ILLINOIS POLLUTION CONTROL BOARD
December 5, 1996

CITIZENS OPPOSED TO ADDITIONAL LANDFILLS and HARVEY PITT, individually and as a member of Citizens Opposed to Additional Landfills,	)	PCB 97-29 (Pollution Control Facility Siting Appeal)
Petitioners,	)	
v.	)	
GREATER EGYPT REGIONAL ENVIRONMENTAL COMPLEX a/k/a GERE PROPERTITES, INC., and the PERRY COUNTY BOARD OF COMMISSIONERS,	)	
Respondents.	)	

MR. KENNETH A. BLEYER APPEARED ON BEHALF OF THE PETITIONERS;

MR. JEERY B. SMITH APPEARED ON BEHALF OF GREATER EGYPT ENVIRONMENTAL REGIONAL ENVIRONMENTAL COMPLEX; AND

MR. DAVID M. STANTON, PERRY COUNTY STATE'S ATTORNEY, APPEARED ON BEHALF OF PERRY COUNTY BOARD OF COMMISSIONERS.

OPINION AND ORDER OF THE BOARD (by J. Yi):

On August 9, 1996 the petitioners, Citizens Opposed to Additional Landfills ("C.O.A.L.") and Harvey Pitt, individually and as a member of C.O.A.L., pursuant to Section 40.1 of the Environmental Protection Act (Act) filed a petition for review. (415 ILCS 5/40.1(1994).) They are appealing the Perry County (County) decision of July 9, 1996 to grant local siting approval for a pollution control facility to the Greater Egypt Regional Environmental Complex a/k/a Gere Properties Inc. (G.E.R.E.). Petitioners request the Board to reverse the County's decision on the grounds that the County lacked jurisdiction, that the proceeding before the County was fundamentally unfair and that the decision of the County was against the manifest weight of the evidence concerning the challenged criteria of Section 39.2 of the Act. (415 ILCS 5/39.2 (1994).) For the reasons enunciated below, the Board finds that the County did have jurisdiction to hear the application. However, we find that the proceeding before the County was fundamentally unfair and so do not reach the third issue concerning the manifest weight of the evidence of the challenged statutory criteria. The County's decision is reversed and the matter is remanded for further hearings.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. Only if the local body finds that all criteria are satisfied can siting approval be granted. In this case, the County found that all of the applicable criteria had been met, and granted siting approval. When reviewing a local decision on the criteria, the Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592, E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.)

Additionally, the Board is authorized to review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, Inc., 451 N.E.2d 555, 562.) In this case, petitioners have raised challenges to the jurisdiction of the County to hear the application, the fundamental fairness of the local proceeding, as well as challenges to the County's decisions on two of the criteria. Since jurisdiction is a threshold issue, we will address that claim first, then proceed to fundamental fairness, and finally the challenged siting criteria of Section 39.2(a) of the Act. (415 ILCS 5/39.2(a) (1994).)

BACKGROUND

On January 23, 1996, G.E.R.E. filed an application for siting approval for a 257-acre pollution control facility to be located in Perry County. (Application Doc. 2 Vol. 1 at 8.)[1] The facility is a part of the Greater Egypt Regional Environmental Complex (Complex), which is proposed as an "integrated, organized, and programmed complex consisting of a number of commercial, industrial, and solid waste control facilities and environmental programs, sited, designed, and operated so as to blend with the natural ecosystem and provide maximum positive benefits to the community and region." (Application Doc. 2 Vol. 1 at 1.) The proposed facility would consist of a material processing facility, a composting facility, and a sanitary landfill. (Application Doc. 2 Vol. 1 at 5.)

The site is generally described as a reclaimed coal strip mine(s) situated in an agricultural setting. (Application Doc. 2 Vol. 1 at 8.) Hearings were held before the County on April 25, 1996 and April 29, 1996. On July 9, 1996, the County entered its written

[1] The Record below was not sequentially numbered throughout. Specifically G.E.R.E.'s application was not numbered. Therefore the reference to the application will be "Application Doc. Vol. at ".

decision granting approval, finding that it had jurisdiction over the application, and that G.E.R.E. established compliance with the applicable criteria. (Pet. Exh. 5.)[2]

On appeal before the Board, C.O.A.L. alleges that the County did not have jurisdiction to proceed on G.E.R.E.'s application, that the proceedings before the County were fundamentally unfair, and that the County's findings that G.E.R.E. met the criteria of Section 39.2(a) of the Act are against the manifest weight of the evidence. The Board held a hearing on October 2, 1996.[3] C.O.A.L. filed its post-hearing brief on October 23, 1996, G.E.R.E. and the County filed their post-hearing briefs on October 30, 1996, and C.O.A.L. filed its reply brief on November 6, 1996.[4]

ARGUMENT AND ANALYSIS

Jurisdiction

Arguments

C.O.A.L. argues that the County did not have jurisdiction to rule on G.E.R.E.'s application because service of notice was not made on a property owner within 250 feet (ft.) of the lot line of the proposed facility as required by Section 39.2(b) of the Act. (Brief at 5-8.) C.O.A.L. claims that the jurisdictional argument was made at the time of the hearing before the County and that the County did not have jurisdiction to entertain G.E.R.E.'s application for siting. (Brief at 5.) C.O.A.L. states that G.E.R.E. filed receipts for certified mailings to landowners evidencing its compliance with the statutory notice provisions. As part of that exhibit, one of the official notices is marked "returned to sender". (Brief at 5.) C.O.A.L. contends that the official notice is addressed as follows:

Mrs. Mary Jane Hudson Summers
Route #1, Box 854
Sesser, IL 62884

and is from counsel for G.E.R.E. and it is marked "return receipt requested". (Brief at 5.) C.O.A.L. asserts that it was returned to G.E.R.E., as stated in bold marking on the envelope, "NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD". (Brief at 5-6.)

C.O.A.L. states that G.E.R.E. was correct at the time of sending official notices in identifying Mrs. Mary Jane Hudson Summers as a person owning real property within 250 ft. of the G.E.R.E. lot line, who, pursuant to Section 39.2(b) of the Act, should have received

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[2] The petitioners' exhibits will be referenced to as "Pet. Exh. at ".
[3] The transcript will be referred to as "Tr. at ".
[4] Petitioners post-hearing brief will be referenced to as "Brief at .", G.E.R.E.'s post hearing brief will be referred to as "G.E.R.E. Resp. at ", the County's post-hearing brief will be referenced to as "Cty Resp. at .", and petitioners' reply brief will be referenced to as "Reply at ".

official notice of the application. (Brief at 6.) C.O.A.L. asserts that "G.E.R.E. prepared and sent Summers a notice on 29 December 1995 to Sesser, Illinois" and that at the time of preparing the notices G.E.R.E. utilized the 1993 county collector's records. (Brief at 7.)

C.O.A.L. argues, however, that at the time G.E.R.E. prepared and sent its notice to all the property owners within 250 ft., Mrs. Summers resided in Christopher, Illinois. (Brief at 7.) C.O.A.L. maintains that "[a]t the time G.E.R.E. prepared and sent its official notices all of the current authentic tax records of the County had shown Summers her (sic) correct Christopher, Illinois address since July, 1995." (Brief at 7-8.) C.O.A.L. states that the County Treasurer's office showed Summers' Christopher, Illinois address correctly at the time it mailed the 1994 tax bill in July, 1995. (Brief at 7, Tr. at 9.) C.O.A.L. asserts that the County Treasurer obtained the address from the County's Assessor which had Summers' correct address as part of its records since July, 1994. (Brief at 8, Tr. at 29.) C.O.A.L. argues that "G.E.R.E. did not attempt to controvert this evidence that for more than five (5) months prior to preparing and sending its notice, as of July, 1995, all of the following authentic tax records of Perry County, Illinois, showed Summers address as having been changed from 'Route #1, Box 854, Sesser, IL 62884' to her correct address '800 Such Victor Street, Christopher, IL': Office of the Perry County Assessor, Office of the Perry County Clerk & Recorder, and Office of the Perry County Treasurer." (Brief at 8.) Therefore C.O.A.L. concludes that G.E.R.E. failed to give Mrs. Summers the notice required under the statute which prevented the County from having jurisdiction to rule on G.E.R.E.'s application. (Brief at 8.)

G.E.R.E., citing to Section 39.2(b) of the Act, states that "[t]he law defines 'owners' as being 'such persons which appear from the authentic tax records of the county in which such facility is to be located, and in no event shall this requirement exceed 400 feet including public streets, alleys and other public ways.'" (G.E.R.E. Resp. at 2) G.E.R.E. maintains that the County when approving the application found:

> That the Perry County board has jurisdiction to rule on the GERE application for siting approval of a pollution control facility based upon the applicant's proper notification as provided by Illinois Statutes as they pertain to the persons and entities that appear on the authentic tax records of Perry County which are maintained by the Perry County Treasurer. (G.E.R.E. Resp. at 1.)

G.E.R.E. maintains that out of 71 notices, only the notice sent to Mrs. Summers at Route #1, Box 854, Sesser, Illinois 62884 was returned marked "unable to forward". (G.E.R.E. Resp. at 2.) G.E.R.E. argues that it utilized the authentic tax records of the County, and therefore met the requirements of Section 39.2(b) of the Act. (G.E.R.E. Resp. at 2-4.)

G.E.R.E. asserts that Mrs. Summers testified at the hearing that she had moved from Sesser to Christopher after a divorce in 1990, but that she did not notify the County of her change of address until July of 1994. (G.E.R.E. Resp. at 3, Tr. at 64.) G.E.R.E states that the notice was given to the County Clerk, who gave it to the Assessor, who changed its 1994-

1995 books by scratching out the address on one side and writing the correct address on the opposite page column. (G.E.R.E. Resp. at 2, Tr. at 23-26.) G.E.R.E. argues that the Mrs. Summers' change of address did not appear on the County Treasurer's official tax records until January 17, 1996, 19 days after the G.E.R.E. mailed its notice. (G.E.R.E. Resp. at 3, Tr. at 16.) In support of its contention, G.E.R.E. notes that "[d]espite all of the above record revisions and corrections, Mary Jane Hudson Summers testified that she had not received her tax bill for 1996, which was now overdue, and that she was headed to the courthouse after testifying". (G.E.R.E. Resp. at 3, Tr. at 67.)

To further support its argument, G.E.R.E. notes that Mr. Cha Hill, the Perry County Treasurer, filed an affidavit with the County Clerk during the 30-day public comment period. In his affidavit Mr. Hill stated "that GERE used the most current records in his office in ascertaining the owners and addresses of all property within 250 feet of the pollution control facility." (G.E.R.E. Resp. at 3, Resp. Exh #1.) Additionally, G.E.R.E. states that Mr. Hill testified "that the only records available in his office on December 29, 1995, showed the name and address of Mary Jane Hudson as Route 1, Box 854, Sesser, Illinois 62884 which is the address used by GERE in sending its notice of filing", and that "the official tax records showing Mary Jane Hudson's Christopher address were not printed and available to GERE until January 17, 1996, after the GERE notices were mailed on December 29, 1995". (G.E.R.E. Resp. at 3, Tr. at 16.)

G.E.R.E citing to DiMaggio v. Solid Waste Agency, PCB No. 89-138(1990) and C.O.A.L. (Citizens Opposed to Additional Landfills) v. Laidlaw Waste Systems Inc. and the Perry County Board of Commissioners, (212 Ill. App. 416, Fifth District, 1995)(Rule 23 Order)[5], argues that it utilized the authentic tax records for the County when it mailed the 71 notices, and is not required to search all of the County's records to determine the authentic tax record.

G.E.R.E. presents an additional argument concerning the question of jurisdiction despite maintaining that the above-discussed argument and authority is conclusive. G.E.R.E. also argues that petitioners have failed to demonstrate that Mrs. Summers property is located within 250 feet of the lot line of the subject property. (G.E.R.E. Resp. at 4-5.) G.E.R.E. states that petitioners had failed to have Mrs. Summers testify that her property was within 250 feet of the lot line of the subject property. (G.E.R.E. Resp. at 4.) G.E.R.E. states that petitioners attempted to compensate for not having Mrs. Summers testify as to the location of her property by arguing that G.E.R.E. would not have sent notice if she were not within 250 ft. of the landfill lot line. (G.E.R.E. Resp. at 4-5.) G.E.R.E. asserts that its attorney's affidavit of mailing states that "he mailed notice of filing to all owners within 400 feet of the 668 acre property boundary" which means that notice was mailed to all property owners within 700 feet of the pollution control facility boundary and does not demonstrate that Mrs. Summers property was within 250 ft. of the property line. (G.E.R.E. Resp. at 5, Resp. Exh. #2.).

[5] See also C.O.A.L. (Citizens Opposed to Additional Landfills) v. Laidlaw Waste Systems Inc. and the Perry County Board of Commissioners, (January 21, 1993), PCB 92-131.

Additionally, G.E.R.E. notes that petitioners presented testimony from Mr. Walker that, based on his knowledge, Mrs. Summers' property is located within 250 ft. of the property line. (G.E.R.E. Resp. at 5, Tr. at 91.) G.E.R.E. states, however, that on cross-examination, Mr. Walker testified that Mrs. Summer's property was 400 feet from the pollution control facility boundary if the lot line is 300 feet within the G.E.R.E. property boundary. (G.E.R.E. Resp. at 5, Tr. at 92.) G.E.R.E. alleges that the landfill is located on a 668 acre site and that the actual landfill lot line is set back at least 300 feet on all sides from the 668 acre boundary line. Citing to Land and Lakes Co. v. Romeoville, (August 26, 1991), PCB 91-7, and C.A.R.L. v. Whiteside County, (February 25, 1993), PCB 92-156, G.E.R.E. maintains that it fully compiled with all statutory requirements of Section 39.2(b) of the Act, and that the Perry County Board had jurisdiction to act on G.E.R.E.'s siting application because it was not required to serve notice on Mrs. Summers because she is not within 250 ft. of the landfill lot line. (G.E.R.E. Resp. at 6.).

In reply to G.E.R.E.'s first argument, C.O.A.L. states that the parties agree that the statute requires that Summers receive notice; that the notice should have been sent by G.E.R.E. to the address shown in the authentic tax records of the County; that there is no dispute that G.E.R.E. prepared and sent Summers a notice on December 29, 1995 to Sesser, Illinois; and, that at the time that G.E.R.E. prepared and sent its notice to Summers, she resided in Christopher, Illinois. (Reply at 2-3.) C.O.A.L. alleges that at the time G.E.R.E. prepared and sent its official notices, it took Summers' Sesser, Illinois, address from the 1993 county collector's records kept in the Treasurer's office, not the Treasurer's actual records. (Reply at 3.) C.O.AL. argues that "[e]ven assuming that G.E.R.E. is correct that the Treasurer's records are the authentic tax records of the county, at the time G.E.R.E. prepared and sent its official notices the current 'authentic tax records of the County' had shown Summers' correct address as Christopher, Illinois, since July, 1995." (Reply at 3.) Furthermore, C.O.A.L. states that the County Treasurer mailed her tax bill to Christopher, not Sesser, more than four months before G.E.R.E. obtained the addresses for mailing notices. (Reply at 3-4.) Thus, C.O.A.L. asserts, G.E.R.E. failed to give Summers the notice required under the statute. (Reply at 4.) In a footnote on page 4 of its reply, C.O.A.L. argues that neither case cited by G.E.R.E. would serve to relieve it from this obligation. (Reply at 4.) C.O.A.L. states that even if the Treasurer's records are the authentic tax records for the County pursuant to DiMaggio G.E.R.E. failed to use the most current version as shown by the fact that Mrs. Summers received her tax bills in 1995 from the Treasurers office prior to G.E.R.E.'s mailing its notices in December 1995. (Reply at 4.) C.O.A.L. argues that C.O.A.L. decision has no precedential value and if it did it does not stand for the proposition G.E.R.E. has argued. (Reply at 4.) Furthermore, C.O.A.L. states that the statements presented by G.E.R.E. to support its proposition are not supported by the record. (Reply at 4.)

In reply to G.E.R.E.'s second argument, that petitioners did not establish that Mrs. Summers' property was within 250 ft., C.O.A.L. states that "[w]e know that the land is within 250 feet because of the information contained in G.E.R.E.'s application which identified it as such." (Reply at 5.) C.O.A.L. argues that the testimony of William Walker, who has lived

on or nearby the land his entire life, establishes that Mrs. Summers' property was within 250 feet of the property line. (Reply at 5.) C.O.A.L. asserts that "G.E.R.E.'s efforts to distance itself from this problem by filing affidavits and making arguments in its brief hardly discount the effect of Mr. Walker's uncontroverted testimony" and that "[t]his is a very simple issue: as a person owning real property within 250 feet of the G.E.R.E. lot line Summers should have received official notice pursuant to the statute". (Reply at 5.)

Board Discussion

The issue of what constitutes the "authentic tax records" and notice has been before the Board and the courts on several occasions. Section 39.2(b) of the Act states in pertinent part:

> No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served *** on the owners of all property *** within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which the facility is to be located***

Section 39.2(b) requires that applicants for siting approval use the "authentic tax records" to determine the owners to whom notice must be sent. (Bishop v. PCB (5th Dist. 1992), 601 N.E.2d 310.) In Bishop, the appellate court addressed the issue of what are "authentic tax records". (Id. at 311-15.) The applicants argued that the "authentic tax records" were those maintained by the county treasurer, and the citizens group opposed to siting argued that the "authentic tax records" were those maintained by the county clerk. (Id. at 311.) The record contained testimony establishing that the offices of the county clerk, assessor, and treasurer all play a role in the collection and record-keeping function of the taxing process. (Id. at 315.) Consequently, the court distinguished Bishop from a Board case (DiMaggio) where the county clerk testified that the county clerk's office maintained the "authentic tax records." (Id. at 315.) In construing Section 39.2(b) of the Act, the court noted that Section 39.2(b) does not define owners as those persons appearing from the county clerk's records or as those available from the most up-to-date record. (Id. at 315) "Generally, as long as notice is in compliance with the statute and places those potentially interested persons on inquiry, it is sufficient to confer jurisdiction…." (Id. at 315.) Therefore, the court held that the authentic tax records in Bishop included the records maintained by the treasurer's office. (Id. at 315.)

In DiMaggio, petitioners argued that a property owner was entitled to service of notice because he was an owner within 250 ft. of the proposed site, and his identity was ascertainable from the county's authentic tax records. (Id. at 7.) Petitioner defined those records as those which "include, but are not limited to, those records which are required or allowed to be kept by the Revenue Act of l939." (Id. at 7-8.) Citing to the Appellate Court, First District, (Katz v. City of Chicago, l77 Ill.App.3d 305, 532 N.E.2d 322 (First District, l988), which held that an interpretation of a statute or ordinance made by the agency or body charged with administering the statute constitutes an informed source of guidance for ascertaining the intent of the lawmaking body, the Board found persuasive that fact that at hearing the county clerk testified that the county clerk's office maintains the authentic tax records. (Id. at 8.) The

Board found that petitioners "assertion that additional records should be searched is not in keeping with the straight-forward, statutory directive concerning notice" and that "[t]he statute does not require searches of records from the treasurer's and assessor's offices, but, rather, the authentic tax records which, as noted, are held by the county clerk." (Id. at 8-9.) The Board held that petitioners had not demonstrated that the applicant failed to notify persons or entities which appear from the authentic tax records of the county as required by Section 39.2 of the Act. (Id. at 8-9.)

In Wabash and Lawrence Counties Taxpayers and Water Drinkers Association v. The County of Wabash and K/C Reclamation, Inc., (May 25 1989) PCB 88-110, the Board stated:

> the phrase 'owners being such persons or entities which appear from the authentic tax record of the County' as being the decisive language in determining whether "owners of all property" were properly notified under 39.2(b). The meaning of this language is clear. The language gives the applicant, the county board and the reviewing bodies a clear standard to determine which parties must be notified. The "authentic tax records of the County" include the names or titles and addresses of the purported property owners. If the applicant has sent proper notice to the owners listed on the tax records he has complied with the requirements of 39.2(b).
>
> In the matter of the property owned by the Trimble heirs, the applicant had the notice of hearing sent to John Trimble, who receives the tax statement (R.3 at 22), at the address listed in the authentic tax records of the County. This notice complies with the requirements of 39.2(b), even though all of the heirs were not sent personal notice, because notice was given to the "owners… which appear from the authentic tax records of the County" as required. (Id. at 4.)

In this case the County, in the ordinance granting siting, stated that it had jurisdiction and that the "authentic tax records" of Perry County are maintained by the Perry County Treasurer. Mr. Hill, the County Treasurer, submitted an affidavit as a public comment stating that his office maintained the official tax records for the County. (C-61A.) The parties agree that G.E.R.E. sent the notices on December 29, 1995. At the hearing before the Board Mr. Hill testified that the 1993 book for the 1994 taxes was printed on January 4, 1995 and the 1994 book for taxes payable in 1995 was printed on January 17, 1996. (Tr. at 15-16.) Furthermore, Mr. Hill stated in his affidavit that G.E.R.E.'s exhibit #9 (the 1993 book) in the proceeding before the County is a true and exact copy of the records that existed at the Treasurers office on December 29, 1995. (C-61A.)

We find, for the same reasons stated in DiMaggio and Wabash, that in this case the "authentic tax records" are held by the County's Treasurer as determined by the County and G.E.R.E. was not required to review all records held by the County. Therefore, G.E.R.E was required to use the current records from the Treasurer's office. Petitioners argument that these could not be the most accurate or current "authentic tax records" because Mrs. Summers received her taxes for 1994 in July 1995 fails, because petitioner did not demonstrate that those

taxes were generated by the 1993 book which was represented by the County Treasurer's Office as the "authentic tax records". In fact, as testified to by Mr. Hill, the list of 1994 taxes payable in 1995 are computer-generated, and the information in his office's computers was not printed until January 17, 1996 and there was no evidence that the information contained on the Treasurer's computers was available to G.E.R.E. (Tr. at 9-10.)

Therefore, we find that G.E.R.E. complied with Section 39.2(b) of the Act by relying on the County Treasurer's office 1993 book when mailing notices. G.E.R.E. was not required to search through all of the County's records to determine if in fact it had the most current authentic tax records once the County represented that the 1993 book was the current authentic tax records. Thus we find that G.E.R.E.'s failure to notify Mrs. Summers did not divest the County of jurisdiction to grant or deny local siting.

Fundamental Fairness

Arguments

Citing to City of Rockford v. Winnebago, 186 Ill. App.3d 303, 313, 542 NE2d 423, 134 Ill. Dec 245 (1989) petitioners state that the Board and the courts of Illinois have held that *ex parte* contacts between local decisionmakers and the applicant are fundamentally unfair. (Brief at 12-13.) C.O.A.L. argues that the evidence demonstrates that G.E.R.E. and the County engaged in *ex parte* contacts and communications with each other through their respective attorneys. (Brief at 13.) C.O.A.L. asserts that this was done outside the public process, no record was kept of the contacts, and no report was ever given to the public of such communications and contacts. (Brief at 13.)

C.O.A.L. cites as evidence of the *ex parte* contacts that the public record indicates that 1) the only discussions which the County undertook with respect to the G.E.R.E. application are identified in the minutes of eleven regular sessions and two executive sessions, and 2) without further discussion or debate, on July 9, 1996, the County unanimously adopted an ordinance granting G.E.R.E.'s application with conditions. (Brief at 14, Tr. 78-84, Pet. Exh. 10.) C.O.A.L. maintains that "[i]n that ordinance the County imposed certain highly technical and complex conditions upon G.E.R.E., including, but not limited to: performing a feasibility study of increasing a roadway, raising the berm to fifteen (15) feet above the 100 year flood plain, developing a geotechnical study, performing measures to secure the slope stability on the west edge of the fill, taking steps to address the compressibility of subsurface materials, locating potential aerial photographs, changing to monthly the required water sampling on the site, requiring that a vehicles on exiting the site be cleaned before leaving, and, that a clause restricting transferability without approval of the County." (Brief at 14.) C.O.A.L. claims that "Chairperson Karnes admitted that he and the other members of the county board had made 'many demands' which G.E.R.E. met and 'asked many questions' which G.E.R.E. answered." (Brief at 14-15, Tr. at 57-58.) C.O.A.L. asserts that none of these demands or questions or G.E.R.E. responses were asked at the eleven regular meetings or two executive sessions, but , that they were instead done through their respective attorneys and outside of the public record. (Brief at 15, Tr. at 59-61.)

Furthermore, C.O.A.L., citing to Southwest Energy Corp. v. Illinois Pollution Control Board, 275 Ill. App. 3d 84, 211 Ill. Dec. 401, argues that these contacts and communications between the County and G.E.R.E. did not afford the petitioners, or public at-large, access to the same information as to the County causing those contacts to be *ex parte*. (Brief at 15.) C.O.A.L. argues that as a result of the "ex parte contacts and communications which did not afford the petitioners an opportunity to participate, nor did it result in the creation of a reliable record sufficient to form the basis of an appeal, these proceedings were fundamentally unfair and therefore pursuant to Section 40.1 of the Act the County's decision should be reversed." (Brief at 15-16.)

The County argues that "[t]he contact complained of by the Petitioners between G.E.R.E. and the County, through their respective legal representatives, did not and does not now render the application process fundamentally unfair." (Cty. Resp. at 2.) The County asserts "[t]hat all contacts between G.E.R.E. and the County prior to the close of the 30 day comment period regarded procedural matters and conditions," and "[s]imilar contacts regarding procedure were made between the County and the Petitioners". (Cty. Resp. at 2.) The County maintains that all contact was between the parties' attorneys and not the parties themselves. (Cty. Resp. at 2.) The County claims that "[u]pon the close of the 30 day comment period, the Petitioner had no "right" to participate." (Cty. Resp. at 2.)

The County states that, in City of Rockford, which petitioners cite as authority, the Court remanded the matter to the local review board to develop a record for review as to the substance of the *ex parte* contacts. (Cty Resp. at 3.) The County asserts that the record has already been established as to the *ex parte* contacts and that the petitioners are no longer unaware of the substance of those contacts. (Cty Resp. at 3.) The County alleges that petitioners have witnessed what they allege to be "discussions, debates and negotiations. . . . . ." (Cty. Resp. at 3.)

The County contends that "[b]ecause there were no discussions and there were no negotiations between the County and G.E.R.E., matters which could conceivably lead to fundamental unfairness, the Petitioners are left to complain only that they did not "witness" the contacts" and "[a] public record has been made on the contact" on review before the Board. (Cty. Resp. at 3.) The County then concludes that "the only question is whether the substance of the contact was fundamentally unfair, not whether the appropriate record was initially made nor that contact was made." (Cty Resp. at 3.)

The County asserts that the petitioner "developed the record for appeal on the *ex parte* issue at the Review Hearing." (Cty Resp. at 4.) The County states that petitioners questioned two of the three members of the Perry County Board of Commissioners which "disclosed that the County and G.E.R.E., through their respective legal counsel, engaged in contact after the close of the 30 day comment period." (Cty Resp. at 4.) The County claims "[t]hat contact involved ONLY matters regarding the conditions to be added IF the landfill application was approved." (Cty. Resp. at 4.) Furthermore the County states "[h]owever, G.E.R.E. had no knowledge what the final conditions were, only that there would be conditions if the

application was approved." (Cty Resp. at 4.) The County argues that it exercised its right to impose conditions upon G.E.R.E. and that there was no contact between the County and G.E.R.E. regarding jurisdiction, citing criteria, or any other matter that might render the process fundamentally unfair. (Cty Resp. at 4.)

G.E.R.E. argues that it and the County did not engage in *ex parte* communications concerning the siting criteria or conditions of siting. (G.E.R.E. Resp. at 7.) G.E.R.E. asserts that the County was very careful throughout the siting proceedings to avoid any contact and that the only contact between the two occurred between the attorneys for each. (G.E.R.E. Resp. at 7.) G.E.R.E. states, to rebut petitioners' contention that there must have been contact between the two because of the conditions the County incorporated into its ordinance, that "Mr. Danny Wildermuth, Perry County Commissioner (sic) testified at the hearing that the conditions came from the County's expert, Mr. Rutasel." (G.E.R.E. Resp. at 7, Tr at 48.)

In response to C.O.A.L.'s allegations that communications occurred between the two based on the statements of Chairperson Karnes, G.E.R.E. notes that those statements were made to the media after a Board meeting. (G.E.R.E. Resp. at 7-8.) G.E.R.E. states that Chairperson Karnes testified that the questions and answers occurred at Board meetings and hearings and that the demands and questions were relayed to the County's attorney. (G.E.R.E. Resp. at 8, Tr. at 57-58.) Furthermore G.E.R.E. asserts that Chairperson Karnes also stated that he presumed the County's attorney relayed the questions and demands to G.E.R.E.'s attorney, but that he was not sure. (G.E.R.E. Resp. at 8, Tr. at 59.)

G.E.R.E. states that "[i]t is apparent that the County Board had certain concerns and questions after all the public hearings, public comment and written material from experts were provided to them", and as testified to by Mr. Karnes and Mr. Wildermuth, "those concerns and questions were relayed to their attorney who came back with the answers or solutions in the form of conditions." (G.E.R.E. Resp. at 8.) G.E.R.E. maintains that the conditions came from the County's expert, and were incorporated into the resolution approving its application prepared by the County's attorney. (G.E.R.E. Resp. at 8.) To conclude, G.E.R.E. argues that the actions of the County were logical and fair and that neither it nor petitioners had an opportunity to participate. (G.E.R.E. Resp. at 8.) In support of the contention that neither the petitioners nor G.E.R.E. had an opportunity to participate, G.E.R.E. states that Paragraph C of the County's resolution states as follows: "[t]hat pursuant to advice by the expert hired by the County to consult on this application, GERE SHALL INCLUDE in its final design plan the following minimum scope of study." (C-278)

Board Discussion

The Board was recently confronted with a similar *ex parte* situation in Residents Against a Polluted Environment and The Edmund B. Thorton Foundation v. County of LaSalle and Landcomp Corporation, (September 19, 1996), PCB 96-243. There the Board summarized the relevant law as follows:

In E & E Hauling Inc. v. Pollution Control Board, 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 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).)

Here, C.O.A.L. asserts that contacts made through the County's and G.E.R.E.'s attorneys rise to the level of improper *ex parte* contacts. In response, the County asserts that the contacts were those only of the attorneys and not the parties themselves and that the record of those contacts made before the Board cures any improper contacts. G.E.R.E. claims that there were no contacts by the parties, that if there was any contact it was through the attorneys and that the record does not demonstrate that they actually occurred, and that the conditions to approval were suggested by the County's engineer.

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 contacts between the County's and G.E.R.E.'s attorneys were improper *ex parte* contacts.

Initially, we must address whether it was possible for the attorneys to engage in improper *ex parte* contacts. The attorney for the County 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 the attorney does not have a vote, to the extent he was acting on behalf of the county board, we find that it is possible for him to have had *ex parte* contacts. The county board was engaging in adjudication in hearing and deciding on G.E.R.E.'s siting application. Furthermore, this proceeding must provide fairness and the appearance of fairness. (E & E Hauling, 116 Ill.App.3d at 598.) Accordingly, the attorney for the County cannot lawfully 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. Indeed, the County cannot do indirectly (contact G.E.R.E. through its attorney) what cannot do directly (contact G.E.R.E. directly).

Having determined that it is possible for the County's attorney to have engaged in *ex parte* contacts, we must determine whether such contacts took place. While we agree with G.E.R.E that there is no evidence that information actually resulted in the inclusion of the specific conditions contained in the County's ordinance, the County, on page four of its post-hearing brief, admits that there were contacts made. The testimony of Chairperson Karnes shows that the County requested its attorney to contact G.E.R.E. (whether the applicant itself or its attorney), the record demonstrates that contact was made after the close of the 30-day public comment period, and that those contacts involved the placement of conditions on the County's approval. These discussions took place outside the record, and provided opponents with no opportunity to cross-examine or question any conclusions reached. We therefore find that the attorney for the County 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 fact that the County had questions unanswered after the completion of the record tends to indicate that G.E.R.E. may not have demonstrated that the statutory criteria were met at the close of the record. While the referred-to contacts are characterized as concerning "procedural" matters and/or conditions, the County apparently felt it necessary to have G.E.R.E. answer those question prior to making its substantive decision on the application. This becomes especially clear when considering the added conditions which directed G.E.R.E. to: perform a feasibility study of increasing a roadway, raise the berm to fifteen (15) feet above the 100 year flood plain, develop a geotechnical study, perform measures to secure the slope stability on the west edge of the fill, take steps to address the compressibility of subsurface materials, perform monthly water sampling on the site and require that vehicles exiting the site be cleaned before leaving; all of these concern the criteria of Section 39.2 of the Act.

We find that the contacts have affected the decision of the County board. The failure to include the questions in the record by asking the questions at the public hearing improperly limited public participation, thereby thwarting the goals of the public hearing process. These discussions could have affected the ultimate decision in this case, since the County felt the need to ask the questions prior to voting on the applications. 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 any conclusions reached. As a result of these *ex parte* contacts the Board finds the siting process was fundamentally unfair.

CONCLUSION

We find the siting proceedings in this matter to be fundamentally unfair. We find that *ex parte* contacts occurred between the County and G.E.R.E. (the siting applicant) while the application was pending, and these *ex parte* contacts were prejudicial to petitioners. 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 learn the content of the discussions between the County and G.E.R.E., and have an opportunity to question and respond to this information. The Board vacates and remands this proceeding to the County for further hearings 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.). Furthermore we find it appropriate to close this docket. After the County renders a new decision based on the record petitioners may appeal that decision to the Board pursuant to Section 40.1 of the Act.

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

ORDER

The July 9, 1996 decision of the Perry County Commissioners (county board granting siting approval) to approve G.E.R.E.'s application is hereby vacated and remanded because the proceeding below was fundamentally unfair. At a minimum, the County Board shall:

1. Conduct one or more public hearings to present the questions asked by the County and the answers provided or any discussions that took place between them, and allow a public comment period of at least 30 days. 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 respond to the questions of the County and G.E.R.E.'s responses those questions.

2. 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.

3. The County board shall vote and render its decision no later than 120 days after receipt of this order.

IT IS SO ORDERED.

Board member J. Theodore Meyer dissents.

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