ILLINOIS POLLUTION CONTROL BOARD
May 25, 1989

McLEAN COUNTY DISPOSAL COMPANY, INC.,	)	
Petitioner,	)	
v.	)	PCB 87-133
THE COUNTY OF McLEAN,	)	
Respondent.	)	

DISSENTING OPINION (by B. Forcade):

While I agree with much of the majority rationale, I must respectfully dissent from the outcome. McLean County Disposal Company, Inc. ("MCDC") argues the impropriety of county board members considering a tape recording as their sole exposure to the record. But, MCDC raises that issue for the first time on appeal to this Board. I believe that MCDC must either: (1) timely raise the issue before the county board where such alleged defect in fundamental fairness could be corrected, or (2) demonstrate factually to this Board why it was not possible to raise the fundamental fairness issue before the county board. Since MCDC has done neither, I believe they have waived the fundamental fairness issue.

The majority adopts the position, in today's opinion, as well as preceding cases, that each county board member must have had possession of or access to the record. In today's Opinion, they hold that such record must include a typed transcript, i.e., a decisionmaker cannot acquire his or her information from tape recordings or from the advice of fellow members who did attend the hearings. Assuming that these are accurate statements of the applicable law, I still do not believe MCDC would prevail, because MCDC has waived the right to raise the issue for the first time on appeal. The Fourth District Opinion which remanded this matter to the Board was premised in large part on the theory that objections not raised below are waived on appeal:

> Generally speaking, a trial court must be specifically informed of the nature of objections. It is unfair to make objections on appeal after concealing the real nature of the objections from the lower court. (DeMarco v. McGill (1948), 402 Ill. 46, 83 N.E. 2d 313.) The requirement that objections must be specifically asserted before the trier of fact is equally applicable to administrative

> proceedings (see Leffler v. Browning (1958), 14 Ill. 2d 225, 151 N.E. 2d 342), especially where the administrative tribunal could easily have remedied the alleged defect in the proceedings. Meinhardt Cartage Co. v. Illinois Commerce Comm'n (1959), 15 Ill. 2d 546, 155 N.E. 2d 631.
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> Citizens Against the Randolph Landfill (CARL) v. The Illinois Pollution Control Board, 127 Ill. Dec. 529, 533 N.E. 2d 401 (Fourth Dist. Dec. 28, 1988), at 536, 537.

There can be no doubt that all participants below were made aware of the fact that the county board hearings were being tape recorded. The Chairman of the McLean County Board announced the recording process in her opening remarks (Tr. of June 16, p. 5) and later admonished one speaker to get closer to the microphone so that the recording could be done properly (Tr. of June 16, at p. 43). Also, she advised everyone that the tapes would be used for the purposes of review:

> Also, I would remind you that we are taping. That is why we are trying to stay closer to the microphones so that in any event if any committee member does have need of the tapes to refresh their memory they will be available to us. So, thank you all. Good night.
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> (Tr. of June 16, p. 155.)

When the legal theory articulated by the Fourth District is applied to these facts, I believe MCDC had a duty to object before the county board or explain to this Board why such objection could not have been made. Otherwise, MCDC's continued participation in the hearing below waives the issue on appeal. Accordingly, I dissent.

On the fundamental legal holding of the majority, I am less certain as to what the law requires of county board members in considering the evidence. In this case, the majority of the county board did not listen to any of the testimony or read any of the transcripts. But, they certainly discussed the case among themselves, i.e., briefing by fellow decisionmakers. The question of whether this amounts to "consideration of the evidence" brings this Board into the thorny quagmire of procedural requirements for institutional adjudicatory decisionmaking. In the wake of the four U.S. Supreme Court Morgan cases (Morgan v. U.S., 298 U.S. 468 (1936) [Morgan I]; Morgan v. U.S., 304 U.S. 1 (1938) [Morgan II]; Morgan v. U.S., 307 U.S. 183 (1939) [Morgan III]; and United States v. Morgan, 313 U.S. 409 (1941) [Morgan IV]), a substantial body of law has

developed. That body of law has not yet coalesced around a singular holding regarding briefings by a committee of fellow decisionmakers as a substitute for an actual review of the transcript. Even "learned treatises" shed murky illumination on what is the prevailing law. See K. Davis, Administrative Law Treatise, Section 11.03 - 11.04 (1958); 2 Am. Jur.2d, Administrative Law, Section 439 (1962, and Supplement); F. Cooper State Administrative Law Chapter 13, Section 3; 18 A.L.R. 2d 606-629 (including Later Case Service).

There is case law to support the proposition that briefings by fellow decisionmakers is an adequate "consideration" of the record. Seabolt v. Moses, 220 Ark. 242, 247 S.W.2d 24 (1952); Fifth Street Pier Corp. v. Hoboken, 126 A. 2d 6 (1956). There is also clearly case law to the contrary. Joyce v. Bruckman, 15 N.Y.S. 2d 679 (4th Dept., 1939). None of the relevant case law comes from Illinois, and many of the cases on this general issue involve interpretation of state statutes not applicable in Illinois.

The problem of the uninformed decisionmaker (one who has neither attended the hearings or read the transcripts) has a long history in Anglo-American jurisprudence. Those individuals generally rely on the advice and information received from those who did attend the proceeding, but the information conveyed is necessarily an abridged version of what actually transpired. A decisionmaker whose first and only involvement with the record is in this fashion will never have the opportunity to fully apply his experience and capabilities in the interpretation and and evaluation of the complete record. Any effort which attempts to abridge a large body of information will by definition omit some data in the process. It is this culling of the record for other decisionmakers which raises the spectre of due process infringement. Since the decisions regarding what information to include and what to exclude are necessarily made subjectively, there are no assurances that those decisionmakers who see and/or hear only a summarized version would have weighed the evidence in an identical manner. There is substantial historical precedent that uninformed decisionmakers can rely on advice and information from others, so long as that advice is subject to scrutiny and rebuttal prior to final disposition.

In Mazza v. Cavicchia, 105 A. 2d 545 (1954), the Supreme Court of New Jersey reviewed the status of "reports" which the uninformed decisionmaker received from others, as that concept has developed in the 20th century in England and the United States. The court stressed that these reports must be subject to public review and rebuttal because, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly [be seen] to be done." Rex v. Sussex Justices, 1 K.B. 256 (1924). See also, Chief Justice Hughes in Morgan II, 304 U.S. at page 22. In

Fifth Street Pier Corp. v. Hoboken, 126 A.2d 6 (1956), the New Jersey Supreme Court extended this doctrine to include approval of uninformed decisionmakers who receive their information from the written reports of fellow decisionmakers. In Seabolt v. Moses, 247 S.W.2d 24 (1952), the Arkansas Supreme Court extended the doctrine to include verbal briefings by fellow decisionmakers.

As a result of the above cited cases, I find it difficult to support the majority legal holding that decisionmakers must have possession of or access to a transcribed record.

Perhaps another perspective is that the law precludes this Board from evaluating what connection the decisionmakers had with the record. In National Nutritional Foods Assn. v. Food and Drug Administration, 491 F2d 1141 (2nd Cir., 1974), the Petitioners sought to prove that it was physically impossible for the newly appointed Commissioner to have considered the record. They agreed that they could not "probe the mental processes" of the commissioner after Morgan II, but asserted that they could "probe whether he exercised his own mental processes at all". Supra, at 1144. After citing a substantial line of precedent, the court refused to allow any inquiry of the decisionmaker.

In a similar manner here, MCDC asserts that, "the question does not go to an invasion of the fact finder's thought processes. Rather, the question is whether there were any thought processes at all." MCDC Brief at 4. I believe this Board should have given MCDC the same answer that the Second Circuit gave National Nutritional Foods Association, by quoting Morgan IV:

> But the short of the business is that the Secretary should never have been subjected to this examination. 313 U.S. at 422.
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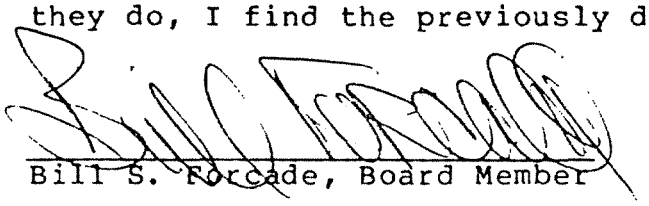
> Supra, at 1144.

For all of the above reasons, I must dissent. I believe the Board should have addressed the merits of the controversy rather than remanding the matter. I would note that the question of how local decisionmakers must address the record in landfill siting cases has been presented to the Illinois Appellate Courts on several occasions. So far, they have declined to answer. Until they do, I find the previously described cases most persuasive.



Bill S. Forcade, Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 6th day of June, 1989.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board