

ILLINOIS POLLUTION CONTROL BOARD
April 11, 1991

FRANK WHITLOCK, PATRICIA)	
WHITLOCK, JANET BERGMAN,)	
MARVIN SAVAGE, SHIRLEY SAVAGE,)	
Individually and in Their)	
Capacity as Representatives)	
of an Organization Known as)	
CONCERNED CITIZENS AGAINST)	
LANDFILL,)	
)	
Petitioners,)	
)	
v.)	PCB 90-231
)	(Landfill Siting)
)	
MONTGOMERY COUNTY BOARD OF)	
SUPERVISORS, ROBERT BISHOP,)	
and ARMINDA BISHOP,)	
)	
)	
Respondents.)	

RICK VERTICCHIO, PHELPS, KASTEN, VERTICCHIO, & RUYLE, APPEARED ON BEHALF OF THE PETITIONERS; and

VAL C. SIMHAUSER, SIMHAUSER LAW OFFICE, APPEARED ON BEHALF OF THE BISHOPS

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

This matter comes before the Board on a third-party appeal filed December 17, 1990 by Frank Whitlock, Patricia Whitlock, Janet Bergman, Marvin Savage, and Shirley Savage individually and in their capacity as representatives of an organization known as Concerned Citizens Against Landfill. Petitioners contest the decision of the Montgomery County Board of Supervisors (County), in which the County granted site location suitability approval for a regional pollution control facility (RPCF). This appeal is brought pursuant to Section 40.1 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1989, par. 1001 et seq.) (Act). Respondents, Robert Bishop and Arminda Bishop (Bishops), were the applicants.

Petitioners seek to have the Board reverse the County's decision for the following reasons: 1) that the County lacked jurisdiction because of notice defects; 2) that the finding of the County that the proposed facility is designed, located and proposed to be operated in such a manner that the public health, safety, and welfare will be protected is against the manifest weight of the evidence (Section 39.2(a)(2)); and 3) that the

finding of the County that the traffic patterns to and from the facility are so designed as to minimize the impact on the existing flows is against the manifest weight of the evidence (Section 39.2(a)(6)). For the following reasons, the Board finds that the County lacked jurisdiction to hear this matter. Therefore the decision of the Montgomery County Board of Supervisors is vacated.

PROCEDURAL HISTORY

Petitioners' third-party appeal is in response to the site location approval granted on November 13, 1990 to the Bishops by the County. Hearing before the Board was held on February 22, 1991. Petitioners filed their brief on March 13, 1991 and the Bishops filed their brief on March 19, 1991. The County did not file a brief.

The Bishops own property in Montgomery County which had been used for a sanitary landfill, during the 1980s; however, the site has not been used as a landfill for several years. On June 6, 1990, the Bishops filed an application with the County seeking local siting approval for a landfill on that property. The Bishops had previously closed the landfill on that property and plan to reopen an expanded landfill.

The new expanded facility was to operate on approximately 37 acres and would include a transfer station and recycling center. The facility would be located in rural Montgomery County and would serve Montgomery County and the surrounding area.¹ (CR 5). The application included a narrative description concerning how the applicant would meet each of the nine statutory criteria.

A public hearing was held by the County on September 27, 1990, and the County approved siting on November 13, 1990. On December 17, 1990, the Board received this appeal.

Statutory Background

Public Act 82-682, is codified in Sections 3.32, 39(c), 39.2 and 40.1 of the Act. It vests authority in the county board or municipal government to approve or disapprove the siting request for each new RPCF. These decisions may be appealed to the Board, which derives its authority to review the landfill site location decisions of local governments from Section 40.1 of the Act. The Board's scope of review encompasses three principal areas: (1) jurisdiction, (2) fundamental fairness of the county board's site approval procedures, and (3) statutory criteria for site location

¹ Citations to the Record before the County will be referenced as "CR _____"; citations to the hearing before the Board will be referenced as "Tr. _____".

suitability. Pursuant to Section 40.1(a) of the Act, the Board is to rely "exclusively on the record before the county board or the governing body of the municipality" in reviewing the decision below. However, with respect to the issue of fundamental fairness, the Illinois Supreme Court has affirmed that the Board may look beyond the record to avoid an unjust or absurd result. E&E Hauling, Inc. v. PCB, 116 Ill.App.3d 587, 594, 451 N.E.2d 55 (2d District 1983), aff'd 107 Ill.2d 33, 481 N.E.2d 664 (1985).

Statutory Criteria

Section 39.2 of the Act presently outlines nine criteria for site suitability, each of which must be satisfied (if applicable) if site approval is to be granted. In establishing each of the criteria, the applicant's burden of proof before the local authority is the preponderance of the evidence standard. Industrial Salvage v. County of Marion, PCB 83-173, 59 PCB 233, 235, 236, August 2, 1984. On appeal, the PCB must review each of the challenged criteria based upon the manifest weight of the evidence standard. See Waste Management of Illinois, Inc. v. IPCB, 122 Ill.App.3d 639, 461 N.E.2d 542 (Third District, 1984). This means that the Board must affirm the decision of the local governing body unless that decision is clearly contrary to the manifest weight of the evidence, regardless of whether the local board might have reasonably reached a different conclusion. See E&E Hauling v. IPCB, 116 Ill.App.3d 586, 451 N.E.2d 555 (2nd District 1983); City of Rockford v. IPCB and Frink's Industrial Waste, 125 Ill.App.3d 384, 465 N.E.2d 996 (2nd District 1984); Steinberg v. Petta, 139 Ill.App.3d 503, 487 N.E.2d 1064 (1st District 1985); Willowbrook Motel v. PCB, 135 Ill.App.3d 343, 491 N.E.2d 1032 (1st District 1985); Fairview Area Citizens Task Force v. Village of Fairview, PCB 89-33, June 22, 1989.

Jurisdiction

The notice requirements of Section 39.2(b) are jurisdictional prerequisites to the local county board's power to hear a landfill proposal. The lack of jurisdiction at the county board level made it unnecessary to review petitioners' other arguments in Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill.App.3d 588, 487 N.E.2d 743 (2nd District, 1985). In that case, failure to publish the appropriate newspaper notice 14 days prior to the request for site approval resulted in the court's vacating the county board's decision and the PCB decision upholding it. The court applied the reasoning of Illinois Power Company v. Pollution Control Board, 137 Ill.App.3d 499, 484 N.E.2d 898 (4th District 1985), which found that the PCB's failure to publish notice as required by Section 40(a) of the Act divested it of jurisdiction.

The notice requirements of Section 39.2 are to be strictly construed as to timing, and even a one day deviation in the notice requirement renders the county without jurisdiction.

Browning-Ferris Industries of Illinois, Inc. v. IPCB, 162 Ill.App.3d 801, 516 N.E.2d 804 (5th District 1987).

DISCUSSION

Petitioners argue that the County lacked jurisdiction to hear the application because the notice requirements of Section 39.2(b) of the Act were not met. Section 39.2(b) of the Act provides:

No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirements; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.

Petitioners assert that the Bishops failed to notify "the owners of all property within 250 feet in each direction of the lot line". Specifically, petitioners assert that Marvin and Shirley Savage, who purchased their property from Anthony Leitschuh on February 28, 1989, were not notified. (Pet. Br. 2).

The Bishops refuted this assertion by pointing out that one of the notices was received by Anthony Leitschuh, who had been the owner of the parcel of land adjacent to the Bishops' property. (Resp. Br. p. 2-3). Mr. Leitschuh's name appeared in the "collector's book" for the 1988 taxes due and payable in 1989. (Resp. Ex. 1). The Bishops assert that as of May 7, 1990, the collector's book for the 1988 taxes due and payable in 1989 was the most current record showing the owners' names and addresses. (Resp. Br. 3).

² Petitioners brief will be cited as "Pet. Br. _____". Respondents brief will be cited as "Resp. Br. _____".

Petitioner presented several witnesses at the Board hearing who explained the tax cycle in Montgomery County. There are three cycles involved in the maintenance and processing of tax records in Montgomery County. (Pet. Br. 3). The first cycle involves the Supervisor of Assessment. The Supervisor assists in valuation and compiles information which is logged into a computer system and manually entered in bound volumes. (Pet. Br. 4). Cycle 2 involves the County Clerk who extends the various assessment to each parcel of land. The third cycle is the actual mailing of bills and collection of taxes which is handled by the County Treasurer. (Pet. Br. 4).

Linda Bolton, who is an employee of the Supervisor of Assessments Office, testified that it is a part of her duties to update addresses and names on the tax rolls up to 48 hours prior to the tax rolls being sent out for billing purposes. (Tr. 53-54). Thus, an address or name change can be accomplished at almost any point in the three cycles.

Ms. Bolton also testified that she had completed a change card for the Leitschuh/Savage property on March 16, 1989. (Tr. 44). That card was also introduced into evidence. (Pet. Ex. 4). The card indicates that it is a "Property Transfer Record" and that the property in the name of "Anthony Leitschuh" is changed to "Marvin Savage" for the tax year 1989 payable in 1990. The change card is a record which is kept in the Supervisor of Assessment's office. However, Ms. Bolton also testified that the aforementioned change was logged into the computer record on May 24, 1989. (Tr. 46).

Petitioner also presented, as Exhibit 1, a copy of the deed for the transfer of the property to Mr. and Mrs. Savage from Mr. Leitschuh. That deed indicates that it was recorded in Book 333 at page 166 on February 23, 1989. Thus, almost one year prior to the preparation of the notice list by the Bishops, both the County Clerk's office and the Supervisor of Assessments office had the change of ownership documented in their respective records.

The Bishops included with the application for siting approval a list entitled "Property Owners Adjacent to Robert Bishop's Property". (CR 12). The list states that it was "[o]btained from the Montgomery County Treasurer's office May 7, 1990." (CR 12). Mr. Leitschuh is included on that list; the Savages are not. The Bishops further presented at hearing a copy of a page from the collector's book for 1988 taxes due and payable in 1989. That listing also indicates that Mr. Leitschuh is the owner of the property. (Resp. Ex. 1).

In addition, the Bishops elicited testimony from the County Treasurer, Mr. Ron Jenkins, that it was his opinion that the collector's book and the hard copy of the original tax bill were the "authentic tax record". (Tr. 99). Thus, the Bishops argue that the 1988 collector's book was the authentic tax record in

Montgomery County as of May 7, 1990 and the Treasurer's office is the keeper of the "authentic tax records".

It should be noted that a reading of the testimony presented by Mr. Jenkins indicates that Mr. Jenkins may have been stating that the collector's book for 1988 taxes due and payable in 1989 was the authentic tax record for 1988. (Tr. 99-100). Mr. Jenkins admits there may be a difference between the listings in the 1988 collector's book and the ownership as of May 7, 1990. (Tr. 101).

The Bishops did not present any evidence as to who had prepared the list of adjacent property owners filed with the application. (CR 12). In fact, Mr. Jenkins testified that the list was not prepared by either himself or his office. (Tr. 83-84). Petitioners point out in their brief that "had the respondents made inquiry of either the Supervisor of Assessments' Office or the County Clerk's Office based upon examination of the tract index, information regarding the transfer of ownership could have readily been obtained." (Pet. Br. 6).

The issue in this case hinges on the phrase in Section 39.2 (b) of the Act "authentic tax record". The Bishops, in their brief, point out that:

This is not a case where the siting applicants failed to send notice, or where the timing or content of the notice was defective, or where the adjoining owner had no notice. Instead, the real issue here is whether the phrase 'authentic tax records' requires a siting applicant to look to sources other than a county treasurer's records, in determining to whom notice should be sent. (Resp. Br. 2).

The Bishops argue that the only reasonable meaning that can be given to the phrase "authentic tax records" is "those records that must be maintained by the county treasurer, and which show the names and addresses of the recipients of the most recent real estate tax bills." (Resp. Br. 2).

The petitioners, however, seem to be asserting that because the tax preparation in Montgomery County is a three cycle process, the applicant must check with all three offices to receive the "authentic tax record". The petitioners in their brief state:

Each phase or cycle is dependent upon the previous cycle for much or all of its information. (cite omitted) Information regarding transfers of property are updated

continually by personnel of the Assessor's Office even during cycles 2 and 3 notwithstanding the Assessor's Office duties in cycle 1 pertaining to evaluations having been completed. (Pet. Br. 4-5).

Both parties cite extensively to statutory and case law in support of their positions. Petitioners rely on the case law discussed above regarding jurisdiction as well as distinguishing this case from two previous Board decisions. Those two decisions are DiMaggio v. Solid Waste Agency of North Cook County, PCB 89-138, (January 11, 1990) (DiMaggio) and Wabash & Lawrence Counties Taxpayers & Water Drinkers Association v. Wabash County, PCB 88-110, (May 25, 1989) (Wabash). In distinguishing DiMaggio, petitioners point out that the Board relied on the County Clerk's testimony that the Clerk was the keeper of the "authentic tax record". (Pet. Br. 10). In this case, according to the Petitioners, the testimony indicates that the tax cycle is a three step process. (Pet. Br. 11). Petitioners state that "[i]t has been established in the record that the authentic tax records of Montgomery County are maintained and compiled in a three stage process, involving three Montgomery County Offices having input into the process at each of [the] three cycles." (Pet. Br. 11).

With regards to Wabash, petitioners state that:

The opinion of the Pollution Control Board seems to indicate that the objection to jurisdiction of the county board was denied based upon petitioner's failure to meet its burden in establishing the notice due to an adjoining landowner. This case is therefore distinguishable from the case at bar in that adequate testimony and exhibits were presented at hearing to establish that Marvin and Shirley Savage were the owners of the adjacent property. (Pet. Br. 13).

The Bishops also cite to DiMaggio and Wabash in support of their position. In discussing the Wabash case, the Bishops point out that the jurisdiction of Wabash County was challenged in three instances. The Bishops state that in two of the three instances:

the Pollution Control Board looked to the records that showed who had received the tax bills. When the decision of the Pollution Control Board in that same case was reviewed and affirmed, the appellate court discussed the notice to Trimble, and stated that 'only that heir was listed by name and address in

the tax records to receive the tax statement.
(cite omitted)'. (Resp. Br. 9)

As previously discussed, the Board relied on the County Clerk's testimony in DiMaggio that the Clerk was the keeper of the "authentic tax record". The Bishops seek to distinguish this case from DiMaggio by stating that:

The Pollution Control Board's opinion in the DiMaggio seems (sic) to be based on some procedures which are unique to Cook County or else based on erroneous testimony by an employee of the Cook County Clerk. (Resp. Br. 9).

The Bishops also cite to several portions of the Revenue Act in support of their position that the treasurer is the keeper of the "authentic tax records". The specific portions of the Revenue Act cited are Ill. Rev. Stat. 1989, ch. 120, pars. 657, 671, 671a, 677, 688 and 704. In summary, those sections of the Revenue Act contain language which refers to the treasurer as the county collector and to specific duties of the collector. The duties of the county collector include requiring identification of a taxpayer seeking to change the address where a tax bill is sent, recording payment "in his book" (Resp Br. 7), and receipt of the collector's book from the county clerk.

The issue of what constitutes proper notice under Section 39.2(b) is not a new one. In the DiMaggio case, the Board stated that: "The statutory burden is not to identify and notify every actual current owner, although ideally this would be achieved." (DiMaggio, p. 8). The Board, in DiMaggio, declined to accept the petitioner's definition of "authentic tax records" which would have defined "those records as those which 'include, but are not limited to, those records which are required or allowed to be kept by the Revenue Act'." (DiMaggio p. 7-8). Rather, the Board relied on testimony by the County Clerk stating that the Clerk's office was the keeper of the "authentic tax records". The reliance on the County Clerk's testimony is supported by the Appellate court which has held that:

an interpretation of a statute or ordinance made by the agency or body charged with administering the statute constitutes an informed source of guidance for ascertaining the intent of the lawmaking body. (Katz v. City of Chicago, 177 App.3d 305, 532 N.E.2d 322 (1st District 1988))." (DiMaggio p. 8).

In the Wabash case, the Board found that notice to named party on the "authentic tax records" was sufficient pursuant of Section 39.2(b) of the Act. It should be noted that the Bishops

assertion that the Board looked to "who had received the tax bills" (Resp. Br. 9) does not fully delineate the Board's finding. The persons who received notice in Wabash were the persons listed on the tax records. The fact that there were other owners not listed on the tax records did not render the notice improper in Wabash.

In the case at bar, the Board is guided by its prior decisions. However, unlike the DiMaggio case where the statement, made by a county official, as to who maintained the "authentic tax records" was made by the Clerk's office, here two county officials offer opinions as to what constitutes the "authentic tax records". Ms. Bolton, of the Supervisor of Assessments office, testified as follows:

Q. (Mr. Verticchio) If I would ask you to find the authentic tax records of an owner of a parcel of property where would you look?

A. (Ms. Bolton) If you wanted the most recent ownership, I would suggest that you would go to the County Clerk's Office because that is where the recording of information is available first. (Tr. 37).

Ms. Bolton also testified that in her opinion the owners of the property based on "authentic tax records" as of May 7, 1990 were Shirley and Marvin Savage. (Tr. 47). As previously noted, the Treasurer, Mr. Jenkins, testified that the "authentic tax records" were the collector's book; however, the Board believes Mr. Jenkins is referring to the 1988 "authentic tax records" and not the "authentic tax records" as of May 7, 1990. Thus, the Board must examine other portions of the record to determine whether the Bishops compiled its list of property owners from the "authentic tax records".

The Bishops have not presented any evidence as to who or how the list of property owners was gathered except to show that it correlates with the 1988 collector's book. The list was not prepared by the Treasurer's office; it is not clear that the Treasurer believed that the 1988 collector's book was the "authentic tax records" as of May 7, 1990.

In addition, there is ample evidence that had the applicant checked with the County Clerk's office or the Supervisor of Assessments' office, the owners listed for the parcel of land would have been Mr. and Mrs. Savage.

The Board does not accept petitioners' interpretation that the "authentic tax records" in Montgomery County are the records maintained by all three County Offices. Such a result would require an applicant to check with each office in the County and would in effect require an applicant to perform a title search.

That result would clearly be beyond the plain language of Section 39.2(b) and this is a result with which the Board has not found favor. As the Board stated in DiMaggio:

The Board finds that Petitioners' assertion that additional records should be searched is not in keeping with the straightforward, statutory directive concerning notice. The statute does not require searches of records from the treasurer's and assessor's offices, but, rather, the authentic tax records which, as noted, are held by the county clerk. (DiMaggio p. 8-9).

Conversely, the Board is also reluctant to limit the meaning of the phrase "authentic tax records" to the collector's book, kept by the treasurer, which appears to be the Bishops' view. Collector's books are completed prior to the tax bills actually being sent in any given year. The books are compiled each year and a previous year's books are not corrected unless there is an error in where a tax bill is sent. Thus, limiting "authentic tax records" to the collector's book would mean that even in counties where a more up to date record is available on computer or other form, an applicant would not need to consult this more up to date record.

It should be noted that it is the County Clerk's Office which is required by the Revenue Act to prepare and certify the collector's book, not the Treasurer. "The county clerk shall, annually, make out for the use of collectors, in books to be furnished by the county, correct lists of taxable property, as assessed and equalized." (Ill. Rev. Stat. 1989, ch. 120, par. 639). The Revenue Act also states that "the county clerk shall deliver all such collector's books to the county collector of such county, having annexed to each of such books a warrant under the signature and official seal of the county clerk, commanding such county collector to collect from several persons named in such books, the several sums of taxes therein charged opposite their respective names." (Ill. Rev. Stat. 1989, ch. 120, par. 688). Thus, the Revenue Act clearly establishes the county clerk as the officer who prepares the collector's book. Therefore, the county clerk is the appropriate official to prepare the "authentic tax records".

Had the list titled "Property Owners Adjacent to Robert Bishop Property" (CR 12) been prepared by the Treasurer, or had the Bishops presented evidence which indicated that a County official had represented to them on May 7, 1990, that the 1988 collector's book was the "authentic tax records", the Board may have been persuaded that the list of owners was from the "authentic tax records". At minimum, the Board would have considered the reliance the applicant had placed on the county officials' statements. However, there is no such evidence. In

fact, the Bishops presented no evidence establishing how the notice list was prepared. In fact, there is testimony that contradicts the proposition that the collector's book constitutes the "authentic tax records". Therefore, the Board finds that the applicant did not properly serve notice "on the owners of all property within 250 feet" of the Bishops' property as appears from the "authentic tax records".

In DiMaggio, the Board held that the county clerk was the keeper of the "authentic tax record". In this case, the county clerk again is the keeper of the "authentic tax record", regardless of which county official may be utilizing it at various times. It is the record maintained by the county clerk which contains the most up to date tax listing. The Board finds no evidence to the contrary, in this case.

Finally, with regards to the notice requirements of Section 39.2(b) of the Act, the Board will address the arguments put forward by the Bishops that the notice was sent to the correct address and that Mr. Leitschuh told the Savages that he had received the notice. Thus, according to the Bishops, the notice was sufficient. (Resp. Br. 11). The return receipt clearly indicates that Mr. Leitschuh was the recipient of the notice. Section 39.2(b) clearly requires two types of notice. One by publication and one by written notice to owners of property listed on the "authentic tax records". Mr. Leitschuh was not the owner listed on the "authentic tax records". The Savages were listed on the "authentic tax record". The Savages did not receive written notice. Sending notice to the wrong person at the correct address is not sufficient. The Savages did not receive the notice required by Section 39.2(b).

In making its determination today, the Board notes that the Appellate Courts have construed the notice requirements of Section 39.2(b) very strictly. Even a slight deviation has resulted in the court ruling that the local board lacked jurisdiction. (See Browning-Ferris Industries of Illinois, Inc. v. IPCB, 162 Ill.App.3d 801, 516 N.E.2d 804 (5th District)). Therefore, the Board is bound by those Appellate Court decisions to also strictly construe the notice requirements of Section 39.2(b). We recognize that such strict construction may be argued as elevating form over substance, particularly where a procedural "slip-up" results in no prejudice in a particular case. In so saying, however, we are not suggesting that the circumstances here would or would not have had a different outcome under a less strict construction.

The remaining issues presented in this appeal regarding criteria 2 and 6 were not argued by the parties. Both parties rested on the record. Due to the Board's finding regarding jurisdiction, the Board will not rule on the remaining issues.

The Board finds that the applicant's notice, required by Section 39.2(b) of the Act, to owners of property within 250 feet

of the proposed site was insufficient. The Bishops failed to provide notice to Marvin and Shirley Savage who were the owners of property within 250 feet and who were listed on the "authentic tax records" of Montgomery County. Therefore, the Board vacates the decision of the Montgomery County Board of Supervisors as the county lacked jurisdiction to hear the application.

ORDER

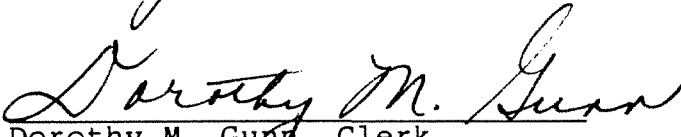
The Board finds that the Montgomery County Board of Supervisors lacked jurisdiction to hear the application for landfill siting, because the applicant failed to provide notice to property owners within 250 feet, as listed on the County's "authentic tax records." Therefore, the decision of the Montgomery County Board of Supervisors approving the landfill siting application is vacated.

IT IS SO ORDERED.

R. Flemal and J. Theodore Meyer concurred.

Section 41 of the Environmental Protection Act provides for appeal of final Board Orders within 35 days. (Ill. Rev. Stat. 1989, ch. 111 $\frac{1}{2}$, par. 1041) 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 11th day of April, 1991, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board