ILLINOIS POLLUTION CONTROL BOARD
July 16, 1987

JOHN ASH, SR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 87-29
	)	
IROQUOIS COUNTY BOARD,	)	
	)	
Respondent.	)	

MR. THOMAS E. McCLURE, ESQ., APPEARED ON BEHALF OF PETITIONER.

MR. TONY BRASEL, ESQ., APPEARED ON BEHALF OF RESPONDENT.

OPINION OF THE BOARD (by Bill Forcade):

This matter comes before the Board upon an appeal filed by John Ash, Sr. ("Ash") on March 9, 1987, pursuant to Section 40.1(b) of the Environmental Protection Act ("Act") (Ill. Rev. Stat. ch. 111½, par. 1040.1(b)). Ash appeals the decision of the Iroquois County Board ("County") denying site location suitability approval for a new regional pollution control facility. A hearing was held on May 12, 1987. Briefs were filed by the County on June 1, 1987, and by Ash on June 2, 1987. The parties each filed reply briefs on June 9, 1987. On June 15, 1987, Ash waived the deadline for decision in this case to July 16, 1987.

For reasons more fully described below, the Board finds that in certain respects procedures employed by the County lacked fundamental fairness. The Board therefore remands this proceeding to the County.

HISTORY

Ash published legal notice on July 28, 1986, of his intention to petition the County for siting approval for a new regional pollution control facility. Petitioner's Exhibit 1[1]. Additionally Ash sent, by certified mail, a written letter of his request for site approval to adjacent land owners of the proposed site and the Illinois legislators whose districts encompass the area in question. P. Ex. 3, 27.

[1]Hereinafter, Petitioner's exhibits admitted by the County will be referred to as "P. Ex. ___".

Ash subsequently filed his request for siting approval with the County on August 11, 1986. Nine hearings on Ash's application were conducted by the County's Regional Pollution Control Committee ("Committee") between November 18 and December 3, 1986. The Committee presented a resolution to the County for the latter's consideration on February 3, 1987. County record, page 65[2]. The document stated the County's resolve to deny the siting approval sought by Ash, for a number of specified reasons. The County approved the resolution by a vote of 19-0 on the same date. Cty. R. at 78.

BACKGROUND

Under Section 39.2(a) of the Act, local authorities are to consider six criteria when reviewing an application for site suitability approval for a new regional pollution control facility which will not accept hazardous waste. The six criteria are:

1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

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;

4. the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation, or the site is floodproofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department;

5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents; and

[2]References to the pages of the record compiled by the County below will hereinafter be referred to as "Cty. R. at ___".

6. the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

Section 40.1 of the Act charges the Board with reviewing the decision of the local authorities. Specifically, the Board is mandated to determine whether the findings made below regarding the six criteria are against the manifest weight of the evidence, and whether the procedures used there were fundamentally fair.

Also in these cases, the Board must consider the facts pertaining to the question of whether the notice requirements of Section 39.2(b) have been complied with. The County argues that the proceedings which were conducted before it below should be vacated, reasoning that due to certain alleged mistakes made by Ash in the process of attempting to meet the requirements of Section 39.2(b), the application was never properly before the County. June 1, 1987, Brief of Iroquois County Board, page 8[3]. As these issues are jurisdictional, they must be addressed before the issues of the six criteria and fundamental fairness. It is to these jurisdictional matters that the Board now turns.

JURISDICTIONAL ISSUES

Illinois appellate courts have consistently construed the notice provisions of Section 39.2 of the Act to be jurisdictional prerequisites which must be followed in order to vest a county board with the power to hear a landfill proposal. This view was first expressed by the Second District Court in The Kane County Defenders, et al. v. The Pollution Control Board, et al., 139 Ill. App. 3d 588, 487 N.E. 2d 743 (2nd Dist. 1985). That court found that the failure of the applicant there to comply with the notice provisions of Section 39.2(b) deprived the county board of jurisdiction to rule on the landfill application before it and rendered its hearing invalid. 139 Ill. App. 3d at 593. See also Concerned Boone Citizens, Inc., et al., v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334 (2nd Dist. 1986). In landfill siting appeals the Board must determine whether or not jurisdiction was properly vested in the county board below, for it is only when that question is answered affirmatively that the Board itself has jurisdiction in the matter.

Specifically, the County opines that in three aspects Ash failed to comply with the requirements of Section 39.2(b) of the Act, and that because of such failure jurisdiction to hear the proposal was never vested in the County. Section 39.2(b) provides that:

[3]Hereinafter referred to as "County Brief".

b. 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.

Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located. Such notice shall state the name and address of the applicant, the location of the proposed site, the nature and size of the development, the nature of the activity proposed, the probable life of the proposed activity, the date when the request for site approval will be submitted to the county board, and a description of the right of persons to comment on such request as hereafter provided.

Description of Site Location

The first aspect in which the County believes Ash failed to comply with Section 39.2(b) involves Petitioner's description of the location of the site in question. The County argues that the letter specifying Ash's intent to file a landfill siting application, which he sent to neighboring property owners and legislators, provided an "imprecise" description of the location of the site. County Brief, p. 9. The site description contained in the letter reads in full as follows:

> The site is located four (4) miles NE of Crescent City, one (1) mile east of State Route 49, near the center of Iroquois County, twenty (20) miles south of Kankakee, ten (10) miles NW of Watseka. It consists of 100 acres west of the County road in the West ½ of Sec. 16, T27N-13W, Iroquois Township, Iroquois County.

The County contends that that "general" description is not as precise as the description of the site provided in the actual application filed by Ash with the County. The latter description appears in full as follows:

> That part of N½ of the N½ of the SW¼ West of County highway #35 in Sec. 16, T27N-R13W, 40 acres more or less.
>
> The SW½ of the NW¼ of Sec. 16, T27N-R13W West of County road #35 except a strip 33 feet wide of even width north to south (1 acre) on the west side--total tract 60 acres, more or less.
>
> Located in Iroquois Township, Iroquois County, Illinois, four (4) miles NE of Crescent City, near the center of Iroquois County, about a half mile west of where Spring Creek enters the Iroquois River.

The Board acknowledges that the site description contained in the letter to adjoining landowners and legislators is stated in a slightly more general form than is the description stated in the application. The only real difference between the two is that the latter describes in extreme detail where, in the area comprising that portion of Section 16 west of county road 35, the 100 acre site is situated. However, the Board cannot find that this distinction makes the letter's description in any way deficient when evaluated according to the requirements of Section 39.2(b).

Section 39.2(b) requires that the notice sent to adjoining landowners and legislators state "the location of the proposed site". An exact legal description of a proposed site is therefore not explicitly required by the Act, and the broad sort of language used to specify the requirement would seem to indicate that a general description of the site location is sufficient. In the case at bar, the intent of Section 39.2 was met because through the information provided in the letter an interested person could certainly determine, with considerable accuracy, the location of the proposed site.

Under the township and range system, land has been subdivided down to the level of "sections", each consisting of 640 acres. From the map provided in the County record (see Cty. R. at 5), it is clear that the area west of county road 35 within Section 16 constitutes less than half of the total area of the section (therefore less than 320 acres), and probably approximates an area of something closer to a third of a section. Thus, as a practical matter, the location of the proposed 100 acre site is described by the letter as being somewhere within an area that is certainly less than 300 acres in size. The Board believes that this description sufficiently describes the location of the site.

The Board has previously held that "a defect in the content of the notice will only be fatal where that error is substantial and material". Rick Moore v. Wayne County Board, PCB 86-197, February 19, 1987. The Board cannot label the description provided by Ash in the letter as even being in error; at most, it only lacked the additional specificity provided by the description found in the application. In contrast, a scenario portraying defective notice occurred in the Moore case. There, the description of the site location provided by the applicant in the notice of application sent to adjoining landowners and published in the local newspaper stated that the property was in a different township than was in fact the case. The notice gave "Township 2 South" as the general location, while in reality the property was situated in Township 1 South. The error placed the noticed site location at least six miles north of the actual site. PCB 86-197, p. 3. The error in the description provided in Moore was in no way comparable to the situation of the instant matter.

Certified versus Registered Mail

The County additionally argues that Ash failed to comply with the requirements of Section 39.2(b) because the notices he sent to adjoining landowners of his intent to file a landfill application were sent by "certified", rather than "registered", mail. Section 39.2(b) states that notices to adjoining landowners are to be served "either in person or by registered mail, return receipt requested". Ash served the notices by certified mail, return receipt requested. Cty. R. at 39. The County contends that the two types of mail service are not synonymous, and emphasizes this point by noting two distinctions. Registered mail is apparently stamped by the Post Office over the envelope flap so that it cannot be opened, while certified mail is not. Also, registered mail is said to be kept in a special pouch by the Post Office and an employee must sign a form every time the pouch is opened; certified mail is mixed with first and lower classes of mail. County Brief, p.10.

Ash insists that the two types of service are substantially similar, with the only difference being that registered mail may be insured while certified mail may not. Cty. R. at 39. He asserts that the Board should not "strictly" construe Section 39.2(b) as excluding the use of certified mail, arguing that the Legislature could not have intended this result since a notice has no monetary value in and of itself and is not something which a sender would elect to insure. Cty. R. at 39-40. Rather, Ash contends that the "true intention" of the Legislature in enacting the notice provision of Section 39.2(b) was to implement a system whereby there would be some record of the notice to owners and legislators having been both sent and received.

The Board believes that Ash has expressed the most logical analysis of the legislative intent behind the notice requirement of Section 39.2(b). The Board can ascertain no substantive difference in the functions provided by registered and certified mail, save that postal insurance may be purchased to cover items sent via the former method. The letters sent by Ash to adjoining landowners and legislators in fulfillment of the Section 39.2(b) requirements are not items of monetary value, and therefore are not parcels for which registered mail alone will suffice. Moreover, the Board notes that no hardship resulted to any person as a result of Petitioner's use of certified mail, return receipt requested. This method still provided a permanent record of the sending and receipt of the notices. P. Ex. 3. Presumably notices were received in a timely fashion by all necessary landowners and legislators, for it has not been alleged that Ash failed to notify any necessary person(s). Additionally, Illinois appellate courts have found, in various factual settings, that the form of mailing notice is not decisive where certified mail will serve the purpose of registered mail. The People ex rel. Gail Head v. The Board of Education of Thornton Fractional Township South High School District No. 215, 95 Ill. App. 3d 78, 81-82 (1st Dist. 1981); Olin Corporation v. William M. Bowling, 95 Ill. App. 3d 1113, 1116-1117 (5th Dist. 1981); Norman Bultman v. Melvin Bishop, 120 Ill. App. 3d 138, 143-144 (5th Dist. 1984); Illini Hospital v. George P. Bates, 135 Ill. App. 3d 732, 734-735 (3rd Dist. 1985).

For these reasons, the Board finds that Petitioner's use of certified mail, return receipt requested, complied with the service requirements of Section 39.2(b).

Timeframe for Publication of Notice

The final jurisdictional issue raised by the County involves the number of days which transpired between the date on which notice was published and the date the application was filed. Section 39.2(b) requires that written notice of intent to file a request for site location approval be published no later than 14 days prior to the date on which the request is actually filed.

Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E. 2d 743 (2nd Dist. 1985). Ash had newspaper notice published on July 28, 1986. He filed his application with the County on August 11, 1986.

The County contends that according to the provisions of Ill. Rev. Stat. 1985, ch. 100, par. 6, Ash failed by one day to comply with the 14 day requirement of Section 39.2(b). Paragraph 6 of Chapter 100 reads in full as follows:

> 6. Computation of time
>
> > In computing the time for which any notice is to be given, whether required by law, order of court or contract, the first day shall be excluded and the last included, unless the last is Sunday, and then it also shall be excluded.

Ash claims that he has complied with the 14 day provision. He applies what he terms the "usual" method of counting, which consists of excluding the date of publication and counting the date of filing, and says that because the application was filed on the fourteenth day after publication, Section 39.2(b) has been complied with. Reply Brief of Petitioner, June 9, 1987, page 11.

The Board concludes that Ash has complied with the 14 day requirement. Ill. Rev. Stat.1985, ch. 100, par. 6 specifies that the "first day", or in this instance the date of publication, must be excluded (not counted), while the "last" day, or in this case the date of filing of the application, must be included (counted), unless that day is a Sunday. Applying these directives to the case at bar, the Board finds that Ash filed his application on the fourteenth day after publication. This meets the requirements of Section 39.2(b), which states, inter alia, that publication of the intent to file a request for site approval must occur "no later than 14 days prior" to the time the application is filed (emphasis added). A plain reading of this provision is that it allows filing of the application to occur on the fourteenth day after publication, but that if filing were to occur on any date closer to the date of publication, the 14 day requirement would not be met. That is, the fourteenth day after publication is the soonest day that application can take place and still comply with Section 39.2(b).

For the above-mentioned reasons, the Board finds that jurisdiction was properly vested in the County, and is consequently properly vested at this time in the Board. The fundamental fairness of the procedures employed by the County will therefore be evaluated.

FUNDAMENTAL FAIRNESS

Ash contends that, for a number of reasons, the procedures employed by the County in reaching its decision lacked fundamental fairness. "Fundamental fairness" as used in Section 40.1 of the Act creates a statutory due process standard, which has been construed as requiring application of adjudicative due process in regional pollution control facility site location suitability proceedings. E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 596, 451 N.E.2d 555, aff'd, 107 Ill. 2d 33, 481, N.E.2d 664 (1985). Thus the proceedings conducted to consider applications for new regional pollution control facilities are quasi-judicial in nature, and so must include the attendant due process safeguards.

Specifically, Petitioner argues that he was not afforded due process below for tne following reasons:

1. Sixteen members of the County Board voted without having attended all the hearings or having read the transcripts of those hearings they missed, thereby failing to adequately "consider" the evidence before them;

2. Ex parte contacts took place between County Board members and the general public.

3. One County Board member, Dale Carley, voted even though he owns real estate near the proposed site and was therefore biased;

4. The County based its rejection of Petitioner's siting application on improper criteria;

The Board will address each of these allegations in turn.

"Consideration" of the Evidence

A long-standing rule of Federal and Illinois administrative law is that, absent statutory provisions to the contrary, it is not necessary that testimony in administrative proceedings be taken before the same officers who have the ultimate decision-making authority. Administrative proceedings may be conducted by hearing officers who refer the case for final determination to a board which has not heard the evidence in person, and the requirements of due process are met if the decision-making board considers the evidence contained in the report of proceedings before the hearing officer and bases its determinations there-

on. Homefinders, Inc. v. City of Evanston, 65 Ill. 2d 115, 128 (1976), citing Morgan v. United States, 298 U.S. 468 (1936); Anniston Manufacturing Co. v. Davis, 301 U.S. 337 (1937); Quon Quon Poy v. Johnson, 273 U.S. 352 (1927); Estate of Varian v. Commissioner, 396 F. 2d 753 (9th Cir. 1968); and NLRB v. Stocker Mfg. Co., 185 F. 2d 451 (3d Cir. 1950). Ash does not challenge the general application of this rule to the case at bar. That is, he does not contest the County's use of a committee to conduct the hearings in this matter and does not argue that such action was inappropriate. However, he does contend that the County failed to adequately "consider" the evidence contained in the record before denying his application and therefore did not afford him due process.

In Illinois, Homefinders and a long line of cases which have followed have firmly established that the requirements of due process mandate that in administrative proceedings decision-makers who do not attend hearing(s) in a given case must base their determinations in that matter on the evidence contained in the record of such hearing(s). The Homefinders case began as an appeal in the circuit court of Cook County of an administrative decision of the Evanston Fair Housing Review Board ("FHRB"). The FHRB had earlier found that Appellants, a sales representative and her employer, a real estate company, violated certain antidiscrimination provisions of the Evanston Fair Housing Ordinance on two separate occasions. The circuit court reversed the FHRB's decision, and was in turn reversed by the Illinois Appellate Court First District. The Illinois Supreme Court granted leave to appeal.

The complaint for review filed by plaintiffs in the circuit court asserted various grounds for reversal of the FHRB's findings. One of the assertions made in the complaint went to the question of whether due process requires that the determination of penalties by the FHRB be made only by those members who heard the evidence. On review, the Supreme Court held that

> The requirements of due process are met if the decision-making board considers the evidence contained in the report of proceedings before the hearing officer and bases its determinations thereon... We are in accord with the majority view and conclude that the requirements of procedural due process would be met under the Evanston Fair Housing Ordinance if those members who were not personally present at the hearings base their determination of penalties on the evidence contained in the transcript of such proceedings. 65 Ill. 2d 115 at 128-129.

See Starkey v. Civil Service Commission., 97 Ill. 2d 91, 100 (1983); American Welding Supply v. Department of Revenue, 106 Ill. App. 3d 93, 97-98 (5th Dist. 1982); Betts v. Department of Registration and Education, 103 Ill. App. 3d 654, 661-662 (1st Dist. 1981); Ramos v. Local Liquor Control Commission 67 Ill. App. 3d 340, 341-342 (1st District 1978); Bruns v. Deptartment of Registration and Education, 59 Ill. App. 3d 872, 875-876 (4th Dist. 1978).

In the instant case, the Board's analysis of whether the County adequately "considered" the evidence adduced at hearing will involve consideration of two questions: First, whether the transcripts were reasonably available such that it can be said that the County Board members had an opportunity to review them, and, second, whether overall the County members were sufficiently exposed to the record to support a finding that they "considered" the evidence within it.

Throughout portions of the Board hearing in this docket, there was some confusion as to the exact date by which the County had received all of the transcripts of the County hearings. Eventually it was agreed by the parties that original copies of transcripts for each of the County hearings had been received by the county clerk on January 30, 1987. Transcript of May 12, 1987, Pollution Control Board hearing, page 183[4]. Complete photocopied sets of the transcripts were not available to the County Board members, however, until immediately before the February 3 meeting at which they voted on Ash's application because copies of the last transcript were not available until 9:00 p.m. on February 2, 1987. Ash Request for Admissions, par. 68, April 8, 1987; Answer to First Set of Request for Admissions, par. 68, April 22, 1987.

The Board finds that the transcripts were not reasonably available to the county board members and, as a consequence, those board members that were not present at the hearing could not have "considered the evidence." While the transcripts were in the possession of the county clerk on Friday, January 30, they were not photocopied for distribution to the county board members until late Monday evening on February 2. The substantive briefing of the board as a whole, by the committee, occurred Tuesday morning, February 3. This was immediately followed by the final vote on the application. Therefore, there was no time or reasonable opportunity for the board members to adequately consider the record prior to decision.

[4] Hereinafter, references to the transcript of the Board's May 12, 1987, hearing will appear as "Board R. at _____".

Though the Board is convinced that Ash has persuasively shown that the decision below was arrived at in a fundamentally unfair manner for this reason, the Board must add that this case has presented some very unusual circumstances which are likely to distinguish it from future landfill siting cases to follow. The applicant posed questions, in interrogatories, as to whether the county board members had "read the transcript." Quite simply put, that question should never have been asked. There exists a substantial body of case law supporting the principle that one cannot invade the mind of the decision-maker. Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process is equally respected. United States v. Morgan, 313 U.S. 409 (1941); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission, 789 F. 2d 26, 44 (D.C. Cir. 1986); Time, Inc. v. United States Postal Service, 667 F. 2d 329, 335 (Second Cir. 1981); United Steelworkers of America, AFL-CIO-CLC, v. Marshall, 647 F. 2d 1189, 1217, (D.C. Cir. 1980).

Remedy

The necessary remedy, and the one which will be utilized in this instance by the Board, is a remand of this matter to the County for an additional vote on the Ash application once the County Board members have considered the record. The Board stresses that no further hearings need be held for the purpose of complying with today's Opinion and Order.

Ash speculated that this outcome might result, and argued prospectively that this matter should not be remanded to the County for further action because the County's February 3, 1987, vote on the application is "void". Ash contends that his application should therefore be deemed approved by operation of law. Brief of Petitioner, June 2, 1987, pages 32-37[5].

The Board believes that remand is appropriate here. The intent behind Section 39.2 of the Act was to give localities a voice in the landfill siting process. That intent would be frustrated if the Board were to conclude that applications became approved by operation of law whenever missteps occurred during site location suitability proceedings at the local level. Approval of these applications by operation of law would also eliminate the only opportunity there will ever be to examine some of the issues (e.g., the six statutory criteria) that were to be considered by the local governmental entity.

[5] Hereinafter referred to as "Ash Brief".

Ash expresses concern that remand is inappropriate because the County is predisposed to vote against the application because it already has. Ash Brief, p. 34. On the contrary, the Board sees the County on remand as viewing the merits of the application for the first time; as the record will now be considered, where it previously was not, the County will fully weigh the record developed in support of the application. The results of the County's next vote may or may not reflect its earlier vote, taken at a time when the record had not been adequately considered.

Ex Parte Contacts

Ash also contends that the County's decision was fundamentally unfair due to certain ex parte contacts which took place between County members and the general public. Description of these contacts was provided by Mike Watson and various County Board members at the Board's May 12, 1987, hearing.

Watson recounted how in conversations he had had with certain County Board members, the subject of contacts between those members and private citizens had been discussed. Watson testified that County Board member Lawrence Kelly told him that Kelly had received a telephone call from a citizen expressing concern regarding the effect the landfill might have on artesian wells in the area, and that this concern was one of the factors behind Kelly's vote against Ash's application. Board. R. at 99-103. Watson also stated that during a conversation he and Ash had with County Board member Virgil Schroeder, Schroeder stated that he had discussed the landfill with people in the Crescent City area. Board R. at 103-104. Moreover, Watson claimed that Schroeder said one of the reasons he voted against the landfill application was because the people within the area were against it. Board R. at 108-111. Schroeder testified at hearing that he never made such a statement to Watson and Ash, and that he did not consider public opinion when casting his vote. Board R. at 145-147.

Watson testified that County Board member James Lanoue told Ash and him that Lanoue voted against the application primarily because everybody he talked to was against it. Board R. at 112-113. Lanoue admits discussing the landfill matter with citizens, but asserts that all of these communications took place prior to the date on which he took office as a County Board member. Board R. at 84-85. Nevertheless, Lanoue admits that public opinion in opposition to the landfill was one of the reasons behind his vote against the application. Board R. at 83.

At hearing, Watson also recounted conversations he had had with County Board members Albert Lundberg, Harold Rust, John Dowling, and Alan Benjamin. Watson stated that all of these persons said they had talked to citizens regarding the landfill. Board R. at 114-115, 117-118. No evidence was

introduced, however, to show that their votes were impacted by the contacts.

There is a substantial volume of case law supporting the impropriety of ex parte contact in administrative adjudication. E & E Hauling at 606, citing United States Lines v. Federal Maritime Com., 584 F.2d 519, 536-542 (D.C. Cir. 1978); PATCO v. Federal Labor Relations Authority, 685 F.2d 547, 564-565 (D.C. Cir. 1982); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); North Federal Savings & Loan Association v. Becker, 24 Ill.2d 514, 520 (1962); Fender v. School District No. 25, 37 Ill. App. 3d 736, 745 (1976).

After it is determined that ex parte contacts did in fact occur, a reviewing court still must consider

> whether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose. Since the principal concerns of the court are the integrity of the process and the fairness of the result, mechanical rules have little place in a judicial decision whether to vacate a voidable agency proceeding. Instead, any such decision must of necessity be an exercise of equitable discretion.

E & E Hauling at 606-607, citing PATCO at 564-565. A court will not reverse an agency's decision because of improper ex parte contacts without a showing that the complaining party suffered prejudice from these contacts. E & E Hauling at 607, citing Fender at 745.

County Board members Lawrence Kelly and James Lanoue admit that their votes on the Ash application were partially premised on the prevailing public opinion, and that they became aware of some of that opinion through contacts they had with citizens.

The Board finds that County Board members Kelly and Lanoue experienced "ex parte" contacts. The Board notes that it reaches this conclusion regarding Lanoue even though all of the discussions regarding the landfill that he had with citizens took place prior to the time that Lanoue was sworn in as a County Board member. These discussions apparently took place after the election in which he won a spot on the County Board, and it is likely that the contacts occurred largely because the citizens who spoke with him knew of his pending ascension to that office. Furthermore, given the admissions of these two gentlemen, the Board further finds that the votes of these two individuals were improper. Messrs. Kelly and Laroue have clearly specified that their votes were cast in part due to public opinion which they derived through ex parte contacts. Consequently, their votes cannot stand and are disallowed. These two individuals will only be able to cast votes on the Ash application if they are able to make determinations on the merits of that application without relying on, or being influenced by, the opinions of others expressed via ex parte contacts.

This notwithstanding, the Board concludes that the ex parte contacts described by Ash are not a sufficient basis on which to find that the County's decision was arrived at in a fundamentally unfair manner. All of the other ex parte contacts which Ash alleges have either been denied (i.e. those involving County Board member Schroeder), or have not been shown by Ash to have had any impact on the votes cast by the relevant County Board members (i.e. those involving County Board members Lundberg, Rust, Dowling, and Benjamin). Thus, all that can be said is that two votes out of the nineteen cast were improper. Under the circumstances, the Board cannot find that the ex parte communications have "irrevocably tainted" the decision of the County. The Board's remand of this proceeding to the County is therefore not in any way based on the ex parte contacts which occurred below.

Ash also contends that an ex parte communication took place in the form of a letter received from the Kankakee River Basin Commission. The final hearing held by the County in this matter took place on December 3, 1986. Section 39.2(c) of the Act, which governs the submission of letters regarding applications for new regional pollution control facilities, states in part that:

> Any person may file written comment with the county board or governing body of the municipality concerning the appropriateness of the proposed site for its intended purpose. The county board or 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.

The letter was received by the County on January 7, 1987, more than 30 days after the close of hearing.

The Board believes that no fundamental fairness problem resulted from the County's consideration of this letter. First, Ash inappropriately characterizes the letter as an "ex parte" contact. Ex parte contacts by definition occur when an interested person has off-the-record communication regarding the matter with a decision-maker. This letter was made part of the record by the County, so was not shrouded from public view. No ex parte contact therefore occurred.

Though Ash inaccurately labeled the County's receipt of the Kankakee River Basin Commission letter an ex parte contact, the major thrust of Petitioner's argument regarding the letter is that the County should not have considered it, as it was received more than 30 days after the last hearing was held. The Board is similarly unconvinced by this argument. The Board interprets Section 39.2(c) of the Act as establishing a minimum period (30 days) for receipt of public comment on an application. A local governmental entity may consider comments received after this time, in its discretion.[6]

Bias of Dale Carley

Another aspect in which Ash challenges the fundamental fairness of the proceedings below involves the vote cast by County Board member Dale Carley. Carley was one of the County Board members initially appointed to the Committee for the purpose of conducting hearings on the Ash application. At the time of his appointment, Carley declined it due to what he perceived as his own bias against the application. Carley testified that his bias at that time existed because of his ownership of a farm and private lake located approximately one-half mile from the proposed landfill site. Board R. at 153-154. Carley believed that the landfill would adversely affect the value of his farm land. Board R. at 160.

Nevertheless, Carley later determined that he should "have more of an open mind and hear the evidence at the hearings". Board R. at 155. Carley attended most of the hearings held by the Committee, and voted with the rest of the County to deny Ash's application. Board R. at 156.

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[6] The Board notes that a party whose interest is adverse to that of the person submitting the comment suffers no additional hardship under this interpretation. If this letter had been received by the County on the thirthieth day following the final hearing (and so consequently within the time specified by Section 39.2(c)), Petitioner would have similarly had no opportunity to file an additional comment rebutting it.

Even though Carley attempted to evaluate the application with more of an "open mind", which is in itself an admirable notion, he was never able to completely lose sight of the fact that he had a financial interest at stake. He admits that when he voted against the application he believed that the existence of a landfill on the proposed site would negatively affect the value of his property (Board R. at 161-162), and that this belief was part of the rationale behind his vote (Board R. at 162-163).

Some fundamental principles relating to conflict of interest were laid down by the Illinois Supreme Court in In Re Heirich, 10 Ill. 2d 357 (1956), cert. denied, 355 U.S. 805 (1957):

> "It is a classical principle of jurisprudence that no man who has a personal interest in the subject matter of decision in a case may sit in judgment on that case. * * * For the guidance of this court's commissioners in future cases and of all other persons required to find facts or apply law in adversary proceedings, judicial or administrative, we hold that when such an arbiter has a financial interest in the subject matter, even though he personally be a man of the most fastidious probity, it is his duty to recuse himself. He must do so if challenged." 10 Ill. 2d 357 at 384.

A personal interest need not even be pecuniary; "(i)t need only be an interest which can be viewed as having a potentially debilitating effect on the impartiality of the decision maker". The Board of Education of Niles Township High School District No. 219, Cook County v. The Regional Board of School Trustees of Cook County, 127 Ill. App. 3d 210, 213 (1st Dist. 1984), citing International Harvester Co. v. Bowling, 72 Ill. App. 3d 910, 914 (1st Dist. 1979).

Under the circumstances, Carley should have recused himself from participating and voting on the application because of his disqualifying conflict of interest. The Board does not envision how, given Carley's own statements about his pecuniary interest, he can ever be viewed as being sufficiently free of bias to be able to participate in and vote on the Ash application.

The reasons courts draw such a "bright line" in these situations is it is nearly impossible to probe an adjudicator's mind, after the fact, as to whether he was unfairly influenced by a conflict of interest. As the Illinois Supreme Court and U.S. Supreme Court have stated, Naperville v. Wehrle, 173 N.E. 165 (1930) at 167, quoting Crawford v. US, 212 U.S. 183:

> Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore, have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law, therefore, most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

In Naperville, the Supreme Court succinctly stated the disposition of an adjudicated case involving an interested adjudicator:

> Appellants contend that Myers was not a competent and disinterested commissioner. If he was not, his participation infects the action of the whole body and makes it voidable. Rock Island & Alton Railroad Co. v. Lynch, 23 ILL. 645; State v. Crane, 36 N.J. Law 394.

County Board Consideration of Public Opinion and Other Improper Criteria

Ash alleges that the County attached "undue significance" to public opinion expressed concerning the proposed landfill. Ash Brief, p. 38. In support of this contention, Ash cites paragraphs 3(e) and 3(g) of the County's resolution. These paragraphs read as follows:

> 3. That the applicant has not adequately or satisfactorily demonstrated that 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, in that:

* * * * *

e. The residents in the area strongly oppose the landfill. Two state representatives have expressed opposition to the proposed site.

* * * * *

g. Written public comments indicated that the Kankakee River Basin Commission and the Iroquois County Soil and Water Conservation Dist. were opposed to the proposal. Three letters were in favor of the site, and over 435 letters were opposed. Cty. R. at 70.

Ash also asserts that the County relied on other factors outside of the six statutory criteria. Petitioner cites only one example for this alleged improper reliance, however, and that is another finding made by the County in its resolution. This finding, found at paragraph 2(m), is reprinted below:

2. The applicant has not adequately or satisfactorily demonstrated that the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected, in that:

* * * * *

m. The township road leading to the site has not been designed for frequent travel by heavy trucks. An empty garbage truck weighs about 12 tons. This road does have a five ton load limit for three months of the year. Cty. R. at 69.

The Board finds that none of the examples raised by Ash indicate any degree of fundamental unfairness. Rather, the paragraphs cited exemplify an appropriate reliance on public comment received and on the statutory criteria.

Section 39.2(c) of the Act allows any person to file written comment with a local governmental entity regarding the appropriateness of the proposed site for its intended purpose (i.e. the siting of a new regional pollution control facility). Local governmental entities are mandated, by Section 39.2(c), to

"consider" any such comments as long as they are received within 30 days after the last public hearing.

The legislature obviously intended that consideration of public comments be a part of the local governmental entity's decision-making process. The County, in paragraphs 3(e) and (g) of the resolution, simply summarized the flavor of the comments received. When, as here, three letters were submitted in favor of the application and at least 435 against it, one does not attach undue significance to public opinion by concluding that area residents "strongly oppose" the application.

Paragraph 2(m) reflects a concern that goes to the question of whether the proposed facility is "so designed, located and proposed to be operated that the public health, safety and welfare might be protected" (Section 39.2(a)(2) of the Act, the six statutory criteria). If the trucks using the site would render the road unsafe, then the public health, safety and welfare might not be protected. This would thus be a proper matter for the County to consider.

The Statutory Criteria

Given the Board's determination to remand this proceeding for remedy of the fundamental fairness problem stemming from the County's lack of consideration of the record and Mr. Carly's participation in the proceeding, the Board will not address Ash's arguments concerning the County's appraisal of his application vis-a-vis the six criteria. At this time it would be premature for the Board to make any finding regarding whether or not Ash has shown that the County's decisions on each of the criteria can be supported by the manifest weight of the evidence.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

IT IS SO ORDERED

Board Member Ron Flemal dissented and Boar Member J. Theodore Meyer was not present and did not vote

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 16th day of July, 1987, by a vote of 4-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board