ILLINOIS POLLUTION CONTROL BOARD
March 7, 1985

JANET HOESMAN and BYRON HOESMAN, Petitioners,	)	
v.	)	PCB 84-162
CITY COUNCIL OF THE CITY OF URBANA, ILLINOIS, AND THE CITY OF URBANA, ILLINOIS, Respondents.	)	

STATEMENT FOR THE RECORD (by J. Anderson):

Given the absence of a Pollution Control Board (Board) opinion in this case from which concurring or dissenting opinions can flow, the following statement summarizes our reasons for our vote.

We voted to affirm, under the Board's manifest weight review standard, the City of Urbana's (Urbana) approval of the suitability of its own site location because we felt that problem areas in this record were of insufficient severity to cause the Board to hold otherwise.

However, there are three areas that are of particular concern: a) the Hoesmans' assertion that public participation in the SB 172 (P.A. 82-682) hearing was diminished particularly because of confusion caused by Urbana's holding of a special use zoning type hearing, pursuant to local ordinance, four days before the SB 172 hearing; b) the Hoesmans' assertion that Urbana in its role as applicant and in its role as decision-maker did not properly address or consider Criterion No.3 of Section 39.2(a) of the Environmental Protection Act (Act); and (c) the lack of sworn testimony at Urbana's SB 172 hearing (an issue not raised by the Hoesmans).

We will address these issues separately.

Confusion allegedly caused by two hearings

For clarity, three public meetings were held regarding this facility: an informational meeting held on August 22, 1984, a special use zoning hearing held on September 6, 1984, and the SB 172 hearing required by Section 39.2 of the Act for a new regional pollution control facility held on September 10, 1984. At the Board's hearing the petitioners primarily focused on the

latter two hearings as the cause of confusion, alleging that many thought that the first hearing was an SB 172 hearing. While there may have been some confusion, we were not persuaded that Urbana's actions were fundamentally unfair. The hearings were separately noticed, and Urbana was obviously operating on a "fast track" due to the filling up of its existing landfill by May, 1985. There is nothing in the Act that precludes outright the holding of extra public meetings concerning a facility as long as Urbana's SB 172 decision flows from the exclusive SB 172 process [see Section 39.2(g) of the Act]. In this case, there was no ex parte situation, since the public had been notified of the nature of the meeting and invited to participate. Urbana asserted that the special use hearing was held to be fair and to follow tradition (Board R. 59). It might also be noted that Urbana recognized that the site could be utilized as a non-regional facility, i.e. used solely for waste collected within its boundaries, in which case Urbana's local zoning and land-use ordinances would form the basis for its approval rather than Section 39.2. In any event, the Board record indicates that at least some of the confusion was caused by communications from Mrs. Hoesman, and that some of those who testified on this issue at Board hearing had attended neither hearing or were unwilling to state that their lack of attendance was caused by confusion. (Board R. 39, 42, 43, 50. check) [note Urbana's note]

Criterion No. 3 allegedly inadequately addressed

While Urbana as applicant might have better addressed Criterion No. 3, and while Urbana as decision-maker narrowly construed Criterion No.3 in its resolution of approval, this record does not support a reversal of the City Council on this basis.

Criterion No. 3 reads in applicable part as follows:

> "The county board of the county of the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve the site location suitability for such new regional pollution control facility only in accordance with the following criteria: . . .
>
> 3. the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

What is expected of the applicant in addressing, and the decision-maker in weighing, Criterion No.3 may arguably be difficult to ascertain with precision, but what is not acceptable is more clear. Section 39.2(g) not only confines SB 172 decisions to the six criteria listed in 39.2(a), but also

specifically precludes the application of "local zoning or other local land use requirements." Also, Criterion No. 3 does not state that the facility location must be compatible or without effect, but rather, that incompatibility and effects be minimized.*

One difficulty with Criterion No. 3 is the issue of how much of the surrounding area or property is to be addressed. Urbana as applicant pointed out the existence of the old and recent landfill areas, the mobile home parks, and junk and salvage industries in the more immediate area as well as as a sewage treatment plant, residences and a wooded area and the rather unchanging nature of the area over recent decades. However, the Urbana City Council as decision maker focused only on property adjacent to the proposed facility in its explanation of its approval of Criterion No. 3, i.e. the landfills on two sides and the row crop land on the third side of the triangular-shaped piece which is the expansion area itself.

It should be noted that the triangular-shaped 10 acres of land at issue here was unused, except in part as a borrow pit that had been filled with water. No one disputed that it had been a haven for rats and skunks, at least until it was drained apparently in preparation for the landfill construction.

At Urbana's hearing the design engineer testified that a 15 foot berm will be constructed so as to screen the landfill and equipment from view, act as a noise barrier, and provide a windbreak against blowing litter. (R. 22-27, Exh. 29). The Second District Appellate Court has already accepted this type of testimony as germane to Criterion No. 3, in E. & E. Hauling, Inc. v. Pollution Control Board, et al., 71 Ill. Dec. 587, 457 N.E. 2d, 555 (1983). That court also did not construe Criterion No. 3 as precluding the presence of close-by residential areas or other land uses.

Urbana did not utilize a real estate appraiser but, instead, relied upon the minimizing effects noted above, historical trends showing that the use of the site as a landfill over many decades has not hindered the development of the mobile homes and other uses, and the agricultural buffer zone which was considered sufficient, even though it puts landfill activities in somewhat closer proximity particularly to the Hoesman's mobile home park. The Hoesmans' believed that the facility would have an

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*Section 39.2(a) uses both "site" and "facility." See Section 3(dd) of the Act for the distinction between site and facility, which in some cases can be an important distinction. In this case, however, there appears to be no other place left on the 120 acre site for the 10 acre facility to be located. (Urbana R.35).

effect on their property values, that even the 1 and 1/2 to 4 years additional landfill activity was too much, and that it would frustrate their intent to develop their agricultural land, (zoned as R-4, for multiple family dwellings but requiring special use approval.)** As noted earlier, local zoning and other land use requirements cannot apply in SB 172 site location decisions. The actual use of the property in the surrounding area is the focus. It should also be noted that Urbana's resolution, in part, used a bootstrapping rationale found unacceptable in Waste Management of Ill., Inc. v Pollution Control Board, No. 83-166, 2d Dist App. May 8, 1984.

Additionally, the City Council referenced in its resolution only adjacent property, which is an overly narrow view of Criterion No. 3. However, any deficiencies in Urbana's rationale in its resolution of approval is not controlling. The appellate court construed Section 39.2(c), which requires a written decision "specifying the reasons for the decision" as applying only to statements accepting or rejecting the criteria, rather than such explanations reflecting their mental process. In E & E Hauling, supra, slip op. at 47, the Court held that "Rather, the County Board need only indicate which of the criteria, in its view, have or have not been met, and this will be sufficient if the record supports these conclusions so that an adequate review of the County Board's decision may be made."

While Urbana's record is thin regarding Criterion No. 3, we do not believe, under a manifest weight review standard, Urbana can be reversed. We particularly feel that the use of an expert in real estate appraisal, while potentially helpful, is not required. The facility, during its active four year or less life, will indeed bring landfill activities in closer proximity to the Hoesmans' farmland and mobile home park. Of course, when any landfill is located it usually results in closer proximity to land occupied by people who use their land for other purposes. We do not believe that this record demonstrates inherent incompatibility, even if Criterion No. 4 allowed such a determination. We do not feel this record supports a holding that Urbana erred.

Lack of Sworn Testimony

At the outset, we believe that Urbana should have required sworn testimony. Section 39.2(d) requires a record sufficient to form the basis for appeal and the appellate court has held that

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**The Hoesmans also alleged that the drainage of the pit drove the animals to their mobile home park, threating the residents. Urbana resolved to eradicate the problem rather than dispute the allegation.

"in hearing and deciding on petitioner's application the [County] Board was engaging in adjudication . . . " (E & E Hauling, supra, slip op. at 17). Sworn testimony by tradition and practice has been a concomitant part of adjudicatory proceedings. However, in this proceeding we believe the error was not fatal. The testimony of the applicant consisted primarily of a presentation and explanation of the certified application,* the contents of which can stand on its own merits. It was announced at the start of the hearing that testimony would be unsworn and there has been no allegation or indication that the content of the hearing or testimony given would have been different. Although they were free to do so, the participants did not really challenge the accuracy of each other's exhibits, presentations or factual statements (except for some "best guess" estimates concerning distances) but, rather, disagreed concerning their opinions and beliefs as to whether the application should be approved. In this case, it appears that any harm resulting from the lack of sworn testimony was negligible. While the Board can act upon fundamental fairness issues without the parties raising them, in this case we do not agree that it should do so. We also note that, if the lack of sworn testimony were held to be an unacceptable flaw, we do not feel it would be appropriate to reverse on this basis remand would be the proper remedy under such circumstances because the hearing record required by Section 39.2(d) would thus be rendered insufficient to comply with that section. (However, we do not believe it would be productive to do so.)

It should also be recognized that the statute does not explicitly require sworn testimony and that neither the Board nor the courts have previously addressed this issue on appeal. Added to this is the fact that the use of sworn testimony is unusual in municipal and county board proceedings, even including zoning proceedings where hearings are required. In short, this is a first time, good faith error.

This constitutes our statement of reasons.

Joan G. Anderson

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J. Theodore Meyer

*The fact that the affirmation actually took place a few days after the hearing is not in our view, of serious consequence.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Statement for the Record was submitted on the 15th day of April, 1985.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board