ILLINOIS POLLUTION CONTROL BOARD
February 25, 1993

ALICE ZEMAN, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	PCB 92-174
	)	(Land Siting Review)
VILLAGE OF SUMMIT and WEST SUBURBAN, RECYCLING and ENERGY CENTER, Inc.	)	(Consolidated with PCB 92-177)
	)	
Respondents.	)	

DONNA QUILTY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-177
	)	(Land Siting Review)
VILLAGE OF SUMMIT and WEST SUBURBAN RECYCLING and ENERGY CENTER, INC.,	)	(Consolidated with PCB 92-174)
	)	
Respondents.	)	

KEITH I. HARLEY APPEARED ON BEHALF OF ALICE ZEMAN, TONY BERLIN, RICHARD ZILKA, MICHAEL TURLEK AND KEVIN GREENE

KENNETH PAUL DOBBS APPEARED ON BEHALF OF DONNA QUILTY

LOUIS F. CAINKAR LTD. BY VINCENT CAINKAR APPEARED ON BEHALF OF THE VILLAGE OF SUMMIT

SIDLEY AND AUSTIN BY ROBERT M. OLIAN AND LAURA L. LEONARD APPEARED ON BEHALF OF WEST SUBURBAN RECYCLING AND ENERGY CENTER, INC.

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

This matter comes before the Board on two petitions for hearing that were consolidated by the Board on November 19, 1992. The first petition, brought by Alice Zeman, Tony Berlin, Richard Zilka, Michael Turlek, and Kevin Greene (Zeman), was filed on November 6, 1992. The second petition, brought by Donna Quilty (Quilty), was filed on November 9, 1992. The respondents in both petitions were the Village of Summit (Summit) and the West Suburban Recycling and Energy Center, Inc. (WSREC). Zeman and Quilty's third party appeals contest Summit's October 19, 1992 grant of local siting approval to WSRIC for a regional pollution control facility pursuant to what is commonly called an "SB 172" proceeding.

ISSUES ON APPEAL

The Zeman petitioners appeal on the basis of a) fundamental fairness regarding the availability of the application and notice of an amended petition, and b) criteria #1 and #4 regarding need and flood plain issues respectively, of Section 39.2(a) of the Environmental Protection Act (Act). (Zeman Pet., PCB 92-174, November 6, 1992.)

Quilty appeals on the basis of fundamental fairness regarding her's and others' ability to participate in Summit's hearing. (Quilty Pet., PCB 92-177, November 8, 1993.)

The Board notes that neither it nor the petitioners have raised any issues as to jurisdiction.

PROCEDURAL BACKGROUND

On May 7, 1992, WSREC submitted to the Village Clerk of Summit its application requesting local siting authority for a municipal waste to energy facility, to generate electricity from the incineration of municipal wastes. (C 0001-0056; Summit H.O. Exh. 1.)[1]

On August 5, 1992, WSREC filed an amended application, which was introduced as an exhibit five days later at the start of Summit's public hearing. (C 00072-00136; C 03006, Pet. Exh. 1.)

Summit started its public hearing at 10:00 a.m. on August 10, 1992, and concluded it at 2:30 a.m. on August 11, 1992; a thirty day comment period, further extended until September 23, 1992, followed.[2] Summit approved WSREC's application on October 19, 1992. (C 05000-05008, Summit ordinance.)

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[1] As regards the Summit proceedings, this opinion will generally follow the pagination and identification in the January 5, 1993 Index of Record on Appeal, e.g., C____, Summit H.O. Exh.__. As regards the Board proceedings, e. g., the transcript will be identified as Tr. at ____; Board H.O. Exh.__.

[2] On August 17, 1992, Summit held a joint hearing with the Village of McCook to address other component facilities. The waste to energy facility is entirely in Summit. It is a component located on a thirty-six acre site that includes land in the Village of McCook. The other components include facilities for recycling, waste processing (transfer station), composting and fuel preparation. (C 03013.) We note that the local siting approval by the Village of McCook has also been appealed, and is pending before the Board in another consolidated proceeding, PCB 92-198 and PCB 92-201.

The Pollution Control Board (Board) held hearings on January 7 and 8, with about 60 persons in attendance, and another on February 8, 1993, with about 20 persons in attendance. Post hearing briefs were filed by petitioners Zeman and Quilty on February 1, 1993. The respondent WSREC filed separate briefs for PCB 92-174 and PCB 92-177 on February 8, 1993. Summit did not file a brief.[3]

STATUTORY BACKGROUND

Public Act 82-682, commonly known as SB-172, is codified in Sections 3.32, 39(c), 39.2, and 40.1 of the Act. It vests authority in a county board or municipal governing body to approve or disapprove the local siting request for each new regional pollution control facility. These decisions may be appealed to the Board in accordance with Section 40.1 of the Act. The Board's scope of review encompasses three principal areas: (1) jurisdiction; (2) fundamental fairness of Summit's site approval procedures; and (3) the statutory criteria that the applicant's facility must meet. Pursuant to Section 40.1(a) of the Act, the Board is to rely "exclusively on the record before the county board or the governing body of the municipality" in reviewing the decision below. The Board shall include in its consideration the "the written decision and reasons for [Summit's] decision, the transcribed record of the hearing held by [Summit], and the fundamental fairness of the procedures used by [Summit] in reaching its decision.

Section 39.2 of the Act presently outlines nine criteria for site suitability, each of which must be satisfied (if applicable) if site approval is to be granted. In establishing each of the nine criteria, the applicant's burden of proof before the local decisionmaker is the preponderance of the evidence standard. (Industrial Salvage v. County of Marion (August 2, 1984), PCB 83-173, 59 PCB 233, 235, 236.) On appeal, the Board must review

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[3] On December 17, 1992, in response to Summit's December 8, 1992 motion for reconsideration, the Board found: that the petitioners were a citizens' group pursuant to Section 39.2(n) of the Act and thus exempt from payment of a fee to Summit for preparing the record on appeal; and that Summit must file the record in accordance with Board requirements. Also, on December 17, 1992, the Board denied WSREC's December 4, 1992 motion to dimmiss petitioner Quilty, finding that she was a participant at the Summit hearing. On January 7, 1993, The Board denied the petitioners' December 23, 1992 motion to sanction, finding that the record had been filed; however, the Board also ordered the Village to cure its failure to file a proper motion instanter in filing the record and to file a certification of the record by filing the motion and certification at the Board's January 7, 1993 hearing.

each of the challenged criteria based upon the manifest weight of the evidence standard. (See McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill. App. 3d 352, 566 N.E.2d 26; 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 v. IPCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part 107 Ill.2d 33, 481 N.E.2d 664.) A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain or indisputable from a review of the evidence. (Harris v. Day (4th Dist. 1983), 115 Ill. App. 3d 762, 451 N.E.2d 262, 265.) The Board, on review, is not to reweigh the evidence. Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. (Fairview Area Citizens Taskforce v. IPCB (3d Dist. 1990), 198 Ill. App. 3d 541, 555 N.E.2d 1178, 1184; Tate v. IPCB (4th Dist. 1989), 188 Ill. App. 3d 994, 544 N.E.2d 1176, 1195; Waste Management of Illinois, Inc. v. IPCB (2d Dist. 1989), 187 Ill. App. 3d 79, 543 N.E.2d 505, 507.) Merely because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings. (File v. D & L Landfill, Inc. (August 30, 1990), PCB 90-94, aff'd File v. D & L Landfill, Inc. (5th Dist. 1991), 219 Ill. App. 3d 897, 579 N.E.2d 1228.) However, where an applicant made a prima facie showing as to each criterion and no contradicting or impeaching evidence was offered to rebut that showing, a local government's finding that several criteria had not been satisfied was against the manifest weight of the evidence. (Industrial Fuels & Resources/Illinois, Inc. v. IPCB (1st Dist. 1992), 227 Ill.App. 3d 533, 592 N.E.2d 148.)

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires the Board to review the proceedings before the local siting authority to assure fundamental fairness. In E & E Hauling, Inc. v. IPCB (2d Dist. 1983), 116 Ill. App. 3d 586, 594, 451 N.E.2d 555, 564, aff'd in part (1985), 107 Ill.2d 33, 481 N.E.2d 664, the appellate court found that although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. (See also Industrial Fuels, 227 Ill. App. 3d 533, 592 N.E.2d 148.; Tate, 188 Ill. App. 3d 994, 544 N.E.2d 1176.) Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois Inc. v. IPCB (2d Dist. 1989), 175 Ill. App. 3d 1023, 530 N.E.2d 682.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of ex parte contacts, prejudgment of adjudicative facts, and the introduction of evidence are

important, but not rigid, elements in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163.)

TESTIMONY AT BOARD HEARING

The bulk of the testimony at the Board's hearing was devoted to issue of fundamental fairness.

January 7, 1993 hearing day.

Petitioner Michael Turlek testified that he became aware of the availibility of the WSREC application (application), as well as the procedural rules for the conduct of the hearing, from reading a July 9, 1992 legal notice in the Desplaines Valley News.[4] (Tr. at 27.)

On the following day, July 10th at about 4 p.m., he went to the Summit village hall service window, identified himself, and requested copies of the application and procedural rules. The person on duty was unable to produce copies, so Mr. Turlek followed her instructions to return the next morning at 9:00 a.m., at which time he again identified himself to her. After she gave him some documents and recorded his name, Mr. Turlek left. After taking time first to perform a few chores, Mr. Turlek looked at the documents and found that they were the rules of procedure and an unsigned resolution for a joint public hearing, but not the application. (Tr. at 27-32.)

Upon promptly returning to the village hall and informing the same person on duty of the omission, Mr. Turlek was invited to accompany the Mayor into the Village Clerk's office. Upon telling the Village Clerk that he had failed to get the application, Mr. Turlek testified that he was told by the Village Clerk that he had received everything that the state law said he was entitled to. Mr. Turlek, in response, referred to the legal notice. In that the Village Clerk did not have a copy of the newspaper, Mr. Turlek proceeded home to get his copy and, by agreement, phoned the Village Clerk and read over the phone the

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[4] The July 9 notice stated in pertinent part:

> Copies of the siting application and the procedural rules for the conduct of the hearing are available for inspection and copying at the office of the Village Clerk of the Village of Summit, 5810 South Archer Road, Summit, Illinois 60501-1493. (C00057; H.O. Exh. 2.)

We also note that the Desplaines Valley News published the same legal notice on July 16 and July 23, 1992. (C 00058, 59; H. O. Exh. 2.)

legal notice relative to the availability of the siting application. The Village Clerk again responded that he had already received everything he was entitled to. (Tr. at 32-34.)

Mr. Turlek then testified that he sought information at the libraries in Riverside and Lyons but that it was general, not specific as it would have been in the siting application. At the Summit hearing, Mr. Turlek in his testimony included a statement that on three separate occasions he was denied both visual and copying access to the application, and submitted an affidavit to that effect during the post-hearing 30 day comment period. (Tr. at 35,36; C 03407; C 05039, 05040).

Mr. Turlek testified that after the Summit hearing, toward the latter part of August, he received a copy of the amended application from Mr. Tony Berlin, a person he had been working with. He asserted that he had earlier been unaware of any amendment to the application and that, had he known about the flood plain issue that was the primary issue addressed in the amended application, he would have testified about it. (Tr. at 37-40.)

Next to testify was petitioner Alice Zeman. She testified that she first learned from a newspaper on May 7, 1992 of a proposed incinerator and composter, and learned from a legal notice of the Village of Summit that an application was available at the Village Clerk's office.[5] On July 20, 1992, at about 11:40 a.m., Ms. Zeman went to the Village Clerk's office and requested the application. As she was then instructed to do, she filled out a request for records (for which she still had a receipt). She saw no copy of the application and the person on duty did not offer to let her inspect it. She was told that the Village Clerk's office would either phone her or send the application by mail. On July 22, 1992, she received in the mail a Summit/Mc/Cook joint hearing resolution, Summit's legal notice and the procedural rules for the August 10, 1002 hearing, but not the application. (Tr. at 41-49.)

Ms. Zeman attended the Summit public hearing, arriving at 7:30 a.m., prior to the scheduled 10:00 start of the hearing. As a member of a citizen's group, referred to as "SCORE", she wanted to utilize posters, etc., and seek signatures on petitions against the incinerator. She had included in her hearing testimony a statement that she never received the application information, and later submitted an affidavit to that effect

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[5] The legal notice that Ms. Zeman appears to be referring to is the "Village of Summit Legal Notice" , where, in the last paragraph, the notice states that the siting application and the procedural rules are available for inspection and copying at the Summit Village Clerk's office. (C 00062; H.O. Exh. 4.)

during the comment period.[6] She testified that no-one from her SCORE organization had a copy of the application, nor did those in another organization referred to as "WIN", prior to the commencement of hearing. She testified that she has never at any time since received a copy of the application. Regarding the amended application, she testified that she did not hear a statement at the very beginning of the hearing about an amended application. The first she learned that an amended application was available was from Mr. Tony Berlin on August 31, 1992. She did not receive or seek out a copy of the amended application thereafter. (Tr. at 49-58; C 03235; C 05035.)

Petitioner Richard Zilka testified that he read about the proposed project and the availability of the application in the legal notice in the July 9, 1992 edition of the Desplaines Valley News (See C 00057.) He went to the Village Clerk's office with a colleague, Frank Schreiber, and requested the application. The person on duty told him she had no applications. After Mr. Zilka told her about the information in the newspaper, she referred him to the Mayor's office. A person in the Mayor's office confirmed that there were no documents, and suggested he contact ABB.[7] Mr. Zilka did not contact ABB. (Tr. at 58-60, 64.)

Mr. Zilka attended the hearing from "morning to night", except for a rest stop period in the afternoon. (Tr. at 61, 67,68).) He arrived at 8:00 a.m. and was one of the first or second people to sign a card to testify and didn't get called until about 1:30 a.m. the following morning.[8] He stated that the hearing officer was shuffling the cards. He submitted an affidavit concerning his experiences during the comment period. (C 05038.) Regarding the amended application, he testified that he did not hear reference to the amended application. He asserted that he was in attendance at the hearing during the entire time, but from where he was sitting he could hardly hear.

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[6] Ms. Zeman at hearing testified that she learned of the application from a legal notice in the Thursday, July 16, 1992 edition of the Desplaines Valley News. (C 03235; also see 00058.)

[7] ABB stands for Asea Brown Boveri, whose headquerters are in Zurich, Switzerland. A subsidiary of ABB is Combustion Engineering, and ABB Resource Recovery Systems (ABB RRS) is a unit of Combustion Engineering. ABB RRS proposes to build and operate the waste-to-energy plant. The recovery center is to be developed and managed by WSREC. (C 03007-03009; 00074,75.)

[8] Mr. Richard Zilka is referred to as Mr. "Richard Sucka" in the Summit hearing transcript. Mr. Zilka testified at that hearing that he was the first to sign up and had to wait ten hours. The transcript indicated that the "cons" testimony started in the afternoon of August 10. (C03365,66.)

He did not know about an amended application until told about it some two months after the hearing at one of the WIN meetings. He asserted that he didn't know of anyone at WIN who had a copy of the application or the amended application before the hearing. (Tr. at 61-68.)

Mr. Frank Schreiber testified that he accompanied Mr. Zilka on his July 20, 1992 attempt to get the application, arriving at the village hall about 11:00 a.m. He testified that he accompanied Mr. Zilka to the Mayor's office, where the person present told Mr. Zilka that she didn't think they had a copy and that he would have to get a copy from ABB. (Tr. at 69-71.)

Petitioner Kevin Greene, who is employed by Citizens for a Better Environment, an organization that advises community groups that are members of the Waste Idea Network,[9] testified that he learned about the availability of documents from a notice in the Desplaines Valley News that had been sent to him. On July 13, 1992 he went to the Village Clerk's office and orally asked a Ms. Daniels, an employee of the office, to inspect the application. She asked him to fill out a record inspection form and then indicated that the application was not available for review at that time. She told Mr. Greene that he would probably be hearing from the village clerk when he returned later that afternoon to make arrangements to inspect the documents. After about four or five days went by without hearing anything, he called the Village Clerk's office and left a message. The Village Clerk never responded. About seven days later he received in the mail a copy of a siting hearing resolution and a copy of the procedural rules, but no copy of the application and nothing regarding its availability. He had no further contact with anyone from Summit. When his phone calls were not returned and he failed to receive a copy of the application in the mail, he bacame nervous about having nothing to review in time for the hearing. He started calling the community activists for a copy of the application, and several said they were having trouble getting copies. In about a couple of weeks he was able to get a copy of what appeared to be the siting application from Ms. Barbara Malarky, a copy which which she had received from ABB. Mr. Greene asserted that he felt at a disadvantage absent looking at the documents at the village hall because he did not know if any supporting documents or exhibits, such as those prepared by expert witnesses or consultants had also been filed. At the time of hearing he still did not know. He said that, based on his prior experince

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[9] Mr. Greene stated that he provides technical assistance involving solid waste issues in western Cook County and the surrounding counties, including participation in siting hearings, and is an employee of Citizen's for a Better Environment. (Tr. at 73-75.)

with siting hearings, he risked not being able to fully understand and rebut the applicant's arguments (Tr. at 74-89.)

Mr. Greene first attended the Summit public hearing from about 9:30 a.m. until 2 p.m. on August 10, 1992. He asked the hearing officer when the public would be able to testify, and was told it probably would not occur until after dinner, about 6:30, 7:00. Mr. Greene left and returned about 5 or 5:30 and testified around 9 or 9:30. He included in his Summit testimony that he had requested, but had not been provided, a copy of the application by the Village Clerk's office, and of his uncertainty about the completeness of the document. He also submitted an affidavit in the post-hearing comment period. (Tr. at 81-83; C 03241, 03242; C 05041.) Regarding the amended application, Mr. Greene stated that at the Summit hearing he had an impression that an amended application was being filed that day, but was unaware that it had been filed five days earlier. He got a copy of the amended application four days after the hearing from the Village Clerk's office; he asked to inspect it, but there were a pile of about 5-7 copies and he was given one free of charge. (Tr. at 82, 83, 87, 96, 97.)

Petitioner Tony Berlin testified that, after reading in a legal notice in early July about the availability at the village hall of a copy of the application or for inspection, he went to the Village Clerk's office and requested a copy, as well as a copy of the hearing procedural rules . After filling out an information form given by the person on duty, she said that a copy was not available and one would be mailed to him. Mr. Berlin stated that he received a copy in the mail of the Summit legal notice---which stated that copies of the application and procedures are available---, a resolution of Summit approving a "joint local siting" (Tr. at 114.)[10], and the procedural rules. Mr. Berlin called the village hall inquiring of a clerk on duty whether this was all he would receive, and she said that that was all he would receive. Mr. Berlin submitted an affidavit concerning this situation during the post-hearing comment period. (Tr. at 111-115; C 05037.)

Mr. Berlin attended the Summit hearing but did not testify. At hearing he heard some reference to another version of the application. In the latter part of August he went to the village hall on another matter, saw a notice on the wall of the availability of a "modified version" of the application (Tr. at 117.), and filled out a request for it. However, about a week later, he found out that he had been given the original May 7, 1992 application. He returned to the village hall to get the updated version and was told that it was unavailable but a copy would be made for him. He received a copy of the amended

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[10] Presumably referring to the August 17 joint hearing.

application within the following week. He stated that he did not submit post-hearing comment, but that at that time there was not much time left before the deadline. (Tr. at 115-121).

Mr. Berlin was on the citizen's fact-finding committee and t000estified that he was never aware of anyone on that committee having a copy of the application.[11] (Tr. at 121-126.)

Petitioner Donna Quilty testified that she had been "in and out" during the day of the Summit hearing (Tr. at 157), but understood that she was supposed to testify in the evening session. She returned to the hearing shortly after work, at about 8:00 p.m. and the auditorium was full.[12] She was instructed to fill out a form for those wishing to speak in opposition to the incinerator. At about 8:45 p.m. the Village Clerk started to read from a report, including, she said, a considerable portion devoted to the issue of composting, which upset her because the hearing did not concern composting. Ms. Quilty stated that the Village Clerk's testimony had not concluded when she left at about 10:00-10:30 p.m. to return to her children, and that he was at that time talking about a composting facility. She said that the hearing officer did not state how long the reading of the report would take. During the reading of the report, Ms. Quilty stated that objections from the audience started, first quietly and then becoming boisterous when there was no initial response from the hearing officer. She stated that at that point security people were brought in, and the hearing officer stated that if they didn't stop they would be ushered out. (Tr. at 126-134, 151, 157.)

Ms. Quilty testified that thereafter many persons left during the Village Clerk's testimony. She stated that there was no announced order of "con" testimony, or whether other reports might then be read. Ms. Quilty testified that had it not been

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[11] Mr. Berlin is apparently referring to the fact-finding committee which prepared a report titled "Citizen's Fact-finding Committee Report Regarding the West Suburban Recycling and Energy Center Village of Summit". This committee, of which Mr. Berlin was a member (C 00604), and its report, is alluded to throughout the testimony. This is the report that assertedly was presented (no transcript was made) by the Village Clerk in his testimony at hearing, as will be discussed later. The report is a compilation of committee and three subcommittee reports prepared by 12 Summit residents appointed by Summit's Mayor. The report is supportive of the WSREC's proposal. The report is contained in the record at C 00673-00708.

[12] It was Summit's counsel's estimate (at the Board hearing) that the auditorium holds approximately 250 to 300 persons. (Tr. at 165.)

for the Village Clerk's testimony she would have stayed, or would have made arrangements to stay if she had been informed how long the Village Clerk would take. She felt that a "stall tactic" (Tr. at 164.) was being used. She acknowledged that, if the Village Clerk had not spoken, the hearing would have ended at 11:00 p.m. While this after she left, she felt that it would have been only a half hour difference. Ms. Quilty stated that she only intended to speak for five minutes in opposition to the proposed incinerator. She did feel it would be not fruitful to file post-hearing comments, and she filed none.[13] (Tr. at 134-145, 163.)

Upon being shown portions of the citizen's fact-finding report, (See footnote 10); (Tr. 152-157), Ms. Quilty disputed that what she was shown was what the Village Clerk said at hearing. She stated that:

> What I saw was [the Village Clerk] with a stack of papers that he was reading, and I was not the only one who felt that he started to get into irrelevant materials, and it had to be more than what I saw on those pieces of pager (sic), because there is no way that myself, that a whole room full of people would have been objecting to anything of what you showed me, if that's all he was reading. There's no way. (Tr. at 156.)

Ms. Quilty testified that she remembered the material she was just shown, but remembered much of it as being irrelevant. (Tr. at 164.)

Ms. Kathleen Kalaga testified that she arrived at the auditorium at 7:00p.m., having been told that this was the time for those opposed to the incinerator to speak. She testified that when the Village Clerk was reading his report, she was aware that the court reporter was not recording. She stated that the Village Clerk read at least 45 minutes, that many in the audience were getting restless, then about 15-20 started loudly objecting - including some who had been there since 10:30 a.m. They were objecting to his talking about composting or recycling, when they were there for the incineration facility. She observed people leaving. She said no indication was given as to how long the Village Clerk would read the report. (Tr. at 169-176.)

Ms. Kalaga had testified before the Village Clerk's testimony. She stated that she felt, as a resident of Summit, embarrassed for her town because of what was a "stall tactic" to

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[13] Ms. Quilty was asked, and so responded, to state what she would have said at the Summit hearing. (Tr. at 145-151.) The Board will take no notice of this testimony as it is irrelevant.

get people to go home. (Tr. at 178.) She stated that the hearing officer had stated that there would be no special order in which the people would be called, and that some who had put their cards in first thing in the morning were not called on until after midnight. Ms. Kalaga testified at the Summit hearing. (Tr. at 176-179, 182, 183.)

Ms. Sue Riqqo, who stated that she is not a member of any organization, had been at the hearing for five hours in the morning. Having inquired of the hearing officer if there was a special time slot for senior citizens, she was told that there was not such a time, but that all could speak at 7 p.m. When she returned at 7:00 p.m., she learned that seniors had been among those who had been invited at 4:00 p.m., an occurrence that Ms. Riggo felt was a ploy to keep her from speaking. She stated that she was the first called after the break at 9:15 p.m. (Tr. at 186-190.)

Ms. Riggo also testified that the court reporter was directed not to record the Village Clerk's report, and that when he started a second report on health and dioxin, the audience started shouting at its length. She stated that at about ten minutes after the Village Clerk started his second report the crowd started "erupting". (Tr. 186-189, 191.)

Ms. Dilys Jones proffered a written statement from her sister with a copy of the questions that her sister said she had submitted during the hearing on the proper form and that they were not answered. The hearing officer allowed only one page of the questions, ruling that the rest were answered. (Tr. 208-216; PX 2.) Ms. Jones herself stated that she stayed from the beginning to the end of the hearing, and testified near the end of the testimony portion of the hearing. (See C 003368-003386.) During the question and answer period that followed, it was arranged that Ms. Jones' 228 questions to ABB would be responded to by them in writing. Ms. Jones testified that she did not receive the answers until September 12, 1992, two days after the close of the public comment period, and also that not all were answered. (Tr. 196-198. See C 03432.)

Rev. David J. Bauer testified that he was denied use of an overhead projector that had earlier been used by the applicant for its presentation. Rev. Bauer wished to put up some overhead transparencies. He was told that he could submit hard copies for the record and was allowed to read the headlines of the newspaper articles that he wished to submit. He was disappointed about the fairness of the hearing and was aggravated about his experience. (Tr. at 216-222. See C 03316-03324).

January 8, 1993 hearing day.

Ms. Anita Cummings testified that she felt that the hearing procedures were unfair in a number of respects, and that she had never seen hearing conducted in such a manner. She asserted that people were not called in the order in which they signed in as they should, that the hearing officer shuffled through the names of those persons signed up to testify, and that it appeared that those who were strongest in opposition were left to testify until very late, when the crowd had thinned. She stated that those in support were scheduled to testify in the early part of the day; yet, in the middle of the scheduled time for the opponents' testimony a member of the village staff was allowed to give an hour and one-half of testimony in support of the incinerator. Those people who could not wait any longer had to leave. She stated also that people should be given equal time to present their views. She also felt that the number of police officers along the walls and back were a very intimidating factor. (Tr. at 229-237.)

Ms. Hazel Noise (phonetic) testified at 4:00 p.m. but attended the evening hearing and felt intimidated by those managing the audience at the Summit hearing, although she acknowledged that those testifying were never interrupted. (Tr. at 238, 239.)

Ms. Michelle Schmidtz stated that she arrived at the hearing at 9:00 a.m. and she, and her husband who actually testified, were heard at 11:00 p.m., over 16 (sic) hours spent waiting to be heard. She stated that she did not hear the hearing officer's offer of a chance to speak in the afternoon. She was under the impression that the reconvened hearing at 7:00 p.m. was for the public, but instead there was a presentation by ABB, and then the Village Clerk read each member's report by Summit's twelve member fact-finding committee, which took until 9:00 p.m., or two-and-one-quarter hours. She did not feel her time frames were inconsistent, and acknowledged that there may have been intervening testimony. She stated that she had not anticipated having to recreate the events at a hearing before the Board. She felt that the hearing was manipulated by the proponents, and that she was aware of several people who were not able to speak, in that they had to return home to sleep and get up for work the next day. She also stated that her questions she submitted were never answered, and that the proceess for getting them answered was never made clear. She testified that the hearing was very intimidating, giving an example of a policeman armed with a gun leaning towards a woman who got in the view of the ABB presentation while putting her form requesting to speak in the box, then retreating when he knew what she was doing. (Tr. at 239-253.)

Ms. Nancy Katz testified that the entire police force of Summit appeared to be at the hearing, about four in the back of the auditorium, four along the left wall, and about five or six outside the auditorium. She stated that it was very intimidating, including a comment by the police chief that he thought people involved in environmental issues just thought other people were stupid. When persistently challenged by the counsel for Summit[14] to identify the police officers by gender, or whether they were black or white, or Hispanic or Asian, Mrs. Katz essentially responded that that she wasn't paying attention to that, but saw that they wore police uniforms, had on badges, and carried guns. (Tr. at 262-266.)

Ms. Karz stated that before they got into the auditorium, before 10:00 a.m. the day of hearing, the Mayor came out and told the police chief to throw in jail anyone who started anything. She testified that she was aware that some people were allowed to give testimony shortly before the 5:00 p.m. dinner break, but thought that, when convening at 7:00 p.m., the opponents would be allowed to continue. She believed that the Village Clerk took more than an hour and a quarter to read his testimony, and that the opponents did not get to speak until around 9:00 or 9:30 p.m.. She stated that if any spoke in opposition before that time the testimony must have been very brief. Ms. Katz stated that she had submitted her questions on the forms but they were never answered. (Tr. at 254-262, 266-279.)

Ms. Marie Kucera, who attended the morning portion of the hearing and all of the evening portion, testified that she was "totally disgusted" (Tr. at 280) by the Village Clerk's monopolizing the meeting with his presentation - the reading of twelve documents prepared by persons who had gone to view [ABB's] Detroit incinerator. She stated that, after he had read five or six of the reports in a "very, low monotone voice" (Tr. at 281), the audience started to become upset. She stated that the hearing officer tried to calm everyone down and instructed the Village Clerk to continue reading (until almost 11:20 a.m. by her estimate). Ms. Kucera stated that some were shouting "filibuster" repeatedly (Tr. at 281) and the police did approach them. Things then quited down, the Village Clerk finished, and the meeting was then opened up. She testified that she saw no motion of the court reporter at all during the entire episode. (Tr. at 279-286.)

Board hearing officer Allen E. Shoenberger made the following statement regarding the credibility of the witnesses

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[14] The Board notes that Mr. Vincent Cainkar, who represented Summit on appeal, was also the hearing officer at the Summit hearing.

(See 35 Ill. Adm. Code 103.203(d)) testifying at the Board hearings of January 7 and 8, 1993:

> I find that there are no issues of credibility that are not apparent on the record. In a number of instances minor discrepencies appeared to exist between testimony of particular witnesses and affidavits executed by those same witnesses with respect to what they received in the mail from the Village of Summit. On these matters I am persuaded that the trial testimony should be given credit and convinced that the siting application was not received from the Village Clerk by these witnesses. (H. O. report, Jan. 12, 1993)

February 5, 1993, hearing day.

As the petitioners and respondents had rested their cases, this hearing was devoted to members of the public generally.

We note that the hearing officer sustained objections over further testimony by Ms. Dilys Jones, who had testified at the January 7, 1993 Board hearing, about her sister's experiences. (Feb. Tr. at 6-23.)

Mr. Zilka, who had earlier testified at the January 7, 1993 Board hearing, stated that he and Ms. Dilys Jones' sister were among those yelling during the Village Clerk's testimony to get the hearing officer's attention, and that the police threatened to throw them out but did not threaten to arrest them. (Feb. Tr. at 23-28.)[15]

The following persons had not testified at the Summit hearing.

Ms. Moreno testified that the notices should have been written in Spanish as well as English, so the minotity community could understand them better. She testified that she felt that she would be harrassed if she requested guidance from Summit. (Feb. Tr. at 28-30.)

We note that Mr. James Sylvester made a sweeping statement concerning the incinerator's emissions which he stated were legal arguments that the hearing officer suggested were more properly directed to the Illinois Environmental Protection Agency. (Feb. Tr. at 31-53.)

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[15] In that the numbering was started anew in the transcript for the February hearing, it will be designated as Feb. Tr. at ___.

We note that Mr. Edward Novak's statement in opposition to the incinerator was couched as a legal argument. (Feb. Tr. at 53-56.)

Mr. Lawrence Joseph argued against the rise of technology from a religious perspective, citing the need for recycling but not for incineration. (Feb. Tr. at 58-74.)

We note that Ms. Evelyn Coleman's statement against the incinerator was couched as a legal argument. (Feb. Tr. at 75-77.)

Board hearing officer Allen E. Shoenberger, pursuant to 35 Ill. Adm Code 103.203(d), found no issues of credibility regarding the February 5, 1993 hearing. (H. O. report, February 9, 1993.)

BOARD DISCUSSION

The respondents did not present any witnesses or exhibits at the Board hearing (except for the Clerk's motion and certification of the record as ordered by the Board) at the Board Hearing. As earlier noted, respondent Summit did not file a brief. Respondent WSREC did file two briefs, one for Zeman and one for Quilty., so it is those briefs that are being referenced below for respondent's arguments.[16]

The Application and amended application. The respondent notes that the Village Clerk filed an affidavit on September 8, 1992 (See C 04060-04061) that, we note, directly contradicts the testimony of the petitioners before the Board regarding the availability of the application, and in part the testimony regarding the amended application. Respondent then quotes from Summit's siting ordinance regarding the application, that also directly contradicts the testimony before the Board in that same regard (See Summit Ordinance at C 05003, para. 8). (Resp. Zeman Br. at 2, 3, 8.) Respondent then argues its case from a number of perspectives:

Respondent asserts that either petitioner(s) received a copy of the application from someone else and then failed to share it with others; or petitioners received a copy of the amended

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[16] We will refer to the respondent's brief addressing the Zeman and Quilty petitions as Resp. Zeman Br. and Resp. Quilty Br. respectively. We note that the more detailed references are made to respondent's Zeman Brief, which advances a number of legal arguments. We also note that this opinion's lack of detailed reference to the petitioners' briefs is not meant to imply in any respect that the Board did not read them carefully.

application after the hearing but that it didn't differ in any material respect from the original regarding items a petitioner testified to or commented on; or petitioner got a copy of the amended application after the hearing and advised other petitioners, who in turn made no attempt to obtain either the application or amended application beyond their initial efforts. Finally, the respondent asserts that none of the petitioners submitted written comments on the substance of either application. (Resp. Zeman Br. at 2,3.)

Respondent then argues that the manifest weight of the evidence standard of review applies to the Board regarding decisions of Summit (quoting from Christian County Landfill, Inc. v. Christian County Board, PCB 89-92 (October 18, 1989. (Resp. Zeman Br. at 8,9.)

Respondent then asserts that the evidence before the Summit Village Board, in addition to the Village Clerk's affidavit, included: the petitioners' affidavits and their Summit hearing testimony; a letter from the Summit hearing officer to counsel for the petitioners that he was extending the Summit post-hearing comment period for 14 more days (See C 01872); and evidence that none of the petitioners submitted substantive comments. (Resp. Zeman Br. at 9.)

Respondent then argues that the testimony of the petitioners at the Board's hearing cannot be considered by the Board, citing Section 40.1 of the Act;

> No new or additional evidence in support of or in opposition to any finding, order, determination, or decision of the appropriate county board or governing body of the minicipality shall be heard by the Board. (Resp. Zeman Br. at 10.)

Respondent then argues that the Board's hearing officer erred in overruling respondent's objection to petitioner's testimony when such testimony could have been presented to Summit.[17] (See Tr. 24-26, 28; Resp. Zeman Br. at 10.)

The respondent then argues that the evidence before Summit lent itself to a number of conclusions, e.g.; the petitioners were lying; the events occurred with the petitioners through inadvertence but was cured by extending the comment period; the "inadvertance" problem could not be cured by the extension of the comment period; the applications were intentionally not provided to the petitioners; the Village Clerk was lying under oath and

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[17] The Board affirms the hearing officer, for the reasons explained in the Board Discussion segment of this opinion, in admitting all testimony objected to.

the applications were not generally available. Respondent argues that, under a manifest weight standard, Summit's determination that "the statute was complied with" cannot be overturned. Respondent argues that the evidence of the Village Clerk's sworn affidavit is enough to support Summit's decision, and that it is not the function of the Board to "reweigh the evidence or assess credibility". (Resp. Zeman Br. at 10, 11.)

Respondent further argues that, even if one attempts to reconcile the "conflicting testimony" before the Summit Board by finding "inadvertance", fundamental fairness was served. At least three petitioners had the amended application before the affidavits were submitted during the comment period, and the existence of the amended application was known to counsel for all the petitioners at least by September 1, 1992. None of the petitioners before the close of the comment period submitted either "written testimony on the amended application or submitted cross-questions to the applicant or any of its witnesses on matters raised therein". (Resp. Zeman Br. at 12.)

The Board rejects the Respondent's arguments.

Regarding the "manifest weight" issue, there is nothing in any holding by this Board or by an appellate court that even remotely suggests that the Board is to review the issue of fundamental fairness using a manifest weight of the evidence review standard.

We remind the respondents that the decisions that are to be made by Summit are contained in Section 39.2 of the Act involving the nine criteria listed therein, and thus it is in the review of these decisions where the manifest weight of review standard applies. Summit itself showed that it understood that the purpose of the hearing was to determine whether the nine criteria had been met in its document that it distributed concerning the public hearing process. (H.O. Exh. 5, C 00066.) We also note that the respondent failed to include in its above quote of Section 40.1 some key language that followed:

> In making its orders and determinations under this Section, the Board shall include in its consideration the written decision and reasons for the decision of [Summit], the transcribed record of the hearing held pursuant to Subsection (d) of Section 39.2 and the fundamental fairness of the procedures used by [Summit] in reaching its decision. (Emphasis added.)

It is not for Summit to decide fundamental fairness, it is for Summit to abide by it.

Regarding the language concerning evidence in Section 40.1 that respondent quoted above, in that fundamental fairness is not

a determination made by Summit, that language is not applicable to the scope of the Board's hearing regarding evidence of fundamental fairness. Indeed, as the petitioner Zeman brief notes, the Board not only is not constrained by Summit's record, the Board may review off-record matters as the particular situation requires. E & E Hauling v. Illinois pollution control Board, 451 N. E. 2d 556, 562 (Ill.App.2d Dist. 1983). (Zeman Br. at 20.) In other words, the Board reviews SB 172 fundamental fairness from the perspective of the general principles of longstanding which have been articulated by the courts and by this Board.

We will now address the issue of credibility of those testifying at the Board hearing about the availability of the application. That testimony persuades the Board that Summit did not make copies of the application available upon request for either inspection or copying for a fee. The Village Clerk's sworn affidavit does not rise to the level of credibility of that of the petitioners, whose testimony was fully aired at hearing and whose credibility was not successfully challenged, either at hearing or in the theoretical hypotheses in the respondent's brief. The Board does not disagree with the finding of its hearing officer that the testimony of the witnesses is convincing in that the applications were not received.

Regarding whether the petitioners timely raised the issue of their failure to get the application, we note that this record clearly indicates that the issue was indeed raised in testimony at the hearing.

Regarding the timeliness of raising the issue concerning the amended application, a number of those had not heard about its existence, certainly not before the hearing. Regarding those who heard about the amended petition during the hearing, we note that during the late evening of the Summit hearing, when a Ms. Marcia Powers asked for a copy of an amended application, stating that she preferred to submit written comments on it rather than the application, the hearing officer told her to submit a freedom of information request with the Village Clerk and she would get one. He then stated that then she could comment on it during the post-hearing comment period. Then a member of the audience asked:

> Wouldn't it have been pertinent to have it available for our review? Most of these comments will go nowhere and you know that because we have nothing to base these comments upon. (C 03315, 003316.)

The hearing officer responded:

> The hearing's been going since 10:00 this morning. There's been more than adequate material to make comments on. (C 03316.)

The Board concludes that those with problems concerning the availability of the application and the amended application timely raised the issue.

We point out that it is Summit's duty under the Act, in Section 39.2(c), to make copies of the filed application available for public inspection or copying. It is not the burden of the citizens to seek copies elsewhere or to provide them to others. The Board and the courts have been unambiguous about this issue, and Summit was aware of this requirement, as shown by their legal notices. The local decisionmaker must utilize procedures or practices that are not inconsistent with the Act or the standards of fundamental fairness. Waste Management v. Illinois Pollution Control Board, 530 N.E.2d 682 (Ill.App.2d Dist. 1988). The Board has stated:

> The function of notice and the required time period between notice and hearing is first to inform the affected public that a landfill suitability process has been initiated and, second, to allow time for the public to review the application to determine whether or in what manner further participation is warranted. McHenry County Landfill, Inc. v. County Board of McHenry County, Nos. PCB 85-56, 85-61-66 (consolidated), September 20, 1985, at 4.

We point out that it is a right of citizens to participate at hearing, to have their views aired in sworn testimony at hearing and to question the applicant at hearing cannot be abridged by shifting their participation over to the post-hearing comment period. (See the Act, Section 39.2(d)(hearing shall develop record sufficient to form the basis of appeal); Section 40.1 (transcribed record of hearing); Kane County Defenders v. Illinois Pollution Control Board, 487 N.E.2d 743 (Ill.App.2 Dist. 1985) (importance of local hearing).

We are particularly concerned that this record contains no indication that Summit formally or even informally made it known that an amended application had been filed five days before the hearing, and thus that it was the amended application that was to be presented at the hearing.

In 1988, a paragraph was added to Section 39.2(e) of the Act by P. A.
85-945, which provides:

> At any time prior to completion by the applicant of the presentation of the applicant's factual evidence and an opportunity for cross-questioning by the county board or governing body of the municipality and any participants, the applicant may file not more than one amended application upon payment of additional fees pursuant to subsection (k); in which case the time limitation for final action set forth

in this subsection (e) shall be extended for an additional period of 90 days.

On the morning of the hearing, when the hearing officer placed the amended petition into the record, the applicant made a brief, non-specific statement that the amendment was in regard to the legal description and Criterion #4, the flood plain criterion. Then later, during the applicant's presentation, we agree with the Zeman brief that the testimony gave an imprecise picture of the nature and extent of the changes contained in the amended petition regarding Criterion #4. The applicant's lack of explanation as to what the use of the non-statutory term "flood fringe" meant in relation to the term "flood plain", and to what was the impact on the twenty-four acres being discussed, contributed to the lack of clarity. (C 03005, 03133-03139; Zeman Br. 35-40.)

It is true that the Section 39.2(e) does not directly address how the public is to be made aware of the filing of an amended application; however, the statute clearly assumes that reasonable efforts have been made to make the public aware of its existence so that the hearing participants, as well as the decisionmakers, can address the amended application. It assumes that this will take time, in that the decision deadline is extended for 90 days. The combination of events that occurred in this proceeding revolving around Summit's handling of the application and the amended application served to frustrate the public's participation to an extent that clearly was contrary to the intent of the statute.

Summit's procedural failure to provide proper access to the application is a fatal flaw from a statutory perspective, and the Board finds that such failure constitutes fundamental unfairness. For this reason alone the Board will remand this matter to Summit for a new hearing. The Board also finds that the procedural manner in which Summit handled the amended application was fundamentally unfair.

The hearing.

Before addressing the testimony of what occurred at hearing, we will first address one aspect of Summit's "Rules and Procedures". (C 00068.) The testimony shows that this document, a double-sided single sheet containing 13 rules for the hearing and post-hearing comments, was widely distributed prior to, and at, the hearing, and played a significant role in the events that later occurred.

Of particular note is Rule 5, which states:

The schedule of presentations shall be as follows:

First: Presentation by the applicant.

Second: Presentation by all other participants in support of the application.

Third: Presentation by participants in opposition to the subject application.

Fourth: Inclusion in the record of written comments received prior to or at the time of the public hearing.

Fifth: Rebuttal by the Applicant to any presentations, comments, or statementts in opposition to the subject application.

Sixth: Inquiry by the Hearing Officer on behalf of the Mayor and Board of Trustees or on behalf of any participant submitting relevant cross-questions to be answered by the Applicant or any witness at the public hearing.

Seventh: Adjournment, recess or continuance of the public hearing.

What was actually allowed to occur at hearing clearly veered from the above rules and in other respects was clearly not what people were given to expect.

After the applicant finished its five-hour presentation during the day (See C 03197), the hearing officer announced that, "under Rule 5" the second portion of the hearing - a presentation of those in support of the application - would commence. (C 03163.) After three persons testified in favor (C 03163-03173), the hearing officer read off the names of about 60 persons and their municipalities in support, noting that their comments would be included in the record and "some will be read later". (C 03173.) We note that we find no indication that any person on that list later testified.

Following that, the hearing officer announced that those in opposition could commence testifying. Four people testified, after which the hearing officer noted that the hearing would resume at 7:00 p.m., and that there would be a short presentation by the applicant, followed by the presentations in opposition to the application. The hearing then was recessed at 5:00 p.m. (C 03191, 03192.)

The hearing resumed at 7:00 p.m. (C 03192.) The hearing officer explained that the hearing would be conducted in accordance with the "Rules and Procedures" - which as noted included the aforementioned "Rule 5". Included in the hearing officer's remarks was a statement concerning procedures for

testimony "for or in opposition to the application". (Emphasis added) (C 03193.) All persons were cautioned against disruption, or be subject to ejection or arrest. He also stated that the speakers had no time limit, but asked that they be considerate, in that "[we] have all night and so we'll finish the hearing tonight, it doesn't matter what time...". (C 03194.) He then read the six criteria from a sheet titled "The Public Hearing Process", which had also earlier been distributed to the audience. (C 03194.)

ABB then made a presentation, including a videotape. (C 03197-03210.) Officials of two nearby villages, and a candidate for State Representative, spoke in opposition. (03210-03224.) Then, for the first time, the hearing officer clearly announced that he was going to diverge from the scheduled agenda. After four residents of Summit spoke in opposition, the Village Clerk would then speak. (C 03224.) After the four rather short presentations in opposition (C 03225-03235), the hearing officer called on the Village Clerk, who announced that he was "chairman of a citizens' fact-finding committee and this is the report of that committee". (C 03236.)

The next sentence in the record is that of the court reporter, who stated: "Whereupon, the report of the Citizen's Fact-Finding Committee was read into the record and is attached hereto". The hearing officer then noted that a copy of the report would be submitted into the record. (C 03236.) The transcribed record contains nothing about what transpired during the Village Clerk's presentation.

The respondent argued that there was "nothing sinister" about all this. The respondent argues that it is common practice, it keeps the court reporter "'fresh' for the duration of the evening", that the issue is a "red herring" in that "if the Clerk made statements that were not contained in the Report, those statements were not considered by the Village Board in arriving at its decision." The brief then asserts that the issue before the Board is whether Summit's decision was correct "in light of the evidence before it". (Resp. Quilty Br. at 9.)

The respondent further argues:

> The Clerk's desire to read the Report, rather than simply submit it for inclusion in the record of the hearing, is likely a recognition of the reality that local siting approval hearings are typically not the antiseptic "make the record" proceedings that the statute mandates, but rather an agglomeration of town meeting, evidentiary hearing, legislative hearing, and information dispensing all rolled into one. (Resp. Quilty Br. at 9.)

The respondent then argues that it would have been worse if the dozen members of the citizens' committee had each elected to take four minutes to testify instead, and then suggests that it is not clear if the hearing officer could have forbade it. (Resp. Quilty Br. at 10.)

The respondent argues that many hearings do not start until 8:00 p.m. with presentation of the applicant's case, and "it is difficult to see how allowing opposition testimony to begin at 9:15 violates either the Rules adopted by the Village or notions of fundamental fairness". (Resp. Quilty Br. at 10.)

We first remind the respondent that in an SB 172 proceeding Summit is assuming an adjudicatory role, and that includes the conduct of its hearing. It is not a town meeting or a legislative hearing, and the respondent itself admits that the hearing was not what the statute mandates. Waste Management v. Illinois Pollution Control Board, 463 N.E.2d 969, 973 (Ill. App.2 Dist. 1984);E & E Hauling, Inc. v. Illinois Pollution Control Board, 451 N.E.2d 556, 564 (Ill.App.2 Dist. 1983); Kane County Defenders v. Illinois Pollution Control Board, 487 N.E.2d 743 Ill.App.2 Dist. 1985).

That the testimony of the Village Clerk was not transcribed is totally unacceptable. It is part of the record of testimony at the hearing and was to be transcribed, as the earlier quote of Section 40.1(a) of the Act makes clear. It is one thing to place directly in the record a written copy of the report as if read; however, it is another thing for a person to testify and Summit fail to transcribe it. Summit cannot determine what testimony is transcribed, no matter who has presented it. The Board has difficulty accepting this turn of events as happenstance, particularly since every other instance where a person testified and a copy was then put into the record, the testimony was also transcribed.

The Board has viewed the document placed in the record, which we note is unidentified except for a notation in the Village Clerk's index of the record (See C 0673-0708). Based on its own hearing experience, the Board can easily believe that it would have taken well over an hour to read, even without interruptions.

In essence, the hearing officer at the evening hearing acted contrary to Summit's own widely distributed Rule 5 as well as his own statement made at the end of the afternoon hearing, and in the process created a hole in the record of testimony, all causing a significant postponement in the ability of almost all persons who signed up to testify. We also note that the delay in the citizens' testimony also caused a delay in their hearing the answers to their written questions, in that this portion took

place at the end of the Summit hearing, a hearing that did not adjourn until 2:30 a.m. (See C 03407-03447.)

We also note that not all the questions asked were responded to, nor did all those wishing to testify do so. (See C 03326, 03331, 03358, 03386.)

While a late-adjourned hearing alone may be unavoidable, the lateness of this hearing was avoidable. Those in attendance had no reason to expect the surprises that occurred, and were understandably discouraged and upset. Without condoning the outbursts, we suggest that the conduct of the hearing aggravated the security situation that Summit was so concerned about. The Board notes that it is not ruling today on whether having only one day of hearing, which might run until late at night, could alone constitute fundamental unfairness. That issue is not presently before us.

We conclude, and so find, that the opponents were not given a fair chance to present evidence against the siting at hearing and that it constituted fundamental unfairness. This is certainly true when one considers the problems with the lack of availability of the applications when presenting opposing evidence in response to unseen documents. We also point out that post-hearing comments are obviously no substitute for participation at hearing.

The Board has concluded that the only way to have a full record on appeal is to remand this matter to Summit for a new hearing process, a new post comment period, and new decision by Summit. We are thus not making any findings regarding the appealed criteria based on this record.

Since the unavailability of the application was fundamentally unfair, the process became void or "terminated" at that point. The Board has reviewed the conduct of the hearing so that its unacceptable aspects will not be repeated. The Board vacates the decision by Summit and closes this docket, having concluded our review of this decision by Summit. We note that if any person wants to appeal a decision made by Summit after remand, they must initiate a new appeal.

On remand, in lieu of a refiling by the applicant, the new proceedings will recommence with the already amended application. Since the application has already been amended, it may not be further amended; if the applicant desires to further "amend" the application, it must file that application as a new application in accordance with the statute. The statutory 180-day timetable will begin 35 days after the date of this Board order, unless stayed by the filing of a motion for reconsideration. Summit will follow that timetable, including the provisions for noticing and holding the hearing, as well as the comment period. Summit

must make the amended application available as required by statute. Any person who wishes to testify, pro or con, may do so, as well as ask questions. While Summit is free to have rules of procedure for the conduct the proceedings, they and the proceeding must be consistent with this opinion, the statute and the standards of fundamental fairness.

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

ORDER

For the reasons expressed in the above opinion, the Village of Summit's October 19, 1992 decision on the application of West Suburban Recycling and Energy Center is hereby vacated as being fundamentally unfair. This matter is remanded to the Village of Summit for a new hearing process, including a post-hearing comment period, in accordance with the following:

1. The statutory 180 day timetable as provided in Section 39.2 of the Environmental Protection Act (Act) (Ill.Rev.Stat.1991,ch. 111 1/2, par. 1039.2) will begin 35 days after the date of this order unless stayed by the filing of a motion for reconsideration.

2. Summit shall timely make available the amended application for inspection and copying in accordance with Section 39.2 of the Act, and may not accept an amended application.

3. Summit shall provide notice of the hearing, and hold it in accordance with the provisions of Section 39.2 of the Act, without limitation, including allowing any person who wishes to participate by presenting testimony or asking questions to do so.

4. Summit shall provide for a post-hearing comment period as provided in Section 39.2 of the Act.

6. Summit's decision must be based on the new record before it in accordance with Section 39.2 of the Act.

IT IS SO ORDERED.

J. Theodore Meyer and G. Tanner Girard concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 25th day of February, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board