ILLINOIS POLLUTION CONTROL BOARD
July 22, 1993

LARRY SLATES, LONNIE SEYMOUR, JAMES KLABER, FAYE MOTT, and HOOPESTON COMMUNITY MEMORIAL HOSPITAL Petitioners, v. ILLINOIS LANDFILLS, INC., and HOOPESTON CITY COUNCIL, on behalf of the CITY OF HOOPESTON, Respondent.	)	PCB 93-106 (Landfill Siting Review)

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

This matter is before the Board on the issue of who are proper parties to this appeal. In its June 3 and June 17 orders, the Board established and revised a schedule for the submission of briefs on this issue. Petitioners filed their brief on July 2, 1993, and ILI filed its brief on July 12, 1993. On July 22, 1993, petitioners filed a reply brief. However, the briefing schedule entered by the Board did not allow for a reply, and petitioners have not moved for leave to file a reply. Thus, we have not considered the reply.

This issue arises from petitioners' statement in their petition for review that petitioners "were in attendance, participated in the [p]ublic [h]earing process conducted by the council *or submitted written objections as part of the [p]ublic [h]earing*." (Pet. at 2, emphasis added.) Section 40.1(b) of the Act provides for appeal by third-parties who "participated in the public hearing conducted by the *** governing body of the municipality." (415 ILCS 5/40.1(b) (1992).) As the Board noted in our June 3 order, we have previously held that for persons who did not attend the local hearing, "simply submitting a public comment after the close of the public hearing does not constitute an adequate basis for standing to seek review." (Valessares v. County Board of Kane County (July 16, 1987), 79 PCB 106, 109, PCB 87-36.) We have also held that "mere" attendance at the local hearing is sufficient to confer standing to appeal. (Zeman v. Village of Summit (December 17, 1992), PCB 92-174 and PCB 92-177 (cons.); Valessares; Board of Trustees of Casner Township v. County of Jefferson (April 4, 1985), PCB 84-175 and PCB 84-176 (cons.).)

Individuals

Both petitioners and ILI agree that Larry Slates, Lonnie Seymour, James Klaber, and Faye Mott were personally present at hearing. Thus, these four individuals have standing to appeal the City of Hoopeston's decision, and are proper parties to this appeal.

C.A.R.E.

Petitioners contend that C.A.R.E. appeared at the public hearing through members Slates, Seymour, Klaber, and Mott. Petitioners state that each of these four individuals appeared at the public hearing "both as individuals and in what was obviously an orchestrated effort on their part as members of C.A.R.E.". (Pet. Brief at 7.)

In response, ILI argues that none of these four individuals indicated at the hearing in any way that they were affiliated with C.A.R.E., and that no person at the public hearing made any reference to C.A.R.E. ILI further contends that a corporation called "Hoopeston C.A.R.E., Inc." was incorporated by the Illinois Secretary of State on June 18, 1993, after the public hearing and after the instant petition for review was filed. Thus, ILI maintains that C.A.R.E. could not have participated in the public hearing and has no standing to pursue this appeal.

The Board first notes that ILI does not argue or present support for the proposition that a group be actually incorporated in order to pursue a third-party appeal under Section 40.1. Thus, the fact that C.A.R.E. was not incorporated until after the public hearing is not dispositive of the issue of standing. Rather, the issue is whether C.A.R.E., as an entity, participated in the public hearing. After reviewing the record and the parties' arguments, the Board finds no evidence that any individual participated in the public hearing on behalf of C.A.R.E. None of the testimony or comments made by Slates, Seymour, Klaber, or Mott mention C.A.R.E. or refer to any type of group. The sign-in sheet for the public hearing also does not show any indication that anyone was appearing on behalf of C.A.R.E. or any other group. (Pet. brief, Exh. D.) Because there is no evidence in the record that any individual participated in the hearing on behalf of C.A.R.E., we find that C.A.R.E. as a group does not have standing under Section 40.1 to appeal Hoopeston's decision. Thus, C.A.R.E. is dismissed as a petitioner.

Hoopeston Community Memorial Hospital

Petitioners state that Hoopeston Community Memorial Hospital and Nursing Home (HCMH), through Russell Leigh, president of the HCMH board of directors, submitted written comments both before

and after the public hearing. Petitioners also contend that Leigh was instructed by the board of directors to appear and testify on behalf of HCMH at the hearing, but was unable to do so because of a restrictive ordinance which required pre-registration 21 days prior to hearing. Petitioners maintain that the notice of public hearing did not set forth the requirement of pre-registration. Attached to petitioners' brief is an affidavit from Leigh, stating that he learned of the 21-day pre-registration rule 10 days before hearing, that he believed and acted under the assumption that he would be forbidden from participating in the hearing because he had not complied with the requirement, and that were it not for the "ordinance preventing my appearance and participation", he would have appeared, questioned, and testified on behalf of HCMH. (Pet. brief, Exh. C.)

Petitioners argue that since Section 39.2 specifically provides for filing of written comments, and states that a local decisionmaker shall consider comments, persons who file such comments should not be denied the right to appeal, especially where those parties contend that the local decisionmaker failed to consider comments. Petitioners also contend that the local ordinance requiring registration 21 days before hearing is unenforceable as unduly restrictive and because Hoopeston failed to adequately inform the public of the provisions. Finally, petitioners maintain that the Board should find that petitioners' inability to comply with the local ordinance is a question of fact that must be addressed by the Board only after evidence is presented at the Board's hearing in this matter. Thus, petitioners contend that HCMH should be allowed to be a party to this appeal.

In response, ILI first notes that in Valessares, the Board ruled that submission of written comments does not confer standing on a person who did not otherwise participate because the Act specifically distinguishes the public comment provisions of Section 39.2 from the "public hearing" referred to in Section 40.1. ILI argues that establishing an exception for those who did not attend the public hearing but assert that their comments were not considered would effectively eliminate the provisions in Section 40.1 requiring participation in the public hearing. Second, ILI contends that petitioners' claims regarding the city ordinance misses the point that all that is required under the statute to confer standing is that a person actually attend the hearing, even if they do not ask questions or make statements on the record. ILI maintains that there were no barriers preventing HCMH from attending the public hearing.

The Board finds that HCMH's filing of a comment does not confer standing to appeal. We specifically reaffirm our finding in Valessares that simply submitting a public comment does not constitute an adequate basis for standing to seek review. One

must be physically present at the local hearing, either in person or through an authorized representative, in order to have standing to seek review pursuant to Section 40.1. To hold otherwise would violate the clear language of Section 40.1(b) that "a third party other than the applicant who participated in the public hearing *** may petition the Board *** to contest the approval of the *** governing body of the municipality." (415 ILCS 5/40.1(b) (1992).)

As to the local ordinance, we make no finding today on whether the ordinance is fundamentally fair. We note that Leigh states in his affidavit that he learned of the 21-day pre-registration requirement just 10 days before hearing, and that "were it not for said ordinance preventing my appearance and participation, I would have appeared, questioned, and testified". (Pet. brief, Exh. C.) However, there is no further explanation of how Leigh learned of the ordinance, or why he believed that the ordinance barred him from appearing at hearing. Therefore, we will reserve ruling on the question of HCMH's standing. HCMH may present evidence at the Board's hearing on the circumstances surrounding Leigh's belief that he could not appear at the local hearing. For example, did a municipal official tell Leigh that the ordinance prevented him from even appearing at hearing? We will address the issue of HCMH's standing in the Board's final opinion and order in this case.

Hoopeston Industrial Corporation

Petitioners state that Hoopeston Industrial Corporation (HIC) was represented at hearing by its director, Harold Cox, and that HIC filed a written public comment. Petitioners have provided an affidavit from Cox stating that he is and was on March 3, 1993 (the hearing date) a member of the board of directors of HIC, and "as such did attend the public hearing". (Pet. brief, Exh. F.) Petitioners contend that although Cox attended and signed in at the hearing, Cox was under the understanding that he would not be allowed to participate because of the 21 day registration period.

ILI argues that although Cox did attend the hearing, he did not identify himself on the sign-in sheet or otherwise as a representative of HIC. ILI contends that the Board has previously held that where an attorney appeared at public hearing, made comments, and even mentioned an individual by name, but did not state that he was representing that individual, the individual had not attended and was not represented at the public hearing. (Valessares, 79 PCB 106, 115.) Thus, ILI maintains that although Cox attended the hearing, HIC did not, and thus does not having standing to appeal Hoopeston's decision.

The Board finds no evidence in the record that HIC was represented at hearing. The sign-up sheet does include Cox's

signature, but there is no indication that he was appearing on behalf of HIC. (Pet. brief, Exh. D.) Likewise, the hearing transcript does not contain any indication that Cox was appearing on behalf of HIC, although the hearing officer did provide for each individual listed on the sheet to make oral comment. (Tr. at 10, 305-306, 324.) In sum, there was no way for anyone at the hearing to know that HIC was in attendance. Cox's affidavit, submitted with petitioners' brief, cannot remedy that fact. We believe that the record of a local hearing must affirmatively reflect that an individual appeared on behalf of an entity in order for that entity to have standing to appeal a local siting decision. Based on our decision in Valessares, where we found that an individual was not represented at hearing where an attorney did not specifically state that he represented that individual, the Board finds that HIC was not represented at hearing, and thus does not have standing to appeal. Thus, HIC is dismissed as a petitioner in this matter.

William and Mary Regan

Petitioners state that William and Mary Regan (the Regans) are owners and trustees of real estate that abuts the property for which siting approval was requested. Petitioners state that the Regans asked their attorney to submit a public comment on their behalf, because the Regans now live in California. Petitioners contend that had the Regans known that their comments would not be considered by the Hoopeston City Council, they "would have attended and participated at the public hearing." (Pet. brief at 7.) Petitioners assert that the Regans' circumstances present a reason for refinement of the rule on standing, because "to impose upon them the necessity of returning to Hoopeston from California and speaking at a public hearing *** would be to punish and restrict them for residing outside of the Hoopeston area while owning land in Hoopeston." (Pet. brief at 16.)

In response, ILI states that there is no dispute that the Regans were not present at the hearing, either in person or through a representative. ILI contends that the Regans' attorney was free to appear at the public hearing on the Regan's behalf, but did not do so. ILI maintains that no special exception is warranted to allow the Regans standing to appeal Hoopeston's decision.

The Board finds that the Regans do not have standing to appeal Hoopeston's decision. As stated above, simply submitting a public comment does not constitute an adequate basis for standing to seek review. As to petitioners' contention that an exception should be created because of the distance between the Regans' residence and their property in Hoopeston, the Board points out that there is no requirement that the Regans themselves appear at the hearing. The Regans could have directed

a representative to appear at the hearing on their behalf. The Board specifically rejects petitioners' assertion that failing to create an exception in some way punishes the Regans for residing outside of Hoopeston while owning property in Hoopeston. Again, Section 40.1 provides that only those who participated in the public hearing have standing to appeal. A person must be present at that local hearing, either in person or through a representative. There is no contention that the Regans' were either present at or represented at the public hearing. Therefore, they are dismissed as petitioners in this case.

James Van Weelden

ILI asks the Board to correct the caption in this case as it refers to "James Van Weelden d/b/a Illinois Landfills Inc." ILI states that Section 40.1 provides that "the applicant" is to be named as respondent. ILI contends that the applicant in this matter is the corporate entity "Illinois Landfills, Inc.", and that ILI is the only entity referred to in the application. Thus, ILI asks that Van Weelden be dismissed as a respondent.

The Board finds no evidence that James Van Weelden is the applicant. Rather, the applicant is ILI. The request to dismiss Van Weelden is granted.

CONCLUSION

In sum, the Board reaffirms its earlier holding that simply submitting a public comment, in the absence of participation in the public hearing, is not sufficient to confer standing to appeal a local government's decision on an application for siting approval. Mere attendance at the hearing is all that is required, either in person or through a representative, to constitute "participation" within the meaning of Section 40.1. To hold otherwise would violate the statutory provisions governing this local siting process.

Petitioners C.A.R.E., HIC, and the Regans are dismissed as petitioners, because there is no evidence that they appeared at the hearing. The Board reserves ruling on whether HCMH has standing to appeal Hoopeston's decision. Respondent James Van Weelden is dismissed, since the record reflects that the applicant in this case is ILI. The caption in this case has been modified to reflect these changes.

IT IS SO ORDERED.

B. Forcade, G.T. Girard, and C. A. Manning dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 22nd day of July, 1993, by a vote of 4-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board