ILLINOIS POLLUTION CONTROL BOARD
June 15, 1992

GALLATIN NATIONAL COMPANY,)
Petitioner,)
v.) PCB 91-256 (Landfill Siting Review)
THE FULTON COUNTY BOARD and THE COUNTY OF FULTON,)
Respondents.)

THOMAS R. MULROY, REBECCA L. RAFTERY, and GARY W. BALLESTEROS, of JENNER & BLOCK, APPEARED ON BEHALF OF PETITIONER, AND

JAMES E. LLOYD and JOAN C. SCOTT APPEARED ON BEHALF OF RESPONDENTS.

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

This matter is before the Board upon the December 23, 1991 petition for hearing filed by Gallatin National Company (Gallatin). Gallatin, as a third-party petitioner,[1] contests the decision of the Fulton County Board (County Board) to grant siting approval to the County of Fulton (Fulton County) for a regional pollution control facility. This appeal is brought pursuant to Section 40.1(b) of the Environmental Protection Act (Act). (Ill.Rev.Stat. 1991, ch. 111½, par. 1041.1(b).)

Throughout this proceeding the applicant has been referred to as the County of Fulton, or Fulton County. The decisionmaker has been referred to as the Fulton County Board. In fact, all relevant actions in this proceeding were taken by the County of Fulton, acting through its duly authorized representatives, the County Board. Thus, the entity authorizing the issuance of bonds, the entity filing the landfill siting application, and the entity rendering the landfill siting decision now under appeal were all the same entity.

PROCEDURAL HISTORY

On July 8, 1991, Fulton County filed an application with the County Board requesting that the County Board approve the siting of a regional pollution control facility. The application requested a vertical expansion of the county's Landfill No. 2, and the development of Landfill No. 3 as a vertical and

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[1] Gallatin owns a permitted landfill in the area, although the landfill is apparently not yet accepting waste.

horizontal expansion of Landfill No. 2. (C0035.)[2] On August 6, 1991, Gallatin entered its appearance as an objector to the application, and thereafter participated in the siting review process. Public hearings were held pursuant to Section 39.2 of the Act on October 21 and 22, 1991. At its December 10, 1991 meeting, the County Board voted to adopt a resolution granting Fulton County local siting approval to its Landfill No. 3.

Gallatin filed its petition for hearing with this Board on December 23, 1991. The Board's hearings on this matter were held on April 2 and 9, 1992, in Lewistown, Fulton County, Illinois. Several members of the public attended the hearings.

In its petition, Gallatin claims that the exhibits and testimony provided by Fulton County at the local hearing failed to show, as required by Sections 39.2(a)(1), (2), and (5) of the Act, that:

a. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

b. the facility is designed to protect the public health, safety, and welfare; and

c. the plan of operations for the facility is designed to minimize the danger to the surrounding area.

In addition, Gallatin argues that the County Board conducted the application process in a fundamentally unfair manner.

BACKGROUND

The history of Fulton County's prior and present landfilling operations are at issue in this case. On February 16, 1972, the Illinois Environmental Protection Agency (Agency) issued Permit No. 1972-12-OP to Fulton County for the operation of a solid waste landfill, known as Landfill No. 1, at an abandoned strip mine site located near the City of Cuba in Putman Township, Fulton County, Illinois. (C0036, C0072, C0819.) Fulton County operated Landfill No. 1 from 1972 to 1984. (C0036-0037, C0819,

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[2] References to the county record will be cited as (C____.) (The transcripts of the local hearings are contained within the county record.) References to the transcripts of the Board's April 2, 1992, and April 9, 1992 hearings will be cited as (Tr. I ___) and (Tr. II ___), respectively. The exhibits introduced at the Board's hearings will be cited as (Pet. Ex. ___) and (Resp. Ex. ___.).

C0828.) Although the initial operating permit was for trench fill operations on 10.83 acres of the strip-mined spoil areas, the permitted boundaries were exceeded during the operating years from 1972 to approximately 1980 so that approximately 80 acres were used. (C0037, C0072, C0819, C0824-0833.) The landfill accepted general municipal wastes except on those occasions when a supplemental permit was granted to accept special (i.e., hazardous, industrial, toxic) wastes. (C0073-0080, C0819, C0822, C1334.) During the time of its operation, the Agency notified Fulton County that the landfill was in violation of the Board's regulations for failing to comply with its operational requirements, including failing to apply daily and final cover, operating without a permit, and failing to submit groundwater monitoring reports. (C0794, C0797-0798, C0799-0801.) Moreover, the landfill did not have a leachate treatment system even though the landfill's permit required one. (C0794, C0796, C0815-0818.) On January 4, 1984, the Agency issued Supplemental Permit No. 1984-1-SP to allow for the modification of the groundwater monitoring program at the site. (C0037, C0082-0083.) On November 12, 1986, the United States Environmental Protection Agency (USEPA) issued a hazardous waste site assessment of Landfill No. 1. (C0794, C0815-0823.) On May 3, 1988, the Agency conducted an on-site inspection of the landfill which indicated that the landfill had never been properly closed.[3] (C0794, C0824-0833.) On July 31, 1989, Daily & Associates, on behalf of the County Board, sent a letter to the Agency that set forth a proposed schedule for closure of the landfill. (C0794, C0834-0835.)

On May 8, 1981, the Agency issued Permit No. 1981-19-DE to the Fulton County for the development of a second landfill known as Landfill No. 2. (C0037, C0093-0101.) The developmental permit did not require a leachate or gas collection system, gas monitoring system, or a liner. (C0093-0101, C1258-1259.) The Agency issued an operating permit, Permit No. 1981-19-OP, for this landfill on January 5, 1984. (C0037, C0103-0104, C0819.) Although the development area of the landfill was 61.6 acres, this landfill has exceeded the vertical limitations in Area 1 of the fill. (C0037, C0093-0101, C0819, C0842-0849, C0850-0858, C0861-0869, C0866.) In addition, the Agency has notified Fulton County that the landfill is in violation of the Act and the Board's regulations. (C0795, C0850-0858, C0859-0860, C0861-0869.) The Board also has found the landfill in violation of the Act and regulations. (In the Matter of: Fulton County, (August 4, 1988), AC 88-63, 91 PCB 223.) (C0795, C0836-0841.) Fulton County

[3]Fulton County, in its response brief, cites to the County hearing transcript in support of its assertion that Landfill No. 1 is not required to have a written closure plan. (Resp. Br. p. 2; C1347-1348.)

is currently preparing another area of the landfill, known as Waste Area 4, to receive waste. (C0037.) Landfill No. 2 is expected to close in June, 1994. (C0037.)

On November 22, 1989, Fulton County attempted to secure a supplemental permit from the Agency for the overfilling of Area 1, the elimination of Areas 6, 7, and 8, and for a change in grade for the final grading plan. However, Fulton County was advised by the Agency that it would need to go through a siting process pursuant to Section 39.2 of the Act. (C0037, C0842-0849, C1454.) Finally, on August 22, 1991, the Agency directed Fulton County to submit an application for significant modification for the landfill so that the landfill's permits would be compatible with the Board's new landfill regulations. (C0788-0789, C0790, C0795, unmarked page between C0869 and C0870.)

In early 1990, the County Board commissioned Daily & Associates to present Fulton County with options to correct the deficiencies in Landfills No. 1 and 2. (Tr. II 63-64.) In April, 1990, Daily & Associates completed its report entitled "Analysis of Options for the County Landfill Facility." (C0938-0951.) The report presented the following three options:

1) close Landfill No. 2 immediately;

2) close Landfill No. 2 at the end of its permitted life (approximately early 1993), or

3) vertically expand Landfill No. 2. (C0938-0951).

On June 12, 1990, the County Board formally voted, 18 to 8, to proceed with Option 3, subject to obtaining both financing and siting approval for the expansion. (Tr. II 65, 97, 108.)

On November 13, 1990, the County Board acted upon the financing component. It voted by ordinance to finance the expansion by borrowing $500,000 through a bond issuance from the Illinois Rural Bond Bank. (C0870-0913, C0914-0918, C0919, C0920-0921, C0922-0926, C0927, C0928-0929, C0930-0932, C0933, C1218; Tr. I 116, 121; Tr. II 68.) The bonds were to be repaid by the revenue generated by the expansion; the debt was required to be further secured by sales tax intercept revenues. (C0883, C0922-0926, C0927, C0928-0929, C1218, C1220-1221; Tr. II 66-68.) The County Board then addressed the siting component. It retained Richard Spencer of Daily & Associates to act as its expert engineer and to prepare the siting application. (C1224.)

In January or February, 1991, Fulton County received the revenues from the bond issue. (Tr. II 68-69.) On May 14, 1991, the chairman of the County Board, Melba Ripper, appointed three County Board members (Wanda Williams, Ray Moore, and William Danner) to a subcommittee known as the Regional Pollution Control

Hearing Committee (Committee).[4] Three other County Board members (Kenny Brooks, Louise Ruff, and Randy Brennan) were appointed as alternate members of the Committee. (C1166; Tr. I 59-60, 62-63, 97; Tr. II 32, 73.) The Committee eventually presided at the siting hearing and made a written recommendation to the County Board to approve the landfill siting. (C1166; Tr. 73-74; Pet. Ex. 3.)

On July 8, 1991, eight months after the County Board issued the bonds, Fulton County applied to the County Board for siting approval. (C0011-0590, 0644; Tr. II 74.) On August 6, 1991, Gallatin entered its appearance in the case and specifically requested that "all notices or any filings of any type made to the Committee concerning the siting be sent to [Gallatin's] attorneys...." (C0645.) On August 30, 1991, Gallatin filed a notice requesting notification from the Committee of any tours of the Fulton County Landfill, and a notice requesting a 30-day advance notification of the siting hearing. (C0646-0652.) Notice of the hearing was mailed to Gallatin's attorneys on September 27, 1991. (C0653-0656, C0658, C0664, C0665.) On October 21 and 22, 1991, the Committee conducted the siting hearing. (C1161-1381, C1382-1578.) On November 20, 1991, Gallatin submitted a document entitled "Gallatin National Company's Proposed Findings of Fact" to the County Board. (C1060-1090.) The proposed findings directed the County Board to specific citations in the record that Gallatin believed detailed the failure of Fulton County to satisfy the applicable statutory criteria. (C1060-1090.) On that same date, Gallatin also submitted the opinions of three technical experts who had reviewed the Fulton County's application. (C1091-1123.)

In November, 1991, the Committee met to determine its findings and recommendations to the County Board. (C1126-1132; Tr. I 65-68, 107-110, 139-142.)[5] On December 10, 1991, the County Board received the Committee's recommendations, dated December 10, 1991, voted 19 to 7 to approve the Fulton County's application for site expansion, and requested that a written decision be prepared by the Fulton County State's Attorney.

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[4] In May, 1990, Ms. Ripper appointed a special ad hoc committee to address issues associated with the Fulton County Landfill. (Tr. II 61-63.) That committee, known as the "landfill siting committee" and different than the Regional Pollution Control Hearing Committee, met on May 3, 6 and 31, 1991. (Tr. II 69-73.) Fulton County's attorney, special assistant state's attorney James Lloyd, and Mr. Spencer of Daily and Associates were members of that committee. (Tr. II 72.)

[5] There is some discrepancy in the record as to whether this meeting occurred on November 10, 1991, or on November 25, 1991.

(C1124-1125, 1126-1131; Pet. Ex. 3, Resp. Ex. 2.) Finally, on January 8, 1992, the County Board filed its written decision pursuant to Section 39.2(e) of the Act with the Fulton County Clerk. (C1147-1154.)

PRELIMINARY MATTERS

Respondents' Motion to Quash

On February 28, 1992, Gallatin served Fulton County's attorney, Mr. James Lloyd,[6] with a subpoena to appear as a witness at this Board's hearing.[7] Fulton County and the County Board filed a motion to quash the subpoena on March 4, 1992. Gallatin filed its response to the motion on March 4, 1992. The Board's hearing officer issued an oral ruling quashing the subpoena on March 4, 1992. Gallatin, at hearing and in its post-hearing brief, objects to the hearing officer's order and, in its post-hearing brief, requests that this Board's hearings be reopened so that it can examine Mr. Lloyd about his contacts with the County Board. (Tr. I 6-7,50-53.) Gallatin argues that Mr. Lloyd is the person most competent to testify about the contacts revealed by his legal bills and the county records, and that no prejudice will result to Fulton County if Mr. Lloyd testified because the County Board was represented at this Board's April 2 and 9, 1992 hearings by Joan Scott.

In response, Fulton County and the County Board note that the hearing officer quashed Gallatin's subpoena because the subpoena was late, the existing case law was against Gallatin, and because the information that Gallatin sought was available from other sources.

In a March 6, 1992 letter to the Board, the hearing officer indicated that he quashed the subpoena against Mr. Lloyd during an emergency telephone pre-hearing conference held on March 4, 1992, and that he would place his rulings on the record at hearing. On March 17, 1992, the Board notified the parties that although the hearing officer would rule on current pending motions, a new hearing officer was assigned to the case. The result of these circumstances was that the original hearing officer never provided the specific reasoning for his ruling. After reviewing the arguments and the record, we decline to

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[6]James Lloyd represented Fulton County, as applicant, during the siting proceeding. State's Attorney Joan Scott represented the County Board.

[7] The subpoena was for attendance at a scheduled March 6, 1992 hearing. That hearing was cancelled because of poor weather, and the hearing was held on April 2 and 9, 1992.

overturn the hearing officer's ruling. Much of the information that Gallatin sought to adduce via its subpoena was made available during the Board's hearings in this case when several persons testified regarding their contacts with Mr. Lloyd. The Board is extremely reluctant to allow an attorney of record to be subpoenaed, thus endangering his or her representation of his client (in this case, Mr. Lloyd's representation of Fulton County as the applicant), without a showing that only that attorney can provide necessary information.

Respondents' Motion in Limine

On March 6, 1992, Fulton County and County Board filed a motion in limine asking the Board to enter an order prohibiting Gallatin from calling witnesses or adducing evidence at the Board's hearing with respect to the issue of fundamental fairness. Gallatin filed its response to the motion on March 17, 1992. The hearing officer denied the motion in limine on March 26, 1992. In their brief, Fulton County and the County Board state that they continue to object to the hearing officer's ruling because:

1. although Gallatin alleged bias, prejudgment, and improper ex parte contacts on October 21, 1991, immediately prior to the siting hearing, it failed to call any witnesses or adduce any evidence in support of its allegations;

2. any circumstances constituting evidence of prejudgment or bias of the County Board would have occurred prior to the siting hearing beginning on October 21, 1991;

3. the County Board ruled upon Gallatin's objections to fundamental fairness in its January 8, 1992 decision; and

4. Section 40.1(b) of the Act provides that the hearing before the Board be based exclusively on the record before the County Board.

In addition to his ruling on the motion to quash, the hearing officer, in his March 6, 1992 letter to the Board, indicated that he was "likely to deny a [m]otion in limine...", and that he would place his ruling on the record at hearing. Because another hearing officer conducted the hearing, the original hearing officer never provided the reasoning for his rulings on the record.

We will not overrule the hearing officer in this instance.

The Illinois supreme court has affirmed that the Board may look beyond the record on the issue of fundamental fairness to avoid an unjust or absurd result. (E&E Hauling, Inc. v. PCB (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd (1985), 107 Ill.2d 33, 481 N.E.2d 664.) The statute requires the Board to examine the fundamental fairness of the procedures used at the local level. (Section 40.1 of the Act.) It would be absurd to find that although the Board must examine fundamental fairness issues, a petitioner is excluded from presenting evidence on those questions. Moreover, the Board cannot find any case that stands for the proposition that we are precluded from considering evidence of prejudgment or bias that may have occurred prior to the local siting hearing or from examining the issue of fundamental fairness simply because the County Board ruled upon objections to fundamental fairness at the siting hearing below. Again, the statute specifically requires the Board to consider fundamental fairness issues on appeal from a local decision.

Finally, Gallatin is not required to prove predisposition at the County Board level in order to preserve its allegations. Fulton County and the County Board's assertion to the contrary ignores the fact that Gallatin may have discovered evidence of predisposition, bias, or ex parte contacts after the siting hearing and that Gallatin may have been unable to make a record of the objectionable conduct until it could take discovery and question the decision makers at the Board level. In addition, the courts have recognized that in order for the question of bias to be reviewed on appeal, a person need only raise or assert an objection prior to or during the siting hearing. (See Fairview Area Citizens Taskforce v. IPCB (3rd Dist. 1990), 198 Ill.App.3d, 555 N.E.2d 1178, 1180; A.R.F Landfill, Inc. v. PCB (1988), 174 Ill.App.3d 82, 528 N.E.2d 390; E & E Hauling, Inc. v. PCB (1985), 107 Ill.2d 33, 38-39, 481 N.E.2d 664, 666; People v. Carlson (1980), 79 Ill.2d 564, 576-577, 404 N.E.2d 233, 238-239.) This is precisely what happened in this case. Gallatin initially raised its objections to the hearing officer at the onset of the siting hearing on October 21, 1991. (C1172-1173.) At that time, Gallatin also provided its objections in written form in a document entitled "Objections of Gallatin National Company to the Fundamental Fairness of Fulton County's Application Process and Motion to Disqualify", dated October 21, 1991. (C1172-1173, C0971-0976.) Although the hearing officer overruled Gallatin's objections without comment, Gallatin renewed its objections later in the siting hearing. (C1173-1174, C1564.) In fact, the hearing officer clarified that Gallatin's objections were made part of the record and that no further action was necessary to preserve Gallatin's objections. (C1564-1565.)

STATUTORY BACKGROUND

Public Act 82-682, commonly known as SB-172, is codified in Sections 3.32, 39(c), 39.2, and 40.1 of the Act. It vests

authority in a county board or municipality to approve or disapprove the siting request for each new regional pollution control facility. These decisions may be appealed to the Board in accordance with Section 40.1 of the Act. The Board's scope of review encompasses three principal areas: (1) jurisdiction; (2) fundamental fairness of the county board's site approval procedures; and (3) statutory criteria for site location suitability. Pursuant to Section 40.1(a) of the Act, the Board is to rely "exclusively on the record before the county board or the governing body of the municipality" in reviewing the decision below.[8]

Section 39.2 of the Act presently outlines nine criteria for site suitability, each of which must be satisfied (if applicable) if site approval is to be granted. In establishing each of the nine criteria, the applicant's burden of proof before the local authority is the preponderance of the evidence standard. (Industrial Salvage v. County of Marion(August 2, 1984), PCB 83-173, 59 PCB 233, 235, 236.) On appeal, the Board must review each of the challenged criteria based upon the manifest weight of the evidence standard. (See McLean County Disposal, Inc. v. County of McLean(4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26; 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 v. IPCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part 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. (August 30, 1990), PCB 90-94, 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

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[8]As previously stated, the Board may look beyond the local authority's record when reviewing the issue of fundamental fairness.

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. March 19, 1992), No. 1-91-0144, slip op. at 26.)

JURISDICTION

Jurisdiction is not at issue in this case.

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires that this Board review the proceedings before the local siting authority to assure fundamental fairness. In E&E Hauling, Inc. v. PCB (2d Dist. 1983), 116 Ill.App.3d 586, 594, 451 N.E.2d 555, 564, aff'd in part (1985), 107 Ill.2d 33, 481 N.E.2d 664, 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 also Industrial Fuels & Resources/Illinois, slip op. at 17; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1193.) In an analysis of bias or prejudgment, elected and administrative officials are presumed to be objective and to act without bias.

In its post-hearing brief, Gallatin cites to the following four arguments in support of its contention that the County Board's decision making process was fundamentally unfair:

1. Gallatin argues that the County's attorney, Mr. Lloyd, and engineer, Mr. Spencer, engaged in a series of ex parte contacts with the County Board, Committee, and hearing officer after Fulton County filed its application for siting approval and after Gallatin filed its appearance. Gallatin adds that fundamental and procedural issues were discussed at such times and that Gallatin was given no notice of such meetings and had no opportunity to respond even though it had specifically requested notice.

2. Gallatin argues that Fulton County failed to distinguish between its roles as applicant and decision maker. More specifically, Gallatin asserts that the evidence shows that Mr. Spencer acted in an advisory capacity to the Committee and that County Board chairman, Ms. Ripper, acted on behalf of Fulton County when she negotiated for the bonds that funded the siting application and signed the siting application.

3. Gallatin argues that the County Board demonstrated bias in favor of the application when it failed to apply its own siting rules. Specifically, Gallatin argues that the County Board violated its rules when it did not publish notice of Fulton County's application or hold the hearing within the time frames specified in the rules, and when it allowed Fulton County to file its siting application without paying the required filing fee.

4. Gallatin argues that, when passing the ordinance authorizing the issuance of bonds, the County Board already had determined that Landfill No. 3 would be built.

Ex Parte Contacts

With regard to the allegation of ex parte contacts, Gallatin cites to several examples of such contacts in its post-hearing brief. First, Gallatin points out that Mr. Keith Kost, Gallatin's local attorney, testified that, at the conclusion of the October 22, 1991 siting hearing, he observed Mr. Lloyd discussing with the six members of the Committee "the burden of proof that Fulton County had to put on and how much evidence the county had to put on to meet the burden". (Tr. I 17.) In addition, Gallatin notes that, in a July 10, 1991 memo, Ms. Ripper directed the Committee to meet with Mr. Lloyd "concerning the siting application and hearing procedures for"[Landfill No. 3]. (Pet. Ex. 6.) Gallatin alleges that the meeting between the Committee and Mr. Lloyd occurred on July 25, 1991. (Tr. I 81, 94-95; Pet. Exs. 1, 5.) Finally, Gallatin notes that Mr. Lloyd's bills to Fulton County indicate, in part, that he attended the July 25, 1991 Committee meeting at the courthouse; an August 14, 1991 Committee meeting in Lewistown to "revise rules and regulations for the [Committee]"; had an October 2, 1991 telephone conference with Mr. Danner regarding "copy of siting committee rules and regulations"; had an October 16, 1991 conference with the hearing officer, Ronald Weber, on "[the] procedure to be used at [the] siting hearing"; and had a December 9, 1991 telephone conference with Ms. Scott, on "[the] landfill resolution and review of committee findings and recommendations" (Pet. Ex. 1.) In addition, Gallatin argues that the Committee members met with Fulton County's engineer, Mr. Spencer, to "[go] over the rules and regulations for siting a landfill". (Tr. I 80; Tr. II 45-46, Pet. Ex. 4.) Finally, Gallatin points to several places in the record where the Committee members themselves confirmed that the ex parte contacts occurred.[9] (Tr.

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[9]Gallatin specifically alleges that it received no notice of the above contacts even though it entered an appearance in the

I 17, 80-82, 94-95, 134; Tr. II 4, 26-28, 36, 45-46, 58, 78.)

A review of the record reveals that there were indeed several contacts during the course of the siting process. We are particularly disturbed by Mr. Lloyd's contacts with the Committee and the hearing officer. We cannot, however, hold the Committee or the hearing officer responsible for such contacts. Rather, Mr. Lloyd, as an attorney, should have been aware of the danger of ex parte contacts once the siting application was filed and once he was appointed as special assistant state's attorney to represent Fulton County. We are also disturbed by the fact that there may have been a violation of the Open Meetings Act if, in fact, no notice of the Committee meetings was given.[10]

Notwithstanding the foregoing, however, the Board does not believe that the contacts or lack of notice fundamentally prejudiced Gallatin. A decision must be reversed, or vacated and remanded, where "as a result of improper ex parte communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect". (E&E Hauling, 451 N.E.2d at 603.) In determining if improper ex parte communications irrevocably taint the decision making process, a number of considerations may be relevant, including: the gravity of the ex parte communications, whether the contacts may have influenced the ultimate decision; whether the party making the improper contacts benefitted from the ultimate decision; and whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond. E&E Hauling, 451 N.E.2d 603.

There are several reasons why we do not believe that Mr. Lloyd's and Mr. Spencer's contacts with the Committee and the hearing officer irrevocably tainted the decision making process. First, we again remind Gallatin that neither the Committee nor

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matter and requested notice. (C0646, Tr. I 24-25, 73-74, 95.)

[10]Mr. Kost testified that he did not receive notice of the July 25, 1991, August 14, 1991, or August 21, 1991 meetings. (Tr. I 24-25, 41.) Ms. Williams testified that she did not give notice of the November 25, 1991 Committee meeting and did not know who was responsible for giving notice. (Tr. I 73-74.) She also testified that she did not know if notice was given of the August 14, 1991 meeting or if any notice was given for any of the Committee's meetings. (Tr. I 73, 82, 95.) Mr. Danner testified that he believed notice was given of the November 25, 1991 Committee meeting. (Tr. I 132.) Mr. Weber testified that he did not notify Gallatin of his October 16, 1991 contact with Mr. Lloyd. (Tr. II 28.)

the hearing officer was the decision maker in this instance. The Committee's only duty was to preside at the hearing and make a recommendation to the County Board. (C1166; Tr. 73-74; Pet. Ex. 3.) The hearing officer's only duty was to preside over the siting hearing. (Tr. II 8, 15.) In fact, there is no evidence of any ex parte contacts between Mr. Lloyd or Mr. Spencer and the decision maker itself (i.e., the County Board).

Second, the testimony of the Committee members and the hearing officer make it clear that, in many instances, they could not recall if or when the alleged contacts occurred. (Tr. I 79, 80, 81-82, 86, 89, 92, 94-95, 100-101, 102-104, 134-135; Tr. II 20, 44, 47-50, 53-54.) For example, with regard to discussion between Mr. Lloyd and the Committee members after the October 22, 1991 siting hearing, the Committee members, the hearing officer, and Ms. Ripper testified that they could not recall any discussion with Mr. Lloyd regarding burden of proof after the siting hearing. (Tr. I 104-106, 136-137; Tr. II 13, 37-38, 53, 84, 85.) In fact, Mr. Kost himself could not remember the substance of Mr. Lloyd's remarks (i.e., the type of burden of proof or the type of evidence needed) to the Committee members that night. (Tr. I 32-34, 37.)

Even when the Committee members and hearing officer did recall such contacts, they testified that the contacts were about non-substantive matters or occurred during other committee meetings. For example, Ms. Williams testified that another committee, the landfill siting committee (as opposed to the Regional Pollution Control Hearing Committee), may have met with Mr. Spencer, on or about August 14, 1991, to review "the rules and regulations for siting a landfill" and that the group was "asking him questions about [the] application, and how he put it together" and "correcting some of the...page number mistakes and such so that it would be clearer". (Tr. I 78-84, 100.) She also testified that she and Mr. Lloyd attended some meetings of other committees during the summer. (Tr. I 100-101, see also Tr. I 80-81, 86-87.) Mr. Danner testified that Mr. Lloyd attended the organizational meetings of the Committee and "assisted the committee in the timetable and the timeframes that the hearings had to be taken place". (Tr. I 134-135.) Mr. Danner also testified that the group "went over some rules and regulations for the meeting", but that he did not believe that Mr. Lloyd attended any other Committee meetings thereafter. (Tr. I 135.) Later in the transcript, Mr. Danner testified that the Committee members also had some meetings with Mr. Lloyd and Mr. Spencer during the summer to discuss the rules and procedures. (Tr. II 44-46, 47-50.) Mr. Moore confirmed that the Committee members met with Mr. Lloyd and Mr. Spencer during the summer to discuss rules. (Tr. II 54, 58.) Mr. Danner also testified that Mr. Lloyd telephoned him on October 2, 1991, to request that "I send him a copy or get him a copy of the rules that had been adopted for the hearing committee". (Tr. II 36, 40-41, 46-47.) Mr.

Weber testified that he had an October 16, 1991 telephone conversation with Mr. Lloyd to obtain "a copy of the set of rules with regard to how the hearing was going to be conducted" and discuss "how the hearing would be opened". (Tr. II 4-5, 18, 21-23.) In addition, Gallatin's own exhibits indicate that the contacts were of a non-substantive nature. (Pet. Exs. 1, 6.)

In any event, the Committee members and hearing officer affirmatively stated that they did not discuss the merits of the case with anyone (e.g., Mr. Lloyd, Mr. Spencer, Mr. Kost, or the County Board members) and were not influenced in any way when making their recommendation for the December 10, 1991 County Board meeting. (Tr. I 107, 109-111, 137-138; Tr. II 6-7, 10, 14, 24-25, 38, 54-55.) Finally, Gallatin has failed to demonstrate how it has been prejudiced or how the alleged contacts or lack of notice compromised the County Board's decision. A court will not reverse an agency's decision because of improper ex parte contacts without a showing that the complaining party suffered prejudice from these contacts. (E&E Hauling, 451 N.E.2d 603.)

The Board is disturbed, however, by the possibility that the membership of Mr. Lloyd and Mr. Spencer (who were not County Board members) on the landfill siting committee while the application was before the Committee, may have given rise to an appearance of impropriety, even though we have found no prejudice arising from any of the contacts. The Board cautions local decisionmakers that any appearance of impropriety should be avoided.

Commingling of Duties

Gallatin cites to several instances to support its contention that Fulton County failed to distinguish between its roles as applicant and decision maker. First, Gallatin contends that Mr. Lloyd assisted in choosing the hearing officer and was retained to represent Fulton County as a special assistant state's attorney even though the state's attorney was representing the decision maker. (Pet. Ex. 1.) Gallatin also points to Mr. Lloyd's claim of attorney-client privilege when he was subpoenaed to testify about his communications with the County Board and the fact that many of the Committee members testified that they were unsure of who was their attorney. (Tr. I 48-49.) Gallatin also questions the fact that Ms. Ripper negotiated the bonds that funded the siting application, signed the siting application, sat at the applicant's table at the siting hearing and this Board's hearings, allowed the Committee to meet in her offices, attended some of the Committee's meetings, and met with Mr. Lloyd on several occasions. (C0012; Tr. I 71; Tr. II 66, 77; App. Ex. 1, Resp. Ex. 2.)

Although Gallatin points to Mr. Lloyd's billing sheets in support of its contention that Mr. Lloyd chose the hearing

officer, the logs do not support the contention. The entry for June 17, 1991 simply states "Telephone conf. with Joan Scott on hearing officer", and the entry for June 18, 1991 states "Telephone Conf. with Bill Randolph on hearing officer at siting hearing." (Pet. Ex. 1.) In fact, the hearing officer testified that the County Board's attorney, Ms. Scott, asked him if he would accept the appointment as hearing officer. (Tr. II 15.) In any event, we conclude that since the hearing officer was not involved in making the decision on the siting application, Mr. Lloyd's involvement did not prejudice Gallatin. (See E&E Hauling, 451 N.E.2d 603.) We also see nothing wrong with the fact that Mr. Lloyd was appointed Special Assistant State's Attorney. Section 3-9008 of the Civil Code permits that appointment of an attorney to "prosecute or defend [a] cause or proceeding" whenever the State's Attorney is "interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend". (Ill.Rev.Stat. 1991, ch. 34, par. 3-9008.) As to the issue of attorney-client privilege, Mr. Lloyd never claimed the privilege during the course of the case before the Board. Rather, the March 4, 1992 motion to quash the subpoena was filed by Ms. Scott on behalf of Fulton County (which Mr. Lloyd represented) and the County Board, as co-respondents. Finally, no Committee members testified that Mr. Lloyd was their attorney. In fact, Ms. Williams and Mr. Danner, testified that Ms. Scott rather than Mr. Lloyd was the Committee's attorney. (Tr. I 61, 66, 74-75, 106, 136.)

We also do not find that Ms. Ripper's actions prejudiced Gallatin. As County Board chairman, Ms. Ripper may well have been the only official authorized to negotiate or sign documents and may have routinely done so during her tenure as County Board chairman. We also see no harm from the fact that she sat at the applicant's table during the local siting hearing. That action alone is not dispositive of any bias. Moreover, it is logical that Ms. Ripper, as a co-respondent, would have sat with her other co-respondent at this Board's hearing.

With regard to the allegation that Ms. Ripper attended the Committee's meetings, Ms. Ripper testified that she did not attend any of the Committee's meetings after the Committee drafted the hearing rules and regulations. (Tr. II 77-78.) More specifically, Ms. Ripper testified that she did not attend the Committee's August 14, 1991 or August 21, 1991 meetings, but was in the outer office.[11] (Tr. II 79-80.) Ms. Ripper later testified that she may have attended the "landfill siting committee's" August 14, 1991 meeting, but that the meeting was

[11]The transcript is not clear as to whether this was a meeting of the Committee or the landfill siting committee. (see Ms. William's testimony at Tr. I 78-84, 100 and p. 12 of this opinion).

"for the revised rules and regulations and procedural matters, location, dates, notices ..." (Tr. II 111; Pet. Ex. 4.) With regard to the November 25, 1991 Committee meeting, Ms. Williams testified that she was unsure of whether the Committee met in Ms. Ripper's office or in a room adjoining Ms. Ripper's office, but stated that, although Ms. Ripper may have been in her office that day, she was not present at the meeting. (Tr. I 68-71, 72-73, 107, 132.) Ms. Ripper testified, and Ms. Williams specifically confirmed, that she did not direct the Committee's discussions or deliberations about what to recommend to the County Board. (Tr. I 107, 110; Tr. II 77-79, 85-87.) In addition, we remind Gallatin that Ms. Ripper's vote did not determine the decision of the County Board nor did Ms. Ripper control the decision maker. We therefore conclude that Gallatin has not been prejudiced and that the alleged contacts did not compromise the County Board's decision.

Failure to Apply Siting Rules

Gallatin cites to the Notice of Public Hearing and a Response to Request to Admit in support of its contention that Fulton County did not publish timely notice of the siting application pursuant to the local siting ordinance.[12] (C0653, Response to Request to Admit-No. 1, filed February 4, 1992.) Gallatin also points to the transcript of the local siting hearing to support its contention that Fulton County failed to conduct a timely hearing. (C1161.) Finally, Gallatin points to the siting application and a response to request to admit to support the contention that Fulton County waived the siting application filing fee. (C0012, Response to Request to Admit-No. 5.)

An examination of the above evidence fails to indicate that Fulton County did not provide notice of the siting application or conduct the siting hearing in a timely manner. Specifically, the Notice of Public Hearing, the Response to Request to Admit, and the siting hearing transcript do not mention when notice was to be published or when the hearing was to be held. The documents provide only the date that notice was actually published and the dates on which the siting hearing were actually held.

In addition, we cannot ascertain the terms of the siting ordinance because the ordinance is not in the record. We wish to state, however, that we disagree with Fulton County's and the County Board's argument that Gallatin failed to preserve its objection on this issue because Gallatin failed to place the local ordinance into the record for review. We again note that a

[12] Gallatin does not allege any violation of the notice requirements of the Act.

person need only raise or assert an objection prior to or during the siting hearing in order for the question of bias to be reviewed on appeal. Gallatin raised its objections below and the hearing officer clarified that Gallatin's objections were made part of the record and that no further action was necessary to preserve Gallatin's objections. (C0971-0976, C1172-1173, C1173-1174, C1564, C1564-1565.)

Although Gallatin should have seen to it that the ordinance was placed in the record, Fulton County and the County Board had the primary duty to see that the ordinance was included in the record. In our January 9, 1992 order in this matter, Fulton County and the County Board were charged with the duty of preparing and filing the local record with this Board. The record was to contain "all documents, transcripts, and exhibits deemed to pertain to this proceeding from initial filing through and including final action by the local government body." (Gallatin National Company v. Fulton County Board (January 9, 1992), PCB 91-256.) The local siting ordinance, therefore, should have been included in the record. We also disagree with Fulton County and the County Board's argument that there is no basis for Gallatin's objection because the hearing officer denied the objections and because the County Board, in its January 8, 1992 decision, determined that it substantially complied with the ordinance. Such a position is fundamentally at odds with this Board's mandate to review local siting decisions. However, given that no violation of the Act is asserted (which would be a jurisdictional matter), and we do not see where Gallatin was prejudiced by the County Board's actions in this matter, we do not find fundamental unfairness here.

With regard to the filing fee, Fulton County and County Board, in their Response to Gallatin's Request to Admit, stated "[c]o-Respondents admit Fulton County did not pay any application filing fee pursuant to Sec. 1039.29(k) as the purpose for the filing fee is to cover the reasonable, necessary costs incurred by Fulton County in the siting review process and since Fulton County was the applicant that it would be charged with all costs." (Response to Request to Admit p. 2 #6). Although Fulton County and County Board admit that they waived the filing fee, we do not see how Gallatin was prejudiced by the fact that no filing fee was paid particularly in light of the fact that Fulton County would be charged with all costs.

Bond Ordinance

Gallatin argues that the County Board already had determined that Landfill No. 3 would be built when it passed the bond ordinance. In response, Fulton County and the County Board contend that the statutory criteria of Section 39.2 were not before the County Board when it voted on the bond issue.

On June 12, 1990, the County Board voted 18 to 1 to proceed with the expansion of Landfill No. 2. (Tr. II 65, [illegible].) The County Board's vote was subject to the following two conditions: 1) obtaining financing for the expansion and 2) obtaining siting approval for the expansion. (Tr. I 111; Tr. II 65, [illegible].) The financial contingency was satisfied on November [illegible], before any siting proceeding had commenced. On that date, the County Board passed an ordinance authorizing the issuance of $500,000 in revenue bonds from the Illinois Rural Bond Bank to finance the landfill expansion. (C0870-0913, C0914-[illegible], C0919, C0920-0921, C0922-0926, C0927, C0928-0929, C0930-093[illegible], C0933, C1218; Tr. I 116-117, 121; Tr. II 68.) The bonds were to be repaid by the revenue generated by the expansion. ([illegible], C0922-0926, C0927, C0928-0929, C1218, C1220-1221; Tr. II [illegible].) Additionally, a sales tax intercept is collateral, to be applied upon any payment default. (Tr.II 65-67.) Fulton County received the revenues from the bond issue in January or February, 1991. (Tr. II 68-69.) The siting application was filed in July 1991.

After reviewing the record, the Board does not find that the County Board's issuance of the bonds indicates predisposition on the question of siting approval. As Fulton County and the County Board maintain, issuing the bonds was merely a preliminary step in applying for site location approval. The County Board was not faced with the same issues in issuing bonds as are raised by an application for site approval. There is no indication in the record that the County Board's vote to grant siting approval was based upon the bonds rather than the six applicable criteria of Section 39.2.

The facts in this case are very similar to the facts scrutinized by the supreme court in E & E Hauling. In that case, the objectors alleged that the local decisionmaker had prejudged the siting application because the decisionmaker had earlier approved the proposed landfill by ordinance. The supreme court rejected that claim, finding that the earlier ordinance was simply a preliminary step, and that there was no evidence that the decisionmaker had prejudged the adjudicative facts, i.e. the applicable criteria under Section 39.2. The supreme court further noted that there is no inherent bias when an administrative body is charged with both investigatory and adjudicatory functions. (E & E Hauling, 481 N.E.2d at [illegible], citing Withrow v. Larkin (1975), 421 U.S. 35, 95 S.Ct. [illegible], 43 L.Ed.2d 712.) Applying the facts and reasoning of E & E Hauling to the instant case, the Board finds that the County Board's issuance of the bonds was a permissible preliminary step, and did not indicate predisposition or bias on the six criteria to be considered under Section 39.2 of the Act.

Additionally, the Board believes that our finding here is supported by the appellate court decisions in Fairview Area Citizens Task Force v. Pollution Control Board (3d Dist. 1990),

198 Ill.App.3d 541, 555 N.E.2d 1178, and Woodsmoke Resorts, Inc. v. City of Marseilles (3d Dist. 1988), 174 Ill.App.3d 906, 529 N.E.2d 274. Although, as Gallatin points out, the facts of those two cases are not directly on point, we believe that the cases are analogous to this case. Both Fairview Area Citizens Taskforce and Woodsmoke Resorts involved municipalities which entered into preannexation agreements with future applicants for siting approval. In both cases, the court held that a possible economic benefit to the local decisionmaker if siting approval was granted did not show predisposition on the specific criteria to be addressed in a siting application. The Board is not persuaded by Gallatin's attempt to distinguish these cases on the grounds that those cases involved possible economic benefit, while the instant case involves a possible economic detriment. Gallatin maintains that if the County Board did not approve siting, it would be unable to repay the $500,000 in bonds. There is some dispute over whether all of the money was spent on the application, or if the county could simply repay the bonds with the remaining proceeds of the bonds. (Tr. I 121, Resp. Br. 24.) Regardless of whether the county could immediately repay the bonds if the siting was not approved, the Board finds that Gallatin's attempt to distinguish these cases disregards the reasoning of the court in both cases. Those decisions focused on the distinctions between entering into a preannexation agreement and reviewing an application for siting approval. Quite simply, those two actions are separate, and a local government's decision on one cannot be construed as a determination on the other.

Finally, the Board notes that a finding that it is fundamentally unfair for a county to issue bonds before filing an application for siting approval would make it very difficult, if not impossible, for a county or a municipality to ever site its own landfill. As the supreme court noted in E & E Hauling, "[i]t does not seem unusual that a landfill would be proposed for location on publicly owned property...We do not consider that the legislature intended this unremarkable factual situation to make 'fundamental fairness of the procedures' impossible." (E & E Hauling, 481 N.E.2d at 668.) In sum, we find no evidence of predisposition on the siting application simply because the County Board previously issued bonds on the subject.

CHALLENGED CRITERIA

Gallatin has raised challenges to three of the six criteria which the County Board found were met by the application. The criteria in dispute are: whether the facility is necessary to accomodate the waste needs of the area it is intended to serve (Section 39.2(a)(1)); whether the facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected (Section 39.2(A)(2)); and whether the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or

other operational accidents (Section 39.2(a)(5)).

As noted above, this Board must review the County Board's decisions on the challenged criteria on a manifest weight of the evidence standard.

Need

The first criterion which the local decisionmaker must consider in ruling upon an application for local site approval is whether "the facility is necessary to accomodate the waste needs of the area it is intended to serve". (Ill.Rev.Stat. 1991, ch. 111 ½, par. 1039.2(a)(1).) In its January 8, 1992 written decision, based upon its December 10, 1991 vote, the County Board found that the facility met this criterion. The County Board noted that G. Richard Spencer, Fulton County's consulting engineer, testified that the proposed expansion "is necessary to accommodate the waste needs of the area bounded by Illinois Route 9 to the southern limits of Fulton County and extending into Mason County, Illinois where there are no other operating landfills". (C1152.) The County Board stated that it had reviewed Gallatin's cross-examination of Mr. Spencer, and specifically rejected paragraphs 15 through 26 of the findings of fact proposed by Gallatin.[13] (C1152.)

Gallatin argues that the County Board's decision that Landfill No. 3 is necessary to accomodate the waste needs of the intended service area is against the manifest weight of the evidence. Gallatin notes that the intended service area is approximately the southern two-thirds of Fulton County and a portion of neighboring Mason County, with a total current population of 26,500 decreasing to 24,000 by the year 2010. (C0045-0046.) Gallatin argues that although Fulton County initially contended that waste generation rates in the service area will increase, the data actually showed that the estimated waste produced in the service area will decrease by 26% in the next 18 years. (C0046, Table 4-B.) Gallatin maintains that Mr. Spencer conceded that the projected waste generation rates did not accurately account for the mandatory recycling requirements imposed under the Solid Waste Planning and Recycling Act (Ill.Rev.Stat.1991, ch. 85, pars. 5951 et seq.), so that when Fulton County achieves the mandatory recycling rates in 1998 and 2000, waste generation rates will decrease even further. (C1266.)

Gallatin further argues that Fulton County also failed to

[13] This statement refers to Gallatin's proposed findings of fact, submitted to the County Board on November 20, 1991. (C1061-1090.)

consider that the intended service area is already served by a large local landfill. Gallatin contends that although Fulton County "gerrymandered" the service area to exclude the Gallatin facility, Gallatin's 80 acre, five million ton capacity landfill is located in Fulton County, ten miles from Landfill No. 3. (C1469-1471.) Gallatin states that the intended service area for its facility includes all of Fulton County and Mason County. Gallatin maintains that Mr. Spencer did not give the Gallatin facility much credit in his analysis of need, because construction of the Gallatin facility has not been completed. (C1310-1313; C1433-1435.) Gallatin cites the appellate court decisions in Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 554 N.E.2d 1176, and A.R.F. Landfill, Inc. v. Pollution Control Board (2d Dist. 1988) 174 Ill.App.3d 82, 528 N.E.2d 390 for the proposition that future development of other disposal sites must be considered in determining need.

Finally, Gallatin contends that Mr. Spencer could not articulate why Landfill No. 3 is necessary. Gallatin states that Mr. Spencer initially stated that the waste disposal needs of the population in the service area was the only factor supporting a conclusion of need. (C1226-1227.) However, Gallatin maintains that Mr. Spencer later changed his opinion and stated that the real reason he believed Landfill No. 3 was necessary was to provide a revenue stream to take care of potential problems of Landfill No. 2. (C1267-1268; C1305-1306.) Gallatin argues that Fulton County's desire for a source of revenue is not a legitimate basis for satisfying the need criterion.

In response, Fulton County and the County Board argue that the County Board's decision was not against the manifest weight of the evidence. Fulton County and the County Board contend that there are no other operating landfills in the intended service area currently accepting waste (C1227), and that all projections point to a stable stream of waste in the intended service area, despite a declining population and considering recycling rates. (C0046, Table 4-B.) Fulton County and the County Board state that Gallatin did not present any studies or evidence to rebut Mr. Spencer's conclusion of declining population and a rise in per capita waste disposal rates. Fulton County and the County Board maintain that Fulton County acknowledged Gallatin's facility and took that facility into consideration in assessing need. (C1311-1313.) However, Fulton County and the County Board contend that the record shows that Gallatin was not accepting waste at the time of hearing, and had never accepted waste (C1455), that the principal service area for Gallatin's facility and the maximum waste load to the facility is outside Fulton County's service area (C1312-1313), and that Fulton County's service area is not the same as Gallatin's intended service area (C1313). Fulton County and the County Board argue that the manifest weight of the evidence supports the County Board's decision that there is a need for the facility and a reasonable

convenience to the intended service area. (Waste Management of Illinois v. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E. 2d 682.)

After a review of the record and the arguments, the Board finds that the County Board's decision that the application demonstrated compliance with criterion one is not against the manifest weight of the evidence. Gallatin did not present any testimony or evidence on this criterion, but relied on cross-examination of Mr. Spencer. The County Board stated in its January 8, 1992 written decision that it had considered Mr. Spencer's testimony upon cross-examination, and then specifically rejected the findings of fact proposed by Gallatin in paragraphs 15-26. (C1152.) Paragraphs 15-26 of Gallatin's proposed findings of fact include all of the arguments raised by Gallatin before this Board. (C1065-1066.) Thus, the County Board specifically considered and rejected Gallatin's contentions that Fulton County had not demonstrated need. The Board finds that the record shows that the County Board could have reasonably reached its conclusion that need had been demonstrated. Additionally, Gallatin did not submit its own evidence on this criterion, and the County Board, as the trier of fact, is well within its authority to reject Gallatin's "impeachment" of Mr. Spencer.

Although Gallatin asserts that Fulton County failed to consider Gallatin's facility, in violation of Tate, the Board finds evidence that Fulton County did indeed consider Gallatin's facility. Mr. Spencer testified that he considered the Galatin facility. (C1312-1313; C1434-1435.) Although Mr. Spencer also stated that he gave little weight to the Gallatin facility because of questions on when that facility would be operational (C1435), that statement cannot translate to a finding that Fulton County failed to consider Gallatin's facility. It is the province of the County Board to determine whether Mr. Spencer's analysis of need was sufficient to demonstrate compliance with criterion one. Based upon this record, we cannot say that it was against the manifest weight of the evidence for the County Board to conclude that criterion one was satisfied.

The Board notes that Gallatin's claim that Fulton County did not consider the Gallatin facility seems to imply that simply because a large landfill has been sited and permitted, and intends to serve the same area, no need for another facility can ever be demonstrated. For this Board to find that no need can exist if another landfill, with much capacity, is serving or will serve the proposed service area, would result in the creation of landfill monopolies, at least within specific service areas. We do not believe that the legislature, in requiring local decisionmakers to consider the waste needs of the intended service area, meant to establish de facto monopolies. In this case, Fulton County presented an analysis of need, and the County

Board found that the facility is necessary. The proper inquiry before the Board is whether the County Board's decision is against the manifest weight of the evidence, not whether there is another landfill which could serve the intended service area. We do not find the County Board decision to be against the manifest weight of the evidence.

The Board does agree with Gallatin that a desire for a source of revenue alone is not a legitimate basis for satisfying the need criterion. However, Gallatin has pointed only to Mr. Spencer's testimony on the issue of revenue. Mr. Spencer was the applicant's witness, not a decisionmaker. Simply because Mr. Spencer testified that revenue was a consideration does not mean that the County Board's decision on criterion one was based upon improper reasons. The record contains direct testimony and evidence on issues properly considered under criterion one, such as waste disposal projections. The Board finds no evidence that the County Board's decision was based upon a desire for a source of revenue.

Public Health, Safety, and Welfare

The second criterion which the local decisionmaker must consider when ruling upon an application for local site approval is whether "the facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected. (Ill.Rev.Stat. 1991, ch. 111½, par. 1039.2(a)(2).) In its January 8, 1992, written decision, the County Board found that the facility met this criterion. The County Board stated that Mr. Spencer testified that Landfill No. 3 will be designed in accordance with applicable regulations (C1228), and will conform with any regulations which may be adopted prior to permit application.[14] The County Board found that Mr. Spencer's design, with a transfer station at the head end of the landfill, would control the placement of waste, maintain daily cover, and address the violations that the county's landfills have experienced in the past. The County Board further found that Landfill No. 3 will improve public health, safety, and welfare by adding leachate collection and groundwater monitoring systems and groundwater intercept, and that these systems would improve upon the current situation in Landfill No. 2. Finally, the County Board stated that it had reviewed Gallatin's proposed findings of fact on criterion two, and specifically rejected those proposed findings. (C1152-1153.)

[14] The Board notes that the County Board's decision refers to "Environmental Protection Agency" regulations. In fact, environmental regulations in Illinois, including the landfill regulations, are Pollution Control Board regulations.

Gallatin argues that because Fulton County failed to prove that Landfill No. 3 is designed to protect public health, the County Board's finding that criterion two was satisfied is against the manifest weight of the evidence. Gallatin contends that leachate is migrating from Landfill No. 2, and that although Landfill No. 3 will be "perched" on top of Landfill No. 2, Fulton County's expansion plan provides for no improvements to Landfill No. 2. Gallatin states that public comment from "outside experts" demonstrated that the underground mines in the area of the landfills make the hydrogeology in the area very complex, and that groundwater will be extremely difficult to control.[15] Gallatin maintains that Mr. Spencer, Fulton County's consulting engineer, admitted that the application only mentioned the need to stop leachate from migrating into the underground mines, without actually designing a system to do so. (C1363.)

Gallatin also argues that building Landfill No. 3 on top of Landfill No. 2 poses additional health and safety questions, because the existing landfill is not a suitable foundation to support a landfill. Gallatin maintains that Fulton County provided no analysis of the settlement of Landfill No. 2 and the effect on Landfill No. 3. Gallatin points to the comment of its expert, Dr. Tuncer Edil, who stated that significant settlement will occur at Landfill No. 3, causing cracks in the liner of Landfill No. 3, structural damage to the leachate collection system, and rupture of the geomembrane. (C1105-1107.) Gallatin contends that the County Board's finding that criterion two had been satisfied, despite the evidence of uncontrolled leachate migration from the existing landfill and the likelihood of foundation failure, was against the manifest weight of the evidence.

In response, Fulton County and the County Board argue that the County Board's decision is not against the manifest weight of the evidence. Fulton County and the County Board contend that the application contains sufficient details showing that the design of Landfill No. 3 will comply with the applicable regulations, including regulations on groundwater, contaminant transport issues, and engineering analysis for the foundation. Fulton County and the County Board note that these regulations require all existing units, such as Landfill No. 2, which will remain open past September 18, 1992, to be modified to conform with the rules. Fulton County and the County Board point out that Dr. Edil was not called to testify at the hearing, and therefore was not subject to cross-examination. Nevertheless, Fulton County and the County Board state that Dr. Edil's opinion

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[15] The "outside experts" were retained by Gallatin, and Gallatin submitted the experts' comments during the public comment period following the public hearing. (C1091-1123.)

does not appear to contradict Fulton County's presentation of facts concerning proper design. Fulton County and the County Board point out that Dr. Edil found that the settlement issue "is tractable provided that adequate engineering inverstigation is committed to it." (C1106.) Fulton County and the County Board argue that the proposed plans in a siting document are considered preliminary, and that the Illinois Environmental Protection Agency will review the complete permit application, further ensuring the public health, safety, and welfare.

Based upon a review of the record, the Board cannot say that the County Board's decision that criterion two was satisfied is against the manifest weight of the evidence. Fulton County's application contains discussion of design considerations, including foundations, liner systems, leachate drainage and treatment, gas monitoring, and final cover. (C0039-0041.) The application also addresses site characteristics, such as geological and groundwater considerations, and landfill development. (C0047-0064; C0592-0611.) Additionally, Mr. Spencer presented testimony in support of the application. (C1227-1239.) This Board is not free to reverse simply because the local decisionmaker credits one group of witnesses and not another group. (Fairview Area Citizens Taskforce, 555 N.E.2d at 1184.)

The Board notes that Fulton County and the County Board argue that the proposed plans in a siting document are considerd preliminary, and that the Illinois Environmental Protection Agency's review of the complete permit application will further ensure the public health, safety, and welfare. Assuming, as is the case here, that the applicant presents a prima facie case that the application meets criterion two, the Board believes that a local decisionmaker is free to place some reliance on the Illinois Environmental Protection Agency's permit review process. The appellate court has held that a local decisionmaker is empowered to consider any and all highly technical details of landfill design and construction in ruling upon criterion two. (Waste Management of Illinois, Inc., v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592, 594-596; see also McHenry County Landfill, Inc., v. Illinois Environmental Protection Agency (2d Dist. 1987), 154 Ill.App.3d 89, 506 N.E.2d 372, 380-381; County of Lake v. Pollution Control Board (2d Dist. 1983), 120 Ill.App.3d 89, 457 N.E.2d 1309.) We do not believe, however, that these cases mean that local decisionmakers must examine each request for siting approval so as to ensure compliance with every applicable regulation. (Cf. Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1195.) Building a new regional pollution control facility in Illinois is a two-step process: siting approval from the local decisionmaker, and an approved permit from the Illinois Environmental Protection Agency. (Ill.Rev.Stat.1991, ch. 111½, pars. 1039, 1039.2.) The local decisionmaker is not required to

perform both functions. In sum, the Board finds that the County Board's decision that criterion two was satisfied is not against the manifest weight of the evidence.

Plan of Operations

The fifth criterion which is to be considered by a local decisionmaker is whether "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents." (Ill.Rev.Stat. 1991, ch. 111½, par. 1039.2(a)(5).) In its January 8, 1992 written decision, the County Board found that this criterion was met, based upon Mr. Spencer's testimony. (C1232-1233.) The County Board stated that by limiting access to Landfill No. 3, the potential for a garbage truck to overturn, causing a fire, would be limited. The County Board further found that "the potential for an explosion would be reduced in that the potential for a fire near methane gas would be reduced." (C1154.)

Gallatin argues that the County Board's finding on this criterion was against the manifest weight of the evidence, because Fulton County failed to offer evidence of any plan of operation. Gallatin contends that in contrast to this failure, Gallatin introduced "ample" evidence of Fulton County's inability to safely operate landfills. (C0794-0869.) Gallatin states that the applicant's operating experience and past record of convictions in the field of solid waste management are relevant considerations in evaluating criterion five. (Ill.Rev.Stat. 1991, ch. 111½, par. 1039.2(a).) Gallatin maintains that other than Mr. Spencer's brief and vague testimony on limiting public access to the landfill, there is no other evidence of Landfill no. 3's plan of operations. Gallatin argues that the failure to provide a plan of operations is particularly flagrant in light of the evidence of Fulton County's past operational history.

In response, Fulton County and the County Board contend that the manifest weight of the evidence indicates that the plan of operations for the landfill is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. Fulton County and the County Board state that the application addresses aspects of the operational plan for gas management and monitoring, leachate treatment, groundwater monitoring, construction quality assurance, operations procedures, and closing operations. (C0061-0064.) Fulton County and the County Board maintain that the application and the uncontradicted testimony of Mr. Spencer presented sufficient details of the plan of operations. Mr. Spencer testified that the transfer station at the head of the landfill would limit public access to the operating fill area, enabling the county to control the placement of waste and maintain daily cover. (C1229-1230.) Fulton County and the County Board state that this action will avoid past violations for blowing litter, inadequate

daily cover, and other operational problems.

The Board cannot find, based upon its review of the record, that the County Board's decision on criterion five is against the manifest weight of the evidence. It is true, as Gallatin alleges, that the application does not contain any distinct plan of operations addressing emergency situations such as fire and spills. However, Mr. Spencer did present testimony on the issue, and the application does address aspects of an operational plan. (C0061-0064; C1229-1232.) Gallatin's evidence on this criterion consists of Illinois Environmental Protection Agency documents on Landfills Nos. 1 and 2. It is clear that there have been operational problems at Landfills Nos. 1 and 2. However, that fact does not rebut Fulton County's evidence regarding proposed operations at Landfill No. 3, which is the facility at issue here. The statute does allow a local decisionmaker to consider the applicant's past operating history in the field of solid waste management, but does not require any type of finding that past operational problems will be solved. Indeed, the statute does not even require that the decisionmaker consider past operating history, but simply states that operating history and violations may be considered. (Ill.Rev.Stat. 1991, ch. 111½, par. 1039.2(a).) Merely because the local decisionmaker could have drawn different inferences and conclusions from the evidence 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. (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228; see Steinberg v. Petta (1st Dist. 1985), 139 Ill.App.3d 503, 487 N.E.2d 1064, 1069.) We do not find the County Board's decision on criterion five to be against the manifest weight of the evidence.

CONCLUSION

The Board finds that the proceedings of the County Board were fundamentally fair. Additionally, the Board finds that the County Board's decisions on criteria one, two, and five are not against the manifest weight of the evidence. Therefore, the County Board's decision granting siting approval is affirmed.

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

ORDER

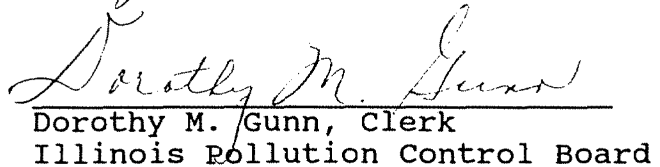
The Board hereby affirms the Fulton County Board's December 10, 1991 decision, set forth in a January 8, 1992 written decision, granting site approval for Fulton County's Landfill No. 3.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1991, ch. 111½, par. 1041) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements.

J. Anderson and M. Nardulli dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 15th day of June, 1992, by a vote of 4-2.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board