ILLINOIS POLLUTION CONTROL BOARD
November 21, 1985

CONCERNED CITIZENS GROUP, An Unincorporated Voluntary Association, THERESA CASTELLARI, DEE ANN MAYER, and SHIRLEY WATSON,	)	
Petitioners,	)	
v.	)	PCB 85-97
COUNTY OF MARION and I.S., INC., an Illinois Corporation, also known as INDUSTRIAL SALVAGE and INDUSTRIAL SALVAGE, INC.,	)	
Respondents.	)	

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon the July 2, 1985, appeal by Concerned Citizens Group, Theresa Castellari, Dee Ann Mayer, and Shirley Watson, from a May 29, 1985 decision of the Marion County Board ("M.C.B."). On that date the M.C.B. approved an application filed by I.S., Inc. ("I.S."), an Illinois Corporation also known as Industrial Salvage and Industrial Salvage, Inc., for approval of the siting of a new regional pollution control facility to be located in an unincorporated area of Marion County. The proposed facility actually is a 40-acre tract located directly east of and adjacent to an existing landfill operated by I.S.

Since there are a number of Petitioners and Respondents involved in this matter, they will be clearly identified at the outset. Concerned Citizens Group is an unincorpoated voluntary association of 123 persons, nearly all of whom are said to reside in the immediate vicinity of the proposed facility. Petitioners Theresa Castellari, Dee Ann Mayer, and Shirley Watson also live in the immediate vicinity of the proposed facility. The Respondents in this matter are I.S. and the Marion County Board; section 40.1(b) of the Illinois Environmental Protection Act ("Act") requires that in an appeal from a county board's approval of an application for the siting of a new regional pollution control facility, the county board and the applicant be named as co-respondents.

Hearings on I.S.' application were held before the M.C.B. on April 19, May 2, and May 17, 1985, and the M.C.B. rendered its decision approving I.S.' application on May 29, 1985.

Petitioners appealed this decision to the Board on July 2, 1985, as stated above. On July 11, 1985 the Board accepted the case* and authorized it for hearing, and ordered the M.C.B. to prepare and file the record on appeal. Petitioners filed a "Motion to Dismiss Request for Site Approval" on July 29, 1985, to which I.S. filed a response on August 2, 1985. The Board denied this motion by Order of August 15, 1985. The States Attorney for Marion County filed the record on July 30, 1985. On August 20, 1985 Petitioners filed a "Supplemental Motion to Dismiss Request for Site Approval", which was denied by the Board on September 5, 1985. The Board hearing in this matter was held on September 12, 1985. I.S. filed a "Motion to Correct Record and Pleadings" on the same day hearing was held and the Board denied that motion by Order of October 10, 1985. I.S. also filed a post-hearing brief on October 28, 1985. No other briefs were filed.

A motion for judgement by default was made by Petitioners at hearing (Board hearing, R. at 165). This motion was apparently made in furtherance of Petitioners' belief that I.S. refused to comply at that time with Hearing Officer Shoenberger's ruling to produce a certain "Lease and Purchase Agreement" relating to the sale of I.S.' Marion County facility. I.S. did produce the document at hearing, but with certain information relating to the financial aspects of the sale blacked out. I.S. argued at hearing that the blacked out financial data was not relevant to any allegation or issue raised by Petitioners (Board hearing, R. at 163). The Board agrees, and therefore denies Petitioners' motion for judgement by default. To the extent this contradicts the Hearing Officer's order regarding production of the document, such order is overruled.

Cases such as this one which involve appeals from local governmental decisions on the siting of new regional pollution control facilities (referred to as "S.B. 172" cases) involve two main issues: Whether the local governing body's decisions on the six statutory criteria of §39.2 of the Act are supportable under the manifest weight standard of evidence, and whether the procedures used by the local governing body in reaching its decision were "fundamentally fair". These issues will be addressed in that order.

*Section 40.1(b) of the Act requires that the Board hear a petition "unless the Board determines that such petition is duplicitous or frivolous, or that the petitioner is so located as to not be affected by the proposed facility."

The Statutory Criteria

Section 39.2(a) of the Act requires a local governmental entity to apply six criteria when making the determination to approve/disapprove a new regional pollution control facility. 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 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 flood-proofed 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

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

Section 40.1(b) of the Act (when read in conjunction with §40.1(a)) provides that the burden of proof is on the petitioner. The applicant must prove to the County Board by a preponderance of the evidence that the facility satisfies all six criteria. However, in order to overturn a County Board decision, a petitioner must prove to this Board that the local govenmental entity's decisions on the six criteria were against the manifest weight of the evidence. E & E Hauling v. Pollution Control Board, 116 Ill. App. 3d 586, 608, 451 N.E. 2d 555 (2d Dist. 1983).

As Petitioners have made no such showing in this case, the Board affirms the decisions of the M.C.B. on the six criteria. Petitioners have raised no arguments concerning the six criteria through any pleadings, and at the September 12, 1985 Pollution Control Board hearing (here-inafter referred to as "Board hearing") on this matter, Petitioners did not make a presentation of any of the six criteria until counsel's closing argument. Even then, counsel only briefly addressed the M.C.B.'s decisions on two of the criteria, and certainly did not show that the decisions below were against the manifest weight of the evidence presented there.

Fundamental Fairness

Section 40.1(b) of the Act (when read in conjunction with §40.1(a)) requires the Board in S.B. 172 cases to consider the fundamental fairness of the procedures used by the local governmental entity in reaching its decision. Petitioners have pleaded two issues which can be construed as going to the fundamental fairness of the proceeding below: First, that of alleged misrepresentation on the part of I.S. due to the various names it appears to have operated under in the past, and second, the sale of I.S. by Respondent John Prior, the occurrence of which is uncontested but for the date on which it transpired.

Petitioners have made much of the issue regarding the true legal name of Respondent John Prior's company, which filed the application to the M.C.B. for approval of a new regional pollution control facility. Specifically, Petitioners contend that I.S.' request for site approval should be "dismissed" due to Mr. Prior's "misrepresentation" of the name of the company he represented at that time.

Throughout the proceedings below and the statutory notices given pursuant to those proceedings, Prior's company variously represented itself as Industrial Salvage, Industrial Salvage, Inc., and I.S., Inc. The testimony given by Mr. Prior at the Board hearing, however, clarifies this apparent discrepancy. In 1969, Mr. Prior purchased a business operating under the name Industrial Salvage. The business was not incorporated at that time, and Mr. Prior operated the business as a sole proprietorship.

In 1980, Mr. Prior incorporated the business under the name I.S., Inc. (Board hearing, R. at 195-6). Further, Mr. Prior stated that from 1980 on he tried to promote the corporation's identity as I.S., Inc., but that the Industrial Salvage name "stuck" (Board hearing, R. at 196).

The Board finds that no real confusion resulted from this company's use of several names. The Petitioners-Objectors in this matter certainly knew Mr. Prior as the person operating the landfill their homes surround; this is not the first time that some of these same petitioners have objected to attempts by Mr. Prior to expand his landfill (see PCB 83-173, vol. 59, P. 233 of the Opinion volumes). Under one name or another, Mr. Prior has operated at the same site for over 15 years. It stretches reason to believe that local residents were not aware of which company he represented.

The same reasoning is applicable to any argument that the M.C.B. was confused as to the true identity of Mr. Prior's company. This proceeding was the third time in less than two years that Mr. Prior had come before the M.C.B. regarding the siting of a new regional pollution control facility. Moreover, the chairman of the M.C.B., Mr. Farrol Armstrong, testified that

he knew Mr. Prior personally, and knew that he operated a landfill in Marion County, prior to the initiation of this proceeding (Board hearing, R. at 129). The Board finds no confusion whatsoever, and consequently no fundamental fairness problem, stemming from the issue of I.S.' legal name.

Petitioners also allege that approval of a new regional pollution control facility pursuant to S.B. 172 is not transferable, and that because Mr. Prior sold the site of the facility here at issue the M.C.B.'s approval should be "reversed" since I.S. is no longer the party in interest (Board hearing, R. at 240). Ostensibly, Petitioners believe the proceedings below to have been fundamentally unfair because the party who now has the interest in the facility did not "...come in in its own name and see if it deserves it" (Board hearing, R. at 240).

The Board is at a loss as to how the sale of the facility violates the requirements of fundamental fairness. No law or theory is put forward that convincingly articulates Petitioner's argument. The Board has, in the past, dealt with similar arguments regarding the sale of a facility and the ability and responsibility of a proponent to follow through with proposed design and operation features. Watts Trucking Service, Inc. v. City of Rock Island, PCB 83-167, March 8, 1984. However, in the Watts case the argument was made in the context of criterion no. 2, which deals with design, location and operation as it relates to the protection of public health, safety and welfare, not fundamental fairness. In Watts, the Board outlined the appropriate scope of review by the County of criterion no. 2: the County can review "conceptual or schematic design to determine if the right type of system and necessary safeguards were present" (Id. at 15). Therefore, the Petitioners' argument that the sale of the proposed facility violates fundamental fairness is rejected, as it is not supported by law.

There were several other aspects of the proceedings below which the Petitioners raised at hearing in an attempt to show a lack of fundamental fairness in the M.C.B. hearings. Among these were: a conversation between board members Armstrong and Biagi in which the high cost to the County of conducting the hearings was discussed (Board hearing, R. at 62); the allegation that the M.C.B. at least partially based its decision on bids received by the City of Centralia from contractors attempting to wrest the city's disposal business from I.S., Inc., and that although these bids were supposedly for amounts higher than were expected to be received, Petitioners did not have the opportunity to see the bids nor cross-examine anyone related to them because none of the bids were put into the record (Board hearing, R. at 229-231); a conversation between Theresa Castellari (a resident of Marion County) and M.C.B. member Kessler, in which the board member admitted he had received phone calls from persons urging him to vote in favor of approving the application (Board hearing, R. at 232-3); an allegation concerning M.C.B member Martin, who apparently voted in favor of the application even though he

supposedly failed to attend any of the M.C.B. hearings, which is alleged to be in violation of law, although no citation was given (Board hearing, R. at 232); an allegation that because the hearing officer at the May 29, 1985 M.C.B. meeting orally summarized the six criteria found at §39.2 of the Act, the M.C.B. members may have been confused as to the exact wording of the criteria.

Regarding the allegation concerning M.C.B. member Martin's absence from the proceedings below, it is well established that fundamental fairness does not require members' personal attendance at hearing, as long as the hearing is fully transcribed and the transcription is available to the member(s) in question prior to decision. Homefinders, Inc. v. City of Evanston, 65 Ill. 2d 115, 128-29 (1976). Therefore, by casting his vote Mr. Martin did not violate Petitioners' fundamental fairness.

The Board is similarly unpersuaded that any of the arguments noted above, whether individually or in toto, caused the hearings below to be fundamentally unfair. It is well established that "fundamental fairness" as used in §40.1 of the Act creates a statutory due process standard, which has been construed as requiring application of adjudicative due process in S.B. 172 proceedings. E & E Hauling, supra at 598-99, cited in Industrial Salvage, Inc. v. County Board of Marion, PCB 83-173 (February 22, 1984), and Town of St. Charles v. Kane County Board, et. al., PCB 83-228 (March 21, 1984), appeal docketed (First District, June 21, 1984). In light of that standard, the Board finds none of these charges of sufficient weight to warrant a finding that, for any of the aforementioned reasons, the proceedings below lacked fundamental fairness.

The Board wishes to devote additional discussion, however, to the allegations made regarding ex parte contacts. There is a substantial volume of case law supporting the impropriety of ex parte contact in administrative adjudication. E & E Hauling, supra, citing United States Lines v. Federal Maritime Com., 584 F.2d 519, 536-42 (D.C. Cir. 1978); PATCO, supra at 564-66; 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). "Ex parte" contacts are those between an interested person and an agency decisionmaker which involve communications relevant to the merits of the proceeding. PATCO v. Federal Labor Relations Authority (D.C. Cir. 1982), 685 F.2d 547, 561-62. "Interested person" is intended to encompass more persons than simply the parties to a proceeding; it includes any individual with an interest in the proceeding that is greater than the general interest the public as a whole may have. Id. at 562. Under PATCO's definition of "ex parte", the written message received by M.C.B. Chairman Armstrong from the operator of the Greenville landfill (Board hearing, R. at 95), and the phone calls allegedly received by

M.C.B. member Kessler from persons supportive of I.S.' application (Board hearing, R. at 158) were ex parte contacts.

Determining whether ex parte contacts did in fact occur is only the first prong of the two-prong test in the ex parte area. The other requires a reviewing court to consider whether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgement of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect. E & E Hauling, supra at 606, citing PATCO, supra at 564-65. Instead of applying mechanical rules in determining whether to vacate an agency proceeding, the reviewing court's decision must of necessity be an exercise of equitable discretion. E & E Hauling, supra at 607, citing PATCO, supra at 565.

The Board finds that the ex parte communications which occurred below did not "irrevocably taint" the M.C.B. proceedings in this matter. Chairman Armstrong received a written message before the vote from the operator of the Greenville landfill stating that that facility had room to handle all of Marion County's refuse. That information can only be construed as unfavorable to I.S.' application, so thus could not have influenced the vote cast by Chairman Armstrong, which was to approve the application. The phone calls allegedly received by M.C.B. member Kessler remain simply that: alleged. Petitioners did not call Mr. Kessler as a witness, which prevented them from determining whether the calls actually occurred and also whether the communications affected his vote in any way. In the face of these deficiencies, the Board cannot say that these calls, assuming arguendo their occurrence, irrevocably tainted the proceedings below to such an extent that remanding this case to the M.C.B. would be warranted.

The Board notes that one of the reasons it finds these varied arguments of Petitioners to hold little weight is because Petitioners failed to fully develop them in well-reasoned form before the Board; these positions were never raised in the form of pleadings or briefs but were rather made inadequately at hearing, so the Board was never availed of them in a form where the issues were carefully framed and presented for decision.

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

ORDER

The May 29, 1985 decision of the Marion County Board approving the request of I.S., Inc. for approval of the siting of a new regional pollution control facility is hereby affirmed.

IT IS SO ORDERED.

Board Members J. Anderson and J. Marlin concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of November, 1985, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board