ILLINOIS POLLUTION CONTROL BOARD
January 21, 1988

GERTRUDE GUERRETTAZ, EUNICE SCHACKMANN, MICKIE BUNTON, KATE BERGBOWER, RUTH BERGBOWER, SANDRA SCHACKMANN, MADONNA SCHACKMANN, WAYNE BERGBOWER, SCOTT BERGBOWER, BROWNIE BERGBOWER, ROSEMARY BERGBOWER, TOM BERGBOWER, TIM MC DONALD, GLORIA MC DONALD, KENNY BERGBOWER, CHUCK BERGBOWER, JIM DHOM, CLOYCE BUNTON, LARRY CASEY, BILL MENKE, JOE SCHACKMANN, KEITH SCHACKMANN, BRYAN BERGBOWER, LISA BERGBOWER, AUDREY MENKE, SUSAN BERGBOWER, CHRISTINE LITZELMAN, ANDY DHOM, SHARON DHOM, ED YAGER, CAROL YAGER, DEBBIE YAGER, GENEVA DHOM, TERESA DHOM, BRIAN DHOM, GENE SCHACKMANN, JANE CASEY and A.C. DHOM,	)	
Petitioners,	)	
v.	)	PCB 87-76
JASPER COUNTY, ILLINOIS and LENA RICHARDSON and BERGBOWER LANDFILL, INC.,	)	
Respondents.	)	

CONCURRING OPINION (by B. Forcade and J.D. Dumelle):

While we agree with the outcome and rationale expressed by the majority that Jasper County was without jurisdiction, we would have also addressed in the Opinion the effect of the tie vote by the county board.

At the conclusion of the public hearings before the county, and post-hearing receipt of public comment, the County Board met on April 28, 1987, to consider their action. The official minutes of that meeting (County Record, Volume B, p. 221), provide the following description:

> The meeting was brought to order by chairman Kepley, then turned over to States Attorney James Tomaw. Mr. Tomaw explained the Board was meeting to discuss testimony in the Bergbower Landfill Hearing. He then instructed Chairman Kepley to read to the Board the seven criteria the Board can consider in this matter.

> The States Attorney suggested Mr. Kepley read each criteria, ask for discussion, then call for a vote from the Board if they agree this criteria has, or has not been met. The Board decided to go through all the criteria, then make their decision.
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> After much discussion, a motion was made by McClure to deny the landfill expansion, due to not meeting criteria #1 and #5. This motion was seconded by Johnson. Those casting yea votes were: Kerner, Johnson, McClure, Ochs, Geier. Those casting nay votes were: Griffith, Walden, Michl, Cunefare, Trimble. Kepley cast an abstain vote.
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> The Chairman declared a tie vote. The motion did not carry.

On May 13, 1987, the County Board again considered this matter. The official minutes (County Record, Volume B, p. 222) provide:

> Rosemary Bergbower came before the Board speaking for her family and neighborhood concerning the tie vote for approval of the Bergbower Landfill. She asked the Board to re-consider and vote again on this issue.
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> Keith Schackmann spoke to the Board with his concerns on the landfill issue. He asked the Board to vote again and consider the witnesses and testimony presented at the hearing.
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> Mr. Kepley reminded the Board of their tie vote concerning the landfill and that if no further discussion, or vote would be held today, the tie vote will stand. The Board did not want to vote again so the vote of the April meet will stand.

The official minutes show that all eleven members were present at each meeting.

The Citizens first argue that the action of the County Board was a "final decision" (Pet. Br., p. 13)1, and that such decision should be construed as a denial of the application under the theory of Committee for a Rickel Alternative v. City of Linden, 214 N.J. Super. 631, 520 A. 2d 823 (1987). Neither briefs nor arguments were provided by the other parties to the proceeding.

The statutory provisions governing action by the County Board are found at Section 39.2 (e), which provides:

> e. Decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section. In granting approval for a site the county board or governing body of the municipality may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board. Such decision shall be available for public inspection at the office of the county board or governing body of the municipality and may be copied upon payment of the actual cost of reproduction. 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.

The only appellate court case to directly interpret this section is the second district's opinion in McHenry County Landfill, Inc. v. PCB, 154 Ill. App. 3d 89, 506 N. E. 2d 372 (1987) (hereinafter, "McHenry County") In addressing the "final action" concept of the statutory language, the court stated:

> Landfill next argues that it was entitled to deem its site approved because the county board failed to take "final action" on its request within 120 days of filing, as required by Section 39.2(e) of the Act. (Ill.Rev.Stat. 1983, ch. 111-1/2, par. 1039.2(e).) Landfill admits that the county board denied site approval 114 days after the initial filing (on March 20, 1985), but contends that the order was not "final" because, on review, the PCB held that the wrong evidentiary standard had been used and that it therefore had "no proper subject for review before it." By the time the PCB remanded the case to the county board for a new vote, the initial 120-day period had expired, and Landfill argues that the county board's subsequent decision therefore was untimely.

> Again, we must look to the legislature's intent (Maloney v. Bower (1986), 113 Ill.2d 473, 479), and the purpose the statute is designed to serve (Benjamin v. Cablevision Programming Investments (1986), 114 Ill.2d 150, 157) when interpreting its language. The legislature did not vest the county board with the authority to finally deny site approval, but instead allowed an applicant to appeal a county board's denial to the PCB. (Ill.Rev.-Stat. 1983, ch. 111-1/2, par. 1040.1.) We therefore conclude that the "final action" which a county board must take within 120 days of filing need only be sufficiently final to justify an appeal to the PCB. The county board's March 20, 1983, order clearly denied site approval and had the legal effect of precluding Landfill from obtaining a permit unless it filed a timely appeal with the PCB. Ill.Rev.Stat. 1983, ch. 111-1/2, pars. 1039.2(f), 1040.1(a); see Port of Boston Marine Terminal Association v. Rederiak-tiebolaget Transatlantic (1970), 400 U.S. 62, 71, 27 L.Ed.2d 203, 210, 91 S.Ct. 203, 209 (an administrative agency's action is "final" for appeal purposes when review will not disrupt the orderly adjudication process and legal consequences will result from the agency's action).

It is clear that the Jasper County Board's actions on April 28, and May 13,: (1) were within the statutory deadlines for action, (2) concluded the County Board's adjudicative process such that an appeal would not be disruptive, and (3) that legal consequences would result. Therefore the County Board took "final action" within the statutorily mandated timeframe and the landfill approval does not issue by operation of law.

Simply because the County Board took final action, does not mean the County Board reached a decision. In Lambros v. Young, 145 F. 2d 341 (1944), the United States Court of Appeals for the District of Columbia addressed the effect of a one-to-one tie vote by the Board of Commissioners on a liquor license matter:

> It is argued on behalf of the Commissioners that we should read into this statute the judicial rule which requires the affirmance of the judgment or order of a trial court when an appellate court is evenly divided. But this rule is not applicable to this case because the statute requires the Commissioners to reach a decision on questions of fact. A

> decision involves reaching a conclusion. Where no conclusion is reached nothing is decided. Even in judicial proceedings the action of a divided court is not a decision. It does not affirm the decision of the court below. Instead, it affirms the order or judgment or decree of the court below. This is not because the appellate court has decided the case. It is, rather, because the appellate court has been unable to decide the case and therefore cannot reverse the lower court's judgment or decree. But this kind of affirmance is not a decision on the facts or law. Neither does it indicate an approval of the lower court's conclusions of fact or law. For this reason the rule cannot be applied to the statute in this case which requires the administrative tribunal to make a decision on questions of fact.

Here, the Act requires the County Board to make determinations on questions of fact and no such determinations were made. Hence, the County Board did not make a decision. We note that the governing statutory provision in this case, Section 39.2 (e) provides in the last sentence that. "If there is no final action by the county board...the applicant may deem the request approved." However, the preceding sentences of that subsection provide that the "decisions" of the county board are to be in writing, are to specify reasons, and are to be made available to the public. This implies that the general assembly made a distinction between "final action", and a "decision".

There is not a large body of case law on proceedings in which action was taken by an administrative agency within the default time requirements, but a majority decision was not reached. The case most directly on point is Committee for a Rickel Alternative v. Linden, 520 A. 2d 823 (1987) (hereinafter "Linden "). There, the New Jersey Appellate Court was faced with an appeal of a de novo determination by the City Council of Linden in a zoning matter which resulted in a tie vote. If the City Council decision was not made and published within 95 days the governing statute provided that such action would be construed as affirmance of the action of an administrative subset of the City Council. In addressing this situation the Linden court stated:

> Further, with exceptions requiring even a more substantial affirmative vote, under N.J.S.A. 40:55D-9a municipal agencies must take all actions by a majority vote of the members present at a meeting on any application for development. Consequently, the Legislature

> contemplated that an application governed by that section would be rejected by a tie vote. We think that the same principle should be applied under N.J.S.A. 40:55D-17e
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> We also point out that in general a person seeking relief from a public body has the burden to demonstrate his entitlement to it. Thus, an appellant ordinarily has the burden to show error in a judgment under review, Brown v. Olesky, 37 N.J.Super. 19, 25, 116 A.2d 818 (App.Div.1955), affr'd, 20 N.J. 520, 120 A.2d 461 (1956). Accordingly, when an appellate court is equally divided it affirms. See Vesley v. Cambridge Mutual Fire Ins. Co., 93 N.J. 323, 460 A.2d 1057 (1983). Here, under Evesham, Supermarkets had the burden to convince the council that it was entitled to the variance. It did not do that.
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> In reaching our result we have not overlooked the fact that, absent written consent for an extension from the applicant, unless the governing body concludes its review of the record not later than 95 days from the date of publication of notice of the board's decision and renders its decision within that period, it in effect renders a decision affirming the action of the board. N.J.S.A. 40:55D-17c. We are satisfied that the purpose of this provision is to require expeditious disposition of appeals by the governing body. See Lizak v. Faria, 96 N.J. 482, 492, 476 A.2d 1189 (1984). In this case, there is no suggestion that the council did not act in a timely way. Rather, its decision was prompt but the board was evenly divided. Thus, as the Legislature did not say that unless the governing body affirms, reverses or remands the matter within the 95-day decision period, that requirement does not undermine our result.

We believe that the relevant provisions of Illinois law are sufficiently similar to those discussed by the New Jersey Appellate Court to adopt its reasoning. Under Illinois law all questions shall be determined by a vote of the majority of the county board members present. Ill Rev. Stat., ch 34, 855 (1983). Under Illinois law the applicant has the burden of proof

in a Section 39.2 proceeding before the County Board. East Peoria v. PCB, 117 Ill. App. 3d 673, 452 N.E.2d 1378 (1985); E & E Hauling v. PCB, 116 Ill. App. 3d 451, 451 N.E. 2d 555 (1983); Waste Management v. PCB, 123 Ill. App. 3d 1075, 463 N. E. 2d 969 (1984); McHenry County Landfill v. PCB, 154 Ill. App. 3d 89, 506 N. E. 2d 372 (1987). Illinois law provides a remedy in Section 39.2 (e) when the county board fails to take final action within the statutory deadline, but McHenry County, tells us that the action of the Jasper County Board was a final action. The Act does not specifically provide a result for a tie vote. Therefore we conclude that the landfill applicant has the burden of convincing a statutorily determined majority of the county board members that its application should be granted. Where, as a result of a timely and proper vote, the applicant fails to convince a statutorily established majority of the county board that it is entitled to approval, its application is denied. It would make no difference whether the motion before the county board was a motion to grant approval or a motion to deny approval. The statute places the burden of proof upon the applicant and the county board cannot change that statutorily established burden no matter how the "motion" is phrased.

This Board has previously considered an appeal of a landfill siting approval process before a county board, which resulted in a tie vote, in Board of Trustees of Casner Township, et. al. v. County of Jefferson, et. al., PCB 84-175 & PCB 84-176 Consolidated (hereinafter "Casner Township"). In that case, the county board met in a timely and otherwise proper manner to consider the application. Neither approval nor denial motions received the requisite majority. One petition for review filed with this Board asserted that the county had taken no action within the requisite timeframe, the other petition for review asserted that the application had been granted by operation of law and sought review. The landfill applicant filed a motion to dismiss asserting that this Board lacked jurisdiction to entertain review of approvals granted by operation of law The Board entered an Order requiring the parties to brief the issue: "Does Section 40.1 (b) convey jurisdiction on the Board to review an approval granted by operation of law ?". At no point in that proceeding did the parties address or did the Board consider whether a lack of a majority vote in an otherwise proper and timely consideration constitutes a failure to take "final action". Also, the Board's determination in Casner Township was issued prior to the Court's guidance in McHenry County on what constitutes "final action" by a county board in a Section 39.2 proceeding and must now be interpreted in light of the court's holding. The Board's conclusion in Casner Township is repeated here, in its entirety, to emphasize what was considered and what was decided (Casner Township, PCB 84-175 & PCB 84-176 Consolidated, Order, January 10, 1985, pp. 6-7):

The Board interprets the language of Section 39.2(e) stating that "the applicant may deem the request approved" as meaning that the applicant may deem himself to have the rights that he would have had under the Environmental Protection Act had the County Board actively granted approval--no more and no less. Specifically, he has the right to proceed to the permitting process after submitting "proof to the Agency that the location of said facility has been approved by the County Board" by operation of law. (See Section 39(c).) However, there is no indication in the statutory scheme created by SB 172 that the General Assembly intended that the applicant would obtain greater rights by a County Board's inaction than he would have had by virtue of an active approval. Specifically, there is no indication that an approval by operation of law was intended to shield the applicant from the special third party appeal process established in SB 172.

Absent a compelling demonstration that the statutory language requires or the General Assembly intended that "deemed approved" requests be treated as different from active approvals, the Board cannot extinguish the third party's statutory right to appeal in Section 40.1(b). The Board does not find Respondent Southern Illinois' emphasis on the word "grant" or argument about the omission of a special appeal provision for "deemed approved" requests to be compelling arguments. The Board believes the proper emphasis in the statutory scheme of SB 172 is on the word "approval" and that to "deem approval" is to deem that approval has been granted. The Board also finds that a special provision for the appeal of a "deemed approved" request would be redundant as the provisions of Section 40.1(b) adequately address both types of approvals.

Neither can the Board find a legislative intent to eliminate third party appeals of "deemed approved" requests. On the contrary, the Board finds that there are compelling arguments for upholding Board review of these approvals. The 120 day deadline for a local body to act is an essential element of the SB 172 statutory scheme. Without a deadline, the

> local body could frustrate the entire permitting process by simply not acting, and the legislative history shows that the General Assembly believed that many local bodies would be under pressure to do just that. The "deemed approved" mechanism functions to move the case along without penalizing any of the parties to the process other than the local body itself. However, if Board jurisdiction to review third party appeals were disallowed in these cases, the symmetry of the SB 172 system would be destroyed. Not only does this create the spectre of manipulation of the process and third party's rights by the local body, it would also produce a situation in which the site suitability which was of fundamental concern to the General Assembly could never be reviewed or assured. This would certainly be an absurd consequence in light of the elaborate public participation and review processes SB 172 created to ensure complete review of these questions.
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> On the basis of the foregoing discussion, the Board finds that it does have jurisdiction to hear this appeal pursuant to Section 40.1(b). Respondent Southern Illinois' Motion to Dismiss the Appeal is hereby denied.

Since the Board in Casner Township did not make any holding on the effect of a non-majority vote, today's evaluation is not in conflict with the actual holding in that case. What Casner Township did hold is that operation of law approvals may be appealed to this Board in the same manner as a deliberate and intentional approval. A similar result was reached by the New Jersey Supreme Court in evaluating the same statute discussed in Linden. In Lizak v. Faria, 476 A. 2d 1189 (1984), the New Jersey Supreme Court stated at 1197:

> With respect to the right to seek review of the statutory grant of a variance, an interested party may appeal to the governing body "any final decision of a board of adjustment approving an application for development." N.J.S.A. 40:55D-17a(1). It would be illogical to permit an appeal from a variance granted after careful deliberations but not from one that is denied after equally careful deliberations and then converted by statute into a grant. No legislative purpose would be served by foreclosing the right of an interested party to appeal a statutory

> grant. In fact, such a result would contravene the legislative intent by precluding neighbors and other members of the public, who may have objected vigorously to the application, from rightful relief. The effect of the grant of the variance on the applicant, objectors, and the municipal zone plan is the same, whether the variance is granted by an affirmative board decision or by operation of the statute. Consequently, we find no merit in the Farias' contention that a statutory grant may not be appealed to the governing body.

In summary, the we believe that a timely and proper vote on a Section 39.2 landfill approval application, that does not secure a statutorily established majority, constitutes a denial of the application. Also, we believe that when landfill approval does issue by operation of law, that approval is appealable to the Board in the same manner as an intentional and deliberate granting of approval. This appears to reconcile all of the existing case law and rationale which we have been able to discover from any jurisdiction interpreting similar statutory provisions. Since the holding in today's case is that the County Board lacked jurisdiction to entertain the proceeding for lack of required service, our discussion on the effect of a non-majority vote would clearly be dicta. However, two of the last nineteen Section 39.2 proceedings filed with the Board (Casner Township and today's proceeding) have involved non-majority decisions and guidance appears appropriate.

Bill Forcade, Member of the Board

J.D. Dumelle, Chairman

IT IS SO ORDERED

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 25th day of January, 1988.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board