

ILLINOIS POLLUTION CONTROL BOARD
June 30, 1988

GERALD CLUTTS,)
)
) Petitioner,)
))
) v.) PCB 88-43
))
HERMAN L. BEASLEY,)
)
) Respondent,)
))
) and)
))
ALEXANDER COUNTY BOARD OF)
)
) COMMISSIONERS,)
))
) Co-Respondents.)

MR. STEVEN D. APPEGATE, OF APPEGATE AND MAURIZIO, APPEARED ON BEHALF OF THE PETITIONER

MR. MICHAEL P. O'SHEA, JR., ATTORNEY AT LAW, APPEARED ON BEHALF OF THE RESPONDENT, BEASLEY

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

OPINION AND ORDER OF THE BOARD (by Michael Nardulli):

This matter comes before the Board on a March 4, 1988 petition to contest granting of site approval, filed by Gerald Clutts. The petition seeks review of a February 4, 1988 decision of Respondent Alexander County Board of Commissioners and granting site approval of Respondent Herman L. Beasley's proposed non-hazardous waste landfill to be located on Mr. Beasley's property. The Board held a public hearing on this petition for review was held on April 29, 1988 in Cairo, Alexander County.

Mr. Beasley submitted an application for siting approval of a non-hazardous solid waste landfill to be located in Alexander County, Illinois. The landfill is proposed for an eighty-three (83) acre site in Thebes, Alexander County. Twenty (20) acres will be used for landfill. The Alexander County Board held public hearing on the application on January 29, 1987 and December 17, 1987. The Alexander County Board approved the application on February 4, 1988 by a vote of 2 to 0 and site approval was granted.

The Petitioner filed a motion to strike the Respondent Beasley's and Co-Respondent Alexander County Board of Commissioner's briefs because they failed to hand deliver the

briefs to the Petitioner's counsel by May 17, 1988 as required by the hearing officer at the Board's April 29, 1988 hearing. The briefs were instead mailed to the Petitioner's counsel on May 27. The Petitioner did not receive the briefs until May 31 - four days after it was due. That allowed the Petitioner less time to prepare his reply brief which was to be filed by June 6, 1988.

To remedy this situation, the hearing officer issued an order giving the Petitioner leave to file his reply brief instanter on or before Friday, June 10, 1988. This action corrects any compromise of Petitioner's situation that resulted from the late filing by the Respondents. Consequently the Petitioner's motion is denied.

Statutory Framework

At the local level, the site location suitability approval process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider six criteria when reviewing an application. 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.

Section 40.1 of the Act charges this Board with reviewing the County Board's decision. Specifically, this Board must determine whether the County Board's decision was contrary to the manifest weight of the evidence, and whether the procedures used at the local level were fundamentally fair. E&E Hauling, Inc. v. Illinois 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); City of Rockford v. IPCB, 125 Ill. App. 3d 384, 386, 465 N.E. 2d 996 (1984); Waste Management of Illinois, Inc., v. IPCB, 122 Ill. App. 3d 639, 461 N.E. 2d 542 (1984). The standard of manifest weight of evidence is:

A verdict is ... against the manifest weight of the evidence where it is palpably erroneous, wholly unwarranted, clearly the result of passion or prejudice, or appears to be arbitrary, unreasonable, and not based upon the evidence. A verdict cannot be set aside merely because the jury [County Board] could have drawn different inferences and conclusions from conflicting testimony or because a reviewing court [IPCB] would have reached a different conclusion .. When considering whether a verdict was contrary to the manifest weight of the evidence, a reviewing court [IPCB] must view the evidence in the light most favorable to the appellee. Steinberg v. Petra, 139 Ill. App. 3d 503, 508 (1986).

Consequently, if after reviewing the record, this Board finds that the County Board could have reasonably reached its conclusion, the County Board's decision must be affirmed. That a different conclusion might also be reasonable is insufficient; the opposite conclusion must be evident. (See Willowbrook Motel v. IPCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985)).

The Petitioner challenges the County Board's decision in the matter because the County Board failed to make a written decision specifying the reasons for the decision as required by 39.2(e) of the Act. The Petitioner also challenges the County Board's finding that criteria one, two, three, five and six from Illinois Revised Statute Chapter 111^{1/2}, 1039.2(a) were met. No challenge is made regarding criterion four.

FUNDAMENTAL FAIRNESS

The Board is charged with deciding whether the County Board's decision was contrary to the manifest weight of the evidence and whether the procedures used at the local level were fundamentally fair. The Respondent makes no direct argument challenging the County Board's procedures or the basis for the decision. In a review of the record, the Board finds the procedures employed by the County Board to be fundamentally fair. The procedures included public hearings in front of the County Board. Anyone interested was given an opportunity to testify or present witnesses and evidence. The Petitioner was represented by counsel and given an opportunity to examine or cross-examine any of the participating parties. There is no indication that the Petitioner was not given the opportunity to present his complete argument against the landfill or completely exhaust his legal rights.

The Petitioner argues that the decision of the County Board should be reversed because the Respondent Beasley failed to cause written notice of his request for site location approval to be served on the owners of all property within 250 feet in each direction of the lot line of subject property, and upon the appropriate members of the General Assembly, within the time limits established in the Illinois Environmental Protection Act, Ill. Rev. Stat. 1987, ch. 111 $\frac{1}{2}$ par. 39.2(b). Section 39.2(b) provides for actual notice to members of the General Assembly and other interested persons "(n)o later than fourteen days prior to a request for location approval...." Petitioner suggests that Respondent Beasley erred by informing these interested parties fifteen days in advance of filing his application for approval of a new pollution control facility, rather than fourteen days or less therefrom.

Neither the courts nor the Board construe this Section in the same manner as the Petitioner. It is more reasonable to maintain that the Section is intended to allow interested parties more notice of the hearing rather than less. Browning Ferris Industries v. IPCB, 154 Ill. App. 3d 89, 506 N.E.2d 372 (5th Dist., 1987) The Board finds that the Section should be read to require, the applicant to notify the effected parties at least fourteen (14) days prior to requesting approval.

The Petitioner maintains that the decision by the Co-Respondent County Board was in violation of Section 1039.2(a) because the County Board failed to make a written decision specifying the reasons for the decision. While The County Board did issue a written decision in this matter (Ex3-9), the Resolution did not specify the reasons for the decision. Although the statute does require the County Board to make written decisions which specify the reasons for its decisions, "such reasons to be in conformance with subsection (a) of this Section" (Ill. Rev. Stat. 1981, ch. 111 $\frac{1}{2}$ par. 1039.1(e)), the statute does not require a detailed examination of the evidence

or a review of the County Board's decision process. The Courts have interpreted this language to mean that the County Board need only indicate that the criteria have or have not been met. This writing will be sufficient if the record supports these conclusions so that an adequate review of the County Board's decision may be made. A detailed explanation of the relation between the conclusions and the criteria is not necessary. E&E Hauling, Inc. v. Illinois Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983), Aff'd in part 107 Ill. 2d 32, 481 N.E.2d 664 (1985). The Board holds that the evidence supports that decision.

STATUTORY CRITERIA

The Board also does not find that the decision of the County Board was contrary to the manifest weight of the evidence. The case presented by Respondent Beasley included his own testimony concerning the need for a landfill, the testimony of the engineer designing the landfill and the testimony of two residents who maintained that a landfill was required. The Petitioner and another resident testified against the landfill and were given an opportunity to cross-examine the Respondent's witnesses, question members of the County Board and submit questions after the first hearing. On review, the decision of the County Board appears consistent with the manifest weight of the evidence and clearly meets the minimum standard of not being contrary to the manifest weight of the evidence.

As previously noted, the Petitioner contests the decision of the County Board under 39.2(a) of the Act. Because the decision of the County Board must satisfy each of these requirements independently, these arguments will be addressed individually:

1039.2(a) Criterion One

The first criterion the County Board needed to consider is whether the facility is necessary to accommodate the waste needs of the area it is intended to serve. The Petitioner maintains that this criterion was not met but fails to elaborate on his contention by providing references to the record to support the contention. In a petition of this nature, it is the Petitioner that assumes the burden of proving that the decision of the County Board was in error. This Board has previously stated that "[w]here a Petitioner fails to make a significant or detailed showing that a County Board determination is in error, the Board can determine that petitioner has failed to carry the burden of demonstrating that the determination is in error". Valessares v. The County Board of Kane County, 79 PCB 106, 125 (PCB 87-36; July 16, 1987). Nevertheless, the Board has reviewed the arguments of both parties and the record. Based upon the review, the Board finds that the County Board's decision on criterion one was not against the manifest weight of the evidence. Therefore, the

County Board's decision on criterion one is upheld.

Beasley testified that the landfill was needed in the area because the closest landfill, in Mounds, Illinois, was open only from 10:00 a.m. to 3:00 p.m., five days a week and the alternative dump was located in Mayfield, Kentucky (T1 at 5)*. Further, two residents of Thebes, who live along Route 1, testified that the development of a landfill in the area would alleviate some of the areas solid waste problems. (T1 at 16-19). There was no evidence presented to show that a landfill was not required. This Board finds that the Alexander County Board could have reasonably concluded that the facility is necessary to accommodate the waste needs of the area it is intended to serve.

Criterion Two

The second criterion to be considered by the County Board is whether the proposed facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. The Petitioner contends that this criterion was not met, but again fails to carry the burden of proof that the determination is in error. The Board's review of the record and arguments shows that the Respondent has employed an experienced landfill design engineer who states he has designed the proposed landfill in compliance with the standards set for non-hazardous waste landfills by the Illinois Environmental Protection Agency (T1 at 6-11, T2 at 2-9). The engineer was examined by members of the County Board (T1 at 11-16, T2 at 9-12) and was cross-examined by the Petitioner (T1 at 21-28, T2 at 20-29). Based upon the review, the Board finds that the County Board's decision on criterion two was not against the manifest weight of the evidence. Therefore, the County Board decision on criterion two is upheld.

Criterion Three

The third criterion set forth in Section 39.2 is whether the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on

* Citations from the transcripts of the Alexander County Board meeting on January 29, 1987 will be identified as "T1-_____". Exhibits from the Alexander County Board meeting will be designated as "Ex 1-_____". Citations from the transcripts of the Alexander County Board meeting of December 17, 1987 will be identified as "T2 - _____". Exhibits from the December 17, 1987 Alexander County Board meeting will be designated as "Ex 2 - _____". The citations and exhibits from the Pollution Control Board hearing on this petition will be identified as "T3 - _____" and Ex 3 - _____" respectively.

the value of the surrounding property. The Petitioner argues that the proposed facility does not meet this criterion. Petitioner contends that the area surrounding the proposed site is agricultural and residential in nature and is devoid of industrial influences. The Petitioner further maintains that the landfill could result in polluted water in the stream and underground. This water is presently the source of the Petitioner's potable water and the water used by his cattle (T1 at 19, T2 at 19). The Petitioner also expressed concerns about the odor from the landfill (T2 at 20) and presented an affidavit from the Chairman of the Board of a bank which indicates that the value of the Petitioner's land would go down if the landfill is permitted. (Ex 2-1). The Petitioner, and other landowners testifying at the hearing, requested that they be given assurances against the loss of land value and the contamination of their water, either by the Respondent Beasley or the County Board (T1 at 20). The Petitioner also maintains that there are better locations on which the landfill should be built.

While the Respondents could not give the Petitioner assurances to prevent the contamination of their water or the loss of property value, the testimony of the engineer supplies a basis for the County Board's decision. The design engineer testified that the landfill was designed, located and proposed to be operated in compliance with Illinois Environmental Protection Agency standards.

The Board also points out that the statute requires that the location of the facility minimize incompatibility and effect on property values. That language should not be read to ask whether there is a "better" location for the facility. The Petitioner has failed to show that the landfill site was selected without attempting to minimize incompatibility in this case. Based upon the review, the Board finds that the County Board's decision on criterion three was not against the manifest weight of the evidence. Therefore, the County Board's decision on criterion three is upheld.

Criterion Five

Criterion five of Section 39.2 requires that the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. Petitioner argues that the County Board does not have any guarantees that the facility will be operated correctly (T1 at 20).

Again, however, the testimony of the design engineer supplies the basis for the County Board's decision. The engineer states that I.E.P.A. standards will be followed, groundwater will be monitored, daily cover will be supplied and the compliance will be ensured by routine inspections by the Illinois Environmental Protection Agency. While the evidence at hearing

may not have answered all of the concerns of the Petitioner and other residents, the County Board's decision was not contrary to the manifest weight of this evidence. It is also important to note that no evidence was introduced by the Petitioner identifying operational problems that might exist. Based upon the review, the Board finds that the County Board's decision on criterion five was not against the manifest weight of the evidence. Therefore, the County Board's decision on criterion five is upheld.

Reference also was made to an Agency inquiry letter which resulted in Beasley voluntarily covering and sowing trash he had dumped on his property on May, 1986. However, information on past violations are not to be considered in the decision of the County Board for landfill siting cases. ** Watts v. City of Rock Island, PCB 83-167, slip opinion at 18, March 8, 1984.

Criterion Six

The final criterion applicable to this case is whether the traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flows. The Petitioner expressed concern about the effect that the proposed landfill will have on traffic (T1 at 20). It was also noted that Beasley has not filed any traffic impact study (T1 at 46) and has not made any arrangement to maintain the road to the landfill (T2 at 37). Beasley states that he intends to haul from three to six truckloads a day to the dump (T2 at 38). The road being used by Beasley's trucks is presently being used by timber trucks, LP gas trucks, grain trucks, farm trucks and cars, as well as by Mr. Beasley's trucks and the trucks of other trash disposal companies (T1 at 47-49).

Again, as with all of the other criteria under 39.2(a), the Petitioner has failed to meet his burden of proving that the County Board's decision was against the manifest weight of the evidence regarding traffic. While the residents of the area expressed concern about the change in traffic patterns, the only testimony of any change was that up to six (6) of Mr. Beasley's trucks would go to the landfill each day. Based on this evidence, the County Board could fairly conclude that the impact on traffic would be minimal. The request for Beasley to maintain the road is inappropriate under this criteria, and need not be

**The Board notes that the following language effective July 1, 1988 has been added to Section 39.2 of the Act. "The county board or the governing body of the municipality may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (an any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section."

addressed. Based upon the review, the Board finds that the County Board's decision on criterion six was not against the manifest weight of the evidence. Therefore the County Board's decision on criterion six is upheld.

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

ORDER

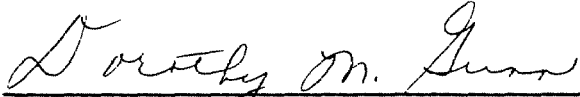
The February 4, 1988 decision of the Alexander County Board granting site location suitability approval to Herman L. Beasley is hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985, ch. 111¹/₂ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rule of the Supreme Court of Illinois establish filing requirements.

Board Member J. Marlin concurred.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 30th day of June, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board