ILLINOIS POLLUTION CONTROL BOARD
September 9, 1993

RICHARD WORTHEN, CLARENCE BOHM, HARRY PARKER, GEORGE ARNOLD, CITY OF EDWARDSVILLE, CITY OF TROY, VILLAGE OF MARYVILLE, and VILLAGE OF GLEN CARBON,	)	
Petitioners,	)	
v.	)	PCB 90-137 (Landfill Siting Review)
VILLAGE OF ROXANA and LAIDLAW WASTE SYSTEMS (MADISON), INC.	)	
Respondents.	)	

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a remand order from the appellate court. This proceeding was originally begun by a July 23, 1990 petition for hearing to contest the June 18, 1990 decision of respondent the Village of Roxana (Roxana). Petitioners Richard Worthen, Clarence Bohm, Harry Parker, George Arnold, the City of Edwardsville, the City of Troy, the Village of Marysville, and the Village of Glen Carbon (collectively, petitioners) ask this Board to review Roxana's decision granting site approval to respondent Laidlaw Waste Systems (Madison), Inc. (Laidlaw) for expansion of its Cahokia Road landfill.

PROCEDURAL HISTORY

The Board originally issued its final decision in this landfill siting appeal on November 29, 1990. On January 3, 1991, the Board received Laidlaw's notice of appeal to the appellate court. The appellate court issued its decision on June 18, 1992, reversing the Board's decision and remanding the matter to the Board. (Laidlaw Waste Systems (Madison), Inc. v. Pollution Control Board (5th Dist. 1992), 230 Ill.App.3d 132, 595 N.E.2d 600, 172 Ill.Dec. 239.) The individuals and municipalities who were petitioners before the Board filed a petition for leave to appeal with the supreme court. That petition was denied by the supreme court in September 1992. The Board received the appellate court's mandate on November 9, 1992.

On January 21, 1993, in response to the appellate court decision, the Board remanded this case to Roxana for a determination of whether the application for siting approval at issue in this proceeding is "substantially the same" as a previous application filed in 1987. On March 8, 1993, Roxana filed its resolution and findings of fact, determining that the

two applications are not substantially the same. The Board then established a supplemental briefing schedule to allow the parties to supplement their original briefs. These supplemental briefs were limited to the issue of whether the two applications are substantially the same. Briefing is now complete, and the Board must proceed to decide those issues which were not previously decided in our November 29, 1990 opinion and order.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Environmental Protection Act (Act). (415 ILCS 5/39.2 (1992).) Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. Only if the local body finds that all applicable criteria have been met by the applicant can siting approval be granted.

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592; E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.) A 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. (Harris v. Day (4th Dist. 1983), 115 Ill.App.3d 762, 451 N.E.2d 262, 265.) The Board, on review, is not to reweigh the evidence. Where 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 Taskforce v. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1195; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505, 507.) 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., PCB 90-94 (August 30, 1990), aff'd File v. D & L Landfill, Inc. (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228. However, where an applicant made a prima facie showing as to each criterion and no contradicting or impeaching evidence was offered to rebut that showing, a local government's finding that several criteria had not been satisfied was against the manifest weight of the evidence. (Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board (1st Dist. 1992), 227 Ill.App.3d

533, 592 N.E.2d 148.)

Additionally, the Board must review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, 451 N.E.2d at 562.)

JURISDICTION

In our November 1990 opinion and order, the Board reversed Roxana's decision granting site approval to Laidlaw for expansion of Laidlaw's Cahokia Road landfill. The Board found that because Laidlaw's 1990 application for siting approval had been filed within two years of the disapproval of a previous 1987 application which was substantially the same as the 1990 application, Roxana had no jurisdiction to consider the application pursuant to Section 39.2(m) of the Environmental Protection Act. That subsection states:

> An applicant may not file a request for local siting approval which is substantially the same as a request which was disapproved pursuant to a finding against the applicant under any of criteria (i) through (ix) of subsection (a) of this Section within the proceeding 2 years. (Ill.Rev.Stat. 1989, ch. 111½, par. 1039.2(m), now codified at 415 ILCS 5/39.2(m) (1992).)

The appellate court reversed the Board's decision and remanded the case to the Board. The court upheld the Board's finding that the two-year period referred to in Section 39.2(m) begins to run as of the disapproval of a previous application. (Laidlaw, 595 N.E.2d at 602-603.) However, the appellate court overturned the Board's finding that the two applications in this case were "substantially the same." The court construed the Board's decision as stating that where two applications for local siting approval seek approval for expansion of the same facility, those facilities are "substantially the same." The court rejected such a conclusion, and remanded the case to the Board. (Laidlaw, 595 N.E.2d at 603-605.)

As noted above, the Board then remanded the proceeding to Roxana. The Board found, after reviewing the appellate court decision, that the issue of whether an application is "substantially the same" as a previous application is a question of fact that must be determined by the local decisionmaker. (Worthen v. Village of Roxana (January 21, 1993), PCB 90-137.) Roxana subsequently filed a resolution and findings of fact, in which Roxana concluded that the two applications are not "substantially the same". Petitioners have challenged that conclusion. If the two applications are "substantially the same", Roxana lacked jurisdiction to consider the 1990

application, because it was filed less than two years after the disapproval of the 1987 request.

"Substantially the Same"

The appellate court found that when considering the issue of "substantially the same", "the two applications must be reviewed as a whole, considering the criteria of section 39.2(a), to determine whether there are sufficient significant differences between them that they do not constitute applications which are substantially the same." (Laidlaw, 595 N.E.2d at 604.) Roxana's March 1, 1993 findings of fact analyze the two applications by applying each of the applicable criteria. Roxana found significant differences between the two applications in six of the nine criteria, and found that the other three criteria are not applicable to the applications. Thus, Roxana found that reviewed as a whole, there are sufficient significant differences between the two applications that they are not substantially the same. (Roxana Findings of Fact at 3-8.)

Petitioners contend that the two requests are substantially the same on criteria one and six. Criterion one asks whether the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve. Petitioners argue that because both applications involve the same site and include Madison County as the "principal" service area, the two applications are substantially the same as to criterion one. As to criterion six, which relates to traffic patterns to and from the proposed facility, petitioners maintain that the traffic study performed in support of the 1990 application was done only four months after the 1987 application was denied. Petitioners note that the phrase "substantially the same" has not been previously interpreted by the Board or the courts, but contend that because the legislature included the word "substantially", the legislature must have intended that an application did not have to be identical in order to be barred under Section 39.2(m). Petitioners argue that interpreting "substantially the same" to mean identical would render Section 39.2(m) meaningless, and allow an applicant to side-step that subsection by changing a few details.

In response, Laidlaw first states that because Roxana's determination on the issue of "substantially the same" is a finding of fact, that finding must be reviewed under the manifest weight of the evidence standard. Laidlaw contends that under that manifest weight standard, Roxana's findings of fact must be affirmed. Laidlaw notes that petitioners only argue that the application is substantially similar in two of the nine criteria. Thus, Laidlaw maintains that applying the appellate court's decision that the applications must be analyzed by considering all of the criteria, petitioners' own brief suggests that the two applications are not substantially the same.

The Board first notes that Laidlaw correctly states that Roxana's decision on this issue can only be reviewed under a manifest weight of the evidence standard. We have construed the appellate court's decision as finding that the issue of whether two applications are substantially the same is a question of fact to be determined by the local decisionmaker. The appellate court reiterated previous appellate decisions finding that this Board, in reviewing the factual determinations of a local decisionmaker, can only determine whether those findings are against the manifest weight of the evidence.[1] (Laidlaw, 595 N.E.2d at 603-604.)

We agree with petitioners that an application does not have to be identical to an earlier application in order to be barred under Section 39.2(m). However, after reviewing the record and the parties' arguments, the Board finds that Roxana's decision, that the two applications are not substantially the same, is not against the manifest weight of the evidence. Roxana analyzed the two applications by applying all six of the criteria which it found to be applicable, and concluded that the two applications were not substantially the same within the context of each of those criteria. For example, as to criterion one, Roxana found that the 1990 application identified a different service area than the 1987 application, that the 1990 application proposes a 94-acre expansion instead of the 154-acre expansion proposed by the 1987 application, and that the 1990 application offered greater documentation of need than that 1987 application. (Roxana Findings of Fact at 3-4.) Likewise, as to criterion three, Roxana found that the 1987 application contained no analysis of the value of the surrounding property, while the 1990 application included a real estate valuation study detailing sales prices near the existing landfill with comparable sales elsewhere in the county, as well as a detailed description of the character of the surrounding area--something not included in the 1987 application. (Roxana Findings of Fact at 5-6.) Roxana also analyzed the two applications as to the other four applicable criteria. (Roxana Findings of Fact at 3-8.) Roxana concluded that because there are significant differences between the two applications in all of the six applicable criteria, the two applications are not "substantially the same". (Roxana Findings of Fact at 8.)

Petitioners do not argue that any of the factual differences noted in Roxana's findings of fact are incorrect, or that Roxana's conclusion that the applications are not substantially

[1] The Board notes that the dissenting justice in the appellate court believed that no manifest weight questions were posed by the appeal, but that the issue of "substantially the same" is a question of law. (Laidlaw, 595 N.E.2d at 605.)

the same is against the manifest weight of the evidence. Indeed, petitioners only contend that the applications are substantially the same within the context of two of the six applicable criteria. Even if the Board were to find, which it does not, that Roxana's findings of fact as to criteria one and six were against the manifest weight of the evidence, Roxana's decision that the applications are not substantially the same as to the other four criteria would be left standing. In sum, we do not find that Roxana's decision on this issue was against the manifest weight of the evidence. A decision is against the manifest weight of the evidence only if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. (Harris, 451 N.E.2d at 265.) The Board does not find that it is indisputable that the two applications are substantially the same. Therefore, we must uphold Roxana's conclusion.

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires the Board to review the proceedings before the local decisionmaker to assure fundamental fairness. In E & E Hauling, 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. (E & E Hauling, 451 N.E.2d at 564; see also FACT, 555 N.E.2d at 661.) Due process requires that parties have an opportunity to cross-examine witnesses, but that requirement is not without limits. 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 of Illinois Inc. v. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682, 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.)

Bias and Conflict of Interest of Hearing Officer

Petitioners contend that they were denied fundamental fairness because the hearing officer who conducted the local siting hearing had been involved in Roxana's annexation of the landfill site. Petitioners state that the hearing officer, Thomas Immel, also gave Roxana legal advice up to the time of the local hearing. Thus, petitioners maintain that the hearing officer had a conflict of interest between his duty to Roxana as his client and his duty to the public to serve as a fair and impartial hearing officer. Petitioners cite several instances in

support of their claim that the hearing officer was biased. For example, petitioners state that the hearing officer suggested that petitioners argue a motion to dismiss the application before arguing a motion to remove the hearing officer. Petitioners maintain that if they had done so, they would have waived their right to seek removal of the hearing officer.

In response, Laidlaw notes that petitioners do not claim that Roxana itself, as opposed to the hearing officer, was biased or predisposed to find against the petitioners. Laidlaw states that the appellate courts have held that the existence of a preannexation agreement, with a potential economic benefit to a village, does not show predisposition of a local decisionmaker. (FACT, 555 N.E.2d 1178; Woodsmoke Resorts, Inc. v. City of Marseilles (3d Dist. 1988), 174 Ill.App.3d 906, 529 N.E.2d 274.) Laidlaw argues that the hearing officer is only a tool to conduct the hearing, and does not advise the local decisionmaker on the merits of the case. Laidlaw contends that the instances cited by petitioners do not show a violation of fundamental fairness.

After reviewing the record and the parties' arguments, the Board finds that the record does not support a conclusion that the hearing officer was biased or had a conflict of interest such that the proceedings before Roxana were fundamentally unfair. None of the instances cited by petitioners persuade the Board that the hearing officer was biased. For example, the hearing officer did suggest that the motion to dismiss the petition be argued before the motion to remove the hearing officer. However, when petitioners declined to do so, the hearing officer promptly allowed petitioners to address the motion to remove the hearing officer. (Tr. 4/3/90 at 26-27.) We find no evidence that this sequence of events was designed to somehow trick petitioners into waiving their right to challenge the hearing officer.

As to petitioners' contention that the hearing officer was acting under a conflict of interest because of his prior representation of Roxana in Roxana's pre-annexation agreement with Laidlaw, and the preparation of Roxana's ordinance governing siting application proceedings, the Board finds no evidence of any conflict which denied petitioners fundamental fairness. As Laidlaw points out, the appellate courts have previously held that it is not fundamentally unfair for a local decisionmaker who entered into a pre-annexation agreement with a siting applicant to subsequently act upon that application. (FACT, 555 N.E.2d at 1180-1182; Woodsmoke, 529 N.E.2d at 275-277.) The hearing officer in this proceeding did not make any substantive findings or recommendations on the merits of the application, but simply conducted the hearing. As the appellate court has previously noted, the role of the hearing officer was ministerial and of no consequence. (E & E Hauling, 451 N.E.2d at 569.) In sum, petitioners have not presented any evidence that the hearing officer's prior professional relationship with Roxana created a

conflict of interest which would support a finding that the proceedings were fundamentally unfair. (See Citizens Against Regional Landfill (CARL) v. Whiteside County (February 25, 1993), PCB 92-156.)

CRITERIA

Petitioners raise two challenges that are related to statutory criteria: criterion one (whether the proposed facility is necessary to accommodate the waste needs of the intended service area), and criterion eight (whether the facility is consistent with any solid waste management plan adopted by the county). (Ill.Rev.Stat. 1989, ch. 111½, par. 1039.2, now codified at 415 ILCS 5/39.2 (1992).) The usual forum for the Board's review of challenges relating to the statutory criteria is a determination of whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, 566 N.E.2d at 29; Waste Management of Illinois, 513 N.E.2d 592.) However, in this case petitioners allege that their challenges involve only questions of law and not questions of fact, so that the manifest weight of the evidence standard is inappropriate. We will address each of the challenges separately.

Service Area

Petitioners contend that Laidlaw's application is "fatally defective as a matter of law" because the application describes a service area of a 100-mile radius of Roxana, but only provides a needs assessment for Madison, St. Clair, and Monroe Counties. Petitioners state that the pre-annexation agreement between Roxana and Laidlaw specifies that the facility would serve a 100-mile radius of the facility, but contend that the needs assessment presented during the siting proceeding was limited to the three Illinois counties. Petitioners argue that by failing to analyze the entire service area, Laidlaw presented an incomplete and inaccurate picture of the area's waste disposal needs. Finally, petitioners maintain that even if Laidlaw's proposed service area was limited to the three Illinois counties, the proof presented by Laidlaw is fatally defective because it assumes that the tri-county area must accept large volumes of imported garbage.

In response, Laidlaw argues that it repeatedly declared that the intended service area is primarily the three Illinois counties. Laidlaw states that the applicant has the right to choose its intended service area (Metropolitan Waste Systems, Inc. v. Pollution Control Board (3d Dist. 1990), 201 Ill.App.3d 51, 558 N.E.2d 785), and that the statute does not require geographical boundaries as rigid barriers to that service area. Laidlaw states that the local decisionmaker then has the authority to accept or reject the intended service area. (Fairview Area Citizens Taskforce v. Village of Fairview (June

22, 1989), PCB 89-33, aff'd FACT, 555 N.E.2d 1178.) Laidlaw maintains that reference to garbage imported from outside the three county area is discussed as one of several uncontrollable factors, and that it is unrealistic not to recognize that garbage is transported to distant sites for disposal. Laidlaw disputes petitioners' contention that the pre-annexation agreement requires that the facility serve a 100-mile radius: rather, Laidlaw states that the 100-mile radius contained in that agreement is a limitation. Laidlaw maintains that it presented sufficient proof to demonstrate compliance with criterion one.

Initially, the Board rejects petitioners' contention that this issue is a question of law, not subject to the manifest weight standard of review, rather than a question of fact. The appellate courts have repeatedly held that this Board's review of a local decision on the Section 39.2 criteria is limited to the manifest weight of the evidence standard. (See, e.g., McLean County Disposal, 566 N.E.2d at 29; Waste Management of Illinois, 513 N.E.2d 592; E & E Hauling, 451 N.E.2d 555.) Petitioners have not presented any argument, beyond their mere assertion, that this case is somehow different. The crux of petitioners' argument on criterion one is that the evidence presented by Laidlaw did not support the alleged service area. That argument attacks the conclusion of the local decisionmaker. Our review of such challenges is limited to a manifest weight of the evidence review. We will continue to apply that standard.

After reviewing the record and the parties' arguments, the Board finds that Roxana's decision that criterion one is satisfied is not against the manifest weight of the evidence. We agree with Laidlaw that the 100-mile radius contained in the pre-annexation agreement is a limitation, not a requirement that the facility serve that entire area. In addition, the Board is not willing to conclude today that a pre-annexation agreement, which is not relevant to the siting process under Section 39.2, somehow binds an applicant in defining the service area for purposes of the Section 39.2 process. Laidlaw's application states that the facility will serve "Madison County and the surrounding areas", and Laidlaw's witness repeatedly testified that the service area is "Madison, St. Clair, Monroe Counties and the surrounding areas if that opportunity avails itself in the future." (App., Vol. 1, Sec. 4; Tr. 4/3/90 at 139-140, 148, 149, 203, 218.) The applicant is entitled to define the service area (Metropolitan Waste, 558 N.E.2d 785), and the local decisionmaker has the power to determine if that proposed service area is acceptable or unacceptable (Fairview Area Citizens Taskforce (June 22, 1989), PCB 89-33). Roxana accepted the service area, and we cannot say that the decision was against the manifest weight of the evidence.

Solid Waste Management Plan

Petitioners contend that Roxana should not have granted siting approval because Madison County is required by the Solid Waste Planning and Recycling Act (Ill.Rev.Stat.1989, ch. 85, par. 5952, now codified at 415 ILCS 15/2 (1992)) to adopt a comprehensive solid waste management plan by March 1991. Petitioners maintain that any siting approval in Madison County is therefore in contravention of the purpose and spirit of that statute to provide a comprehensive plan for the county. Petitioners assert that Laidlaw entered into a pre-annexation agreement with Roxana to avoid the jurisdiction of Madison County, and to avoid the impact of the required county solid waste management plan.

Laidlaw argues that petitioners' claims ignore the clear mandate of Section 39.2. Laidlaw notes that Section 39.2(a) specifically states that the municipality in which a proposed facility is located has jurisdiction to rule upon a request for siting approval, and that subsection (g) states that Section 39.2 are the exclusive procedures for local siting approval. Laidlaw maintains that petitioners do not contend that Madison County had actually adopted a solid waste management plan.

Initially, the Board notes that this challenge to Roxana's decision does not lend itself to a manifest weight of the evidence review. Petitioners do not contest Roxana's conclusion that there was no county waste management plan, or otherwise challenge Roxana's factual conclusions. Instead, petitioners contend that the approval is in conflict with the purpose of a state statute requiring the adoption of a solid waste management plan. Thus, the Board will simply address petitioners' contention.

Section 39.2 clearly states that the governing body of the municipality shall approve or disapprove requests for local siting approval. Roxana had a duty to decide whether Laidlaw's application for siting approval met each of the applicable criteria under Section 39.2(a). Subsection (e) requires the local decisionmaker to take final action on an application within 180 days. If final action is not taken in a timely manner, an applicant may deem the request approved. Nothing in Section 39.2 allows a local decisionmaker to deny approval, or delay decision, because a county may not have yet adopted its solid waste management plan. We are unsure as to what petitioners believe Roxana should have done when it received the siting application. If Roxana had simply deferred action until the county plan was adopted, siting approval probably would have been granted by operation of law pursuant to Section 39.2(e). If the legislature had intended that no siting approvals be granted in counties where a solid waste management plans had not been adopted,

Section 39.2 could have been amended to reflect that intent. The Board rejects petitioners' claim.

CONCLUSION

In sum, the Board finds that Roxana's conclusion, that the 1990 and 1987 applications are not substantially the same, is not against the manifest weight of the evidence. We find that the record does not support a conclusion that the hearing officer was biased or had a conflict of interest such that the local proceedings were fundamentally unfair. Additionally, we find that Roxana's conclusion that criterion one is satisfied is not against the manifest weight of the evidence. Finally, we reject petitioners' contention that the grant of siting approval is in conflict with the statute requiring counties to adopt solid waste management plans. Thus, we affirm Roxana's June 18, 1990 decision granting siting approval to Laidlaw.

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

ORDER

Roxana's June 18, 1990 decision granting siting approval to Laidlaw Waste Systems (Madison), Inc. for expansion of its Cahokia Road landfill is affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements. (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 9th day of September, 1993, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board