

ILLINOIS POLLUTION CONTROL BOARD
January 19, 1995

CONCERNED CITIZENS OF)
WILLIAMSON COUNTY, AND REV.)
PAUL CRAIN AND ROSE ROWELL, AS)
MEMBERS OF CONCERNED CITIZENS)
OF WILLIAMSON COUNTY, AND)
INDIVIDUALLY,)

Petitioner,)

v.)

PCB 94-262
(Landfill Siting Review)

BILL KIBLER DEVELOPMENT CORP.,)
a/k/a KIBLER DEVELOPMENT CORP.,)
AND THE WILLIAMSON COUNTY BOARD)
OF COMMISSIONERS FOR AND ON)
BEHALF OF THE COUNTY OF)
WILLIAMSON IN THE STATE OF)
ILLINOIS,)

Respondents.)

KENNETH A. BLEYER, ESQ., APPEARED ON BEHALF OF THE PETITIONERS;

THOMAS J. IMMEL, ESQ., APPEARED ON BEHALF OF KIBLER DEVELOPMENT CORPORATION;

CHARLES GARNATI, ESQ., WILLIAMSON COUNTY STATES ATTORNEY, APPEARED ON BEHALF OF THE WILLIAMSON COUNTY BOARD OF COMMISSIONERS.

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

This matter is before the Board on a September 21, 1994, petition for review, filed by Concerned Citizens of Williamson County, and Reverend Paul Crain and Rose Powell as members of Concerned Citizens of Williamson County, and individually (collectively, CCWC). In response to a Board order, CCWC filed an amended petition on October 20, 1994.

CCWC's petition is filed pursuant to Section 40.1(b) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992)). CCWC seeks review of an August 23, 1994, decision of respondent Williamson County Board of Commissioners (County Board) granting site location suitability approval to respondent Kibler Development Corporation (Kibler Development) for a new regional pollution control facility. Hearing was held on December 19, 1994, before Board Hearing Officer John Hudspeth in Herrin, Williamson County, Illinois. Members of the public attended the hearing.

For the reasons enunciated below, the Board finds that the

proceedings leading to the County Board's siting approval were fundamentally unfair, and the Board therefore reverses and remands the County Board's decision.

BACKGROUND

Kibler Development originally filed an application with Williamson County for local siting approval of a new regional pollution control facility on May 19, 1992. The County Board granted Kibler Development's request for site approval on November 13, 1992. The County Board's decision granting site location approval was appealed to this Board and we issued an opinion and order on May 20, 1993, which found a jurisdictional defect and vacated the County Board's siting approval (Concerned Citizens of Williamson County v. Kibler Development et al, PCB 92-204, 142 PCB 573-579 (May 20, 1993)). Kibler Development chose to file a new application with Williamson County rather than appeal the Board decision. (Res.Br. at 1.)¹

On February 9, 1994, Kibler Development published a notice (C0003-C0004) in the Southern Illinoisan and the Marion Daily Republican, two newspapers of general circulation, which stated that Kibler Development would file an application for siting approval for a new regional pollution control facility on March 1, 1994, with the County Board. The application was filed on March 1, 1994. (C0001-C0320.)

Public hearings were held in Williamson County on June 2 and 3, 1994. (C0466-C0845.) On June 17, 1994, the County Board held a special meeting. Official minutes stated that the meeting was called "to obtain information regarding the technical aspects of the Regional Pollution Control Facility proposed by Kibler Development Corporation siting application". (C0936.) The minutes also listed the topics discussed and the individuals participating in the discussion (C0936), which included the County Board's technical experts and Bill Kibler, owner of Kibler Development. (C0002.) According to County Board Commissioners, members of the public were allowed to observe the June 17, 1994, County Board meeting, but were not allowed to participate. (Tr. at 141, 206.)

On August 23, 1994, the County Board issued its decision

¹The County Board will be cited as "C ____". The transcript of the December 19, 1994, Board hearing will be cited as "Tr. at ____". Citizen's petition will be cited as "Pet. at ____". Citizen's amended petition will be cited as "Am.Pet. at ____". CCWC brief will be cited as "Pet.Br. at ____". Kibler Development's brief will be cited as "Res.Br. at ____". December 19, 1994, motion for sanctions will be cited as "Mot. at ____".

granting Kibler Development's request for site approval. (C1029-C1030.) CCWC filed the instant petition for review with the Board on September 21, 1994, and filed an amended petition on October 20, 1994.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. Only if the local body finds that all applicable criteria have been met by the applicant can siting approval be granted. The County Board found that Kibler Development met its burden on all the criteria. (C1029-C1030.)

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26 McLean County.) Additionally, the Board must review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act (415 ILCS 5/40.1 (1992)) requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, 562, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664 (E & E Hauling).)

CCWC's petition (Am.Pet. at 1-7) raises numerous issues concerning jurisdictional, fundamental fairness, and siting criteria challenges to the County Board siting approval decision. Since jurisdiction is a threshold issue, we will address those claims first, then proceed to fundamental fairness, and finally the siting criteria at Section 39.2(a). We will also deal with several preliminary matters including outstanding motions by both parties.

PRELIMINARY MATTERS

Board Hearing Officer Decisions

In its closing brief, CCWC challenged several actions of this Board's hearing officer at the December 19, 1994, public hearing. CCWC asserts that the hearing officer improperly denied CCWC the opportunity to make an offer of proof. (Pet.Br. at 6-7, Tr. at 203.) CCWC also maintains that the hearing officer improperly denied CCWC the opportunity to refresh a witness' recollection of events. (Pet.Br. at 8, Tr. at 186, 197, 201.) After carefully considering CCWC's arguments and the hearing

transcript, the Board hereby affirms the hearing officer's decisions in these matters.

CCWC's Request for Funds

CCWC requested that the Board rule on a motion first made by CCWC in a post-hearing memorandum filed with the County Board on July 1, 1994. (C0978-C0991.) CCWC requested financial assistance from the County Board for reasonable expenses, attorney fees, and costs. (C0991, Pet.Br. at 6.) CCWC cited no regulatory or statutory authority for this request. The Board can find no authority in the Act which would allow the Board to grant CCWC's motion for its reasonable expenses, attorney fees, and costs as requested in this matter. Therefore, the Board denies the request for funds.

Motions for Dismissal by CCWC

On December 19, 1994, the Board received a motion for dismissal filed by CCWC. At the Board hearing on December 19, 1994, CCWC also made an oral motion for dismissal based on the actions of Kibler Development. (Tr. at 19, 130.) CCWC specifically excluded the actions of the Williamson County Board of Commissioners from the motion for dismissal. (Tr. at 19.) CCWC asked the Board to dismiss with prejudice the siting application of Kibler Development, or otherwise reverse the County Board, because CCWC alleged that its case was prejudiced by the failure of Bill Kibler to present himself to be deposed and to testify at hearing. (Tr. at 19.) Kibler Development challenged the discovery requests on numerous grounds, alleging statutory and procedural deficiencies in issuance of the discovery subpoenas. (Tr. at 31-75.) In its closing brief, CCWC expanded the motion for dismissal into two motions: a motion for dismissal for failure to honor a deposition notice (Pet.Br. at 11); and a motion for dismissal for failure to honor a subpoena. (Pet.Br. at 14.)

CCWC filed a notice for discovery deposition with the Board on December 9, 1994, for the following individuals: Sam Shemwell, Virgil Harris, Curtis Palmer, Duane Wittenborn, John Gordon, Bill Kibler, Michael Rapps, and Ron Reeder. At the Board hearing, Kibler Development made "a motion to quash all of the discovery requests in this case". (Tr. at 31.) The County Board's attorney challenged the subpoenas by stating that "I don't think things have been done properly" (Tr. at 85), but he produced the requested witnesses "in the spirit of cooperation". (Tr. at 85.) The Board Hearing Officer initially reserved ruling on these motions, which originated at hearing; however in the interest of expediency the Board Hearing Officer ultimately denied the motions. (Tr. at 83.)

The Board finds that, in this instance, CCWC was not

prejudiced by the failure of Bill Kibler to be deposed or testify. The petitioner was able, through other evidence, to present its case to the Board. Therefore, a dismissal is not warranted at this juncture. The Board also affirms the hearing officer's denial of the "motion to quash all of the discovery requests in this case" made at hearing by Kibler Development. (Tr. at 31.)

Motion for Sanctions by CCWC

On December 19, 1994, the Board received a motion for sanctions filed by CCWC against Kibler Development, Thomas Immel and Mr. Kibler. CCWC argued that sanctions for failure to honor a deposition notice and, as to Mr. Kibler for failure to appear at hearing should be imposed. (Tr. at 19, Pet.Br. at 9, Mot. at 5.) CCWC cites Board regulatory authority to sanction the offending party by ordering it to pay reasonable costs and expenses incurred. (35 Ill. Adm. Code 101.280 and 107.101.)

After a careful review of the facts in this case, the Board finds that the actions of respondents should not be sanctioned. The record indicates that respondents have not directly violated a Board or hearing officer order in this case. Further, the record is not clear that Mr. Kibler actually received the subpoena in question and therefore his failure to appear is understandable. Thus, in examining all of these factors the Board is not convinced that sanctions are warranted. Therefore, the motion for sanctions is denied.

JURISDICTION

The notice requirements of Section 39.2(b) of the Act are jurisdictional prerequisites to the County Board's power to hear a landfill siting proposal. CCWC asserts that Kibler Development failed to show that all proper persons or entities received notice. (Am.Pet. at 7, Pet.Br. at 5, 30.)

In considering the notice challenge raised, the pertinent parts of Section 39.2(b) of the Act are as follows:

No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served *** on the owners of all property *** within 250 feet in each direction of the lot line of the subject property ***

Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located. Such notice shall state the name and address of the applicant, the location of the proposed

site, the nature and size of the development, the nature of the activity proposed, the probable life of the proposed activity, the date when the request for site approval will be submitted, and a description of the right of persons to comment on such request as hereafter provided.

(415 ILCS 5/39.2(b) (1992).)

CCWC maintains that Kibler Development did not show that proper notice had been served on property owners who were mobile home owners or whose estates were mineral interests. (Pet.Br. at 5.) In addition, CCWC asserts that the mail receipts addressed to United States Senator Paul Simon and United States Congressman Jerry Costello did not bear a date of receipt, and thus raise doubts as to whether or not Senator Simon or Congressman Costello were properly noticed. (Pet.Br. at 5.)

Kibler Development maintains that evidence of proper newspaper notice are in the record. (C0003-C0004.) Kibler Development also maintains that all property owners were properly noticed (C0486-C0488, C0616, C0723, C0846-C0903); that CCWC offered no proof to support the notice sufficiency challenges (Res.Br. at 8); and that the County Board made a finding that all the required notices had been given. (C1029.)

After careful consideration of the parties' arguments and the record in this proceeding, the Board finds no evidence that the newspaper notices were deficient. In addition, the Board can find no evidence in the record that the notices to affected persons or entities were deficient. With regard to petitioner's assertion that notice to United States Senator Paul Simon and United States Representative Jerry Costello were deficient, the Board finds that the record shows (C0863, C0900-C0902) that notice was properly given. In summary, the Board finds that the County Board had jurisdiction under Section 39.2(b) of the Act to consider Kibler Development's landfill siting application.

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 decision-maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. (See also Industrial Fuels, 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, 117 PCB 117.)

CCWC alleges that the proceedings were fundamentally unfair in eight ways: 1) Ex-parte contacts occurred at a special meeting of the County Board on June 17, 1994 (Pet.Br. at 15); 2) Bill Kibler's refused to testify at the public hearing on June 2 and 3, 1994, did not allow CCWC to bring out all possible information for the County's consideration (Pet.Br. at 18); 3) faulty publication notice of the June 2 and 3 public hearing (Pet.Br. at 19); 4) the County Board failed to comply with its own ordinance for conduct of the siting application process (Pet.Br. at 20); 5) late filing of County Board expert Gordon's report and his unavailability at public hearing on June 3, 1994 (Pet.Br. at 21); 6) failure to give proper notice of the procedures to be used at the public hearing (Pet.Br. at 24); 7) failure to schedule the public hearing at a time convenient for the general public (Pet.Br. at 25); and 8) improper viewing of another landfill site by County Board Commissioner Virgil Harris (Pet.Br. at 30).

1. The County Board's June 17, 1994, Special Meeting

CCWC argues that actions at the County Board's June 17, 1994, special meeting were fundamentally unfair to CCWC, because Bill Kibler, owner of Kibler Development, was allowed to participate in a discussion of the landfill siting application which involved the three County Board Commissioners and their technical experts. (Pet.Br. at 15-17.) CCWC maintains that Bill Kibler's participation in the June 17, 1994, discussion was also fundamentally unfair because he did not testify at the public hearing on June 2 and 3, 1994, and, therefore, his comments on June 17, 1994, were supplemental to the public record in this matter. (Pet.Br. at 17.) CCWC also maintains that the integrity of the proceedings was severely compromised by the County Board's June 17, 1994, meeting for the purpose of collecting further additional information about the application after the public hearings on June 2 and 3, 1994, were closed. (Pet.Br. at 16-17.) CCWC argues that the additional fact that CCWC was excluded from participation in the June 17, 1994, meeting "seems to exacerbate the problem so much so that only outright dismissal of the application is appropriate". (Pet.Br. at 17.)

Kibler Development maintains that the June 17, 1994, meeting was a discussion between the County Board Commissioners and their

staff and advisors that the County Board decided to conduct in public view. (Res.Br. at 5.) Kibler Development claims that the meeting was called by the County Board "to openly deliberate and discuss technical issues concerning the [Kibler Development] application". (Res.Br. at 5.) Kibler Development cites the County Board's news release (C0924) and official meeting minutes (C0936) as evidence of public notice and meeting intent on June 17, 1994. Kibler Development also notes that the County Board and their advisors sat around a table discussing the application, while Bill Kibler sat in the audience with the members of the public, including representatives of CCWC. (Tr. at 103-106, 112, 119-120, 135-137, 143-144, 158-159, 195-197, 206, 218-219, 225-226.)

Based upon the record in this case, appellate court decisions, and review of Section 39.2 of the Act, the Board finds that the participation of Bill Kibler, owner of Kibler Development, in a discussion with the County Board concerning technical aspects of the application on June 17, 1994, was fundamentally unfair.

The basic facts of the June 17, 1994, special meeting of the County Board are uncontroverted and are outlined in the official minutes of the meeting. (C0936; Tr. at 159-160.) Discussion at the meeting covered numerous technical aspects of the application and the entire meeting lasted for nearly two hours. Discussion participants included the County Board Commissioners, their technical experts, and Bill Kibler, owner of Kibler Development. (C0936.) Mr. Palmer, Chairman of the County Board, testified that the County Board did not allow public comment at the June 17, 1994, meeting. (Tr. at 206.) A representative of CCWC, who attended the June 17, 1994, meeting, testified that she understood that the audience would be excluded if the audience attempted to participate in the discussion. (Tr. at 122.)

Appellate court decisions have found that the local decision process must be viewed as an adjudicatory, rather than legislative, process. (E & E Hauling, 451 N.E.2d at 564-566; Tate v. Macon County Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176.) In a landfill siting adjudicatory proceeding, the decisionmaker must resolve disputed facts and determine that the nine statutory criteria have been met. (Id.) The decisionmaker must be impartial and decide the issues based on the record before it. Ex parte contacts or other action which could unfairly influence the decisionmaker are improper in an adjudicatory proceeding. This differs from the legislative function that the governing body generally undertakes where decisions tend to be of a policy-making type. However, a court will not reverse an agency's decision because of ex parte contacts with members of that agency absent a showing of prejudice. (Fairview, 198 Ill. App. 3d 541, 555 N.E.2d 1178, citing, Waste Management of Illinois v. IPCB (1988), 175 Ill.

App. 3d 1023, 530 N.E. 2d 682.) Further, Section 39.2(g) of the Act specifies that the procedures of the Act are the exclusive siting procedures. Section 39.2(d) specifies that "[t]he public hearing shall develop a record sufficient to form the basis of appeal of the decision...". Thus, the June 17, 1994, special meeting of the County Board was fundamentally unfair for several reasons.

First, Mr. Kibler participated in a discussion on technical aspects of the application with the County Board members after the close of the public hearing held on June 2 and 3, 1994, and prior to the County Board's siting approval on August 23, 1994. County Board member Virgil Harris testified that he had not decided how to vote at the time of the June 17, 1994, special meeting. (Tr. at 93-94.) Thus, the County Board had statements made by Mr. Kibler, owner of Kibler development, which were not made a part of the record developed in part at the June 2 and 3 public hearing. Therefore, the County Board's decision was not based solely on the record of the proceeding and was fundamentally unfair.

Second, since Mr. Kibler did not testify at the public hearing on June 2 and 3, CCWC did not have the opportunity at hearing for cross-examination or rebuttal of his personal statements. Mr. Kibler's statements at the June 17, 1994, special meeting are prejudicial. CCWC was not allowed to participate in the discussion or to cross-examine Mr Kibler; thus, there was never an opportunity to refute or challenge Mr. Kibler's statements.

Clearly, the June 17 meeting was an *ex parte* discussion, albeit one that is summarized in the public record. (C0936.) The existence of *ex parte* contacts is an element in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, 117 PCB 117.) The Board does not take issue with the County Board's intended purpose at the special meeting of June 17, 1994: a publically viewed discussion with the County Board's experts on the technical aspects of the application. However, the participation of only one party (Bill Kibler, owner of Kibler Development), in the discussion, does not comport with adjudicatory standards, including the exclusion of *ex parte* contacts.

2. Bill Kibler's Refusal to Testify at the Public Hearing on June 2 and 3

CCWC argues that Bill Kibler's refusal to testify at the June 2 and 3 public hearing violated CCWC's right to due process. (Pet.Br. at 18.) CCWC asserts that Kibler could have offered valuable information to the County Board. (Pet.Br. at 18.) CCWC further asserts that Kibler's participation in the discussion at the June 17 special meeting was evidence that Kibler's input was

important. (Pet.Br. at 19.)

Kibler Development maintains that CCWC never fully explained how Kibler's non-testimony deprived CCWC of a fundamentally fair proceeding. Kibler Development argues that the appropriate experts and their documents were introduced at the June 2 and 3 public hearing, and that they were subject to extensive cross-examination by petitioner's attorney at that time. (Res.Br. at 6.)

Based on a review of the record in this proceeding, the Board finds that the proceedings were not fundamentally unfair because Bill Kibler did not testify at the June 2 and 3 public hearing. The record shows that Kibler Development's experts were available at the public hearing, in addition to the documents submitted with the application. (C0001-C0320, C0466-C0845.) CCWC has failed to show how Bill Kibler's failure to testify at public hearing on June 2 and 3 has prejudiced CCWC. The Board has already ruled on Bill Kibler's participation in the June 17, 1994, County Board special meeting in the section above.

3. Notice for June 2 and 3, 1994, Public Hearing

CCWC asserts that the public notice published in the Marion Daily Republican and Southern Illinois newspapers on February 9, 1994, was defective because the site map was too small and did not show the location of Illinois Centre Mall. (Pet.Br. at 19, 20.) CCWC argues that opponents were denied fundamental fairness because "the map failed to put the general public on notice that a regional landfill was being proposed" within one mile of Illinois Centre Mall. (Pet.Br. at 20.)

Kibler Development maintains that the County Board's published notice of the June 2 and 3 public hearing contained a portion of a plat map depicting accurately the location of the proposed landfill site. (Res.Br. at 8, C0910.) As further evidence that CCWC was not denied fundamental fairness, Kibler Development notes (Res.Br. at 8) that nine citizens offered public comment at the hearing (C0770) and numerous citizens submitted post-hearing written comments. (C0913-C0921.)

Based on review of the record, and particularly the public notice (C0910), the Board finds that CCWC's arguments have no statutory basis and are without merit.

4. Local Ordinance on Hearing Procedures

CCWC argues that the proceedings at the County Board hearing on June 2 and 3, 1994, did not comport with Williamson County Ordinance 92-8-11-6, Sections 7(a) and 8(b). (Pet.Br. at 20.) CCWC alleges two areas of noncompliance. First, "the state's attorney failed to begin each day of hearings by instructing all

of the participants of the rules and their respective responsibilities as required by Section 7(a)". (Pet.Br. at 20.) Second, despite local ordinance requirements that witness registration and document filing was to be done at least five days prior to the hearing, Kibler Development entered some documents and registered some witnesses at hearing. (Pet.Br. at 21, C0910.) CCWC objected to the introduction of those documents and testimony of those individuals at hearing. (Tr. at 0500, C0504, C0717.) CCWC further asserts that it was fundamentally unfair that Kibler Development was allowed to introduce those documents and the testimony of those witnesses over CCWC's objections, because CCWC was not able to review the list of witness documents prior to the public hearing. (Pet.Br. at 21.)

Kibler Development responds that since CCWC did not raise objection to the Williamson County State's Attorney's failure to begin each day of public hearings with instruction according to the local ordinance, the objection should be deemed waived. (Res.Br. at 9.) Kibler Development also notes that the local ordinance was not introduced into the record by CCWC, so the Board is not able to review the ordinance. (Res.Br. at 9.)

The Board finds that CCWC's challenges concerning the hearing officer's failure to give instructions, and the introduction of exhibits and testimony of individuals at hearing, are totally without merit. CCWC has presented nothing beyond speculation that it was harmed by introduction of witnesses and exhibits at hearing. After review of the record, the Board finds no prejudice in the County Board's actions.

5. Late Filing of Mr. Gordon's Report and His Unavailability as a Witness on June 3, 1994

Mr. John Gordon represented the engineering firm of Gordon and Price, Inc., which reviewed the Kibler Development siting application at the request of the County Board. (C0356, Tr. at 98.) The "Gordon Report" (C0355-C0453) was filed with the County Board on May 27, 1994. (C0355.) Mr. Gordon attended the public hearing on June 2, 1994, but was not called as a witness. (Tr. at 100-102.) He did not attend on June 3, 1994, because of a previously scheduled vacation. (Tr. at 101.)

CCWC asserts that it was denied fundamental fairness because the Gordon Report was filed on May 27, 1994, "just two business days prior" to public hearing. (Pet.Br. at 22.) Next, CCWC maintains that since Kibler Development did not call Mr. Gordon as a witness on June 2, 1994, when Kibler Development was presenting its case at hearing, and since CCWC could not call Mr. Gordon as a witness until June 3, 1994, when he was unavailable to testify, that it was denied fundamental fairness. (Pet.Br. at 21-22.)

Kibler Development argues that Mr. Gordon was hired by the County Board, not by Kibler Development. (Res.Br. at 7.) Kibler Development argues that the Gordon Report did not materially conflict with the conclusions of Kibler Development experts who were planned witnesses at the hearing. (Res.Br. at 7.) Kibler Development further asserts that the late filing (May 27) of the Gordon Report also worked to the disadvantage of Kibler Development, which had "serious clarification questions" for Mr. Gordon. (Res.Br. at 8.)

The Board finds that neither the filing of the Gordon Report on May 27, 1994, a few days prior to hearing, nor the unavailability of Mr. Gordon's testimony on June 2 or 3, 1994, compromised the fundamental fairness of the proceedings. There is no requirement in Section 39.2 of the Act (415 ILCS 39.2) that the County Board hire an expert to review the application. Subsection 39.2(g) of the Act specifies that the Act contains the exclusive siting procedures for regional pollution control facilities. (415 ILCS 39.2(g).) The Gordon Report was equally available to both parties in the record. (C0355-C0453.) Finally, CCWC has not demonstrated any of the elements in assessing fundamental fairness listed in Hediger (Hediger v. D & L Landfill, Inc. (December 20, 1990, PCB90-163)), nor has CCWC justified adding additional elements to the list.

6. Proper Notice of Hearing Procedures

CCWC contends that, contrary to standards of fundamental fairness, the general public and interested parties were not given notice of the procedures to be used at public hearing. (Pet.Br. at 24.) CCWC argues that the County Board should have established procedures to govern the siting process as permitted under the Act. (Pet.Br. at 24.)

Kibler Development asserts that CCWC was present at hearing and represented by an attorney. (Res.Br. at 8.) Kibler Development also notes that the hearing officer announced the procedures on June 2 at hearing (C0485-C0486), and further asserts that the procedures were followed. (Res.Br. at 8.) Finally, Kibler Development argues that no one raised objection to the procedures at hearing. (Res.Br. at 8.)

The Board deems the argument of CCWC waived by its inaction in the proceeding before the local decisionmaker. (FACT, 555 N.E.2d at 1182-1183.)

7. Schedule Public Hearing at Time Convenient to Public

CCWC argues that the June 2 public hearing was scheduled at 4:00 p.m. on a weekday, when many members of the general public were unable to attend because of work schedules and/or children. (Pet.Br. at 25.)

Kibler Development notes that this objection was not raised at the County Board hearing on June 2 and 3, but was raised in post-hearing comments by CCWC. Kibler Development contends that this argument should therefore be deemed waived by the Board. (Res.Br. at 9.) Kibler Development also argues that the Act specifies no appropriate time for hearings.

The Board has previously ruled that hearings held during normal business hours meet the requirements of fundamental fairness. (Turlek et al v. Village of Summit et al., (May 5, 1994) PCB 94-14, 94-21, 94-22 (consl.) — PCB ____, citing, Citizens for a Better Environment v. McCook, (March 25, 1993), PCB 92-198, PCB 92-201, 140 PCB 223.) Further, the Board has held that holding a hearing in the evening hours, even late into the next morning, is not, on its face, fundamentally unfair. (Daly et al. v. Village of Robbins, (July 1, 1993) PCB 93-52, 93-54 (consl.) — PCB ____.) Therefore, the Board finds that the time set for the June 2 and 3 public hearing was not fundamentally unfair.

8. Trip to View Another Landfill Site by County Board Commissioner Virgil Harris

Commissioner Virgil Harris testified at hearing that he had visited another landfill located between Batavia, Illinois and Geneva, Illinois, "probably" after the filing of the siting application. (Tr. at 94.) Mr. Harris testified that he had used information gathered from the visit in his decision on the instant landfill siting application. (Tr. at 95.) CCWC argues that based on the Board precedent (Concerned Citizens for a Better Environment v. City of Havana, et al, PCB94-44), Mr. Harris' trip was fundamentally unfair because CCWC "did not have the chance to combat the commissioner's impressions about the landfill he visited". (Pet.Br. at 31.) Kibler Development maintains that Mr. Harris made the trip on his own time without conferring with any of the parties involved. (Res.Br. at 9.) In addition, Kibler Development points to Mr. Harris' statement at hearing that he based his decision on the Kibler Development siting application solely on the record in the case. (Tr. at 96.)

After careful review of the arguments and the record, the Board finds that Mr. Harris' personal visit to a landfill was not fundamentally unfair to CCWC. Mr. Harris' stated at hearing that he based his decision on the record. (Tr. at 96.) The Board does not agree with CCWC that Mr. Harris' trip has the same elements that led to a finding of fundamental unfairness in Havana (Concerned citizens for a Better Environment v. City of Havana, et al, PCB94-44) or a more recent case, Beardstown (Beardstown Area Citizens for a Better Environment v. City of Beardstown and Southwest Energy Corporation, PCB94-98). Havana and Beardstown are distinguished by elements that were not

present in the instant case including: trips paid for and arranged by the applicant; site-seeing and other activities unrelated to information gathering; and the participation of family members.

CONCLUSION

As stated above, the Board finds that these proceedings were fundamentally unfair because Bill Kibler, owner of Kibler Development, participated in a discussion on technical aspects of the application with the County Board on June 17, 1994. We reject the other jurisdictional and fundamental fairness challenges raised by CCWC and also reject several preliminary motions by CCWC.

The Board will remand this proceeding for further action consistent with the Board's findings herein. The Board finds that remand of the proceeding is the proper course of action. (See Land and Lakes v. Romeoville, PCB 91-7 and (CBE v. McCook, PCB 92-201.)

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

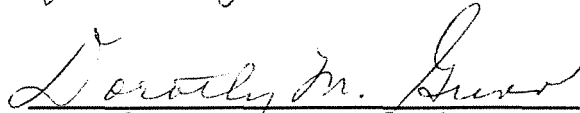
ORDER

The August 23, 1994, decision of the Williamson County Board of Commissioners granting siting approval to Kibler Development Corporation, is hereby reversed and remanded as a result of a fundamentally unfair proceeding. The County Board shall conduct a new public hearing and comment period on the application. The public hearing shall include the statements made by Mr. Bill Kibler at the June 17 special meeting, as well as allowing the questioning of or rebuttal to Mr. Kibler's statements. The County Board shall make its decision based on the record in this case which will include the new public hearing and comment period. The 120 day statutory decision time begins 35 days after the date of this order unless tolled by the filing of a motion to reconsider. This docket is closed.

IT IS SO ORDERED.

Board Members J. Theodore Meyer and Marili McFawn concur.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 19th day of January, 1995, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board