ILLINOIS POLLUTION CONTROL BOARD
May 5, 1994

MICHAEL TURLEK, LILLIAN SMEJKAL and JOHN LATHROP, Petitioners, v. VILLAGE OF SUMMIT and WEST SUBURBAN RECYCLING AND ENERGY CENTER, INC., Respondents.	)	PCB 94-19 (Land Siting Review)

KAY KULAGA AND ALICE ZEMAN, Petitioners, v. VILLAGE OF SUMMIT and WEST SUBURBAN RECYCLING AND ENERGY CENTER, INC., Respondents.	)	PCB 94-21 (Land Siting Review)

CITIZENS FOR A BETTER ENVIRONMENT, PATRICIA J. BARTLEMAN, NANCI KATZ and MICHELLE SCHMITS, Petitioners, v. VILLAGE OF SUMMIT and WEST SUBURBAN RECYCLING AND ENERGY CENTER, INC., Respondents.	)	PCB 94-22 (Land Siting Review) (Consolidated)

KEITH HARLEY, CHICAGO LEGAL CLINIC, INC., APPEARED ON BEHALF OF MICHAEL TURLEK, LILLIAN SMEJKAL, AND JOHN LATHROP.

KAY KULAGA AND ALICE ZEMAN APPEARED ON THEIR OWN BEHALF.

STEFAN A. NOE, CITIZENS FOR A BETTER ENVIRONMENT, AND ELPIDIO R. VILLARREAL, AND DAVID C. LAYDEN, SONNENSHEIN NATH & ROSENTHAL, APPEARED ON BEHALF OF CITIZENS FOR A BETTER ENVIRONMENT, PATRICIA J. BARTLEMAN, NANCI KATZ AND MICHELLE SCHMITZ.

ROBERT M. OLIAN AND MARK CHUTKOW, SIDLEY AND AUSTIN, APPEARED ON BEHALF OF WEST SUBURBAN RECYCLING AND ENERGY CENTER.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on three third-party petitions for review filed pursuant to Section 40.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/40.1(b)(1993)). Each petition contests the December 6, 1993 decision of the Village of Summit (Village) granting site location suitability approval for construction of a new regional pollution control facility (RPCF) to West Suburban Recycling and Energy Center, Inc. (WSREC). The petition in PCB 94-19 was filed on January 7, 1994, and the petitions in PCB 94-21 and PCB 94-22 were filed on January 10, 1994. The petitions were consolidated by the Board on its own motion on January 20, 1994.

As directed by the Board in its order of January 20, 1994, petitioners in PCB 94-22 filed an amended petition on January 31, 1993, and petitioners in PCB 94-19 and PCB 94-21 each filed an amended petition on February 1, 1994. A hearing was held on these consolidated petitions on March 1, 1994.

BACKGROUND

WSREC filed an application for siting approval of a new RPCF on June 25, 1993. Public hearings were held on that application on September 28 and 29, 1993. On December 6, 1993, the Village issued its written decision finding that WSREC's application met all applicable criteria set forth in Section 39.2 of the Act (415 ILCS 5/39.2), and passed Ordinance No. 93-0-30 granting siting approval.

The Village had previously approved on August 5, 1992 a siting application filed by WSREC for a similar facility at the same site. The public hearings on that application were held on August 10 and 11, 1992. That decision was appealed to the Board. In its decision of February 25, 1993, the Board found the procedures used by the Village to be fundamentally unfair. The Board remanded the case to the Village for a new hearing process to be conducted in accordance with the provisions of Section 39.2 of the Act and the Board's order. (Zeman v. Village of Summit (February 25, 1993), PCB 92-174, PCB 92-177 at 26.) The Board also instructed WSREC that it could not amend its petition during the remanded proceeding because it had already done so in the original proceeding. If WSREC desired to further "amend" its application, the Board advised WSREC to file a new application in accordance with the Act. WSREC appealed the Board's decision to the appellate court, which subsequently dismissed the case for lack of jurisdiction on June 14, 1993. (West Suburban Recycling and Energy Center, Inc. v. Illinois Pollution Control Board (1st Dist. June 14, 1993), slip op. No. 1-93-1070.)

The consolidated appeals now before the Board seek review of the Village's latest decision on several grounds. The first petition (PCB 94-19), filed by Michael Turlek, Lillian Smejkal, and John Lathrop (Turlek *et al.*), asserts that the Village lacked jurisdiction to render the December 6, 1993 decision, on the grounds that the June 25, 1993 application was improperly filed while the August 5, 1992 previous application approved by the Village on October 19, 1992 was still pending. The second petition (PCB 94-21), filed by Kay Kulaga and Alice Zeman (Kulaga and Zeman), challenges the fundamental fairness of the Village's procedures on six counts. The third petition (PCB 94-22), filed by Citizens for a Better Environment, Patricia J. Bartleman, Nanci Katz, and Michelle Schmits (CBE *et al.*), asserts that the Village's decision must be reversed on the grounds that the Village's findings that the flood-proofing and need criteria of Section 39.2 (415 ILCS 5/39.2(a)(4) and (1), respectively) were satisfied was against the manifest weight of the evidence.

LEGAL 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 the applicant has provided sufficient detail to demonstrate compliance with each of the nine criteria can it grant siting approval. In this case, the Village found that WSREC met its burden on all the criteria. (R. at 5-9.)

Jurisdiction

Petitioners Turlek *et al.* challenge the Village's siting approval on jurisdictional grounds. They contend that Section 39.2 does not give local governing bodies authority to entertain two applications simultaneously from the same applicant for alternative facilities at the same site. They contend that the Village, in entertaining two such applications from WSREC, acted outside the limits of its authority under Section 39.2, and that its decision was therefore void.

The Board's authority to review a local governing body's decision on jurisdictional grounds is not specifically set forth in the Act. Rather, the right to review jurisdictional factors is an inherent power of a reviewing adjudicatory body. Decisions by a unit of local government must comply with jurisdictional prerequisites in order to vest the governing body with power to act. (See Kane County Defenders v. Pollution Control Board (2d Dist. 1985) 933 Ill.Dec. 918, 921, 487 N.E.2d 743; Browning-Ferris Industries of Illinois v. Pollution Control Board (5th Dist. 1987) 516 N.E.2d 804, 114 Ill.Dec. 649 (notice requirements

are jurisdictional prerequisites which must be followed in order to vest county board with power to hear a landfill proposal).)

Under Section 39.2, a local governing body's authority to act in approving or disapproving a request for siting approval of a RPCF is purely statutory. Section 39.2(g) dictates that the procedures contained in Section 39.2 shall be the exclusive siting procedures, rules, and appeal procedures for new RPCFs. Therefore, failure to comply with the statutory provisions in reaching a decision under Section 39.2 would render that decision void.

Fundamental Fairness

Petitioners Kulaga and Zeman have raised a number of claims that the proceedings at the local level were not fundamentally fair. Section 40.1 of the Act requires the Board to review the proceedings before the local decisionmaker to assure fundamental fairness. In E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, 564 aff'd in part (1985) 1077 Ill.2d 33, 481 N.E.2d 64, 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. (E & E Hauling, 451 N.E.2d at 564.) Due process requires that parties have an opportunity to cross-examine witnesses, but that requirement is not without limits. 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. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682, 693.) 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.)

Standard Of Review: Manifest Weight Of The Evidence

Petitioners CBE *et al.* have challenged the Village's decision on two of the nine criteria it must consider in granting or denying siting approval. 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, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592; E & E Hauling, 451 N.E.2d at 555.) 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. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 79, 544 N.E.2d 1176, 1195; Waste Management of Illinois, Inc. v. Pollution Control Board (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.)

PCB 94-19 JURISDICTIONAL CHALLENGE BY TURLEK *et al.*

Petitioners Turlek *et al.* claim that the Village was without jurisdiction to accept or rule on WSREC's application for site approval because the WSREC had two applications pending before the Village at the same time. They contend that the Village's authority to consider an application is limited to its statutory grant of authority under Section 39.2, and that the statutory scheme "anticipates a single applicant who submits a single request seeking approval for a single facility." (Turlek *et al.* Br. at 12.) They also assert that limiting applicants to one application promotes the efficient use of judicial and administrative resources, and avoids the public confusion which could result from the filing of two or more applications. (Turlek *et al.* Br. at 14-15.)

A careful review of the timeline reveals that in fact the two applications were not pending at the same time. The appellate court dismissed WSREC's appeal on June 14, 1993. WSREC's second application was not filed until June 25, 1993.

Petitioners' assertion that two applications were pending at the same time in this proceeding is dependent on the assumption that issuing a "notice of intent to file an application" in accordance with the requirements of Section 39.2(b) (415 ILCS 5/39.2(b)) initiates the "siting process," and that initiating this process is the same as having an application pending. Using this reasoning, petitioners contend that the second application should actually be considered to have been "pending" as of June 8, 1993, the date WSREC mailed notices of its intent to file a new application to adjacent landowners. This overlapped with the appeal of the initial siting decision, which was dismissed by the appellate court on June 14, 1993. We reject this interpretation. While proper notice is a precondition to a proper siting

application, the application is not pending until it is itself submitted for review. Neither the language of the Act nor the law cited by petitioner requires us to find otherwise.

Petitioners also argue that the two applications made the process confusing to certain persons, which is, in essence, an issue of fundamental fairness. While this may have been so, the statute does not directly or indirectly prohibit the sequence of the two applications in this case. First, in vacating the Village's approval of WSREC's once amended application of August 5, 1992, the Board specifically instructed WSREC that since it had already amended its application in that proceeding, if it wished to further "amend" the application, it was required to submit an entirely new application. The Board did so because Section 39.2(c) of the Act prohibits more than one amendment to a siting application. Therefore, WSREC was required to submit the new application on June 25, 1993 since it sought approval for a facility twice the size of that originally approved by the Village.

We also note that Section 39.2(m) does not apply to WSREC's June 25, 1993 application. Section 39.2(m) prohibits an applicant from submitting a siting application for a period of two years after the disapproval of a substantially similar application, where the initial application is disapproved pursuant to a finding against the applicant under any of the nine criteria set forth in Section 39.2(a). Since the Village found that WSREC satisfied all the statutory criteria concerning its original application, and since the Board remand was not based on failure to satisfy the statutory criteria, WSREC is not subject to the two-year restriction on filing a substantially similar application.

PCB 94-21 FUNDAMENTAL FAIRNESS CHALLENGES BY KULAGA & ZEMAN

Petitioners Kulaga and Zeman raise challenges to the fundamental fairness of the proceedings before the Village on the WSREC application on eight grounds. In the context of fundamental fairness, petitioners also raise as an issue whether they were afforded due process in this appeal. For the reasons set forth below, none of these challenges are successful.

Availability of the Documents Prior to Public Hearings

Petitioners Kulaga and Zeman claim that the proceeding before the Village was fundamentally unfair based on unavailability of documents both before and after the public hearing. These two petitioners claim in their petition that they were denied access to information regarding WSREC's application prior to the public hearings. (Kulaga and Zeman Petition for Hearing, Count VI.) At the Board's hearing on March 1, Kulaga submitted Exhibit G which included copies of her Record

Inspection Request and letter to the Village Clerk, both dated September 7, 1993. In her letter, pursuant to the Freedom of Information Act (FOIA), Kulaga sought documents which memorialized agreements and meetings between the Village and WSREC, but she specifically excluded a request for the siting application filed by WSREC on June 25, 1993. In general, Kulaga was seeking documents pertaining to written and oral agreements between the Village and WSREC; records of meetings between the two; and records regarding the current environmental conditions of the property on which the RPCF is to be sited. In an attempt to clarify at hearing the allegations made at Count VI of her petition, Kulaga testified that she was not claiming that the application itself was not available to her, and that she had received a copy of a host agreement. (Tr. at 48-49.) Petitioners did not pursue this issue in their post-hearing brief.

Under Section 39.2(c) of the Act, the applicant is only required to submit to the Village a copy of its siting application and any documents submitted to Illinois Environmental Protection Agency (Agency). The Village must then make these documents available for inspection. WSREC contends, and it is not disputed, that it had not at that time submitted any documents to the Agency. Therefore, based on the facts presented to the Board, the only document which by statute the Village was required to make available for inspection prior to the hearing was the siting application. As Kulaga's testimony at hearing demonstrated, petitioners do not dispute that the application was available to them. Therefore, we conclude that petitioners have failed to prove the proceedings before the Village were fundamentally unfair on the basis of this allegation.

The Village Board's Failure to Attend the Public Hearing

Petitioners assert that the decision of the Village was rendered fundamentally unfair by the fact that the members of the Village Board did not attend the public hearing, but instead relied on transcripts of the proceedings. The appellate courts have affirmed the Board in finding that it is acceptable for the decisionmaker to rely on transcripts of the public hearing in rendering its decision. (City of Rockford v. County of Winnebago, 542 N.E.2d 423 (Ill App. 2d Dist. 1989); Waste Management of Illinois v. Pollution Control Board (1984) 123 Ill. App.3d 1075, 79 Ill.Dec. 415, 463 N.E.2d 969 ("As long as the entire record was available for review by the full county board all members heard the case irrespective of their attendance.").) We therefore find that failure of Village Board members to attend the hearing did not render the proceedings fundamentally unfair.

Scheduling the Hearing During Normal Business Hours

Petitioners raise the issue that the hearings were held only during normal business hours. The Board has previously held that hearings held during normal business hours meet the requirements of fundamental fairness as long as they are consistent with the published legal notice required under section 39.2(d) of the Act. (See Citizens for a Better Environment v. McCook (March 25, 1993), PCB 92-198, PCB 92-201.) We find nothing in this case which would have us depart from our prior rulings on this issue. Therefore, we find that hearings conducted during normal business hours comport with fundamental fairness.

Limitation of Public Participation

Petitioners claim that fundamental fairness was denied due to improper limitations on public participation. They claim that the hearing officer improperly paraphrased and eliminated cross-questions posed to the applicant, that the hearing officer failed to enforce the rules and procedures in a fair manner, and that the Village misled the public through a newspaper article which incorrectly stated that pre-registration was required for all those who wished to testify. For the reasons set forth below, we find that each of these arguments fail.

Paraphrasing and Limitation of Questions - Petitioners Kulaga and Zeman assert that the Hearing Officer incorrectly paraphrased questions, and refused to ask questions that were submitted and directed to the applicant. In particular, petitioners refer to questions submitted by Ms. Vicki Jurka, which they contend were improperly summarized or not asked at all.

A similar issue was raised in Daly v. Village of Robbins (July 1, 1993), PCB 93-52, PCB 93-54. In Daly, petitioners claimed that the hearing officer's "arbitrary jettisoning of cross-questions" violated their right of public participation and made the hearing fundamentally unfair. The Board held that public participation was not thwarted so as to make the hearing fundamentally unfair where the hearing officer informed participants that duplicative or irrelevant questions would not be asked, wrote the reason for not asking the question on the form, and where any questions not asked were more fully explained in supplemental information supplied to the village.

In the present case, Rule 11 of the "Rules and Procedures of The Village of Summit for the Conduct of Public Hearings Pertaining to Applications for Approval of Regional Pollution Control Facilities" governs cross-questioning. It provides as follows:

> All cross-questioning shall be conducted through the Hearing Officer who shall determine the relevancy and duplication thereof. Any participant shall submit proposed cross-questions to the Hearing Officer who shall direct relevant and non-duplicative cross-questions to the applicable witness. Participants are urged to submit proposed cross-questions to the Hearing Officer prior to the commencement of the public hearing. The Hearing Officer may allow direct cross-questioning of a witness if questions have been submitted and determined to be relevant and non-duplicative. Cross-questioning of witnesses will be permitted only during that period immediately following each witness's testimony. If a list of cross-questions is extensive or requires technical answers, the Hearing Officer may permit the witness to answer the questions in writing within 15 days thereafter with a copy of the answers provided to the person presenting the cross-questions and entered into the record of proceedings.

(R. at 52-53.)

This rule does not give the hearing officer unlimited discretion in handling cross-questions. When a question is proffered, the hearing officer must either ask the question, or rule that it is irrelevant or duplicative. Alternatively, the hearing officer may ask the party to whom the question is presented to respond in writing within 15 days. However, the Hearing Officer does not have authority to refuse to ask submitted cross-questions without ruling they are irrelevant or duplicative.

We find that the hearing officer's paraphrasing of questions did not result in fundamental unfairness. Although a consistent pattern of refusing to ask questions could render a proceeding fundamentally unfair, we find no such pattern in this case. Although several questions were paraphrased by the hearing officer, all of the questions referred to in petitioners' brief and at the Board's hearing were asked and responded to in some manner. (See Tr. at 161-171; R. at 92-93, 96-98, 148-150, 170.)

Interruption and Intimidation - Petitioners Kulaga and Zeman contend that the hearing officer, Mr. Cainkar, and counsel for the applicant, Mr. Olian, interrupted and intimidated several members of the public who were testifying in opposition to the application. They point out that Alice Zeman was interrupted by Mr. Cainkar and by Mr. Olian, and that Maryann Davidowski and Mr. John Lathrop were both interrupted by Mr. Olian. We find that these interruptions did not limit public participation so as to make the proceeding fundamentally unfair.

Mr. Cainkar interrupted Ms. Zeman by saying the following:

> I hate to interrupt you. We are here, and I understand there might be other uses for the land, but you need to get more to the point. There are many people wishing to speak.

(R. at 322.)

We find that Mr. Cainkar's interruption of Ms. Zeman's testimony was an attempt by him to exercise his authority as hearing officer to manage the hearing and keep the testimony relevant. The Board has previously held that a rule limiting parties to an initial five minutes of testimony was a reasonable limitation which balanced the individual's interest with society's interest in effective and efficient governmental operation. (Daly v. Village of Robbins (July 1,1993), PCB 93-52, PCB 93-54; see also Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505, 507.) The attempt of Mr. Cainkar to limit the testimony of Ms. Zeman imposed a far less severe restriction, and we find that it was not an abuse of discretion.

Examining Mr. Olian's interruptions of Ms. Zeman and Ms. Davidowski, we find that his noting the length of Ms. Zeman's testimony and characterizing Ms. Davidowski's testimony as "another detour" did not constitute intimidation. We note that neither party was prevented from completing her testimony. Where there is a pattern of unchecked intimidation such comments might be considered an attempt to limit public participation, but here the evidence does not establish such a pattern.

Petitioners also claim that Mr. Olian interrupted the testimony of Mr. John Lathrop with a loud outburst, and that this outburst forced Mr. Lathrop to cut short his testimony. This is not recorded in the transcript of the proceedings, although respondents do not deny that it took place. Such an outburst might be considered an unwarranted limitation on public participation, again, if it is part of a pattern of intimidation which the hearing officer allows to occur. Here, the evidence does not indicate such a pattern of intimidation existed. Furthermore, our review of the record indicates that the hearing officer apparently responded by attempting to control the situation and calm Mr. Olian. (Tr. at 77.) Further, we note that there is no direct testimony of Mr. Lathrop as to what occurred and no evidence that he was intimidated or any indication about what he was prevented from saying. We conclude that the evidence is insufficient to warrant a finding of intimidation resulting in fundamental unfairness.

Incorrect Information in Newspaper Article - Petitioners allege they were misled by an article published September 11,

1993 in the newspaper, Suburban Life. This article stated that persons intending to testify in opposition to the incinerator at the September 29 hearing were required to register with the hearing officer prior to 9 a.m. on September 28, when in fact no such preregistration requirement existed. The statement was attributed to Village President Ronald Kluszewski.

The Board has previously examined this issue in Citizens for a Better Environment v. Village of McCook (March 25, 1993) PCB 92-198, PCB 92-201. In McCook, the Board stated:

> The Board cannot make the fairness of the proceedings before the Village dependent upon the accuracy of local newspaper articles or newsletters. . . . Rather, the Board finds that the fairness of the hearing, in terms of accurately giving notice of the time and place of the hearing, is governed by the legal notice required to be published by the Act.

Id. at 5-6.

The required public notice which was published in this proceeding correctly stated the dates and times of the hearings, and gave no indication that pre-registration was necessary. (R. at 50). We therefore find that the newspaper article which incorrectly stated there was a pre-registration requirement did not make the proceedings fundamentally unfair.

Village Decision Based on Flawed and Incomplete Record

Petitioners also claim that fundamental fairness was denied since the decision by the Village was based on a flawed and incomplete record. (Kulaga and Zeman Br. at 21). In support of this claim of fundamental unfairness, petitioners raise again their allegations discussed above about limited testimony and questioning, and the errors in the transcript attributing portions of the testimony to the wrong speakers. WSREC responds that these errors were not sufficient to render the proceeding fundamentally unfair because they were not significant or causing prejudice. In suggesting this standard, WSREC cites cases dealing with errors surfacing during appellate reviews primarily in the context of criminal convictions. (WSREC Br. at 36.)

In this opinion, we have already reviewed whether the individual flaws cited by petitioners rendered the hearing process fundamentally unfair and concluded that they do not. The inaccuracies and flaws in the record do not leave the record insufficient on its face. The record contains other, additional information sufficient for the Village to have considered in reaching its decision. Examining individually and collectively these claims in the context of whether the record before the Village trustees was sufficient for it to render its decision, we

find that it was, and therefore the underlying process was not fundamentally unfair.

Due Process Before the Board

Petitioners raise arguments concerning the availability, completeness, and organizational state of the record after the Village's decision but before petitioner's appeal to the Board. Petitioners frame these arguments as fundamental fairness claims. However, fundamental fairness is only applicable to procedures before the local siting authority pursuant to section 40.1. Therefore, the Board will construe these arguments as due process claims.

First, petitioners claim that the record was unavailable for inspection after the Village's December 6, 1993 decision approving the application, and prior to the filing of their appeal with the Board. They claim that the unavailability of the record prevented them from adequately preparing their appeal.

In their post-hearing brief, petitioners also argue that the Village prejudiced their appeal rights in that the record filed with the Board was so disorganized as to result in the record being constructively unavailable to petitioners, and thus in violation of due process. (Kulaga and Zeman Br. at 10.) Petitioners also argue that the record was incomplete because of errors in the transcript, *e.g.* attributing portions of testimony to the wrong speaker. (Kulaga and Zeman Br. at 7.) WSREC responds that these errors were not sufficient to render the proceeding fundamentally unfair because they were not significant or causing prejudice. In suggesting this standard, WSREC cites cases dealing with errors surfacing during appellate reviews primarily in the context of criminal convictions. (WSREC Br. at 36.)

At the Board's hearing, Kulaga testified that during the first week of December she submitted a FOIA request to the Village to view the complete record on which its siting approval was based during the first week of December. (Tr. at 15.) Receiving no response, Kulaga telephoned the Village and was told that the record was available at the Clerk's office. On December 30, 1993, she viewed the transcripts at the Clerk's office but was unable to locate any other evidence despite requests for the same directed to the Clerk. When she returned on January 4, 1994, she found a second binder which contained post-hearing comments. When she returned on January 6, 1994, she still did not see any of the evidence submitted at hearing despite a specific request for that information. By letter dated January 6, 1994, Louis Cainkar, the Village attorney who acted as hearing officer in its proceedings, informed Kulaga that the entire record had been transferred to his office to be prepared for submittal to the Board. Kulaga also testified that on January 6,

1994 Zeman viewed a volume marked R-1 which was "supposed to contain all the other information." (Tr. at 16-18.) Additionally, at the Board's hearing, Cainkar, acting in his capacity as Village attorney in cross-examining Kulaga, asked her if she had called or written to him after receiving his letter. (Tr. at 30.) Summarized, her response was that she did not because there was insufficient time to review the record at that late date and prepare an appeal by the statutory deadline. Kulaga and Zeman filed their petition on January 10, 1994.

In essence, petitioners argue that it is a violation of due process that the Village did not make available to her a complete copy of the record below during the thirty-five days statutorily allowed for her to appeal the decision which is based upon that record. While the Board agrees that the Village did not cooperate in making that record available to her during that time-frame, the Village's obstructive behavior did not sufficiently impair petitioners' ability to appeal so as to amount to a due process violation.

This conclusion is not based upon the Village's behavior, but is due to the Board's practice in this type of appeal. A party's pleadings are only required to give an opposing party notice of the grounds upon which a claim is based. A petitioner is not limited to the facts alleged in the original petition to support the claims contained therein. Here, petitioners were able to make their claims before the Board, and had an opportunity to subsequently review the record to supplement their original claims if they so desired.

Also, we have reviewed the record to determine the extent of its disorganization and the errors in the transcripts. While we agree with petitioners that portions of the record are not well organized, we do not find that it is to a degree which would prejudice their ability to prepare their appeal before us. We were able to sort the record out sufficiently to determine that the errors were not significant, albeit with some difficulty concerning the documents submitted by persons other than the applicant. We recognize, as argued by the respondents, the organized state of the record is unfortunately largely dependent on the original state of the documents as submitted. Finally, we do not find that the errors in the transcript render the record below fatally incomplete.

<u>PCB 94-22 SITING CRITERIA CHALLENGES BY CBE *et al.*</u>

As earlier explained, Section 39.2 of the Act governs local siting determinations. Section 39.2(a) lists nine criteria a local government body is to consider when reviewing an application for siting approval. When reviewing challenges to the siting approval on these types of substantive claims, the

standard of review the Board must apply is whether the finding below were against the manifest weight of the evidence.

Petitioners CBE *et al.* assert that the Village's decision should be reversed on the grounds that its findings that the need and flood-proofing criteria set forth in Section 39.2(a)(1) and 39.2(a)(4) were met was against the manifest weight of the evidence.

Section 39.2(a)(4): Flood-proofing - Section 39.2(a)(4) provides that local siting approval shall only be granted if the proposed facility meets the following criterion:

> (4) the facility is located outside the boundary of the 100 year flood plain or the site is flood-proofed;

The Village's decision granting site approval states that "the facility is designed to be flood proofed." (R. at 7.) In challenging the Village's determination that this satisfies Section 39.2(a)(4), CBE *et al.* cite Section 39.2(e) of the Act which states in pertinent part:

> In granting approval for a site the county board or governing body of the municipality may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section . . . .

Petitioners argue that the Village has only two choices: it must either make a written determination that the site is not in the 100 year flood plain or the site is flood-proofed, or it must condition approval on the applicant's ultimate satisfaction of the flood-proofing requirement.

Section 39.2(e) gives governing bodies the authority to impose conditions on site approval, but it does not require that they do so. Section 39.2(a) allows the decisionmaking body to determine that the facility "as proposed" will meet the statutory criteria. Therefore, the Village was required to determine only that the facility as proposed would either be outside the 100 year flood plain, or that the site would be flood-proofed.

This precise issue has been addressed in Daly v. Village of Robbins, (July 1, 1993) PCB 93-52, PCB 93-54. In Daly, the Board upheld the Village of Robbins' determination that Section 39.2(a)(4) was satisfied where the village ordinance granting site approval stated the facility was "designed" to be flood-proofed. The Board rejected the petitioners' argument that the statutory language at paragraph (a)(4) of Section 39.2 mandates that the Village find the facility is flood-proofed, not merely designed to be flood-proofed. (Id. at 25.)

In this case WSREC submitted a flood-proofing plan as part of its application (R. at 504 - 507), and the Village could have found that the plan satisfied the requirements of Section 39.2(a)(4). We therefore find that the Village's determination that the site is designed to be flood-proofed was not against the manifest weight of the evidence.

Section 39.2(a)(1) Necessary to Accommodate Waste Needs - CBE *et al.* assert that WSREC's need assessment failed to competently assess the waste needs of the proposed service area, because it relied on outdated landfill capacity data, and because it failed to make adjustments to reflect potential increases in waste management paths other than land-filling, such as source reduction, recycling and composting. Petitioners dispute the accuracy and validity of the studies relied on by the Village in reaching its decision. They claim that the information contained in Solid Waste Needs Assessment for the Cook County Planning Area is outdated, and the West Cook County Solid Waste Management Plan contains information which supports the conclusion that there is no immediate need for an incinerator. Petitioners claim that the Village ignored the evidence they presented on source reduction, recycling and composting, and failed to consider the impact of other pollution control facilities sited in the service area. We find that none of these factors demonstrate that the Village's decision was against the manifest weight of the evidence.

Section 39.2(a)(1) provides that local siting approval shall only be granted if the proposed facility meets the following criterion:

> (1) the facility is necessary to accommodate the waste needs of the area it is intended to serve;

In construing this statutory provision, an applicant for siting approval need not show absolute necessity. (Clutts v. Beasley (5th Dist. 1989), 541 N.E.2d 844, 846; A.R.F. Landfill v. Pollution Control Board (2d Dist. 1988), 528 N.E.2d 390, 396; WMI v. Pollution Control Board (3d Dist. 1984), 461 N.E.2d 542, 546.) The Third District has construed "necessary" as connoting a "degree of requirement or essentiality." (WMI v. Pollution Control Board, 461 N.E.2d at 546.) The Second District has adopted this construction of "necessary," with the additional requirement that the applicant demonstrate both an urgent need for and the reasonable convenience of, the new facility. (Waste Management v. Pollution Control Board, (2d Dist. 1988), 530 N.E.2d 682, 689; A.R.F. Landfill v. Pollution Control Board, 528 N.E.2d at 396; WMI v. Pollution Control Board, (2d Dist. 1984), 463 N.E.2d 969, 976.) The First District has stated that these differing terms merely evince the use of different phraseology rather than advancing substantively different definitions of need. (Industrial Fuels & Resources/Illinois, Inc. v. Pollution

Control Board, (1st District 1992), 227 Ill. App.3d 533, 592 N.E.2d 148, 156.)

The Village's decision approving the facility states that "the new regional pollution control facility . . . is necessary to accommodate the waste needs of the area it is intended to serve." (R. at 5.) In support of this determination, the decision cites the following: 1) the expert testimony of John L. Kirby, who testified the facility is necessary to meet the needs of the intended service area; 2) Fifth Annual Report of Available Disposal Capacity for Solid Waste in Illinois prepared by the Illinois Environmental Protection Agency; 3) West Cook County Waste Needs Assessment prepared for Northeastern Illinois Planning Commission and West Central Municipal Conference; 4) West Cook County Solid Waste Management Plan prepared for the West Cook County Solid Waste Agency; and the Solid Waste Needs Assessment for the Cook County Planning Area prepared for Cook County. (R. at 5.)

John Kirby, who was qualified as an expert witness, testified on behalf of WSREC. He testified that the facility is necessary to meet the needs of the intended service area (R. at 103). Mr. Kirby testified that capacity in the service area will be exhausted by the year 2000, and that even if the state achieves its goal of recycling 15% of the waste stream, there will still be an excess of seven million tons of waste to be disposed. (R. at 105.)

The study Available Disposal Capacity for Solid Waste in Illinois, Sixth Annual Report (January, 1993) (R. at 648), assesses the projected disposal capacity for solid waste in sanitary landfills throughout the state. It includes information on recycling, composting, and incineration in making its projections of available capacity. The study Solid Waste Needs Assessment for the Cook County Planning Area (June 1991) (R. at 767, 795-799) assesses the solid waste management needs in suburban Cook County for the period 1990-2010. (Id. at 770.) It includes information on recycling and incineration, and makes waste stream projections for the years 1990-2010. According to its introduction, this study is intended to provide the basis for determining the amount and type of disposal capacity needed to serve the suburban Cook County Area during the next 20 years. (Id.) We note that this is the area of "primary focus" within the intended service area. (R. at 487 (siting application).) The other studies cited by the Village in its decision do not appear in the record.

In response to petitioners' claim that the Village failed to consider factors other than landfill capacity, such as the impact of recycling and composting, we find the record shows that there was sufficient information in the record for the Village to find that such factors had been adequately considered in the need

determination. Mr. Gary Pierce testified that the facility would only handle non-recyclable waste, and that it would therefore not compete with these efforts. There was also expert testimony that the facility would be needed despite reductions in the waste stream caused by increased recycling and composting. We note that the studies Available Disposal Capacity for Solid Waste in Illinois, Sixth Annual Report (January, 1993) (R. at 648, 662-667), and Solid Waste Needs Assessment for the Cook County Planning Area (June 1991) (R. at 767, 795-799) both contain information on recycling and composting, and the Village could have reasonably assumed that the projections contained in the report reflected consideration of this data. Furthermore, the Village's opinion states that the reports and testimony clearly establish that there is a need for the facility even if there is an increase in recycling and composting of municipal waste. (R. at 5.) We find that this determination was not against the manifest weight of the evidence.

Petitioners argue that the Village failed to consider the evidence they presented, and instead relied on reports petitioners consider unreliable. Under the manifest weight of the evidence standard, the Board is not allowed 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. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 79, 544 N.E.2d 1176, 1195; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill. App.3d 79, 543 N.E.2d 505, 507.) That is the crux of petitioners' argument. Nothing in the record supports petitioner's argument that their evidence was not considered or that the reports relied upon were not reliable. Therefore, we cannot reweigh the evidence.

Petitioners' reliance on A.R.F. Landfill v. Pollution Control Board (Ill.App. 2d Dist. 1988), 528 N.E.2d 390, for the proposition that reliance on outdated information is grounds for finding that the applicant did not establish need is misplaced. In A.R.F., the local government found that the applicant did not meet the need criterion, and the Board and appellate court held that this determination was not against the manifest weight of the evidence. Here, the Village has determined that WSREC did meet the need criterion, and it is the Board's duty to determine whether this determination in favor of the applicant is against the manifest weight of the evidence.

Petitioners also point out that the Village did not consider the potential impact on the service area of several other facilities that have been proposed but are not yet operational. We find that while it would have been proper for the Village to consider these proposed facilities (Waste Management of Illinois,

Inc. v Pollution Control Board (1988) 175 Ill.App.3d 1023, 1032 125 Ill Dec 524, 532 530 N.E.2d 682, 690), it was not necessary that it do so (Tate v. Illinois Pollution Control Board (4th Dist. 1989) 544 N.E.2d 1176, 136 Ill.Dec. 401, 421; *cf*. Land and Lakes Company v. Village of Romeoville, (June 4, 1992) PCB 92-25, 134 PCB 53, 70).

Petitioners also point out that two of the studies recited in the Village's opinion are not contained in the record. We find that there was sufficient support in the record for the Village to reach its decision exclusive of these two studies.

CONCLUSION

The Board has carefully considered each of the arguments raised in the three petitions for appeal filed in this matter. On the question of jurisdiction, the Board has found that two siting applications were never simultaneously before the Village, and therefore the Village had authority to consider the contested application. On the challenges to the fundamental fairness of the proceedings before the Village, we have found none which rendered the proceedings conducted by the Village to be fundamentally unfair. Finally, we have considered challenges concerning two of the siting criteria contained in Section 39.2 of the Act, specifically the need and flood-proofing criteria, and have not found the Village's findings on either of these criteria to be against the manifest weight of the evidence. Therefore, the Board must affirm the Village of Summit's siting approval rendered on December 6, 1993.

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

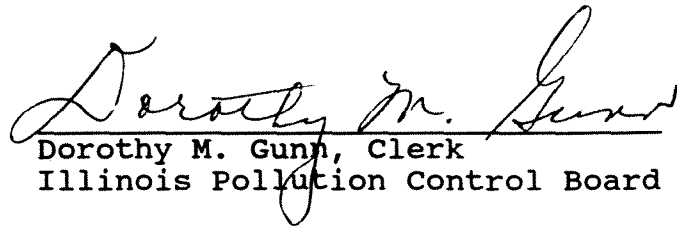
ORDER OF THE BOARD

For the reasons expressed in the above opinion,the Board affirms the Village of Summit's December 6, 1993 decision granting site location suitability approval for a new regional pollution control facility to West Suburban Recycling and Energy Center, Inc.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246. "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of May, 1994, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board