BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB No. 07-146
UNITED CITY OF YORKVILLE, CITY COUNCIL,	)	
	)	
	)	
Respondent.	)	

Notice of Filing

To: All Counsel of Record (see attached service list)

On July 17, 2009, the undersigned filed with the Illinois Pollution Control Board, 100 W. Randolph St., Chicago, IL, the **Amicus Curiae Brief of Friends of Greater Yorkville**, which is also served on you.

Respectfully submitted,

FRIENDS OF GREATER YORKVILLE

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***Amicus Curiae* Brief of Friends of Greater Yorkville**

In considering the decision of a municipality's governing body that has denied a siting application, the plain language of Section 40.1(a) of the Environmental Protection Act allows the Pollution Control Board to consider "the fundamental fairness of the **procedures** used by . . . the governing body of the municipality in making its decision." 415 ILCS 5/40.1(a) (emphasis added). The case law has interpreted this to mean that, "[i]n a local siting proceeding, fundamental fairness incorporates only the **minimal standards of procedural due process**." Peoria Disposal Co. v. PCB, 385 Ill. App. 3d 781, 797 (3d Dist. 2008) (emphasis added). Substantive due process is not within this parameter. An administrative agency only has that jurisdiction set forth in its enabling legislation:

> As a creature of statute, [an administrative agency] may exercise only the powers conferred upon it by the legislature. Any power or authority claimed by an administrative agency must find its source within the provisions of the statute by which the agency was created. The agency's authority must either arise from the express language of the statute or devolve by fair implication and intendment from the express provisions of the statute as an incident to achieving the objectives for which the agency was created.

Nader v. Ill. State Bd. of Elections, 354 Ill. App. 3d 335, 340 (1st Dist. 2004) (internal citations and punctuation omitted). The Illinois legislature has not given this Board authority to address substantive due process as it relates to citizen participation in siting hearings and the other

statutory and constitutionally protected citizen activities that occurred in the period leading up to the denial of Fox Moraine's siting permit application.

In contrast to this fundamental law, Petitioner Fox Moraine asks the Board to interpret "fundamental fairness" to go far beyond the procedures that the Yorkville City Council used. It asks this Board to expand its inquiry to whether comments made by members of the general public outside of the siting hearing caused the whole siting process to be fundamentally unfair. As Fox Moraine admits, these are not *ex parte* contacts with members of the City Council. They are public comments made at other city council meetings and during the election campaign that was occurring at about the same time as the siting hearing. These are plainly matters that are beyond the scope of what this Board can review as part of its "fundamental fairness" inquiry.

In fact, any effort to extend procedural due process into this area of substantive fundamental fairness would result in this Board making determinations of: (1) what is and is not "fair" in annexation proceedings, plan commission hearings and regular City council meetings; (2) what citizens should and should not be permitted to do in the election of local officials; and (3) the manner in which citizens may participate in a siting hearing where the statute not only contemplates, but encourages, local citizen participation—and even more troubling—the parameters of citizen's First Amendment rights in these various processes and proceedings. None of these concepts are embodied in section 40.1(a) and to attempt to infer that they are would open a Pandora's Box of deliberative confusion. If this Board were to buy into Fox Moraine's position, the Board's ruling would have the inevitable consequence of chilling and restraining First Amendment speech, peaceable assembly, and other political and procedural rights as provided Illinois citizens under the case law, municipal code, and the siting statute.

What Fox Moraine is asking the Board to find is that the exercise of various First Amendment rights by citizens of Yorkville deny Fox Moraine fundamental fairness. These First Amendment rights include the citizens' right to make public comments—orally and by posting signs on matters of political concern to the local community. They include the citizens' rights to petition their elected officials as to the manner in which they wish to be represented. They include the citizens' rights to inform their fellow community members about political issues in an election. And they include the citizens' rights to vote for those elected officials whom they believe will best represent them. This is the political process acting in its purest form. The underlying problem with Fox Moraine's position is that it really seeks relief for what it perceives—but fails to identify—as violations of substantive due process; not to the procedural due process to which it is entitled and which it received.

If this Board were to entangle itself in the question of whether the citizens' exercise of their First Amendment rights denied Fox Moraine "fundamental fairness," this would have to be considered an issue of substantive due process. Such an analysis would go far beyond the question of whether the "minimal standards of procedural due process" were met—which is the question this Board is authorized to consider in this context. Rather, it would ask that, even if the City Council provided adequate procedural due process, the hearing was nevertheless unfair because of the content of the citizens' public comments and speech during the course of the election. Such analysis clearly exceeds the scope of what the General Assembly has authorized this Board to consider by the plain language of section 40.1(a) and the cases interpreting it and cited herein.

For these reasons, the Board should confine its analysis of "fundamental fairness" to the procedures used by the Yorkville City Council in conducting the siting hearing. This Board

should not consider public comments that citizens made during the hearings on annexation or during an election. It should not consider the political affiliations of particular citizens and candidates or their positions on the landfill during the election. It should not even consider the substantive content of the public comments made during the siting hearings, beyond ensuring the procedures satisfied Fox Moraine's right to minimal standards of procedural due process. In sum, this Board should not engage in the wide-open inquest of whether independent citizens' exercise of First Amendment rights had the effect of denying Fox Moraine its rights to due process.

A. Under the plain language of Section 40.1 and the case law interpreting that statute, the Board must limit its inquiry to the fairness of the procedures used during the siting hearing.

By refusing to consider anything beyond the procedures that the Yorkville City Council used during the siting hearing, the Board will simply be following the case law. In Residents Against a Polluted Environment v. PCB, 293 Ill. App. 3d 219, 222-23 (3d Dist. 1997), the Appellate Court affirmed the Board's refusal to allow landfill opponents to present evidence of an applicant's involvement in La Salle County's process of amending its Solid Waste Management Plan, prior to the applicant's application. The Appellate Court held that section 40.1 does not authorize the Board to review these kinds of matters outside the siting process. Id. at 223.

Here, Fox Moraine is asking this Board to delve into First Amendment issues far more unwieldy and complex than the amendment of the solid waste management plan in Residents. Just as the Appellate Court held that section 40.1 does not authorize the Board to review the applicant's involvement in the amendment of that solid waste plan, this Board should not attempt to review citizens' public comments made at the annexation hearings.

The annexation process provided for public comment, and its procedures were governed by the Municipal Code (65 ILCS 5/1 *et seq.*). Likewise, any review of the canvassing activity or political affiliation of individuals during the Yorkville election of 2007 would be fraught with First Amendment issues beyond the scope of what the Board can review. The plain language of section 40.1 is clear: the board is only allowed to consider "the fundamental fairness of the **procedures** used by the [Yorkville City Council] in reaching its decision." 415 ILCS 5/40.1(a) (emphasis added).

B. The content of public comments must be distinguished from the procedures the City Council used in allowing those comments.

An argument similar to Fox Moraine's position was addressed and rejected in Waste Mgt. of Illinois v. PCB, 123 Ill. App. 3d 1075, 1081 (2d Dist. 1984). There, the petitioner-applicant argued that "the intensity of citizen opposition" at the public hearing and "the substantial negative public reaction to its application" caused the county board's decision to be fundamentally unfair, in that it was "based 'not on the evidence but on political concerns.'" Id. The Appellate Court disagreed, stating:

> The statute requires, however, only that the procedures be fundamentally fair. The procedures employed by the Hearing Committee provided a full and complete opportunity for petitioner to support its application. * * * [T]he existence of strong public opposition does not invalidate the [county board's] decision.

Id. Reasoning further, the Court stated that "[w]here the statute requires the [county board] to conduct a public hearing, a decision does not become unfair merely because elected officials recognize public sentiment." Id. at 1082.

The natural corollary of this reasoning is the fact that the siting process does not become fundamentally unfair because citizens convey their public sentiment to their elected officials. The protection of the First Amendment extends to both the citizens' right to petition their elected

officials and to have their elected officials actually receive and consider those petitions. Stahelin v. Forest Preserve Dist. of DuPage County, 376 Ill. App. 3d 765, 777 (2d Dist. 2007).

In fact, section 39.2 requires local officials to receive and consider citizens' public comment in making its decision. Section 39.2(c) states that "[a]ny person may file written comment ... concerning the appropriateness of the proposed site for its intended purpose." Section 39.2(d) requires a public hearing be held. Section 39.2(c) requires that the "governing body of the municipality shall consider any comment received or postmarked not later than 30 days after the date of the last public hearing." In other words, public comment is a mandatory part of the siting procedure. The fact that the content of that public comment was largely an expression of strong negative opinions about Fox Moraine's application did not cause the procedure used to be unfair.

In People ex rel. Klaeren v. Village of Lisle, 202 Ill. 2d 164 (2002), our Supreme Court recognized the principle that when a statute provides for procedural due process in a legislative hearing, the procedures afforded must be meaningful. Section 39.2 provides citizens with the right to public comment as part of *their* right to procedural due process. The content of the citizens' exercise of their meaningful right to procedural due process is not something that can deprive Fox Moraine of *its* right to procedural due process.

The statutory requirement that the public be allowed to comment distinguishes the siting application process from a more traditional judicial or adjudicatory proceeding. Consider the difference if the siting process were a one-on-one, adversarial proceeding where a trier of fact was called on to consider only the evidence the parties chose to present. If that were the case, then public comment would have no place in the procedure. An ordinary citizen would have no First Amendment right to express any opinion to the trier of fact. If a judge in such a proceeding

were to allow public comment, then the fact of public comment itself might violate due process. But the violation would be the fact of public comment, not the content of the comments themselves.

Here, the General Assembly does not create such a judicial or adjudicatory procedure. It decided that the procedure for deciding landfill siting applications should be one in which "[p]public participation not only is encouraged, but is required by the statute." Waste Mgt., 123 Ill. App. 3d at 1081 (citing 415 ILCS 5/39.2(c)). As such, courts have recognized that "[a] local siting authority's role in the siting approval process is both quasi-legislative and quasi-adjudicative." Land & Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48 (3d Dist. 2000). Thus, even though section 39.2 sets out the nine statutory criteria that must be satisfied before a local body can grant approval, "a local governing body may find the applicant has met the statutory criteria and properly deny the application based upon legislative-type consideration." Southwest Energy Corp. v. PCB, 275 Ill. App. 3d 84, 91 (4th Dist. 1995). And one such legislative-type consideration that local governing body may—and must—take into account is its constituents' public comments regarding the proposed landfill.

Because public comment is a mandatory part of the procedure, and because citizens are making these public comments to their elected representatives, the case law has not extended "fundamental fairness" to apply to the content of citizens' public comments. To the contrary, section 39.2 expressly prohibits the content of a public office-holder's statements about a siting application from being used as a basis to prevent that person from voting on the application:

> The fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue.

415 ILCS 5/39.2(d). As the Court in Southwest Energy stated, that provision "demonstrate[es] the General Assembly's understanding that it has called upon locally elected officeholders on municipal or county boards—not judges—to adjudicate whether the siting criteria set forth in section 39.2(a) . . . are present in a given case," and because of that, "standards governing judicial behavior cannot and do not apply to local officeholders." Id. at 92.

If section 39.2 provides that elected officials may make public statements without the content of those statements precluding them from voting on the application, how could the same basic principle not apply to expressions of opinions by individual citizens? Plainly, the statute does not allow the expression of opinion by any person to be intermingled with an analysis of whether the procedures were fair, especially where those procedures allow for public comment. Speech does not violate procedural due process because it is loud, vociferous, or makes Fox Moraine uncomfortable. The First Amendment even protects this type of speech. See Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

C. The legislature created a process in which a high level of citizen participation is encouraged, and this participation is fully protected by the First Amendment. This participation was heightened by the fact that a municipal election was occurring at the same time, with all election activities being protected by the First Amendment.

The citizens of Yorkville had a First Amendment right to oppose the siting of this landfill in Yorkville. Fox Moraine had no right to be unopposed. The statutory provision for public hearings with public comment indicates that these hearings are held to elicit and evaluate the reactions, comments, and complaints of private citizens about the fact that a landfill might be built in their community.

With the issue of landfill siting, the Illinois General Assembly saw fit to create a procedure whereby the public participated more directly than with other issues. By creating this procedure, the General Assembly advances significant First Amendment interests. All citizens,

regardless of the content of their ideas, have the right to petition the government. This is a core political right acknowledged or provided by the Illinois Legislature in the siting statute.

Equally as important, though, the citizens of Yorkville had a First Amendment right to elect representatives whom they believed would best represent the community. Those residents who were opposed to the landfill siting had the right to support representatives whom they believed were also opposed to the landfill siting, just as any residents who supported the landfill would have a right support representatives whom they believed also supported the landfill. . They had the right to canvas during the election and speak freely about an important political issue affecting the community. This, again, is a core political right; as was their right to express themselves by the posting of signs carrying their message. These things are not some sort of procedure that the Board can analyze from fundamental fairness standpoint. To adopt a contrary position would essentially communicate to a siting applicant that it should file its siting application and go forward with the siting hearing during an election because, if the siting is subsequently rejected by candidates supported by siting opponents, the applicant enhances its position to overturn the denial because citizens exercised their free speech and political rights to elect their favored candidates. There is nothing in the siting statute to even suggest that this concept should be entertained by this Board.

It is obvious that Fox Moraine had all the same First Amendment rights that landfill opponents had. Fox Moraine could have mounted a campaign during the election to inform citizens about the benefits that the landfill would have brought to Yorkville. It could have mobilized more citizens who wanted a landfill to advocate on its behalf through public comments. It could have supported candidates favorable to its position. It may well have even done these things. But even if it did, it does not change the charge of this Board to review the

procedural due process provided at the siting hearing. It is more than significant in the context of this Board's review standard that Fox Moraine does not contest that it was given all reasonable opportunity to present its evidence and position at the siting hearing.

Fox Moraine made the tactical decision to submit its siting application to the City of Yorkville five months before a municipal election was to occur. Fox Moraine knew that an election was going to take place about the same time as the public hearings on its application. It is naïve to think that Fox Moraine did not anticipate that the landfill would become an issue in the municipal election. There is nothing that makes landfill siting an off-limits issue for citizens and candidates to discuss.

D. What Fox Moraine is asking would require this Board to engage in a substantive due process analysis, which is beyond what is required by "fundamental fairness" in this context.

Ultimately, what Fox Moraine is asking in this case is that the Board interpret fundamental fairness as incorporating principles of substantive due process—that the Yorkville citizens' exercise of their First Amendment rights manipulated the political process to the point where Fox Moraine did not receive a fair hearing, even if the City Council followed proper procedures. A similar argument was presented to and rejected by the U.S. Court of Appeals for the First Circuit in the case of Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 45-47 (1st Cir. 1991). There, the plaintiff was an applicant who sought to build two hazardous waste facilities. Id. at 34. The state board responsible for issuing permits denied the plaintiff its permits, despite the plaintiff's allegations that it had satisfied all of the relevant siting criteria necessary to receive a permit. Id. at 34-35. The plaintiff alleged, among other things, that the true reason for the denial was political manipulation of the permitting process by opponents of the

landfill, and that this violated its right to substantive due process. Id. at 36. On the question of whether this violated substantive due process, the court stated:

> The substantive due process claim must rest on suggestions of political manipulation of the permitting process aimed *** at stopping the project for some other reason, such as popular opposition to a dump of this nature. As noted, the project stirred up opposition by many elements of the local community. The question thus arises whether allegations of political interference with the permitting process give rise to a substantive due process claim. We think not, on this record.

Id. at 46. The Court further stated that for courts "to attempt to regulate, as a matter of substantive due process, the permissible extent to which government administrators may take such opposition into account would seriously embroil them in unpromising and unwarranted efforts to tailor the democratic process." Id. at 47.

The reasoning in the Nestor case provides support for the Board to refuse to interpret fundamental fairness as incorporating the Yorkville citizens' expression to the City Council of public opposition to the landfill. For the Board to attempt to regulate, through fundamental fairness, the permissible extent to which local elected officials may take citizen opposition into account would seriously embroil the Board in unpromising and unwarranted efforts to tailor the democratic process. If the Board were to try to do this, what standards could it possibly apply? The best way to avoid this is to limit the analysis of fundamental fairness to the procedures that the City of Yorkville Council used in the siting hearing, and not change the standard of review established by the legislature and confirmed by the courts.

E. The court should avoid a substantive due process analysis where the issue can be decided on non-constitutional grounds.

In one respect this Board could avoid the morass of substantive due process analysis that Fox Moraine is seeking by deciding that Fox Moraine has failed to meets its burden on one or more of the nine siting criteria. "A negative decision as to one of the criteria is sufficient to

defeat an application for site approval of the pollution control facility." Town & Country Utilities, Inc. v. PCB, 225 Ill. 2d 103, 109 (2007). The Board should continue its past practice of not delving into substantive due process as an element of its review except to conclude that substantive due process is not its statutory function. Friends of Greater Yorkville will not address the nine criteria in this *amicus* brief. Friends of Greater Yorkville simply adopts the arguments of the Respondent and requests that this Board find that its decision was not against the manifest weight of the evidence.

Conclusion

For all the reasons cited above, Friends of Greater Yorkville respectfully requests this Board to affirm the decision of the Yorkville City Council in denying Fox Moraine's siting application.

Respectfully submitted,
FRIENDS OF GREATER YORKVILLE

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Certificate of Service

The undersigned attorney certifies that on July 17, 2009, I served a copy of the ***Amicus Curiae*** **Brief of Friends of Greater Yorkville** on the following, via email:

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