ILLINOIS POLLUTION CONTROL BOARD
March 7, 1985

JANET HOESMAN and BYRON HOESMAN, Petitioners,	)	
v.	)	PCB 84-162
CITY COUNCIL OF THE CITY OF URBANA, ILLINOIS, AND THE CITY OF URBANA, ILLINOIS, Respondents.	)	

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

On March 7, 1985, the Board reached a "decision deadlock" on this appeal and was unable to adopt an order either reversing or upholding the City Council by the statutorily required four votes. (See Order of the Board, March 7, 1985.) As a result of this "deadlock" and the termination of the statutory 120 day decision period, the Urbana City Council (Council) decision to grant site location suitability approval for the new regional pollution control facility in question may be deemed approved by operation of Section 40.1(b) of the Environmental Protection Act ("Act"), and the Board's jurisdiction over this matter has ended.

This Opinion is intended to delineate the reasons that we two Board Members voted to reverse the City Council's approval. In addition, we would commend the parties in that the record and pleadings coming to this Board are a model for clarity and organization.

A. Decision Based on Unsworn Testimony

At the required public hearing before the City of Urbana, Mayor Jeffrey Markland, hearing officer, stated, "Please note that while speakers will not be sworn in , their testimony becomes an official part of the record of these proceedings" (Record, Section 2.1, p. 4). Subsequent testimony was not sworn. For this reason, we would reverse the City Council in that unsworn testimony does not provide "evidence" to support the determination below. This is based on prior court holdings that adjudicative due process standards apply to local government determinations under Section 39.2 of the Act.

In E & E Hauling, Inc. v. Pollution Control Board, et. al., 71 Ill. Dec. 587, 451 N.E.2d 555 (1983), the Second District addressed the procedural requirements that apply to County Board determinations regarding site suitability. After rejecting a claim of constitutional due process for such proceedings, the

Second District held that the words "fundamental fairness" create a statutory due process standard for such proceedings. Having found due process to apply, the court proceeded to explain the two types of due process (adjudicative and rulemaking) and determine which applies to local government site suitability determinations. In so doing the Second Circuit equated site suitability determinations with this Board's determinations on variances.

> While the line between adjudication and rulemaking "may not always be a bright one," the basic distinction is one "between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." (United States v. Florida East Coast Railway Company, 410 U.S. 224, 245, 35 L Ed. 223, 239, 93 S. Ct. 810, 821 (1973).) Under Section 39.2 the Board's decision on the grant or denial of a permit turns on its resolution of disputed fact issues, whether the particular landfill, or expansion, for which the permit is sought meets the specific factual criteria set out in Section 39.2 of the Act. The facts that the Board relies on are developed primarily by the immediate parties rather than acquired through the Board's own expertise.
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> Our supreme court has held that the decision whether to grant a variance from an environmental regulation is quasi-adjudicatory, although the imposition of conditions on the variance is rulemaking. (Monsanto v. Pollution Control Board, 67 Ill.2d 276, 289-90 (1977). See also Environmental Protection Agency v. PCB, 92 Ill. App.3d 1074, 1081-82 (1981).) As the factual criteria involved in the County Board's decision under Section 39.2 are not substantially broader than those in the statutes involved in the above-cited cases, we adopt a similar rule here. (Slip Op. at 17-18.)

There is remarkably little case law nationally on whether adjudication requires sworn testimony. To the extent a common thread has emerged, it is:

> Unsworn testimony. An objection to the admission of unsworn testimony must be taken in the trial court; but it is held that, although an objection is not taken in the trial court, or urged on the appeal, an appellate court cannot ignore the error or regard the silence of counsel as a waiver, and a judgment will be reversed where there is no other proof in support of the verdict. (Corpus Juris Secundum, Appeal & Error, §295, p. 909.)

There is some Illinois case law on this point. In Ivanhoe v. Buda, 251 Ill.App. 192 (First District, 1929) the Court held

it was improper to allow unsworn testimony by an attorney where that testimony formed a basis for the ultimate award:

> We think it was error to permit the attorney to read to the jury what was said to be Dr. Wiggleworth's mortality tables. The attorney was not sworn and his statement to the jury as to the plaintiff's expectancy was improper (at 195).

In the absence of more specific judicial guidance, we would hold that testimony at Section 39.2 hearings must be sworn and that to the extent a local government determination on some criteria is based exclusively on unsworn testimony, it must be reversed even if not objected to below or raised on appeal.

In reviewing the record before the Urbana City Council, the only oral or documentary "evidence" we find on the six criteria, bearing an attestation of truth, is Exhibit 3.1. That exhibit is Urbana's application to the Illinois Environmental Protection Agency for a developmental permit. That document (at Part 1.0, page 11) contains an adequate affirmation signed by an engineer and Mayor Mallard, that the statements contained therein are true. However, those affirmations were not signed until September 14 and September 18, 1984, respectively. This was well after the public hearing of September 10 and cannot be used to support the testimony or 32 exhibits introduced at that hearing.

While Exhibit 3.1 might support the Urbana City Council determination on the more technical aspects of the six criteria of Section 39.2 of the Act, it is totally lacking in information on need (Criterion No. 1) or incompatibility with the character of the surrounding area and effect on the value of the surrounding property (Criterion No. 3). Consequently, we would find there is no "evidence" on these criteria to support the Urbana City Council determination and we would reverse.

B. Decision on Criterion No. 3 Against the Manifest Weight of the Evidence

Notwithstanding our view that the unsworn testimony in this record cannot be regarded as evidence, we would have reversed the City Council's approval with regard to Criterion No. 3 anyway. For that reason, we will provide a review of the "information" in this record as it relates to Criterion No. 3.

Section 39.2(a) of the Environmental Protection Act (Act) provides that the governing body of the municipality shall approve site location suitability for a new regional pollution control facility (RPCF) only in accordance with six enumerated criteria.

Criterion No. 3 contains two distinct factors which must be addressed by the governing body, i.e., the facility is located so as to minimize incompatibility with the character of the

surrounding area and the facility is located so as to minimize the effect on the value of the surrounding property. The Petitioners, Janet and Byron Hoesman, charged that the Council's decision was against the manifest weight of the evidence with regard to both factors, and that, furthermore, there was no evidence in the record as to the effect of the facility on property values.

With regard to both factors, the Council gave the following four reasons for its conclusion that the site was located in accordance with Criterion No. 3:

a) The facility is merely an extension of an existing sanitary landfill which comprises in excess of 120 acres;

b) The site is triangular in shape with two sides abutting previously approved and operated sanitary landfill areas;

c) The remaining property line of the site is adjacent to row-crop farmland and, parallel to said property line, the Applicant will construct an earthen berm to provide a visual and physical separation of the site; and

d) The Applicant will attempt to promote the ultimate development of the site and previously approved and operated sanitary landfill areas into recreational purposes in conjunction with the Urbana Park District.

1. Incompatibility with the Character of the Surrounding Area

In Waste Management of Illinois, Inc., v. Lake County Board and the Village of Antioch, (PCB 82-119, December 30, 1982), the Board held that the fact that a site is an extension of an existing system or is proposed to be located next to a previously operated site cannot be used to demonstrate the compatibility of the site. In that case the Board cited two reasons for rejecting this type of demonstration. First, Sections 39.2 and 3(x)(2) of the Act clearly require that expansions of existing RPCF be subject to the same review process as that required for totally new facilities. Second, once a pre-existing landfill is closed, the character of the area becomes one of open space and the residents may have a reasonable expectation that it will be so maintained. The Board concluded that it would "not allow the potential of damage to the surrounding community due to a proposed expansion to be negated by a 'boot-strapping' argument that the existing landfill has already caused real or perceived damage to that same area." (Id. p. 12). This decision was explicitly upheld on review by the Second District Appellate Court (No. 83-166, May 8, 1984):

> We agree with the PCB that the clear intent of the statute is to require the local government units to consider a proposed facility expansion as a new and separate regional pollution control facility. Consistent with this legislative intent, therefore, petitioner should not be able to establish compatibiliity based upon a preexisting facility.

This reasoning is equally valid in this case. Therefore, the first two reasons given by the Council with regard to this criteria cannot be used as evidence of the compatibility of the surrounding area.

The fourth reason given by the Council, i.e., that it will attempt to promote the development of the proposed site and previously operated sites into recreational areas, must also be rejected. Projections as to the future reconstruction or development of the site are irrelevant to the current compatibility of an operating site with the surrounding area. The local body is not charged with reviewing the compatibility of subsequent uses of the site, but rather with reviewing the compatibility of the proposed use. To allow this type of reasoning to prevail would be to condone another "boot-strapping" argument that would negate consideration of potential damage to the surrounding area from the operation of the proposed RPCF.

In its third reason given under Criterion No. 3, the Council notes that one side of the site borders on "row-cropland" and that the Applicant will construct an earthen berm as a visual and physical barrier on this side. As an initial matter, we note that neither the construction of the earthen berm nor any other construction design or operational plan are evidence that the site is <u>located</u> so as to minimize incompatibility. These efforts to mitigate the impact of the facility take the location of the facility as a given. They are correctly considered under Criterion No. 2 and Criterion No. 5. However, Criterion No. 3, if it is to be given a meaning which is distinct from Criterion No. 2 or Criterion No. 5, must be interpreted as also requiring a review of the location of the site in terms of the character of the surrounding area. Such review should be independent of any measures which may be taken to mitigate an adverse impact on the area. This is not to say that construction, design, and operational features are irrelevant. They may certainly be evidence of the character of the site itself. However, they do not negate the need to independently consider the character of the area in which the site is to be located.

The Council's only reasoning regarding the critical consideration under Criterion No. 3 is limited to the character of the property immediately bordering the proposed site which it characterizes as "row-cropland." In previous SB 172 cases, the Board and the courts have reviewed a "surrounding area" as far as 500 feet, 1,000 feet, one mile and even five miles away from the proposed site. (For example, see <u>Waste Management of Illinois,</u>

Inc., v. Lake County Board and Village of Antioch, PCB 82-119, December 30, 1982, pp. 8-13; Waste Management of Illinois, Inc., v. Illinois Pollution Control Board, No. 83-166, Second District Appellate Court of Illinois, May 8, 1984, pp. 20.23; Town of St. Charles et al. v. Kane County Board and Elgin Sanitary District, PCB 83-228, 229 and 230 (consolidated), March 21,1984, p. 16.) In this instance, the record indicates that approximately 300 to 400 people live within 1,000 feet of the proposed site. Some of these residents may currently live as close as 600 feet from the proposed site (Record, Section 2.1, p. 72). A number of these residents appeared and spoke at the Urbana Plan Commission's hearing on the Special Use Permit, the detailed minutes of which are contained in this record at Section 4.1. Three residents also spoke at the hearing required by Section 39.2. (See Record Section 2.1). In addition, two petitions containing approximately 107 signatures of residents living within 1,000 feet of the site are contained in the record at Section 4.1, pp. 36-39. Given the abundant information in this record of intensive residential uses within 1,000 feet of this site, we believe the Council should have addressed in its reasoning a broader "surrounding area" than merely that on the property-line of the proposed site.

Although the Council did not refer to it in its written reasons, the record does contain information on a broader surrounding area. In addressing Criterion No. 3 at the September 10, 1984 hearing, the Applicant's Director of Public Works, Mr. James Darling presented slides and briefly discussed the character of the broader surrounding area. (Section 2.1, pp. 17-19).) Referring to Respondent's Exhibit No. 21, an aerial photograph showing an area of unspecified scale around the proposed site, Mr. Darling pointed out the uses and in some instances the zoning of this area. The uses shown in the photograph include the existing and former landfill site to the north and east, sewage lagoons to the north, a sewage treatment plant to the west, a single family home area and a junkyard and salvage yard to the northwest, a wooded recreation area and an industrial park to the southwest, and agricultural and residential properties to the south and southeast, including four mobile home parks and a single family-home subdivision. Exhibit No. 22 is a land use map of the same area. Exhibit No 23 is a zoning map of the area. These maps, together with the aerial photograph, indicate that the surrounding area contains a variety of residential uses, including single family, multi-family, and mobile home residences, parks and commercial districts. Mr. Darling testified that the mobile home parks were constructed in the 1960's while the original landfill began operation in the 1940's. (Record, Section 2.1, p. 17.) Other information in the record also indicates that the character of the surrounding area has become increasingly residential in the last 40 years. (Petitioner's Exhibit No. 6, Record, Section 2.1, pp. 60-66 and 70-73.) In fact, although the Applicant and the Council characterize the property immediately south and adjacent to the proposed site as "row-crop land", Champaign County has zoned the

property R-4 for multi-family residences. If this property were to be developed according to its planned potential, the proposed site would share a property line with multi-family residences, the proposed earthen berm being the only buffer. Apparently, just this situation has been allowed to occur on the south property line of the existing landfill. The landuse map labeled Respondent's Exhibit No. 22 shows that the 1982 17 acre landfill expansion was constructed adjacent to the Chief Illini Mobile Home Park.

We conclude that the close proximity of such intensive residential uses and the fact that the proposed site would border on property planned for residential development is a clear indication that the location has not been selected so as to minimize incompatibility with the surrounding area. On the contrary, information in the record indicates that the site has been selected primarily because it is the last tract owned by the City of Urbana and it represents the least expensive and most expeditious disposal alternative. (Record, Section 2.1, pp.31-40; Record, Section 4.1, pp. 40-52, 81 and 86.) The Respondent's primary consideration with regard to compatibility appears to have been the fact that the area has been the site of previous landfills. As noted earlier and in previous Board and Appellate Court Opinions, the fact that an area has in the past been burdened with a landfill cannot be used to negate consideration of what would otherwise be deemed incompatible development. Therefore, after a review of the Council's reasoning as well as the record before it, we conclude that the Council's determination with regard to the compatibility of the surrounding area was contrary to the manifest weight of the information.

2. Effect on the Value of the Surrounding Property

With regard to the second factor required to be considered under Criterion No. 3, i.e. the facility is located so as to minimize the effect on the value of the surrounding property, the Applicant presented no concrete information whatsoever. In its Brief, Respondents assert that the Applicant testified that the City has considered the effect of the new landfill on area property values and taken steps to minimize incompatibility. (Respondents' Brief, p. 28.) However, in the testimony to which the Respondents point, the Director of Public Works' states that he can't say whether the proposed landfill will affect the value of the adjacent property and that he is not qualified to appraise real estate. (Record Section 2.1, p. 50.) The only "evidence" offered on the question of property values is Mr. Darling's admittedly non-professional evaluation implying that property values will not be affected because a landfill in the area "is nothing new" and because the long term plan for the site is that it be developed as recreational land. As stated earlier, these two considerations do not address the effect of the proposed facility on the surrounding area. In a similar fashion the co-owners of the adjacent property stated that they have plans to sell or develop their property and offered their opinions that

the closer proximity of a new landfill will adversely affect the value of this property. (Record, Section 4.1, pp. 84-85; Section 2.1, pp. 62, 75-76.) All of this is non-professional opinion, unsworn testimony, and does not rise to the level of "evidence" upon which the Council could base an adjudicative determination. We found nothing in this record which constitutes "evidence" on the question of property values. Thus, the Councils's finding that the site is located so as to minimize the affect on the value of surrounding property, must be considered to be without support in the record.

Jacob D. Dumelle
Chairman

Bill Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was submitted to me on the 12th day of March, 1985.

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