ILLINOIS POLLUTION CONTROL BOARD
March 21, 1984

TOWN OF ST. CHARLES, Petitioner, v. KANE COUNTY BOARD AND ELGIN SANITARY DISTRICT, Respondents.	)	PCB 83-228
CITY OF AURORA, Petitioner, v. KANE COUNTY BOARD AND ELGIN SANITARY DISTRICT, Respondents.	)	PCB 83-229
KANE COUNTY DEFENDERS, INC., ROBERT MOORE, VIRGINIA POLING, ROBERT SWISSLER, AND AUDREY PASHOLK, Petitioners, v. KANE COUNTY BOARD AND ELGIN SANITARY DISTRICT, Respondents.	)	PCB 83-230

DISSENTING OPINION (by B. Forcade and J. D. Dumelle):

We dissent from the majority on two issues: whether ESD filed an adequate "request", and whether the ex parte contacts demand reversal. We would reverse and remand the decision of the County.

Two terms of relevance are used in Section 39.2 of the Act. The first is "request", and the second is "written notice of such request". Several factors lead to the conclusion that the General Assembly intended the "request" to be at least similar to a permit application, i.e., it must contain sufficient information to support an affirmative County Board finding.

1. Section 39.2 requires the "notice of request to be filed with many people and published; only one copy of the "request" need be filed at one location. This implies that the "request" must be a substantially larger amount of information than is contained in the "notice of request".

2. The "notice of request" must include: (a) name and address of applicant; (b) location of the proposed site; (c) nature and size of the development; (d) nature of the activity proposed; (e) probable life of the proposed activity; (f) date the "request" will be submitted; and (g) description of the right of persons to comment. Therefore, the "request" must include substantially more information than that listed above.

3. The copy of the "request" must be available for copying at the actual cost of reproduction. It seems unlikely the General Assembly would worry about exorbinant copy costs if they intended a 2 page "request" to satisfy the statute.

These factors alone lead to the conclusion that the "request" must contain significantly more information than is contained in the "notice of request". Here, the 2 page "request" filed by ESD contains significantly less information. There is an additional factor which leads to the conclusion that the "request" must contain sufficient information on each of the six criteria of Section 39.2 (a) to support site location approval, and that is public participation.

Section 39.2 (c) provides that any person may file written comments concerning the appropriateness of the site with the County within 30 days of receipt of the "request". Since the County may approve or disapprove site suitability based solely on the six criteria of Section 39.2 (a), it is obvious that public comment was intended to address those six criteria. Unless the "request" contains specific factual information on those six criteria there is nothing for the public to comment upon and the public participation provision is negated. Here the public comment period was closed at the end of the 30 day period. At that time the only information on file at the County was a 2 page request reciting in conclusory language that each of the six criteria had been met. After the close of the public comment period, and 2 to 6 days before hearing ESD submitted over 9 volumes of documentary information concerning the site. All of this information was available to ESD at the time the 2 page "request" was filed.

The majority emphasized that information was available to the public from ESD and that Defenders obtained information from ESD. We believe it was the intent of the General Assembly that members of the public need not go to the applicant to retrieve information concerning site location suitability, and this intent is expressed in Section 39.2 (c) which provides for public inspection and copying of information at the County.

The second disagreement with the majority concerns the ex parte contacts, specifically the September 1 restaurant meeting between ESD and 6 of the County Board Members. There is no dispute that this meeting occurred after the adjudicative process had commenced, long before the decision was reached, and that the sole purpose of the meeting was to influence those Board Members in attendance to approve the site suitability. All six members subsequently voted to approve.

The majority approved this activity, relying on E & E Hauling and cases cited therein, because there was no showing that the process was irrevocably tainted or that petitioners suffered undue prejudice. Today's decision is an unwarranted extension of the previous case law.

E & E Hauling cites three other cases* to support the rule of law that ex parte contacts require remand of the decision only where irrevocable taint or undue prejudice is shown. To properly interpret this rule the factual situation in all four cases must be examined.

In Neuberger, opponents of a zoning change appealed the Portland City Council's approval of the change claiming ex parte contacts. They claimed that the city council employee in charge of zoning had received draft language from the zoning change proponents without providing notice or opportunity to comment to the opponents. The Oregon Supreme Court found that (1) the ex parte contact took place after the City Council had voted to make the zoning change but before Council voted on the specific language of the new zoning ordinance, and (2) although the contact was ex parte the specific language had been submitted to the opponents in another document more than two months before final action.

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*1. Professional Air Traffic Controllers Organization v. Federal Labor Regulations Authority, 685 F.2d 547 (D.C. Cir. 1982) (hereinafter "PATCO").

2. Fender v. School District No. 25, 37 Ill. App. 3d 736 (1st Dist. 1976) (hereinafter "Fender").

3. Neuberger v. City of Portland, 288 Ore. 585 (1980) (hereinafter "Neuberger").

In Fender, a tenured teacher, who was dismissed by the School Board, challenged the dismissal. The teacher claimed that after the hearing on his dismissal but prior to decision there were ex parte contacts because the district superintendent and opposing counsel attended the School Board meeting of August 29 where the Board deliberated the teacher's fate. The School Board later dismissed the teacher. The Illinois First District Appellate Court held that since there was no claim or evidence that the district superintendent or counsel offered evidence, addressed the Board or participated in deliberations reversal was not required. Mere attendance was insufficient to justify remand.

In PATCO, the Federal Labor Relations Authority ("FLRA") decertified the air traffic controllers union for a nationwide strike in violation of 5 U.S.C. § 7116(b)(7). One day before oral argument in the appeal the Department of Justice informed the District of Columbia Circuit Court of Appeals of potential improper ex parte contacts by members of the FLRA. The Court found, with one exception, that the contacts fell into two categories: (1) contacts between the prosecutor and adjudicator which did not discuss the merits of the PATCO case and which were unavoidable in such a small agency and (2) inquiries by interested persons regarding procedures and timing that did not influence the outcome. The one exception was a dinner which FLRA Member Applewhaite had with a longtime friend Mr. Shanker, President of the teachers union. Mr. Shanker was not a party to the PATCO case but did hold strong views, compatible with PATCO's position, on how that case should be decided. The majority of the dinner conversation was unrelated to PATCO, but for ten or fifteen minutes Mr. Shanker did communicate with Member Applewhaite, often in general terms, about the appropriate punishment for a striking union like PATCO. Subsequently the FLRA, including Member Applewhaite voted to decertify the union, a decision against the position of PATCO and Mr. Shanker. The Court found that while the ex parte contact was improper it did not require remand.

In E & E Hauling, Mr. Heil sought site suitability approval from the DuPage County Board. After the public hearing on site approval, Mr. Heil and his counsel met with the County Board finance committee on April 19, 21, 23, 26 and 27, 1982. Those meetings were not subject to public notice nor attended by site opponents. The Illinois Second District Appellate Court found these contacts improper, but did not require remand for two reasons. First, the Court found that although the DuPage Board had not formally approved the application, it had essentially made up its collective mind to approve the site before these meetings and had moved to consideration of the appropriate conditions - which is not adjudication. Second, the only evidence or argument at the meetings concerned conditions, not whether the site should be approved. Thus, this case is like Neuberger in that the contacts took place after decision.

The purpose of this rather lengthy case recitation is two-fold. The first purpose is to demonstrate that none of the cited cases addressed a pre-decisional ex parte lobbying effort with the decisionmaker subsequently voting with the lobby effort. The second purpose was to show that each Court went to great lengths to demonstrate the limited factual scope of its holding. Today the majority has substantially expanded the scope of prior holdings to approve pre-decisional ex parte lobbying of 6 people with a subsequent favorable vote of 6 people. We disagree.

Bill S. Forcade, Board Member

Jacob D. Dumelle, Chairman

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 27th day of March, 1984.

Christan L. Moffett, Clerk
Illinois Pollution Control Board