compiled in 1996 and 1997 demonstrates overwhelming evidence to support the County Board's decision. Resp. Br. at 4.

Conditions have been attached to siting approvals and have withstood challenges. See, City of East Peoria v. PCB, 117 Ill. App. 3d 673, 452 N.E.2d 1378 (3rd Dist. 1983); County of Lake v. PCB, 120 Ill. App. 3d 89, 457 N.E.2d 1309 (2nd Dist. 1983). In County of Lake, the court held that the language of Section 39.2 provided that local governmental units could take into consideration the technical details relating to design and operation of a landfill. Conditions can be imposed "to accomplish the purposes" of Section 39.2 which means that local authorities can impose "technical" conditions on siting approval. County of Lake, 120 Ill. App. 3d 89, 457 N.E.2d at 1315.

CONCLUSION

The Board has carefully considered each of the arguments raised by petitioners in reviewing the County's decision to grant siting approval to G.E.R.E. and has not found the siting proceeding before the County was fundamentally unfair, nor that the County's findings regarding the siting criteria are against the manifest weight of the evidence. Therefore, the Board affirms the County's siting approval rendered on May 27, 1997.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

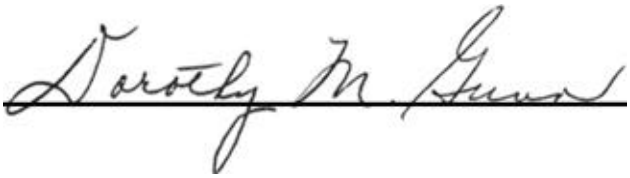
For the foregoing reasons the Board affirms the May 27, 1997, decision of the Perry County Board of Commissioners granting siting approval to G.E.R.E.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this

order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 6th day of November 1997, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board