ILLINOIS POLLUTION CONTROL BOARD
April 3, 1986

CITY OF COLUMBIA, WALTER BYERLEY, JR., BARBARA HEINLEIN, DANIEL HEINLEIN, HOMER STEMLER AND LORETTA STEMLER,	)	
Petitioner,	)	
v.	)	PCB 85-177
COUNTY OF ST. CLAIR AND BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC.,	)	
Respondents.	)	

BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC.,	)	
Petitioner,	)	
v.	)	PCB 85-220
COUNTY OF ST. CLAIR, ILLINOIS,	)	
Respondent,	)	
and	)	
CITY OF COLUMBIA, JEAN ECKERT, MARCELLUS ECKERT, LANNY JACKSON, VICKY JACKSON, HARRY RAYMOND, PATRICIA RAYMOND, HOMER STEMLER AND LORETTA STEMLER,	)	
Intervenors.	)	

CITY OF COLUMBIA, JEAN ECKERT, MARCELLUS ECKERT, LANNY JACKSON, VICKY JACKSON, HARRY RAYMOND, PATRICIA RAYMOND, HOMWER STEMLER AND LORETTA STEMLER,	)	
Petitioners,	)	
v.	)	PCB 85-223 (Consolidated)
COUNTY OF ST. CLAIR AND BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC.,	)	
Respondents.	)	

JAMES YOHO AND TOM D. ADAMS APPEARED ON BEHALF OF THE CITY OF COLUMBIA, ET AL;

JOHN BARICEVIC, STATE'S ATTORNEY, APPEARED ON BEHALF OF THE COUNTY OF ST. CLAIR; AND

FRED C. PRILLAMAN (MOHAN, ALEWELT, AND PRILLAMAN) APPEARED ON BEHALF OF BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC.

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

Each of these consolidated appeals concerns the November 25, 1985 denial by the County of St. Clair (County) of a June 27, 1985 application by Browning-Ferris Industries of Illinois, Inc. (BFI) for site location suitability approval for a new regional pollution control facility. The facility proposed by BFI would be located in rural Sugar Loaf Township approximately 4 ½ miles southeast of the Village of Dupo, on property owned by and under lease from Columbia Quarry Co. The proposed facility would be a landfill accepting municipal wastes and non-hazardous special waste.

The proceedings before the County and the Board are in accordance with what is commonly known as SB172, codified in Sections 3(x), 39(c), 39.2 and 40.1 of the Environmental Protection Act (Ill. Rev. Stat. 1985 ch. 111 ½, pars. 1003(x), 1039(c), 1039.2, and 1040.1). The County determined that BFI had satisfied all but two of the criteria contained in Section 39.2*: the need criterion and the traffic pattern design

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* Section 39.2(a), as it existed at all applicable times, provided that "the county board...shall approve the site location suitability for such new regional pollution control facility only in accordance with the following criteria:

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

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

3. the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

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

criterion. The following is a brief summary of the nature of each appeal.

PCB 85-177 is a third party appeal pursuant to Section 40.1(b) filed December 2, 1985. Six parties are appealing any "deem approved" status that may be claimed by BFI pursuant to 39.2(e) of the Act because the County did not act within 120 days of the filing of the request. (These parties in all three cases are collectively referred to hereafter as "City".)

PCB 85-220 is an appeal by BFI of the denial of its application pursuant to Section 40.1(a) filed December 30, 1985. BFI asserts that it may deem its application approved, pursuant to Section 39.2, but alternatively that the proceedings were fundamentally unfair due to County reliance on evidence not admitted at hearing, and that the County's decision on criteria 1 and 6 were against the manifest weight of the evidence. Nine persons, three of whom also are petitioners in PCB 85-177, have been admitted as intervenors.

PCB 85-223 is a cross-appeal of the County's decision allowed by the Board consistent with Section 40.1(b) filed December 30, 1985. The same nine parties who are intervenors in PCB 85-220 assert that due to BFI's failure to comply with the notice requirements of Section 39.2, there was no complete application over which the County could exercise jurisdiction, that the proceedings before the County were fundamentally unfair because of flaws in the hearing process, and that the County's decision that criteria 2,3,4 and 5 were satisfied was against the manifest weight of the evidence.

The three cases were consolidated by the Board for hearing on appeal on January 9, 1986. The Board held its hearing on February 13, 1986, at which 50-60 members of the public were in attendance.

At the Board hearing, the parties presented evidence and argument, but each noted that the full specification of the points of error to be asserted would be made only in the final briefs. Briefs were due to be filed March 13; the County filed its brief on that date. BFI filed its brief March 14,

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

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

The Board notes that a seventh criterion was added by P.A. 84-1071, effective December 2, 1985, concerning an emergency response plan for hazardous waste facilities.

accompanied by a motion for leave to file instanter asserting photocopying difficulties; the motion is granted. The City filed an unsigned brief on March 18 accompanied only by an undated, unsigned certificate of service.

On March 21, BFI filed a motion to strike this unsigned, unexplained late filing. The City filed a reply in opposition (as well as a signed brief) on March 24. The Board denies the motion, but in so doing notes that it does not excuse the late filing which substantially reduced the Board's time to deliberate all issues in this case and to formulate an Opinion. The Board must also reject the City's contention that:

> "There is no requirement whatsoever that Objectors even file a brief; it is totally a courtesy to the Board. There is no statute, procedural rule or even Board order requiring that a brief be filed. *** Even if a party files no brief whatsoever, no issues are thereby waived; the Board still has an obligation and duty to read the record, identify issues of fact and law and rule upon them. A brief simply is an aid to the Board in performing this function".

While the Board is charged by Section 40.1 to consider the fundamental fairness of the proceedings, the Board is not required to make a party's case. Since all arguments were not presented either in the petitions or at hearing, the final brief is an essential element of the case, and not simply a "courtesy" to the Board.

PROCEEDINGS AT THE COUNTY LEVEL

As will be detailed later in this Opinion, the Board finds that, due to procedural deficiencies in the application and hearing process, it cannot reach the merits of the County's decision concerning whether each of the six criteria has been satisfied. For this reason, the Board will recite and summarize the procedural aspects of this record*, but will touch upon the evidence presented concerning the criteria only briefly and only insofar as it relates to procedural issues.

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* At the outset, the Board must note that it has been more than usually difficult to assemble a complete record in this action, which the Board attributes to the County's lack of previous experience with document maintenance in SB172 proceedings. No comprehensive listing of the items comprising the County Record exists. The County hearing record does not adequately describe all of the exhibits admitted there. To the extent that this record contains any systematic attempt to detail the contents of the record, it is contained in BFI's Brief, p. 3-13; the Board appreciates this effort.

A portion of the County's record was submitted by the County Clerk on January 14. The documents listed in the "Certificate of Record" are not marked by exhibit numbers or any other number. By filing of January 21, an additional public comment was submitted which had been inadvertently omitted from the earlier filing. On February 14, the Clerk submitted an "Amended Certificate of Record" which does not list the January filings, but which lists additional materials either by exhibit numbers or description; the list contained inaccuracies. Additional items which were considered by the County in making its decision and/or which had been admitted as exhibits at the County hearing were introduced as exhibits at this Board's hearing. After the Board's hearing, two additional BFI exhibits admitted at the County hearing were transmitted to the Board. One was received from BFI on March 20. The final exhibit was not received until March 27.

BFI filed its application for site location suitability approval on June 27. Notice to adjoining landowners and legislators was initiated on June 12, 1985, via certified mail, return receipt requested. Some notices were received by the addressees on June 13, others through the balance of June, and some apparently not at all (County Rec., Pet. Ex. 1).* On June 14, a newspaper notice of intent to file the request was published in the News-Democrat. The notice bore a June 12 date and stated that Browning-Ferris intended to file its request on June 28, 1985 (Id., Pet. Exh. 2). (But see Id., Pet. Exh. 17 in which BFI's letter to IDOT re criterion 4 indicates an anticipated June 27 filing date.)

The St. Clair County Board has an Environment Committee consisting of 7 of the 30 County Board members. The Committee held a public hearing in the Jury Assembly Room of the St. Clair County Courthouse in Belleville, Illinois, on September 24, 1985, with six Committee members attending. The hearing began at some time between 7:00 and 7:30 p.m., and ended at some time between 2:00 and 2:30 a.m. the following morning. The official transcript was recorded on a tape recorder by Dick Weilmuenster, Director of Land Development, and typed on legal-sized paper, consisting of 114 typewritten pages and 9 sign-in sheets. Mr. Weilmuenster also was the person who swore in witnesses. A court reporter employed by BFI was also present at this public hearing, and her transcript appears in the record as City Exh. F. The Board notes that the official transcript is not as complete as the unofficial version, in that portions of sentences were lost when tapes were changed (see, e.g., Id., Tr. at 38, 54, 104), as well as longer passages of testimony for reasons the official

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* Items contained in the County Record will be referenced as "County Rec." followed by an abbreviated form of the item's description and page number if necessary, e.g. "Tr[anscript]. p. 104", "Pet. Exh.". References to the record amassed by the Board in this appeal will be to "PCB Rec." followed by "Tr." or "Exh."

version does not indicate (compare Id., Tr. at p. 104 with, PCB Rec., City Exh. F at 215-217; the latter contains about 1 ¼ pages of testimony not appearing in the official version).

The Jury Assembly Room is the largest room in the County Building and the immediate area; testimony at the Board hearing indicated that there may be a larger hall somewhere in the County (Id., Tr. 80-82, 141). While estimates varied, it would appear that some 300-400 persons arrived to attend the hearing, 75 or so of whom could not fit into the room and listened from the hallway (Id., Tr. 46, 161). Of those in the room, only about 175 had seats (Id., Tr. 44-45, 166). One citizen described the room as "extremely crowded" and "hot" (Id., Tr. 148). There was a voice amplification system provided in the room, but probably not in the hallway (Id., Tr. 82).

At the commencement of the hearing, it was established that first BFI would present its application and answer questions thereon (but only from members of the Committee, the State's Attorney acting as Hearing Officer, and any attorneys), that next presentations would be made by groups represented by attorneys, and that finally statements and questions from others would be received subject to a two-minute time limit (which, however, the hearing officer could extend at his discretion) (County Rec. Tr. at 3-4).

BFI presented four witnesses and some 22 exhibits. This presentation and the cross-examination thereon lasted until about 11:30 p.m. (PCB. Rec., Tr. 47). Various objectors to the landfill, including the City, who were represented by attorneys presented 13 witnesses and some 25 exhibits. These presentations and cross-examinations thereon lasted until about 1:30 a.m. (Id.). Ten citizens then asked questions and presented statements; the Board notes that these citizens were not placed under oath, although persons sponsored by attorneys were so sworn.

There is indication in the testimony at the Board hearing that additional citizens wished to speak (Id., Tr. 155, 158, 161), but this portion of the hearing ended upon the Hearing Officer's announcement of the Committee's direction that the two persons then standing in line would be the last citizens to speak. Closing arguments, including one under oath, were made by the attorneys. The City's attorney asserted that a 180 day deadline applied to the matter; BFI did not object or assert otherwise (County Rec., Tr. 112-113). The City also announced its intent to file additional documents in response to the technical data presented by BFI at hearing.

Between September 25 and October 25, a number of written comments were filed with the County Clerk, most of them being letters from citizens residing in either Monroe or St. Clair Counties, petitions signed by persons residing in those areas, and other writings. Two written comments, offered by the City at

the Board hearing as City Exhibits A and B, appear to have been relied upon concerning the need and traffic findings. They are briefly summarized as follows:

City Exhibit A: On October 23, 1985, the City filed a letter stating that its consulting engineers, Russell and Axon, Inc., had reviewed all of the evidentiary exhibits filed by BFI, and had determined that BFI failed to present evidence of a design for traffic patterns to and from the proposed landfill so as to minimize the impact on existing traffic flows. The City of Columbia formally objected to the grant of site location suitability approval. Attached to the letter is an Evidence Affidavit of Wiliam O. Haag, Jr., P.E. presenting various facts concerning the traffic issue.

City Exhibit B: On October 24, 1985, Attorney James Yoho, representing various objectors, filed a document entitled "Comments in Opposition to the Request for Site Approval," in brief form, accompanied by an Affidavit signed by John Thompson. The Thompson Affidavit concentrates mainly on the first criterion (whether the facility is necessary), and states in summary that there are approximately 10.7 years of capacity left in the service area, as opposed to the 5 year estimate presented by BFI at hearing.

The Environment Committee held a meeting on October 22, at which it voted to approve BFI's request in all respects (PCB. Rec., BFI Ex. A & C). BFI's application was then considered by the full County Board at its October 28 meeting. A motion was passed to send the matter "back to the Environment Committee for further study and also an independent source to do a study of the landfill's life expectancy in St. Clair County" (PCB. Rec., City Exh. D).

The Environment Committee held another meeting on November 19. The Thompson information on the need question was specifically mentioned by at least one member of the Environment Committee as one reason for changing his vote, and urging that others also do the same. The Committee voted to deny its approval to the application, reversing its former opinions on Criterion 1, "need" and Criterion 6 "traffic", (Id., BFI Ex. B).

At the County's November 25, 1985 meeting, the County adopted Resolution No. 219-85-R, rejecting BFI's application for failure to satisfy the "need" and "traffic" criteria (PCB. Rec., City Exh. E). (The record does not indicate whether the study called for at the October meeting was submitted to or relied upon by the County Board.)

STATUTORY AMENDMENT TO SITING PROCEDURES

The siting procedures established by P.A. 82-682 were modified by P.A. 83-1522. P.A. 83-1522 became effective July 1, 1985; as aforementioned, BFI filed its application June 27,

1985. In summary, the Board finds that P.A. 83-1522 establishes the procedures to be followed in this action. The Board further finds that the County took action within 180 days of the filing of the application. Therefore, BFI may not deem its application approved pursuant to Section 39.2.

The respective provisions of these two public acts are summarized below insofar as they are relevant to this action:

Requirement	P.A. 82-682	P.A. 83-1522
Filing period for written comments [Sec. 39.2(c)]	Postmarked within 30 days of filing of application*	Postmarked within 30 days of last public hearing
Time for holding public hearing [Sec. 39.2(d)]	Within 60 days days of filing of application	No sooner than 90 or later than 120 days of filing of application
Time for county decision [Sec. 39.2(e)]	Within 120 days of filing of application	Within 180 days of filing of application

On the issue of whether a 120 day deadline or a 180 day deadline applies, BFI argues that the old statute applies to an application filed before the effective date of the new statute which modifies it, while the City argues to the contrary.

The Board notes that it is arguable that the Board is addressing this issue either out of order or gratuitously, since a finding that the County lacked jurisdiction to consider BFI's application due to notice deficiencies arguably moots the issue of what decision deadline applies. However, the Board finds it essential to address this issue here, given that the question of which statute applies a) is inextricably interwoven with sufficiency of notice issues, and b) is one which the Board would address even if moot to avoid the delay and expense of a remand to the Board for consideration of this procedural issue in the event of appellate reversal of the Board's decision on the jurisdictional issue. As a final introductory note, the Board also observes that statutory applicability arguments are contained in legal briefs filed by the County on January 9, 1986 and by BFI January 10 and 21, in addition to those in all parties' closing briefs.

P.A. 83-1522 contains no explicit legislative directive as

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* Note, however, that the Board has not construed this provision as precluding the county from considering late-filed comments. See Browning-Ferris Ind. of Ill. v. Lake County Bd. of Supervisors, PCB 82-101, December 2, 1982 at p. 6.

to its applicability to applications filed before its effective date and still pending after its effective date. The parties are in general agreement that in the absence of legislative direction, the only statutes which can be given retroactive application are those which are procedural in nature, and whose retroactive application to matters pending before the effective date would not impair or remove a vested right. However, as acknowledged by the Supreme Court in Orlicki v. McCarthy, 4 Ill.2d 332, 122, N.E.2d 513 at 515, 516 (1954) in a scholarly dissertation on the legal history of the issue, "no simple formula can be evolved as to when an amendment relates to a procedural, or to a substantive right (sic)", while the "concept of 'vested right' is fraught with vagaries that defy precise definition". In Orlicki, the Supreme Court was called upon to construe the retroactivity of an amendment to a "dramshop" act, which reduced the time for filing of an action against a saloon-keeper by the survivors of the deceased drinker from 5 years to 2 years, and imposed a limit on the amount of money damages. In analyzing the case, the Supreme Court determined that the legislature which had created the rights to a cause of action could repeal or amend those rights. The Court looked to the intent of the legislature as derived both from the language of the statute, as well "as the evil to be remedied", while alternatively finding that even if legislative intent could not be determined, that the statute should be retroactively applied on the basis of "substantial precedent holding such time limitation amendments to be procedural in character." 122 N.E.2d at 518.

Employing a similar mode of analysis, the Board notes that the right of a 120 day "deemed issued" approval contained in P.A. 82-682 is a right created by the legislature to remedy the evil which an applicant could suffer by way of a local government's failure to make a prompt decision on a pending application. It is to be noted that the effect of that right may be draconian; all local approval rights may be extinguished even in the absence of bad faith, where, for instance, a county may lack a quorum or may deadlock. The nature of the amendments to that original act contained in P.A. 83-1522 indicate that the legislature sought to remedy new evils recognized from the experience gained in the implementation of the original act: that the 120 day time frame was too tight to allow adequate public participation and the resulting fully informed decision-making by the County. In P.A. 83-1522, the public's comment period was extended from 30 days to between 120 and 150 days, while the public's time to prepare for hearing was extended from 60 days to between 90 and 120 days; the extension of the decision deadline flows from the extension of the comment period.

The Board finds that retroactive application of the 180 day period of P.A. 83-1522 only defers, for 60 days, an applicant's ability to assert an application is deemed approved; it does not destroy the right which accrues or "vests" in the event of government inaction. The Board further finds that, given the

nature of the evil to be remedied--lack of adequate time for participation--that the legislature intended retroactive application of this statute. The Board is not persuaded by BFI's argument that the several months delay in the time between the signing of the public act and its stated effective date indicates contrary intent. Finally, even if the intent of the legislature cannot be determined, the Board finds that P.A. 83-1522's limitation of a previously created right is akin to the time limitation found to be procedural in Orlicki (in which the right to assert a cause of action was shortened by 3 years), and finds the act to be procedural in nature.

Even if the Board has mischaracterized P.A. 83-1522 as procedural in nature and wrongly applied it retroactively as a matter of law, the Board is persuaded by the City's arguments that as a matter of equity, BFI must be estopped from the assertion that the shorter time period of P.A. 82-682 applies. Throughout the course of the proceeding before the County, BFI acted in a manner suggesting acquiescence in the applicability of P.A. 83-1522. BFI's newspaper notice stated that public comment rights were those post-hearing rights listed in P.A. 83-1522. The record reflects no objection by BFI to the scheduling of hearing on the 90th, rather than the 60th, day following its application. At close of hearing, BFI's attorney responded to a question concerning comment rights that a participant "does have 30 days under statute to file any other documents" (County Rec., Tr. 113, see also 39). Under these facts, the Board finds that estoppel must lie, applying "the broad concept that a party whose own conduct contributes or causes another to commit an irregularity in judicial procedure, cannot later twist that irregularity to his own advantage" In Re Rauch, 45 Ill. App.3d 784, 359 N.E.2d 894, 896 (1977) (appeal allowed to proceed where all counsel agreed to order purporting to extend statutory appeal period).

COUNTY JURISDICTION AND ADEQUACY OF BFI's NOTICE

In summary, the Board finds that the County lacked jurisdiction to consider BFI's application on the grounds that a) BFI filed the application with the County 13 days after newspaper publication of the notice of intent to file, rather than the 14 days required by statute, and b) BFI did not initiate service of notice to landowners within a reasonable time before the application's filing.

Newspaper Notice

The City essentially argues that the County did not have a valid, complete application before it over which to exercise jurisdiction, because of the one-day deficiency in the notice period. The City asserts that the controlling case here is Kane County Defenders, Inc. v. IPCB, _____ Ill. App. 3d _____, 487 N.E. 2d 743 (1985).

In the Kane County case, the Elgin Sanitary District (ESD) filed its application August 11, 1983. Newspaper notice was not published until August 10. However, as this notice stated only that the application would be filed "within 14 days", ESD published a new notice on August 20 which stated the date the application was filed, the last date of the comment period, and the date of the public hearing. The petitioners in that case argued that the 14 day notice provision of paragraph 1 of Section 39.2(b) (individual notice to land owners) applied to paragraph 2 (newspaper notice), and that ESD violated the notice provisions, "thereby substantially shortening the length of the comment period available to the general public". The Board takes administrative notice of the fact that, had notice been published 14 days in advance of a specified filing date, the public would have had 44 days to consider and to formulate written comments; because notice of the filing date, from which the comment period ran, was not published until August 20, the period was effectively reduced from 44 to 22 days.

The Appellate Court for the Second District held that "ESD's failure to publish appropriate newspaper notice and notice of the date it filed the site location request rendered the county board hearing invalid for lack of jurisdiction", finding the notice requirements of Section 39.2(b) to be "jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal". In reaching this result, the court applied the reasoning employed by the Third District Appellate Court in Illinois Power Co. v. IPCB, 137 Ill. App. 3d 449, 484 N.E.2d 898 (1985). In Illinois Power, in a situation where the Board had failed to give both the 21 day notice to individuals and the newspaper notice to the general public required by Section 40(b), the Court found that the statutory notice requirements were jurisdictional, given the statutes' use of the mandatory term "shall", and the general principle that an administrative agency derives power solely from its enabling statue.

In Kane County, the Second District asserted the Illinois Power rationale applied "even more strongly" because

> "[The] broad delegation of adjudicative power to the county board clearly reflects a legislative understanding that the county board hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the landfill site approval process. We find support for this view also in the statutory notice requirements themselves, which are more demanding at the county board phase of the process.*** The notice requirements are jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal. (citations omitted)".

The Board notes that the facts in Kane County are distinguishable from the facts presented here. P.A. 82-682 governed that proceeding; P.A. 83-1522 governs these. There, ESD reduced comment rights by half to 22 days in a situation where written comments could be filed only in advance of hearing. Here, BFI truncated the notice period by one day in a situation where, due to the change in statute, the comment period lasted 120 days and comment rights existed before and after hearing. However, given the Kane County finding that compliance with notice directives is jurisdictional, the Board must find that even a one day failure of newspaper notice rendered BFI's application deficient, with the result that all proceedings before the County are voided.

The Board notes that it could be argued that there is an inconsistency between the result reached here and the result reached by the Board in McHenry County Landfill, Inc. v. County Board of McHenry County, PCB 85-192 (March 14, 1986). That case also involved appeal of a county decision on site location suitability pursuant to SB172. There, this Board had mailed a request for publication of notice to a newspaper on June 28, one day after the hearing date was established. Notice did not appear until July 5. The result was publication of a 20 day notice instead of the 21 day notice established in Section 40.1(a). The landfill applicant asserted that the Board hearing was therefore invalid and that his application should be deemed approved pursuant to Section 40.1 for failure of the Board to take action. The precedents cited were the cases discussed above: Illinois Power and Kane County.

The Board's decision in this case is entirely consistent with that in McHenry County, and does not reflect application of a "double standard" to actions by the applicant versus those by the Board. Rather, the rationale here is that the intent of the Act is to provide a mechanism and a county or municipal forum for the consideration of site location suitability issues. Where an alternative mechanism for resolution and review of an issue exists, e.g. filing of a new application, a party may be held to the letter of the law, when that party alone bears the burden of any omission. Where a slight omission may substantially impair, if it does not extinguish, a right of a party who bears no culpability, e.g., a deemed issued approval, the Board must look to the spirit of the law.

The Board notes that its finding on the newspaper notice issue is dispositive of the case. However, all remaining procedural issues are being considered a) to provide guidance in the event BFI refiles an application, and b) to avoid any potential appellate remand of this case to the Board for failure to address procedural issues.

Notice to Landowners

Section 39.2(b) requires that "[n]o later than 14 days prior to a request ... the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested" to neighboring landowners and members of the General Assembly. The City asserts that BFI's notice was defective because examination of the registered mail return receipts reveals that, while all notices were mailed June 12, some landowners received the notice later than June 13 (the 14th day prior to the application's filing), some receipts were signed by persons other than the addressee, and some notices may not have been delivered at all. See PCB Rec., BFI Gr. Ex. 1 and Tr. 203. The City asserts that the statute must be read as requiring that all notices be received by the individuals to which they are addressed. In support thereof, the City cites Cutler v. Leoder Cleaners, 12 Ill. App. 2d 439, 139 N.E.2d 832, 935 (1957), where, in the context of construction of a pleading concerning notice of a breach of a lease, the court found that an allegation that notice was "served" was equivalent to an allegation that notice was "received" since "proper service of a notice implies receipt thereof".

The Board notes that in Section 101.105 "Computation of Time" of the Board's procedural rules, in subsection (b) the Board has provided that:

> "Notice requirements shall be construed to mean notice received, but proof that notice was sent by means reasonably calculated to be received by the prescribed date shall be prima facie proof that notice was timely received."

The Board will not, at this time, construe the "cause to be served" language of Section 39.2 of the Act as absolutely requiring that notice be received by all parties 14 days prior to an application's filing. To so hold could, as a practical matter, prevent or greatly delay an application being considered by a county because of an applicant's inability to perfect notice: an opposing landowner could frustrate, or cause endless renoticing of, the filing of an application by refusing to receive or pick-up mail or by evading personal service. However, the Board does construe the Act as requiring that service of the notice be initiated sufficiently far in advance to reasonably expect receipt of notice 14 days in advance of the filing of a notice. BFI's initiation of registered mail service on the 15th day in advance of the filing date was unreasonable under the circumstances; in Section 103.123(b) of the Procedural Rules, the Board does not presume its service by first class mail complete until four days after mailing. Service was therefore defective for this reason.

The Board does not find service defective because a person other than the addressee received and signed for the notice: the

Board presumes proper delivery of the notice by the Postal Service to a householder.

Content of the Notice

The newspaper notice published by BFI stated that the application would be filed June 28, whereas it was filed June 27. The notice was misleading and therefore defective. Otherwise, the content of the notice meets the requirements of Section 39.2(b); the collateral and incidental mention of the public hearing was not deficient. The Board rejects the City's inherent contention that the notice must contain the date of the public hearing. The statute does not require this by its terms. Additionally, as a practical matter, to so require could frustrate public participation: a hearing date mutually convenient for all who wish to participate cannot be arrived at before the identity of potential participants is known.

FUNDAMENTAL FAIRNESS

In summary, the Board finds that some aspects of this proceeding were fundamentally unfair. Were the Board not required to vacate the County's decision on the grounds that notice defects deprived the County of jurisdiction, the Board would be required to remand this action to the County to cure the unfairness.

Hearing room size, late hours, restrictions on cross examination and public comment time

The City challenges the fairness of the hearing on various grounds, including the hearing room's lack of seating capacity, completion of the hearing in the early morning hours, and the restrictions on public comments and questions. Even if, arguably, no single one of the above factors would have rendered these proceedings fundamentally unfair, certainly in combination these factors had a "dampening and prejudicial effect on...the hearing attendees". Board of Trustees of Casner Township et al. v. County of Jefferson and Southern Illinois Landfill, Inc., PCB 84-175, April 4, 1985, at p. 9 (remanding a similarly flawed proceeding for cure of the hearing deficiencies). The Board appreciates the County's logistical dilemma in finding a new room for a hearing when faced with overflow crowds, and does not find it unreasonable that hearing was commenced. However, failure to recess at some point and continue the hearing to another time was unreasonable, given the fact that persons who were not sponsored by attorneys could not begin to speak until approximately 1:30 a.m., and the number of, and time available to, persons who could speak was restricted without warning. The Board agrees with the County that the record does not reflect that a continuance was asked for. However, it also does not reflect that the option was presented by the County, and non-attorneys in particular may not have been aware of the option. In any event, the absence of such a request does not relieve the County from exercising its

responsibility to take the initiative. In this case, moreover, the County clearly signaled its intention to conclude the hearing that night.

There is no demonstration in this record as to whether citizens had an opportunity to make their statements under oath and chose not to do so, or whether citizens were simply not given the opportunity . It would be fundamentally unfair to create two classes of testimony: sworn testimony sponsored by attorneys, and unsworn testimony by others. Lack of affiliation with an attorney is no ground to establish a procedure where a) a citizen's testimony must be given lesser weight because it is unsworn and therefore inherently less credible in the scheme of the judicial system, and b) a citizen's questions are considered to be of secondary importance. The intent of the SB172 procedure is to allow for equal participation on the same footing by all persons who may be affected by the siting of a facility.

County Reliance On Facts Not Presented At Hearing And Ex Parte Contacts

Section 39.2(c) of the Act provides in pertinent part, that "Any person may file written comment with the county board...concerning the appropriateness of the site for its intended purpose. The county board ... shall consider any comment [timely] received... in making its final determination" (emphasis added). BFI presents a question of first impression to the Board: the meaning of the words "public comments" in a quasi-adjudicatory proceeding.

BFI argues that it was fundamentally unfair for the County to have relied on "evidence" submitted in affidavit form submitted after hearing in the closing days of the written comment period. BFI asserts that, in quasi-adjudicatory proceedings such as the courts have held these to be, "nothing may be treated as evidence which has not been introduced as such and incorporated into the hearing record." 73A CJS Public Administrative Law and Procedure Section 126 (1983). BFI contends that:

> "what SB172 refers to when it permits members of the general public to file their own "written comments" ... is arguments about what the evidence at the public hearing shows or does not show. ... [T]o the extent that written comments purport to be evidentiary in nature, they are highly objectionable since they are typically unsworn statements by out-of-court declarants and thereby constitute hearsay. Putting the comments in "affidavit" form does not make [them] evidence, nor does it cure the due process objection that the other side has no opportunity for cross-examination." (BFI Brief of 3/14/86 at p. 20-21).

The Board does not find that factual material cannot be submitted during the comment period. To do so would negate the legislative intent expressed in Section 32(c) as revised by P.A. 83-1522 that there be an opportunity for comment both before and after hearing. Had the legislature intended post-hearing comments to be restricted to legal briefs concerning the weight of the evidence produced at hearing, as BFI urges, the legislature would have so stated.

On the other hand, fundamental fairness/due process considerations are likely to preclude the County from giving the same weight to written comments and any facts contained therein as it might give to statements made at hearing under oath which are subject to cross-examination. The fair weight of written comments must be determined by a local government in the context of the proceeding considering all applicable factors, including the nature of the comment, time of filing and ability of other individuals to respond to the comment. In this case, the Board will not determine what weight, if any, the County could fairly have given the Thompson and Haag affidavits, as to do so would require the Board to evaluate the merits of the evidence concerning a defective application.

The City asserts that ex parte contacts have taken place between county board members and various individuals concerning BFI's application. One such contact was admitted by the board member who, on November 19, urged the Environment Committee to reverse the approval it had given on October 22. This board member advised his colleagues that, "This morning I met with members of Dupo and members of the Dupo Village Board that were available, and they concur with this action." (PCB Rec., BFI Ex. B.)

In deliberating the effects of ex parte contacts, the Board must consider

> "whether, as a result of improper ex parte communications, the...decisionmaking process was irrevocably tainted so as to make the ultimate judgment...unfair, either to an innocent party or to the public interest that the [local government] 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...ultimate decision; whether the party making the improper contacts benefited from the...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...decision and remand for new proceedings would serve a useful purpose." E&E Hauling, Inc. v. PCB, 111 Ill.App.3d 586, 451.N.E.2d 555, 587 (1983), citing PATCO v. Federal Labor Relations Authority, 685 F.2d 547, 564-65 (D.C. Cir. 1982).

The City has not developed its arguments concerning ex parte contacts fully enough to allow the Board to make findings using this standard. However, the Board must note that this is the most serious and offensive of the contacts alleged. The nature of the issue is grave: whether the seven-member Committee, in part based upon Dupo's approval of a reversal, should reverse its prior recommendation to the full Board of thirty members. The possibility that this contact affected the outcome of the vote of the full County Board is high, as the content of the communication was passed to at least the seven Committee members.

Another alleged ex parte contact involved two Board Members' attendance at a public meeting held in the Village of Dupo on October 17, 1985. At this meeting, Dupo requested that BFI present information about its application (PCB Rec,. Tr. 123-127). Board Members asked questions and spoke at the meeting. This meeting occurred after the County's hearing, before the close of the comment period. Again, Board Members were potentially receiving information not contained in the record, and were participating in ex parte discussions. Attendance at this meeting was impermissible, although the Board will make no finding that this alone would require reversal of the County's decision.

The Board notes that at hearing the County asserted that it was "ludicious, asinine, and unbelievable" to suggest that Board Members had acted improperly, since "[e]lected officials are expected to respond to the public. If they don't attend public hearings as an elected official, they would be saying we don't want to hear what you have to say, those people don't care what we have to say." (PCB Rec., Tr. 211)

While the Board has had a long-standing appreciation of the local officials' practical problem, the courts have interpreted SB 172 as quasi-adjudicatory in nature. This requires the elected officials to operate in a judicial mode. While an application is pending the officials must restrict themselves from otherwise usual constituent contacts and must refrain from tapping otherwise available information sources; no information can be utilized which is not in the record for all to see and refute.

Finally, for similar reasons, it was improper for the Environment Committee to open up its November 19, 1985 meeting for public comments after it made its initial vote to deny but before it reconvened to take a roll call vote in response to these comments. (PCB Rec. Tr. 74-80) The meeting was not noticed as an open one at which the public could participate, no representative of BFI was present, and the committee members had yet to vote on the application in their capacity as Board Members. This sort of procedure was termed an ex parte contact by the court in E&E Hauling, supra.

RECORD SUFFICIENT TO FORM THE BASIS OF APPEAL

The final issue the Board must address is the condition of the County record. Section 39.2(d) requires the County to develop a record sufficient to form the basis of appeal; Section 40.1(a) requires the Board to consider that record. If the Board and any subsequent reviewing court is to determine whether the County's decision was consistent with the manifest weight of the evidence, the County must promptly submit to the Board, in organized fashion, all materials which it received. The Board is still unsure that this has occurred, even after the filing of various supplements to what was originally certified as the County Record.

First, as to the hearing transcript, the Board appreciates that it is more economical for the County to itself tape record and later transcribe a hearing, than to retain the services of a shorthand reporter. Tape recording and transcription are not per se objectionable, provided that the resulting transcript is as complete and accurate as that which would be supplied by a shorthand reporter. As earlier noted, this one is not. If a tape is being made, witnesses must be asked to stop speaking while tapes are changed, and must identify themselves so that they can be identified in the transcript. Transcript designations such as "O[pposing] C[ounsel]" and "Man from Audience" are insufficient. The record here does not indicate otherwise, but the County must also insure that the person administering oaths is authorized to do so under state law.

Next, exhibits admitted at hearing were not properly identified and described on the hearing record; it is unclear whether they were properly marked at hearing. One result was that at the Board's hearing, there was considerable discussion as to what had in fact been admitted.

Another result was that the County Clerk's original certificate of record contained no description of exhibits; the amended certificate was also deficient in this regard. The County Clerk's certificate of record should be a single document which assigns each item a number and describes the item: "Letter from Millstadt" is insufficient without either a date of receipt by the County or reference to the date the letter was filed. The corresponding documents should also be numbered so that they can be conveniently located and referenced. The documents should be bound in some fashion to insure their integrity. The Board advises the parties that, in the event of appeal of this action, the Board cannot reorganize the County Record for the benefit of the appellate court, but must transmit the record as is. In the event no notice of appeal is filed, the Board will return the record to the County upon its request.

Finally, the Board must observe that since the proceedings before the County were void due to lack of jurisdiction and the County decision is therefore vacated, the record here does not

automatically carry over to any subsequent application proceeding as it would if the Board has remanded this application to the County. However, this does not prevent formal resubmission of any items in this record to the County in a new proceeding.

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

ORDER

The November 27, 1985 decision of the St. Clair County Board denying BFI's June 27, 1985 application for site location suitability approval is hereby vacated, as the County could not exercise jurisdiction over the improperly noticed application.

IT IS SO ORDERED.

J. T. Meyer concurred.

J. D. Dumelle dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certifies that the aboye Opinion and Order was adopted on the 3rd day of April, 1986, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board