ILLINOIS POLLUTION CONTROL BOARD
November 19, 1987

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

RONALD M. SCHULTZ AND DOUGLAS P. SCOTT [CITY OF ROCKFORD DEPARTMENT OF LAW], APPEARED ON BEHALF OF PETITIONER;

GARY L. KOVANDA, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF RESPONDENT; AND

MICHAEL F. KUKLA [COWLIN UNGVARSKY, KUKLA AND CURRAN] APPEARED ON BEHALF OF SAVE THE LAND, INC., RICHARD BROWN, EDWARD BROWN, MELVIN BANKS, WARD MERCER, LORENZO CAPES, ARMEN SWANSON, LEE CARLSON, BETTY CARLSON, ORVILLE QUANTO AND DOROTHY QUANTO.

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

This matter comes before the Board on the June 29, 1987 petition by the City of Rockford (City) for review of a decision by the Winnebago County Board (County) denying an application for site location suitability approval of a new regional pollution control facility. This case accordingly involves construction and application of Sections 39.2 and 40.1 of the Illinois Environmental Protection Act (Act), Ill. Rev. Stat., ch 111 1/2, pars. 1039.2 and 1040.1 (also commonly known as SB172).

For the reasons expressed below, the decision of the County Board is vacated and the proceeding is remanded back to the County Board.

PROCEDURAL HISTORY

On December 4, 1986, the City of Rockford filed an "Application for Location Approval of a New Regional Control Facility" with the Winnebago County Clerk in accordance with Section 39.2(c) of the Act; notice was given as required by that section.

The City's application was for a new landfill containing approximately 155 acres to be located at the northeast corner of Baxter and Mulford Roads (Baxter and Mulford site). The proposed

landfill would accept municipal non-hazardous waste from Winnebago County residents for approximately 19.6 years.

Pursuant to Section 39.2 and its own Ordinance implementing that Section, the Winnebago County Board (County) held 17 public hearings on March 8,9,10,16,17,18,23,24,25,31 and April 1,2,5,6,7,8 and 13, 1987. At least some of these hearings were televised. These hearings were held at the Cherry Valley Township Garage in Winnebago County. The hearing was conducted by the County's Zoning and Planning Committee, and was chaired by Peter MacKay, the Committee Chairman. The City called a total of seventeen (17) witnesses, who gave testimony concerning all six criteria of Section 39.2(a). Save the Land, Inc., (STL), an objector group, called ten (10) witnesses, who discussed criteria (ii), (iii) and (v) of Section 39.2(a). Additionally, thirty-five (35) members of the public testified. At hearing, attending County Board Members called no witnesses, and asked no questions of any witness. At the conclusion of the hearings, a written public comment period was established to end May 13, 1987.

The Zoning and Planning Committee (Committee) met on April 22 and May 13, 1987, to examine written comments; a meeting scheduled for this purpose on May 6 did not meet due to lack of a quorum. The Committee met again on May 18, 1987, to deliberate over the evidence collected during the public hearings. The Committee formulated recommendations on each of the criteria to be forwarded to the full County Board. The Committee recommended that the County find that criteria (i)(ii) and (iii) had not been satisfied, and that criterion (iv) had been satisfied. The Committee deadlocked on the question of whether criteria (v) and (vi) had been met, and so submitted alternative language to the County to be used to support whichever conclusion prevailed.

On May 21, 1987, the County Board held a meeting of the Committee of the Whole, in the County Board Chambers. At this meeting, the recommendations on the six criteria promulgated by the Zoning and Planning Committee were discussed by the County Board.

The County Board met again May 28, 1987, at the Board Chambers, and voted to deny site approval, by voting that the City had not met criteria (i), (ii), (iii), (v) or (vi); the County Board voted that the City had met criterion (iv). The County's resolution adopted and incorporated the language supplied by the Committee.

Pursuant to Section 40.1(a), the City filed its appeal with the Board. A hearing was held in the Winnebago County Board Chambers on September 1, 1987, before Hearing Officer Allen E. Schoenberger. Prior to this hearing, the Hearing Officer had issued a discovery order allowing interrogatories and depositions to be taken by the City relating to fundamental fairness issues.

At the hearing, Save the Land, Inc., Richard Brown, Edward Brown, Melvin Banks, Ward Mercer, Lorenzo Capes, Armen Swanson, Lee Carlson, Betty Carlson, Orville Quanto and Dorothy Quanto, (collectively STL) were allowed to intervene, over the objection of the City. The City called twenty (20) witnesses adversely at the hearing, nineteen (19) of them being current County Board members, and one (1) being a former Board member. All of the witnesses were Board members at the time of the May 28, 1987, vote.

Pursuant to the schedule established by the Hearing Officer, the City filed a brief on September 29, 1987, the STL and the County filed briefs on October 13 and 14, respectively, and the City filed a reply brief on October 20, 1987.

Finally, the record submitted by the County on July 22, 1987,* did not contain documentation concerning the meetings of April 22, May 13, and May 21 held by the Committee, and did not contain any indication of how many or which County Board Members had voted in favor of the County's May 28 Resolution. Following a conference call, by Order of November 5, 1987, the Hearing Officer directed the City and the County to make an appropriate filing remedying this deficiency. On November 9, 1987, the City and the County filed a stipulation of facts concerning the April 22, May 13,18 and 21 meetings, for which minutes had been prepared but not approved. The minutes and roll calls sheets for the County Board meeting of May 28, 1987 were also submitted for inclusion in the County Record. For ease of reference, the Board has caused this stipulation to be paginated as C.865-882, and has further caused the Clerk of the Board to add a notation to this effect to the County Clerk's Certificate of Record.

On November 18, 1987, the City and the County filed minutes of the Committee's April 22, 1987 meeting and of the County's Committee of the Whole meeting of May 21, 1987. These minutes were accompanied by a joint objection to their inclusion into the record, but no basis for the objection was stated.

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* Citations to the record in this action are made as follows 1) references to the County public hearing transcript are to "C. Tr. ___"; 2) references to exhibits received by the County at hearing are to "C. App. Ex. ___", etc.; 3) references to the separately bound correspondence and miscellaneous items file are to "C. ___" (markings appearing on the pages of this volume were made by the County, not the Board); 4) references to the Board hearing transcript are to "PCB Tr. ___"; 5) references to exhibits received by the Board are to "PCB Pet. Ex. ___". The Board further notes that Petitioner's Group Exhibits 2,5, and 6 submitted at the Board's hearing on September 1, 1987 consist of groups of unnumbered pages. For ease of reference to individual items in these group exhibits, the Board has caused the pages to be individually numbered.

The Board assumes that the parties' objection is not to the relevance of this material, as the Appellate Court for the Second District has ruled that such transcripts may indeed be relevant to issues of fundamental fairness, issues which have been raised by the City here. Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, Lake County Board, and Village of Antioch, 123 Ill. App. 1075, 463 N.E. 2d 696 (2nd Dist. 1984). As a practical matter, the Board notes that filings received the day before decision is due in a case such as this (where decision must be rendered to avoid issuance of an SB172 approval by operation of law) are simply received too late to receive proper consideration by the Board. This is particularly so, when, as today, the Board has some fifty-odd other items for consideration on its agenda. The Board notes, however, that a cursory review of this filing indicates that the information is cumulative to certain evidence admitted at this Board's hearing in this matter without objection. For these reasons, the Board will accede to the parties' request that these minutes not be formally incorporated into the County's record in this matter. The filing will, however, physically remain in the Board's record for transmittal to any reviewing court.

Intervenor Status

At the outset, the Board on its own motion takes up the issue of STL's intervenor status. In McHenry County Landfill, Inc. v. Illinois Pollution Control Board, 154 Ill. App. 3d 89, 506 N.E. 2d 372 (2nd Dist. 1987), the Appellate Court ruled that Section 40.1 of the Act does not allow for cross-appeals by objectors in cases where a local government has denied approval on a finding that some but not all of the criteria of Section 39.2 have been met. The Board disagrees with the Hearing Officer's ruling that McHenry County Landfill does not preclude intervention in an appeal filed by the applicant before the Board. In Waste Management of Illinois, Inc. v. Lake County Board, PCB 87-75, (July 16, 1987), the Board rejected an attempt to intervene, pursuant to 35 Ill. Adm. Code 103.142, in a SB-172 appeal of a denial of site location suitability approval. After discussing McHenry County Landfill, the Board, in its Order, stated:

> As the legislature specifically refrained from providing the right of third-party appeals in cases such as the case at bar, [appeal of a site location suitability denial] a Board procedural rule [Section 103.142] cannot be relied on to provide such.

Consequently, STL will not be afforded intervenor status. The caption of this Opinion reflects that conclusion. However, in A.R.F. Landfill, Inc. v. Lake County, PCB 87-51 (August 20, 1987), the Board allowed the submission of an amicus curiae brief by an interested person. Similarly, the Board will allow and treat STL's brief as an amicus curiae brief. However, in its

brief, STL attempts to litigate the sufficiency of the evidence supporting the County's decision that criterion (iv), relating to flood plains, was met. The Board notes that this criterion is not an issue on appeal, and therefore, the Board accordingly strikes pages 80 and 81 of STL's October 13, 1987 brief. Although they will not be considered by the Board, they will physically remain in the record for transmittal to any reviewing court.

Statutory Requirements and The County's Written Decision

At all times pertinent hereto, under Section 39.2(a) of the Act local authorities were to consider six criteria when reviewing an application for site suitability approval for a new regional pollution control facility which will not accept hazardous waste. The six criteria are:

1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

3. the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

4. the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation, or the site is floodproofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department;

5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents; and

6. the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

Sections 39(c) and (d) contain various requirements for notice, hearing, and written public comment periods. As compliance with these requirements is not at issue here, they will not be set forth.

Section 39.2(e) provides in pertinent part that "decisions of the county board are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with [the criteria] of subsection (a)".

The Winnebago County Board's Resolution of May 28, 1987 (C. 860-864), adopted by a vote of 23-3 with two members absent (C.870-881), denied approval for the following stated reasons:

> "Criteria (sic) No. 1: Because the life expectancies of the existing facilities is such as to provide adequate waste disposal for the area of Winnebago County, Illinois, for at least ten years, the proposed facility of 80 acres, having a projected life of twenty years in addition to the estimated remaining life of the other existing facilities, is not necessary to serve the area. [Individual votes were taken on each criterion and the supporting reasoning for the conclusion prior to the vote on the resolution overall. This language was supported by an initial vote of 17-9.]
>
> Criteria No. 2: The design as such is meant to guard against leachate migration into the aquifers, and is meant to prevent such an occurrence, but falls short of any guarantee against failure. The location is in close proximity to major drinking water aquifers and the Kishwaukee River. Any failure could be catastrophic. The actual operation of the facility is not delineated. Criteria No. 2 cannot be satisfied. [This language was supported by an initial vote of 22-4.]
>
> Criteria No. 3: A 20 foot berm will allow view of the landfill operation from ground level once the height of the fill reaches the height of the berm. From higher elevations, view of the operation will be visible earlier. The negative impact on surrounding property values will be closer to maximum than minimum, and will adversely affect most land use operations excepting actual crop growth in the surrounding area of the proposed landfill. [This language was supported by an initial vote of 23-3.]
>
> Criteria No. 4: The facility would be located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation. [This language was supported by an initial vote of 26-0.]

> Criteria No. 5: The tenor of opinion seemed to be a general reliance on local fire departments and their mutual aid compacts with attendant hazardous material handling units. The plan submitted fell short of outlining a specific plan for dealing with operational accidents, fires, spills or any subsequent danger to the surrounding area. [This language was supported by an initial vote of 15-11.]
>
> Criteria No. 6: Inasmuch as traffic counts presented did not address all major roads leading to the siting area and were not all done at peak times, and since no actual figures for truck movement ventured beyond the theoretical considering the existence of other waste disposal facilities in theoretically simultaneous operation, the negative impact on existing traffic flows will be more than minimal." [This language was supported by an initial vote of 16-10.]

Section 40.1 of the Act charges the Board with reviewing the decision of the local authorities. Specifically, the Board is mandated to determine whether the findings made below regarding the six criteria are against the manifest weight of the evidence, and whether the procedures used there were fundamentally fair. E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451, N.E. 2d 555 (2nd Dist. 1983), aff'd. in part 107 Ill. 2d 33, 481 N.E. 2d 664 (1985); (Waste Mgt. of Ill., Inc. v. McHenry County Board, ___ Ill. App. 3d ___, ___ N.E. 2d ___, No. 2-87-0029 (2nd Dist. September 11, 1987) (reaffirming application by the Board of the manifest weight of the evidence standard of review to each criterion). In this case, the City has raised both issues.

FUNDAMENTAL FAIRNESS

As is its usual practice, the Board first turns to the allegations that the procedures employed by the County in conducting its hearings and in reaching its decision were fundamentally unfair, as a fundamental unfairness finding may preclude the Board from reaching weight-of-the-evidence issues.

In E & E Hauling, supra, the first case construing Sections 39.2 and 40.1, the appellate court for the Second District interpreted statutory "fundamental fairness" as requiring application of standards of adjudicative due process. 116 Ill. App. 3d 586. A decisionmaker may be disqualified for bias or prejudice if "a disinterested observer might conclude that he, or it, had in some measure adjudged the facts as well as the law of the case in advance of hearing it". Id., 451 N.E. 2d at 565. A decision may be reversed, or vacated and remanded, where "as a result of improper ex parte communications, the Agency's

decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect." Id., 451 N.E. 2d at 571. Finally, adjudicatory due process requires that decisionmakers properly "hear" the case and that those who do not attend hearings in a given case base their determination on the evidence contained in the transcribed record of such hearings. Id., 451 N.E. 2d at 569.

The City alleges, in summary, that:

> After reviewing the cases on landfill siting hearings, before both this Board and the Appellate Courts, it is clear that in terms of fundamental unfairness, the proceedings before the Winnebago Country Board in the instant matter are well ahead of any other case. Never before has there been a case brought with the number and nature of ex parte contacts found here, or the total lack of knowledge of the subject matter prior to voting, or the callous disregard for the role to be played by the County Board members in this case as opposed to their normal business. In short, because of the pressure put on by the objectors, and obvious predispositions and biases of Board members, the City never had a chance [to have its application approved]. (City Brief, p. 143)

The Board's analysis of these contentions must begin with its recognition that governmental officials should, in the usual case, be presumed to act without bias. In its review of the Appellate Court's ruling in E & E Hauling, the Illinois Supreme Court held that the lower court had erred in finding that the DuPage County Board would, but for application of the "rule of necessity", be disqualified from ruling on the landfill expansion request at issue. In that case, the County Board was ruling on a landfill application submitted by the DuPage County Forest Preserve District (District). By statute, County Board Members were also District Members, and had in both capacities passed favorably on the application several times prior to the effective date of SB172 (in part due to contractual obligations between the District as owner and E & E Hauling as operator).

The Illinois Supreme Court found that simply because the County would receive revenues as a result of their decision, that there was no disqualifying conflict of interest, as the County and other "public service bodies ... must be deemed to have made decisions for the welfare of their governmental units and their constituents". Finding that it would "not be unusual" that a landfill would be proposed for location on publicly owned property the Court went on to state that it did not believe the "legislature intended this unremarkable factual situation to make

fundamental fairness of the proceedings impossible." 481 N.E. 2d at 668.

The Court further held that the County's pre-SB172 approval of the landfill by resolution could not be deemed to be unlawful "prejudgment of administrative facts", as the County had not previously judged the proposal in light of the six statutory criteria. In so finding, the Court relied on a line of decisions that there is no inherent bias created when an administrative body is charged with both investigatory and adjudicatory functions, citing Withrow v. Larkin, 421 U.S. 35, 47-50 (1975) and Scott v. Department of Commerce & Community Affairs, 84 Ill. 2d 42, 54-56, 416 N.E. 2d 1082 (1981).

In the Scott case, the Illinois Supreme Court, quoting Martin-Trigona v. Underwood, 529 F. 2d 33, 37 (7th Cir. 1975), adopted the following test:

> "one who asserts this contention necessarily carries or assumes a difficult burden of persuasion. Initially, he must overcome a presumption of honesty and integrity in those serving as adjudicators; and second, he 'must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" [Citing Withrow, 421 U.S. at supra, 47.]

The Board also notes that it has recognized that a substantial body of case law exists supporting the principle that one cannot invade the mind of the decisionmaker. John Ash, Sr. v. Iroquois County Board, PCB 87-29, July 16, 1987, appeal dismissed, No. 3-87-0553 (3d Dist. October 14, 1987), Board Opinion at p. 12 citing United States v. Morgan, 313 U.S. 409 (1941); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission, 789 F. 2d 26, 44 (D.C. Cir. 1986); Time, Inc. v. United States Postal Service, 667 F./ 2d 329, 335 (Second Cir. 1981); United Steelworkers of America, AFL-CIO-CLC, v. Marshall, 647 F. 2d 1189, 1217, (D.C. Cir. 1980). But note that in dicta in Citizens To Preserve Overton Park, Inc. supra, 401 U.S. at 420 (1971), the Court noted that before an inquiry into an administrator's mental processes when contemporaneous formal findings exist, there must be "a strong showing of bad faith or improper behavior"); See, Note, National Nutritional Foods Assn., v. FDA, 491 F. 2D 1141 (2d Cir. 1974), 50 Wash. L. Rev. 739 (1975).

In this case, the Board, through its Hearing Officer, has not permitted inquiry into what County Board Members read or

thought, although it has permitted inquiry into what they said and did. In order to place in perspective the City's specific arguments, a brief overview of the history of the proposed site and hearing/decision is necessary to provide the proper perspective.

Site Description and History

The proposed landfill site occupies the northeast quadrant of the Mulford Road-Baxter Road intersection in Cherry Valley Township. The property is an irregularly shaped corner parcel containing 155 acres which encloses on three sides a rural homestead of approximately 5 acres [a property which the City has attempted to purchase (C. App. Ex. 72)]. The City surveyed a nine-section area which includes the 155-acre site and all the area within one mile of the closest point of the landfill site. Within this 5,760 acre area, 97.9% of the total is zoned AG agricultural, 1.4% is zoned RR Rural Residential, and 0.7% is zoned RA Agricultural. There are 151 dwelling units in this area; 74 homes are located in the Thorne Ledge Subdivision, which is 1 1/4 miles north of the proposed site, and 22 homes are clustered around the Rockford Rotary Forest Preserve 1 mile west of the proposed site. (C. App. Ex. 73, p. 5-6)

The 155 acre site was purchased by the City in a land contract in 1970, with final transfer of the deed occurring in 1977. The Board takes notice that in 1970, the City's proposed purchase was the subject of litigation by neighboring land owners and others who objected to the City's proposed use of the site as a sanitary landfill; STL started as an organization at about this time. (PCB Tr. 134) This litigation, O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E. 2d 432 (1972), resulted in a holding by the Illinois Supreme Court that the County could not by zoning ordinance prohibit development of a landfill if a permit was issued by the Agency. In 1972, the City obtained a permit to develop the site as a sanitary landfill, but the permit was allowed to lapse for reasons not included in this record. (C. App. Ex. 38, p. 32)

This record further indicates that in about 1980 the City "reactivated" plans to develop a landfill to dispose of hazardous as well as non-hazardous waste at this site. STL, taking "a stand in opposition to negligent zoning and landfills in general", requested the County to adopt its draft in opposition to the landfill (Pet. Exh. 4). Peter MacKay, now-chairman of the County's Zoning and Planning Committee and the Board Member who introduced the resolution to the County, testified that the vote on the resolution was unanimous. (PCB Tr. 141-142). The record does not reflect whether the City attempted to obtain a permit at that time. The Board notes that SB172 as added to the Act by P.A. 82-682, became effective November 12, 1981.

At some time prior to the City's filing of its application on December 6, 1986, Board Members Vernon Bell * and Margaret McGaw signed a petition stating that they shared "the opinion that a 'sanitary landfill' at Mulford and Baxter Road will adversely affect property values and the safety, health and welfare of the residents of the surrounding area". (PCB Tr, 32,124) Over one hundred such petitions were included in the record for review by the County (C. 719-831); that signed by the Board Members is the last page in the volume).

STL activities

STL as an organization was very active during the hearing and comment phase. STL distributed flyers urging citizens to write their Board Members and to send a copy of the letter to the County Clerk (C. 679-680). STL caused placement of signs about the County with various texts including "no dump", "save the land" and "incineration" (PCB Tr. 40, 159). Mr. MacKay estimated that he had seen some 100 or so signs around the County; 13 others Board Members who were asked the question also testified that they had seen signs (PCB Tr. 158, 28, 40, 49, 59, 80, 93, 96, 105, 119, 122, 169, 174, 210).

STL president, Ralph Frantz, and member Warren G. Larson, appeared at hearings as formal representatives of STL at counsel table, and STL itself presented 10 opposition witnesses. STL operated a concession stand in the hearing room, from which various Board Members bought refreshments during the course of the hearing. STL also issued buttons saying "Save The Land". (Four Board Members acquired such buttons and wore them for greater or lesser periods of time during and after the public hearings on the City's application). (PCB Tr. 25,68,139,204). Two public comments on STL letterhead are included in the County public comment record. One undated letter, signed by Ralph Frantz, includes information presented to STL at its February 12, 1987 meeting by an incinerator salesman who stated that an incineration plant could be operational within 2 years of his company's receipt of siting approval and a permit (C. 657-658). (This information was also personally presented to Board Member Barnard at a March 3, 1987 lunch meeting.) Another letter, signed by Warren Larson and dated May 13, 1987, speaks to criteria (ii) and (iii) (C. 681-718).

As earlier stated, the County Board discussed and considered the City's application on May 21 and May 28. During the period May 18 through May 28, 1987, STL bought commercial time on Radio Station WROK/WZOK to broadcast the following messages:

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* The record indicates that Mr. Bell is no longer a member of the County Board (PCB Tr. 122). Additionally, Richard Kulpa stated at this Board's hearing that he had resigned from the County Board that day (PCB Tr. 144).

"Rockford Metro Centre. Rockford Lightning. Greater Rockford Airport Terminal. New American Theater. Rockford Magazine. Pride of Rockford. Regional Rockford Garbage Dump! Have you ever noticed, no matter how you present or package somethings, they just aren't right? They're contradictory! A garbage dump next to five beautiful forrest preserves is just not right! State of the art garbage dump, is another contradiction. You can help associate Rockford with good things. Call your County Board Members now. Tell them no more garbage dumps.

Imagine a disease infected water supply. Imagine your property values plummeting. Imagine your trash blowing freely on our rural roads. That's what you have if the planned dump is approved by the Winnebago County Board on May 28th. It's proven, landfills are a bad answer. 155 acres of prime farm land could turn into a garbage dump before your very eyes. Help save our environment. Rockford and County residents invest thirty seconds right now and call your County Board Member and say no to landfill. If you don't know who to call, call the hot line at 874-8776. That's 874-8776. Paid for by Save The Land Incorporated.

The City of Rockford wants to put in another garbage dump. How do you feel about a poisoned water supply? How do you feel about your children being exposed to cancer causing chemicals? It's a proven fact all garbage dumps leak poisons and chemicals into surrounding water supplies. Help protect our water. Rockford and County residents invest thirty seconds right now and call your County Board Member and say no to landfill. If you don't know who to call, call the hot line at 874-8776. That's 874-8776. Paid for by Save The Land Incorporated. (Pet. Ex. 7)"

The record is unclear about the results of the call-in campaign personally to County Board Members; although three Board Members testified that they respectively received 10, 25-30 and 35 calls (PCB Tr. 92, 57, 121-122, 168). There is nothing in the county record indicating that the County Board members received these calls. Three Board Members heard the commercial (PCB Tr. 29, 93, 210, Mr. MacKay did not hear the commercial on a regular broadcast, but instead on a WROK "Viewpoint" program editorializing against the commercial. "Id." 148-149.)

Following the County's May 21, 1987 meeting, STL presented to at least one County Board Member a "fact sheet" of the hearings signed by Ralph Frantz, a document which is not included

in the County Record (PCB Pet. Ex. 5, p.1-17). The same Board Member also received a transcript of the February 12, 1987 STL meeting concerning incineration. This document, hand addressedto "Bd Members" and signed "JT" does not appear in the County Record, (PCB Pet. Ex. 18-27).

Finally, Ralph Frantz and four others appeared at the May 28th meeting and addressed the County concerning the site prior to commencement of County deliberations. The minutes of the meeting do not reflect the substance of the address (C. 869 18).

Activities By The County and Its Members

The testimony of Mr. MacKay clearly indicates that he was very aware of the difference between his ordinary legislative functions as a Board Member and his functions as "hearing officer" and adjudicator under SB172. Although he was "not particularly comfortable with being a quasi-judge", Mr. MacKay stated that:

> "I had made effort (sic) to prevent county board members prior to the public hearing and after the siting application was made to avoid discussing the ramifications of the issue prior to the public hearing, in fact during the public hearing, because they had to be on the panel that made the decision on the siting application."

While he himself did not, in conversation, "get involved in the right or wrong of the issue with anybody", he noted that his attempts to prevent other Board Members from doing so were successful only to some degree, since:

> "you can't tell people not to talk. When the issue of incineration, sometimes remarks would be made at county board meetings, I objected every time that type of conversation came up at county board meetings, committee meetings, whenever it was done in my presence (PCB Tr. 135-136).

During the course of the hearings it does not appear that Mr. MacKay cautioned Board Members from purchasing refreshments from STL but he did request that Board Members Bell, Barnard, Connelly and Giorgi, who appeared at hearing wearing STL buttons leave or remove them, feeling that such activity was in "poor taste." (PCB Tr. 137).

Seventeen of the County Board Members who testified at the Board hearing indicated that they had received letters from constituents, with few exceptions being anti-landfill, in estimated numbers ranging from 25 to 150 (PCB Tr. 27, 39, 46, 58, 79-80, 92 97, 116, 119, 121-122, 143, 168-169, 174, 182, 189-191, 197, 202, 209). Examination of the copies of letters and documents tendered at the PCB hearing by Board Members Folz,

Goral and Winters (PCB Pet. Ex. 2,5,6) indicate that while some of this material was included in the County Record, much was not. (e.g. PCB Pet. Ex. 1&2, p. 1-7 appears at C. 580, 261, 397, 372, 585, 593, 565-66.) In addition to the STL materials noted in the preceding section, notable omissions from the County Record include a resolution from Cherry Valley Township and a letter giving times of school bus loadings at the Baxter and Mulford intersection. (PCB Pet. Ex. 5, pp. 92, 117-118) There is no evidence concerning whether Board Members were advised as to what to do with letters which did not indicate that copies had been sent to the Clerk.

The PCB record indicates that 10 Board Members attended at least one of the public hearings (PCB Tr. 23, 44, 56, 67, 95-96, 104, 126, 166, 173, 205, 206). Seven testified they had attended none.* (PCB Tr. 37, 77, 86, 114, 121, 181, 187).

There is evidence that the Board Members were advised by memorandum that the hearing record was available to the County Board Members no later than April 23, 1987 in the County Board Office (PCB Pet. Ex. 5, p. 78). However, five Board Members who voted against the application indicated that they were unaware or unsure of the location of the record. (PCB Tr. 114, 121, 128, 174, 185).

On April 29, 1987, Board Member Bell, along with Board Chairman James Terranova, appeared on a radio program "Talk of the Town", whose hour-long subject matter was "the landfill issue". According to Board Member McGaw, who tuned in to the last part of the program, radio callers were asking questions about the proposed landfill. Mr. Bell stated that he had already made-up his mind on the issue, but would not reveal his vote. (PCB Tr. 29,122-123). The record contains no additional information concerning this program.

Mr. MacKay's Committee met on April 22 and May 13, and 18. The Committee's Recommendation's including the alternative conclusions of criteria five and six on which the Committee was deadlocked, were considered by the County Board on May 21 and May 28. Prior to the commencement of the County's deliberations, the County allowed Ralph Frantz and four others to address it concerning the site (C. 869 18). The County's October 23, 1986 Ordinance outlining its decisionmaking process in SB172 proceedings provides in pertinent part that:

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* The Board notes that, in the transcripts of the County Board hearings, the presence of only the County Board members who were members of the Zoning and Planning Committee were noted. Four of the five committee members appeared to have attended each hearing.

A. The decision of the committee on the application shall be in writing, specifying the reasons for that decision. Said decision shall be based solely upon the criteria set forth in the Illinois Environmental Protection Act, and shall be forwarded to the County Board for final action.

B. The County Board shall make its decision based on the record from the public hearing and review of the recommendation of the committee.

C. The decision of the County Board, whether approval, approval with conditions, or denial shall be made in the form of a resolution which shall set forth the reasons for that decision. (City Brief, p. 1, & App. C. p. 4)

Notwithstanding, discussions at the County Board meetings concerning the application indicate that additional issues, such as the advisability of incineration as a landfill alternative, and additional information not in the record was requested or discussed.

At the May 21 meeting, Vernon Bell asked and answered his own question during discussion of the issue by stating that a) there were no "guarantees" against leaking; and b) there is no such thing as a sanitary landfill (PCB-30-31).

Lynne Connelly stated a) that the applicant promised her to build a transfer station, a fact not in the record; b) that several water wells had been closed, a fact not in the record; c) that landfills in the area are on the Superfund list, which she believed was not in the record; and d) that she read a statement from a doctor in Chicago concerning landfills - also not in the record (PCB-60-62). In addition, she discussed the "track record" in the County with respect to landfills, also not in the record (PCB-63).

Amadeo Giorgi noted on May 21:

> "That brings up a good question. We have been talking about the different problems we have. Is there a possibility by Thursday night to come up with the questions that were asked tonight like the traffic patterns, the amount of trucks that will be involved, if there is a fire what do we do if there is a fire and how many people would be involving the property depreciations? Can we get those figures before Thursday night so we can make a decision on the vote? I think it's a good

> -- somebody should sharpen a pencil and start doing something before Thursday night." (PCB-108).

Giorgi also said he had driven by the site, and it is not a very big road (PCB-109).

David Winters, during the May 21 meeting, brought up vermin control at O'Hare Airport, and disease to wipe out hog populations, neither of which were in the record (PCB-159-196).

On May 28, Richard Kulpa said there were not any "guarantees", but did not know if language of guarantees was in the record (PCB-118). John Schou discussed plans at Pagel Pit, and is not sure if they are in the record (PCB-169-170). Afric Simon stated that "incineration is the only way to go" during the night of May 28, but doesn't recall if incineration is in the public record (C-185).

Scott Christiansen discussed at the May 28 meeting "looking for alternatives", and said during the PCB hearing "Now, I know the criteria was to deal specifically with the hearing only. However, as a legislator it is certainly my right to speak of alternatives (to landfilling)." (PCB-78-79).

Jim Hughes, who sat on the Zoning and Planning Committee, made references to all landfills leaking and past history at People's Avenue landfill and the 18th Avenue pumping house -- facts not in the record (PCB-98-99).

On May 28, 1987, the County Board held a meeting during which it voted to deny the City's application. The minutes of the meeting indicate that prior to the vote, "Gail Kelce, Dennis Kelce, Irene Meeker, Ralph Frantz, and Terry Ingrassia addressed the [County] Board regarding the proposed Mulford/Baxter landfill site." The minutes do not indicate whether any other members of the public were present or whether the City had a chance to respond to this presentation. Evidently, the presentation was not transcribed.

The last public hearing was held on April 13, 1987. Consequently, the presentation to the County Board was given after the close of the public hearings but still before the County Board rendered a decision. A similar incidence occurred in E&E Hauling. In that case, the applicant had several meetings with the Finance Committee of the County Board subsequent to the close of the public hearing but before the County Board's decision. The record was lacking as to whether the Village of Hanover Park, which opposed the landfill, or any members of the public participated in the meetings. E&E Hauling, 451 N.E.2d at 570. The Second District reasoned that "[t]he lack of notice to the public that the landfill would be discussed at the Finance Committee suffices to characterize those meetings as 'ex parte' whether or not they were truly secret." The court concluded that

the ex parte contacts of these meetings were improper, although the Village of Hanover Park did not prove that it was prejudiced by these contacts. E&E Hauling, 451 N.E.2d at 571. Similarly,the Board concludes that the presentation to the County Board at the May 28th meeting was an improper ex parte contact.

As aforementioned, the vote against the City's application overall was 23 to 3 against the landfill with preliminary votes for the language concerning the applicants failure on criteria 1, 2, 3, 5, and 6, being respectively 17-9, 22-4, 23-3, 15-11, 16-10, 23-3. When County Board Members testified before this Board some three months later, very few could remember more than two or three criteria, if any (PCB Tr. 41-42, 50-51, 80-83, 88-89, 100, 111, 118, 123-124, 127, 177, 182, 184, 187, 206).

City Objections To Hearing Procedures

The City contends that certain of the hearing procedures were fundamentally unfair. The first was the choice of the hearing site, the Cherry Valley Township Garage. Mr. MacKay, who conducted the hearings, testified that it was not a usual place for his committee to meet. He also testified that the hearing was held there in response to a request by the Township, and that he had made the commitment before the City registered its objection to the location. (PCB Tr. p. 146-147). The Township Supervisor was a witness in opposition to the application (C. Tr. 5-6, 1510-1541).

The City next objects to the fact that STL was allowed to sell refreshments in the hearing room. Mr. MacKay recalls that "nobody objected to that beyond questions that it might be a fundraiser. However, there were no signs." (PCB Tr. 164). Five County Board Members testified that they had partaken in refreshments and left donations to "pay" for them. There was also testimony that representatives of the City did so as well. (PCB Tr. 51, 53, 98, 101, 129-131, 175-176, 178, 204.)

The third objection involves cross-examination of witnesses. At the first hearing, STL President, Ralph Frantz and Warren P. Larson sat at the Counsel table with Attorney Michael Kukla, Mr. MacKay asked for opening statements from "the objectors", which Mr. Kukla waived. Mr. Kukla then proceeded to cross-question the City's first witness. Immediately thereafter, the City requested that STL members not engage in questioning of witnesses, and Mr. MacKay agreed. A dispute then arose as to whether Mr. Kukla's representation and questioning served only to preclude Messrs. Frantz and Larson from asking questions, or whether it served to preclude all STL members from asking questions as well. Mr. MacKay stated that his ruling did not cover all STL members, as he "had a problem with limiting citizens' input inasmuch as it is a public hearing" and didn't think it was the County's place "to ask people, citizens, at a public hearing whether or not they belong to Save The Land". Later, a citizen who identified himself as an STL member cross-questioned a City witness. (C. Tr.

1, 48, 88, 93-95, 98.) Mr. MacKay testified that he has never seen a membership list for STL, and would have no knowledge as to who might be an STL member beyond his personal assumptions (PCB Tr. 158.) The City objects to Mr. MacKay's ruling as inconsistent, and an unfair slanting of procedures.

The Board does not find that any of these three practices objected to, viewed in isolation, give rise to a finding of fundamental unfairness. As the Baxter and Mulford site is located in Cherry Valley Township, it was not unreasonable to hold the hearing in that location, although the Board takes the City's point that the location was hardly "neutral territory". As to the cross-examination issue, Mr. MacKay's decision to allow questioning by citizen objectors other than Messrs. Frantz and Larson as well as counsel for objectors was a reasonable one. Although there was initial confusion concerning the scope of his ruling, Mr. MacKay clearly did not reverse himself. SB172 contemplates and encourages citizen participation without requiring that they be represented by an attorney; to permit individual members of a group which is represented by counsel to ask questions is within the County's discretion providing such questions do not become unduly repetitious or harassing. There is no showing here that this in fact occurred.

In fact, the Board must comment that Mr. MacKay overall did a fine job of conducting the public hearings in this matter, in threading his way through various objections posed by participants, in handling inappropriate reactions from the "audience", and in minimizing disruption to the hearing process by directing the television crews covering the hearings to "back-off" with their lights and cameras (e.g. PCB Tr. 1264-1266, 1703).

Concerning the STL refreshment stand, the issue is perhaps more appropriately cast as whether STL (as opposed to, for instance, the Girl Scouts) should have been allowed to run a refreshment stand at hearings in which they were identified as objectors. The "fundraiser" aspects of their action are certainly problematical, and an inference could well be drawn of governmental support for the STL position. However, it is unclear whether the STL presence as concessionaire was under the control of the County, which was conducting the hearing, or the Township, whose facility was being used and whose Supervisor was an identified objector. As a practical matter, under these circumstances it was not unfair for the County Board Members to buy refreshments from the sole concession available; as the Board itself knows, attendance at hearings can be "thirsty work". The Board wishes to emphasize that this holding applies only to the unclear facts of this case; the Board could well find granting of such a concession by a decision making body fundamentally unfair in the future.

Impropriety In The Decision Making Process

The City's argument here is that a variety of factors rendered the decisionmaking process fundamentally unfair. Section 39.2 requires the County's ruling to be an adjudicatory-type decision based solely on consideration of the evidence presented at the public hearing and the written public comments, solely as they relate to the six statutory criteria. The essence of the City's argument is that, instead, the County made a legislative-type decision. The City asserts that this is evidenced by testimony of County Board Members which on the one hand indicates lack of familiarity with the statutory criteria, lack of knowledge concerning even the location of the County hearing and public comment record, and lack of familiarity with the Committee's Recommendations, but which on the other hand indicates reliance on information not in the public record obtained through exposure to signs, radio programs, and commercials, private conversations, telephone calls, and letters not in the record (i.e., ex parte contacts), personal readings, and general knowledge of "facts" concerning other landfill sites. The City additionally asserts that some County Board Members showed clear indications of bias and pre-judgment of facts.

The Board agrees with the City's contentions. There is little in this record which indicates that the County Board Members (save for MacKay, as earlier noted, and Folz, PCB Tr. 51,54) made any real distinction between their quasi-judicial functions and their legislative functions, and much that they did not.

At the outset, utilizing the rationale of the Supreme Court in E & E Hauling, the Board does not find that the bare fact that the County had by 1980 resolution indicated disapproval of the site would prevent the County Board as a whole from properly considering the City's application without bias or prejudgment. However, the situation is complicated by the County's membership on the Solid waste Intergovernmental Committee (SWIC) along with the City and the Rockford Sanitary District and various nonvoting members from various citizens groups. Various studies adopted by the SWIC were presented by the City in support of its landfill proposal (C. App. Ex. 2, 11, 12, C. Tr. 11-12). However, the SWIC had moved on to consider the feasibility of incineration with the result that general solid waste plannng issues were injected by the County Board Members as well as participants into the SB-172 proceeding.

The County record contains admonitions by Mr. MacKay about what the focus of the hearings was to be and a reminder by the City at the first hearing that the proceeding was solely about a applicability of the six criteria in relation to the proposed site and not about "whether another alternative is better or should we recycle or should we go full bore to shredding or composting and it's not about landfills in general ... and [m]ost

importantly, it's not about waiting around on a landfill until an incinerator is built" (C. Tr. p. 9,13,19). Yet all of these issues recur in the County's debates concerning the Section 39.2 criteria. As Lynne Connelly echoing Scott Christiansen (PCB Tr. 78-79) stated:

> "I also looked at all the rest of the information that was available to us. I did not limit myself just to the hearing. My gosh, we have known about this since the early '80s, and I believe the city has been after that parcel of land since 1969-70. It's not something new that we just were faced with in the last year. (PCB Tr. p. 75)"

As well as evidencing an unacceptable blurring by the County of the issues to be considered, and disinclination to be bound by the limits of the record before the County, this record also indicates a basic failure by the majority of County Board Members to appreciate the significance of the concept of *ex parte* contacts.

The prohibition against *ex parte* contacts flows from the requirement that adjudicatory decisions be made on the basis of a sworn and transcribed record subject to cross-questioning by all parties involved. To the extent the SB172 process contains a 30-day post hearing public comment period without including a restriction of the scope of comments to argument about information already in the record, the ability to rebut all on-record information is diminished; nonetheless the principle of prohibiting informal or special access to decisionmakers remains the same.

There is no indication that most Board Members did anything either to restrict their usual informal contacts with their constituents or to make such contacts part of the record by *e.g.* routinely forwarding all correspondence to the Clerk, by reducing the contents of unavoidable phone calls to writing and filing the memo with the Clerk. It is difficult for the average person to relate to being a judge, although many have had experience as a juror. The Board Members clearly did not ask themselves whether, if they were acting as jurors in a court case they would think it fair, or proper to 1) wear a button supporting one party over another, 2) to buy buttons or refreshments during trial from one party's "defense fund", 3) to read letters supporting one party over another not placed in evidence, 4) to appear on radio to discuss a case prior to giving a verdict, 5) to have telephone or personal conversations about the merits of the case with persons not on the jury, 6) or to decide the merits of the case on a basis other than the judge had instructed them.

Any natural, if inappropriate, tendencies the County Board Members may have to confuse their duties and role was exacerbated by STL's public opinion campaign. STL's flyers urging the

writing and proper filing of written comments as well as hearing attendance and testimony was perfectly proper and indeed laudable in an adjudicatory context. Its other activities--the signs, hearing room refreshment stand, and submittal to the County of off-record comments during its deliberation of the Committee's recommendations, and the radio commercial-call in campaign immediately before the County's vote -- are all time honored lobbying activities which are inappropriate in the quasi-judicial atmosphere of an SB172 proceeding. STL's running of its anti-landfill radio commercials, urging citizens to call the judge/jury, only served to encourage ex parte contacts. The legislature has provided for and doubtless anticipated hot debate in SB172 proceedings, but the forum provided for such debate is the hearing room, not the cloakroom, the streets, or the airwaves. (The Board of course notes that, news reportage of the proceeding is to be expected, as was the case here, where news articles (PCB Tr. 35,84,94) as well as radio programs discussed the subject.)

In considering whether ex parte contacts have "irrevocably tainted" a decisionmaking process so as to render it fundamentally unfair, relevant considerations include:

1) the gravity of the ex parte communications;

2) whether the contacts may have influenced the agency's ultimate decision;

3) whether the party making the improper contacts benefitted from the agency's ultimate decision;

4) whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and

5) whether vacation of the agency's decision and remand for a new hearing would serve a useful purpose ... E & E Hauling, 451 N.E. 2d at 571, citing PATCO v. Federal Labor Authority, 685 F. 2d 547, 564-5 (D.C. Cir. 1982).

The Board believes that the cumulative effect of STL's various extra-record activities is grave, and influenced the Board's decision to STL's benefit. While the City likely knew of some, if not all, of these contacts, there was no permissible way for it to respond in kind.

This brings the Board to the question of remedy. Essentially the City's allegations as to the unfairness of the County Board's proceeding may be classified in three ways: bias, ex parte contacts, and consideration of material not in the record. The Board will address each category in turn.

The City contends that a degree of unfairness exists because the County had unfavorably considered this landfill site in prior

years and thus some members had already voted against it. This site was discussed by the House of Representatives in debate on SB-172 on July 1, 1981, and it was made clear that the siting law would apply. The pertinent parts of the discussion are quoted below:

> Mulcahey: Represenative Breslin, we've had Amendments attached to this Bill in Committee. We've had Committee Bills that have come before this House on Second Reading to try to resolve a problem that exists in my district, and I believe in Representative Schraeder's district. A very serious problem we had with the EPA, with licensing and so on and so forth. I think you're familiar with that problem. I would like to know what does this Conference Commitee Report if it's adopted in its final form, what is it going to do resolve the problem of Cherry Valley in Winnebago County?
>
> Breslin: I am not familiar with the present status of Cherry Valley in particular. But what it does is, as to all facilities that have not been granted a permit by the Environmental Protection Agency as of today's date, July 1, 1981. They must before getting a permit from the EPA, first secure the permit from the county or the local unit of government in which they lie. If they lie totally within a municipality then they get it from the municipality, it they lie in the county, in the unincorporated area then they get the permission from the county, if they overlap they get it from both. And this must be granted prior to the EPA going ahead with its siting approval.
>
> Mulcahey: Okay, now in this particular case we have property that's already been purchased in Winnebago County. It's been lying there for ten years. It's owned by the City of Rockford. In order to grant...in order for the EPA to grant a permit to the City of Rockford for this particular site, the City Council and in this case, the Winnebago County Board would have to also give their permission, is that correct?
>
> Breslin: It's outside the boundaries of the city?
>
> Mulcahey: Yes, it is.

Breslin: Yes. Yes.

Mulcahey: Thank You.

Speaker Daniels: Further discussion? Representative Jim Kelley.

Kelley: Yes, I believe Representative Mulcahey asked the questions that I was going to. We have a problem in Winnebago County. I didn't follow the last question he asked you, Representative...was this land has been purchased and laying there. Does that still come under your Bill, that they can not get a permit to dump if they haven't done so by the first?

Speaker Daniels: Representative Breslin.

Breslin: If the EPA has not granted them a permit by the time this Bill is signed then the siting provisions of this Bill will apply to them. Okay? Regardless of when the land was purchased or how long it's been there or who owns it?

Kelley: Could I speak, just for a second, to the Bill, Mr. Speaker?

Speaker Daniels: Proceed, Sir.

Kelley: I would certainly urge everybody on this side of the aisle and both sides of the aisle to vote for this Bill because you never know when you're going to be next and have one in your backyard.

The Legislature knew this site was controversial at the local level and that the new siting law would apply. It follows that it expected the County to make a decision on this matter despite any prior activity by the City or landfill opponents.

In the decision making process of an SB-172 proceeding, it is essential that the decision makers remain objective and are open minded in their review of the evidence. Any bias or predisposition by any decision maker, for one position or another, could render his or her decision unfair and therefore void. However, the Board recognizes that courts have viewed an allegation of bias with some degree of scrutiny. That is, a decision maker is presumed to be impartial and objective. In Citizens for a Better Environment v. Illinois Pollution Control Board, 152 Ill. App. 3d. 105, 504 N.E.2d 166 (1st Dist. 1987). The First District discussed this issue:

> In addressing this issue, we note that it is presumed that an administrative official is objective and "capable of judging a particular controversy fairly on the basis of its own circumstances." (United States v. Morgan (1941), 313 U.S. 409, 421, 85 L. Ed. 1429, 1435, 61 S. Ct. 999, 1004). The mere fact that the official has taken a public position or expressed strong views on the issues involved does not serve to overcome that presumption. (Hortonville Joint School District No. 1 v. Hortonville Educational Association (1976), 426 U.S. 482, 49 L. Ed. 2d 1, 96 S. Ct. 2308). Nor is it sufficient to show that the official's alleged predisposition resulted from his participation in earlier proceedings on the matter of dispute. (Federal Trade Commission v. Cement Institute (1948), 333 U.S. 683, 92 L. Ed. 1010, 68 S. Ct. 793).

504 N.E.2d. at 171.

Although the First District's Statement in Citizens for a Better Environment was made during the judicial review of a rulemaking, the Board believes that the statement still has considerable value in this proceeding which is a review of a quasi-judicial decision. The cases cited in the above passage concern decisions which were reviewed on the basis of adjudicatory standards. A closer look at these cases emphasizes further their value to this proceeding.

Morgan concerned a rate order issued by the U.S. Secretary of Agriculture. In that case, the Court held:

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

313 U.S. at 421, 85 L Ed at 1940

Hortonville Joint School District No. 1, dealt with a decision of a School Board to fire striking teachers. The alleged bias concerned the fact that the School Board had been involved in negotiations with the teachers prior to the firing. The Court emphasized the fact that Wisconsin statutes empowered the School Board with the authority to dismiss teachers as a part

of the School Board's exclusive governmental or policymaking function concerning schools. The Court concluded:

> A showing that the [School] Board was "involved" in the events preceding this decision, in light of the important interest in leaving with the [School] Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policy makers with decision making power.
>
> 426 U.S. at 497, 49 L Ed 2d at 11

Also, while citing Morgan the Court also stated:

> Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances."
>
> 426 U.S. at 493; 49 L Ed 2d at 9

Federal Trade Commission concerned the review of an Order issued by the Federal Trade Commission (FTC) against certain cement manufacturers that required the manufacturers to cease and desist from acting in concert to sell cement under a particular pricing scheme. 333 U.S. at 689, 92 L Ed at 1028. Allegations of bias centered around FTC reports, previously issued to Congress, which had concluded that the particular pricing scheme was violative of anit-trust laws. In discussing the bias issue, the Court stated:

> If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point [the pricing scheme at issue] unfair trade proceeding would similarly disqualify them from ever passing on another. See United States v. Morgan, 313 U.S. 409, 421, 85 L ed 1429, 1435, 61 S Ct 999. Thus, experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress.
>
> 333 U.S. at 702, 92 L Ed at 1035.

The rationale of the above cases could apply with equal strength to the instant proceeding. Specifically, they are helpful in evaluating the impact of the County Board's handling of landfill issues prior to the filing of the City's application on the SB-172 process.

The Supreme Court of Illinois in E&E Hauling, Inc. v. Pollution Control Board, 107 Ill. 2d 33, 481 N.E.2d 664, (1985), also discusses the issue of bias as it relates to the decision maker's prior activities. Specifically, the situation in E&E Hauling is analogous to the instant case. However, in E&E Hauling, the alleged bias was a bias in favor of the landfill. The Supreme Court states:

> The Village next claims that the hearing was unfair because both the county and the district had earlier approved the landfill by ordinance. The village thus is claiming a type of bias that has been called "prejudgment of adjudicative facts." (See K. Davis, 3 Administrative Law Treatise sec. 19:4 (2d ed. 1980).) But the ordinances were simply a preliminary to the submission of the question of a permit to the Agency. Subsequently, the Act was amended and the board was charged with the responsibility of deciding whether to approve the landfill's expansion. The board was required to find that the six standards for approval under the amended act were satisfied. It cannot be said that the board prejudged the adjudicative facts, i.e., the six criteria. This conclusion is supported by the line of decisions that there is no inherent bias created when an administrative body is charged with both investigatory and adjudicatory functions. See, e.g., Withrow v. Larkin (1975), 421 U.S. 35, 47-50, 95 S.Ct. 1456, 1464-65, 43 L.Ed.2d 712, 723-25; Scott v. Department of Commerce & Community Affairs (1981), 84 Ill.2d 42, 54-56, 48 Ill.Dec. 560, 416 N.E.2d 1082.
>
> 481 N.E.2d at 668.

In E&E Hauling v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555 (2d Dist. 1983), the Second District adopted a specific standard concerning bias in an SB-172 proceeding. Citing Cinderela Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583, 591 (D.C. Cir. 1970), the court found that a disqualifying bias exists if a disinterested observer might conclude that the decision maker had in some measure adjudged the facts as well as the law of the case in advance of hearing it. E&E Hauling, 451 N.E.2d at 565-66.

Consequently, the Board must look to see whether there is evidence that a decision maker had adjudged the City's application prior to completion of the hearing process. After reviewing the record, including information which was brought out at the PCB hearing, the Board finds only one incident which would clearly indicate bias. Specifically, the Board is referring to the instance when four County Board Members wore anti-landfill buttons at hearing. It is the duty of the County Board Members to listen to the evidence with an open and impartial mind and make a decision as to the six criteria based upon that evidence. The wearing of these buttons was certainly not in keeping with the quasi-judicial role that the Board Members must carry out. For these reasons, the Board finds that County Board Members Bell, Barnard, Connelly, and Giorgi were biased against site location suitability approval for the City's proposal. It follows then that these Board Members are to be disqualified from any subsequent decision making process with regard to the City's proposal.

As discussed above, many ex parte contacts occurred between the County Board Members and various members of the public. As stated by the Second District in E&E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d. 586, 451 N.E.2d 555, 570 (footnote 2) (2d Dist.), "[t]o the extent that such ex parte contacts are improper, they are improper precisely because they are outside the public record." The Second District also stated that "unnecessary and avoidable contacts" should not be excused. Although the Board notes that the record is not clear as to how many of these contacts could have been avoided or were unnecessary, the record does indicate that these contacts did influence the decisions of some County Board Members. The Board has previously found that such a relationship between the ex parte contacts and the decision renders the decision fundamentally unfair. Ash v. Iroquois County Board, PCB 87-29, slip. op. at 15 (July 16, 1987).

After considering the nature, extent, and effect of these ex parte contacts, the Board finds that the County Board's decision was fundamentally unfair. However, this problem can be remedied on remand by putting the substance of the ex parte contacts into the record so that the City has an opportunity to fully respond. The Board notes that the County Board Members should take great pains to avoid ex parte contacts, but when such contacts unavoidably arise, they should be made part of the record. Certainly, the County Board Members should not act in any way to foster or enhance the opportunity for ex parte contacts. Specifically, the Board notes the appearance by two County Board Members on a call-in radio talk show. Although it is not clear from the record whether the purpose of this radio program was to discuss landfills in general or the City's proposal in particular, the County Board Members should have refrained from participating in such an endeavor, for it was likely that specifics of the City's proposal would be discussed.

Finally, the Board notes that some of the County Board Members admit that they, in their decision making process, considered evidence which was not in the record. This is clearly in violation of the procedure established by the Act. The County Board must make a decision with regard to the six criteria that is based exclusively on the evidence in the record. If this requirement is not met, the decision is fundamentally unfair.

A related issue concerns the public's general opposition to the landfill. The Act provides that written comments from the public, filed subsequent to the close of the hearing, must be considered by the decision making body. Naturally, these comments are a part of the record. The Board is well aware of the widespread, anti-landfill sentiment among the public. However, the mere fact that the County Board Members are elected officials subject to constituent pressure does not indicate that the County Board decision on the whole was based on off-the-record public sentiment. This issue was addressed by the Second District in Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 123 Ill. App. 3d 1075, 463 N.E.2d 969, (2d Dist. 1984).

> While the board members were aware of public opposition because of the statutorily-mandated public hearings, 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. The only factor cited by petitioner is that more than half of the LCB [Lake County Board] members faced reelection within two months of the date of the decision. This fact, however, is not referenced in the record, and more important, is insufficient to establish a biased decisionmaking process. Where the statute requires the LCB to conduct a public hearing, a decision does not become unfair merely because elected officials recognize public sentiment. Petitioner here has failed to sustain its burden of showing that the procedures of the LCB or the decision making process were fundamentally unfair.
>
> 463 N.E.2d at 975.

The City also contends that many County Board Members did not attend the hearings and were unfamiliar with the location of the transcript, and thus presumably the content of the record. The Board addressed this matter to some extent in Ash v. Iroquois County Board (supra). In the instant matter, it is clear that the transcripts were available to the decision makers. That some individual members cannot remember their location several months after the matter was decided does not necessarily mean that the

decision was not based on evidence in the record. The Board notes that County Board Members have an obligation to familiarize themselves with the record in these proceedings and render a decision based solely on that record.

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

In summary, the Board finds that the County Board's decision was the result of a fundamentally unfair process. Several Board Members were biased against the landfill, and these Board Members are disqualified from any further participation in this matter. Secondly, a number of ex parte contacts occurred which influenced the decision of some County Board Members; this, too, results in an unfair process. Finally, many Board Members admit that they based their decisions upon evidence not in the record. This violates the requirements of the Act. The County decision was much more in the nature of a legislative than quasi-judicial decision. Given the above, the decision may not stand.

The site location suitability process established by SB-172 continues to be troublesome to local decision makers, the public, and this Board. The legislation gives broad decision making power to the local entities for determining site suitability. The Courts have held that the decision process is to be strictly quasi-judicial and that statutory notice requirements must be rigidly upheld. The fact that County Board members and their constituents normally interact at a legislative rather than judicial level places the players in a frustrating, unfamiliar position that often leads to error when judicial rather than legislative standards must be applied.

In Illinois, local decision makers are currently involved in a variety of activities related to solid waste disposal. This includes representing their governmental unit on local and regional panels developing long range disposal and management plans, studying disposal options, and interacting with various interested groups. This activity is increasing as the Illinois Solid Waste Management Act takes effect. That Act in part states:

> 2. Public Policy. (a) The General Assembly finds:
> (1) that current solid waste disposal practices are not adequate to address the needs of many metropolitan areas in Illinois;
> (2) that the generation of solid waste is increasing while landfill capacity is decreasing;
>
> * * *
>
> (5) that state government policy and programs should be developed to assist local

> governments and private industry in seeking solutions to solid waste management problems.
> (b) It is the purpose of this Act to reduce reliance on land disposal of solid waste, to encourage and promote alternative means of managing solid waste, and to assist local governments with solid waste planning and management. In furtherance of those aims, while recognizing that landfills will continue to be necessary, this Act establishes the following waste management hierarchy, in descending order of preference, as State policy:
>
> (1) volume reduction at the source;
> (2) recycling and reuse;
> (3) combustion with energy recovery;
> (4) combustion for volume reduction
> (5) disposal in landfill facilities.

Local officials will often be involved concurrently in solid waste planning activities and landfill siting proceedings. They cannot ignore either of these functions. They must take care, however, to keep the legislative and quasi-judicial functions separate. Specifically, they may not discuss the details of a specific landfill application off the record or allow their off-record knowledge to influence their SB-172 decisions.

The law provides for appeal of local decisions to this Board. Under certain circumstances, such as the ones in the instant proceeding, the appeal process has built in problems. The only standard of review available to the Board, under current case law, is the manifest weight of the evidence standard, which requires the reviewer to view the facts in the light most favorable to the County. The Board is precluded, under current case law, from conducting a de novo review. Waste Management v. McHenry County Board, supra. This Board also cannot send the record to another forum for a fair de novo review. Where, as here, the County has been improperly influenced in its decision, the applicant would essentially be doubly penalized, the first time in the original decision making process and the second time in the review process which gives deference to the original decision.

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 Board will vacate and remand the decision of the County with the following instructions: a) Winnebago County Board Members Bell, Barnard, Connelly, and Giorgi are disqualified from participating further in this matter; b) The substance of known ex parte contacts shall be made a part of the record and shall be the subject of an additional hearing; and c) The Winnebago County Board shall render a decision based exclusively on the six criteria of Section 39.2 of the Act and exclusively upon evidence in the record.

This will allow the substance of most if not all ex parte contacts, as well as the content of radio and other ads, to be reviewed on the record. It will give all County Board Members a chance to re-evaluate the record and render a decision based solely on that record. The Board notes that the hearing record itself appears to be complete and developed in a fundamentally fair manner. This process should remove the procedural clouds from this proceeding and allow it to proceed on the merits.

This constitutes the Board's finding of fact and conclusions of law in this matter.

ORDER

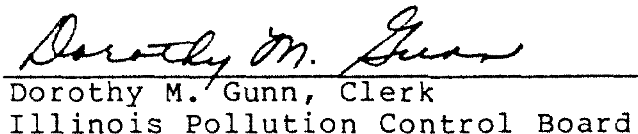
The Board hereby vacates the decision of the Winnebago County Board which denied site location suitability approval, and this matter is remanded back to the Winnebago County Board.

IT IS SO ORDERED.

B. Forcade concurred.

J. Anderson and J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 19th day of November, 1987, by a vote of 5-2.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board