ILLINOIS POLLUTION CONTROL BOARD
October 19, 2000

AMERICAN BOTTOM CONSERVANCY, EAST ST. LOUIS COMMUNITY ACTION NETWORK, KATHY ANDRIA and JACK NORMAN,	)	
Petitioners,	)	
v.	)	
	)	PCB 00-200
VILLAGE OF FAIRMONT CITY and WASTE MANAGEMENT OF ILLINOIS, INC.,	)	(Pollution Control Facility Siting Appeal)
Respondents.	)	

YVONNE M. HOMEYER APPEARED ON BEHALF OF PETITIONERS;

JOHN BARICEVIC APPEARED ON BEHALF OF VILLAGE OF FAIRMONT CITY; and

DONALD J. MORAN APPEARED ON BEHALF OF WASTE MANAGEMENT OF ILLINOIS, INC.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On May 24, 2000, American Bottom Conservancy, East St. Louis Community Action Network, Kathy Andria and Jack Norman (petitioners), filed an appeal pursuant to Section 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/40.1 (1998)) of an April 19, 2000 decision by the Village of Fairmont City (Fairmont City) granting siting for an expansion of a pollution control facility pursuant to Section 39.2 of the Act (415 ILCS 5/39.2 (1998)). The expansion was requested for the Milam Recycling and Disposal Facility (Milam RDF) which is owned and operated by Waste Management of Illinois (WMI). On August 4, 2000, petitioners filed an amended petition for review. Petitioners assert that the proceedings before Fairmont City were fundamentally unfair and that the decision to grant siting approval was against the manifest weight of the evidence.

Hearings were held before Chief Hearing Officer John Knittle on August 22 and 23, 2000. The hearings were held in Belleville, St. Clair County, Illinois. Petitioners filed their brief on September 13, 2000, and a reply brief on October 3, 2000. Fairmont City filed its brief on September 25, 2000, and WMI filed its brief on September 26, 2000.[1]

The Board vacates Fairmont City's decision granting siting for a pollution control facility expansion to WMI and remands the proceeding to Fairmont City for rehearing. Based on the record and as explained below, the Board finds that viewed in combination, various unfair practices rendered the proceedings as a whole fundamentally unfair.

PRELIMINARY MATTERS

Before proceeding to the merits of the case, the Board must first address a procedural issue and several motions pending before the Board. The procedural issue concerns Fairmont City's answer to the petition for review.

[1] The transcript of the hearings before the Board will be cited as "Tr. at"; the petitioner's brief will be cited as "Pet. Br. at"; the reply brief will be cited as "Reply"; WMI's brief will be cited as "WMI Br. at" and Fairmont City's brief will be cited as "Resp. Br. at". The Fairmont City record will be cited as "C".

On August 21, 2000, Fairmont City filed an answer to the first amended petition for review. This answer was timely filed. See 35 Ill. Adm. Code 103.122(d). On September 27, 2000, Fairmont City filed a second answer to the first amended petition for review. A motion or an explanation as to why it was being filed did not accompany this answer. The two answers differ to some extent. Therefore, the Board on its own motion strikes the second answer to the amended petition for review.

On August 23, 2000, the Board received a motion to correct the record on appeal filed by petitioners. In this motion, petitioners ask the Board to strike Books 1 through 32 as filed by Fairmont City and ask that Fairmont City be directed to file the remaining exhibits entered at the hearing held before Fairmont City. Also, the petitioners assert that the transcript of the siting hearing held before Fairmont City is not complete. On October 12, 2000, petitioners filed a "Memorandum withdrawing petitioners' motion to correct record on appeal."

On October 16, 2000, Fairmont City filed a motion to supplement the record. In Fairmont City's motion to supplement, Fairmont City seeks to add a copy of the newspaper notice and an affidavit that the notice of hearing was served by personal service. These items would seem to be the items which were not placed in the record before the Board but were entered as exhibits in the hearing before Fairmont City.

The Board denies the request to withdraw the motion to correct the record on appeal and grants Fairmont City's motion to supplement. As to the remaining issues in the motion filed by petitioners, a review of the transcript from the siting hearing held before Fairmont City indicates that all 167 pages are included. The pages have been misnumbered in places, but all are in fact there. The Board therefore denies that part of the motion to correct the record.

A review of Books 1 through 32 (C00001-C12,709) does not enlighten the Board as to the relevancy of those items to this siting proceeding. The items contained in those books appear to be documentation for previous construction and expansion at the landfill site. However, the actual application for the expansion is only two volumes, Books 33 and 34. C12,710-C13,486. However, in its brief, WMI does cite to items found in Books 1 through 32. As the Board does not believe the inclusion of these items prejudices the petitioners, the Board will not strike the documents.

On October 6, 2000, WMI filed a motion for leave to file a surreply. On October 12, 2000, petitioners filed a motion for leave to respond to the surreply. The Board denies both motions.

STATUTORY BACKGROUND

Section 39.2(c) of the Act provides in pertinent part that:

> An applicant shall file a copy of its request . . . . All such documents or other materials on file with the . . . governing body of the municipality shall be made available for public inspection at the office of the . . . governing municipality and may be copied upon payment of the actual cost of reproduction.

Section 39.2(d) of the Act provides that:

> At least one public hearing is to be held by the county board or governing body of the municipality no sooner than 90 days but no later than 120 days from receipt of the request for site approval. No later than 14 days prior to such hearing notice shall be published in a newspaper of general circulation published in the county of the proposed site, and delivered by certified mail to all members of the General Assembly from the district in which the proposed site is located, to the governing authority of every municipality contiguous to the proposed site or contiguous to the municipality in which the proposed site is to be located, to the county board of the county where the proposed site is to be located, if the proposed site is located within the boundaries of a municipality, and to the Agency.

Section 40.1(a) of the Act provides in pertinent part:

> If the county board or the governing body of the municipality . . . refuses to grant approval under Section 39.2 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the county board or the governing body of the municipality. * * * The county board or governing body of the municipality shall appear as respondent in such hearing, and such hearing shall be based exclusively on the record before the county board or the governing body of the municipality. * * * In making its orders and determinations under this Section, the Board shall include in its consideration the written decision and reasons for the decision of the county board or the governing body of the municipality, the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. 415 ILCS 40.1(a) (1998).

FACTS

Many of the facts in this proceeding directly relate to the arguments made by the parties regarding the fundamental fairness of this proceeding, so the Board will give a brief recitation of the facts at this time and a more detailed recitation where appropriate.

Milam RDF was originally permitted in 1974 and is located in Fairmont City, a municipality in St. Clair County. WMI Br. at 3. The facility is located near the intersection of Interstates 55 and 70 and currently accepts municipal solid waste, demolition waste and construction wastes, and non-hazardous permitted special waste. *Id.* On November 19, 1999, WMI filed a site location application with Fairmont City for vertical expansion of the Milam RDF. *Id.* The siting application proposed a vertical expansion above the 176-acre footprint previously sited and permitted in 1991. *Id.* The siting expansion did not propose any lateral expansion of the facility. *Id.*

The proposed expansion would include disposal capacity of approximately four million tons of municipal solid waste and non-hazardous special waste. WMI Br. at 3. The vertical expansion would increase the life of the facility by four years. WMI Br. at 3, citing C12,736.

After the siting application was filed, Kathy Andria attempted to obtain a copy of the siting application from Fairmont City by contacting Karen Manso the deputy clerk for Fairmont City. Tr. at 50-52. Andria was informed that the cost of making a copy would be $600-$670. Tr. at 52. Andria offered to take the application to a copy service herself and was told she could not do that. Tr. at 175. Andria tried to see that application at the Village Hall. Tr. at 61, 177, and 179. Andria was not able to view the application in person and was told that she must see Manso, who was not there. Tr. at 146, 281. Andria also testified that she tried calling Manso, but Andria was unable to reach Manso. Tr. at 62.

WMI did allow Andria to view a copy of the application at the Milam RDF offices and to make copies using WMI's copy machine. This was approximately two weeks before the hearing. Tr. at 65. In addition, chief of police Scott Penny offered to let Andria see the application on one occasion when Andria visited the Village Hall for another reason. Tr. at 61, 62, and 401. However, she did not have time to view it that day. Tr. at 61, 62, and 402.

There were three different public notices for the siting hearing. Each appeared in the *Belleville New-Democrat* with three different dates for the siting hearing. Tr. at 82-84. A notice appeared on February 23, 2000, noticing a hearing on Monday, March 13, 2000. Pet. Exh. 14. A second notice appeared on February 29, 2000, noticing a hearing for Monday, March 17, 2000. Pet. Exh. 15. A third notice appeared on March 1, 2000, noticing a hearing for Friday, March 17, 2000. Pet. Exh. 16.

On March 17, 2000, a public hearing was held before Fairmont City. C13,734-13,897. WMI made available for questioning at Fairmont City's hearing the individuals who drafted the reports in WMI's application. *Id.* Petitioners, Andria and Jack Norman, participated in the hearing and asked questions of WMI. Andria was

representing the remaining two petitioners at Fairmont City's siting hearing. Tr. at 12. On April 19, 2000, Fairmont City approved the siting. C13,898-13,901.

The hearing officer for the siting hearing was Grey Chatham, who is the brother-in-law to Fairmont City's attorney, John Baricevic. Pet. Exh. 3. At the public hearing, the hearing officer did not allow petitioners to review the exhibits offered by Fairmont City and WMI. C13,761. The hearing officer also denied admission for exhibits offered by petitioners. C13,888-13,892.

After the close of the hearing, petitioners asked for a copy of the hearing transcript. Tr. at 95. However the transcript was not available, according to Fairmont City, until May 9, 2000, after the close of the public comment period (April 16, 2000, Tr. at 97). Tr. at 113-114; Pet. Exh. 25.

On April 19, 2000, the Fairmont City village trustees determined that WMI had met the nine statutory criteria. The trustees voted to allow the expansion of Milam RDF. The vote was six to zero. C13,898-13,901.

FUNDAMENTAL FAIRNESS

In this section the Board will address the issue of whether the proceedings were fundamentally fair. The Board will begin by summarizing existing case law on the issue of fundamental fairness. Next, the Board will summarize the arguments of the petitioners. The Board will follow with a discussion of Fairmont City's arguments and WMI's arguments. Finally, in this section the Board will discuss the reply filed by petitioners. The Board will then analyze the arguments and render its decision on the fundamental fairness of the proceeding.

Summary of Pertinent Case Law

As discussed above, the Board must review the proceedings before the local siting authority to determine if the proceedings were fundamentally fair. The courts have given the Board some guidance on this issue. In E & E Hauling v. Pollution Control Board, (E & E Hauling v. PCB) 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983) aff'd 107 Ill.2d 33, 481 N.E.2d 664 (1985), the court indicated that fundamental fairness refers to the principles of adjudicative due process and a conflict of interest itself could be a disqualifying factor in a local siting proceeding if the bias violates standards of adjudicative due process. E & E Hauling v. PCB 451 N.E.2d 555, 564. Further in E & E Hauling v. PCB the appellate court found that although citizens before a local decisionmaker 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. Illinois Pollution Control Board, 227 Ill. App. 3d 533, 592 N.E.2d 148 (1st Dist. 1992); Tate v. Macon County 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 of Illinois Inc. v. IPCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (2nd Dist. 1989).

The courts have indicated that the public hearing before the local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. Pollution Control Board, 245 Ill. App. 3d 631, 616 N.E.2d 349, 356 (3rd Dist. 1993). 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. The courts have also indicated that fundamental fairness must include the opportunity to be heard and impartial rulings on evidence. Daly v. Pollution Control Board (Daly v. PCB) 462 Ill. App. 3d 968, 637 N.E.2d 1153, 1155 (1st Dist. 1994).

Petitioners' Arguments

The petitioners assert that the proceedings before Fairmont City were fundamentally unfair in five respects. First, petitioners assert that the application was not available to them prior to the public hearing. Second, petitioners argue that there was confusion regarding the actual date of the public hearing. Third, the petitioners contend the public hearing on the siting applications was conducted unfairly. Fourth, petitioners maintain that the proceedings were fundamentally unfair because the transcript of the public hearing was not made available to the petitioners prior to the close of the public comment period. Finally, petitioners argue that the unavailability of the public hearing transcript between the close of the public comment period and the deadline for this appeal rendered the proceedings fundamentally unfair.

Petitioners assert that the application was not available to them prior to the public hearing

Kathy Andria testified that she attempted to obtain a copy of the siting application from Fairmont City, by contacting Karen Manso, the deputy clerk for Fairmont City. Pet. Br. at 6. Andria testified that she contacted Manso to try to obtain such a copy in early December 1999. Pet. Br. at 5, citing Tr. at 51. Andria was informed that the cost of making such a copy would be $600-$670. Tr. at 52. Andria offered to take the application to a copy service herself and was told she could not do that. Tr. at 175. Andria asked that the photocopying costs be placed in writing and sent to her. Tr. at 52; Pet. Exh. 10. As photocopying was cost prohibitive, Andria tried to see the application at the Village Hall. Tr. at 61, 177, and 179. Andria was not able to view the application in person and was told that she must see Manso, who was not there. Tr. at 146, 281. Andria also testified that she tried calling Manso, but Andria was unable to reach Manso.

WMI did allow Andria to view a copy of the application at the Milam RDF offices. WMI also allowed Andria to make copies using WMI's copy machine, approximately two weeks before the hearing. Pet. Br. at 8. In addition, chief of police Scott Penny offered to let Andria see the application on one occasion when Andria visited the Village Hall for another reason. Tr. at 61, 62, and 401. However, she did not have time to view it that day. Tr. at 61, 62, and 402.

Petitioners argue that the quoted cost for photocopying was excessive and set forth two arguments for that proposition. First, petitioners assert that a copy of the application was given to an attorney for a cost of $120. Pet. Br. at 7. In support of this assertion, petitioners point to the testimony of Andria wherein she stated Manso told her that such a copy was provided. Tr. at 56. Also, Penny testified that the attorney received a copy of both binders of the application. Tr. at 407. Lastly, Fairmont City's sign-in log indicates that the same attorney did look at the application on January 14, 2000. C13,732.

Petitioners' second argument is that the application is only 776 pages in total. Even at 22 cents a page (the highest quoted price in the letter from Manso to Andria) the total should have been no more than $170. Reply at 11. Thus, the petitioners argue, Fairmont City quoted a price which was substantially more than the actual cost of reproduction contrary to Section 39.2(c) of the Act (415 ILCS 5/39.2(c)(1998)). Pet. Br. at 8.

Petitioners argue that they were prejudiced by the inability to obtain a copy of the application and to view it. By the time WMI had allowed the petitioners to view a copy of the application at the Milam RDF it was a mere two weeks before the siting hearing. Pet. Br. at 8. Petitioners contend that they did not have sufficient time in those two weeks to adequately analyze the technical material, consult with experts who could analyze the technical material, or to prepare questions that "fairly met the technical substance of the material." Pet. Br. at 8-9.

Petitioners argue that there was confusion regarding the actual date of the public hearing

Three different public notices appeared in the *Belleville News-Democrat* with three different dates for the siting hearing. Tr. at 82-84. A notice appeared on February 23, 2000, noticing a hearing on Monday, March 13, 2000. Pet. Exh. 14. A second notice appeared on February 29, 2000, noticing a hearing for Monday, March 17, 2000. Pet. Exh. 15. A third notice appeared on March 1, 2000, noticing a hearing for Friday, March 17, 2000. Pet. Exh. 16. The hearing was held on Friday, March 17, 2000.

Petitioners argue that the confusion over hearing dates prejudiced petitioners because until after Monday, March 13, petitioners could not be sure that the correct date would be Friday, March 17. Pet. Br. at 11. Andria drove by the Village Hall on Monday, March 13 to see if a hearing was taking place. Tr. at 87. Andria testified that she would have liked to have had "several people at the hearing but it was difficult to ask, since the date of the hearing was not certain." Pet. Br. at 11, citing Tr. 88 and 89.

Petitioners contend the public hearing on the siting application was conducted unfairly

Petitioners argue several very specific reasons why they believe the hearing was conducted unfairly. First, petitioners maintain that the hearing officer, Grey Chatham, was biased against them and that the bias arises from his relationship with the attorney for Fairmont City, John Baricevic. Next, they argue that the hearing was unfair because petitioners had the burden of putting on testimony. Third, they argue that the inability to view exhibits during the hearing was unfair. Finally, they argue that the hearing officer's failure to admit Andria's exhibits made the proceedings unfair. The Board will address each argument in turn.

Petitioners point out that Chatham is Baricevic's brother-in-law. Pet. Br. at 12, citing Pet. Exh. 3. Further, petitioners maintain that the two attorneys share an office at 4010 N. Illinois Street in Belleville with a common waiting area and phone number. Pet. Br. at 12-13, citing Pet. Exh. 5 and Pet. Exh. 6; Tr. at 18-20.

Petitioners argue that the hearing officer had a personal relationship with the "agent for the governing body that made it impossible for him to be impartial." Pet. Br at 13. Petitioners assert that the hearing officer acted arbitrarily throughout the hearing and that his conduct demonstrated prejudice. Pet. Br. at 12-13.

Petitioners also argue that the hearing was unfair because WMI did not provide testimony at the hearing. WMI's attorney summarized the application and asked that it be admitted. WMI indicated it would not call witnesses but witnesses were available for questioning. C13,755-13,756. Petitioners assert that because they did not have access to the application the failure to put on witnesses placed "an incredible burden on" petitioners. Pet. Br. at 15.

Third, petitioners contend that the hearing officer's refusal to allow them to review the application during the hearing was unfair and prejudiced them. Petitioners were unable to compare the actual application with the materials they had copied from WMI and could not know for sure that they had the right materials. Pet. Br. at 15-16. Further, because petitioners could not view the evidence, they were denied the right to object to evidence that was presented. Reply at 9-10.

Finally, the petitioners assert that the public hearing on the siting application was unfair because petitioner Andria's evidence was not admitted. Petitioners point to the transcript and argue that the hearing officer repeatedly assured Andria that her evidence could be introduced. Pet. Br. at 17. However, when Andria actually tried to introduce evidence, the hearing officer denied the admittance of "all of them except the Cahokia Mounds brochure." Pet. Br. at 17. Specifically, the hearing officer denied admittance of a flood plain map because it was outdated (C13,888), a prospectus from WMI because of lack of relevance (C13,889), a corporate profile of WMI because of hearsay (C13,890), the publication notices because they were already in the record (C13,891), and a letter indicating the cost of copying the application because it was already discussed on the record (C13,892).

Petitioners acknowledge that the hearing officer told them the items could be included as public comment. Pet. Br. at 17. However, petitioners argue that public comment is given less weight than evidence and cite to CDT Landfill Corp. v. City of Joliet (March 5, 1998), PCB 98-60 to support this proposition. Also, petitioners argue, fundamental fairness requires that the petitioners be given a full and fair opportunity to present evidence. Residents Against a Polluted Environment v. Pollution Control Board, 293 Ill. App. 3d 219, 687 N.E.2d 552, 555-556 (3rd Dist. 1997). Petitioners argue that under Daly v. PCB "a fair hearing in a local siting hearing must include the opportunity to be heard and impartial rulings on the evidence." 637 N.E.2d 1153, 1155. Thus, petitioners assert that the hearing officer's rulings deprived the petitioners of a fair hearing.

Petitioners maintain that the proceedings were fundamentally unfair because the transcript of the public hearing was not made available to the petitioners prior to the close of the public comment period

Petitioners argue that Fairmont City was required to make a copy of the transcript from the public hearing available to them pursuant to Section 39.2(c) of the Act (415 ILCS 5/39.2(c) (1998)) and the failure to provide a copy prejudiced the petitioners. Pet. Br. at 24. Petitioners point out that the Board has determined that failure to make available a transcript can render the siting proceeding fundamentally unfair. Pet. Br. at 24, citing SPILL v. City of Madison (March 21, 1996), PCB 96-91 and Sierra Club v. City of Wood River (October 5, 1995), PCB 95-174.

The testimony of Penny indicates that the transcript was "lost" because it was shipped in a photocopy box. Tr. at 403-404. Penny indicated that the transcript was misplaced with supplies and then was found. *Id.* However, in a letter dated May 8, 2000, the village clerk indicated that the transcript had not yet been received. Pet. Br. at 24 citing Pet. Exh. 24. In any event, a copy was not provided to petitioners upon their request. Pet. Br. at 26. Petitioners, Andria and Norman both testified that they were unable to provide detailed public comment because they did not have a copy of the transcript. Tr. at 93, 367-368.

Petitioners argue that the unavailability of the public hearing transcript between the close of the public comment period and the deadline for this appeal rendered the proceedings fundamentally unfair

On May 10, 2000, Fairmont City informed Andria that the transcript was available and if she would send a check a copy would be sent to her. This was after the close of the public comment period and after the vote was taken on the siting application. May 10, 2000, was not outside the 35-day appeal period for an appeal of the siting decision to the Board. Petitioners maintain that they would have received the transcript after the time to appeal the siting decision had run. Pet. Br. at 26. Petitioners argue that they were prejudiced because they could not refer to the public hearing transcript in preparing the petition for review. Pet. Br. at 26.

Fairmont City's Arguments

Fairmont City responds to the arguments of petitioners with four general arguments. First, Fairmont City maintains that the application was available. Second, Fairmont City contends that the multiple public notices did not prejudice petitioners. Third, Fairmont City asserts that the siting hearing was fair. And last, Fairmont City argues that the unavailability of the transcript from the public hearing on the siting application did not prejudice petitioners. The Board will discuss each argument in turn.

Fairmont City maintains that the application was available

Fairmont City asserts that from November 19, 1999, until March 17, 2000, the application for expansion of the Milam RDF was available for review. Resp. Br. at 2. Fairmont City asserts that Andria made only two visits to the Village Hall and when she learned that Manso was not there she did not ask "for someone else to help her." *Id.* Further, Fairmont City argues that Andria did not need to go through Manso to review the application. Resp. Br. at 2, citing Pet. Exh. 10. Fairmont City also argues that Penny offered to allow Andria to view the application but "she was too busy" and would come back later. Pet. Br. at 2. Fairmont City asserts that Andria has been involved in three other siting cases, she has access to the chief of police and village attorney, and the application was available, but she chose not to view it. Resp. Br. at 2-3.

Fairmont City also argues that petitioners can cite no authority that the inability to purchase a copy of the application is a violation of fundamental fairness. Resp. Br. at 3. Also, Fairmont City asserts that the record is silent on how many pages of the application were copied for the attorney who received a copy for $120 or whether any facts may have changed between the time of the inquiry by Andria and the attorney's purchase.

Lastly, Fairmont City maintains that Andria did eventually obtain a copy of the application. Fairmont City notes that there is no testimony from Andria about any additional facts or witnesses that might have been presented if Andria had earlier purchased a copy of the application. Resp. Br. at 3. Fairmont City points out that Andria "makes general comments about technical aspects of the application but has presented no names of proposed witnesses" she might have presented had she had earlier access to the application. Resp. Br. at 3.

Fairmont City contends that the multiple public notices did not prejudice petitioners

Fairmont City asserts that the notice need only place a potentially interested person in a position to inquire about details of the activities. Resp. Br. at 5, citing Tate v. Illinois Pollution Control Board (Tate v. PCB) 188 Ill. App.3d 994, 544 N.E.2d 1176 (4th Dist. 1989). Fairmont City contends that the multiple notices were necessary to correct printer's errors in the first two notices. Resp. Br. at 4. Fairmont City asserts that petitioners have waived this issue and even if waiver does not apply, petitioners cannot demonstrate that the multiple notices prejudiced them.

Fairmont City asserts that the siting hearing was fair

Fairmont City denies that a business relationship exists between the hearing officer and Fairmont City's attorney, although they are brothers-in-law. Fairmont City argues that this fact does not rise to a conflict of interest. Further, Fairmont City asserts that the rulings by the hearing officer denying admission of the documents were appropriate because no witnesses were presented to lay proper foundation for the introduction of the exhibits. Resp. Br. at 7. Fairmont City also disputes that the petitioners were required to present testimony and that the petitioners did not have a copy of the application. Resp. Br. at 6.

Fairmont City argues that the unavailability of the transcript from the public hearing on the siting application did not prejudice petitioners

Fairmont City asserts that the transcript was not made available to the petitioners due to a "clerical error" by Fairmont City. Resp. Br. at 7. As petitioners did not request an extension of the public comment period, Fairmont City contends that petitioners have waived objection. *Id.* Fairmont City argues that if waiver does not apply, petitioners have not shown prejudice. *Id.*

WMI's Arguments

WMI argues that the petitioners' arguments lack any legal or factual support. WMI Br. at 2. WMI asserts that fundamental fairness assures each party an opportunity to be heard at a siting hearing including the right to present evidence and cross-examine witnesses. *Id.* WMI maintains that fundamental fairness does not "protect a party from its own negligence or lack of diligence." *Id.* WMI sets forth several arguments in response to the issues raised by petitioners. First, WMI contends that petitioners are experienced siting participants. Second, WMI asserts

that the proceedings before Fairmont City were fundamentally fair as the application was available and there was no confusion regarding the date of the siting hearing. Third, WMI contends that the siting hearing was fundamentally fair because the hearing officer did not suffer from bias, petitioners are responsible for preparing or presenting evidence at the public hearing, petitioner had the siting application during the siting hearing and the hearing officer properly excluded evidence. Fourth, WMI asserts that the unavailability of the siting hearing transcript did not prejudice the petitioners. The Board will examine each of these arguments in turn.

WMI contends that petitioners are experienced siting participants

WMI argues that Andria is an experienced participant in the siting process and has been involved in three prior proceedings. WMI Br. at 7. WMI contends that Andria's own experience "undermines" the claims of fundamental unfairness because Andria "clearly understood the statutory timelines involved in these proceedings." WMI Br. at 7-8, citing Tr. at 158-160, 82, 63, 97, 102, 92-93, and 112. WMI asserts that Andria was not prejudiced by "her failure to obtain or view a copy of the siting application, by conduct of the public hearing, or by any confusion of public hearing notices. The only prejudice Ms. Andria suffered was due to her own inability or failure to seek information and to plan, organize and prepare the evidence or case she intended to present," according to WMI. WMI Br. at 9.

WMI asserts that the proceedings before Fairmont City were fundamentally fair as the application was available and there was no confusion regarding the date of the siting hearing

WMI argues that the siting application was available and that Andria is not prejudiced by being unable to get a copy of the application but by "her own decision to not resolve the cost issue." WMI Br. at 11. WMI argues that Andria admits they did not pursue getting a copy because "we didn't have that money" (Tr. at 54, 61) and that Andria never approached anyone at Fairmont City until the public hearing about the cost. WMI Br. at 11, citing Tr. at 173, 177. WMI maintains that if cost were truly "an insurmountable obstacle" petitioners could have viewed the siting application at the Village Hall. WMI Br. at 11.

As to viewing the siting application at the Village Hall, WMI asserts that Andria's failure to do so "rested solely on her own schedule and her own decision to make time to" view the siting application. WMI Br. at 12. WMI maintains that Andria only "clearly remembers going once to view the application" at the Village Hall. WMI 12. WMI asserts that Andria "assumed" she had to see Manso, but when Manso was not available, Andria did not ask to see the "receptionist's supervisor" about seeing the siting application. WMI Br. at 12. Andria did not ask anybody else if she could view the siting application and she never called the mayor or Penny. WMI Br. at 12.

WMI further argues that Andria was given the opportunity by WMI to copy the complete application but chose not to. WMI Br. at 13. WMI argues that it was the petitioners' discomfort and "deliberate choice" in not copying the entire application at WMI"s offices. *Id.*

WMI next argues that there was no confusion regarding the hearing dates. WMI Br. at 14. WMI points out that the correct hearing date was published on March 1 and allowed 16 days notice before the start of the public hearing. WMI contends that Andria claims the confusion over the date of the hearing caused prejudice because she could not confirm hearing dates and was unable to coordinate witnesses. WMI Br. at 15. However, WMI maintains that after determining that the siting hearing was on March 17, Andria did not contact any person to testify at the hearing. WMI Br. at 15. Further, WMI asserts that Andria claims that "instead of looking at the siting application, she had to try and find out about the hearing and 'had to go and see what was happening.' (Tr. at 88.) This consisted of going to the Village Hall once, calling WMI once, and then calling the Village Hall again. (Tr. at 86-88.)" WMI Br. at 15.

WMI contends that the siting hearing was fundamentally fair because the hearing officer did not suffer from bias, petitioners are responsible for preparing or presenting evidence at the public hearing, petitioner had the siting application during the siting hearing and the hearing officer properly excluded evidence

WMI first asserts that any claim of bias against the hearing officer is waived because it was not raised below. WMI Br. at 16. WMI asserts that the petitioners learned that the hearing officer and Fairmont City's attorney shared office space the day after the hearing, at the very start of the public comment period. WMI argues that petitioners' failure to raise the issue then deprived Fairmont City of an opportunity to address the issue and the right to raise the issue is waived. WMI Br. at 16-17, citing A.R.F. Landfill v. Pollution Control Board, 174 Ill. App. 3d 82, 528 N.E.2d 390, 394 (2nd Dist. 1988).

WMI next argues that the hearing officer was not the decisionmaker and he made no recommendations and presented no findings to Fairmont City. WMI Br. at 17. Therefore, WMI contends, his role was not relevant to fundamental fairness. WMI Br. at 17, citing Citizens Against Regional Landfill v. Pollution Control Board, 255 Ill. App. 3d 903, 627 N.E.2d 682, 685 (3rd Dist. 1994). Further, WMI asserts, petitioners have no evidence that the relationship with Fairmont City's attorney affected the hearing officer's impartiality or conduct of the hearing. WMI Br. at 18. Finally regarding the hearing officer, WMI asserts that the hearing officer did not exhibit bias. WMI Br. at 18.

WMI argues that the petitioners' claim that WMI must put on witnesses is "legally and logically preposterous." WMI Br. at 20. WMI maintains that the application itself contains the facts and evidence supporting the site location request and experts are not required to be called as a witness in a siting hearing. WMI Br. at. 20, citing Concerned Adjoining Owners v. Pollution Control Board, 288 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist. 1997). WMI points out that the application itself contains the applicant's case and it is up to the objectors to present evidence to dispute the siting application. WMI argues that it made available the experts who had prepared reports for examination at the public hearing and petitioners questioned whomever they chose. WMI Br. at 21.

As to the availability of the siting application at the hearing, WMI asserts that the petitioners had access to the siting application during the hearing. WMI Br. at 22. WMI argues that because petitioners were allowed to copy the application at WMI's offices prior to the siting hearing, petitioners did have a copy. *Id.*

WMI lastly argues that the exhibits offered by Andria were properly excluded based on fundamental evidentiary principles (WMI Br. at 22): the flood plain map "was neither current nor accurate" based on unrebutted testimony (WMI Br. at 22); the Waste Management Prospectus and SEC statements were not relevant, (WMI Br. at 23-24); the public notice of a March 13 hearing was not probative; and the letter regarding the cost of copying the siting application was cumulative (WMI Br. at 23). Thus, all were properly excluded according to WMI.

WMI asserts that the unavailability of the siting hearing transcript did not prejudice the petitioners

WMI concedes that the Board has determined that the transcript from the siting hearing must be made available by the local governing body in Sierra Club v. City of Wood River (October 5, 1995), PCB 95-174. However, WMI disagrees with the Board's finding and argues that the Board should overturn the decision in Sierra Club v. City of Wood River (October 5, 1995), PCB 95-174. WMI Br. at 24-25. WMI asserts there is no basis in the statutory language or public policy to require local governing bodies to provide transcripts of the public hearing during the written comment period. WMI Br. at 26.

WMI further argues that even if the local governing body must make the transcript available, petitioners were not prejudiced by the inability to review the transcript. WMI Br. at 27. WMI asserts that petitioners submission of public comments "disproves any claim of prejudice." WMI Br. at 27. WMI asserts that the petitioners were not prevented from submitting public comments, and were not prejudiced because the hearing transcript was only 167 pages and consisted of information available in the application, or through testimony elicited through cross-examinations by petitioners. WMI Brief at 28-29.

WMI argues that this is the "third time" Andria has made the claim that the hearing transcript was unavailable. WMI Br. at 29. WMI argues that Andria could have "heeded the information given to her in Sierra Club" and contacted the court reporter. WMI Br. at 29. WMI argues that Andria's failure to do so "indicates that she either did not believe the transcript was necessary to prepare her written comment, or she intended for tactical reasons to rely exclusively on the Village for the transcript." WMI Br. at 29.

WMI also argues that the transcript was available to petitioners in preparing their petition for review. WMI Br. at 30. WMI points out the petition for review was filed on May 23, 2000, two weeks after Andria received the letter that the transcript was available. *Id.*

Petitioners' Reply

In the reply, petitioners raise the issue of jurisdiction for the first time. Specifically, petitioners argue that the failure to include Village Exhibit 1 from the siting hearing in the record is a fatal flaw to jurisdiction. Reply at 2. Petitioners maintain that Fairmont City is required to give notice of the siting hearing and the exhibit introduced at the siting hearing was "purporting to show compliance with this jurisdictional requirement." Reply at 2. That exhibit was not included in the record on appeal (see above at page 2). Reply at 2. Petitioners maintain that the "inescapable conclusion is that the exhibit would show that the Village failed to serve all parties" under the Act. Reply at 3.

Petitioners also argue in their reply that they have properly raised the issue of hearing officer bias as the relationship between Fairmont City's attorney and the hearing officer was not known until petitioners had hired their own attorney. Thus raising the issue at this time is appropriate according to the petitioners. Reply at 3-4.

Petitioners assert that WMI's brief is "full of references to the alleged extensive experience of Ms. Andria about siting hearings." Reply at 5. Petitioners argue that WMI is arguing that because of that experience, Andria should be held to a different standard than another public citizen. Reply at 5. Petitioners assert that there is not provision in the law and WMI has cited not legal authority for "categorizing members of the public according to how much experience they may have had with siting hearings." Reply at 5. Further, petitioners maintain that WMI blames Andria for "putting herself" in the situation created by Fairmont City so that Andria would have grounds for appeal. Reply at 6. Petitioners contend that the evidence in the record of the irregularities make it "absurd to claim that Ms. Andria set out to entrap" Fairmont City. *Id.*

DISCUSSION

Jurisdiction

Although petitioners raise the issue of jurisdiction in their reply brief, the Board finds that the issue is moot. Fairmont City has supplemented the record with proof that notice was properly given for the hearing pursuant to Section 39.2(d) of the Act. Section 39.2(d) of the Act provides that:

> At least one public hearing is to be held by the county board or governing body of the municipality no sooner than 90 days but no later than 120 days from receipt of the request for site approval. No later than 14 days prior to such hearing notice shall be published in a newspaper of general circulation published in the county of the proposed site, and delivered by certified mail to all members of the General Assembly from the district in which the proposed site is located, to the governing authority of every municipality contiguous to the proposed site of contiguous to the municipality in which the proposed site is to be located, to the county board of the county where the proposed site is to be located, if the proposed site is located within the boundaries of a municipality, and to the Agency.

In this appeal, the Board does have in the record proof that the notice of hearing was timely published in the newspaper of general circulation published in the county of the proposed site. See Pet. Exh. 16 and Fairmont City's motion to supplement. Therefore, the Board finds that the issue of whether Fairmont City had jurisdiction is moot. The Board will examine the issue of notice of Fairmont City's hearing only in the context of fundamental fairness.

Fundamental Fairness

The Board will now consider the issue of whether the proceedings were fundamentally fair. First, the Board will examine the issue of whether the siting application was available to the petitioners. Second, the Board will

determine whether the multiple notices of hearing lead to confusion and a fundamentally unfair proceeding. The Board will then decide whether the public hearing was conducted unfairly. Finally, the Board will decide if the failure to provide the petitioners with a copy of the siting hearing transcript lead to a fundamentally unfair proceeding.

Section 39.2(c) of the Act provides in pertinent part that:

> An applicant shall file a copy of its request . . . . All such documents or other materials on file with the . . . governing body of the municipality shall be made available for public inspection at the office of the . . . governing municipality and may be copied upon payment of the actual cost of reproduction.

Thus, the language of the Act is explicit that a copy of the application must be available for inspection and copying at the actual cost of reproduction.

The following facts are not disputed: Andria was not able to view the application at Fairmont City; the costs of copying the application were quoted to Andria at $600-$670; a copy of the application was provided to an attorney at a cost of $120; that same attorney is the only person who signed in and viewed the application at Fairmont City's Village Hall. Also uncontested is that when Andria went to view the application, the deputy clerk was not available. Andria's testimony is also that she called the deputy clerk to make an appointment but the clerk was not available.

WMI and Fairmont City insist that had Andria asked someone else she would have been able to view the application. They also point out that on one occasion she was offered the opportunity to view the application, but Andria turned it down. Also, WMI allowed petitioners to make a copy of the application two weeks before the siting hearing. Therefore, respondents are arguing that any prejudice in the proceeding was created by the petitioners.

The arguments of WMI and Fairmont City do not persuade the Board. First, WMI's act to allow WMI access to the application does not alleviate Fairmont City of its statutory obligation to provide access to the application. Section 39.2(c) of the Act (415 ILCS 3/39.2(c) (1998)). Second, the fact that on one occasion when Andria visited Fairmont City Village Hall on other business and the chief of police offered to show Andria the transcript also does not alleviate the problem. The clerk has a full time job so Andria contacted the deputy clerk. Tr. at 283. However, the deputy clerk was not available and did not return calls. Tr. at 62. Petitioners and members of the general public should not be forced to inquire of every person in and around the Village Hall in order to examine a siting application.

Further, the Board has previously held that failure to make even one volume of an application unavailable for public inspection renders the proceeding fundamentally unfair. See Residents Against a Polluted Environment v. LaSalle County (September 19, 1996), PCB 96-243. In this case the inability of petitioners to review any part of the siting application until two weeks prior to the hearing did prejudice the petitioners as they were less able to prepare for the siting hearing. The Board finds that Fairmont City's failure to have the application available for inspection renders these proceedings fundamentally unfair.

However, the unavailability of the siting application is by no means the only part of this issue the Board finds questionable. Also of concern, is the fact that after a written estimate for the cost of copying was sent to petitioners, Fairmont City provided a copy to a third-party at a substantially reduced price. Fairmont City failed to inform petitioners of the lower cost until the siting hearing. Thus, the Board finds that Fairmont City also failed to meet its statutory obligation to provide a copy of the siting application at the actual cost of copying. Section 39.2(c) of the Act (415 ILCS 3/39.2(c) (1998)).

Next, the petitioners have argued that the multiple notices created confusion and led to the proceedings being fundamentally unfair. The Board disagrees. The published final notice clearly and accurately reflected the hearing date and contained all the information required by the Act. The previous public notices were incorrect and

to clear up any confusion additional publication was undertaken. The Board does not find this fundamentally unfair.

The petitioners also argue that the siting hearing was conducted in a fundamentally unfair manner. In support of this argument, petitioners argue that the hearing officer was biased, WMI should have put on witnesses, the hearing officer refused to allow petitioners to view the exhibits, and petitioners' exhibits were improperly denied admittance. Here again the Board is not wholly persuaded by petitioners' arguments. First, the Board does not believe the fact that the hearing officer and the Fairmont City attorney were brothers-in-law and shared office space is sufficient to find a disqualifying bias. Also, the failure of the hearing officer to allow petitioners to view the exhibits was based on his belief that petitioners had sufficient time before the hearing to review the siting application. Thus, the hearing officer's ruling that petitioners could not view the exhibits at hearing is not inherently biased. Therefore, the evidence in this record does not lead the Board to a finding that the hearing officer was biased and the ruling alone is not fundamentally unfair. This finding is consistent with previous Board precedent as the hearing officer was not the decisionmaker in this proceeding. See, Citizens Against Regional Landfill v. Pollution Control Board, 255 Ill. App. 3d 903, 627 N.E.2d 682, 685 (3rd Dist. 1994), citing Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill. App. 3d 541, 555 N.E.2d 1178 (3rd Dist. 1990).

Regarding the failure of WMI to put on witnesses the Board finds that this does not render the proceedings fundamentally unfair. See Concerned Adjoining Owners v. Pollution Control Board, 288 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist. 1997). WMI had available witnesses to answer questions. Petitioners did ask to question several witnesses and WMI provided the witnesses. WMI established the credentials of the witnesses and then allowed petitioners to question WMI's experts regarding the application. WMI merely chose to introduce the application and stand on the merits. This alone does not render the proceedings fundamentally unfair.

Finally, with regards to the exhibits which were not admitted at the siting hearing, the Board finds that the prospectus from WMI (C13,889), and the corporate profile of WMI (C13,890) were properly excluded. However, the Board also finds that the hearing officer's failure to include the flood plain map (C13,888), the publication notices (C13,891), and a letter indicating the cost of copying the application (C13,892) were inappropriate. Standing alone such a ruling may not render the proceeding fundamentally unfair, yet when the proceeding is considered as a whole, this finding contributes to the fundamentally unfair nature of the proceeding. Concerned Citizens for a Better Environment v. City of Havana (May 19, 1994), PCB 94-44.

The last issue raised is whether the unavailability of the transcript from the siting hearing renders the proceedings fundamentally unfair. The Board finds that the failure to provide a copy did prejudice the petitioners and as a result rendered the process fundamentally unfair. WMI and Fairmont City insist that the petitioners' inaction led to any prejudice. The Board disagrees. Petitioners timely sought a copy of the hearing transcript from Fairmont City. Fairmont City indicated that it did not have the transcript until May 9 after the close of the public comment period. The Board notes that, the ordinance approving the siting indicates that the village trustees reviewed "all relevant expert testimony" yet according to the information provided to Andria, the transcript was not yet available. C13,901, Tr. at 113-114.

The Board has previously held that failure to make available a transcript can render the siting proceeding fundamentally unfair. SPILL v. City of Madison (March 21, 1996), PCB 96-91 and Sierra Club v. City of Wood River (October 5, 1995), PCB 95-174. Although the Board did not find the proceeding fundamentally unfair in Sierra Club v. City of Wood River (October 5, 1995), PCB 95-174, the Board is convinced that the facts in this case more closely resemble SPILL v. City of Madison (March 21, 1996), PCB 96-91 wherein the Board did find the proceedings fundamentally unfair. Unlike Sierra Club v. City of Wood River, the transcript was not available at the Village Hall; Wood River had made the transcript available. Further, in this proceeding, petitioners did not tape the siting hearing as they did in Sierra Club v. City of Wood River. Also, the petitioners were not told to contact the court reporter as they were in Sierra Club v. City of Wood River. The petitioners in this instance took the appropriate steps to review the transcript in this proceeding and the transcript was not made available for public review. The transcript was "lost" and not provided until after the close of public comments.

Respondents argue that the fact that public comments were filed by petitioners proves they were not prejudiced. The Board disagrees. Both petitioner Andria and petitioner Norman stated that they were prejudiced by not having the transcript.

CONCLUSION

The Board finds that the failure to provide adequate opportunity for petitioners to inspect the siting application along with the unavailability of the siting hearing transcript rendered the proceeding before Fairmont City fundamentally unfair. "Where fundamental fairness requires supplemental proceedings before the local governing body, the Board may remand the cause to that body for additional proceedings." Land and Lakes Company v. Pollution Control Board, 245 Ill. App. 3d 631, 616 N.E.2d 349, 357 (3rd Dist. 1993). The Board finds that the pattern of errors which occurred in this proceeding can be cured by remanding this matter to Fairmont City for new proceedings. See Land and Lakes Company v. Pollution Control Board, 245 Ill. App. 3d 631, 616 N.E.2d 349, 357 (3rd Dist. 1993); Laidlaw Waste Systems, Inc. v. Pollution Control Board, 230 Ill. App. 3d 132, 595 N.E.2d 600 (5th 1992); City of Rockford v. County of Winnebago, 186 Ill. App. 3d 303, 542 N.E.2d 423 (2nd Dist. 1989). Therefore, the Board will remand this matter to Fairmont City to hold a new siting hearing consistent with this opinion and the provisions of Section 39.2 of the Act.

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

ORDER

The decision by Village of Fairmont City granting siting approval to Waste Management of Illinois, Inc. to expand the Milam Recycling and Disposal Facility is vacated. This matter is remanded for rehearing before the Village of Fairmont City. At a minimum the Village of Fairmont City shall:

1. Proceed as if the application were newly filed pursuant to Section 39.2 of the Environmental Protection Act (415 ILCS 5/39.2 (1998)) as of the date that the Village of Fairmont City receives this opinion and order.

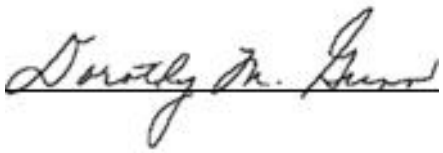
2. Make the application available for public inspection pursuant to Section 39.2(c) of the Environmental Protection Act (415 ILCS 5/39.2(c) (1998)).

3. Hold a hearing no sooner than 90 days but no later than 120 days from receipt of this opinion and order. Such hearing shall be noticed pursuant to Section 39.2(d) of the Environmental Protection Act (415 ILCS 5/39.2(d) (1998)).

4. Act within 180 days of the receipt of this opinion and order according to Section 39.2(e) of the Environmental Protection Act (415 ILCS 5/39.2(e) (1998)).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 19th day of October 2000 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board