ILLINOIS POLLUTION CONTROL BOARD
June 4, 1992

LAND AND LAKES COMPANY, JMC OPERATIONS, INC., and NBD TRUST COMPANY OF ILLINOIS AS TRUSTEE UNDER TRUST NO. 2624EG,	)	
Petitioners,	)	
v.	)	PCB 92-25
	)	(Landfill Siting Review)
VILLAGE OF ROMEOVILLE,	)	
Respondent,	)	
COUNTY OF WILL,	)	
Intervenor.	)	

STEPHEN F. HEDINGER APPEARED ON BEHALF OF PETITIONERS.

LYMAN C. TIEMAN APPEARED ON BEHALF OF RESPONDENT.

GLENN C. SECHEN, MATTHEW KLEIN APPEARED ON BEHALF OF THE COUNTY OF WILL, INTERVENOR.

NANCY A. MCKEATING APPEARED ON BEHALF OF THE JURCA OBJECTORS.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the February 13, 1992 petition for review filed by petitioners Land and Lakes Company, JMC Operations, Inc. and NBD Trust Company of Illinois as Trustee Under Trust No. 2624EG (Land and Lakes collectively). Land and Lakes challenges the January 8, 1992 decision of the Village of Romeoville (Village) denying site location approval of an expansion of its regional pollution control facility pursuant to Section 40.1(a) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1040.1(a)). Hearings attended by members of the public were held on April 21, 1992 and May 1, 1992 in Romeoville, Illinois.

PROCEDURAL HISTORY

On January 15, 1991, Land and Lakes filed a petition for review challenging the Village's December 21, 1989 siting decision. On August 26, 1991, the Board entered its decision finding that the Village failed to comply with Section 39.2(d) of the Act rendering its decision void. (PCB 91-7 (August 26, 1991) at 17.) Upon reconsideration, the Board found that the Village had given proper notice pursuant to Section 39.2(d) of the Act and vacated its prior decision. (PCB 91-7 (December 6, 1991) at 4-5.) However, the Board also found that the Village failed to

issue a definitive approval or denial and that the case needed to be remanded to the Village for a definitive vote on criterion 1. (Id. at 5-11.) The Board stated that the sole issue before the Village on remand was whether Land and Lakes had met its burden of proving there is a need for the proposed facility pursuant to criterion 1 of section 39.2 and applicable case law. (Id. at 10-11.)

On January 8, 1992, the Village issued its decision finding that the facility is not necessary to accommodate the waste needs of the intended service area and that no conditions are attached to the denial of criterion 1 (sometimes referred to as the "need criterion"). As instructed by the Board (PCB 91-7 (January 23, 1991)), Land and Lakes filed a new petition for review challenging the Village's decision upon remand. The Board will not reiterate all the facts of this case as they are fully set out in the Board's August 26, 1991 and December 6, 1991 opinions and orders in PCB 91-7. Rather, the facts will be discussed where necessary in the following analysis of the issues presently before the Board.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. Only if the local body finds that all applicable criteria have been met by the applicant can siting approval be granted. The Village found that Land and Lakes did not meet its burden on the criterion relating to need (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1039.2(a)(1)).

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592; E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.) A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. (Harris v. Day (4th Dist. 1983), 115 Ill.App.3d 762, 451 N.E.2d 262, 265.) The Board, on review, is not to reweigh the evidence. Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. (Fairview Area Citizens Taskforce v. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555

N.E.2d 1178, 1184; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1195; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505, 507.) Merely because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings. File v. D & L Landfill, Inc., PCB 90-94 (August 30, 1990), aff'd File v. D & L Landfill, Inc. (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228.

Additionally, the Board must review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, 451 N.E.2d at 562.) Land and Lakes has not raised any jurisdictional issues, but has raised a question of fundamental fairness. However, before the Board considers the threshold issue of fundamental fairness, the Board will address Land and Lakes' contention that this Board should review the need criterion in light of both the Village's December 12, 1990 (i.e., the first vote) decision and the January 8, 1992 decision (i.e., the second vote).

PRELIMINARY ISSUES

Clarification of First Vote

Land and Lakes devoted much of the hearing and their brief to arguing how the Village voted on the need criterion on December 12, 1990. Land and Lakes argues that the record after remand coupled with the record in PCB 91-7 establishes the Village's intent in attaching Condition 6 to the first vote on criterion 1.[1] According to Land and Lakes, a review of the first vote, in light of testimony given after remand, establishes that the Village improperly attempted to redefine the service area (see, Metropolitan Waste Systems, Inc. v. PCB, 558 N.E.2d 785, 787 (3d Dist. 1990)) and that the appropriate relief is to strike Condition 6 and declare the siting application approved.

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[1] Pursuant to this Board's order of January 23, 1992 (PCB 91-7), Land and Lakes requested that portions of the record in PCB 91-7 be incorporated into PCB 92-25. The Board also notes that because it was required to review the fundamental fairness of the first proceeding and address the issue of criterion 1 for the first time, other portions of the record in PCB 91-7 have been relied on in reaching the instant decision.

Land and Lakes' arguments regarding the first Village vote are misdirected. In its prior opinions in PCB 91-7, the Board thoroughly discussed the confusion and inconsistencies surrounding the Village's first vote. The Board stated that the Village's decision on Criterion 1 was subject to so many differing interpretations that neither the parties nor the Board could decipher whether the Village found that Land and Lakes met its burden of establishing need. Consequently, the Board found that the Village failed to issue a valid decision and remanded the case to the Village for a "definitive determination on Criterion 1". (PCB 91-7 (December 6, 1991) at 11.) After remand, the Village issued a determination on Criterion 1 consistent with the Board's directive. The Village clearly determined that the facility is not necessary to accommodate the waste needs of the intended service area and noted that no conditions are attached to the denial of Criterion 1.

The Board will not revisit the Village's first vote in an attempt to interpret what that vote meant. The purpose of the remand was to make certain the Village's determination on need. The Village has done so. Any attempt to now argue what Condition 6 and the first vote meant is totally irrelevant in this proceeding. Therefore, contrary to Land and Lake's request, the Board will not review the propriety of Condition 6 in relation to the need criterion.

In response to Land and Lakes' argument regarding the first vote and Condition 6, respondents contend that Land and Lakes' attempt to utilize post-decision testimony of current and former trustees to impeach the written decision on the second vote is improper. Respondents argue that the Board should sustain their continuing objection to such testimony.

The Board has previously noted the wealth of case law establishing that before an inquiry can be made into the decisionmaker's mental processes when a contemporaneous formal finding exists, there must be a strong showing of bad faith or improper behavior. (Dimaggio v. Solid Waste Agency of Northern Illinois (January 11, 1990), PCB 89-138 at 5; City of Rockford v. Winebago County (November 19, 1987), PCB 87-92 at 9 [citations omitted].) In their adjudicative role, the decisionmakers are entitled to protection of their internal thought processes. (Dimaggio at 5.) Consequently, without adequate facts warranting an inference that fundamental unfairness may have occurred in the hearing process, the Board will not unnecessarily invade the proper realm of the Village trustees. (Dimaggio v. Solid Waste Agency of Northern Cook County (October 24, 1989), PCB 89-138 at 7-8.)

Here, Land and Lakes attempted to elicit testimony from former and current trustees to explain whether the first vote was an approval with conditions or a denial. This line of inquiry is

distinct from Land and Lakes' inquiry into alleged bias and ex parte contacts, which are discussed below, and is simply an attempt to reopen the first vote even though the Board has already ruled that the first vote is void. (PCB 91-7 (December 6, 1991) at 5.) Therefore, in addition to a lack of relevancy, the Board also declines to review the Village's first vote because the testimony elicited by Land and Lakes' in an attempt to establish what the first vote meant constitutes an improper invasion into the mind of the decisionmaker. All such testimony, which the Board notes is replete throughout the transcripts of the Board's April and May 1992 hearings, will not be considered by the Board in rendering its decision in this case.

Evidentiary Issues

Land and Lakes raises a number of objections to the hearing officer's rulings at the April and May 1992 hearings. First, Land and Lakes contends that the hearing officer erred in admitting the deposition of Trustee Martin only under an offer of proof. (Pet. Exh. 6.) The deposition of Trustee Martin relates solely to why Martin voted in December of 1990 and is an improper invasion of the decisionmaker's mental processes. Therefore, the Board upholds the hearing officer's ruling on Pet. Exh. 6.

Second, Land and Lakes reiterates its objections made during hearing to the "hearing officer's limitations upon petitioner's examination of certain Village [trustees]." (Pet. Brief at 20.) The Board notes that Land and Lakes simply cites to the transcripts in support of this broad contention without identifying with a great deal of specificity the particular rulings at issue.

Regarding the testimony of Trustee Valderrama, the hearing officer sustained the County of Will's hearsay objection based upon Valderrama's purported attempt to speak for the village as a whole as evinced by use of the terms "us" and "we". (Tr. at 110.) The Board finds this ruling proper. The hearing officer also sustained the Village's objection to testimony of Valderrama's thought process regarding the first vote. (Tr. at 109-13.) For reasons stated above, this ruling is affirmed. For the same reasons, the hearing officer's ruling on the objection to Trustee Martin's testimony regarding the first vote is affirmed. (Tr. at 205-7.) As to Trustee Peterek, on the basis of relevancy the hearing officer did not allow Land and Lakes to question Peterek as to his participation in Brent Hassert's campaign for state legislature. (Tr. at 69-71.) The Board agrees that such testimony is irrelevant. For the same reason, the Board also affirms the hearing officer's ruling regarding similar questioning of Trustee Dewald. (Tr. at 272-74.) As to Trustee Dewald, the hearing officer sustained the County of Will's objection to Land and Lakes' question as to the trustee's purpose in moving that the expansion be denied. (Tr. at 265-66.)

Again, the ruling is affirmed as an improper attempt to invade the decisionmaker's thought process.

Land and Lakes argues that many of the hearing officer's rulings are erroneous because they extend the "privilege" beyond its intended scope. By the term "privilege", Land and Lakes apparently means the principle discussed above that, in their adjudicative capacity, the trustees are entitled the protection from scrutiny into the though process afforded members of the judiciary discussed above. (See also, DiMaggio (October 24, 1989), PCB 89-138 at 7-8.) Land and Lakes argues that any entitlement to this "privilege" was waived by the following statements made by Trustee Dewald at the January 8, 1992 meeting:

> [In response to a point of clarification] That in so doing, we are denying the expansion of the landfill.
>
> I watched a lot of these Board Members work real hard and listen to a lot of testimony and put a lot of work into it, and me and dan being newcomers, doing a lot of reading and being involved even back then. I don't know that any discussion any further could change anyone's mind, so I would like to call the question, if I could, please. (Tr. at 266-68, 269-70.)

The Board does not believe that the decisionmaker can "waive" the principle that the thought process of one in an adjudicative capacity is not to be invaded. Even if Dewald had offered such information, the Board would not consider it in rendering its decision where a formal finding exists. The Board agrees with Land and Lakes' contention that an applicant can probe facts relevant to fundamental fairness. However, an applicant cannot elicit testimony from the decisionmaker which probes the mental processes behind a decision where, as here, a formal written decision exists. Assuming, arguendo, that a decisionmaker can waive the principle that the thought process of one in an adjudicative capacity is not to be invaded, these statements cannot be construed as a voluntary explanation by Trustee Dewald as to why or how he voted on the siting application.

Lastly, Land and Lakes reiterates its objection to all of the exhibits introduced by Will County at the Board's April and May 1992 hearings.[2] Land and Lakes asserts that the exhibits should have been excluded by the hearing officer on the basis of lack of relevancy. Exhibit 1 is a letter from Land and Lakes' attorney to the Village's attorney concerning PCB 91-7, exhibit 2

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[2] Land and Lakes again contends that Will County is not a proper party and should not have been allowed to intervene. The Board will not reconsider its prior order granting Will County's motion to intervene.

is a letter from the Mayor of Romeoville to the Village board and exhibit 3 is a letter from one of the owners of Land and lakes to the Village administrator, exhibit 4 is a campaign disclosure statement for Citizens for John Strobbe, exhibit 6 is a similar disclosure statement for the People's Choice Party[3] and exhibit 6 is a group of phone logs maintained by the Village showing calls received from Land and Lakes. The hearing officer overruled Land and Lake's relevancy objection (Tr. 164, 344-47) and the Board finds no reason to overturn the hearing officer's ruling. The weight to be accorded these exhibits is a matter for the Board to decide in assessing fundamental fairness and whether the Village's decision on criterion 1 is against the manifest weight of the evidence.

FUNDAMENTAL FAIRNESS

Disqualification for Bias

Land and Lakes raises several issues relating to its contention that the procedures at the Village were fundamentally unfair. First, Land and lakes contends that two trustees, Dewald and Peterek, were biased against the landfill siting. In support of this contention, Land and Lakes points to the fact that Dewald and Peterek "are long-time political allies of the staunchest opponents to [Land and Lakes'] landfill siting application." (Pet. Brief at 13.) Both Dewald and Peterek were elected as Village trustees in April of 1991 and therefore, voted on the second vote after remand, but not the first vote in PCB 91-7. (Tr. at 45, 219, 287.) According to Land and Lakes, the staunch opponents are Brent Hassert and Ann Dralle, who have contributed money to Dewald and Peterek's campaigns for Village trustee positions (Tr. at 279). Land and Lakes also contends that Dewald's and Peterek's campaigns establish that they were predisposed to voting to deny site approval.

The Board must first consider whether Land and Lakes has waived its right to object to the participation of Dewald and Peterek given that such an objection was not raised at the January 8, 1992 Village meeting. (See, E & E Hauling, Inc. v. PCB (1985), 107 Ill. 2d 33, 481 N.E.2d 664.) "A claim of disqualifying bias or partiality on the part of a member of the judiciary or an administrative agency must be asserted promptly after knowledge of the alleged disqualification." (Id. at 666.) A failure to object at the original proceeding constitutes a waiver of the issue on appeal. (Id.)

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[3] The Board received certified copies of exhibits 4 and 5 on May 8, 1992 as directed by the hearing officer. (Tr. at 326.)

Land and Lakes attempts to distinguish E & E Hauling by asserting that it did not become aware of Dewald's and Peterek's bias until the Board's hearings in April and May of 1992. The information relied upon by Land and Lakes in asserting bias relates to Dewald's and Peterek's February and March 1991 campaign for April 1991 trustee positions. Land and Lakes asserts that the campaign literature distributed by these trustees during their campaign and their receipt of contributions from people opposed to the landfill show bias against siting. However, Land and Lakes fails to explain why it was unable to ascertain information relating to the alleged bias which appears to have been available in April of 1991, prior to the Village's meeting in January of 1992. Therefore, the Board finds that Land and Lakes has waived its claim that Dewald and Peterek should be disqualified by not raising this objection at the January 8, 1992 Village meeting.

Although the Board has found that Land and Lakes has waived its claim of disqualification of Dewald and Peterek, the Board will nevertheless consider the issue on the merits. Peterek, elected to the Village in April of 1991, testified that Brent Hassert and Ann Dralle assisted his campaign. (Tr. at 62-63.) Dewald, also elected in 1991, testified that he talked to Hassert about the campaign and that Hassert gave advice on an informal basis. (Tr. at 222-23.) Dewald had known Hassert since second grade. (Tr. at 294-45.) Dewald testified that Dralle did not assist his campaign. (Tr. at 227.) Dewald testified that the committee to elect Dewald and Peterek received a $500 contribution from the committee to re-elect Hassert to the state legislature (Tr. at 279), $500 from Ann Dralle (Tr. at 279) and $1,000 from a White Fence Farm[4] fundraiser (Tr. at 279). Both Dewald and Peterek testified that these contributions had no influence on their January 1992 vote finding that Land and Lakes did not establish need. (Tr. at 74-75, 293.) Dewald stated that he "knew people on both sides of the issue." (Tr. at 297-98.)

Campaign literature circulated by Dewald and Peterek contained statements such as "[o]ne can only remember the chaos the landfill brought to our community. even after a major outcry against the landfill at the polls, the village board proceeded with the landfill" (Pet. Exh. 3) and "[c]oncerned about the landfill" (Pet. Exh. 4). Peterek testified that he viewed the referendum passed by the voters of Romeoville opposing the annexing of Village property for the landfill as a mandate by the people against the landfill. (Tr. at 57.) In explaining his campaign literature, Peterek testified that one of the things he and Dewald were trying to convey was that the existing village Board was unresponsive to the people. (Tr. at 61.) Peterek also

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[4] Brent Hassert, Jr. is an owner of White Fence Farm. (Tr. 280).

explained that at the time of the campaign, the Village had already voted on Land and Lakes' application. such that there was no siting issue pending. (Tr. at 61.) Dewald also testified that the campaign literature was geared toward the unresponsiveness of the Village. (Tr. at 232.) Dewald was questioned regarding the following statement made at the January 8, 1992 Village meeting: "I watched a lot of these Board Members work real hard ... and me and Dan [Peterek] being newcomers, doing an awful lot of reading and being involved even back then." (Tr. at 270.) Dewald stated that by referring to "back then" he simply meant that was interested in the first vote as a citizen of Romeoville and that he read the newspaper to keep himself aware of what was going on in the city. (Tr. at 272.) Lastly, Land and Lakes relies on a newspaper article dated January 8, 1992 which states that Dewald said that prior to becoming a trustee, he did not believe a landfill was needed and quoting Dewald as stating that "I still do believe at this moment right now that we don't need a landfill" and that there were several reasons it was not needed, including traffic and proximity to residents. (Pet. Exh. 5; Tr. at 251.) Dewald testified that he did not remember if these statements were made before or after the January 8th vote. (Tr. at 248, 284.) Dewald also testified that he could not remember if the quotations were accurate and that they may have been taken out of context. (Tr. at 284-88.) Dewald also testified that, prior to becoming a trustee, he was not fully aware of the statutory criteria governing siting applications. (Tr. at 287.) Lastly, Dewald testified that he refrained from making a decision on Land and Lakes' application until the vote was called on January 8th and that he put aside any prejudgment or prejudice for or against the landfill. (Tr. at 288-92.)

Public officials are presumed to act without bias. (E & E Hauling, 481 N.E.2d at 668.) A decisionmaker may be disqualified for bias or prejudice if a "disinterested observer might conclude that he had in some measure adjudged the facts as well as the law of the case in advance of hearing it." (E & E Hauling (2d Dist. 1983) 451 N.E.2d at 565-66, aff'd, 481 N.E.2d 668 (1985), citing Cinderella Career and Finishing Schools, Inc. v. F.T.C. (D.C. Cir. 1970), 425 F.2d 583, 591.)

Upon review of the record, the Board concludes that Land and Lakes' has made no showing that Peterek or Dewald had decided to deny Land and Lakes' application for siting approval prior to the Village's January 8, 1992 meeting. When Peterek and Dewald were campaigning for trustee positions, no siting application was pending before the Village. In campaigning for trustee positions, Dewald and Peterek were certainly free to state their opinions of the first vote as those opinions relate to the functioning of the then existing Village Board. There is nothing in the record to indicate that these two trustees did not exercise their adjudicatory functions in voting on the siting

application. Trustees are elected officials and Land and Lakes points to nothing unlawful about the receipt of campaign contributions. Moreover, both Dewald and Peterek testified that their receipt of campaign contributions in no way influenced their vote on siting. The Board rejects Land and Lakes' contention that Peterek and Dewald should be disqualified.

Land and Lakes also alleges fundamental unfairness resulting from trustee Pakula's "changed vote." According to Land and Lakes, Pakula's "change was to be expected, given that she received over 50 telephone calls from landfill opponents in the week preceding" the second vote. (Pet. Brief at 16; Tr. at 144.)

Pursuant to the Board's ruling above regarding impermissible invasion into the mind of the decisionmaker and lack of relevancy, the Board rejects Land and Lakes' contention that Pakula's vote establishes that the second proceeding was fundamentally unfair. Land and Lakes' contention that Pakula "changed her vote" is based upon testimony, objected to by respondents, concerning the first vote. (Tr. at 133-41.) However, the principle that one cannot invade the decisionmaker's mental processes as well, as the Board's determination that any inquiry into the Village's first vote is irrelevant, prevents any inquiry into allegations of a "changed vote."

Ex Parte

Although not clearly argued by Land and Lakes, it appears that they also assert that Pakula's telephone conversations from constituents opposed to the landfill were improper ex parte contacts rendering the proceedings fundamentally unfair. A court will not reverse an agency's decision because of ex parte contacts with members of that agency absent a showing of prejudice. (Fairview Area Citizens Taskforce v. IPCB (3d Dist. 1990), 198 Ill. Ap. 3d 541, 555 N.E.2d 1178, 1183, citing, Waste Management of Illinois v. PCB (1988), 175 Ill. App. 3d 1023, 530 N.E.2d 682, 697-80.) "Moreover, existence of strong public opposition does not render a hearing fundamentally unfair where ... the hearing committee provides a full and complete opportunity for the applicant to offer evidence and support its application." (Id.) Thus, while ex parte communications to Village members in their adjudicative capacity are improper, there must be a showing of prejudice. (Id.)

The Board finds that Land and Lakes was given every opportunity to be heard and to present evidence in support of their application at the hearings. Additionally, Pakula testified that all but one of the phone calls she received were against siting the landfill. (Tr. at 144.) She also testified that these phone calls in no way prejudiced her decision. (Tr. at 146.) The record does not demonstrate prejudice resulting from the phone calls received by Pakula and, therefore, Land and

Lakes' attempt to have the Village's decision reversed on this basis fails.

De Novo Review on Second Vote

Finally, Land and Lakes argues that the Village erred by conducting a de novo review on remand rather than merely clarifying its first vote. (Pet. Brief at 7-11.) Again, Land and Lakes' contention is based upon its position that the Board's hearings in the instant case establish that the first vote was actually a vote to grant approval subject to Condition 6. Given that the second vote is clearly a vote denying site approval, Land and Lakes asserts that the Village improperly voted de novo as evinced by the changed vote. In support of its contention that an improper de novo vote was taken, Land and Lakes points to the fact that Peterek and Dewald, who were not on the Village Board for the first vote, were allowed to participate on the second vote.

The Board remanded this case because the Village failed to issue a definitive approval (with or without conditions) or a definitive denial of the siting application. (PCB 92-25 (December 6, 1991) at 7.) Because of this confusion, the Board concluded that the Village "did not issue a valid decision ... with the result that the case must be remanded for a clarifying vote." (Id. at 5.) In its order, the Board directed the Village to issue a definitive determination on Criterion 1. (Id. at 11.) If Land and Lakes is contending that de novo means that the Village reviewed the record before casting its second vote, such a procedure is not inconsistent with the remand directive. The Board would view any attempt to supplement the Village record on remand to be an improper de novo review, but the Village was certainly free to review the existing record. To the extent that Land and Lakes contends that an improper de novo review occurred on remand as evinced by a "change" in the Village's vote, as noted above the Board will not consider any testimony relating to the first vote because such testimony is both irrelevant and an improper probe into the mind of the decisionmaker. The Board is not concerned with whether the second vote is "changed" from the first vote because the Board has already determined that it could not decipher the meaning of the first vote. In light of the confusion surrounding the first vote, any attempt to assess whether any change occurred is irrelevant.

As to Land and Lakes' claim that Peterek and Dewald should not have participated in the second vote, no such objection was made at the Village proceeding. Generally, a failure to object at the original proceeding constitutes a waiver of the issue on appeal. (E & E Hauling (1985), 481 N.E.2d at 666.) Land and Lakes did not object to Dewald's or Peterek's participation in the second vote. Any claim that such participation constituted an impermissible de novo vote on remand should have been raised

at the January 8, 1992 Village meeting. Land and Lakes' failure to raise this objection constitutes a waiver of the issue.

Additionally, if no waiver exists, the Board notes that the Village Board is a continuing body, the existence of which never ceases by reason of a change in membership. (Roti v. Washington (1st Dist. 1983), 114 Ill. App. 3d 958, 450 N.E.2d 465, 473.) Given that the make-up of the Village Board changed after the first vote, the fact that the record was available for Peterek's and Dewald's review renders their participation in the second vote valid. (Waste Management of Illinois v. PCB (1984), 123 Ill. App. 3d 1075, 463 N.E.2d 969.)

In summary, the Board finds no fundamental unfairness in the Village's January 8, 1992 proceeding.

The Board must also address whether the proceedings leading to the first vote in December 1990 were fundamentally fair as this issue was not reached in either of the Board's opinions in PCB 91-7. Land and Lakes contends that the proceedings were fundamentally unfair for the following reasons: (1) the Village is constitutionally disqualified from acting in a quasi-judicial capacity, and, therefore, the Section 39.2 siting proceedings are fundamentally unfair by definition; (2) Land and Lakes was not given the opportunity to introduce testimony on the reasonableness or necessity of Condition 6; and (3) improper evidence was considered by the Village.[5]

Regarding Land and Lakes' constitutional challenge, the Board ruled in its August 26, 1991 opinion and order that it would construe Section 39.2 of the Act as constitutional until the courts hold otherwise. (PCB 91-7 at 7.) The Board adheres to this ruling and rejects Land and Lakes' challenge to the constitutionality of Section 39.2.[6]

Land and Lakes contends that the proceeding was fundamentally unfair because it was not given the opportunity to present testimony on the reasonableness or necessity of Condition 6. As the Board noted in its prior decisions in PCB 91-7, the record contained many inconsistencies as to the Village's first

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[5] In assessing the fairness of the first proceeding, the Board relies upon those arguments presented by the parties in post-hearing briefs submitted in PCB 91-7.

[6] The Board grants Land and Lakes' May 14, 1992 motion for leave to amend its post-hearing brief to include its constitutional challenge to the siting procedures which had been raised previously in PCB 91-7. No response objecting to this motion was filed by respondent or the intervenor.

vote and the attachment of conditions. Because no such condition is attached to the Village's second finding on criterion 1, this issue is moot.

Land and Lakes asserts that the proceedings were fundamentally unfair because the Village was allowed to consider material which was never introduced into evidence. Land and Lakes admits that, pursuant to the Village's ordinance governing siting proceedings, all documentary evidence is to be submitted the first day of hearing. The record establishes that the Village Clerk distributed these documents to the trustees by the third day of hearing. (May 3, 1991 Tr. at 17-18; C-2497-3433.) Land and Lakes argues that these documents should not have been available to the trustees because they were never formally introduced into the record. In particular, Land and Lakes' relies on a public petition against siting the landfill expansion which was submitted the first day of hearing and documents which it asserts suggest that the facility would not protect the public health safety and welfare and suggesting that the Village lacked jurisdiction over the application. (C-3246-3431.)

Initially, the Board finds that the distribution of documents the Village Clerk is apparently consistent with the Village ordinance. Moreover, given that the Village did not find against Land and Lakes on criterion 2, the "public health, safety and welfare criterion", the Board finds the availability of documents suggesting that the proposed facility would not meet this criterion does not establish that the proceeding was fundamentally unfair. Similarly, any documents relating to the Village's jurisdiction cannot be found to have prejudiced Land and Lakes because the Village concluded that it did have jurisdiction to decide the matter.

Lastly, as noted above, the Village trustees are presumed to act without bias and, in the absence of evidence to the contrary. Additionally, the existence of strong public opposition to the expansion does not render the proceeding fundamentally unfair where the applicant is provided a full opportunity to support its application. Therefore, the Board finds that the availabilty of the petition does not render the proceedings fundamentally unfair.

Land and Lakes also relies on the inclusion of an advisory referendum placed on the Village ballot for a primary election held March 20, 1990. (C-2874-75) and subsequent knowledge that the outcome of this referendum was that many voters disapproved of siting in support of its claim of fundamental unfairness. However, the Board finds this information to fall within the purview of the law discussed above regarding the petition. The Board concludes that Land and Lakes fails to establish any prejudice resulting from inclusion of the referendum ballot in the Village record.

Land and Lakes also contends that Will County, as an objector, "took part in an active campaign to deprive petitioners of fundamentally fair proceedings." (Pet. Brief PCB 91-7 at 42.) In particular, Land and Lakes contends that Will County's public comment should have been stricken from the record and points to "Will County's inability to play fair" as evinced by its attachment of a copy of a complaint to its "Proposed Findings of Fact" which was never introduced at hearing. (Id.) However, both of these documents relate to the issue of whether the Village had jurisdiction. Again, given that the Village found that it did indeed have jurisdiction, Land and Lakes incurred no prejudice from the submittal of these documents.

Land and Lakes asserts that the Village hearing officer should have refused to accept Will County's "Proposed Findings of Fact" (in essence, this is Will County's brief filed after the conclusion of the Village hearings) (C-3643-3671) because the brief was filed late "thus hampering [Land and Lakes] effort to respond". (Id.) The record establishes that Land and Lakes did file a response to Will County's brief. (C-3722-62.) Land and Lakes correctly notes that Will County's brief does not contain a proof of service so that it is impossible to determine what date Land and Lakes received the County's brief. (C-3643-71.) The record does indicate that the Village received Will County's brief on November 1, 1990. (C-3644.) Land and Lakes makes no assertion as to when it received the County's brief. The Board cannot find the proceeding fundamentally unfair simply because a post-hearing brief was received late, particularly where the complaining party does not state how late the brief was and where that party was able to file a response.

Land and Lakes' final argument regarding Will County is that its counsel failed to inform the Village that the County was prosecuting a suit to close the Wheatland Prairie Landfill in violation Rule 3.3 of the Illinois Rules of Professional Conduct. Initially, the Board notes that it does not have the authority to enforce the rules of professional conduct. Additionally, the record establishes that such information was included in the record as a result of Land and Lakes' motion to supplement the record. (C-4110-24.) Consequently, Land and Lakes suffered no prejudice as a result of Will County's alleged failure to disclose this information.

Land and Lakes also challenges the fairness of the Village's proceedings on the basis of alleged ex parte contacts. Land and Lakes notes that the record establishes that trustees received threats (Strobbe Dep. at 8, Stoppenbach Dep. at 6-7, 21) and numerous telephone calls in opposition to the expansion. Additionally, Land and Lakes points to trustees who engaged in personal conversations with landfill opponents, contacts which exposed trustees to Will County's position on need and trustees awareness of the media coverage of the siting proceeding.

As noted above, a local siting body's decision will not be reversed for ex parte contacts absent a showing of prejudice. (E & E Hauling (1985), 451 N.E.2d at 571, aff'd 481 N.E.2d 664.) While ex parte contacts are discouraged, courts have recognized that "ex parte communications are inevitable given a [Board] member's perceived legislative position, albeit in these circumstances, they act in an adjudicative role as well." (Waste Management (2d Dist. 1988, 530 N.E.2d at 698.) Consequently, as long as the party was given a fair opportunity to be heard and present evidence during the proceedings, the decision will not be overturned. (Fairview Area Citizens Taskforce (3d Dist. 1990), 555 N.E.2d at 1183.)

The voluminous Village record establishes that Land and Lakes was afforded the opportunity to be heard and to present evidence in support of its siting application. The Board finds that Land and Lakes has failed to establish prejudice resulting from the ex parte contacts.

In summary, the Board finds no fundamental unfairness in the Village's proceedings leading to the first vote.

CHALLENGED CRITERIA

Land and Lakes challenges the Village's finding that it failed to meet its burden of establishing that the facility is necessary to accommodate the waste needs of the area it is intended to serve. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039.2(a)(1).)[7] As noted above, the Board must review the Village's decision on criterion 1 to determine if it is against the manifest weight of the evidence.[8]

The area intended to be served by the landfill expansion is northern Will County, the extreme southeastern portions of DuPage County and the far western communities of Cook County. (C-014,

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[7] Land and Lakes does not address this issue in its brief filed in PCB 92-25, but incorporates its argument on criterion 1 made in its brief in PCB 91-7.

[8] In reaching its determination, the Board will not consider any written findings of fact adopted by the Village on the first vote because that vote is not relevant to the instant proceeding. (C-4354-72.) As the Board noted in its December 6, 1991 opinion and order, the record in PCB 91-7 reveals many contradictions between the actions taken by the Village at its December 12, 1990 meeting and its written account of those actions. (PCB 91-7 (December 6, 1991) at 6.)

C-070, C-7556-57.)[9] Charles Haas, an environmental consultant, prepared a study for Land and Lakes on the need for the facility. (C-060-066, C-7552.) Haas' study concludes that the facility is needed. (Id.) Haas reached this determination by calculating the 1990 base population for the service area and waste generation rates as reported by the IEPA to arrive at an estimate of waste generation within that service area. (C-7552-53.) Also using IEPA data, Haas examined the individual disposal facilities within the service area, the lifetime of these facilities and the yardage of the facilities currently accepting waste. (C-7553.) Haas' study considered the existing Land and Lakes Willow Ranch facility, the CDT Landfill in Joliet, ESL and the Greene Valley facility as active landfills in calculating need. (C-7600.) Haas stated that Greene Valley receives 3.7 million cubic yards of waste per year and that 1.2 million cubic yards could be attributed to waste generated by Land and Lakes' proposed service area. (C-7561-63.) Haas compared the waste generation figure of 1.8 million (C-75620 to the disposal capacity of the existing facilities and concluded that the service region would be a net exporter of waste by the end of 1992. (C-7553-54, 7560.) The proposed facility would have a capacity of 7-8 million cubic yards. (C-7560.)

On cross-examination, Haas states that he did not compute the geographic size of the service area, nor did he compute the most distant point from the facility to the outward boundary of the service area. (C-7557.) Haas testified that he did not know where counties within the service area are currently sending their waste. (C-7580, 7591-95.) He also stated that while the Wheatland Prairie facility located in Will County, the Robbins incinerator and the Gallatin National Balefill in Fulton County are licensed, he did not rely on these facilities in calculating need. (C-7583, 7588, 7589-90, 7601, 7605.) Haas testified that Wheatland was not considered because it had voluntarily shut-down and did not expect that it would reopen, although he admitted it had available space and could be reopened at any time. (C-7583, 7609, 7619.) Haas did not rely on the Robbins incinerator because it is small and its impact on need is, therefore, minimal (C-7588) and because of the moratorium on incinerators in Illinois (C-7609). Haas also did not consider any Kane County landfills in calculating need because they were "too far away". (C-7596.) Although Haas admitted that Greene Valley had ten years capacity remaining, he did not believe that Greene Valley would receive the excess waste needs of the service area (i.e., 1.8 million - 1.2 million = 600,000 cubic yards) because excessive use of the facility would not be financially advantageous. (C-7564-66.)

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[9] "C- " refers to the Village Board record.

Rolf C. Campbell, a planning and zoning consultant, also testified as to need on behalf of Land and Lakes. (C-7994.) Campbell opined that the facility is needed based upon his "general knowledge of the area", the "growth trend happening" in DuPage, Will and Cook Counties and his opinion that existing facilities cannot deal with the growth. (C-8001-02.)

On cross-examination, Campbell testified that he did not do a need study for the Land and Lakes' facility and that his testimony was based upon a study he had prepared the previous year for the CDT facility located in Joliet which had a different service area. (C-8029-31.) Campbell did not know how much waste was generated in the proposed service area, nor was he aware of the garbage haulers or landfills providing service to the area. (C-8083-84.)

Jim Ambroso, vice president of environmental affairs for Land and Lakes, also testified as to need. (C-8249.) He testified that the service area was defined by looking at the communities that used the existing Land and Lakes' Willow Ranch facility for the past nine years, other available facilities and the customers and scavengers who have expressed a desire to come to the facility in the future. (C-8264-65, 8276-77.) Ambroso stated that the proposed facility was designed to accept 1.3 million cubic yards per year. (C-8277.) Ambroso testified that the Wheatland facility is closed, that the Robbins incinerator was not yet operational and the Gallatin facility cannot guarantee capacity to contract haulers. (C-8265-69.)

Will County presented the testimony of Kevin Standbridge, solid waste director for the County. (C-9035.) Standbridge testified that he was involved in the preparation of Will County's "Interim Solid Waste Management Plan" and the "Solid Waste Mangement Plan Public Hearing Draft of September 1990". (C-4497-4819, C-9044, C-9056-58.) Standbridge testified that Will County's September 1990 proposed solid waste management plan, which contains a needs analysis, was in the 90-day public comment period. (C-6596-6678, C-9056.) In preparing the proposed plan, haulers were surveyed to calculate waste generation rates and those rates were compared to the Northeastern Illinois Planning Commission's estimates of population growth in the county to arrive at an estimate of the waste to be generated in Will County in the next 20 years. (C-4517-32, C-6603-04, C-9058.) The County looked at the remaining capacity of solid waste disposal facilities in the County as reported by IEPA. (C-6608, C-9058.) The County calculated approximately 17.5 million cubic yards of remaining capacity as of March 31, 1990. (C-6608.) Lastly, the County looked at the amount of solid waste being imported into Will County to assess need. (C-6608, C-9059.) The proposed solid waste management plan concludes that "after volume reduction and recycling, capacity for the disposal of 616,000 cubic gateyards of solid

waste will be necessary sometime around 1998." (C-6611.) Standbridge testified that the plan considered the expansion of the CDT landfill in the needs analysis. (C-9059.) Standbridge also stated that the proposed service area of both plans is Will County. (C-9059-60.) Standbridge testified that, based upon information received from IEPA by virtue of a delegation agreement, Waste Management stated in its application to amend its closure/post-closure care plan that Wheatland Prairie's operations were only temporarily suspended. (C-9083.) Stanbridge also testified that the Gallatin Balefill includes Cook, will and DuPage Counties in its service area. (C-9087.) Based upon the above, Standbridge opined that Land and Lakes' proposed facility is not needed. (C-9087-90.)

On cross-examination, Standbridge stated that the projected need date in the plan considers the CDT expansion as being completed before the need will exist in the county. (C-9151-52.) The record indicates that CDT received site approval from the City of Joliet for the expansion and that an application for a development permit was submitted on January 23, 1990 and denied. (C-3765, C-6607.) Standbridge also stated that the Robbins incinerator had obtained a development permit from IEPA and that it was his belief that the moratorium on incinerator construction exempted such permitted facilities. (C-9146.)

Land and Lakes contends that the Will County's assessment of need is flawed because it considers Greene Valley, Wheatland Prairie, the CDT expansion and the Robbins incinerator in assessing need. Regarding CDT, Land and Lakes contends that the expansion does not have an operating permit and should not be considered pursuant to Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill. App. 3d 994, 544 N.E.2d 1176). Tate, relying on Waste Management of Illinois v. Pollution Control Board (2d Dist. 1988), 175 Ill. App. 3d 1023, 530 N.E.2d 682, 690, recognizes that it is appropriate for a county board to consider proposed facilities, whether in or out of the county, if such facilities will be capable of handling a portion of the waste disposal needs of the county and will be capable of doing so prior to the projected expiration of current disposal capabilities within the county in assessing need. (544 N.E.2d at 1193.) The court upheld the Board's determination that it was improper, in assessing need, to consider an offer of proof that a landfill located within 15 miles of the county where the facility is located had obtained siting approval but no IEPA permits with a 50-year capacity. (544 N.E.2d at 1193.)

Under Tate, it appears that Will County's analysis of need is flawed. However, Will County is not the decisionmaker. Therefore, the fact that Will County's assessment of need may be somewhat flawed does not necessarily lead to the conclusion that the Village's decision on criterion 1 is against the manifest

weight of the evidence as the record contains other evidence of need.

Regarding Will County's consideration of the Wheatland Prairie facility in assessing need, the record establishes that the facility has been voluntarily closed, but has a remaining capacity and may be reopened at any time. There is conflicting testimony as to the likelihood of the facility reopening.

It does not appear that Will County's assessment of need is fatally flawed because it considered the Robbins incinerator in assessing need. The record establishes that there are differing opinions at to whether the incinerator's disposal capacity is too minimal to impact need and as to the effect of the construction moratorium. Additionally, the record indicates that the incinerator has been permitted.

Land and Lakes also contends that Will County should not have used the Greene Valley landfill in assessing need in its proposed solid waste management plan because this facility will be available exclusively for waste generated from DuPage County. Land and Lakes admits that this exclusive arrangement has not been finalized. The record does indicate that no formal executed agreement exists establishing that Greene Valley would accept only DuPage County waste and that Haas considered Greene Valley as an active facility within the proposed service area. (C-4194-96, C-9896-97, C-9917-18, C-9931.) Therefore, it does not appear to be erroneous for Will County to have utilized Greene Valley's remaining capacity in assessing need.

The appellate court has held that an applicant for siting approval need not show absolute necessity in order to satisfy criterion 1. (Clutts v. Beasley, 541 N.E.2d 844, 846 (5th Dist. 1989); A.R.F. Landfill v. PCB, 528 N.E.2d 390, 396 (2d Dist. 1988); WMI v. PCB, 461 N.E.2d 542, 546 (3d Dist. 1984).) The Third District has construed "necessary" as connoting a "degree of requirement or essentiality." (WMI v. PCB, 461 N.E.2d at 546.) The Second District has adopted this construction of "necessary", with the additional requirement that the applicant demonstrate both an urgent need for, and the reasonable convenience of, the new facility. (Waste Management v. PCB, 530 N.E.2d 682, 689 (2d Dist. 1988; A.R.F. Landfill v. PCB, 528 N.E.2d at 396; WMI v. PCB, 463 N.E.2d 969, 976 (2d Dist. 1984.).) The First District recently stated that these differing terms merely evince the use of different phraseology rather than advancing substantively different definitions of need. (Industrial Fuels & Resources/Illinois, Inc. v. IPCB (1st Dist. March 19,1992), No. 1-91-0144 slip op. at 19.)

After reviewing the record, the Board finds that the Village could have reasonably reached its conclusion that Land and Lakes failed to meet its burden of establishing that the facility is

necessary to accommodate the waste needs of the service area. The Board finds that Will County's assessment of need is not indicative of whether Land and Lakes' facility is needed because it utilized Will County alone as the proposed service area. An assessment of need based on a totally different service area than that proposed by the applicant is not a useful indicator of need. As previously noted, the Board also finds that Will County's assessment of need is flawed because it improperly relies upon the speculative CDT expansion in assessing need. However, the record does contain testimony elicited on cross-examination of Land and Lakes' witnesses on need which casts doubt on the validity of the conclusions of those witnesses as well as on Haas' study. In particular, the Village could have reasonably concluded that the Haas' study did not adequately consider the Robbins Incinerator Wheatland Prairie and Gallatin National Balefill in assessing need. Unlike Industrial Fuels & Resources/Illinois, Inc. v. PCB (1st Dist. March 19, 1992), No. 1-91-0144 slip op. at 22, 26, here the Village could have concluded, based upon cross-examination, that the applicant's assessment of need was "materially flawed". Therefore, based upon the manifest weight standard of review, the Village's decision denying siting approval must be affirmed.

ORDER

For the foregoing reasons, the Board concludes that the decision of the Village of Romeoville finding that Land and Lakes did not meet its burden of establishing need is not against the manifest weight of the evidence. Therefore, the Village's denial of siting is affirmed.

IT IS SO ORDERED.

J. Theodore Meyer concurs.

J. Anderson dissents.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 4th day of June, 1992 by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board