BEFORE THE ROCHELLE CITY COUNCIL
OGLE COUNTY, ILLINOIS

IN RE: THE APPLICATION FOR APPROVAL OF A POLLUTION CONTROL FACILITY OF ROCHELLE WASTE DISPOSAL, L.L.C.	))))	No. PCB 03- 218 (Pollution Control Facility Siting Appeal)

HEARING BRIEF

Council members may not testify that they were not influenced by *ex parte* communications or that they relied exclusively upon the record in making their decision

It is anticipated that the Rochelle City Council will attempt to elicit testimony from council members to the effect that although they engaged in prohibited *ex parte* communications, they were not influenced by those communications, they did not consider those communications in rendering their local siting decision and they relied exclusively upon the record made during the siting hearing. Such testimony is clearly inadmissible despite the fact that the Pollution Control Board ("PCB") has occasionally admitted such testimony ***in the absence of an objection***. See, e.g., Land and Lakes Co. v. Randolph County Board of Commissioners, PCB 99-69 *18 (2000) ("All four members of the Planning Commission testified that the limited contacts did not affect their decision and the recommendation they made to the Randolph County Board"). Such self-serving testimony is inadmissible and also creates an untenable Catch-22. That is because although a violation of fundamental fairness cannot be based on an *ex parte* communication without a "showing of prejudice" (E&E Hauling, Inc. v. PCB, 116 Ill.App.3d 586, 607, 451 N.E.2d 555, 571, 71 Ill.Dec. 587, 603 (2d Dist. 1983), aff'd, 107 Ill.2d 33, 41 N.E.2d 664, 89 Ill.Dec. 821 (1985)), victims of the *ex parte* communication have been precluded from probing the decisionmakers' "internal thought processes"

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(DiMaggio v. Solid Waste Agency of Northern Cook County, PCB 89-138, *3 (1989)), but decisionmakers themselves have sometimes been improperly permitted to testify that the *ex parte* communication supposedly did not affect their decision or that they relied exclusively on the record.

Thus, in E&E Hauling part of the court's rationale for finding no prejudice was the rather remarkable conclusion that:

> By the time these meetings took place, the Board, though it had not yet formally approved the application, had ***essentially made up its collective mind to approve the proposed expansion*** and had moved to consideration of the conditions. 116 Ill.App.3d at 607, 451 N.E.2d at 572, 71 Ill.Dec. at 604 (emphasis added).

How the court could know that without considering the decisionmakers' "internal thought processes" is inexplicable.

It is true that the mental processes of judicial or administrative decisionmakers are not a proper subject of judicial inquiry, but the notion that the decisionmakers themselves should be able to testify that they only relied upon the record or that they were uninfluenced by the *ex parte* communications they engaged in is completely wrong. Indeed, the line of authority relied upon by the PCB in DiMaggio makes clear that the decisionmakers themselves may not testify on that subject. DiMaggio relied upon U.S. v. Morgan, 313 U.S. 409 (1941), which held, according to the PCB, "that the mind of the decisionmaker should not be invaded." DiMaggio, PCB 89-138, *5 (1989). In Morgan, the Secretary of Agriculture had been extensively examined at trial "regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates." U.S. v. Morgan, 313 U.S. 409, 422 (1941). The Court, through Justice Frankfurter, held this was inappropriate:

> 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'. . . . 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'. . . . Just as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected. U.S. v. Morgan, 313 U.S. 409, 422 (1941) (citations omitted).

Although Morgan has sometimes been referred to as having established the "mental processes privilege," that is not really correct because it is

> in its pure form is not so much an evidentiary privilege as a doctrine defining the proper scope of judicial review. U.S. v. Hooker Chemicals & Plastics Corp., 123 F.R.D. 3, 23 (Appendix) (W.D.N.Y. 1988).

Thus, the inadmissibility of judicial or administrative decisionmakers' mental processes is not a "privilege" of the decisionmaker to be waived. On the contrary, a trial judge or administrative decisionmaker is (just like a juror) incompetent to testify to what they did or did not consider in reaching their decision. See, e.g., Fayerweather v. Ritch, 195 U.S. 276, 306-07 (1904). In Fayerweather the Supreme Court explained why such testimony "was obviously incompetent." 195 U.S. at 307. The Court held that it would be unfair to permit such testimony by a decisionmaker because

> no testimony should be received except of open and tangible facts, -- matters which are susceptible of evidence on both sides. 195 U.S. at 307.

This rule applies in administrative proceedings as well as judicial proceedings. See, e.g., Chicago, Burlington & Quincy Ry. Co. v. Babock, 204 U.S. 585, 593 (1907); Jackson Daily News v. Local No. 215, International Printing Pressman and Assistants' Union of North America, AFL, 103 NRLB 207, 1953 WL 10901 (1953). This rule applies regardless of whether the judge or administrative decisionmaker is willing to testify

because "such testimony poses special risks of inaccuracy." Washington v. Strickland, 693 F.2d 1243, 1263 (5th Cir. 1982). As the court held in Hooker Chemicals:

> Moreover, the fact that the state trial judge might be ***willing*** to testify is irrelevant to this consideration. Our concern with the accuracy and probative value of the testimony remains the same. 123 F.R.D. 3 at 21 (Appendix) (emphasis original).

Similarly, in U.S. v. Crouch, 566 F.2d 1311 (5th Cir. 1978), it was held that a reviewing court was barred from examining the mental processes of a judge not because of a privilege waiveable by the judge but because "[t]his court has no means of observing mental process." 566 F.2d at 1316. Even if the judge were to come forward with an explanation of his mental process, "we could not consider his explanation." 566 F.2d at 1316.

There are a number of reasons the courts have refused to allow judges or administrative decisionmakers to testify regarding their mental processes including "the difficulty inherent in accurately re-creating a mental process" and the fact that "it is practically impossible for a party to challenge the mental impressions of a judge, as his thought process is known to him alone." Georgou v. Fritzshall, 1995 WL 248002 (N.D. Ill. 1995).

For essentially the same reason, where a juror has been subjected to an improper *ex parte* communication, the juror may testify to the fact of the communication, but not the effect it had on him. Rule 606(b) of the Federal Rules of Evidence provides:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations ***or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror*** to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought

> to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes (emphasis added).

As the comments to that rule suggest, the jurors may "testify as to matters other than their own interactions."

Thus, what the PCB should consider on the issue of prejudice is whether the *ex parte* "contacts ***may*** have influenced the agency's ultimate decision" (E & E Hauling, 107 Ill.App.3d at 607, 451 N.E.2d at 571, 71 Ill.Dec. at 603), not whether the decisionmaker claims it did not. Those PCB decisions which have permitted such self-serving testimony ***without any objection*** are not a basis for admitting such testimony over the Petitioner's strenuous objection in this proceeding. That type of testimony is simply incompetent and inadmissible.

It should also be noted that the council members' comments to the newspaper immediately ***following*** their decision to the effect that they voted in accordance with popular opinion and/or believed that they had been elected to do that are admissible because the exclusion of evidence as to decisionmakers' mental processes only applies up to the time the decision is made and "does not extend to 'post-decisional . . . explanations or interpretations of' such decisions." Hooker Chemicals, 123 F.R.D. 3 at 12 (Appendix). See also Wilkinson v. Chao, 2003 WL 22767814 at *7 (D.N.H. November 24, 2003) (deliberative process privilege inapplicable once the process is over and post-decisional views admissible); RLI Insurance Company Group v. Superior Court, 51 Cal.App.4th 415, 437- 38, 59 Cal.Rptr.2d 111, 124-25 (Ct.App. 1997) (same). See generally 26A, Wright & Miller, Federal Practice and Procedure, § 5680 nn. 203-217 ("postdecisional" statements admissible).

If a judge engages in inappropriate *ex parte* communications, the issue of disqualification is based on not the judge's subjective belief as to whether his impartiality had been compromised, but on the objective standard of Canon 3 of the Code of Judicial Conduct:

> A. Judge shall disqualify himself or herself in a proceeding ***in which the judge's impartiality might reasonably be questioned . . . .*** Illinois Supreme Court Rule 63C(1).

This objective standard is also the rule pertaining to federal judges under 28 U.S.C. 455(a), which provides:

> Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his ***impartiality might reasonably be questioned*** (emphasis added).

The question is whether "[a] thoughtful observer aware of all the facts . . . would conclude that [the *ex parte* communication] . . . carries an unacceptable potential for compromising impartiality." Edgar v. K.L., 93 F.3d 256, 259-60 (7th Cir. 1996). In Edgar the Seventh Circuit discounted the judge's assurances "that he would have an open mind," relying instead on whether "an ***objective*** observer would doubt that this opportunity was adequate . . . . 92 F.3d at 260 (emphasis added).

> The issue then is ***not the Court's own introspective capacity*** to sit in fair and honest judgment with respect to the controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality. This is an objective standard . . . . U.S. v. Ferguson, 550 F.Supp. 1256, 1259-60 (S.D.N.Y. 1982) (emphasis added).

See also, State v. Mann, N.W.2d 528, 532 (Ia. S.Ct. 1994) ("the test is not whether the judge self-questions his own impartiality, but whether a reasonable person would question it. Thus, an objective test is substituted for a purely subjective one").

Therefore, whether the *ex parte* contacts resulted in such prejudice as to justify reversal for lack of fundamental fairness should be based on the objective facts, not on the decisionmakers' self-serving claims that they based their decision on the record.[1]

ROCHELLE WASTE DISPOSAL, L.L.C.

McGREEVY, JOHNSON & WILLIAMS, P.C.
Its Attorneys

By: _____
Michael F. O'Brien
One of its attorneys

[1] In a separate Hearing Brief the Petitioner has addressed why the inappropriate *ex parte* communications of the decisionmakers in these proceedings justify a finding that fundamental fairness has been violated.

ATTORNEY'S CERTIFICATE OF SERVICE BY PERSONAL SERVICE

The undersigned, being first duly sworn on oath, depose and say that I am an attorney and personally served the foregoing instrument upon the within named:

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by hand delivering a true and correct copy of the same at Rochelle, Illinois, at or about the hour of ___ o'clock a.m./p.m., on the10th day of December, 2003.

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