ILLINOIS POLLUTION CONTROL BOARD
July 1, 1993

ST. CLAIR COUNTY, Petitioner, v. VILLAGE OF SAUGET, VILLAGE OF SAUGET PRESIDENT and BOARD OF TRUSTEES, and G.J. LEASING COMPANY, INC., a corporation d/b/a CAHOKIA MARINE SERVICE, Respondents.	)	PCB 93-51 (Landfill Siting Review)

JAMES T. SCOTT, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF PETITIONER;

JOSEPH G. NASSIF AND LINDA W. TAPE, of COBURN, CROFT, AND PUZELL, APPEARED ON BEHALF OF RESPONDENT G.J. LEASING COMPANY, INC.; and

HAROLD G. BAKER APPEARED ON BEHALF OF RESPONDENT VILLAGE OF SAUGET.

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

This matter is before the Board on St. Clair County's (County) March 11, 1993 petition for review. The County filed an amended petition on May 5, 1993.[1] The County seeks review of the Village of Sauget's (Sauget) February 2, 1993 decision granting local site approval to G.J. Leasing Company, Inc., d/b/a Cahokia Marine Service (CMS) for a waste transfer station. A public hearing on the petition for review was held on May 7, 1993, in Sauget, Illinois.

The Board's responsibility in this matter arises from Section 40.1 of the Environmental Protection Act (Act). (415 ILCS 5/40.1 (1992).) The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the local siting approval provision for new regional pollution control facilities, set forth in Section 39.2 of the Act. More generally, the Board's

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[1] There were several preliminary motions in this case, including two motions to dismiss. Those matters are fully discussed in the Board's orders of April 8, 1993, May 5, 1993, and May 20, 1993, and will not be reiterated here.

functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Board's sister agency, the Illinois Environmental Protection Agency (Agency) is responsible for carrying out the principal administrative duties, inspections, and permitting. The Agency does not have a statutorily-prescribed role in the local siting approval process under Sections 39.2 and 40.1, but would make decisions on permit applications submitted if local siting approval is granted and upheld.

PROCEDURAL HISTORY

CMS filed its application for local siting approval for a waste transfer station with Sauget on August 7, 1992. (C1-C174.) CMS subsequently filed a supplemental request on November 4, 1992. (C181-C361.) CMS requested local site approval for a waste transfer facility to handle non-hazardous special and municipal waste. The transfer station would be located on CMS' existing bulk transfer terminal facility, on the eastern bank of the Mississippi River. (C187-C188.) Sauget held a public hearing on CMS' application on November 10, 1992. (C363-C419.) On February 2, 1993, Sauget adopted a resolution granting site approval to CMS. (C510-C529.) The County filed this petition for review with the Board on March 11, 1993, and filed an amended petition on May 5, 1993.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. (415 ILCS 5/39.2 (1992).) 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.

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. However, where an applicant made a prima facie showing as to each criterion and no contradicting or impeaching evidence was offered to rebut that showing, a local government's finding that several criteria had not been satisfied was against the manifest weight of the evidence. (Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board (1st Dist. 1992), 227 Ill.App.3d 533, 592 N.E.2d 148.)

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.) The County has not raised any jurisdictional issues, but has raised a question of fundamental fairness. Because the issue of fundamental fairness is a threshold matter, the Board will consider that issue first.

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires the Board to review the proceedings before the local decisionmaker to assure fundamental fairness. In E & E Hauling, the appellate court found that although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. (E & E Hauling, 451 N.E.2d at 564; see also FACT, 555 N.E.2d at 661.) Due process requires that parties have an opportunity to cross-examine witnesses, but that requirement is not without limits. Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois Inc. v. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682, 693.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of ex parte contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163.)

The County contends that the use of a videotape at the local hearing violated fundamental fairness. The videotape was presented by CMS, and portrayed the transfer of New York municipal waste from railcars to trucks at CMS in the summer of 1992. The videotape was produced by the Agency, and edited with its permission. CMS submitted the videotape to show a municipal solid waste operation in progress. (C367; C373-C383.) The County argues that fundamental fairness was violated in three ways: 1) use of the videotape foreclosed any opportunity for cross examination of the persons appearing on the tape; 2) the videotape had been edited to eliminate reference to the fact that compliance with Agency requests had been obtained by injunctive relief from the circuit court, and that any disclaimer which preceded the tape was insufficient to remedy this error; and 3) the use of any videotape without a proper foundation is fundamentally unfair.

In response, CMS contends that the information on the tape was more in the form of a pictorial presentation or public comment than testimony, and points out that the Board has previously upheld the limited use of unsworn "testimony" as public comment. (Industrial Fuels & Resources/Illinois v. City of Harvey (September 27, 1990), PCB 90-53, rev'd on other grounds 227 Ill.App.3d 533, 592 N.E.2d 148.) CMS also argues that the record clearly shows that the edited videotape was indeed a full and fair representation of the facts, and states that the County's own witness stated at the Board hearing that there was nothing edited from the tape which was relevant to any of the statutory criteria. (Tr. at 39.) As to the County's improper foundation argument, CMS maintains that this argument was not raised at either the local hearing or in the petition for review, so that the argument cannot be raised now.

After reviewing the transcript of the local hearing, the Board concludes that the County has waived any claim that the use of the videotape was fundamentally unfair. There was no objection, made by the County or anyone else at the hearing, to the use of the videotape.[2] (C367, C369-C382.) At the conclusion of the videotape, Sauget's village attorney asked if there were any questions, and received no response. (C382.)

It is well-settled that a failure to object at the original proceeding generally constitutes a waiver of the right to raise an issue on appeal. (E & E Hauling, Inc. v. Pollution Control Board (1985), 107 Ill.2d 33, 481 N.E.2d 644, 666.) The

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[2] The County was represented at the local hearing by a county board member. As CMS points out, the County did not present any witnesses at the hearing, nor cross-examine any witnesses.

requirement that an objection be raised at the local level has been applied in the context of claims of bias or predisposition by local decisionmakers (FACT, 555 N.E.2d at 1180-1181; Waste Management of Illinois Inc. v. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682, 695; A.R.F. Landfill v. Pollution Control Board (2d Dist. 1988), 174 Ill.App.3d 82, 528 N.E.2d 390, 394), and to objections that fundamental fairness was violated by the appearance of a county assistant state's attorney on behalf of an objector (Waste Management of Illinois Inc. v. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682, 694). The Board finds that the requirement also applies to claims that the admission of certain evidence violated fundamental fairness. An objection must be raised at the local level, or the claim will be waived at the Board level.[3] Therefore, we find that the County waived its claim of violations of fundamental fairness by failing to raise any type of objection to the videotape at the local hearing.

CHALLENGED CRITERIA

As noted above, Section 39.2(a) of the Act provides that local decisionmakers are to consider as many as nine criteria when reviewing an application for siting approval. When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. The County has challenged Sauget's findings that criteria one (necessity) and eight (consistency with any solid waste management plan) have been satisfied.

Need

Section 39.2(a)(1) states that local siting approval shall be granted only if the local decisionmaker finds that "the facility is necessary to accommodate the waste needs of the area it is intended to serve." Sauget found that this criterion had been satisfied. (C519.) The County contends that this decision was against the manifest weight of the evidence, because the proposed service area was never conclusively defined. The County notes that it is the applicant, not the local decisionmaker, who defines the proposed service area. (Metropolitan Waste Systems, Inc. v. Pollution Control Board (3d Dist. 1990), 201 Ill.App.3d 51, 558 N.E.2d 785.) However, the County argues that the service area in this case was defined in terms of regions and not in terms of specific governmental corporate entities from which quantifiable data regarding waste could be assembled. The County

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[3] We note that the County does not claim that it was in some way prevented from raising an objection to the videotape, or that an exception to the general rule of waiver applies in this case.

maintains that the service area must be clearly defined, and that failure to do so would allow an applicant to demonstrate compliance with this criterion by mere testimony that there is a generalized need for the facility. Thus, the County argues that because the proposed service area was never clearly defined, Sauget's decision that criterion one was met is against the manifest weight of the evidence.

In response, CMS contends that it defined the proposed service area in its application as "the waste transfer station may handle municipal solid waste ('MSW') from areas outside and inside the State of Illinois, including the Village of Sauget and proximate areas" (C8, C189), and that the application also stated "[t]he transfer station at [CMS] would serve the need for a waste transfer station for waste moving into and around Illinois because it is centrally located". (C189.) CMS also points out that one of its experts stated that "[t]he landfills the transfer facility is designed to serve are the central and southern portion of Illinois". (C399.) CMS further states that its expert testified that he believed that the proposed facility met the requirements of Section 39.2(a)(1). Finally, CMS maintains that no evidence was offered at the local level which called the definition of the service area into question. Thus, CMS argues that the County has not met its burden of proving that Sauget's decision on criterion one was against the manifest weight of the evidence.

After reviewing the record and the arguments of the parties, the Board finds that Sauget's decision was not against the manifest weight of the evidence. It is true that this service area is loosely defined. However, CMS specifically refers to "areas outside and inside the State of Illinois", "waste moving into and around Illinois", and landfills in the central and southern portions of Illinois. These statements, coupled with expert testimony that the facility met the need criterion, are sufficient to support Sauget's finding. The Board has previously upheld a service area defined as 63% from a 50-mile radius of the facility, with the remainder from "greater distances." (Waste Management of Illinois v. Will County (PCB 82-141), April 7, 1983, aff'd Waste Management of Illinois v. Pollution Control Board (3d Dist. 1984), 122 Ill.App.3d 639, 461 N.E.2d 542.) The Board also rejected arguments that the service area was "too large." (Clean Quality Resources, Inc. v. Marion County Board (August 26, 1991), PCB 91-72; Industrial Fuels & Resources/Illinois, Inc. v. City of Harvey (September 27, 1990), PCB 90-53, rev'd on other grounds Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board (1st Dist. 1992), 227 Ill.App.3d 533, 592 N.E.2d 148.)

The Board again emphasizes that we are not to reweigh the evidence, and that a decision is against the manifest weight of the evidence only 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.) We cannot say that the evidence as to the service area is so lacking as to render Sauget's decision against the manifest weight of the evidence.

Solid Waste Management Plan

Section 39.2(a)(8) of the Act states that local siting approval shall be granted only if the local decisionmaker finds that "if the facility is to be located in a county where the county board has adopted a solid waste management plan ... the facility is consistent with that plan." The counties of Madison, St. Clair, and Monroe have adopted a joint solid waste management plan. Sauget specifically found that the proposed facility does not conflict with that plan, and that the proposed facility is consistent with the plan. (C521.)

The County contends that Sauget's finding that the proposed facility is consistent with the solid waste management plan is against the manifest weight of the evidence. The County states that although Sauget's resolution granting siting approval refers to testimony and comment from the County, it does not refer to a comment from the Madison County Board. The County maintains that this comment objects to the siting of the facility on the grounds that it is inconsistent with the solid waste management plan. (C433-C436.) The County asserts that Sauget's failure to address Madison County's comment, while noting that the County did not object (at the local level) on grounds of inconsistency with the plan, "suggests" that Sauget failed to consider Madison County's objection. Thus, the County argues that Sauget's decision "to rely upon the opinion of [CMS'] expert without fully considering and addressing Madison County's allegations of inconsistency was against the manifest weight of the evidence". (Pet. reply brief at 7.)

In response, CMS argues that even viewing the evidence in the record in a light most favorable to the County, at best, conflicting views were presented to Sauget concerning consistency with the solid waste management plan. CMS states that its application for siting approval indicates that the proposed facility is consistent with the plan (C18, C196-C197), and that one of its experts testified as to his opinion that the proposed facility is consistent with the plan (C405). CMS maintains that conflicting testimony is not a basis for this Board to reverse a local decisionmaker's finding. (Waste Hauling, Inc. v. Macon County Board (May 7, 1992), PCB 91-223.) Thus, CMS contends that the County has not met its burden to prove that Sauget's decision is against the manifest weight of the evidence.

The Board finds that Sauget's decision that the proposed facility is consistent with the solid waste management plan is

not against the manifest weight of the evidence. As CMS points out, it presented testimony that the facility is consistent with the plan. (C18; C196-C197; C405.) The only evidence that the County has pointed to against that conclusion is a letter from the Madison County Board, received as a comment in the local record. That letter, while mentioning the plan and voicing a number of concerns about the siting of the proposed transfer station, does not specifically state a belief by Madison County that the facility is inconsistent with the solid waste management plan. (C433-C436.) Even assuming that this letter creates conflicting evidence on the issue of consistency, we cannot reverse merely because the local decisionmaker credits some evidence over other evidence. (FACT, 555 N.E.2d at 1184; Tate, 544 N.E.2d at 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.)

The Board rejects the County's claim that Sauget's mention of testimony by the County without referring to Madison County's comment "suggests" that Sauget did not consider that comment. There is no requirement that a local decisionmaker fully discuss all evidence in the record, nor provide an analysis of its decision on each criterion. The Act requires only that the local decisionmaker issue a written decision, setting forth its findings on each applicable criterion. (415 ILCS 5/39.2(e) (1992).) Madison County's letter is contained in the local record as a public comment. The County has not alleged that the letter was not available to the individual village board members, or given any other proof that Madison County's comment was not considered. We find no evidence that Sauget failed to consider all testimony and comments presented during the course of the local proceedings.

CONCLUSION

In sum, we find that the County waived its claim that fundamental fairness was violated by the use of a videotape at the local hearing, by failing to previously raise any objection to the use of that tape. After reviewing the record and the parties' arguments, the Board finds that Sauget's decision that the proposed facility meets criteria one and eight is not against the manifest weight of the evidence. Thus, the Board affirms Sauget's decision granting local siting approval to CMS.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The Board finds that St. Clair County waived its claim that fundamental fairness was violated by the use of a videotape at the local hearing, by failing to previously raise any objection to the use of that tape. The Board also finds that the decision of the Sauget Village Board that the proposed facility meets criteria one and eight is not against the manifest weight of the evidence. Thus, the Board affirms Sauget's February 2, 1993 decision granting local siting approval to CMS.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 1st day of July, 1993, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board