ILLINOIS POLLUTION CONTROL BOARD
August 13, 1992

STEPHEN A. SMITH, d/b/a ABC SANITARY HAULING, JOHN APPL, d/b/a APPL SANITARY SERVICE, LAWRENCE W. BOLLER II, d/b/a AREA GARBAGE SERVICE, CHARLES H. MILLER, d/b/a C.H. MILLER SANITARY, CHRIS JOHNSON, d/b/a CHRIS'S SERVICE CO., EDDIE L. COOK, SR., d/b/a COOK'S SANITARY HAULING, DON CORY, d/b/a CORY SANITARY HAULING, RONALD E. HAYDEN, d/b/a HAYDEN SANITARY SERVICE, GORDON FICKLIN, d/b/a ILLINI SANITARY SERVICE, CHRIS YAGER, d/b/a KLEAN-WAY DISPOSAL, GEORGE McLAUGHLIN, d/b/a McLAUGHLIN SANITARY, CHERYL MANUEL, d/b/a ROLLAWAY WASTE, RONALD W. MANUEL, d/b/a RON MANUEL SANITARY, RUSSELL SHAFFER, d/b/a SHAFFER SANITARY CO., WILLIAM C. UDEN, d/b/a UDEN & SONS SANITARY HAULING, and WILLIS SANITARY HAULING, INC.,	)	PCB 92-55 (Landfill Siting Review)
Petitioners,	)	
v.	)	
CITY OF CHAMPAIGN, ILLINOIS, INTERGOVERNMENTAL SOLID WASTE DISPOSAL ASSOCIATION, and XL DISPOSAL CORPORATION,	)	
Respondents.	)	

GLENN A. STANKO, of RENO, O'BYRNE & KEPLEY, APPEARED ON BEHALF OF PETITIONERS;

TRISHA A. CROWLEY APPEARED ON BEHALF OF RESPONDENT THE CITY OF CHAMPAIGN; and

JEFFREY W. TOCK, of TOCK & MILLER, LTD., APPEARED ON BEHALF OF RESPONDENTS INTERGOVERNMENTAL SOLID WASTE DISPOSAL ASSOCIATION AND XL DISPOSAL CORPORATION.

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

This matter is before the Board on an April 15, 1992 petition for review of the March 3, 1992 action of respondent the

City of Champaign (Champaign). Petitioners Steven A. Smith, d/b/a ABC Sanitary Hauling, et al. (collectively, petitioners) are all engaged in the sanitary hauling business in Champaign, the City of Urbana, and/or the unincorporated sections of Champaign County. Petitioners ask this Board to review Champaign's action on a request for site location approval of a material recovery/transfer facility. The petition for review is brought pursuant to Section 40.1 of the Environmental Protection Act (Act). (Ill.Rev.Stat. 1991, ch. 111½, par. 1040.1.) This Board held a public hearing on the petition for review on June 15, 1992, in Champaign.

PROCEDURAL HISTORY

On September 16, 1991, pursuant to Section 39.2 of the Act and a Champaign city ordinance, respondents Intergovernmental Solid Waste Disposal Association (ISWDA) and XL Disposal Corporation (XL) jointly filed an application with Champaign for siting approval of a material recovery/transfer facility. (C. 1-467.)[1] ISWDA, which is an Illinois municipal joint action agency whose members are Champaign, Urbana, and Champaign County, was identified as the owner of the proposed facility. XL, an Illinois corporation, was identified as the operator of the facility. (C. 6.) The facility is proposed to be located on a 25 acre site within Champaign's city limits, immediately north of a forging company and immediately west of a railroad right-of-way. (C. 10.) Hearings on the application were conducted by an appointed hearing officer on December 16, 17, 19, and 20, 1991. Oral public comment was heard on January 2, 1992, and written comments were accepted through February 3, 1992.

The Champaign City Council held study sessions on the application on February 13 and 20, 1992. On March 3, 1992, the city council considered Council Bill No. 92-58, entitled "An Ordinance Granting Site Approval to the Material Recovery/Transfer Facility (ISWDA-XL)". (C. 1612-1625.) The council was advised that the statutory deadline for final action on the application was March 15, 1992. (C. 1626-1627.) One council member, Gary Shae, read a letter stating that he had decided to abstain because of an ex parte communication which had such an influence on him that he was unable to ignore it and make a decision based on the record. (C. 1628.) The vote on the proposed ordinance was one vote "yes", two votes "no", and six abstentions. (C. 1634-1635.) The city council's rules of order

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[1] The record of the local proceedings will be denoted by "C.", references to the transcripts of the June 15, 1992 Board hearing will be indicated by "Tr.", and references to the exhibits introduced at that Board hearing will be denoted by "Pet. Exh.".

require that all ordinances be passed by affirmative votes of no less than five members. (Pet. Exh. 2, §2.64(c).) The mayor, Dannel McCollum, declared a temporary loss of quorum, based on the six abstentions. (C. 1635.) Pursuant to the council's rules of order, a temporary lack of quorum results in postponement of the matter under consideration until the next regular meeting. (Pet.Exh. 2, § 2.64(j).) The next meeting was scheduled for March 17, 1992, two days after the March 15 decision deadline. A motion to reconsider the vote failed, with four "yes" votes, four "no" votes, and one abstention. (C. 1638-1640.) On March 16, 1992, counsel for ISWDA and XL advised Champaign that the applicants considered the application to be approved as of March 15, 1992 "as a result of the City of Champaign's lack of taking final action within the 180 days allowed by Ill.Rev.Stat. ch. 111½, par. 1039.2(e)." (C. 1608.) Petitioners filed the instant appeal on April 15, 1992.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. 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. The local decisionmaker must make its decision within 180 days. Section 39.2(e) states in part:

> If there is no final action by the county board or governing body of the municipality within 180 days after the filing of the request for site approval the applicant may deem the request approved. (Ill.Rev.Stat.1991, ch. 111½, par. 1039.2(e).)

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 v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26.) 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, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, 562, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.)

DISCUSSION

Compliance with Local Siting Ordinance

Petitioners first contend that Champaign improperly accepted and filed the siting application. Petitioners point to Champaign's ordinance establishing the procedural framework for siting proceedings in the city. Among other requirements, that ordinance requires that an application for siting approval include a statement that the applicant has presented the proposed site to Champaign County "for a determination of compliance with the Champaign County Solid Waste Management Plan, if such plan has been adopted.." (Pet. Exh. 1, §2(C)(13).) Petitioners note that the instant application contended that Champaign County had delegated the required determination to ISWDA. Petitioners filed a motion to strike the application. That motion was denied. Petitioners now argue that acceptance of the application was improper, that since ISWDA is one of the applicants for siting approval it can hardly summarily conclude that it had been delegated the authority to make the determination, and that the motion to strike the application should have been granted.

In response, ISWDA and XL maintain that Champaign County has indeed delegated to ISWDA the power to implement the county's solid waste management plan, including determining whether a particular siting application complies with that plan. Additionally, ISWDA and XL contend that petitioners have not alleged any violation of the Act which would raise a jurisdictional issue, and have not shown any prejudice which would show a violation of fundamental fairness. ISWDA and XL argue that the motion to strike was properly denied.

This Board has previously held that we are without statutory authority to compel enforcement of a local ordinance, and that review of the sufficiency of an application is limited to jurisdictional issues--whether the application met the requirements of Section 39.2(a) of the Act. (Citizens for Controlled Landfills v. Laidlaw Waste Systems (September 26, 1991), PCB 91-89 and 91-90 (cons.), slip op. at 5-6; see Gallatin National Co. v. Fulton County Board (June 15, 1992), PCB 91-256, slip op. at 17.) Of course, where a petitioner contends that an alleged failure to comply with a local ordinance rendered a proceeding fundamentally unfair, the Board will review the alleged failure on that basis. In this case, petitioners admit that they do not contend that this is a jurisdictional issue. (Reply Br. at 3.) Instead, they state that, although they do not believe that any showing of prejudice is necessary, such prejudice is evident in this case. Petitioners state that the absence of Champaign County's imprimatur is a factor upon which petitioners have relied in opposing the application. Petitioners state that if nothing else, they have been misled.

Assuming that petitioners' contention raises a fundamental fairness issue, the Board finds that petitioners have failed to demonstrate any prejudice. Section 39.2(a) clearly requires that the local decisionmaker determine whether an application complies with any applicable solid waste management plan. That duty cannot be delegated to any other decisionmaker. In other words, regardless of whether ISWDA or Champaign County has the authority to make the statement required by the local ordinance, the Champaign City Council was still obligated to make the final determination as to compliance. Petitioners clearly could have presented proof that the application did not comply with the plan, no matter what the county might have indicated. Petitioners' contention that they were "misled" does not demonstrate prejudice from any failure to obtain the statement required by the local ordinance. The Board finds no violation of fundamental fairness. (See Gallatin National (June 15, 1992), PCB 91-256, slip op. at 17.)

Final Action

Petitioners next argue that, considering all actions by the city council in combination, the city council took "final action" on the application in a timely fashion, such that the request for siting approval should not be deemed approved pursuant to Section 39.2(e). Petitioners cite McHenry County Landfill v. Illinois Environmental Protection Agency (2d Dist. 1987), 154 Ill.App.3d 89, 506 N.E.2d 372, where the appellate court stated that the "final action" which a local decisionmaker must take within the statutory deadline "need only be sufficiently final to justify an appeal to the [Board]. (McHenry County Landfill, 506 N.E.2d at 378.) Petitioners also cite a concurring opinion in Guerrettaz v. Jasper County (January 21, 1988), PCB 87-76, where two Board members addressed the issue of "final action" in the context of a tie vote. Petitioners argue that the city council's action in this case includes all of the elements of "final action" identified in McHenry County Landfill and Guerrettaz. Petitioners maintain that: 1) all of the council's actions through March 3, 1992 were within the statutory deadline; 2) the vote on the original motion to approve siting and the vote on the motion for reconsideration concluded Champaign's adjudicative process such that an appeal would not be disruptive; and 3) legal consequences could and did result from the March 3 vote, in that the application failed to command a majority. Thus, petitioners allege that the applicants failed to satisfy their burden of proof so that the application was denied. Petitioners contend that if the application is deemed approved, the facility would be sited without an affirmative vote by the majority of the city council members. Petitioners allege that such a result is unconscionable.

In response, ISWDA and XL argue that it is clear that the city council did not take final action prior to the expiration of

the statutory decision period. ISWDA and XL contend that none of the cases cited by petitioners are supportive of their argument that final action was taken, since none of the cases involve a situation where the vote on whether to approve an application was continued to a date beyond the 180 day limit. ISWDA and XL maintain that the city council's vote on the ordinance to approve siting was really a "non-vote", since the abstentions resulted in a loss of quorum. ISWDA and XL argue that this "non-vote" and the subsequent denial of the motion for reconsideration were by their very nature not final actions, since by council rule, the "non-vote" continued the action to the next regular council meeting. ISWDA and XL assert that the city council's actions on March 3 did not conclude the adjudicative process such that an appeal would not be disruptive, because Champaign had up to and including March 14 to hold a special meeting and take final action on the application. ISWDA and XL further contend that the only legal consequence that resulted from the city council's March 3 actions was that action on the siting decision was continued to March 17. ISWDA and XL maintain that the facility was neither approved nor disapproved on March 3, and that there was no tie vote that could be interpreted as final action under the dicta of the Guerrettaz concurring opinion. ISWDA and XL state that the Board must recognize and honor the plain language of Section 39.2(e), recognize that the city council did not take final action within the 180 day deadline, and hold that the siting application has been approved.

Champaign also argues that the city council's March 3 actions did not conclude the adjudicative process, since the direct effect of the vote on the motion to approve the application was to place the item on a subsequent council agenda. Champaign further contends that the legal consequences of the March 3 actions resulted from the expiration of the 180 days, and not from the actions themselves. Finally, Champaign notes that the statute does not make siting automatic only if there is no action by the local decisionmaker. Rather, the application is deemed approved if there is no final action. Champaign states that the city council took action on this application, but that it did not take "final action" within the statutory period.

After a review of the statute, the record, and the arguments of the parties, the Board finds that Champaign did not take final action within the statutory 180 day decision period. As ISWDA and XL point out, McHenry County Landfill involved a case where the application was originally denied by the county, and after appeal to this Board, was remanded back to the county to correct an error. Thus, the applicant argued that the decision had not been made within the statutory time period (then 120 days). The appellate court held that the initial county decision constituted the final action required by Section 39.2(e). The Guerrettaz concurring opinion cited by petitioners is dicta, since that case was actually decided on the grounds that the required notice of

the filing of the application was deficient. The majority opinion never discussed the question of "final action" or the effect of the tie vote in that case. (Guerrettaz v. Jasper County (January 21, 1988), PCB 87-76.) In fact, none of the cases discussed by petitioners resolve the situation presented by this case.

Even assuming that this Board should apply the "three step" analysis advanced by petitioners, the Board finds that the actions taken by Champaign do not constitute "final action." The March 3 action was taken within the statutory decision period. However, the Board rejects petitioners' claims that the vote on the motion to approve the application and the vote on the motion for reconsideration concluded Champaign's adjudicative process such that an appeal would not be disruptive. Under the city council rules, the vote on the motion to approve the application automatically continued the item to the next regular council meeting. Additionally, Champaign could have scheduled a special meeting to consider the matter at any time up to March 15. Given these two facts, it seems clear that the March 3 votes cannot be construed to have concluded the city council's adjudicative process. Likewise, the March 3 votes did not have legal consequence, except to place the matter on the agenda for the March 17 meeting. As Champaign notes, it is the expiration of the 180 day deadline which had legal effect, not the votes themselves. The Board simply cannot see how a series of actions, none of which was conclusive in itself, can result in "final action" on the application.

Section 39.2(e) clearly states that if a local decisionmaker does not take final action within 180 days, "the applicant may deem the request approved." (Ill.Rev.Stat. 1991, ch. 111½, par. 1039.2(e).) Therefore, the Board rejects petitioners' claim that the application was denied because the application failed to command a majority vote. The statutory language also repudiates petitioners' argument that an approval without an affirmative vote by a majority of council members would be unconscionable. Section 39.2 gives local governments the power and the responsibility to rule upon an application for siting approval. The statute clearly contemplates a situation, such as this, where the local decisionmaker fails to take final action within the statutory deadline. The remedy provided by the legislature is that the application is deemed approved. This case fits the statutory scheme perfectly: Champaign failed to take final action within 180 days, and therefore the application for siting approval is deemed approved.

The Board notes that petitioners argue that if the application is deemed approved, petitioners have been denied fundamental fairness. Petitioners contend that: 1) they were denied a decision based on the weight of the evidence and the relevant criteria, and were not given a statement of reasons for

the decision; 2) the provision allowing for "deemed approved" was manipulated in a fashion not intended by the legislature, because the mayor "engineered" the abstentions when it was clear that the application would be rejected; and 3) approval is being claimed for an applicant and a facility which no longer exist. None of these arguments, however, leads to a conclusion that the procedures used by Champaign were not fundamentally fair.

Petitioners' first claim, that they were denied a decision based on the criteria and a statement of reasons for the decision, once again ignores the statutory provisions of Section 39.2(e). Quite simply, the statute does not provide for these protections in a situation, such as this, where the local decisionmaker fails to take final action within 180 days. Instead, as discussed above, the application is deemed to be approved. The second claim, that the abstentions were improperly "engineered", ignores a long line of case law that one cannot invade the mind of the decisionmaker. (Land and Lakes Co. v. Village of Romeoville (June 4, 1992), PCB 92-25, slip op. at 4; Dimaggio v. Solid Waste Agency of Northern Illinois (January 11, 1990), PCB 89-138, slip op. at 5: City of Rockford v. Winnebago County (November 19, 1987), PCB 87-92, slip op. at 9, aff'd (2d Dist. 1989) 186 Ill.App.3d 303, 542 N.E.2d 423.) The extensive discussion of conversations between the mayor and the council members before the March 3 meeting is irrelevant. The inquiry is whether there was final action, not whether some council members may have been encouraged by another voting member of the council to vote a particular way.[2] The Board points out that petitioners do not claim that the abstentions were based on improper ex parte contacts from those outside the decisionmaking body. Finally, the argument that approval is being improperly claimed for an applicant and facility which no longer exist does not raise a fundamental fairness issue. As stated above, the Board is to review the fundamental fairness of the procedures used by the city council. Nothing the city council did, or did not do, relates to any subsequent problems between the applicants.

In sum, the Board finds that Champaign failed to take final action on the application within 180 days of the filing of the

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[2] The Board specifically rejects petitioners' statements that "the reasonable inference from the objective facts is that the 180-day provision was manipulated by the use of abstentions", and "[i]f the council members abstained for some other legitimate reason, then it was incumbent upon the respondents to adduce those reasons in order to rebut petitioners' case." (Reply Br. at 9.) As stated above, one cannot invade the mind of the decisionmaker. Except for the limited situations , such as ex parte contacts, a council member's reasons for his or her vote are irrelevant.

request. Therefore, pursuant to Section 39.2(e) of the Act, the application is deemed approved.

Constitutional Claims

Petitioners next argue that the statutory provisions providing for "deemed approved", as applied to petitioners, deny them due process of law and equal protection of the law, in violation of the federal and state constitutions. Petitioners note a series of appellate court decisions holding that constitutional guarantees of due process do not apply to participants in site approval proceedings, but state that those conclusions are "arguable." In any event, petitioners contend that they stand in a markedly different position. Petitioners note that existing flow control ordinances would require them to use and pay for the proposed facility. Thus, petitioners contend that they have a property interest for due process purposes.

Illinois case law is quite clear that objectors to a proposed facility do not have a constitutionally protected interest in the continued non-existence of such a facility on another's property, and that the grant of site approval does not trigger the application of due process guarantees. (E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, 563-564, aff'd (1985), 107 Ill.2d 33, 481 N.E.2d 664; Fairview Area Citizens Taskforce v. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1180; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1193.) Petitioners' claim that these decisions are "arguable" does not convince the Board to act differently in this case.

As to petitioners' contention that they have a property interest for due process purposes, the Board points out that it is not the siting decision which arguably affects any property interest, but the local flow control ordinances. As ISWDA and XL point out, flow control is not involved in siting decisions under Section 39.2, and siting approval of the material recovery/transfer facility does not require that petitioners use the facility. The flow control ordinances are separate and distinct from the local site approval process, and this Board cannot review those local flow control ordinances. Finally, the Board rejects petitioners' claim that Section 39.2 creates two classifications of objectors in local site approval proceedings (based upon the diligence or lack thereof of the local decisionmaker), such that the statute violates the equal protection clause.

Criteria and Manifest Weight

Petitioners state that any review of the evidence in this case, as it applies to the nine criteria of Section 39.2(a),

should use a weight of the evidence standard. Petitioners claim, however, that approval of the application cannot even survive scrutiny using a "manifest weight" standard. ISWDA and XL cite the Board's decision in Board of Trustees of Casner Township v. County of Jefferson (January 10, 1985 and April 4, 1985), PCB 84-175 and 84-176 (Cons.) (Casner Township), and contend that "approval of the applicable criteria" was not against the manifest weight of the evidence.

In Casner Township, the Board was presented with the first instance where a local decisionmaker failed to reach a decision on a siting application within the statutory decision period (then 120 days), so that the application was deemed approved by operation of law. The Board was then faced with the question of whether the Board has jurisdiction to hear an appeal from a "deemed approved" result. After briefing on the issue, the Board found that it does have jurisdiction to hear such appeals. In its order deciding that issue, the Board stated:

> The [c]ounty [b]oard is deemed to have approved the application by operation of law and the applicant should find himself in the same position he would have been had the [c]ounty [b]oard approved the request by written decision. Specifically, the same presumptions and burdens of proof apply here and the Board will review the record using the manifest weight standard articulated in earlier [siting] cases. (Casner Township (January 10, 1985), PCB 84-175 and 84-176 (Cons.), slip op. at 8.)

However, when making the final decision in the case, the Board held that procedural irregularities at the local hearing rendered the proceedings fundamentally unfair, and remanded the case to the local decisionmaker. (Casner Township, (April 4, 1985), PCB 84-175 and 84-176 (Cons.).) Thus, the Board never actually reviewed the record.

After further consideration, the Board finds that we erred in determining that we should conduct a review of the record where a siting decision has been deemed approved. The statute provides that an application is automatically deemed approved, by operation of law, when a local decisionmaker fails to reach a decision within the statutory timeframe. Therefore, by definition, there is no local decision on the criteria for this Board to review. Section 40.1 and the accompanying case law are clear that this Board's function is to review the local decision, not to make an initial determination as to whether the applicable criteria of Section 39.2(a) have been met. It is impossible to apply a manifest weight of the evidence review to a non-existent decision. Thus, the Board overrules Casner Township, to the extent that that decision states that in a deemed approved situation this Board will review the record for compliance with

the applicable criteria. The Board specifically reaffirms its findings in Casner Township that we have jurisdiction to hear appeals from a "deemed approved" result. The Board can, and must, review the areas of jurisdiction and fundamental fairness in such "deemed approved" cases. However, the Board cannot review a non-existent decision on the criteria.

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

ORDER

The Board finds that the City of Champaign failed to take final action on the September 16, 1991 application for site approval filed by the Intergovernmental Solid Waste Disposal Association and XL Disposal within 180 days of the filing of that application. Pursuant to Section 39.2(e) of the Act, the application is deemed approved.

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. (But see also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration" and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

B. Forcade concurred, and J. Marlin abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 13th day of August, 1992, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board