ILLINOIS POLLUTION CONTROL BOARD
November 19, 1987

CITY OF ROCKFORD, a Municipal Corporation, Petitioner, vs. WINNEBAGO COUNTY BOARD, Respondent.	)	PCB 87-92

DISSENTING OPINION (by J. Anderson):

The majority Opinion of the Pollution Control Board (PCB) today finds that the decision of the Winnebago County Board (County) denying the application of the City of Rockford (City) for site location suitability approval for a new regional pollution control facility "was the result of a fundamentally unfair process" and further finds that the appropriate remedy of this unfairness is to vacate the decision and to remand the application for further proceedings and re-deliberation. (Opinion, p. 29, 31).

I am in strong disagreement with the majority's view that the pervasive and systemic violations of the most fundamental standards of adjudicatory due process in this case can be "put right" by a remand for hearing and reconsideration in November to the same elected body which decided this case in May on the basis of non-statutory "criteria" supported by off-record "facts" and ex parte contacts during the midst of an inflammatory citizens' public opinion publicity campaign which virtually promised political "punishment" for votes favorable to the City's application.

This case does not involve the kinds of relatively isolated instances of unacceptable error which can fruitfully be addressed on remand. I do not believe that the decision-makers here are in a position to make the process whole again. While I appreciate the Board's desire to remand for correction of procedural error in SB172 cases, anything short of simple reversal here, it seems to me, will serve to exacerbate, not ameliorate, the situation. I should also point out that, had this case been reversed, the environmental considerations would be undertaken by the Environmental Protection Agency when it reviews all aspects of facility design and operation pursuant to its permitting responsibilities.

I believe my conclusion is amply supported by the recitation of facts and legal precedent as contained in pages 1-21 of the majority Opinion. I am also in agreement with the majority's general statements concerning the troublesome aspects of the SB172 process outlined by the majority Opinion on pages 29-30 (beginning with the third complete paragraph on p. 29 and ending with the last complete paragraph on p. 30).

In fashioning its remand remedy, however, the majority has failed to take into account the fact, as noted by the Illinois Supreme Court, that "'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances", and that, even given the presumption of "honesty and integrity" that applies to actions of local governments in SB172 cases, review of the situation must be accompanied by a "realistic appraisal of psychological tendencies and human weaknesses". Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 416 N.E. 2d 1082, 1087, 1089 (1975) (as cited and discussed in the majority Opinion at p. 9).

I do not believe that the PCB majority is being realistic here.*

The majority Opinion correctly notes that, between the activities of Save The Land (STL) and the County Board Members, the entire SB172 adjudicatory decisionmaking process broke down. A number of the SB172 cases previously decided by this Board presented troublesome fundamental fairness issues regarding personal bias and ex parte contacts; in no case was there the systemic and cumulative breakdown that occurred here. While the Board has a history of giving citizens the "benefit of the doubt" concerning procedural errors which they perhaps unwittingly commit during the course of SB172 (and other) proceedings, I

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* While it is hardly my habit to do so in dissenting Opinions, in this case, I feel it is important to briefly outline some of the experiential bases I have applied to my analysis of the record in this case. In addition to my technical background, I served as a delegate to the 1969-1970 Constitutional Convention and was a member of the Convention's Committee on Local Government (see generally Anderson and Lousin, From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Illinois Constitution, 9 John Marshall Journal of Practice and Procedure 697 (1976) and n. 11 at p. 701). I subsequently served as Trustee and Vice-Chairman for the College of DuPage, and as Commissioner for the Metropolitan Sanitary District of Greater Chicago. I also served on a number of appointed local government committees. I was initially appointed to this Board in 1980, and hence have reviewed the record and participated in, often as principal drafter, the decision in each of the 32 previous SB172 cases deliberated by this Board.

believe that extension of this benefit to STL here is unwarranted. During the course of the hearings at the County level as well as at the PCB level, STL was represented by counsel and gave every appearance of being conversant with SB172 case law, and unhesitatingly exercized its procedural rights to participation in the quasi-judicial SB172 proceedings.

Since 1981, the Board and the courts have pointed out the error and unacceptability in SB172 proceedings of ex parte contacts or, to put it bluntly in the context of the judge/jury analogy used by the majority Opinion (p. 20-21): "jury-tampering". I find it difficult to believe that STL could have managed to inform itself of its procedural rights without being aware of procedural restrictions. Yet STL exhibited a course and pattern of conduct intended to influence the County by means to which the City could not lawfully reply in kind: the signs, the buttons for Board Members, the "incineration" lunch with a Board Member, the refreshment stand, the injection into the County comment record of minutes of its meeting concerning the incineration proposal (ruled out of order as a subject matter at hearing), the supplying directly to the County Board Members of information not filed with the County Clerk, the address to the County Board on May 28. These efforts, of course, culminated in the piece de resistance: the radio commercials (set out in their entirety in the majority Opinion at page 12) whose clearly intended result was to encourage constituent telephone calls personally to the County Board Members reminding them that a vote for the City's application was a vote "in fact" for dead trees, dead crops, dead fish, and dead children.

I find STL's attempt to excuse this behavior by waiving the banner of first amendment rights to freedom of expression (STL Brief, p. 73) truly disingenuous. I daresay that STL would be unlikely to make such an assertion if the applicant, rather than STL, had carried out such activities.

Citing Waste Management of Illinois Inc. v. IPCB, 123 Ill. App. 3d 1075, 463 N.E. 2d 969 (2d Dist. 1984), the majority Opinion concludes (at p. 29-30) that:

> "The City has not shown that the County Board's decision was based merely on the political climate of the area, altnough some County Board Members did base their decisions, in part, on evidence not in the record."

This reliance on Waste Management is inappropriate, as in that case the court found that the only factor cited in support of the contention that a biased decisionmaking had occurred was the fact--which the court stated was not of record--that half of that County Board faced re-election within 2 months of the decision. The court accordingly found that "petitioner has not demonstrated

that the board members decided on its application as a result of the public opposition and without consideration of the evidence."

In analyzing the City's allegations of bias or pre-judgment of adjudicatory facts on the part of the County Board Members, I in no way disagree with the majority's citation of cases standing for the proposition that, without more, any statements made by the County Board individually or collectively against the Baxter and Mulford site prior to the filing of the City's SB172 application do not per se serve to disqualify them as decisionmakers. Here, however, there is plenty of "more".

While STL did not carry out its responsibility to act appropriately, the County Board Members collectively did not carry out their concurrent responsibilities. I agree with the majority that Mr. MacKay, Chairman of the Zoning and Planning Committee who conducted the County hearings, did a fine job of conducting the hearings themselves. However, since he was, as he put it, only a "quasi-judge", Mr. MacKay had inherent limitations to his powers and could not issue an effective order directing STL to cease its off-record activities, any more than he could so direct (as opposed to advise) his fellow County Board Members. Without the power to declare a "mistrial" to allow the action to recommence from "square one" before a new judge/jury which had no previous exposure to the action or pre-judgment as to the outcome, the hearing officer in an SB172 case does face considerable difficulty.

Notwithstanding, the County Board Members are chargeable with knowledge of SB172 case law and of their responsibilities, no matter how difficult for elected officials, to manage any unavoidable ex parte contacts as they occur. Such management techniques range from termination of conversations once their direction is clear, to placement of letters into the County's public record, to reduction of the contents of phone calls to writing for placement into the record, to abstention from the vote. The County did none of these things.

I must also note, however, that I believe that for such "fixes" to be effective, they must be performed at or near the time of the contact. In this case, pursuant to the PCB majority remand order, I do not see how a County Board Member can be reasonably expected to reconstruct letters, phone calls, or conversations which occurred last May, or how the City can effectively rebut them. I also fail to see how the effect of these contacts, as well as the "facts" emanating from the STL radio commercials, can be effectively purged from the County's decisionmaking system. These "facts" and opinions have already been internalized by the County Board Members, whose recollection of them will only be refreshed by further repetition at subsequent hearings (as explained later in greater detail.)

This brings me to the other off-record "facts" shared by the County Board Members during their debates (majority Opinion, pp. 15-16, 20), as well as the non-statutory "criteria" reflected in the County's resolution e.g. lack of "guarantee" of design failure (majority Opinion, pp. 6-7). In contrast to the majority's view (Opinion p. 28-29), it is my belief that most County Board Members who had made even a cursory review of the information legitimately before the County in this much publicized proceeding could not help but have some memory of what the actual SB172 criteria were only three months after the vote, while County Board Members who had based their decision only or largely upon their legislative experience, the debate of their colleagues, ex parte conversations, or media exposure would not.

I believe that a "realistic appraisal" of the comments made by various County Board Members at the County's May 21 and 28 meetings and at the PCB hearings, as well as the County Resolution, made in light of the 17 year history of the City's and County's actions concerning the intended use of the Baxter and Mulford site as a landfill, would lead "a disinterested observer [to] conclude that [many County Board Members] had in some measure adjudged the facts as well as the law of the case in advance of hearing it." E & E Hauling Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555, 565 (2nd Dist. 1983).

The PCB majority recognizes a bias problem in this case, and singles out for disqualification four County Board Members, those who wore STL buttons at hearing. I believe that this response is ill-considered and fails to address the overall problems in this case. As to the four excluded for wearing buttons, I can easily argue, consistent with the majority's logic, that Board Members Connelly and Barnard should not have been excluded for this reason alone.* The gist of their testimony is that they picked up buttons at a hearing, put them on, wore them about five minutes, talked about it together, and took them off because they didn't want to be seen as expressing an opinion (PCB Tr. 60, 68, 204). (Mr. MacKay also testified that he cautioned against button wearing by County Board Members. PCB Tr. 137.)

In effect, these Board Members, by relatively quickly taking off the buttons, arguably "cured" the problem. Since the County hearing transcripts do not indicate which County Board Members were present at which hearings, it is impossible to determine how

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* There are other bases for exclusion of these individuals which are more compelling. However, I do not believe that discussion of the reasons for disqualifying individual County Board Members is fruitful, given my belief that here the problem cannot be cured by singling out only some County Board Members to shoulder all the blame.

many decisionmakers witnessed their actions. Notwithstanding, I think it is fair to assume that their action had less effect on the County's decisionmaking process than the petition against the landfill signed by two other Board Members which was included in the County Record for all to see; the majority opinion does not disqualify these Board Members, who had been requested by the City to recuse themselves because the wording of the petition, although circulated before the City's application was filed, very closely tracks the language of criteria (ii) and (iii) of SB172. (See Opinion, p. 11).

Even if one were to agree (which I do not) that the effect of the ex parte contacts of varying degrees of severity testified to by a full seventeen (17) of the twenty-three (23) members who voted against this application (see Opinion at p. 12-13) can be cured at a subsequent hearing, I think that the majority Opinion is fatally flawed because it does not (perhaps because it cannot) give effective instructions for the parties to follow on remand.

Exactly what are the County Board Members, the City and the other participants to do at the hearing ordered by the PCB majority? The majority opinion gives no direction on this, other than to say that the "substance" of all ex parte contacts (presumably including the radio ads and signs) shall be made part of the record.

Actually, I would be hard put to tell the participants what to do that would not exacerbate the situation. The County Board Members who testified at the PCB hearing have already stated that they had no precise memory of the substance of their off-record ex parte phone calls (except that callers were overwhelmingly against the landfill). Some have produced some of the letters they received, but those who discarded them were vague about content, again save for the fact that the letters were largely anti-landfill. Are County Board Members to give the names of the persons who called them? Are the transcript and exhibits at the PCB hearing to be rehashed? Is each County Board Member to present additional testimony concerning ex parte contacts? Is each to testify concerning contacts since the time of the County decision? These contacts could have as great a damaging effect on the County's deliberations upon remand as the earlier ones. Once all this is aired, should those acknowledging ex parte contacts recuse themselves? What if this constitutes a majority of the County Board?

Moreover, the "substance" of many of the ex parte contacts was the preferability of a proposed incinerator over the proposed landfill (Opinion at p. 12-13). This subject matter was repeatedly, and correctly, ruled out of order by Mr. MacKay during the prior County hearings as being beyond the scope of SB172. Is the City now permitted (required?) to attempt to rebut this information which the PCB majority has included into the record for hearing? Is the City to do the same (whatever that

is) with every other irrelevant "fact" which might have swayed the County?

Finally, what if the record developed on remand shows that the County has again reached a legislative decision? By the majority's logic, one remand could be followed by another and another for correction of the same error, creating a closed loop in contravention of SB172's intent that the applicant have a speedy final decision on its application from its local government.

I do not think that the drafters of SB172, or the courts who have heretofore interpreted it, could have contemplated the dilemma which this case has posed. I agree with the majority (Opinion p. 7,30) that current case law prohibits the Board from exercising what I would find the most preferable option in a case such as this, which would be to have the Board review the record de novo to determine whether the City had proven by a preponderance of the evidence that the criteria of SB172 had been satisfied. While the decision would not be made by local government, a decision would be reached on the record by an unbiased decisionmaker.

I do not find unacceptable, under the circumstances here, the only practical option available to the Board: reversal. The majority Opinion (p. 30) stated:

> The Board also has the option to conclude that Winnebago County cannot render a fundamentally fair decision and totally reverse the County, thus allowing the application to proceed to the Illinois Environmental Protection Agency for decision on permits. This option would be a severe penalty for the opponents of the landfill who contributed greatly to the unfairness of the process.

The logic of that last sentence eludes me. Given the majority's acknowledgment that the unfairness in this proceeding stems solely from the actions of STL and the County, why is it fair to "penalize" the applicant with an impossible remand hearing before the County?

It is hard enough in the first instance for the County Board Members to adapt to the constraints imposed on them by the quasi-judicial SB172 process. That, however, is required by statute; this remand is not so required. The PCB majority is now asking these elected officials to dispassionately reconsider their first decision because of procedural error, no matter whether any reversal of the decision would fly in the face of constituents' expressed wishes. Any tendency to "stick to one's guns" can only be strengthened by the personal embarrassment and resentment

which many must have felt as a result of the microscopic scrutiny of their actions in this unaccustomed legalistic, quasi-judicial context.

I do not believe the PCB majority is taking a real world view of the practical effects of their remand. In essence, and without in any manner impugning the honesty and integrity of the County Board Members, I believe that the PCB majority is asking the County Board to cure a problem that it simply cannot reasonably be expected to cure. I suspect that the only change in the County's action on remand will be that the Board Members will be super-cautious about engaging in debate and about how they articulate a reason for a vote against (or for) the landfill. While the written record of the decisionmaking process might thus be "sanitized", I doubt that the process itself will be.

I am convinced that the Board will continue to see cases evidencing the strain caused by SB172's statutory and court ordered restrictions. There are no easy solutions to this problem. However, local government officials faced with SB172 applications might well wish to become personally familiar with SB172 case law so that they can serve their constituents by not becoming embroiled in lengthy, time-consuming and expensive appeals because of failure to act as "quasi-judges".

Again, and in conclusion, it is my firm belief that the only available, realistic, and effective remedy for the prejudice to and breakdown of the SB172 decisionmaking process demonstrated here is reversal of the County's decision. For all of the reasons expressed herein, I dissent from the majority Opinion and Order.

Joan G. Anderson

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 2nd day of December, 1987.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board