ILLINOIS POLLUTION CONTROL BOARD
November 19, 1987

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

CONCURRING OPINION (by B. Forcade):

I reluctantly concur in the Order to remand this matter to the County Board, but I am unable to support portions of the majority opinion which accompanies that Order. I disagree with the majority opinion in two primary areas:

My two areas of disagreement are that the majority opinion:

1) Places undo reliance upon, and is critical of, the activities of individuals outside the decisionmaking process; and

2) Specifically, permits the examination of County Board members in the hearing before this Board witnout a prior showing of bad faith or improper benavior.

The majority opinion is extremely critical of the activities of STL. After spending two pages of the Opinion describing STL's activities, the majority concludes:

> 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 airways. (Opinion, pp. 20-21)

I am unable to determine that STL's activity was "inappropriate". STL was not simply engaging in the "time honored" activity of lobbying. STL was engaging in activity that is protected by the First Amendment - Freedom of Speech. There is no indication in this record that STL disrupted the process of government by disorderly conduct. The only indication is that STL members peacefully and politely expressed their opinions to government officials. I am not willing to criticize constitutionally protected activity in any form or manner. If that activity creates difficulty for the manner in which government conducts business, the burden for correcting the difficulty must fall on government officials, not the First Amendment activity. The burden on the Winnebago County Board members was to discourage "unnecessary and avoidable contacts" and to report all other contacts accurately to the public record. E&E Hauling v. PCB, 116 Ill.App.3d 586.

The failure of various County Board members to report ex parte contacts to the record does, in my opinion, constitute a denial of fundamental fairness. However, it is the actions of the County Board members which is at issue, not the propriety of STL's activities.

My second concern is the examination of County Board members which the majority opinion allows:

> 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. (Opinion, pp. 9-10)

This statement in the majority opinion is simply not true. And, even if it were true, I question the validity of having the County Board members questioned at all, in the absence of some strong preliminary showing of bad faith. No such preliminary factual showing was made, only allegations in the petition for review.

Today's decision by the majority continues the current trend in Section 39.2 proceedings: the landfill is tried before the county board and the County Board members are tried before this Board. I certainly agree that issues of ex parte contacts, conflicts of interest and the like are appropriate issues for presentation to this Board as a showing that the proceeding below was not fundamentally fair. However, I also believe that the county board proceeding is entitled to a strong presumption of propriety that must be overcome before there can be a "fishing expedition" into the personal lives and mental processes of the County Board members. The majority opinion now specifically endorses such fishing expeditions without a preliminary factual showing of error, so long as the inquiry involves only what County Board members said and did. I cannot support that theory.

The Board is not alone in its struggle over invading the mind of the decisionmakers. The courts have struggled with this issue since the early 1930's. The basic framework for how institutional adjudicatory decisionmakers must "consider the evidence" and what inquiries can be made into that process, was laid down by the United States Supreme Court in the four Morgan cases and their progency (Morgan v. U.S., 298 U.S. 468 (1936) [Morgan I]; Morgan v. U.S., 304 U.S. 1 (1938) [Morgan II]; U.S. v. Morgan, 307 U.S. 183 (1939) [Morgan III]; and U.S. v. Morgan, 313 U.S. 409 (1941) [Morgan IV].

In 1936, the U.S. Supreme Court held that "tne one who decides must hear." [Morgan I]. Subsequently, the district court allowed the Secretary of Agriculture to be examined on whether he had heard the case (read the record). On subsequent appeal, the Supreme Court reversed itself with Mr. Chief Justice Frankfurter stating in the Opinion:

> But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Morgan v. United States, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare Fayerweather v. Ritch, 195 U.S. 276, 306-7, so the integrity of the administrative process must be equally respected. See Chicago, B.&Q. Ry. Co. v. Babcock, 204, U.S. 585, 593. It will bear repeating that although the administrative

> process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of eacn should be respected by the otner. United States v. Morgan, 307 U.S. 183, 191.
> United States v. Morgan, 313 U.S. 409 (1941) [Morgan IV].

The four Morgan cases, and their progeny, lay the groundwork for the questions now plaguing the Board. It seems clear that institutional decisionmakers must render their decisions in an appropriate manner but that you can only ask certain questions of the decisionmaker and then only if you meet some burden or prima facie factual showing that the decisionmaking process was flawed. What showing must be made and what questions you can subsequently ask is a very murky area of the law. In National Nutritional Foods v. F.D.A., 491 F.2d 1141 (2nd Cir., 1974), no examination of the Secretary was allowed even though it would have been physically impossible for the Secretary to read the hundreds of thousands of pages of record involved in the decisions the Secretary made in the first 13 days after he took office. See also Libis v. Board of Zoning Appeals of Akron, 292 N.E.2d 642 (Ohio Appellate, 1972).

I have reviewed a substantial body of literature (and much of the case law cited therein)[1] in an attempt to determine what questions may be asked of county board decisionmakers in a Section 39.2 proceeding and what, if any, preliminary showing must be made prior to asking those questions. The law is, at best, murky. Nonetheless, if Chief Justice Frankfurter's rationale in Morgan IV holds true, I find it difficult to believe that the Board's current concept of "permitted questions" would have been allowed if posed to a trial court judge in Illinois.

In John Ash v. Iroquois County, PCB 87-29 (July 16, 1987), the Board "permitted" the applicant to inquire of each county board member whether they had "read the transcript".

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1. K. Davis, Administrative Law Treatise, Section 11.02-11.04
2 Am Jur.2d, Administrative Law, Section 439
F. Cooper, State Administrative Law, Chapter 13, Section 3
18 A.L.R.2d, 606-629 (including Later Case Service)
Stein, Mitchell, Mezines, Administrative Law, Cnapter 38
50 Washington Law Review, 749 (1978)
30 Administrative Law Review, 237

In A.R.F. v. Lake County, PCB 87-51 (October 1, 1987), the Board "permitted" interrogatories to each county board member which:

> ...asked identification of each and every communication with any person regarding the A.R.F. landfill; asked for disclosure of any financial interest the County Board members had in Waste Management or property near the A.R.F. facility; asked for their attendance record at the A.R.F. hearings; asked for their participation in negotiations and voting record relating to the Heartland property annexation; asked for financial disclosure regarding interests in other landfills or incinerators in any jurisdiction; asked about financial benefits received from Waste Management; asked if the county board had ever made public statements about the existing A.R.F. landfill; asked whether the county board member had read the entire transcript (if not, what parts were not read); and asked whether the county board member would have voted against the approval regardless of the evidence. (John Ash v. Iroquois County, Concurring Opinion, B. Forcade)

In today's proceeding, the Board has "permitted" substantial invasion of the decisionmaking process, far beyond the majority's assertion of an inquiry into what the County Board members said and did. A typical examination in the hearing before this Board was that of County Board Member Ousley Walker, who was asked:

> Q. You didn't attend the committee-of-the-whole meeting either where this was discussed, did you?
>
> A. No, sir, I did not.
>
> Q. And you didn't make any of the zoning and planning committee meetings when they talked about it?
>
> A. I did not.
>
> Q. And you didn't go to any of the hearings?
>
> A. No, sir.
>
> Q. You voted against all of the criteria -- you voted against the city on all criteria except for one is that correct?

A. I believe so.

Q. Do you remember what any of those criteria were?

A. No, sir.

Q. Do you remember any of the recommendations of the zoning and planning committee?

A. I made up my mind that night. I was undecided until the night of the vote, and the only thing that caught my eye was the 80 foot above grade. That was it.

Q. So that was the basis of your vote?

A. Yes, sir.

(PCB Tr., pp. 181-182)

The Board has thus, "permitted" questions about whether the decisionmaker remembers the factual recommendations in a case, about whether the decisionmaker remembers the "law" that applied in a case, or why the decisionmaker voted a particular way. I believe these questions invade the decisionmaking process. I doubt they would be asked of an Illinois trial judge.

I have used the word "permitted" in a very specific sense. The questions were asked (at hearing or by interrogatory), no objection was posed by counsel for the county board, and, as a result, the answers became part of the record. This Board has never been asked to rule on whether County Board members can be questioned at all, nor on whether certain questions are appropriate. I would continue to assert, per guidance from Chief Justice Frankfurter, that the short of the business is that the County Board members should never have been subjected to this examination. Accordingly, I cannot support the majority's rationale that it is appropriate to inquire about what they saw and did.

Whether or not the questions should have been asked, they were. The questions and answers are a part of the record without objection from the parties. Based on the facts in the record, I see little recourse but to remand for lack of fundamental fairness.

Bill S. Forcade
Member of the Board

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 1st day of December, 1987.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board