ILLINOIS POLLUTION CONTROL BOARD
August 6, 1987

GERALD CLUTTS AND LEE SIEGFRIED,	)	
Petitioners	)	
vs.	)	PCB 87-49
HERMAN L. BEASLEY,	)	
Respondent,	)	
and	)	
ALEXANDER COUNTY BOARD OF COMMISSIONERS,	)	
Co-Respondent.	)	

MICHAEL P. O'SHEA, JR. APPEARED ON BEHALF OF RESPONDENT HERMAN L. BEASLEY; AND

MARK H. CLARKE, STATE'S ATTORNEY APPEARED ON BEHALF OF RESPONDENT ALEXANDER COUNTY BOARD OF COMMISSIONERS.

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

This action is a third-party appeal filed April 20, 1987, pursuant to Section 40.1 of the Environmental Protection Act ("Act") (Ill. Rev. Stat. Ch. 111-1/2, par. 1040.1). Gerald Clutts and Lee Siegfried ("Petitioners") appeal the March 19, 1987 decision of the Alexander County Board of Commissioners ("County") site location suitability approval to an application for a new regional pollution control facility proposed by Herman L. Beasley. Hearing was held by the Board on June 16, 1987. Petitioners filed a brief on July 1, 1987 and respondent Beasley filed a brief on July 22, 1987.

Procedural History

The site for which Beasley seeks approval is a 20 acre tract of land in rural Alexander County, Illinois. Beasley proposes to accept non-hazardous waste only, and anticipates the life of the site to be 15 years.

The Board notes that this is the second time County approval of the Beasley site has been appealed to the Board, by adjacent landowners. The County had granted its approval on October 2,

1986, and an appeal was filed with the Board on November 5, 1986 and captioned as PCB 86-192, Siegfried v. Beasley and Alexander County Board of Commissioners. In addition to asserting that the County's decision was against the manifest weight of the evidence, Siegfried's petition also asserted various procedural errors in the proceeding. These included lack of written notice of the application on adjoining landowners, lack of availability of the application for public inspection, lack of notice of the public hearing (also alleged to be untimely), lack of a hearing record, and lack of a written decision by the County. At the hearing held by the Board on December 29, 1986, the parties submitted a proposed stipulation. (Resp. Ex. 1)

On January 8, 1987, the Board issued its final order in PCB 86-192 (Pet. Exh. 2), vacating the County decision and dismissing the appeal.

That Order stated in pertinent part that:

> "The stipulation calls for the October 2, 1986, decision of the Alexander County Board to be vacated and the application of Herman Beasley to be remanded to the Alexander County Board. The Board accepts those portions of the stipulation where the parties agree that the October 2, 1986, decision of the Alexander County Board be vacated, that this matter be remanded to the Alexander County Board for appropriate action, and that all further proceedings be in strict compliance with Section 39.2 of the Environmental Protection Act ("Act"). Any subsequent siting decisions concerning this landfill will be appealable in a separate and new proceeding before this Board.
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> To the extent that the stipulation may be construed as establishing a hearing date (in paragraph 4) which may be inconsistent with the requirements of Section 39.2(d), that paragraph is not accepted. The Board cannot, by accepting this stipulation, relieve the applicant or the County Board of any of the statutory application, notice and hearing requirements. Any future requests for site-location suitability approval must be in complete accord with Section 39.2. The parties to be stipulation are particularly directed to the notice provisions for application and hearing which must be strictly followed in order to vest the County Board, and this Board, with jurisdiction in this

matter. See The Kane County Defenders, Inc., et al. v. The Pollution Control Board, et al., 467 N.E.2d 743 (1985) and MIG Investments, Inc. and United Bank of Illinois v. EPA and PCB, No. 2-85-734 (2nd Dist. October 15, 1986)".

On January 14, 1987, Beasley sent written notice to adjacent landowners and certain legislators of his intent "to submit approval to the [Alexander] county board on January 29, 1987". Each notice contained the legal description of the proposed site, the statement that it would accept "non-hazardous waste from the business of the applicant" for the probable 15 year life of the site, and notice that the county would accept written comments not later than 30 days after the date of the last public hearing. County Rec., Item 1. An identical notice was published January 15 in the Southeast Missourian "a newspaper published in the City of Cape Girardeau, in Cape Girardeau County and State of Missouri". County Rec., Item 2. The County Record also contains the Beasley application, which has no filing date.

On remand, the County held a hearing on January 29, 1987, and approved the site by resolution on March 19, 1987.

The Instant Appeal

In this action, Petitioners again challenge the procedures by which the application was handled. Petitioners assert that Alexander County lacked jurisdiction to act upon the application because of various defects in notice and because the hearing was held on the same day the application was filed. Alternatively, petitioners argue that the County's decision was against the manifest weight of the evidence. For the reasons outlined below, the Board finds that the County lacked jurisdiction to consider the application, and vacates the County's approval.

Notice Defects

As petitioners correctly state, Section 39.2 requires various types of notice at two stages of the site location process 1) prior to the submission of the application and 2) prior to the public hearing concerning the application. Petitioners assert that notice requirements were neglected at both stages.

As to pre-application notice, Section 39.2(b) provides in pertinent part that:

> No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served either in person or by registered mail, return

> receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property. ...
>
> Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located....

During the course of this appeal, the Petitioners established additional facts relative to Section 39.2(a) by way of a May 21, 1987 Request for Admission of Facts.* These are that: 1) Beasley failed to cause notice of his request for site-location approval to be published in a newspaper of general circulation published in Alexander County and 2) Beasley filed his application on January 29, 1987, the day of the public hearing.

As to the notice and timing of the hearing, Section 39(d) provides in pertinent part that:

> At least one public hearing is to be held by the county board or governing body of the municipality no sooner than 90 days but no later than 120 days from receipt of the request for site approval, such hearing to be preceded by published notice in a newspaper of general circulation published in the county of the proposed site, and notice by certified mail to all members of the General Assembly from the district in which the proposed site is located and the Agency.

Facts relative to Section 39(d) elicited pursuant to the Request to Admit are that: 1) the public hearing of January 29, 1987, was held on the same day that Respondent-Applicant Beasley's request for site-location approval was submitted to, and received by, Co-Respondent Alexander County Board of Commissioners, 2) neither Beasley nor the County published notice of the public hearing in a newspaper of general circulation in Alexander County, 3) no notice of the public hearing was sent by certified mail to Representative David D. Phelps or Senator Glenn Poshard, the members of the General Assembly from the legislative district

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* At the June 16 hearing, an untimely response to the request was stricken by the Hearing Officer. Beasley has not appealed this ruling.

encompassing Alexander County, and 4) no notice of the public hearing was sent by certified mail to the Illinois Environmental Protection Agency.

The Board will first address the Section 39.2 requirement for publication of notice "in a newspaper of general circulation published in the county in which the site is located". Petitioners argue that the word "published" should be construed as meaning "printed", while Beasley argues that "published" should be construed as meaning "regularly and generally disseminated". Neither party provides citations in support of its position.

The Board notes that the Illinois Supreme Court construed the meaning of the word "published" as used in the Election Code in People ex rel. City of Chicago Heights v. Richton, 253 N.E.2d 403 (1969). In that case, the Election Code required notice of a Chicago Heights election to be given in a newspaper "of general circulation published within the city". The notice was printed in the now-defunct Chicago's American, a daily newspaper of general circulation within Cook County printed in the City of Chicago. The Court was presented with the argument, similar to that made by petitioners here, that "published within the city" means "printed and issued within the city".

The Court stated that:

> We find respondent's argument unpersuasive. In Pekins v Board of County Comrs. of Cook County, 271 Ill. 449, 475, 111 N.E. 580, the court said: "The object of requiring publication of such ordinances in a newspaper having a general circulation in the municipality in which it is to become effective is in order that its provisions may become known to the inhabitants of such municipality. The primary meaning of the word "publish" is "to make known". Further, from a reading of section 12-1 of the Election Code (Ill. Rev. Stat. 1967, ch. 46, par. 12-1), it is clear that the legislature knew quite well the difference between the words "print" and "publish". That section reads in pertinent part: * * * except in cases otherwise provided for, the county clerk shall publish *** a notice *** in two or more newspapers printed and published in the county ***. In section 6-17 the legislature required only that the notice be given in a newspaper "of general circulation published within" the city. Had the General Assembly intended that notice of election be given in a newspaper both printed

> and published in the community, it would have done so with appropriate language, as was done in section 12-1. Accordingly, we hold that the word "published" as used in section 6-17 of the Election Code is not synonymous with the word "printed" but means to make public or to make known to people by newspapers of general circulation (Emphasis in original) 253 N.E.2d at 405.

Accord, Second Federal Savings and Loan Assn. v. Home Savings and Loan Assn., 60 Ill. App. 3d 248, 376 N.E.2d 349 (1st Dist. 1978), construing requirements of the Illinois Savings and Loan Act, Ill. Rev. Stat., ch. 32, par. 744(h)(4), and implementing regulations.

The Board adopts the Richton reasoning, and finds that the notice requirements of Section 39.2 are satisfied if notice is published in a newspaper of general circulation which is regularly and generally distributed in the county in which the site is located, even if the newspaper is not printed in that county. To do otherwise could frustrate the intent of Section 39.2. As Beasley has aptly pointed out "[s]ome small, rural Illinois counties...do not have the benefit of a home-county newspaper. [T]he legislature [could not have], by inference, excluded or disqualified these citizens from consideration of a new pollution facility merely because of the absence of a local publisher". (Resp. Brief, p.1)

Applying this construction to the facts of this case, the Board notes that the Southeast Missourian, the daily newspaper in which the notice of the application appeared, was printed in a Missouri county contiguous with Alexander County. Beasley asserts that this newspaper is regularly sold, distributed and circulated in Alexander County, an assertion which petitioners have not challenged. Based on these facts, the Board finds that Beasley's publication of notice of his application in the Southeast Missourian satisfied the notice requirements of Section 39.2(b) of the Act.*

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* By way of dicta, the Board wishes to observe that publication of notice in the Southeast Missourian may, as a practical matter, have provided greater actual notice of the application than would its publication in the sole "home-county" newspaper. The Board takes administrative notice of the fact that there is only one newspaper printed in Alexander County is the Cairo Citizen, a weekly publication. "1987 Illinois Newspaper Directory and Advertising Ratebook", Illinois Press Association, p. 9 and 78. Regular readers of a daily newspaper may well choose not to supplement their reading with a weekly newspaper.

While the Board has found that Beasley has complied with the requirements of Section 39.2(b), the Board finds that Beasley and the County have not complied with the requirements of Section 39.2(d).

Beasley contends that the single notice given satisfies Section 39.2(d) as well as Section 39.2(b). This argument is incredible. The statement in the notice that "the applicant intends to submit approval (sic) to the appropriate county board on January 29, 1987" would by no stretch of the imagination convey to the average interested person that a public hearing would be held on that day. Even assuming that interested persons could divine that a public hearing was to be held on that day, the notice would be deficient for failure to state the place where hearing would be held and the time at which it would commence.

Petitioners additionally assert that the unnoticed hearing was held in contravention of the first sentence of Section 39.2(d), requiring that hearing be held "no sooner than 90 days after the application's filing." Beasley's arguments in opposition are that his January 29, 1987 application should be deemed as relating back to October 2, 1986, the date when the County first considered his application, that petitioners agreed to the date in the stipulation of December 29, 1986 submitted in PCB 86-192, and that any and all jurisdictional deficiencies were waived by petitioners failure to make objection prior to the County's issuance of its written decision.

As to the argument that the January 29, 1987 application relates back to October 2, 1986, there is no factual basis in this record to support a finding either that Beasley had ever filed an application prior to January 29, 1987, or that any such prior application was identical to that filed on January 29, 1987. Indeed, one of the deficiencies concerning the County's October 2, 1986 action alleged in the PCB 86-192 petition was that either Beasley had failed to file an application, or, if so, the application was not available for inspection as required by Section 39(c). The purpose of the Section 39.2(d) requirement that hearing be held no sooner than 90 days after an application's filing is to insure that the public has adequate time, in advance of hearing, to analyze the application and to prepare questions and comments for presentation at hearing. The Board cannot find that there has been either literal or substantial compliance with this requirement, and rejects the "relation-back" argument.

The argument that petitioners are bound by the December 29, 1986 stipulation is also rejected. The Board, in its Order of January 8, 1987 in PCB 86-192 (supra, p. 2) specifically did not accept that portion of the stipulation purporting to set a hearing date inconsistent with Section 39.2(d) requirements.

Additionally, even were the Board to find that petitioner Siegfried was bound by the hearing date stipulation, petitioner Clutts would not be found to be so bound, as he was not a party in the PCB 86-192 proceeding.

This leads to the final argument, that any and all jurisdictional notice and hearing defects are waived by failure to assert them before the County. The Board and courts have applied the waiver rule in some contexts in SB-172 proceedings, see e.g. Valessaries and Heil v. County Board of Kane County and Waste Mgt. of Ill., Inc., PCB 87-36. July 16, 1987, pp. 10-12 and cases cited therein. Application of such a rule to the jurisdictional defects which the Board has found here would run contrary to the intent of SB 172 that a local government's decision concerning site location suitability applications be made only after its receipt of input from an informed public.

The SB 172 notice and hearing process was structured by the legislature to foster public awareness of the pendancy of an approval application and to minimize procedural barriers to citizen's participation at hearing. Where rights of notice of hearing are breached, a "Catch-22" situation is created. Only members of the public who appear at the hearing held by local government can pursue an appeal to the Board; those who do not appear at hearing because they lacked notice of where and when it would be held cannot file an appeal. The petitioners here are, in effect, asserting breach of rights on behalf of those who have no standing to assert such rights by virtue of the fact that their rights were breached. In cases in which the courts have reviewed a substantial breach of rights of notice required by the Environmental Protection Act, the courts have not required the petitioners to demonstrate that they personally have been prejudiced, requiring only that the breach occurred. Illinois Power Co. v. IPCB, 137 Ill. App. 3d 449, 484 N.E.2d 898, 900 (4th Dist. 1985), Kane County, supra, MIG Investments, supra; but see McHenry County Landfill v. IEPA, Nos. 2-86-265 and 2-86-369 Ill. App. 3d _____ (2d Dist. March 30, 1987) involving an inadvertent error causing 20, rather than 21, day notice of hearing.

The legislature has structured the SB 172 hearing at the County level as an informational hearing, at which there are no parties, rather than as a contested case hearing at which parties are clearly defined. Section 39.2 does not literally require, nor does it contemplate, that interested persons would necessarily need to hire an attorney to present their questions and concerns. While some citizens do choose to do so, it is the Board's experience that the vast majority of participants in SB 172 cases do not. That appears to be the case here, as the record of the county hearing does not indicate that an appearance was entered on behalf of either Mr. Clutts or Mr. Siegfried, although each of them spoke at hearing. Given the circumstances

here, the Board declines to hold that two citizens who appear at a hearing without benefit of counsel can waive the rights of other members of the public to provision of the notice required by the Act.

Finally, even if the waiver rule were to be applied here, the Board finds that Section 40.1(a) of the Act would require the Board to raise the jurisdictional issues presented here on its own motion; Section 40.1(a) requires the Board to consider "the fundamental fairness of the procedures used by the county board...in reaching its decision". The Board again points out that it had articulated its concerns concerning notice requirements in its final Order in PCB 86-192.

Other Matters

Given its finding that the County lacked jurisdiction to consider the Beasley application due to lack of compliance with Section 39.2(d), the Board need not and cannot reach the issue of whether the County's decision was against the manifest weight of the evidence.

The Board wishes, by way of dicta, to make some observations which may be of some assistance to the parties in the event that Mr. Beasley makes a third attempt to bring his application before the County for consideration; the Board believes that this is appropriate given the resources expended by all concerned to no avail.

Any subsequent proceeding will not "relate back" to this one; in any reapplication Beasley should begin at "square one" as outlined in Section 39.2(b) with notices of the date on which he plans to file his request with the County. The County Clerk should note the date on which the application is received, as well as the date of all other documents received before the County closes the record.

As to the Section 39.2 hearing notice, the notice must specify the exact date, time and place of hearing; it is not sufficient to generally state that "hearing will be held between 90 and 120 days after the filing of the application"

The Board discourages combination into a single notice of the Section 39.2(b) notice of the application and the Section 39.2(d) notice of hearing, although the statute does not preclude doing this. However, if Beasley and the County publish a combined notice, the notice must be written so as to make clear that both types of statutory notice are being given.

The Board notes the testimony of County Commissioner James R. Wissinger at the Board's June 16 hearing (R. 28-29) that questions which he had asked of Beasley at the County hearing had never been answered. The Board also notes that Mr. Clutts had submitted written questions after hearing in response to the

County Board's invitation at hearing that he do so (Pet. Exh. 1); no answers to these questions appear in this record.

The Board notes that the exchange of information should take place in a hearing, not during a post-hearing comment period. The purpose of the post-hearing comment period is the expression of opinion based on the application and the information developed at hearing.

The Board additionally comments that, to avoid violation of the prohibition of ex parte contacts, the County could not have considered responses to any post-hearing questions unless they had been made at a subsequent public hearing; the County may wish to consider this when allowing an applicant to defer answers to questions.

Finally, the parties are strongly advised to monitor the progress of SB 749 and SB 931, enacted by the legislature in the past legislative session and currently awaiting action by the governor. Both bills, if signed, would amend Section 39.2, and would affect subsequent SB 172 proceedings.

This Opinion constitutes the Board's findings of fact and conclusion of law in this matter.

ORDER

The March 19, 1987 decision of the Alexander County Board of Commissioners granting site location suitability approval of the application for a new regional pollution control facility submitted by Herman L. Beasley is vacated, on the grounds that the County lacked jurisdiction to consider the application.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 ch. 111 1/2 par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illincis establish filing requirements.

IT IS SO ORDERED.

B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 6th day of August, 1987, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk