ILLINOIS POLLUTION CONTROL BOARD
September 19, 1996

RESIDENTS AGAINST A POLLUTED ENVIRONMENT and THE EDMUND B. THORNTON FOUNDATION,	)	
Petitioners,	)	
v.	)	PCB 96-243
	)	(Pollution Control Facility Siting Appeal)
COUNTY OF LASALLE and LANDCOMP CORPORATION,	)	
Respondents.	)	

GEORGE MUELLER, HOFFMAN, MUELLER, CREEDON, APPEARED ON BEHALF OF PETITIONERS;

ROBERT M. ESHBACH, SPECIAL ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF RESPONDENT COUNTY OF LASALLE;

JAMES I. RUBIN AND KEVIN J. O'BRIEN, BUTLER, RUBIN, SALTARELLI & BOYD, APPEARED ON BEHALF OF RESPONDENT LANDCOMP CORPORATION.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on a petition for review filed by Residents Against A Polluted Environment (Residents) and The Edmund B. Thornton Foundation on May 29, 1996. Petitioners seek review of an April 25, 1996 decision of the LaSalle County Board (LaSalle or county board) which granted site location suitability approval to LandComp Corporation (LandComp) for the construction of a new pollution control facility. The proposed pollution control facility in this case is a municipal solid waste landfill. Petitioners filed their appeal pursuant to Section 40.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/40.1(b) (1994)).

On July 18, 1996, the Board issued an order addressing several pre-hearing motions. That order granted LandComp's request to strike paragraph 8(w) of the petition for review, which related to adoption of the County Solid Waste Management Plan, and granted LandComp's request to bar the introduction of evidence of *ex parte* contacts prior to the filing of the siting application with the county board. Furthermore, the order granted LandComp's request to treat volume VII of the siting application as "not subject to disclosure".

A hearing was held in this matter on January 8, 1996, before Board Hearing Officer Deborah L. Frank, which members of the public attended. Petitioners filed their post-hearing brief on August 14, 1996, respondent LandComp filed its post-hearing brief on August 16,

1996, and respondent County of LaSalle filed its post-hearing brief on August 20, 1996. Petitioners filed their reply brief on August 26, 1996. Additionally, the following four public comments were received: (1) a July 26, 1996 comment from Gerald L. Bernabei; (2) a July 29, comment from Joan C. Bernabei; (3) an August 6, 1996 comment from Pamela Delvallee; and (4) an August 8, 1996 public comment from Andree-Marie Koban.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2 provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. Section 39.2(g) of the Act provides that the siting approval procedures, criteria, and appeal procedures provided for in Section 39.2 shall be the exclusive siting procedures for new pollution control facilities. However, the local siting authority may develop its own siting procedures, so long as those procedures are consistent with the Act and supplement, rather than supplant, those requirements. (See Waste Management of Illinois v. Pollution Control Board, 175 Ill. App. 3d 1023, 530 N.E.2d 682, 692-693 (2d Dist. 1988).) At the conclusion of the local siting process, LaSalle found that all of the applicable criteria had been satisfied, and therefore granted siting approval to LandComp.

Section 40.1 of the Act requires the Board to review the proceeding before the local siting authority to assure fundamental fairness. In E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 594, 451 N.E.2d 555 (2d Dist. 1983), *aff'd in part*, 107 Ill. 2d 33, 481 N.E.2d 664 (1985), the appellate court found that although citizens before a local decision maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. (See also Industrial Fuels & Resources v. Pollution Control Board, 227 Ill. App. 3d 533, 592 N.E.2d 148 (4th Dist. 1992); Tate v. Pollution Control Board, 188 Ill.App.3d 994, 544 N.E.2d 1176 (4th Dist. 1989).) Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management, 175 Ill. App.3d 1023, 530 N.E.2d 682.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, 117 PCB 117, 121.)

Upon appeal, the Board may also review a local authority's decision on the nine statutory criteria. In so doing, the Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean, 207 Ill.App.3d 352, 566 N.E.2d 26, 29 (4th Dist. 1991); Waste Management of Illinois, Inc. v. Pollution Control Board, 160 Ill.App.3d 434, 513 N.E.2d 592 (2d Dist. 1987); E & E Hauling, 116 Ill.App.3d 586.)

BACKGROUND

LandComp filed its application for the construction of a new municipal solid waste landfill with the LaSalle County Board on November 1, 1995. The proposed facility would encompass 185 acres, with an approximately 101.5 acre landfill footprint. (County Board Hearing Transcript (County Tr.) at C67.) The site for the proposed landfill is approximately one mile west of Ottawa, Illinois in LaSalle County. It is directly northwest of the States Land Improvement No. 2 Landfill. (LandComp's Application for Siting Approval (Application) at 2.3-1.) The proposed landfill would provide 5,700,000 tons of disposal capacity, which is projected to meet the disposal needs of the county for a minimum of 25 years. (Application at 1-1.) The proposed "primary" service area is LaSalle County, with an initial service area including the surrounding nine counties of DeKalb, Kendall, Grundy, Woodford, Marshall, Putnam, Livingston, Bureau, and Lee. (Application at 1-2 to 1-4.) Additionally, if the primary service area does not generate a minimum of 140,000 tons of waste annually, the service area would be expanded to include additional counties in northern Illinois. (Application at 1-4.) Such expansion would be subject to the approval of the Lake County Board.

Public hearings were held before the LaSalle County Siting Hearing Committee (siting committee) from February 1, 1996 through March 6, 1996 before Hearing Officer Allan Schoenberger. the siting committee consisted of five members of the county board, with two additional members as alternates. At the conclusion of the hearings, Hearing Officer Schoenberger prepared a 101-page recommendation, recommending that the application be granted. On April 25, 1996, the siting committee issued its unanimous recommendation that the application be granted, subject to 26 conditions. That same day, the full county board approved the application subject to the recommended conditions, adopting in their entirety the recommendations and findings of the Siting Committee. This appeal followed.

In this appeal, petitioners challenge the siting decision as being premised on proceedings which were fundamentally unfair on several grounds, and against the manifest weight of the evidence on three of the nine statutory criteria. For the reasons explained below, we find that the procedures before the county board did not comport with adjudicative due process standards of fundamental fairness. First, we find that LaSalle was required to make volume VII of LandComp's application available for public inspection, pursuant to Section 39.2(c) of the Act, and that its unavailability rendered the proceedings fundamentally unfair. Second, we find that the report prepared by the county's consulting engineers, Camp, Dresser, and McKee (CDM), evidences an extensive dialogue, which took place outside the record, between CDM and the applicant's consultant, Patrick Engineering. We further find that Susan Grandone-Schroeder was privy to these discussions, and that they constituted *ex parte* contacts, which prejudiced petitioners and other public participants, and rendered the proceedings fundamentally unfair. Because we find the proceedings were fundamentally unfair on these two grounds, we vacate and remand the decision of the county board without reviewing the statutory criteria.

ARGUMENTS AND DISCUSSION

Petitioners allege that the proceedings before the county board were fundamentally unfair on a variety of grounds. First, they assert that the county board was predisposed in favor of the application. In support thereof, they assert that LandComp's contractual relationship with the county created inherent bias, that the county's attempt to renegotiate the rate structure in the host agreement while the application was pending demonstrates bias, and that the county showed overt favoritism to LandComp during the hearings. Second, petitioners assert that the hearing officer was biased, and that his bias rendered the proceedings fundamentally unfair. Third, petitioners assert that the deliberations of the siting committee were improperly influenced and controlled by non-board members who were biased in favor of the applicant. Fourth, petitioners assert that non-disclosure of volume VII of the application, even to the county board members, rendered the hearings fundamentally unfair. Finally, petitioners assert that the document generated by CDM, the county's environmental consultant, represents a series of *ex parte* contacts which rendered the proceedings fundamentally unfair.

Concerning the siting criteria, petitioners first assert that the applicant failed to establish that there is a need for the facility. Second, petitioners assert that the applicant has failed to demonstrate that the facility is so designed, located and proposed to be operated that the public health, safety, and welfare will be protected. Third, petitioners assert that the applicant failed to demonstrate that the proposal was consistent with the county's solid waste management plan. Again, we will not review petitioners' allegations concerning the siting criteria because we are remanding this matter to the county board to cure the fundamental unfairness. Since one of the errors involves the county's failure to include technical information in the public record, we cannot fully examine whether the evidence supports the county's decision on the criteria. To do so would be premature.

As stated above, petitioners' last two arguments support a finding that the proceedings below were fundamentally unfair. Nevertheless, we will examine all five of petitioners' arguments concerning fundamental fairness.

Non-Disclosure of Volume VII of the Application

Petitioners challenge the fundamental fairness of the siting process below on the grounds that volume VII of the siting application was not available to the county board members or the public. LandComp argues that the county ordinance, which required LandComp to file volume VII as part of its siting application, also allowed the information contained in volume VII to be treated as confidential. LaSalle further argues that, because the information contained in volume VII was not relevant to the statutory siting criteria, the fact that it was kept confidential did not render the proceeding fundamentally unfair.

The Board has examined whether volume VII was available to the county board members or the public, and the effect its availability had on the fundamental fairness of the proceeding below. When LandComp filed its application, including volume VII, with the county clerk, Susan Grandone-Schroeder, the Director of the County Department of Environmental Services and Land Use, immediately removed all copies of volume VII and

locked them in her truck. At the first public hearing before the siting committee, the hearing officer admitted volume VII into the record, but ruled it confidential pursuant to the county ordinance. Based upon these facts and our review of relevant law, we find that volume VII was not available to the public, and therefore these proceedings were fundamentally unfair. Section 39.2 (c) of the Act requires that volume VII, as part of the siting application, must be made available to the public. Since it was not available to the public at the office of the county board, the proceeding below was fundamentally unfair.

The facts pertinent to this issue of fundamental fairness are as follows. Prior to any siting application being filed, the county board adopted an ordinance requiring that siting applicants provide financial information to the county as part of a siting application, and that such information could be deemed confidential upon written request. On October 31, 1995, LandComp brought its seven volume application to the county clerk's office. Grandone-Schroeder testified that she immediately removed all copies of volume VII, which contained the financial information, and sealed them in boxes which she placed in the back of her covered truck. (Board Tr. at 103.)

On February 1, 1996, at the conclusion of its opening statement at the county board's public siting hearing, LandComp moved all seven volumes of its application into evidence; the hearing officer granted that motion. Counsel for petitioners objected due to lack of foundation, noting "parenthetically" that his copy of the application contained only six volumes. (County Tr. at 24-26.) Shortly thereafter, counsel for petitioners objected to going forward with the hearing unless he was given an opportunity to review volume VII. LandComp argued that the county ordinance required that volume VII's information be filed and that it could be designated confidential, and that this information was not relevant to the statutory siting criteria. The hearing officer then reviewed volume VII *in camera*, and ruled that it was to be afforded confidentiality, because the financial information was not relevant to the siting criteria, and because other, non-financial information contained in volume VII was located elsewhere in the record. (County Tr. at 60.)

At the Board's hearing on July 22, 1996, Grandone-Schroeder testified that she and county attorney Robert Eschbach had reviewed the contents of volume VII, and determined that it did not contain anything of substance that would have aided the county board in evaluating the statutory criteria. (Board Tr. at 103-104.) On August 1, 1996, a county board member submitted a public comment to the Board that she had had to make a decision about siting without being allowed to see volume VII, and questioned why it had been submitted but not even placed on public record. (Public Comment of Andree-Marie Koban, filed August 1, 1996).

Petitioners assert that, because volume VII of the siting application was unavailable, the siting proceedings were fundamentally unfair. (Pet. Br. at 44.) In support, they argue first that, because volume VII was not available to the county board members, the decision makers were deprived of a full and complete record upon which to make a decision. (Id. at 45.) Second, they argue that the hearing officer incorrectly determined that volume VII should be protected from public disclosure in its entirety. (Id. at 45-46.) They assert that volume VII

contained information which was not subject to the confidentiality provisions of the county ordinance.

LandComp's response emphasizes that, because Grandone-Schroeder took possession of volume VII, the county board never had access to it. (LandComp's Br. at 41.) LandComp also asserts that the county's treatment of volume VII was appropriate because the county ordinance provides that certain information must be filed, but shall, upon request, be treated as confidential. (Id. at 42.) LandComp relies upon this and the hearing officer's ruling on confidentiality, which was based on his finding that volume VII's contents were entirely irrelevant to the nine statutory criteria. (Id. at 43-44.) LandComp concludes that withholding this information could not have rendered the proceedings fundamentally unfair because, it asserts, this information could have no role in the county board's adjudication.

LaSalle's response to petitioners' arguments is premised upon this last argument. LaSalle argues that caselaw holds that Section 39.2 of the Act does not establish financial responsibility as a criterion, and that such a consideration cannot be implied. (LaSalle Br. at 32.) LaSalle argues that, because the information was irrelevant to these proceedings, the fact that volume VII was kept confidential does not constitute fundamental unfairness. (Id. at 33.)

We will first address whether the public must have access to volume VII. The hearing officer ruled that, pursuant to the local siting ordinance, the financial information contained in Volume II was subject to confidentiality. We will not review this determination because the Board does not review the siting proceedings for compliance with the local siting ordinance. (Smith v. City of Champaign, (August 13, 1992) PCB 92-55.) However, we will review whether application of the local siting ordinance rendered the proceeding fundamentally unfair. (Id.)

A local siting authority may have its own procedures so long as they are consistent with the requirements of Section 39.2 of the Act. The appellate court has addressed the issue of consistency of the local siting procedures with the requirements of the Act. In Waste Management, 175 Ill. App.3d 1023, 530 N.E.2d 682, the appellate court stated:

> Although section 39.2(g) clearly states that the procedures provided for in the Act "shall be the exclusive siting procedures," that section must be read together with section 40.1(a), which requires consideration of the fundamental fairness of any procedures used by the county board in reaching its decisions. These two sections may be read consistently. The Act does not provide specific procedures for conducting the local hearing itself. It does establish procedures for the application process and for standards which must be applied. The language of section 40.1(a) recognizes that specific procedures as to the conduct of the local hearings may be established by a county board and also requires that those procedures be fundamentally fair. Thus, the Act does not prohibit a county board from establishing its own rules and procedures governing conduct of a local siting hearing so long as those rules and procedures are not inconsistent with the Act and are fundamentally fair.

(Id., 175 Ill. App. 3d at 1035-1036.)

Therefore, a local siting authority can develop its own procedures for conducting the siting proceedings as long as those procedures are consistent with the requirements of the Act and are fundamentally fair. In this case, the local siting procedures required that the applicant submit, as part of its application, the information contained in volume VII. The local siting ordinance also provided that such information could be afforded confidentiality. However, Section 39.2(c) provides in relevant part:

> An applicant shall file a copy of its request, with the county board . . . . the request shall include (1) the substance of the applicant's proposal and (2) all documents, if any, submitted as of that date to the agency pertaining to the proposed facility, except trade secrets as determined under Section 7.1 of this Act. All such documents or other materials on file with the county board . . . shall be made available for public inspection at the office of the county board. . . .

(415 ILCS 5/39.2(c) (Emphasis added).)

We find that the local ordinance in this case is inconsistent with Section 39.2(c) of the Act. LandComp filed volume VII as part of its siting application with the county clerk's office on November 1, 1995. On that same day, Grandone-Schroeder removed all copies of volume VII from the county clerk's office. Later, the hearing officer ruled that volume VII was to remain confidential pursuant to the local county ordinance. There is no dispute that volume VII was not available for public inspection at the office of the county board at any time during the siting proceedings. Section 39.2(c) provides no exceptions to its mandate that *all* documents filed with the county board be available for public inspection. Whether or not volume VII was relevant to the nine statutory criteria, the county board was required to make it available to the public. Therefore, that portion of the local ordinance affording confidentiality to volume VII is inconsistent to the Act. While case law allows the county board to develop its own procedures for conducting siting proceedings, those procedures must be consistent with the siting provisions of the Act. If they are not, as is the case here, the proceedings below are fundamentally unfair.

Ex Parte Contacts

Petitioners next assert that *ex parte* contacts between the county and LandComp rendered the proceedings fundamentally unfair. In support, petitioners allege two separate grounds for finding that *ex parte* contacts occurred. First, petitioners allege that the report from CDM represents a series of impermissible *ex parte* contacts between the county and the expert for the applicant. Second, petitioners allege that the county impermissibly attempted to renegotiate the rate structure in the host agreement with LandComp, while the siting application was pending. As set forth below, we find that both occurrences constituted improper *ex parte* contacts, but that only the first prejudiced petitioners so as to render the proceedings fundamentally unfair.

In E & E Hauling, 451 N.E.2d at 564-566, the appellate court found that the local decision making process must be viewed as an adjudicatory, rather than a legislative, process. This requires the decision maker to be impartial, subject to the exception found at 39.2(d) of

the Act. Contacts which could unfairly influence the decision maker are improper in adjudicatory proceedings. The decision maker in this case, the county board, must not engage in the types of contacts normally allowed when it acts as a legislative body. The impropriety of *ex parte* contacts in administrative adjudication is well established. (Id. at 571.) *Ex parte* contacts are condemned because they: (1) violate statutory requirements of public hearings, and the concomitant right of the public to participate in the hearings, (2) may frustrate judicial review of agency decisions, and (3) may violate due process and fundamental fairness rights to a hearing. (Id.) Therefore, fundamental fairness requires that the local hearing process comport with adjudicative standards of due process.

In making the determination whether improper *ex parte* contacts rendered the proceedings fundamentally unfair, we must first determine whether improper *ex parte* contacts occurred. An *ex parte* contact is one which takes place without notice and outside the record between one in a decision making role and the party before it. (Town of Ottawa v. Pollution Control Board, 129 Ill.App.3d 121, 126, 472 N.E.2d 150; (3d Dist. 1984).) In Waste Management, 175 Ill.App.3d 1023, 530 N.E.2d 682, the court stated that this definition was inclusive rather than exclusive. (Id. at 1043.) Relying on Black's Law Dictionary, the court stated that *ex parte* contacts include "something done for, in behalf of, or on the application of, one party only." (Id. at 1042.) The court further stated that "*ex parte* proceedings are proceeding brought for the benefit of one party only and without notice to the other party." (Id. (citations omitted).) Applying these definitions, the court determined that contacts between county board members and constituents, which took place outside the presence of the applicant, and which were clearly in support of the position held by various objectors who were parties to the siting proceeding, constituted *ex parte* contacts. (Id.) In the context of a siting proceeding, then, an *ex parte* contact is a contact between the siting authority and a party with an interest in the proceeding without notice to other parties to the proceeding.

The mere occurrence of *ex parte* contacts does not, by itself, mandate automatic reversal. It must be shown that the *ex parte* contacts caused some harm to the complaining party. In Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill.App.3d 541, 555 N.E.2d 1178, 144 Ill.Dec. 659 (3d Dist. 1990) (hereinafter, FACT), the court stated:

> [*E*]*x parte* communications from the public to their elected representatives are perhaps inevitable given a county board member's perceived legislative position, albeit in these circumstances, they act in an adjudicative role as well. Thus although personal *ex parte* communications to county board members in their adjudicative role are improper, there must be a showing that the complaining party suffered prejudice from these contacts.

(FACT, 198 Ill.App.3d at 549.)

As stated in E & E Hauling, 116 Ill.App.3d 586, 451 N.E.2d 555, when determining whether *ex parte* contacts warrant reversal:

> A court must consider whether, as a result of improper *ex parte* communications, the agency's decision making 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.

(116 Ill.App.3d at 606-607, *citing* PATCO v. Federal Labor Authority, 685 F.2d 547, 564-65 (D.C. Cir. 1982).)

CDM Report

Petitioners assert that the report generated by CDM represents a series of improper *ex parte* contacts. (Petitioners' Br. at 46.) They argue that this report evidences a series of direct communications between CDM, the county's consultant, and Patrick Engineering, the applicant's consultant, and that Grandone-Schroeder was privy to these exchanges. They assert that these contacts included at least one face-to-face meeting, which both Eschbach and Grandone-Schroeder attended. (Id.) They assert that this report, which is dated February 1996, and which is 136 pages in length, with an additional 23 pages of exhibits, contains highly technical, substantive information, which would have assisted them in their cross-examination if it had been available. (Id. at 48.)

Additionally, petitioners assert that the substance of these *ex parte* contacts were relied upon in the decision making process. Petitioners assert that the conditions proposed by Grandone-Schroeder could only have resulted from her discussions with CDM, whose view was slanted by its *ex parte* communications with Patrick Engineering. (Id. at 49.) Finally, petitioners assert that the sheer scope and volume of the *ex parte* communications evidenced in the CDM report should lead the Board to consider them inherently prejudicial. (Id.)

In response, LandComp asserts that CDM's role was to assist Eschbach, the county attorney, and Grandone-Schroeder, in formulating questions for the siting hearing. (LandComp's Br. at 44.) LandComp asserts that the meeting between CDM, Eschbach, Grandone-Schroeder, and representatives from Patrick Engineering took place shortly after the application was filed, and was only for the purpose of determining whether the application was complete. (Id.)

LandComp asserts that, after this initial meeting, CDM raised questions regarding the contents of the application in written form, and Patrick supplied written answers. CDM then transmitted the results of these discussions to Grandone-Schroeder via a series of faxes, to assist Grandone-Schroeder and Eschbach in preparing cross-examination questions for witnesses during the hearings. LandComp asserts that these questions and answers were not distributed to the siting committee or county board. (Id.)

LandComp asserts that a siting authority's use of technical advisors is common and has previously been approved by the Board and appellate courts. (Id. at 45.) LandComp asserts that this Board has previously approved the process of a technical advisor working directly with members of the siting authority, answering questions, and providing opinions. LandComp asserts that the contents of the CDM report are not *ex parte* contacts because CDM is the county's consultant, not the decision maker, and does not have a vote on siting. (Id.) LandComp cites FACT, 198 Ill.App.3d at 548, for the assertion that technical advisors are not barred from communications with representatives of the applicant. LandComp argues that CDM was even further removed from the process than the advisors in FACT, because CDM did not advise the county board members directly, but only advised Eschbach and Grandone-Schroeder. (Id.)

LandComp also asserts that any technical, substantive information in the CDM report was never given to the county board members. LandComp cites Material Recovery v. Village of Lake in the Hills (July 1, 1993), PCB 93-11, slip op. at 12-13, in asserting that the siting authority is under no obligation to produce the reports of its technical advisor. (Id. at 46.) LandComp asserts that since CDM only advised Grandone-Schroeder and Eschbach, not the county board, the inability of petitioners to access the information provided could not be prejudicial. Finally, LandComp asserts that there is no evidence that the information received by Grandone-Schroeder and Eschbach actually impacted the county board's decision. Petitioners cite Grandone-Schroeder's testimony that the conditions she suggested were derived from evidence at the siting hearing. (Id.)

LaSalle asserts that the testimony of Grandone-Schroeder and Eschbach establishes that at no time did they directly communicate the contents of the CDM report to siting committee members or any other county board members, and that the actual report itself was not provided to county board members. LaSalle points to FACT in asserting that the law concerning *ex parte* contacts does not apply to consultants for the county. (LaSalle Br. at 36.) Furthermore, LaSalle asserts that the facts of this case do not support the conclusion that the county's consultants acted as a conduit for information to County Board members. LaSalle relies on E & E Hauling, 116 Ill.App.3d 586, 451 N.E.2d 555, in asserting that *ex parte* contacts do not require reversal without a showing of prejudice. LaSalle asserts that even if there were *ex parte* contacts, petitioners failed to demonstrate how they suffered prejudice from these contacts. (Id. at 36-37.)

In FACT, objectors to the village board's approval of siting argued that the village board members improperly relied on the report of an expert retained by the village. The expert met with the applicants, in the presence of the village attorney, on at least one occasion, and had other conversations with the consultants for the applicant. This Board held that, even though three village board members testified they relied on the report, officials are presumed to act objectively, and there was no evidence they had acted otherwise. Furthermore, this Board held that, with regard to matters included in the report which were not testified to at hearing, the report was properly submitted as public comment. The appellate court affirmed, stating that, since no village board members attended the meeting between the two consultants, there was no evidence the village board improperly relied upon the report. The court stated that the allege predisposition of the village's consultant was irrelevant, since the consultant had

no vote. Furthermore, the appellate court affirmed this Board's holding regarding information not testified to at hearing, holding that the report was properly submitted as public comment.

In Material Recovery, the village board denied siting approval for a material recovery facility and solid waste balefill. The applicant argued, in relevant part, that the proceedings were fundamentally unfair because the Village retained experts to assist in its decision making, but failed to include the reports of the Village's experts in the record. The record had included a final report which summarized the findings of the county consultants, but failed to include the individual reports prepared by two of the consultants. The Board held that fundamental fairness did not require that the individual reports be submitted into the record.

In McLean County Disposal Company v. County of McLean, (November 15, 1989) PCB 89-108, 105 PCB 203, 207, this Board, in addressing whether the county's determination on criterion 2 was against the manifest weight of the evidence, held that the recommendation of an expert retained by the county is not binding on the county board. In Hediger v, D& L Landfill, (December 20, 1990) PCB 90-163, 117 PCB 117, 124, the Board stated, "The decision making authority rests solely with the local government. A local government's consultant report . . . is not binding on the decision maker."

As stated above, *ex parte* contacts include contacts which take place without notice and outside the record between one in a decision making role and the party before it (Town of Ottawa, 129 Ill.App.3d at 126), and include "something done for, in behalf of, or on the application of, one party only." (Waste Management, 175 Ill.App.3d at 1042). As discussed in greater detail below, we find that the CDM report represents a series of improper *ex parte* contacts between the county and the applicant. Grandone-Schroeder's participation in a discussion between the county's consultant and the applicant's consultant on the technical merits of the application constituted improper *ex parte* contacts.

Initially, we must address whether it was possible for Grandone-Schroeder to engage in improper *ex parte* contacts. Grandone-Schroeder is an employee of the county, acted on behalf of the county at hearing, and was responsible for advising the board members on the merits of the application. Therefore, while she does not herself have a vote, to the extent she was acting on behalf of the county board, we find that it is possible for her to have had *ex parte* contacts. The county board was engaging in adjudication in hearing and deciding on LandComp's siting application. Furthermore, this proceeding must provide fairness and the appearance of fairness. (E & E Hauling, 116 Ill.App.3d at 598.) Accordingly, Grandone-Schroeder cannot acquire information beyond that in the record or from outside the public hearing process any more than a judicial clerk could acquire information directly or indirectly from a party before a court.

Having determined that it is possible for Grandone-Schroeder to have engaged in *ex parte* contacts, we must determine whether such contacts took place. The facts show that Grandone-Schroeder was privy to a discussion with a representative of the applicant about the technical merits of application. This discussion took place outside the record, and provided opponents with no opportunity to cross-examine or question any conclusions reached. While we agree with respondents that there is no evidence that the information exchanged between

CDM and Patrick was given directly to the county board members, the information in the report was known to Grandone-Schroeder at the time she advised the board. We therefore find that Grandone-Schroeder was engaging in *ex parte* contacts. We must now determine whether these contacts resulted in any prejudice.

Applying the criteria set forth in E & E Hauling, 116 Ill.App.3d 586, 451 N.E.2d 555, we find that the *ex parte* contacts irrevocably tainted the hearing process. The CDM report demonstrates that a lengthy dialogue took place between the county expert and the applicant's expert. While Grandone-Schroeder referred to the contacts as "a series of faxes," the document produced is 136 pages in length, with an additional 23 pages of tables. While Grandone-Schroeder testified that the discussions concerned "clarification" of the application (Board Tr. at 97-99), a review of the CDM report indicates that the consultants discussed, in great detail, the technical merits of many aspects of the application.

We find that the scope of these contacts was so extensive that failure to include them in the record improperly limited public participation, thereby thwarting the public hearing process. The report represents the type of discussion which should take place on the record at the public hearing, in order to allow public participation in the siting process. Grandone-Schroeder, who was responsible for advising the county board on the siting application, was privy to the entire dialogue between the consultants. This discussion could have affected the ultimate decision in this case, since Grandone-Schroeder had this information available to her when advising the county board members on the siting committee. The exchanges which took place were not available to opponents of the facility or their experts, and this eliminated their ability to challenge or respond to the conclusions reached.

The case at bar differs from those cited by respondents in several significant ways. Here, there was no report submitted into the record. In FACT, the appellate court stated that the alleged predisposition of the village's consultant was irrelevant, since the consultant had no vote. Here we are not relying on the predisposition or bias of the consultant, or even of Grandone-Schroeder. Instead we are holding that the *ex parte* contacts thwarted the public hearing process by limiting public participation on important technical issues. The appellate court in FACT also affirmed this Board's holding that, with regard to matters included in the report which were not testified to at hearing, the report was properly submitted as public comment. In the case at bar, the *ex parte* contacts were never made part of the record, and no such cure was effected.

Attempt to Renegotiate Rate Structure

Petitioners assert that the county's attempt to renegotiate the rate structure in the host agreement, while the siting application was pending, constituted an impermissible *ex parte* contact. In support of this assertion, petitioners point to the testimony of Grandone-Schroeder. She testified that, due to concerns over rate increases at the landfill currently operated by Paul

DeGroot, the principal for LandComp, she contacted LandComp to renegotiate the rate structure set forth in the host agreement, and that she and Eschbach met with representatives of LandComp. Petitioners acknowledge that LandComp's attorneys were unwilling to negotiate any modifications of the host agreement during the pendency of the siting application, but assert that Grandone-Schroeder was able to "extract" from LandComp a promise to discuss the matter further after the siting proceeding. (Pet. Br. at 27.) Petitioners assert that this constitutes a "blatant and obvious" *ex parte* contact. (Id.)

LandComp responds that the record is clear that LandComp would not discuss the tipping fee structure during the pendency of its application. LandComp further asserts that there is no evidence that the county board knew of the meeting, and that it therefore could not have had any impact on the county's decision on the application. (LandComp's Br. at 32.) Both LandComp and LaSalle assert that the contact with Grandone-Schroeder was not an *ex parte* contact, since Grandone-Schroeder is not a member of the county board. (LandComp's Br. at 33; LaSalle's Br. at 23.) LandComp also asserts that, even if the contact was an *ex parte* contact, petitioners have not demonstrated that it caused them any prejudice. Finally, LaSalle asserts that the issue being discussed at the meeting was not related to any of the statutory criteria. (LaSalle's Br. at 23.)

At the Board's hearing, Grandone-Schroeder testified that she had requested a meeting with DeGroot, in order to discuss an amendment to the host agreement between LandComp and the county that would lock in a maximum disposal fee at the proposed landfill. (Board Tr. at 81-82.) However, no discussion of the issue took place due to the pendency of the siting application, and there was no agreement as to a maximum disposal fee. (Board Tr. at 83-84.) Grandone-Schroeder testified that the only agreement reached was that, once the siting process was completed, if LandComp's application was approved, they would discuss the issue at a later date. (Board Tr. at 84.)

We find that Grandone-Schroeder's meeting with LandComp constitutes an *ex parte* contact. As stated above, we find that Grandone-Schroeder, to the extent she acted on behalf of the county board, was capable of having improper *ex parte* contacts. Her meeting with LandComp was outside the public record and without notice to the public, and her overtures on behalf of the county to renegotiate the tipping fee, while LandComp's siting application was pending before the county, afforded LandComp an opportunity to influence the county board. By participating in a discussion with a representative of the applicant outside the record, Grandone-Schroeder was engaging in *ex parte* contacts.

Having found the meeting to be an *ex parte* contact, we must next examine whether the county board's decision making was irrevocably tainted. (E & E Hauling). The facts in this case pose an interesting dilemma. The contact was initiated not by a party, but by the employee advising the county board about the siting application. Nevertheless, it afforded the siting applicant an opportunity to influence the decision maker. However, it is undisputed that LandComp declined the county's overture, refusing to renegotiate the tipping fee while the application was pending. Therefore, we find that no there was no prejudice to the public interest.

Predisposition of the County Board

Petitioners raise three arguments in asserting that the county board was predisposed in favor of the application. First, they seek to reassert the contents of their pre-hearing motion concerning the county's Solid Waste Management Plan and other pre-siting agreements. Second, they assert the county had a contractual relationship with the applicant prior to the filing of the siting application, which created inherent bias. Second, they assert that the county showed overt favoritism to LandComp during the hearings. Having examined these challenges, we find none valid.

Exclusion of Pre-Application Evidence

In their post-hearing brief, petitioners support their allegation that the county board was predisposed in favor of granting LandComp's application by re-alleging the contents of the pre-hearing motion which was denied by the county hearing officer. (Petitioner's Br. at 21-22; County Rec. at C04220 - C04221.) That motion incorporated by reference the allegations contained in a complaint filed in circuit court by petitioners and certain other organizations against the county. (C04222 - C04232.) The substance of these allegations is that the manner in which the vendor agreement was entered into between the county and LandComp indicates that LandComp exercised undue influence over the county board. Petitioners allege that this undue influence disqualified the county board from hearing the siting application, and rendered any such proceedings before the county board fundamentally unfair.

Petitioners further allege that the refusal of the county's hearing officer to allow testimony at the siting proceeding concerning the adoption of the county's solid waste management plan rendered the proceedings fundamentally unfair, since it prevented petitioner's from establishing the county board's pre-decisional bias. (Petitioner's Br. at 22.) Petitioners assert that the county hearing officer's error was compounded by the Board granting LandComp's motion *in limine* and the county's motion to strike. (Id. at 23.) Both of these motions concerned paragraph 8(w) of the petition for review, which alleged that LandComp improperly influenced and dictated the development of the county's Solid Waste Management Plan, the conditions for siting approval, and procedural rules for the county's siting proceedings. Additionally, LandComp's motion requested that the Board bar testimony supporting allegations contained in paragraphs 8(e), (f), and (w) of the petition for review.

LandComp responds to petitioners' argument by asserting that the Board's order of July 18, 1996 was correct because the Board refused to consider LandComp's participation in prior legislative processes before the county board. LandComp relies on E & E Hauling v. Pollution Control Board, 107 Ill.2d 33, 43, 481 N.E.2d 664 (1985), in asserting that the Board correctly rejected petitioner's arguments that these actions support an inference that LandComp had caused the county board to pre-judge its application. (LandComp's Br. at 28.) LandComp also asserts that the Board's hearing officer correctly relied on the Board's July 18, 1996 order in refusing to allow testimony concerning the county's selection of a preferred vendor and adoption of the host agreement. (LandComp's Br. at 29.) Finally, LandComp asserts that petitioners failed to make the necessary offers of proof to preserve their claim that evidence was improperly excluded. (Id.)

Respondent LaSalle asserts that petitioners' allegations concern alleged wrongdoings occurring years before LandComp filed its application. (LaSalle's Br. at 19.) LaSalle asserts that the determination of fundamental fairness required by Section 40.1 addresses only the fundamental fairness of the siting hearing and procedures employed therein, and that the Board is therefore without jurisdiction to review the alleged wrongdoings. To the extent petitioners' allegations concern the siting proceedings, LaSalle cites Southwest Energy v. Pollution Control Board, 275 Ill. App. 3d 84, 655 N.E.2d 304 (4th Dist. 1995) (appeal concerning the proposed Havana facility), and the 1992 amendment to Section 39.2 of the Act, in asserting that the fact that a county board member has publicly expressed an opinion does not preclude that member from participating in the proceedings, and that local siting authorities are not held to the same standards as judicial bodies. (LaSalle Br. at 20.) LaSalle asserts that even if a disqualifying bias or prejudice is found, the Rule of Necessity requires that the county board act as the siting authority.

There is a presumption that administrative officials are objective and capable of fairly judging a particular controversy. In Waste Management, the court stated:

> Moreover, the fact that an administrative official has taken a public position or expressed strong views on an issue before the administrative agency does not overcome the presumption. Where, as here, an administrative body operates in an adjudicatory capacity, bias or prejudice may only be shown if a disinterested observer might conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it.

(175 Ill.App.3d 1023, 1040 (Second Dist. 1988).)

Furthermore, Section 39.2(d) as amended in 1992 provides in relevant part:

> 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).)

We affirm the ruling in our July 18, 1996 order that allegations concerning the adoption of the county's Solid Waste Management Plan are not proper allegations for Board consideration in a Section 40.1 pollution control facility siting appeal. We further affirm that order's reliance on Beardstown Area Citizens for a Better Environment v. City of Beardstown, (January 11, 1995) PCB 94-98, in ruling that contacts between the applicant and the siting authority prior to the filing of the siting application do not constitute impermissible *ex parte* contacts. (Id., slip op. at 9-10.) Additionally, we affirm the rulings of the Board's hearing officer in excluding questions concerning the adoption of the county's solid waste management plan. As stated in our July 18, 1996 order, there is no authority for applying *ex parte* restrictions concerning pollution control facility siting prior to the filing of an application for siting approval. Because evidence of these contacts are not relevant to the siting criteria and are not indicative of impermissible pre-decisional bias of the siting authority, we find that the

county hearing officer's failure to allow testimony concerning these allegations did not render the proceedings fundamentally unfair. Similarly, the contacts between the applicant and the county board prior to the filing of siting application are irrelevant to the question of whether the siting proceedings themselves were conducted in a fundamentally fair manner.

Contractual Relationship Between LandComp and LaSalle

Petitioners next assert that LandComp's status as the exclusive vendor for the county, and the host agreement between the county and LandComp, created inherent bias which rendered the siting proceedings fundamentally unfair. Petitioners point out that the Board has recognized the concept of inherent bias in Concerned Citizens for a Better Environment v. City of Havana, (May 16, 1994) PCB 94-99. (Petitioner's Br. at 25.) They assert that LaSalle had a great deal invested in LandComp, and has a "clear and obvious" motive to grant LandComp's siting application. Petitioners assert that the relationship between LandComp and the county is much more complex than that encountered in prior cases involving annexation agreements. (Id. at 26.)

LandComp responds that the Board and the courts have repeatedly rejected the assertion that the existence of a host agreement indicates predisposition or bias on the part of the siting authority. (LandComp's Br. at 31.) LandComp repeats the rule that administrative officials are presumed to be objective, and asserts that, since there is no evidence of actual bias, petitioners' attempt to impute bias to county officials must fail. (Id. at 32.)

LaSalle responds that the issue of inherent bias concerning the host agreement is very much the same as that found in prior cases involving pre-annexation agreements. LaSalle asserts that the appellate court has addressed this issue in FACT, and has held that such an agreement does not create bias. (LaSalle Br. at 22.)

The Illinois Supreme Court has addressed the issue of whether a contractual relationship between the siting authority and the applicant creates bias in E & E Hauling v. Pollution Control Board, 481 N.E.2d 664. In that case, petitioners argued that the county board was disqualified from acting as the siting authority because the county received $30,000 per month in revenue from the landfill, and because the local siting authority had previously approved the landfill by ordinance. However, the Court held that the members of the local siting authority should not be disqualified because revenues were to be received by the county, and that public officials should be presumed to act without bias. Furthermore, the Supreme Court held that the county's prior adoption of an ordinance approving the landfill did not indicate that the local siting authority had prejudged the application, since it was still required to determine that the statutory criteria were satisfied.

Illinois appellate courts have also held that the existence of a pre-annexation agreement, with a potential economic benefit to a local siting authority, did not show predisposition of the local decision maker. (FACT, 555 N.E.2d 1178; Woodsmoke Resorts v. City of Marseilles 174 Ill.App.3d 906, 529 N.E.2d 275 (3d Dist. 1988).) In Gallatin National v. Fulton County Board (June 15, 1992), PCB 91-256, 134 PCB 245, the Board found that the issuance of preliminary bonds was a permissible preliminary step and did not indicate predisposition or

bias. (See also Village of LaGrange v. McCook Cogeneration Station, PCB 96-41 (December 7, 1995).)

We find that the situation in the case at bar is similar to those cases mentioned above. The existence of the host agreement and the exclusive vendor relationship, while creating a potential economic benefit for the county, are not indicative of predisposition or bias. These agreements constitute permissible preliminary steps, and we therefore find that these agreements did not render the proceedings below fundamentally unfair.

County's Demonstration of Favoritism

Petitioners next argue that the proceeding was rendered fundamentally unfair because the county showed overt favoritism towards LandComp during the siting proceeding. As evidence of this favoritism, petitioners point to a phone call from DeGroot to a radio call-in show that was running a program about the proposed landfill. DeGroot's phone call was placed from the office of the county auditor's secretary. (Petitioner's Br. at 28-29.)

LandComp responds that the county auditor is not a board member, and was not present during DeGroot's use of the phone. LandComp further asserts that there is no allegation that any board member even knew of the phone call. (LandComp Br. at 33.) Similarly, LaSalle argues that the incident in question is unrelated to the procedures used by the local decision maker, and has no bearing on the fundamental fairness of those procedures. (LaSalle at. 23-24.)

Petitioners also point to a letter from the Department of Natural Resources submitted to Mr. Ted Lambert, chairman of the county board, during the public comment period. In the letter, the Department of Natural Resources withdrew its previously expressed objection to the proposed landfill. This letter was placed in the mailboxes of the majority, but not all, of the county board members, and was transmitted to the county clerk and placed in the record. (Petitioners Br. at 29.) Petitioners contrast this with the treatment of another letter submitted to Lambert. This second letter was written by Professor James Brown, an archeologist at Northwestern University, and expressed opposition to the landfill. Petitioners state that, while Professor Brown's letter was dated March 29, 1996, it was not received by the county clerk until April 15, after the close of the public comment period. (Id.) However, upon recommendation of the hearing officer, Professor Brown's letter was included in the record. (Id.)

LandComp and LaSalle respond that both letters were placed in the record, and that there was no favoritism shown or prejudice demonstrated. (LandComp Br. at 33-34; LaSalle Br. at 25.) LaSalle also asserts that all announcements and publications pertaining to the hearing directed that public comments be submitted to the county clerk, and that no evil intent on the part of the county board chairman was demonstrated.

We find that neither of these incidents indicates any predisposition or bias on behalf of the county board which could render the proceedings fundamentally unfair. The county auditor had no role in the siting proceedings, and was not even present when DeGroot used his

phone. Furthermore, any partiality in treatment of the letters was cured because both letters were placed in the record.

In sum, we find that the allegations that the county board was predisposed in favor of LandComp are without merit. In the first instance, under case law, the county is allowed to have a pre-existing contractual relationship with the applicant. In the second instance, there is no connection between DeGroot's use of the county auditor's phone and the siting proceedings. Finally, because the public comments received by the county board chairman were ultimately put into the record, we find that the facts do not demonstrate overt favoritism.

Bias of the Hearing Officer

As its next argument that the siting proceedings were fundamentally unfair, petitioners allege that the county's hearing officer demonstrated consistent and thorough bias against the objectors and in favor of the applicant. Petitioners assert that this bias was demonstrated at hearing, and in the hearing officer's report to the siting committee.

In support of their allegations that the hearing officer demonstrated bias during the hearing, petitioners allege a multitude of improper activities by the hearing officer. These include: inconsistent evidentiary rulings favoring the applicant; consistently characterizing prior testimony in a manner favorable to the applicant; making editorial comments detrimental to the objectors; improperly cutting-off questioning regarding LandComp's financial condition; and protecting DeGroot during cross-examination by preventing questions concerning his input into the Solid Waste Management Plan, and his input into the county board's decision to amend the size of the proposed landfill.

Regarding the hearing officer's limitation of questions concerning the applicant's financial condition, petitioners cite County of Lake v. Pollution Control Board, 120 Ill. App. 3d 89, 457 N.E.2d 1309, (2d Dist. 1983), in asserting that financial responsibility is "certainly indirectly related to at least some of the statutory criteria." (Pet. Br. at 34.) Petitioners also cite Southwest Energy, 275 Ill.App.3d 84, in asserting that, while site approval cannot be granted unless the statutory criteria are satisfied, a local governing body may properly deny siting approval based upon legislative-type considerations.

In support of their allegations that the hearing officer's report demonstrates bias, petitioner's assert that within the report the hearing officer reviewed in detail testimony favorable to the applicant, while ignoring or dismissing testimony unfavorable to the applicant. (Pet. Br. at 34-35.) Petitioners then specifically attack the report's statements concerning the need for the landfill, proximity to the I & M Canal, and traffic issues, and allege disparate treatment of the applicant's witnesses and petitioners' witnesses at hearing.

In response, LandComp asserts that the substance of petitioners' argument is that they disagree with the hearing officer's evidentiary rulings and report to the siting committee, and that a review of the record reveals no evidence to support petitioners' claim of bias. (LandComp's Br. at 34.) Regarding petitioners assertion that the hearing officer cut-off argument, LandComp asserts that the hearing officer simply sustained objections with which

the petitioners disagreed. LandComp asserts that the hearing officer properly allowed LandComp's witnesses to testify concerning the proposed facility's compliance with the local siting criteria imposed by the Solid Waste Management Plan, but properly rejected cross-examination as to how those criteria were developed. (Id. at 35.) LandComp asserts that inquiry into the process of legislative enactment is outside the scope of the siting proceeding. Concerning offers of proof, LandComp asserts that the hearing officer properly ruled that written offers of proof could be submitted, and that the failure of petitioners to do so waived any objection. (Id.) LandComp responds to petitioners' assertions regarding the hearing officer's "editorial comments" by asserting that the hearing officer was merely explaining his rulings on evidentiary disputes.

LandComp also asserts that the hearing officers properly sustained objections to inquiries into LandComp's finances. (LandComp's Br. at 36-37.) LandComp asserts that the applicant's financial status is outside the scope of the nine siting criteria. LandComp asserts that this principle was established in County of Lake v. Pollution Control Board, 120 Ill.App.3d 89 (2d Dist. 1983), and was recently confirmed in Those Opposed to Area Landfills v. City of Salem, (March 7, 1996) PCB 96-79 (TOTAL).

LaSalle asserts that petitioners have presented no evidence to establish a motive or reason for the hearing officer to be biased in favor of the applicant, and that none of the factors indicating bias by the hearing officer in Southwest Energy were present in this case. (LaSalle Br. at 26-27.) LaSalle asserts that the hearing officer played two distinct roles: acting as hearing officer in the proceeding, and making a recommendation to the siting committee. LaSalle asserts that the fact that the hearing officer made a recommendation favorable toward the applicant does not relate back to the hearing itself, and does not constitute evidence of bias during the hearing. LaSalle asserts that petitioners' allegations concerning the report merely constitute disagreements with the hearing officer's conclusions.

In County of Lake, the court affirmed the ruling of the Board striking a condition imposed by the siting authority which required the siting applicant to provide a bond as proof of financial responsibility. The court held that the Board properly struck the condition because Section 39.2 does not authorize the county to require financial responsibility. The court stated:

> Financial responsibility is not part of the . . . criteria to be considered in granting approval. It is only indirectly related to [criteria] (v) but not sufficiently to find that it is implied.

(Id. at 1317.)

In TOTAL v. City of Salem, (March 7, 1996) PCB 96-79, the Board addressed the question of an objector's right to present evidence on the issue of financial assurance. In the local siting hearing, objectors to the proposed expansion of a city-owned landfill sought to examine the city manager on the issues of economics and profitability, where the city manager was acting as the applicant for siting approval on behalf of the city. The hearing officer in the siting proceeding denied their attempts to call the city manager as an adverse witness. In

addressing the question whether the hearing officer's limitation of evidence on economics and profitability rendered the proceedings fundamentally unfair, the Board stated:

> While the Board understands TOTAL's arguments that economics are connected to the ability of the landfill expansion to be operated in a manner to meet the criteria concerning public health, safety and welfare in Section 39.2(a) of the Act, the exact language of the criterion states ". . . the facility is so designed, located and proposed to be operated . . ." and does not require that the local siting authority determine the solvency of the applicant. The issue of financial assurance of the applicant is addressed at the permitting stage before the Illinois Environmental Protection Agency. Furthermore, TOTAL could have presented its own witnesses and cross examined the applicant's witnesses on those issues. We find that TOTAL was not so limited in presenting evidence concerning economics such that the proceeding was fundamentally unfair.

(Id., slip op. at 16-17.)

We find that neither the hearing officer's actions at hearing, nor the hearing officer's report, demonstrate bias by the hearing officer which rendered the proceedings fundamentally unfair. We agree with respondents that the alleged bias at hearing is largely disagreement with the hearing officer's rulings. Furthermore, we find that the limitation of questions concerning the development of the county's solid waste management plan was proper, since the siting hearing is not intended to include inquiry into prior legislative enactments.

Similarly, we do not find that the hearing officer's limitation of cross-examination regarding economic issues demonstrated bias. At the outset of the public hearings, the hearing officer had applied the confidentiality provisions of the local ordinance to the financial information filed by LandComp in volume VII of its application. Although we disagree with the hearing officer's prior application of the local ordinance, his rulings concerning cross-examination appear consistent with his interpretation of the law. In this context, his ruling limiting cross-examination does not demonstrate bias.

Alleged Improper Influence of Non-Board Members on Siting Committee Deliberations

Lastly, petitioners allege that the county attorney, the hearing officer, and the Director of the County Department of Environmental Services and Land Use were present during the deliberations of the siting committee, and controlled and manipulated the committee. (Petitioner's Br. at 40.) The deliberations were conducted in a closed session, but a transcript of the meeting was included in the record. Petitioners allege that the discussion was led by Schoenberger and Grandone-Schroeder, and that the Hearing Officer Report served as an outline for the deliberations. Petitioners also assert that Schoenberger and Grandone-Schroeder came to the meeting with a list of proposed conditions.

LaSalle asserts that petitioners cite no case law or authority as to what constitutes improper influence or control by non-board members, and that the facts in this case fall far short of establishing any improper conduct. (LaSalle Br. at 28.) LaSalle points out that the siting committee deliberated extensively, and that the transcripts of such deliberations are in the record. LaSalle asserts that the deliberations were controlled by the siting committee chairman, Kenneth Stockley, although the hearing officer necessarily spoke at length when presenting his report. (Id. at 29.) LaSalle asserts that a review of the transcripts demonstrates that there was considerable discussion among the committee members. Finally, LaSalle asserts that the objectors have not established any motivation for bias on the part of the non-board members present during the deliberations, and asserts that their expressions of opinions do not constitute bias. (Id.)

We find that the roles of Schoenberger, Grandone-Schroeder, and Eschbach in advising the siting committee during its closed deliberative session did not render the proceedings fundamentally unfair. While each advised the county board on the application, there is no indication that the county board members abdicated their decision making authority. Furthermore, nothing requires that their advice be purely neutral or noncommittal. As decision makers, the county board members on the siting committee were free to either accept or reject the advice provided.

CONCLUSION

We find the siting proceedings in this matter fundamentally unfair on two grounds. First, one volume of LandComp's siting application was not available to the public at the county clerk's office, as required by section 39.2(c) of the Act. Second, we find that *ex parte* contacts occurred between the county board and the siting applicant while the application was pending, and these *ex parte* contacts were prejudicial to petitioners. Petitioners also alleged three additional errors, but we do not find any of these challenges to fundamental fairness valid. The Board will vacate and remand this proceeding to the county board for further action consistent with the Board's findings herein and summarized below. We find that remand of this proceeding is the proper course of action (*See* Hediger v. D & L Landfill, (December 20, 1990) 117 PCB 121.) First, all documents filed with the county clerk must be available to the public pursuant to Section 39.2(c) of the Act. Neither the Act nor caselaw provides an exception to this statutory requirement. In this case, a county ordinance requires that the siting applicant file financial information as part of the siting application. The ordinance also provides that such information shall be afforded confidentiality upon request. LandComp filed such information with the county clerk in volume VII of its siting application. However, immediately after LandComp filed this information, a county employee removed all copies of volume VII from the clerk's office, and locked them in her truck. At the first public hearing, the hearing officer ruled that volume VII was to be kept confidential. Thus, volume VII was not available to the public during the local siting proceeding.

We recognize that Waste Management, 175 Ill.App.3d 1023, allows the local siting authority to adopt its own siting procedures, but only so long as those procedures are not inconsistent with the Act, and are fundamentally fair. We find that the confidentiality provisions of the county's siting ordinance are inconsistent with Section 39.2 of the Act. Since

volume VII was not available to the public due to the actions of the county employee and the hearing officer, the proceeding below was fundamentally unfair.

The second reason we find the proceedings below fundamentally unfair is because we find that the Director of the County Department of Environmental Services and Land Use engaged in *ex parte* contacts with the engineering consultant for the siting applicant, Patrick Engineering. While the application was pending, she was privy to the extensive discussion which took place between the county's consulting engineer, CDM, and the applicant's consulting engineer, Patrick Engineering. These discussions reviewed in great detail the technical merits of the application, as evidenced by the report produced by CDM. That report was not produced until the Board's hearing and is therefore not part of the public record developed in the proceedings below. Having determined that *ex parte* contacts took place, we also find that the petitioners were prejudiced.

Further, we find these *ex parte* contacts met the test established in E & E Hauling, 116 Ill. App. 3d 586, including the final consideration: whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose. We find that the county board's decision must be remanded so that the public can have access to volume VII of the siting application, and can learn the content of the discussions between the county and LandComp's consulting engineer, and have an opportunity to question and respond to this information.

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

ORDER

The April 25, 1996 decision of the LaSalle County Board (county board) granting siting approval to LandComp Corporation is hereby vacated and remanded because the proceeding below was fundamentally unfair. At a minimum, the County Board shall:

1. Deposit a copy of LandComp's entire siting application, including volume VII, at the office of county board, and make the same available to the public.

2. Deposit a copy of the Camp, Dresser and McKee (CDM) Report dated February 1996, at the office of county board, and make the same available to the public.

3. Conduct one or more public hearings, and allow a public comment period of at least 30 days, on the siting application, including volume VII, and the CDM report. Provide public notice of the hearing in accordance with the requirements of Section 39.2(d) of the Environmental Protection Act (415 ILCS 5/39.5). At hearing, allow the public to question the applicant concerning volume VII, and those persons, including but not limited to Susan Grandone-Schroeder and Patrick Engineering, about the information contained in the CDM report. The public shall also be allowed to testify or comment about volume VII and the CDM report.

4. The county board shall render a new decision based upon the record in this case which will include the information acquired during the public hearing and comment period.

5. The county board shall vote and render its decision no later than 120 days after the date of this order.

This docket is closed.

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the _____ day of _____, 1996, by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board