ILLINOIS POLLUTION CONTROL BOARD
September 19, 1996

RESIDENTS AGAINST A POLLUTED ENVIRONMENT and THE EDMUND B. THORNTON FOUNDATION,	)	
Petitioners,	)	PCB 96-243 (Pollution Control Facility Siting Appeal)
v.	)	
COUNTY OF LASALLE and LANDCOMP CORPORATION,	)	
Respondents.	)	

DISSENTING OPINION (by J. Theodore Meyer):

I dissent from the majority opinion in this matter to state that I believe, first and foremost, that the communications between the county clerk, the county attorney and consultants for Landcomp were not ex parte contacts. The local siting proceeding is a legislative one; as such, a county board's advisor should be allowed to gather information without violating fundamental fairness. Secondly, even if the communications at issue should be construed as ex parte contacts, they were not so prejudicial as to cause injury to petitioners and thereby render the county's siting proceedings fundamentally unfair.

As has been previously acknowledged, ex parte communications are bound to occur between county board members and their constituents largely due to the board members' legislative position. (Fairview Area Citizens Taskforce v. PCB, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3rd Dist. 1990).) Courts historically have viewed local siting decisions as adjudicative in nature. (Id.) However, in light of more recent amendments to Section 39.2 of the Act, the reality is that local siting decisions are legislative in nature. For example, the last sentence in Section 39.2(d), enacted in House Bill 4040 in the 1992 spring session, and effective January 1, 1993 by Public Act 87-1152, states:

> [t]he fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue.

(415 ILCS 5/39.2(d).) This amendment demonstrates the Illinois General Assembly's awareness that a local decision-maker can determine his vote before a hearing is held before the local governing body, an ability that is common in legislative decisions and forbidden in adjudicatory decisions. This amendment also demonstrates the General Assembly's concern regarding recent claims of procedural unfairness. (See Fairview Area Citizens Taskforce, supra (Appellate Court rejected appellants' claim that the village board was predisposed to rule against appellants because board members believed landfill in question would provide an

economic benefit to the community); and City of Rockford v. County of Winnebago, 186 Ill. App.3d 303, 542 N.E.2d 423 (1989) (Appellate Court rejected claim that the county board was prejudiced because of ex parte contacts between county board members and opponents if a proposed landfill.).)

Another example of the legislative nature of a local siting decision is found in the last paragraph in Section 39.2(b) of the Act which gives the local siting authority the ability to deny siting based upon an applicant's operating history. (415 ILCS 5/39.2(b).) Thus, "a local governing body may find the applicant has met the statutory criteria and properly deny the application based upon legislative-type considerations". (Southwest Energy Corp. v. IPCB, Concerned Citizens for a Better Environment and the City of Havana, 275 Ill.App.3d 84, 655 N.E.2d 304 (4th Dist. 1995).)

These amendments indicate that the local county board or governing body is operating in its legislative capacity when making a local siting decision. As such, standards for judicial behavior, including ex parte contacts, should not be applied to local officials. As I have previously stated:

> the application of standards of adjudicatory decision[-]making, rather than legislative standards, is unfair to local decision[-]makers. Local elected officials are almost always asked to wear a legislative 'hat' when taking official actions. To ask elected officials to put on an adjudicatory 'hat' and act like judges when reviewing a siting application places an unnecessary burden on both the individual decision[-]maker and on the siting process.

(Concerned Citizens for a Better Environment v. City of Havana (May 19, 1994) PCB 94-44, __ PCB __ (Meyer concurring).)

The members of the LaSalle County Board, therefore, were acting in their legislative capacity during this landfill siting application process. As such, I believe it is perfectly appropriate for the county attorney or county clerk, in their capacity as advisors to the county board, to gather facts and figures from both the county's expert and the applicant's expert, prepare a report from those communications, and advise the county board accordingly. To rule otherwise impedes the siting authority's fact-finding and decision-making abilities. Indeed, the $75,000 the county board spent to hire Camp, Dresser and McKee (CDM) would appear to be wasted if the county board were unable to benefit from their consultant's findings.

Assuming, arguendo, that the communications which occurred between the county clerk, the county attorney and consultants for Landcomp constituted ex parte communications. The fact remains that the resulting CDM report was never submitted to the county board and never made publicly accessible; instead, the report was only utilized by the county clerk in her capacity as advisor to the county board. The CDM report was an internal document prepared for the exclusive use of the county board. As such, the CDM report is not evidence of ex parte communications which resulted in a siting decision-making process so prejudicial as to violate the tenets of fundamental fairness.

For these reasons, I respectfully dissent.

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J. Theodore Meyer

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the _____ day of _____, 1996.

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Dorothy M. Gunn, Clerk
Illinois Pollution Control Board