BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STOP THE MEGA-DUMP, Petitioner, v. COUNTY BOARD OF DEKALB COUNTY, ILLINOIS, and WASTE MANAGEMENT OF OF ILLINOIS, INC. Respondents.	)	PCB 10-103 (Third-Party Pollution Control Facility Siting Appeal)

NOTICE OF FILING

To:
John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on this 31st day of January, 2011, I filed electronically with the Office of the Clerk of the Pollution Control Board the attached, **MOTION FOR WAIVER OF THE PAGE LIMIT FOR POST-HEARING RESPONSE BRIEF** and **THE COUNTY BOARD OF DEKALB, ILLINOIS' BRIEF IN RESPONSE TO THE BRIEF AND ARGUMENT OF PETITIONER, STOP THE MEGA-DUMP**, copies of which is herewith served upon you.

Respectfully submitted,
THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS,

Amy Antoniolli

Dated: January 31, 2011

Renee Cipriano
Amy Antoniolli
SCHIFF HARDIN, LLP
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
312-258-5500

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 31st day of January, 2011, I have served electronically the attached, **MOTION FOR WAIVER OF THE PAGE LIMIT FOR POST-HEARING RESPONSE BRIEF** and **THE COUNTY BOARD OF DEKALB, ILLINOIS' BRIEF IN RESPONSE TO THE BRIEF AND ARGUMENT OF PETITIONER, STOP THE MEGA-DUMP,** upon the following person:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

and by first class mail, postage affixed, upon persons included on the **ATTACHED SERVICE LIST.**

THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS,

Amy Antoniolli
Amy C. Antoniolli

Dated: January 31, 2011

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STOP THE MEGA-DUMP, Petitioner, v. COUNTY BOARD OF DEKALB COUNTY, ILLINOIS, and WASTE MANAGEMENT OF OF ILLINOIS, INC. Respondents.	)	PCB 10-103 (Third-Party Pollution Control Facility Siting Appeal)

MOTION FOR WAIVER OF THE PAGE LIMIT FOR POST-HEARING RESPONSE BRIEF

Now comes the Respondent, County Board of DeKalb County, Illinois ("County Board"), by and through its attorneys, and for its Motion for Waiver of the Page Limit for Post-Hearing Response Brief before the Pollution Control Board ("Board"), states as follows:

1. Section 101.302(k) of the Board's procedural rules states as follows:

> Page Limitation. No motion, brief in support of motion, or brief may exceed 50 pages, and no amicus curiae brief may exceed 20 pages, without prior approval of the Board or hearing officer. These limits do not include appendices containing relevant material. 35 Ill. Adm. Code 101.302(k).

2. In order to fully and fairly present Respondent's case before this Board, Respondent respectfully requests a waiver of the applicable 50-page limitation. Petitioner Stop the Mega-Dump ("Petitioner") appeals the County Board's decision to approve Waste Management of Illinois, Inc.'s ("Waste Management") Site Location Application for the DeKalb County Landfill Expansion pursuant to Section 39.2 of the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.* (2010) (the "Act"). Petitioner appeals the County Board's decision on the grounds that the landfill siting proceedings below were not fundamentally fair and that the County Board's decision on three of the nine statutory siting criteria was against the manifest

weight of the evidence. The County Board cannot adequately address the numerous mischaracterizations of facts and the law, including factual omissions, half-truths, and false representations, found in Petitioner's opening brief in the 50-page limit provided by the Board's procedural rules.

3. The County Board, therefore, moves this Board to grant a waiver of the 50-page limit applicable to the post-hearing response brief and accept the County Board's brief, entitled "The County Board of DeKalb, Illinois' Brief in Response to the Brief and Argument of Petitioner, Stop the Mega-Dump," filed concurrently with this motion.

WHEREFORE, the County Board respectfully requests that the Pollution Control Board grant this motion for waiver and allow the County Board's post-hearing response brief to exceed the 50-page limit set forth in 35 Ill. Adm. Code 101.302(k).

Respectfully submitted,

THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS,

Amy Antoniolli

Amy C. Antoniolli

Dated: January 31, 2011

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STOP THE MEGA-DUMP, Petitioner, v. COUNTY BOARD OF DEKALB COUNTY, ILLINOIS and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB No. 10-103 (Third-Party Pollution Control Facility Siting Appeal)

THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS' BRIEF IN RESPONSE TO THE BRIEF AND ARGUMENT OF PETITIONER, STOP THE MEGA-DUMP

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STOP THE MEGA-DUMP, Petitioner, v. COUNTY BOARD OF DEKALB COUNTY, ILLINOIS and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB No. 10-103 (Third-Party Pollution Control Facility Siting Appeal)

THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS' BRIEF IN RESPONSE TO THE BRIEF AND ARGUMENT OF PETITIONER, STOP THE MEGA-DUMP

Now comes the County Board of DeKalb County, Illinois, by and through its attorneys, and for its Brief in Response to the Brief and Argument of Petitioner, Stop the Mega-Dump, states as follows:

INTRODUCTION

Petitioner, a citizens' organization, appeals the County Board of DeKalb County, Illinois' (the "County Board") decision to approve Waste Management of Illinois, Inc.'s ("Waste Management") Site Location Application (the "Application") for the DeKalb County Landfill Expansion (the "Expansion") pursuant to Section 39.2 of the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.* (2010) (the "Act").

ARGUMENT

The County Board's local siting proceedings were fundamentally fair and its decision to approve the Expansion was not against the manifest weight of the evidence. The County Board's

decision should be affirmed.

I. THE PROCEEDINGS BELOW WERE FUNDAMENTALLY FAIR

The County Board's local siting proceedings were fundamentally fair and Petitioner has presented no evidence demonstrating otherwise. All members of the public were afforded the guarantees of administrative due process and were encouraged to participate in the proceedings. The County Board complied with the access and copying requirements of Section 39.2(c) of the Act in all respects. The County Board and its members were entirely free from bias and did not, in any way, prejudge the adjudicative facts. There is no basis for a contrary finding and the County Board's decision to approve the Expansion should be affirmed.

Petitioner's opening brief would have this Board believe a fantastical tale of intrigue and conspiracy theory. According to Petitioner, the County Board has been under the Applicant's evil spell for years and now acts without any regard for the public welfare and with only one, nefarious purpose in mind: the expansion of the DeKalb County jail. To achieve this end, the County Board has supposedly colluded with the Applicant to prejudge the Application through a series of unknown — but no doubt highly prejudicial! — communications, and later lie about it under oath. The two have also, as part of their supposed plan, discouraged public participation by withholding the Application and setting up barriers to participation in the local siting hearing, thereby implying that Petitioner's intervention was necessary to save the public from the County Board.

Yet, upon examination of the evidence, this Board will find that Petitioner has dishonestly developed its case from omissions, half-truths and false representations, none of which bear weight when tested. In fact, the County is surprised to have encountered such a

collection of misrepresented testimony, misunderstood evidence and mis-cited law as it finds in Petitioner's opening brief. No matter how passionately Petitioner believes in its cause and no matter what tactics it employs to argue its case, it cannot turn a hearing in which anyone and everyone was permitted and encouraged to participate into a plot against the public. It cannot turn the number of chairs in a county office into an attempt to limit the public's statutory rights. It cannot turn routine host agreement negotiations, pre-filing facility tours and application reviews into backroom intrigue. It cannot invade the County Board's legislative function and usurp the County Board's obligation to conduct the people's business.

Petitioner's appeal of the County Board's decision is driven by the emotional response of its members to the idea of a landfill expansion. Petitioner's members have further used the Expansion to launch political attacks on County Board members in an election year. A survey of Petitioner's contentions reveals that Petitioner's main concern is not with how the County Board conducted the proceedings below, but with the procedures themselves. These emotional responses, political motivations, and frustrations with procedures that frequently accompany landfill siting appeals do not form a legal basis for reversing the County Board's decision.

This Board will find, upon an examination of the evidence and the law, that the County Board did its utmost to meet the needs of DeKalb County in a fair, open, and honest manner. The County Board encouraged public participation in all respects and each and every County Board member understood and performed his or her obligations under the Act and performed those obligations without bias or prejudice. The proceedings below were fundamentally fair and the decision of the County Board should be affirmed.

A. The Public Was Afforded a Full Access to the Application and a Full Opportunity to be Heard, to Present Evidence and to Cross-Examine Adverse Witnesses.

The County Board provided all members of the public with administrative due process, including the right to be heard, to cross-examine adverse witnesses, and impartial rulings on the evidence. The notice and registration provisions of the DeKalb County Pollution Control Facility Siting Ordinance (the "Ordinance") and the Articles of Rules and Procedures for the County Board's Pollution Control Facility Committee (the "Articles") had no adverse effect on public participation. Furthermore, the County Board complied with the access and copying requirements of Section 39.2 of the Act in all respects.

1. The Articles and Ordinance had no adverse effect on the fundamental fairness of the local siting proceedings.

The notice and registration provisions of the Ordinance (C6790-800) and the Articles (C6801-22) had no adverse effect on the fundamental fairness of the proceedings before the County Board. (County Br., pp. 19-22).

Petitioner's arguments fail for four principal reasons. First, there is no legal authority supporting Petitioner's assumption that everyone and anyone who wishes to "participate" — that is, present evidence and cross-examine witnesses — in a local siting proceeding must be given the opportunity to do so. (County Br., p. 19 n.3). Second, the County's Articles and Ordinance in fact encourage participation by a broader range of the public than the Act, itself, does. Third, the provisions of the Articles and Ordinance were not, in fact, followed by the local hearing officer; everyone who wished to participate in the hearing was, in fact, permitted to do so. (*Id.* at 19-20). Fourth, Petitioner has presented no evidence of any person who wished to participate in the siting hearing but was discouraged from doing so by their understanding of the Articles and

Ordinance. (*Id.* at 20). Instead Petitioner's opening brief highlights Petitioner's disturbing willingness to speculate wildly while disregarding the actual facts of record.

a. The Articles and Ordinance did not contravene Illinois law and, in fact, encouraged public participation.

Petitioner's argument rests on an erroneous assumption, namely, that the Articles and Ordinance, on their face, deny members of the public a right to participate that is secured by some other provision of Illinois law. (Pet. Br., p. 12). Petitioner claims, for example, that the Articles and Ordinance deny participation to "everyone" other than those entitled to notice under the Ordinance, but never establishes that "everyone" is, in fact, entitled to participate. (*Id.*) Indeed, Petitioner never cites any legal authority establishing who, among the public, has the right to participate in a local siting hearing. Petitioner has failed to meet its burden in this regard, and its argument should fail.

Moreover, Petitioner misstates the relevant provisions of the Articles and Ordinance. Article III, Section 5 of the Articles states that:

> for purposes of the hearing, a "participant" may only be one of the following: an owner of property subject to notification under § 50-54(a)(3) of the Ordinance, an attorney representing said property owners, or an official or attorney representing a township of a municipality located within one and one half miles of the proposed facility.

(C6802). Petitioner falsely claims that Section 50-54(a)(3) "essentially mirrors the property notice on adjoining owners requirement as set forth in §39.2(b) of the Act, and the section thereby effectively limits participation to property owners within four hundred feet of the subject site and municipalities within 1.5 miles of the subject site." (Pet. Br., p. 12).

In fact, Section 50-54(a)(3) of the Ordinance creates a much broader entitlement to notice than Section 39.2(b) of the Act. Section 50-54(a)(3) requires the applicant to provide written

notice of a request for site approval, by personal service or by registered mail on the owners of all properties:

(1) Within the subject area not solely owned by the applicant,

(2) Adjoining the subject property,

(3) That would be adjoining but for public right-of-ways and other easements that do not extend more than 400 feet from the subject property line, and

(4) *Adjoining those properties above.*

(C6793-94) (emphasis added). Section 39.2(b) of the Act, on the other hand, only requires notice of a request for site approval to "the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property ...; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways." 415 ILCS 5/39.2(b). Thus, the Articles and Ordinance, read together, allow everyone entitled to individual notice under the Act to participate as well as the owners of every property *adjoining* the properties owned by people entitled to individual notice under the Act.

Although no legal authority, to the County Board's knowledge, has ever equated the Act's individual notice provision with a right to participate in the local siting hearing, the County Board suggests that this provision constitutes the best guidance for a decisionmaker charged with

determining who possesses that right.[1] If a broader segment of the general population than that entitled to notice under Section 39.2(b) were legally entitled to participate in a local siting hearing, the Act itself would "discourage" that broader segment's participation since the Act would not mandate notice of the application to that broader segment. "[W]e presume that the legislature, when it enacted the statute, did not intend absurdity, inconvenience, or injustice." *Land v. Board of Educ.*, 202 Ill. 2d 414, 422, 781 N.E.2d 249, 254-55 (2002).

DeKalb County's Articles and Ordinance, as shown above, require notice to a *broader* class of persons than that specified in the Act, which *encourages* participation by a broader range of the public than the Act itself suggests. The Articles and Ordinance are, therefore, fully consistent with the Act and cannot have resulted in a fundamentally unfair proceeding.

b. Petitioner cannot prove actual prejudice.

Even if Petitioner's argument had legal merit, which it does not, Petitioner has failed to prove that the local procedures resulted in actual prejudice. A local siting proceeding is only "fundamentally unfair" if the manner in which it was conducted resulted in actual prejudice. *E&E Hauling, Inc. v. Pollution Control Board*, 116 Ill App. 3d 586, 604, 451 N.E.2d 555, 569 (1983) (citing *Dodson v. National Transp. Safety Board*, 644 F.2d 647, 652 (7th Cir. 1981) ("It is settled that agency action will not be upset in the event of a harmless procedural error. This is especially true where the error was harmless because there was no resulting prejudice, or where the failure to follow the procedural rule inflicts no significant injury upon the party entitled to the

[1] The Act's only specific grant of a right to participate in the local siting hearing is limited to "[m]embers or representatives of the governing authority of a municipality contiguous to the proposed site or contiguous to the municipality in which the proposed site is to be located and, if the proposed site is located in a municipality, members or representatives of the county board of a county in which the proposed site is to be located ... ." 415 ILCS 5/39.2(d).

rule's observance.") (citations omitted)).[2]

There is no actual prejudice here. Petitioner admits that the hearing officer, at first, allowed participation by everyone who had registered with the County Clerk, including Petitioner's representatives, regardless of whether they met the Articles' and Ordinance's criteria. (Pet. Br., p. 9). Petitioner further admits that "[t]he hearing officer ultimately allowed everyone who so desired, regardless of property ownership status, proximity to the landfill, or date of registration to actively participate." (*Id.*)

Petitioner cannot deny that its representatives and others cross-examined every witness presented by the Applicant or that Petitioner presented its own witness testimony. (County Br., p. 20). Furthermore, there is no evidence that a member of the public decided not to attend or to participate in the public hearing because of the Ordinance and Articles or was denied an opportunity to participate in the hearing. In the absence of actual prejudice, Petitioner's argument must fail.

Because there is no evidence of actual prejudice, Petitioner resorts to wild speculation. Despite the fact that the Articles and Ordinance require broader individual notice than the Act and that the hearing officer explicitly permitted anyone who wished to participate in the hearing to do so, Petitioner claims that "the damage" was already done through the publication of the Articles and Ordinance on the County's website. (Pet. Br., p. 13). Petitioner admits that there is no evidence of any such "damage," however, claiming instead that "we will never know who or how many members of the public failed to participate because of the publicly published rules."

[2] There is no legal authority, to the County Board's knowledge, for Petitioner's claim that a mere inconsistency between local rules and procedures and the Act, absent actual prejudice, "will render the proceedings fundamentally unfair." (Pet. Br., p. 12).

(*Id.*) Petitioner further alleges, again without supporting evidence, that the Expansion's opponents were denied "a meaningful opportunity to prepare" because "they would have believed ... that they would not have been allowed to participate ..." and, therefore, "would not have arranged for witnesses or taken other steps to prepare cross examination or evidentiary presentations." (*Id.* at 13-14).

Petitioner has an evidentiary burden to prove actual prejudice and cannot meet this burden with mere speculation and supposition. Petitioner cannot transform a complete lack of evidence into substantive proof of prejudice by claiming that "we will never know" if anyone was, in fact, prejudiced.[3] Similarly, Petitioner cannot deny that its representatives can and did cross-examine witnesses and present their own witness testimony and expert written comment. (County Br., p. 20; C7995-8002). Neither Petitioner's representatives nor anyone else testified that he failed to prepare his own cross-examinations or evidentiary presentation because of his understanding of the Articles and Ordinance. Petitioner cannot transform a lack of evidence into a substantive argument for reversal through mere speculation and supposition as to what certain, unidentified individuals "would have" thought and "would not have" done.[4]

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[3] Petitioner appears to make the novel argument, without actually stating as much, that this Board should adopt the "chilling effect" doctrine from the realm of federal, constitutional, First Amendment jurisprudence and incorporate it, somehow, into the substantive law interpreting the Illinois Environmental Protection Act, presumably so as to excuse Petitioner from its obligation to prove actual prejudice. (*Id.* at 13). Petitioner cites no legal authority permitting a departure from Illinois' longstanding requirement of proof of actual prejudice in "fundamental fairness" determinations, and the County Board is aware of none.

[4] Petitioner does not demonstrate that it has standing to argue such hypothetical harms suffered by such hypothetical persons. "The doctrine of standing requires that a party, either in an individual or representative capacity, have a real interest in the action brought and in its outcome. The purpose of the doctrine is to ensure that courts are deciding actual, specific controversies and not abstract questions or moot issues." *In re Estate of Wellman*, 174 Ill.2d 335, 344 (1996). In this case, if a member of the public were denied a legally-recognized right to participate in the local siting hearing, only that person, in particular, would have standing to argue that the proceedings were fundamentally unfair as a result.

c. Petitioner's argument regarding the Articles' and Ordinance's alleged discouragement of preparation is waived.

Finally, even if Petitioner's argument regarding the Articles' and Ordinance's alleged discouragement of preparation had legal merit, which it does not, Petitioner waived this argument by failing to preserve it below. Petitioner's representatives never informed the hearing officer that they lacked sufficient access to the application, as was the case in *American Bottom Conservancy v. Village of Fairmont City,* PCB 00-200 (Oct. 19, 2000), cited by Petitioner, or that they needed more time to prepare their opposition. "[A] failure to object at the original proceeding constitutes a waiver of the right to raise an issue on appeal." *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill. App. 3d 1023, 1039-40, 530 N.E.2d 682, 695 (2d Dist. 1988) ("*Waste Management I*")

Petitioner's arguments regarding County's Articles and Ordinance provides no basis for reversal. Petitioner's argument is legally unfounded and Petitioner cannot prove actual prejudice. The proceedings below were fundamentally fair and the County Board's decision should be affirmed.

2. The Public Was Able to Review and Copy Waste Management's Application.

The County Board made the Application available to the public for inspection and copying and otherwise complied with all statutory requirements relating thereto. No one testified that he was unable to review or copy the Application. Although the County Board had no legal obligation to make the Application available to the public in electronic form, it did provide DVD copies of the Application to those who requested them.

a. The Application was made available to the public for review.

Petitioner admits that "everyone who wanted to view the application was able to do so."

(Pet. Br., p. 14). Petitioner does not and cannot deny that the County Board fully complied with the Act's requirements and made the Application available for public inspection and copying at the County Board's office. 415 ILCS 5/39.2(c).

Instead, Petitioner quibbles that Mac McIntyre reviewed the application in a room with "only one chair." (Pet. Br., p. 14). Sharon Holmes testified she saw both Mr. McIntyre and "his friend" sitting in chairs. (Holmes Dep., p. 14:17-19). Mr. McIntyre admitted that he reviewed the Application in the County Clerk's office for "a couple of hours." (Tr., p. 73:1-7). As noted below, Mr. McIntyre was also given a DVD copy of the application for five dollars. Petitioner further claims that Danica Lovings was "unable" to review the application, but disingenuously omits Ms. Lovings' testimony that, in fact, she *chose* not to review the application. (Pet. Br., p. 14). She testified as follows:

> Q. Did you ever go to the library to review the application?
>
> A. No, I didn't.
>
> Q. Why not?
>
> A. Because I didn't have the amount of hours that it would require to review the information I wanted to review at the library. I couldn't spend that much time away from home and work.
>
> * * *
>
> Q. Did you ever go to the county clerk's office to be able to review the site location application?
>
> A. No. She told me it was available at the library, which for me would have been closer than the county clerk's office.

(Tr., pp. 38:11-19, 40:6-11). Petitioner's cavils with respect to Mr. McIntyre and Ms. Loving do not evidence a violation of the Act's public inspection requirements.

Petitioner carps that the notice of public hearing "improperly" stated that copies of the Application may be obtained from the County Clerk upon filing a request under the Freedom of Information Act ("FOIA"), but Petitioner fails to establish that requiring a FOIA request would violate the Act. Petitioner argues that such a requirement would prevent persons from obtaining the Application anonymously, but cites no provision of the Act or other Illinois law giving persons a right of anonymous access to such applications. (Pet. Br., p. 14-15). In fact, the Board has held that local siting proceedings are not rendered fundamentally unfair when a clerk requires a member of the public to file a FOIA request before releasing otherwise routinely-available landfill siting information. *County of Kankakee v. The City of Kankakee, Town and Country Utilities, Inc., et al.*, PCB 03-31, 03-33, & 03-35 (consol.), slip op. at 20 (Jan. 9, 2003).

In any case, no one testified she was required to file a FOIA request to view or copy the Application. Sharon Holmes, the County Clerk, testified that her office never required anyone to file a FOIA request in order to review or copy the Application. (Holmes Dep., pp. 19:20-24, 20:13-22). Mary Supple, the administrative assistant to the County Administrator, similarly testified that she never required anyone to file a FOIA request prior to viewing the Application and had never been instructed to obtain such requests. (Supple Dep., p. 35:2-16).

b. The County Board made the Application available for copying upon payment of the actual costs of reproduction.

Petitioner cannot claim that the County Board refused to make copies of the Application when requested or that it charged more than the actual cost of reproduction. No one testified that he was unable to obtain a copy of the Application for the actual cost of reproduction. Nor did Petitioner establish that the County Clerk's stated charge of twenty-five cents per page exceeded the actual costs of reproduction. Ms. Holmes testified that she arrived at her office's standard

copying charge was arrived at through consultation with other county clerks, longtime policy and "knowing what the going rate is." (Pet. Br., p. 15; Holmes Dep., p. 9:9-18). Petitioner claims this charge was not made public "pursuant to any published schedule of copying costs," but Geralynne Kunde, a County Clerk employee, testified that the charge was "posted on the recorder's side of the office." (Pet. Br., p. 15; Kunde Dep., p. 8:9-20). Ms. Holmes, admittedly, did not know the per page "cost of the paper, toner and wear and tear on the copy machine," but Petitioner has not established that these elements constitute the actual cost of reproduction absent, for example, labor and overhead costs, or that twenty-five cents per page is not a fair approximation of the actual per page costs of reproduction. Finally, Petitioner claims that Mary Supple "would have charged between ten and fifteen cents a copy," but Ms. Supple was actually testifying, in the cited passage regarding the fees charged by other County offices. (Pet. Br., p. 15; Supple Dep., pp. 32:18 - 33:1).

Petitioner's remaining argument is both irrelevant and misrepresents the record. Petitioner claims that "County Administrator Ray Bockman testified that he never made arrangements for copying the siting application on public request." (Pet. Br., p. 15). In fact, Mr. Bockman testified that he "did not prearrange with any local merchant or vendor to provide [copying] service at a prearranged cost." (Bockman Dep., p. 42:18-23). Mr. Bockman also testified that "I had asked Mary Supple to inquire of local copy facilities ... . I had asked her to get estimates of how long it would take someone, if asked, to reproduce a copy of this application ... . I simply asked her to ask around and see who was available and get a feel for the approximate cost ... ." (*Id.* at 40:24 - 41:5, 42:8-10). Petitioner's argument is, in any case, irrelevant, as Petitioner cites no authority establishing that the County Board is legally obligated

to prearrange copy services with an outside vendor.

c. The County Board was not obligated to make the Application available to the public in electronic form, although it did, in fact, do so.

Petitioner has not articulated a viable argument regarding Section 39.2(c)'s actual requirements. Instead, it suggests that the County Board violated the Act by not distributing digital copies of the Application either on DVD or on the County's website. The County Board had no legal obligation to make the Application available in digital form yet, by Petitioner's own admission, the only two people who requested DVD copies received them. (Pet. Br., pp. 15-16).

Petitioner claims the DVD's were only provided "after much clamor," but the testimony suggests otherwise. Mr. McIntyre testified that "I wanted to get a copy of the DVD [Sharon Holmes] said they had, and there was resistance to that, and then I asked if I needed to file a FOIA, a Freedom of Information Act, request to get the DVD. There were some phone calls made, and then the – she gave me what she said was her only copy of the DVD ... ." (Tr., pp. 65:19 - 66:1). Mr. McIntyre copied the DVD for Petitioner's representative, Dan Kenney. (*Id.* at 71:24 - 72:8). Mr. Bockman hand-delivered a copy of the DVD to the home of Mark Charvat, the only other person to request one, on the same day he made his request. (*Id.*, at 105:24 - 106:3; Bockman Dep., pp. 53:9 - 55:2).

Finally, although no law requires local siting authorities to post siting applications online, Petitioner nevertheless castigates the County Board for not placing the Application on the County's website and, in doing so, indulges itself of yet another misrepresentation. Petitioner claims that "Bockman's only explanation was that placing the siting application on the website was not required." (Pet. Br., p. 16). This is false. In fact, Mr. Bockman testified — following a colloquy in which Petitioner's counsel stated that "I'm not even implying that it was required to

be placed on the website" — that "the size of the file" made posting the Application difficult and that "those who oppose initiatives of the government always cite people who don't have access to the world wide web as being disadvantaged by their placement on the web and that placement of these items on the web discriminates against those who can't afford computers, etcetera." (Bockman Dep., pp. 37:20-22, 38:13 - 39:14). Therefore, Mr. Bockman's explanation, based on twenty-six years of experience as the DeKalb County Administrator, was that placing such a document on the website does not resolve issues of access because not everyone has access to a computer or the internet. (Bockman Dep., pg. 39:8-14).

d. Petitioner admits that its arguments are meritless.

Petitioner admits that its "access" arguments "might, by themselves, be deemed as harmless error ... ." (Pet. Br., p. 16). Petitioner nevertheless claims that "harmless errors" — if errors they were — can, somehow, accumulate and rise to the level of fundamental unfairness. Petitioner cites *American Bottom Conservancy*, PCB 00-200, slip op. at 10, for this proposition, but the page cited by Petitioner simply recites the applicant's arguments in that case. To the County Board's knowledge, no other portion of the *ABC* opinion contains such a holding and no authority has found fundamental fairness to have resulted from a collection of harmless errors. On the contrary, this Board has expressly rejected Petitioner's argument. See Village of LaGrange v. McCook Cogeneration Station, L.L.C., PCB 96-41, slip op. at (Dec. 7, 1995) ("In finding that none of the elements cited by petitioners as fundamentally unfair rise to the level of fundamental unfairness that would cause remand or reversal ... the Board also finds that the cumulative effect of those elements was not so fundamentally unfair as to taint the proceedings ... .").

Petitioner also cites to *Williams v. Board of Trustees of Morton Grove Firefighters' Pension Fund,* 398 Ill.App.3d 680 (1st Dist. 2010) for the proposition that the cumulative effect of a number of factors may result in an unfair hearing. (Pet. Br., p. 48). *Williams* is not relevant precedent because it involved the fundamental fairness of a hearing held pursuant to the Illinois Pension Code. Even if *Williams* were relevant, the facts are distinguishable. The First District appellate court in *Williams* found that the active role of village attorney, who was a member of the board of trustees of the village firefighters' pension board, during the hearing demonstrated she was advocating on behalf of the village instead of acting as a disinterested decisionmaker. The court found the village attorney's behavior of moving to bar evidence offered by the plaintiff's counsel, repeatedly objecting to the firefighter's questions, and extensively questioning medical witnesses resulted in an unfair hearing. Petitioner has not demonstrated that any County Board member has advocated in a way, let alone to the extent the village attorney did in *Williams*.

Petitioner's with respect to public access and participation is built on fundamental misunderstandings and misrepresentations of both the law and the record. The Articles and Ordinance had no adverse effect on the fundamental fairness of the local siting proceedings and the public was afforded a full opportunity to review and copy the Application and any related materials.

B. The Applicant's Pre-Filing Contacts with the County Board and its Staff Are "Irrelevant" and Did Not Result in Prejudgment of the Adjudicative Facts.

As an initial matter, the only contacts between the Applicant and the County Board are expressly permitted under Illinois law and cannot render the local siting proceedings fundamentally unfair. Petitioner complains of four "classes" of contacts: (1) pre-filing host fee

negotiations; (2) pre-filing tours of the Prairie View Landfill; (3) a pre-filing review of the Application by the County Board's technical consultants and (4) non-substantive, post-filing contacts regarding administrative matters. These contacts did not concern the adjudicative facts of the Application.

Furthermore, Petitioner has waived all claims of bias or prejudgment. "[A] failure to object at the original proceeding constitutes a waiver of the right to raise an issue on appeal. Moreover, a claim of bias or prejudice ... must be asserted promptly after knowledge of the alleged disqualification. This is so because it would be improper to allow a party to withhold a claim of bias until it obtains an unfavorable ruling." *Waste Management I*, 175 Ill. App. 3d at 1039-40, 530 N.E.2d at 695. In *Waste Management I*, the applicant moved to disqualify four county board members prior to the county board's siting decision. *Id.* at 1028, 530 N.E.2d at 687-88. On appeal, the applicant asserted that four additional board members should have been disqualified for bias and prejudice. *Id.* at 1039-40, 530 N.E.2d at 695. The *Waste Management I* court held that the applicant waived its claim of bias and prejudice with respect to the four additional board members. *Id.*

Petitioners did not file a motion to disqualify any of the County Board members in this case and, therefore, has waived all arguments of bias and/or prejudice. As in *Waste Management I*, Petitioner should not be permitted to withhold its claims of bias and prejudice until after it obtained an unfavorable decision and then assert those claims for the first time on appeal.

Petitioner's motion to dismiss did not preserve its claims of bias and prejudice. (Pet. Br., p. 9). That motion sought the disqualification of the entire County Board and the dismissal of the proceedings, even though it contained no specific allegations of fact regarding the County

Board, generally, or twenty-one of its members, in particular. (C7550-51). Petitioner should not be permitted to preserve issues of bias and/or prejudice by making a blanket, factually-unsupported motion against the entire County Board, waiting to see if the County Board's decision is to its liking and — only then — seeking to substantiate its accusations with factual allegations. Petitioner's entire argument regarding bias and prejudice is waived.[5]

Petitioner's arguments are meritless, in any case. The pre-filing host agreement negotiations, facility tours and draft application review were purely routine and did not result in the actual prejudgment of adjudicative facts. The proceedings were fundamentally fair and the County Board's decision should be affirmed.

1. Petitioner misstates the law with respect to pre-filing contacts.

Contrary to Petitioner's claim, there is a substantive and well-recognized distinction

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[5] The motion contained allegations regarding only two County Board members: Eileen Dubin and Julia Fauci. (C7550-51). Petitioner subsequently orally renewed its motion on the grounds of statements allegedly made by County Board member Riley Oncken. (C7113-15). Ms. Dubin ultimately voted against the Expansion. (C8535). Accordingly, to the extent Petitioner preserved any issue of disqualifying bias and/or prejudice, it preserved that issue with respect to Ms. Fauci and Mr. Oncken only. Since the County Board voted to approve the Expansion in a sixteen-to-eight decision, any bias and/or prejudice on the part of Ms. Fauci or Mr. Oncken would not have altered the outcome of the vote and is, therefore, harmless. (*Id.*)

Petitioner mis-cites *Girot v. Keith*, 212 Ill.2d 372 (2004), for the proposition that "bias by a decision maker never constitutes harmless error." (Pet. Br., p. 47). The *Girot* court actually held that bias by a decision maker cannot constitute harmless error when that bias violates constitutional due process rights secured by the Fourteenth Amendment to the United States Constitution. 212 Ill.2d at 382. It is well established, however, that a non-applicant who participates in a local pollution control siting hearing has no property interest at stake entitling him to the protection afforded by the constitutional guarantees of due process. *Land and Lakes Co. v. Pollution Control Bd.*, 319 Ill. App. 3d at 41, 47, 743 N.E.2d 188, 193 (3rd Dist. 2000). The holding in *Girot* does not apply here.

Petitioner's remaining authority, *Danko v. Board of Trustees*, 240 Ill. App. 3d 633 (1st Dist. 1992), addresses standards to be applied in proceedings under the Administrative Review Act, 735 ILCS 5/3-101, *et seq.*, and is not applicable here. (Pet. Br., pp. 47-48). Even if it were, this case merely holds that a single, biased decision-maker *can* infect a entire decision making body, thereby rendering the

between the pre- and post-filing contacts of an applicant and a local siting authority. This Board has held that, "[i]n the context of a siting proceeding, ... an *ex parte* contact is a contact between the siting authority and a party with an interest in the proceeding without notice to the other parties to the proceeding." *Residents against a Polluted Environment v. County of LaSalle*, PCB 96-243, slip op. at 8 (Sept. 19, 1996) ("*Residents I*").

This Board has further held that "contacts between the applicant and the siting authority prior to the filing of the siting application do not constitute impermissible *ex parte* contacts." *Residents against a Polluted Environment v. County of LaSalle*, PCB 97-139, slip op. at 7 (June 19, 1997) ("*Residents II*"). *See also County of Kankakee*, PCB 03-31, 03-33, & 03-35 (consol.), slip op. at 20 (holding that a letter "received before the application was filed ... was a pre-filing contact rather than a post-filing *ex parte* contact."); *Beardstown Area Citizens for a Better Environment v. City of Beardstown*, PCB 94-98, slip op. at 9 (Jan. 11, 1995) ("we reject petitioners' claims of impermissible *ex parte* contacts before the application was filed ... . Petitioners have cited no authority which would apply *ex parte* restrictions prior to the filing of an application for siting approval").

The Illinois appellate court reached a similar result, in *E&E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d 586, 598-99, 451 N.E.2d 555, 566 (2d Dist. 1983) ("*E&E Hauling I*"), when it held that the standards of adjudicative due process — and their prohibition on *ex parte* contacts — apply only to the adjudicative — as opposed to the legislative or rulemaking — functions of a local siting authority, *i.e.*, to "proceedings designed to adjudicate disputed fact in particular cases" and, specifically, to "a decision on the grant or denial of a permit [that] turns on

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decisions of that body voidable — not void. *Danko*, 240 Ill. App. 3d at 641. There is no evidence that

its resolution of disputed fact issues, whether the particular landfill, or expansion, for which the permit is sought meets the specific factual criteria set out in section 39.2 of the Act." Thus, in order to constitute a true *ex parte* contact, the contact must occur post-filing in the context of an adjudicative proceeding.

The distinction between pre- and post-filing contacts is legally substantive. A reviewing body must examine a post-filing, *ex parte* contact in light of the overall "integrity of the process and the fairness of the result" and determine whether it so "irrevocably tainted" the local decision-making process so as to make the ultimate judgment unfair. *E & E Hauling I*, 116 Ill. App. 3d at 606-07, 451 N.E.2d at 571.

A pre-filing contact, on the other hand, is "irrelevant" to the fundamental fairness analysis unless it is probative of actual prejudgment of the adjudicative facts. This Board has held that "contacts between the Applicant and the County Board prior to the filing of the Application are irrelevant to the question of whether the siting proceedings, themselves, were conducted in a fundamentally fair manner." *Residents II*, PCB 97-139, slip op. at 7.

Petitioner dismisses the pre-filing contacts in the *Residents* cases as "routine" but, in fact, they involved the substantive legislative functions of a county board, namely, the negotiation of a host fee agreement and the drafting of the County's solid waste management plan and procedural rules for the local siting hearing. *Residents I*, PCB 96-243, slip op. at 14; *Residents II*, PCB 97-139, slip op. at 7. Absent an express over-ruling by this Board or the appellate courts, *Residents I* and *II* remain good law and the types of pre-filing contacts discussed therein remain

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the entire County Board was "infected" with bias or prejudgment in this case.

"irrelevant" to the fundamental fairness analysis.[6]

Pre-filing contacts may, however, be admissible if they are probative of the actual prejudgment of adjudicative facts. *Land & Lakes Co. v. Pollution Control Bd.,* 319 Ill. App. 3d 41, 743 N.E.2d 188 (3rd Dist. 2000) ("*Land & Lakes*"). In ,*Land & Lakes*, the court considered pre-filing contacts between an applicant and the local decision-maker's technical consultant — in essence, a pre-filing review. *.Id.*, 319 Ill. App. 3d at 49, 743 N.E.2d at 195. The appellant, a landfill opponent, did not argue that the contacts were *ex parte* or rendered the process fundamentally unfair. *Id.* Instead, it argued that the local decision-maker had improperly delegated its decision-making responsibility to the consultant. *Id.* The *Land & Lakes* court rejected this argument and then stated, in *dicta*, that "[i]n the absence of any pre-filing collusion between the applicant and the actual decisionmaker ... the pre-filing contact between [the applicant] and [the consultant] could not have deprived [appellant], or any other siting approval opponent, of fundamental fairness." *Id.*

This Board later clarified that the *Residents* cases did not create a "general prohibition" against the admission of pre-filing contacts into evidence where those contacts "may be probative of prejudgment of the adjudicative facts." *County of Kankakee*, PCB 03-31, 03-33, & 03-35 (consol.), slip op. at 5.

When the *Residents* cases, *Land and Lakes*, and *County of Kankakee* are read together, therefore, it is clear that a pre-filing contact is only relevant to the fundamental fairness analysis if it is "probative of prejudgment of the adjudicative facts," *i.e.*, the determination of "whether

[6] The County Board's understanding of these holdings and its reliance thereon is set forth in the County Staff Report. (C7827-36). Petitioner disingenuously suggests that the legal discussion set forth in

the particular landfill, or expansion, for which the permit is sought meets the specific factual criteria set out in section 39.2 of the Act." *E & E Hauling I*, 116 Ill. App. 3d at 598-99, 451 N.E.2d at 566. Petitioner's suggestion that *all* pre-filing contacts must be treated as impermissible, *ex parte* contacts is erroneous and would, if credited, prevent local governmental bodies from fulfilling their legislative function. (Pet. Br., p. 16).

The standard for proof of prejudgment is particularly high. County board members engaged in a landfill siting hearing under Section 39.2 of the Act are presumed to be objective and capable of fairly judging the particular controversy. *Waste Management I*, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695. "The presumption of the validity of the actions of a public official will be overcome only where it is shown by clear and convincing evidence that the official has an unalterably closed mind in critical matters." *Fox Moraine, LLC v. City of Yorkville*, PCB 07-146, slip op. at 60 (Oct. 1, 2009). Such a showing must depend on evidence of actual bias. *Residents against a Polluted Environment v. Pollution Control Board*, 293 Ill. App. 3d 219, 225-26, 687 N.E.2d 552, 556-57 (3d Dist. 1997) ("*Residents III*"). This Board may only find actual prejudgment of an adjudicative fact by a County Board member or the County Board as a whole "if a disinterested observer might conclude that he, or it, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." *E & E Hauling I*, 116 Ill. App. 3d at 598, 451 N.E.2d at 565.

There is no evidence that either the County Board or any of its members prejudged the adjudicative facts of the Application. Instead, the pre-filing contacts between the Applicant and the County Board in this matter are "irrelevant" to the fundamental fairness inquiry . These pre-

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that Report "reads like it could have been written by WMII," but Petitioner is fully aware that the

filing contacts concerned the legislative functions of the County Board, *i.e.*, the negotiation of the Host Agreement between the Applicant and the County and a pre-filing review of the draft application by the County Board's technical consultant. Such pre-filing contacts are expressly permitted by longstanding Illinois law, including the holding in *County of Kankakee*.

Petitioner also mis-cites this Board's holding in *County of Kankakee* with respect to pre-filing facility tours. This Board specifically distinguished the permissible facility tour in *County of Kankakee* from the impermissible tour provided in *Southwest Energy Corp. v. Pollution Control Bd.*, 275 Ill. App. 3d 84, 655 N.E.2d 304 (4th Dist. 1995) — a case upon which Petitioner heavily relies (Pet. Br., p. 24) — on the ground that "the contact between the City [of Kankakee] and [the applicant] occurred *before* the application was filed." PCB 03-31, 03-33 & 03-35 (consol.), slip op. at 21 (emphasis in original). Petitioner disingenuously omits this portion of the Board's holding from its discussion of *County of Kankakee* and its relevance to pre-filing facility tours.

In summary, the County Board acknowledges that pre-filing contacts may be relevant to a fundamental fairness analysis, but only if they are probative of the prejudgment of the adjudicative facts. No such prejudgment occurred in this case, and Petitioner has waived its prejudgment arguments in any case. The pre-filing contacts identified by Petitioner concerned negotiation of the Host Agreement, a pre-filing facility tour, and a pre-filing review of the draft application by the County Board's technical consultant and are "irrelevant" to the fundamental fairness analysis under the authorities mentioned above.

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discussion was authored by the County Board's own legal counsel. (Burger Dep., pp. 16:23 - 17:2).

2. The pre-filing contacts between the Applicant and the County Board concerned the Host Agreement and are "irrelevant" to the fundamental fairness analysis.

The two pre-filing meetings between the Applicant and the County Board are irrelevant to whether the siting hearing, itself, was fundamentally fair, because these meetings occurred in the context of the Host Agreement negotiations and because the meetings are not probative of prejudgment of the adjudicative facts. Furthermore, as noted above, any claim of prejudgment with respect to the Host Agreement negotiations has been waived.

a. The Host Agreement negotiations.

Petitioner grossly misstates the nature of the two Host Agreement negotiations. Petitioner would have the Board believe that the County Board conducted private mini-hearings as part of a "persuasion process" by which Waste Management could convince County Board members of the merits of the proposed landfill expansion. The record shows that Petitioner's characterization is mistaken and that nothing about the negotiations were inappropriate or otherwise rendered the siting proceedings fundamentally unfair. Section 50-54(a)(1) of the Ordinance provides that:

> Prior to submitting an application for siting approval for a [pollution control facility], the applicant shall enter into negotiations with the county board to develop a host agreement. The host agreement must be approved by the county board. The host agreement shall be signed by the applicant and the chairman of the county board before the applicant submits an application for siting of a [pollution control facility]. The host agreement shall be completed prior to any pre-filing review of a conceptual [pollution control facility].

(C6793).

The Applicant did, in fact, negotiate the terms of a host agreement with the County Board and said Agreement was later approved by the County Board and executed by the Applicant and

County Board Chair Ruth Ann Tobias. (C1345-90). In the course of negotiations, the Applicant made two presentations: first to the Ad Hoc Solid Waste Committee of the County Board on February 9, 2009, and then to the full County Board on February 24, 2009. (Bockman Dep., Exs. 3-4). Contrary to Petitioner's implication, the public was free to attend both meetings and ask questions. (Pet. Br., p. 4; Tobias Dep., pp. 8:20 - 9:11). The County Board sent notice of the meetings to the press, the County Board members, and all relevant department heads and the meetings were publicized on the County's website. (*Id.* at 9:13-22; http://www.dekalbcounty.org/Agendas/09/9_13feb.html; http://www.dekalbcouty.org/Agendas/09/23_27feb.html). No member of the public elected to attend either meeting. (Tobias Dep., pp. 8:20-23, 9:12-22). After the meetings, minutes were posted on the County's website. (Bockman Dep., Ex. 3, 4). These public meetings familiarized the County Board members with the concepts included in the Host Agreement and the impact of that Agreement on DeKalb County should the County Board approve the Application. (Bockman Dep., Exs. 3-4).

To refer to the two presentations as "mini-hearings" infers that evidence was taken for the purpose of determining an issue of fact for making a decision based on that evidence. In fact, the presentations were made at public meetings intended to help the County Board members understand the concepts included in the Host Agreement and how that agreement would impact DeKalb County should the County Board approve the Application. (Bockman Dep., Exh. 3). The Host Agreement negotiations proceeded in accordance with the Ordinance and did not in any way render the proceedings fundamentally unfair.

b. Pre-filing host agreement negotiations are "irrelevant" to the fundamental fairness analysis.

As noted above, this Board has held that pre-filing contacts between an applicant and a

local siting authority for the purpose of negotiating a host community agreement are "irrelevant" to whether the siting hearing, itself, was fundamentally fair. *Residents I*, PCB 96-243, slip op. at 14; *Residents II*, PCB 97-139, slip op. at 7. This Board also approved such negotiations in *County of Kankakee*, in the absence of evidence that the host agreement negotiations resulted in the prejudgment of adjudicative facts. PCB 03-31, 03-33, & 03-35 (consol.), slip op. at 20. *See also Beardstown*, PCB 94-98, slip op. at 9 (approving pre-filing luncheon attended by applicant and three members of local siting authority); *Southwest Energy*, 275 Ill. App. 3d at 97, 655 N.E.2d at 312 (approving closed-door, pre-filing luncheon attended by applicant and members of local siting authority).

Petitioner admits that the two pre-filing meetings in this case occurred in the context of the Host Agreement negotiations. (Pet. Br., p. 3). Petitioner also admits, as it must, that pre-filing Host Agreement negotiations are not, "*per se*, inappropriate ... ." (*Id.*) Petitioner does not deny that pre-filing negotiations of a host agreement have been approved by this Board in both the *Residents* cases and in *County of Kankakee* and that such negotiations are "irrelevant" in the absence of evidence that the negotiations resulted in the actual prejudgment of adjudicative facts.

c. No County Board member prejudged the adjudicative facts as a result of the pre-filing Host Agreement negotiations.

Petitioner does not even attempt to demonstrate actual prejudgment of adjudicative facts as a result of the Host Agreement negotiations and its arguments must, therefore, fail. Petitioner fails to demonstrate that any information provided during the Host Agreement negotiation bore substantively on the adjudicative facts, *i.e.*, the facts necessary to satisfy the nine statutory criteria set forth in Section 39.2 of the Act. Instead, Petitioner disingenuously characterizes the meetings — without any supporting evidence whatsoever — as "mini hearings" and claims —

again without supporting evidence — that the Applicant used these meetings to discuss "details" of the expansion, and "persuade [the County Board] of the merits thereof." (Pet. Br., p. 19).

The actual evidence and testimony, however, uniformly demonstrate that the Host Agreement meetings were purely general in nature:

> Q. What type of presentation did you make?
>
> A. The presentation included the elements that later were part and parcel of the negotiations and the host agreement.
>
> Q. Did the presentation include discussion of any aspects of the proposed facility in terms of design, features, size, and operations?
>
> A. The workshop utilized, as I recall, two or three graphics to describe the existing facility, one; secondarily, a rendering of potential end uses for the facility.
>
> Q. Did you discuss any of the proposed design or operational features of the facility?
>
> * * *
>
> A. Well, certainly those items that would later be contained within the host agreement, various portions of that were described, such as the size of the facility.

(Addleman Dep., p. 9:3-22). Ruth Ann Tobias, chair of both the County Board and its Ad Hoc Solid Waste Committee, testified that the Applicant merely "told us what the extent of the operation would be." (Tobias Dep., pp. 4:21-23, 7:23 - 8:9). County Board member Paul Stoddard testified that the presentation concerned "the conclusion of the host fee negotiations." (Stoddard Dep., p. 9:14-18). County Board member Patricia Vary primarily understood the pre-filing meetings as ones in which "we [*i.e.*, the County Board] were telling them [*i.e.*, the

Applicant] what we would want if they went through with it." (Vary Dep., p. 9:21-22).[7]

The County Board members' testimony is corroborated by the minutes of these pre-filing meetings, which demonstrate the meetings' general nature. (Bockman Dep., Exs. 3 & 4). The minutes show that both meetings were primarily concerned with the Host Agreement's financial components. Waste Management made general statements regarding the proposed expansion, as it was required to do to explain the Host Agreement, but as this Board can confirm by reviewing the minutes, the general information provided can hardly be characterized as so compelling or persuasive as to have resulted in the prejudgment of adjudicative facts. Indeed, it is difficult to see how it bears on the adjudicative facts at all. Certainly, Petitioner has made no such showing.

Petitioner's argument must also fail because Petitioner has presented no evidence establishing that any County Board member prejudged the adjudicative facts as a result of the Host Agreement negotiations. Petitioner notes that County Board members asked questions that Petitioner characterizes as "substantive," but this proves nothing. (Pet. Br., p. 4). Asking a question does not equal prejudgment. While Petitioner does argue "prejudgment" generally, as discussed above, this argument does not concern the adjudicative facts and is not tied to information learned during the Host Agreement negotiations.

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[7] Petitioner omits this testimony in order to claim that "[e]ven though these presentations were made in the context of host agreement negotiations, county board member Patricia Vary remembered that they were mostly about the landfill design." (Pet. Br., p. 4). In the cited passage, Ms. Vary in fact testified:

A. [W]e were telling them what we would want if they went through with it.

Q. And were these presentations about the design and proposed operation of an expanded landfill?

A. Mostly the design.

Finally, to the extent Petitioner insists on characterizing the Host Agreement negotiations as *ex parte* contacts, it should be noted that the general information provided during the two, pre-filing meetings was later made available to the public both in the Application and in the Host Agreement.[8] (C1345-90). As stated above, the public was free to attend both of the pre-filing meetings, and to ask questions. (Pet. Br., p. 4; Tobias Dep., p. 8:20 - 9:11). Nothing in the meetings was kept from the public and nothing in the meetings resulted in the prejudgment of the adjudicative facts. Petitioner has made no showing to the contrary.

d. Petitioner's arguments are waived.

Petitioner did not move to disqualify any of the County Board members identified above during the course of the local proceedings. Accordingly, any claim of bias or prejudice on the part of said County Board members is waived. *Waste Management I*, 175 Ill. App. 3d at 1039-40, 530 N.E.2d at 695.

3. The pre-filing facility tours were expressly permitted under this Board's prior holdings and did not result in the prejudgment of the adjudicative facts.

Pre-filing facility tours of the type conducted by Waste Management have been specifically approved by this Board. Although Petitioner characterizes the tours as *ex parte* contacts, the tours occurred before Waste Management filed the Application and are not, therefore, subject to *ex parte* restrictions. Furthermore, Petitioner has not shown that the pre-filing tours provided the County Board members who attended with information bearing on the adjudicative facts, *i.e.*, the statutory criteria set forth in Section 39.2 of the Act, or that any

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(Vary Dep., p. 9:21 -10:1).

[8] The minutes of the second meeting were also made available to the public on DeKalb County's website. *See* http://www.dekalbcounty.org/Packet/09/Mar.pdf.

County Board member prejudged the adjudicative facts as a result of the tours. Finally, as noted above, any claim of bias or prejudice with respect to the pre-filing facility tours is waived.

a. Pre-filing facility tours are permissible.

As noted above, this Board has approved pre-filing facility tours. Petitioner nevertheless claims that all private facility tours "are *per se*, prejudicial ...," regardless of whether the tours occurred pre- or post-filing (Pet. Br., p. 24). In support of its contention, Petitioner cites *only* post-filing cases, in which the tours occurred in the context of an ongoing, adjudicative proceeding. *See Beardstown*, PCB 94-98, slip op. at 2, 4; *Concerned Citizens for a Better Environment v. City of Havana*, PCB 94-44, slip op. at 6; *Southwest Energy*, 275 Ill. App. 3d at 86-87, 655 N.E.2d at 306.

Petitioner simply ignores the holding of this Board in *County of Kankakee*, which distinguished *Southwest Energy* on the ground that the facility tour at issue in *Kankakee* "occurred *before* the application was filed." PCB 03-31, 03-33 & 03-35 (consol.), slip op. at 21 (emphasis in original). Petitioner suggests that this Board made its decision in *Kankakee* solely on the ground that "the record in that case did not clearly indicate whether members of the public were invited to attend the trip ...," but this suggestion is, in effect, a claim that this Board took a lack of evidence regarding public invitation as proof that the public was, in fact, invited. Given that this Board must make its fundamental fairness rulings based on a preponderance of the evidence, Petitioner's reading of the holding in *County of Kankakee* is clearly erroneous.[9]

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[9] Petitioner's reading of *County of Kankakee* would also require the landfill *opponent* to prove that the public was *not* invited on a pre-filing tour in order for the tour to render the subsequent proceedings fundamentally unfair. Taking Petitioner's reading at face value, Petitioner's argument must fail, because Petitioner has adduced no such evidence in this case. Petitioner also fails to note that the

The County Board maintains, therefore, that the pre-filing facility tours were not private, were permissible under *County of Kankakee,* and are "irrelevant" to the fundamental fairness analysis, unless they resulted in the actual prejudgment of adjudicative facts.

b. No County Board member prejudged the adjudicative facts as a result of the pre-filing facility tour.

Petitioner cannot prove actual prejudgment. First, Petitioner cannot demonstrate that the County Board received information during the tours that bears on the adjudicative facts. Petitioner, essentially, admits as much when it claims that "[w]e can never know exactly what was said, what was presented or what questions were answered." (Pet. Br., p. 23). Petitioner appears to have forgotten that it deposed both the Waste Management representative who conducted the tours and all eleven County Board members who both attended a tour and voted in favor of the Expansion.[10] Petitioner had every opportunity to learn "exactly what was said, what was presented [and] what questions were answered" — it simply has not liked the answers and so invites this Board to rule on the basis of mere speculation, instead.

The actual evidence shows that, like the Host Agreement negotiations, the pre-facility tours were general in nature and merely illustrated the concept of a working solid waste landfill. Lee Addleman, the Waste Management representative who conducted the tours, testified as follows:

County Board treated the tours as public meetings and posted notice of the tours on the County's website. *See* http://www.dekalbcounty.org/Packet/09/Aug.pdf; http://www.dekalbcounty.org/Packet/09/Sep.pdf.

[10] The County Board's opening brief inadvertently stated that ten — not eleven — County Board members both attended a pre-filing facility tour and voted to approve the Application. (County Br., pp. 28-29). The County Board unintentionally omitted John Emerson from its count and regrets the error. Mr. Emerson testified that he did not consider any facts or information that was not contained in the site location application, presented at the public hearing, or contained in any submission to the County Board in making his decision on the site location application. (Emerson Dep., pp. 13:21 - 14:3).

Q. What was the typical tour agenda?

A. At the facility?

Q. Yes.

A. Okay, the normal course of the tour started with receipt control so that individuals went into the scale house and actually saw how the trucks were logged in, their weights, the videotapes that are taken of the license plate, the driver, all of the typical considerations for security that we do at all of our sites.

Q. What's the next thing then that –

A. After that we put them back on the bus and we took them out to an active area so that they could see day-to-day operations, and in this particular case we had the good fortune to be able to view a cell under construction and a cell being capped.

* * *

Q. What was the purpose of these tours?

A. The Prairie View facility located in Wilmington, Illinois is our closest facility, it is of comparable size, of comparable daily volume, and contains the design elements that are part of the proposal in DeKalb.

(Addleman Dep., pp. 15:2-18, 16:5-10). Mr. Addleman did not testify that "various elements of the proposed expansion were discussed," as Petitioner falsely claims. (Pet. Br., p. 20).

As Petitioner's own brief demonstrates, the County Board members who attended the tours learned only generalities: that the expansion would be "similar" to the toured facility, that the toured facility was "clean," that Waste Management employees "looked like" "they knew what they were doing and were professional about the way they were going about their business," that Waste Management would construct cells in the expansion in the same way it did in the toured facility and that Waste Management would "treat garbage" in the expansion in the same way it did in the toured facility. (Allen Dep., p. 23:3-7, 25:6-13; 31:17-24, 32:19 - 33:4;

Fauci Dep., p. 20:1-5; Haines Dep., p. 15:22 - 16:2; Oncken Dep., p. 19:11-21; Stoddard Dep., p. 11:11-21).[11]

Petitioner never explains how these generalities amount to evidence of the adjudicative facts, nor does the record indicate that the County Board members were given any Application-specific or site-specific information that would assist the County Board in making a decision on the Application, which had not yet been filed, satisfied the nine siting criteria. Instead, Petitioner baldly asserts, without any further explanation or evidence, that "[t]he connection between the private tours and the evidence presented at the siting hearing is unquestionable." (Pet. Br., p. 22). Petitioner's conclusions regarding what this Board may or may not "question," however, is not a substitute for evidence.

Second, the Petitioner has not produced evidence proving that any County Board member in fact prejudged the adjudicative facts as a result of the tours. At best, one member, Marlene Allen, testified that she left the tour with "a positive impression," but this impression does not seem related to an adjudicative fact in particular, and a mere "impression" does not bespeak a mind "unalterably closed" regarding a particular adjudicative fact. (Allen Dep., p. 25:14-17).

County Board members Anita Jo Turner and Michael Haines found their tours "educational" and "informative," respectively, which proves nothing; they might very well have found themselves "educated" and "informed" in a manner that caused an initial bias *against* the Expansion, only to have that bias overcome by the substantive evidence of the adjudicative facts

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[11] Dale Hoekstra, director of operations for Waste Management and an Illinois EPA certified landfill operator, accompanied his testimony during the local siting hearing with a series of slides depicting the current operations of the Prairie View facility, *i.e.*, the same facility toured by the County Board members. (C7100-02, C7617-23). Accordingly, to the extent the County Board members who

presented in the siting hearing itself. (Turner Dep., Ex. 1; Haines Dep., p. 13:22-23). Petitioner edits Paul Stoddard's testimony to suggest that he concluded the tour with a positive impression but, in fact, Mr. Stoddard testified that "there are aspects of it I thought were good and there were some aspects that I was not as impressed by." (Stoddard Dep., pp. 11:22 - 12:4). Finally, the mere fact that Ms. Turner and Ms. Vary used what they learned on the tour to "understand" the evidence presented during the siting hearing does not mean they prejudged that evidence; "understanding" is not the equivalent of "approving" or "deciding" or "prejudging." (Turner Dep., p. 11:21-24; Vary Dep., p. 12:5-13).

Eleven of the fifteen County Board members who attended a pre-filing facility tour voted to approve the Expansion. (C8534-35). All eleven of the County Board members who both toured the Prairie View facility and voted to approve the Expansion testified that they did not consider any information or evidence not presented in the siting proceeding or contained in the siting record in making their decision to approve the Application. (Allen Dep., pp. 29:23-31:1; DeFauw Dep., p. 15:5-18; Emerson Dep., pp. 13:21 – 14:3; Fauci Dep., pp. 42:11-43:14; Haines Dep., p. 42:2-8; Hulseberg Dep., p. 18:3-15; Oncken Dep., p. 31:8-23; Stoddard Dep., p. 33:1-17; Tobias Dep., pp. 33:24-34:11; Turner Dep., p. 19:5-14; Vary Dep., p. 35:4-17).

Petitioner's assertion that each of these County Board members lied under oath by "paying lip service to having based their decision on the evidence" and by providing "self-serving, presumably rehearsed" testimony is, frankly, beyond the pale. (Pet. Br., pp. 24-25). County board members engaged in a landfill siting hearing under Section 39.2 of the Act are presumed to be objective and capable of fairly judging the particular controversy. *Waste*

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attended the tours learned any general information regarding the Prairie View facility, that general

Management I, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695. "The presumption of the validity of the actions of a public official will be overcome only where it is shown by clear and convincing evidence that the official has an unalterably closed mind in critical matters." *Fox Moraine*, PCB 07-146, slip op. at 60. Such a showing must depend on evidence of actual bias. *Residents III*, 293 Ill. App. 3d at 225-26, 687 N.E.2d at 556-57. Petitioner has not produced a scrap of evidence to suggest that *any* County Board member prejudged the adjudicative facts as a result of the pre-filing facility tour. This has not stopped Petitioner from making the very serious claim that at least ten County Board members lied under oath. Petitioner's bad faith assertion is an offense to this process and to the County Board.

Petitioner argues that the "disinterested observer" test for prejudgment outlined in *E & E Hauling I* and *Rochelle Waste Disposal, L.L.C. v. City Council*, PCB 03-218 (Apr. 15, 2004), renders the County Board members' testimony "irrelevant," but no legal authority supports that claim. (Pet. Br., pp. 24-25). A "disinterested observer" is not permitted to ignore the legal presumption of validity given to the County Board's actions or the testimony of the County Board members. Certainly, neither *E & E Hauling I* nor *Rochelle* contain any such holding. In fact, in *Rochelle*, this Board, applying the "disinterested observer" test, considered both the explanatory testimony of city council members and the presumption of validity in determining that certain statements by those members did not evidence prejudgment. PCB 03-218, slip op. at 25. The same result should apply here. The bits of innocent, out-of-context deposition testimony assembled by Petitioner cannot overcome the presumption that the County Board acted objectively and bear no weight in comparison to the County Board members' clear and

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information was presented at the public hearing. (C7759-7766).

unequivocal sworn testimony.

Finally, there is no legal support for Petitioner's claim that this Board must find the siting proceedings fundamentally unfair if the "contacts represented by these private tours may have influenced the ultimate decision." (Pet. Br., p. 24) (emphasis in original). A finding of fundamental unfairness *must* contain a finding of "actual prejudice." *E&E Hauling*, 116 Ill App. 3d at 604, 451 N.E.2d at 569. The mere possibility that a pre-filing contact *may* have influenced the ultimate outcome is not a sufficient basis for finding fundamental unfairness.

c. Petitioner's arguments are waived.

Petitioner did not move to disqualify any of the County Board members identified above during the course of the local proceedings. Accordingly, any claim of bias or prejudice on the part of said County Board members is waived. *Waste Management I*, 175 Ill. App. 3d at 1039-40, 530 N.E.2d at 695.

Pre-filing facility tours have been approved by this Board. Petitioner cannot show that the tours provided the County Board with information that bore on the adjudicative facts or that any County Board member in fact prejudged the adjudicative facts by virtue of the tours. Petitioner did not move to disqualify any of the County Board members of whom it now complains and its arguments are, therefore, waived. Petitioner's fundamental fairness argument must fail and the decision of the County Board should be affirmed.

4. Petitioner misrepresents both the facts and the law with respect to the pre-filing review of the draft application.

Section 50-54(c) of the Ordinance states "[i]n order to develop a record sufficient to form the basis of an appeal of the county board decision, the county department of health and the state's attorney's office may retain consultants on behalf of the county." C0006797. The

County Board engaged Patrick Engineering to conduct a routine pre-filing review of the draft application, specifically with respect to criterion (ii). (Burger Dep., pp. 4:23 - 6:7, 9:7-17, 10:13-23). As part of this routine review, Patrick Engineering communicated various comments and criticisms of the draft Application to Waste Management. (*Id.* at 11:13 - 12:16). Pre-filing reviews of a proposed application by a local siting authority's technical consultants have been explicitly authorized by this Board. *See Sierra Club v. Will County*, PCB 99-136, slip op. at 12 (Aug. 5, 1999); *McLean County Disposal v. Pollution Control Bd.*, 207 Ill.App.3d 477, 566 N.E.2d 26 (4th Dist. 1991); *Fairview Area Citizens Taskforce v. Village of Fairview*, PCB 89-33 (Jun. 22, 1989), *aff'd Fairview Area Citizen's Task Force v. IPCB, 198 Ill. App. 3d 541, 555 N.E.2d 1178 (1990); Material Recovery Corp. v Lake in the Hills*, PCB 93–11 (Jul. 1, 1993).

In *Sierra Club*, this Board considered a pre-filing review conducted by the Will County Board's technical staff and consultants. PCB 99-136, slip op. at 11. As in the instant case, the technical staff and consultants communicated with the applicant prior to the filing of the application in the form of written and oral comments on the draft application. *Id.* This Board held that the pre-filing review did not render the local siting proceedings fundamentally unfair for three reasons. First, the staff and consultants did not provide their report to the County Board until after the application was filed. *Id.* at 12. Second, "the County staff and consultants neither voted on the siting approval, nor participated during the Will County Board's deliberations."[12] *Id.* Third, "a consultant report or staff recommendation is not binding on the decision-maker. Therefore, even if the County Staff and consultants did not review the application with

[12] Petitioner substantially misrepresents the holding of *Sierra Club*, claiming that it forbids anyone involved in the pre-filing review from "participat[ing] in .. the siting hearing ... ." (Pet. Br., p.

objectivity, the Will County Board did not have to accept the ... Report findings." *Id.*

In this case, the pre-filing review fully conformed to the three factors identified in *Sierra Club*. Petitioner does not, and cannot, deny that the DeKalb County Staff Report, which contained the County Board's technical consultants' analysis, was not submitted until April 12, 2010 — more than four months after the Application was filed. (C0001, C7821). Petitioner does not, and cannot, suggest that the Staff Report was binding on the County Board or its members or that any person involved in the pre-filing review or the preparation of the Staff Report voted on the siting approval.

Instead, Petitioner substantially misrepresents the record to create the false impression that certain persons acting on behalf of the County Board — namely, the County Administrator, Ray Bockman, and the County Board's legal counsel, Renee Cipriano — both "actively participated" in the pre-filing review and in the County Board's deliberations. (Pet. Br., pp. 8, 26). For example, Petitioner claims that Chris Burger, the Patrick Engineering employee responsible for the pre-filing review, "testified that in the review process he reported to County administrator, Ray Bockman, and that the review also included the county board attorney, Renee Cipriano ... ." (Pet. Br., p. 7). Mr. Burger actually testified as follows:

> Q. Which County representatives were involved with Patrick in conducting the pre-filing review?
>
> A. None really. I mean, I reported to Ray Bockman, but the filing review was really housed by Patrick.
>
> Q. Did Mr. Bockman participate in the review in terms of sitting in on meetings and so forth?

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26). In fact, *Sierra Club* bars those who conducted the pre-filing review from participating in the County Board's "deliberations," *not* the siting hearing generally. PCB 99-136, slip op. at 12.

A. I had one meeting with Ray where I went over drawings, and actually Renee Cipriano had just been hired so we – I basically brought them both up to speed on the concept and tried to bring them up to speed on any issues or questions that we had on previous pre-filing documents. Ray wasn't involved with any of our discussions with Waste Management over our concepts or our observations of their documents.

(Burger Dep., pp. 9:18 - 10:9). Petitioner further claims that "Bockman testified that he participated in the prefiling review" and that he and Renee Cipriano met with Chris Burger "on several occasions." (Pet. Br., p. 8). In fact, Bockman testified as follows:

Q. Did you participate actively in the pre-filing review process?

A. No.

Q. Did you sit in on any of the meetings?

A. No.

(Bockman Dep., p. 23:11-15). Mr. Bockman further testified that he and Ms. Cipriano met with Mr. Burger "once or twice" to receive progress reports that were not, subsequently, shared with the County Board. (*Id.*, p. 24:3-13). Other than the November 20, 2009 meeting, Mr. Bockman was not involved in any discussions regarding the concepts in, or Patrick Engineering's observations of, the Application. (Burger Dep., p. 10:7-9).

Petitioner attempts to "dress up" its allegations of Ms. Cipriano's participation in the pre-filing review by claiming that she subsequently "participated" and was "actively involved in the process" of reviewing the Application once it was filed. (Pet. Br., p. 7-8). In addition to being substantially untrue, Petitioner's claim also omits that all communications between the technical staff and the Applicant had ceased prior to the post-filing review. Mr. Burger testified as follows:

Q. Subsequent to November 30th did you have any more interaction with any

Waste Management representatives, employees or consultants?

A. Not in relationship with this project.

Q. Okay. I take it then that Patrick conducted a review of the application itself after it was filed?

A. Correct.

Q. Who participated in that review?

A. Staff, under my guidance. Had a number of different people. Do you want me to list them?

Q. I don't need them all listed. Just internal staff to you, right?

A. Right.

Q. Did –

A. I'm sorry, and one subconsultant.

Q. Did Ms. Cipriano participate in that review?

A. She had a set of documents to review, I'm sure she – you know, we communicated.

Q. What do you mean she had a set of documents to review?

A. I think she had her own set.

Q. She had the application?

A. Yes.

Q. And so she was actively involved in that process with you?

A. Yes. We didn't have ongoing meetings or discuss the application until I believe just prior to the hearing.

Q. Well, I wasn't at the hearing, but did Patrick propose any questions or lines of questioning for various witnesses that Waste Management presented?

A. Yes.

Q. And did you collaborate with Ms. Cipriano on doing that?

A. Yes, yeah, just prior to the hearing.

(Burger Dep., pp. 15:2 - 16:14). Petitioner even suggests that Ms. Cipriano "was one of the principal authors of the county staff report." (Pet. Br., p. 8). In fact, Ms. Cipriano only authored the portions of that report that "dealt with some legal issues;" the technical portions, including any portions that could have been influenced by the pre-filing review communications with Waste Management, were authored by Mr. Burger. (Burger Dep., pp. 16:15 - 17:5).

Upon examination of the testimony, the scope of Petitioner's attempted deception is revealed. Neither Mr. Bockman nor Ms. Cipriano participated in the pre-filing review beyond one or two meetings in which they received progress reports. Ms. Cipriano did not participate in the post-filing review of the application other than to meet with Chris Burger immediately prior to the siting hearing to discuss potential lines of cross-examination for the Applicant's witnesses. Ms. Cipriano did not author any portion of the Staff Report other than those dealing with legal issues. Neither Mr. Bockman nor Ms. Cipriano ever participated in any technically substantive discussion or communication with the Applicant. Moreover, Petitioner does not even *attempt* to show that either Mr. Bockman or Ms. Cipriano came into possession of information not available to the public during the pendency of the siting proceedings, as would be required to constitute a true, *ex parte* contact. The suggestion that either Mr. Bockman or Ms. Cipriano participated in any impermissible contact with the Applicant, either pre- or post-filing is, simply, a fantasy.

Petitioner seemingly intentionally misquotes Mr. Bockman's testimony so as to misguide the Board into believing that Mr. Bockman advised the County Board chairman during the pre-

filing review of the Application. Petitioner claims that Mr. Bockman reported to the chairman of the county board "on a daily basis." (Pet. Br., pp. 8, 26). Mr. Bockman actually testified that he reported to the chairman on a "day-to-day" basis. (Bockman Dep., p. 5:11-13). More importantly, the line of questioning to which Mr. Bockman responded had nothing to do with pre-filing review, but rather concerned his general duties as County Administrator. Regarding pre-filing review, Mr. Bockman actually stated he did not share the "progress reports" with any County Board member. (Bockman Dep., pg. 24:8).

No evidence suggests that either Mr. Bockman or Ms. Cipriano advised the County Board on the Application's merits or otherwise participated in the County Board's deliberations. Mr. Bockman testified that he did not participate in the County Board's deliberations. (Bockman Dep., p. 67:12-15). He further testified that Ms. Cipriano's sole role in the siting proceeding was "to assist the County Board in creating a record that could form the basis of an appeal." (Bockman Dep., 68:10 - 69:13).

These facts distinguish the *Residents I* case, on which Petitioner heavily relies. (Pet. Br., pp. 25-26). In that case, Susan Grandone-Schroeder, the Director of LaSalle County's Department of Environmental Services and Land Use, participated in a series of *post-filing* meetings and fax communications between the county's and the applicant's technical consultants, in which over 150 pages of technical information were exchanged. *Residents I*, PCB 96-243, slip op. at 4, 9, 11-12. This information was never admitted into the public record. *Id.* at 12. Moreover, unlike Mr. Bockman and Ms. Cipriano, Ms. Grandone-Schroeder was "responsible for advising the board members on the merits of the application" and the information she obtained through her post-filing contacts was known to her at the time she

advised the board. *Id.* at 11-12. Finally, notwithstanding Petitioner's blithe suggestion that these communications' post-filing status "is not material" this Board found that the communications "irrevocably tainted" the process precisely because they "thwart[ed] the public hearing process." *Id.* at 12. *Residents I* is distinguishable and not controlling in this case.

In summary, the pre-filing review in this case was entirely routine. No evidence suggests that Mr. Bockman or Ms. Cipriano participated in the review in any substantive way. Moreover, neither Mr. Bockman nor Ms. Cipriano voted on the Application, participated in the County Board's deliberations or advised the County Board on the Application's merits. The suggestion that the pre-filing review constituted an impermissible *ex parte* contact is meritless. Petitioner's argument should be disregarded and the County Board's decision affirmed.

5. The only post-filing contacts took place between the Applicant and the County Administrator, not the County Board or its staff, and consisted entirely of non-substantive, administrative matters.

Ray Bockman, County Administrator, testified as follows:

Q. Between November 30th and the final decision on May 10th did you have any communication with any Waste Management representative?

* * *

A. Yes.

Q. Which Waste Management representatives did you communicate with during that period of time?

A. Mr. Adlemann [*sic*].

Q. For what purpose?

A. It was – it was administrative purposes, scheduling, logistics of the meetings, where and when they would be held, who would be present, what rooms would be used, how they would be set up and things like that.

Q. And how frequently would you communicate with Mr. Adlemann [*sic*]?

A. I would say some weeks several times a week, other weeks not at all. It tended to be more as an event approached and things needed to be discussed.

Q. Did you communicate with anyone besides Mr. Adlemann [*sic*] during this period of time?

A. No.

(Bockman Dep., pp. 56:8 - 57:8). Ms. Holmes, the DeKalb County Clerk, testified as follows:

Q. What did you do with the signup sheets that were filled out?

A. I gave them to Mr. Moran, I believe he and Mr. Bockman were there together but I couldn't be sure.

Q. And when was that in relation to when the actual public hearing occurred?

A. Probably a day or so before the public hearing, I don't know.

(Holmes Dep., p. 24:5-13).

Petitioner's suggestion that his testimony evidences prejudicial, *ex parte* communications simply beggars belief. (Pet. Br., p. 27). Petitioner claims that they are, somehow, probative of "the cumulative effects of *ex parte* communications," and cites *American Bottom Conservancy*, PCB 00-200. To the County Board's knowledge, no portion of *ABC* permits an appellant to cobble together proof of fundamental unfairness from permissible and non-prejudicial conduct.

6. The County Board did not prejudge the adjudicative facts.

a. The Expansion's financial impact on the County is not an adjudicative fact and any County Board member's consideration of that impact is, therefore, irrelevant.

The fact that DeKalb County is likely to realize an economic benefit from successful siting is irrelevant to the issue of bias or prejudgment, because it is not probative of prejudgment

of the adjudicative facts, *i.e.*, the statutory criteria set forth in Section 39.2 of the Act. *See E & E Hauling I*, 116 Ill. App. 3d at 598-99, 451 N.E.2d at 566 (adjudicative facts are "whether the particular landfill, or expansion, for which the permit is sought meets the specific factual criteria set out in section 39.2 of the Act."). Illinois law is clear: municipalities may consider such economic benefit in their siting decisions so long as they find that the statutory criteria have been met. *Fairview Area Citizens Taskforce v. Pollution Control Board*, 198 Ill. App. 3d 541, 546-47, 555 N.E.2d 1178, 1181-82 (3d Dist. 1990) ("*Fairview II*") (statements by village board members indicating that landfill would provide economic benefit to community not indicative of prejudgment of adjudicative facts). Revenue or other financial considerations are not relevant because neither the local siting authority, nor its members, will "realize and enjoy the additional potential revenues or pecuniary benefit. It is the community at large which stands to gain or lose from [the local siting authority] approving or disapproving this site." *Woodsmoke Resorts, Inc. v. City of Marseilles*, 174 Ill. App. 3d 906, 909, 529 N.E.2d 274, 276 (3d Dist. 1988) (consideration of revenues not equivalent to prejudgment of adjudicative facts). "County boards and other governmental agencies routinely make decisions that affect their revenues. They are public service bodies that must be deemed to have made decisions for the welfare of their governmental units and their constituents." *E & E Hauling, Inc. v. Pollution Control Bd.*, 107 Ill. 2d 33, 43, 481 N.E.2d 664, 668 (1985) ("*E & E Hauling II*") (County Board's consideration of landfill revenue not indicative of bias or prejudgment).

This presumption is not overcome merely because a member of the local siting authority has taken a public position or expressed strong views on a related issue. "The fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on

an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue." 415 ILCS 5/39.2(d). Public statements of county board members regarding landfills and their effects on the community are inadmissible to prove prejudgment of the adjudicative facts. *Waste Management I,* 175 Ill. App. 3d at 1040, 530 N.E.2d at 695. *See also Peoria Disposal Co. v. Pollution Control Board*, 385 Ill. App. 3d 781, 798, 896 N.E.2d 460, 475 (3d Dist. 2008) (membership in organization opposed to landfill not indicative of prejudgment).

The vast majority of the statements, e-mails and comments complained about by Petitioner are, therefore, irrelevant because they concern the financial health and well-being of DeKalb County and the expected financial impact of approving or denying the Expansion — *not* the adjudicative facts. The statements of County Board members Oncken, Fauci, Vary, Haines and Hulseberg regarding the desirability of the Expansion or the revenues derived from them, the financial impact on the community if the Application were denied, or even the past performance of Waste Management's existing landfill are simply not relevant to the issue of prejudgment, because they do not concern the adjudicative facts.[13] (Pet. Br., pp. 29-32; Oncken Dep., pp.

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[13] Petitioner argues that any statement approving of Waste Management's prior conduct in operating the existing landfill "clearly evidence" improper, *ex parte* contacts between Waste Management and the County Board. (Pet. Br., p. 29). Petitioner forgets that Waste Management had operated the landfill since 1991 and was required to re-apply to the County Board for a business license on an annual basis. (C0006; Addleman Dep., pp. 10:19 - 11:3). County Board member Riley Oncken testified as follows:

> Q. [W]hat was the basis for your conclusion that [Waste Management was] a good neighbor?
>
> A. I think just based on what I knew of Waste Management in the community. It wasn't based on any specific experience that I had had with Waste Management or any knowledge about how they had handled anything, just generally speaking

18:18 - 19:10, Exs. 1-3; Tr., pp. 50:24 - 51:5, 193:3-23; Fauci Dep., Exs. 1-2; Vary Dep., Exs. 1-2; Haines Dep., Ex. 1).

To hold otherwise would prevent the County Board from performing its legislative function or from acting in its constituents' best interests. Petitioner does not argue that the various statements regarding DeKalb County's financial difficulties are false. Instead, Petitioner argues that any consideration of those difficulties amounts to prejudgment and, thereby, prohibits the County Board from taking action that would address those difficulties. In essence, Petitioner would have this Board invade the County Board's legislative function and deliberative process and dictate to the County Board the manner in which it may address the County's economic condition. No legal authority supports such an invasion; Petitioner certainly cites none.

b. The County's need for a jail expansion is not an adjudicative fact and any County Board member's consideration of that need is irrelevant.

For these reasons, Petitioner's discussion of DeKalb County's jail expansion and related bond authorization is irrelevant. Whether the County Board or its members believed that the Expansion would provide revenues sufficient to meet other County needs is not an adjudicative fact. The County Board is entitled to weigh the County's needs and potential revenue sources as part of its legislative function. Illinois law is clear on this subject, and Petitioner cites no law to the contrary.

Petitioner also substantially misrepresents the record regarding the jail expansion and the related bond authorization, making its argument doubly meritless. For example, Petitioner

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> I think from talking to other people they had a relatively good reputation for handling things within the county and at the existing site.

(Oncken Dep., pp. 18:24 - 19:10).

claims that "the County actually identified and ear-marked those host fees [from an expanded landfill] in advance as the only feasible means for financing the jail expansion, even before the siting application was filed." (Pet. Br., p. 2). In fact, the County Board merely passed an ordinance authorizing — not requiring — the County to issue bonds for the purpose of funding a renovation and expansion of the County Jail. (DeKalb County Ord. No. 2010-05, §§ 1-2). The ordinance further provides that if the bonds are, in fact, issued, they may be repaid from one or more potential revenue sources including, but not limited to, "host community agreement fees to be paid to the County with respect to the DeKalb County Landfill currently operated by Waste Management of Illinois, Inc." (*Id.* at § 4(ii)). Nothing in the ordinance specifically refers to host fees from the Expansion, in particular.

The Chairman of the County Board's Finance Committee, Michael Haines, explained that the ordinance in question merely creates the "possibility" that the bonds would be repaid with the revenue from landfill tipping fee revenue. (Haines Dep., pp. 6:15 - 8:4). The ordinance in fact identifies two other "possible" revenue sources: sales tax receipts and United States bond subsidy payments. (Ord. No. 2010-05, § 4). Nothing in the ordinance *requires* the issuance of bonds or the collection of host fees — whether existing or future — and the passage of the ordinance does not, therefore, require or imply that the County Board must approve the Expansion. It is, simply, factually incorrect to say that the County Board had "committed or earmarked" host fees from the Expansion.

Furthermore, it is incorrect to say that the proposed Expansion represented the "only feasible" means of funding the jail expansion. Mr. Bockman's update to the Law and Justice Committee on February 22, 2010, reiterated facts widely known and understood by the County

Board members that the landfill host fee revenues were but one potential source of funding for the jail expansion.[14] County Board member Riley Oncken testified that the County could issue general obligation bonds funded by a tax increase. (Oncken Dep., p. 7:12-22). County Board member Paul Stoddard testified that, if the Expansion were not approved, the County had "alternatives:"

> one, there would be the possibility of another referendum. There would be the possibility of perhaps, the money isn't all there, but some sort of mixture perhaps of sales taxes from the County farm property which was currently anticipated to go towards the courthouse expansion. Those are not enough to cover the jail, but conceivably you could put together a package of those plus a reduced referendum. So there are other alternatives.

(Stoddard Dep., p. 15:11-21). County Board member Michael Haines testified tat pending a federal determination, a casino would open in DeKalb County representing a "significant source of revenue for the county which is nontax revenue." (Haines Dep., pp. 7:8-11, 20:16-23). County Board member Julia Fauci testified that, if the County could not locate the revenue, they would simply continue to pay other counties to receive inmates since "[t]hat's what the voters have told us to do." (Fauci Dep., pp. 23:23 - 24:4).

The record contains no evidence that the County Board approved the Application in disregard of the adjudicative facts in order to fund the jail expansion. County Board member Anita Jo Turner testified as follows:

> Q. Were you aware that the County Board needed to approve this landfill in order to get a funding source for the jail bonds?
>
> A. That is not true.
>
> Q. You don't believe that's the case?

[14] Tobias Dep. pg. 28:4-5; Stoddard Dep. pg 15:10-21; Oncken Dep. pg. 7:14-18.

A. That -- no.

Q. What's your take on the issue?

A. We -- if it was approved we could use that for that, but that was not the reason that we were approving it.

(Turner Dep., pp. 14:16 – 15:1).

Even if the County had "committed" the Expansion host fees — which it did not — this Board has held that such actions do not amount to prejudgment. In *Gallatin National Co. v. Fulton County Board*, PCB 91-256 (June 15, 1992), Fulton County itself operated an existing landfill. PCB 91-256, slip op. at 2. When the county sought to expand that landfill, the county board created a committee to hear the county's application. *Id.* at 4-5. To fund both the committee's proceedings and the expansion application's preparation, the county board issued bonds to be repaid from the expected revenue generated by the expansion. *Id.* Thus, the county board had explicitly committed the expansion revenue before the county had even prepared, much less filed and held a siting hearing on, an application. This Board held that the bond issuance did not indicate prejudgment of the siting application, because the bond issuance did not concern the adjudicative facts: "[t]he County Board was not faced with the same issues in issuing bonds as are raised by an application for site approval. There is no indication in the record that the County Board's vote to grant siting approval was based upon the bonds rather than the six applicable criteria of Section 39.2." *Id.* at 18.

c. <u>The remaining, alleged statements of various County Board members are not evidence of prejudgment of adjudicative facts</u>.

"The fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude

the member from taking part in the proceeding and voting on the issue." 415 ILCS 5/39.2(d). Petitioner cannot overcome this rule of law with vague, and disputed, allegations regarding off-the-cuff remarks by County Board members.

For instance, one member of the public, Ms. Paulette Sherman, claimed that during a break in the local hearings County Board member Riley Oncken said "I don't know why all of these people are here. We've already made up our minds."[15] (Tr., p. 18:8-24). Ms. Sherman admitted that Mr. Oncken's statement did not clarify to whom or what he was referring. (*Id.* at 30:8 - 32:9). Mr. Oncken testified that he never made any statement to the effect that he had made up his mind or that any other County Board member had made up his or her mind. (*Id.* at 198:2-8; C7114-15). He also testified that he did not decide how to vote on the Application until shortly before the ultimate vote and did not consider any evidence outside of the record in making that decision. (Tr., p. 198:12-18).

Even if the statement had occurred, it would not prove prejudgment. When faced with claims of prejudgment, this Board has considered decisionmaker's statements made on the record at the local level. *See Peoria Disposal*, 385 Ill. App. 3d at 799, 896 N.E.2d at 476. Relying in part on Mrs. Sherman's allegation, Petitioner's representatives orally moved to terminate and dismiss the local siting hearings. (C7113). Mr. Oncken immediately addressed the issue on the record stating:

> To be absolutely clear, I have not made a decision on Waste Management's application to expand the landfill in DeKalb County until all of the evidence is presented and I have an opportunity to review the testimony and evidence which has been given. I am in no position to judge the merits of the application and whether Waste Management has met its burden of proof on the nine criteria. I

[15] Petitioner's claim that Mac McIntyre "overheard" Mr. Oncken's statement is false. (Pet. Br., p. 32). Mr. McIntyre, in fact, testified that he "heard those statements secondhand." (Tr., p. 69:12-17).

> have and will continue to judge the evidence impartially, fairly and without bias or prejudice of any kind.

(C7114-15). On May 10, 2010, the day of the County Board's vote on the Application, Mr. Oncken again explained his understanding of the role of the decisionmaker in a siting appeal:

> The law in this situation is very clear. We must set aside our personal feelings, prejudices, opinions, and render an opinion based solely on the evidence presented. Just as a jury swears they will fairly and impartially render a verdict based on the information presented without any inside information or outside information, so must we ... . Certainly as the proposed facility is in my district – and I have heard from many citizens about their concerns and objection – it would be politically smart for me to vote against this .... To do so in this situation would disregard the law and would compromise my integrity.

(C8504-05).

Mr. Oncken's understanding of his obligations is accurate and his statements on the record not only refute Ms. Sherman's allegation, but, also, show that he was prepared to and did in fact make a fair and unbiased decision on the Application at a political cost to himself.

Similarly, Petitioner claims that County Board member Julia Fauci stated, in the summer of 2009, that the expansion of the landfill was "pretty much a done deal." Ms. Fauci's statement was, in fact, much more nuanced. Ms. Fauci testified:

> A. [I]t was after the host fee agreement had been voted on that I saw [Dan Kenney] at the Jewel grocery store ... and he asked me, he said what does it look like, you know, how do you think it's going. And we had just almost unanimously voted for the host fee agreement ... . And I said, well, it looks like everybody's voted for the host fee agreement, in my mind looks like everybody's feeling pretty positive about it ... .
>
> Q. As a matter of fact didn't you say, Dan, it looks like it's a done deal?
>
> A. Something to that effect, it just looked positive. I might have used those words but in the sense – I don't know if I used those or not, but I thought things were going pretty well.

(Fauci Dep., pp. 12:7 - 13:8). As her testimony makes clear, Ms. Fauci was making a statement of opinion regarding the County Board's overall mood, not a statement that any particular County Board member had prejudged a particular adjudicative fact.

The remaining statements identified by Petitioner are even less substantive. The statement of County Board member Anita Jo Turner which Mac McIntyre claims to have heard appears to be nothing more than the ordinary deliberation of County Board members charged with assessing evidentiary testimony. (Tr., pp. 66:23 - 68:7). County Administrator Ray Bockman's alleged statement appears to be nothing more than an understandable joke, given Mr. McIntyre's opposition to the landfill. (*Id.* at 68:20 - 69:4). In any case, Mr. Bockman did not vote on the Application or participate in the County Board's deliberations. (Bockman Dep., p. 67:9-15).

County Board member Steve Walt's e-mail merely informed a constituent, accurately, that the time for public comment had passed. (Walt Dep., Ex. 1). Mr. Walt was, apparently, unimpressed by that particular constituent's public comments, cross-examinations, and testimony (she had been permitted to participate by the hearing officer and had asked to be sworn as a witness, as well), which could accurately be characterized as lengthy, off-topic and rambling, but Mr. Walt made clear that he only took issue with that one, particular person. (*Id.* at 12:6-13; C7057-59, C7066, C7241, C7318-21, C7346-48, C7356-59, C7477-83). Petitioner, however, unfairly edits Mr. Walt's testimony to create the false impression that he was hostile to public participation generally. (Pet. Br., p. 33). Mr. Walt, in fact, testified that "[i]t didn't appear to me that the purpose of the hearings was for some wing nut to bloviate about how they thought things

should be done, *nor were the hearings set up so I could bloviate about how I thought it should be done.*" (Walt Dep., p. 11:16-21) (emphasis added). He further testified:

Q. So you were disgusted pretty much with that whole hearing process?

A. With who?

Q. The hearing process.

A. No, with her.

(Walt Dep., p. 12:6-10). To claim that this testimony evidences hostility towards the public or prejudgment of the adjudicative facts is a misrepresentation at best. In fact, County Board members handled their responsibility as decisionmakers professionally despite threats from Petitioner's members to vote County Board members out of office if the members voted in favor of the Application. (C0008082-83; Wilcox Dep. pp. 34:3-9, 54:23-55:24).

Petitioner's claim that the County Staff Report "ignored STMD as an objector" is also false. (Pet. Br., pp. 10, 33). The Staff Report did, in fact, identify the five registered, individual objectors who appeared on behalf of Petitioner, recognized the post-hearing briefs described below and examined the witness testimony provided by the objectors. (C7825, C7849-50). Petitioner itself did not file a post-hearing brief, as Petitioner claims. (Pet. Br., p. 33). Instead, two post-hearing briefs were filed by individual objectors, Mac McIntyre and Dan Kenney, who gave conflicting information regarding their affiliation, identifying themselves as a "member of the citizen group Stop the DeKalb County Mega-Dump" and "the chair of the citizens' group Stop the DeKalb Mega-Dump," respectively. (C7796, C7806).

Finally, there is simply no basis for Petitioner's claim that the County Staff Report did not "consider" any public comments. (Pet. Br., pp. 10-11, 33). The Staff Report did, in fact,

note the substance of the public comments as well as the County's receipt of a petition in opposition to the Expansion with 148 signatures. (C7825-27, C8340-41). The public comments were entered into the record. (C7884-8056). It is also true, as a matter of law, that public comments are not given the full weight of evidence. 35 ILL. ADMIN. CODE 101.628(c) ("Written statements submitted without the availability of cross-examination will be treated as public comment ... and will be afforded lesser weight than evidence subject to cross-examination."). *Rochelle*, PCB 03-218, slip op. at 10 (Apr. 15, 2004) ("The public comments submitted by interested persons from the surrounding community at the local level and at the Board level are evidence in the record properly considered by the decision-making body. But, these public comments are entitled to less weight than is sworn testimony subject to cross-examination.") Nothing in the staff report suggests, however, that the post-hearing report submitted by the Applicant received undue weight in comparison with the other public comments, as Petitioner claims. (Pet. Br., pp. 11, 33). In fact, the Staff Report responds to numerous oral and written comments made by members of the public, including members of the Petitioner. (C8285, C8289, C8292-95, C8298, C8308, C8316, C8324).

Petitioner has clearly raised every conceivable issue it can imagine, yet it cannot prove prejudgment. Petitioner attempts to cobble together an argument from out-of-context statements, mis-cited law and a very free hand with the facts but, in the end, Petitioner's argument amounts to nothing more than a fantastical, but imaginary, conspiracy theory. Petitioner's prejudgment arguments should be disregarded and the County Board's decision should be affirmed.

7. Petitioner has waived any argument regarding the post hearing briefing schedule and was not prejudiced in any event.

Petitioner has cited no authority for the proposition that hearing participants must be afforded at least thirty days, *i.e.*, until the close of the statutory public comment period, to file a post-hearing brief, and the County Board is aware of none. Indeed, Petitioner has cited no authority granting participants the right to file a post-hearing brief at all, and the County Board is aware of none. In fact, this Board has held Section 39.2 of the Act does not "create a right to respond to a public comment ... ." *Sierra Club*, PCB 99-136, slip op. at 9.

Furthermore, neither Petitioner, its representatives, nor any other landfill opponent objected to the post-hearing briefing schedule. (C7513-14). When the hearing officer asked if the proposed post-hearing briefing schedule was acceptable, the only objector who spoke was Clay Campbell, who agreed that the schedule was "fine." (*Id.*) Petitioner's argument is, therefore, waived. "[A] failure to object at the original proceeding constitutes a waiver of the right to raise an issue on appeal." *Waste Management I*, 175 Ill. App. 3d at 1039-40, 530 N.E.2d at 695.

Dan Kenney filed his post-hearing brief on April 7, 2010 — five days late — but his brief was accepted by the County Board. (C7806). Mac McIntyre filed his post-hearing brief on April 5, 2010 — three days late — but his brief was accepted by the County Board. (C7796).

In summary, there is no basis to conclude that the proceedings below were fundamentally unfair. Those proceedings were fundamentally fair and the County Board's decision to approve the Expansion should be affirmed.

II. THE COUNTY BOARD'S APPROVAL OF THE SITING APPLICATION WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The County Board reasonably relied upon the evidence and testimony provided during the siting hearing and the materials submitted during the public comment period in reaching its decision that the Application satisfied the nine statutory criteria identified in Section 39.2 of the Act. The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

Although Petitioner's original Petition for Review raised issues with respect to criteria (i), (ii), (iii), (v) and (vi), Petitioner's Opening Brief only discusses the County Board's findings with criteria (i), (ii) and (vi). Accordingly, any arguments regarding criteria (iii) and (v) are waived. "[T]hose issues [that were] raised by a petition but have not been argued by a petitioner are waived." *American Bottom Conservancy v. City of Madison*, PCB 07-84, slip op. at 4 (Feb. 21, 2008).

A. Standard of Review - "Manifest Weight of the Evidence"

It is well-settled that a county board's decision to grant or deny siting approval can only be reversed if the decision is contrary to the manifest weight of the evidence. *Waste Management of Illinois, inc. v. Pollution Control Board*, 160 Ill. App. 3d 434, 441-42, 513 N.E.2d 592, 597 (2d Dist. 1987) ("*Waste Management II*").

Petitioner bears the burden of proof on an appeal to this Board. 415 ILCS 5/40.1(b). In determining whether a decision is against the manifest weight of the evidence, it is not sufficient that a different conclusion may be reasonable. *Wabash & Lawrence Counties Taxpayers & Water Drinkers Ass'n v. Pollution Control Board*, 198 Ill. App. 3d 388, 392, 555 N.E.2d 1081, 1085 (5th Dist. 1990). A decision is against the manifest weight of the evidence *only* if the

opposite conclusion is clearly evident, plain or indisputable. *Worthen v. Roxana*, 253 Ill. App. 3d 378, 384, 623 N.E.2d 1058, 1062 (5th Dist. 1993).

When reviewing a decision under the "manifest weight of the evidence" standard, the reviewer may not re-weigh evidence and may not re-assess the credibility of witnesses. *Id.* It is the sole province of the hearing body to weigh the evidence, resolve conflicts in testimony and assess the credibility of witnesses. *Tate v. Pollution Control Board*, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989). Merely because the hearing body could have drawn different inferences and conclusions from the testimony is not a basis for reversal. *File v. D & L Landfill, Inc.*, PCB 90-94 (Aug. 30, 1991). If there is any evidence which supports the County Board's decision and the County Board could reasonably have reached its conclusion, its decision must be affirmed. *Id.*

Petitioner argues that this Board should take a more active role in landfill siting cases and may re-weigh the evidence presented below. (Pet. Br., p. 34; *citing Town & Country Util., Inc. v. Illinois PCB*, 225 Ill.2d 103, 120 (2007); *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill.2d 191, 205 (1998)). *City of Belvidere*, in fact, addresses the standard of review under the Illinois Public Labor Relations Act, 5 ILCS 315/1, *et seq.*, and is not applicable in this matter.

Furthermore, the Board and Third District appellate court have recently rejected the suggestion that *Town & Country* has changed the Board's standard of review on the criteria in landfill siting appeals. Peoria Disposal, 385 Ill. App. 3d at 799, 896 N.E.2d at 476; Fox Moraine, PCB 07-146 (Oct. 1, 2009). In Fox Moraine, the petitioner argued that Town & Country was an invitation for the Board to conduct a technical review of the record to determine

whether the record supported the local siting decision. *Fox Moraine*, PCB 07-146, slip op. at 67. In response, the Board held:

> The decision in Town & Country made clear that the Board's decision is reviewed by the appellate court in a siting appeal; however, the Illinois Supreme Court did not disturb the existing case precedent on siting appeals. The Board's position is shared by the appellate court in Peoria Disposal, where the applicant argued that Town & Country changed the standard by which the Board reviews the local siting decision. The appellate court rejected that argument. Peoria Disposal, 385 Ill. App. 3d at 800, 896 N.E.2d at 477. The precedent is well-settled that the Board reviews the local siting decision to determine if that decision is against the manifest weight of the evidence.

Id. The Board, accordingly, reaffirmed that the Board uses its wealth and breadth of technical expertise to review local siting decisions on the statutory criteria under the longstanding manifest weight of the evidence standard.

B. Criterion (ii) - Protection of Public Health, Safety and Welfare

The County Board found that the Expansion satisfies criterion (ii). The County Board's decision on criterion (ii) was not against the manifest weight of the evidence and should be affirmed.

Section 39.2(a)(ii) of the Act requires that an applicant for local siting approval demonstrate that the proposed facility "is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii). This criterion requires a demonstration that the proposed facility does not pose an unacceptable risk to the public health and safety. *Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board*, 227 Ill. App. 3d 533, 546, 592 N.E.2d 148, 157 (1st Dist. 1992). It does not, however, require a guarantee against any risk or problem. *Clutts v. Beasley*, 185 Ill. App. 3d 543, 541 N.E.2d 844, 846 (5th Dist. 1989). The determination of whether a proposed facility satisfies criterion (ii) is

purely a matter of assessing the credibility of expert witnesses. *Fairview II*, 198 Ill. App. 3d at 552, 555 N.E.2d at 1185.

Petitioner argues that the proposed design, location and operation of the Expansion raises three health and safety concerns: (1) groundwater impacts, (2) hydrogen sulfide emissions, and (3) seismic events. Petitioner has produced no evidence demonstrating that the County Board's determination with respect to criterion (ii) is against manifest weight of the evidence and has not demonstrated that an opposite conclusion is clearly evident, plain or indisputable. The County Board's determination was not against the manifest weight of the evidence and should be affirmed.

1. There is no evidence of leaking at the North Area.

Petitioner presented no evidence demonstrating that the North Area of the existing landfill is leaking or that the Expansion presents an issue of groundwater impacts. Furthermore, any evidence of problems with the existing landfill is entitled to little weight in the context of evaluating the Expansion.

Andy Nickodem, a civil engineer employed by Golder Associates and specializing in the design of landfills and other solid waste facilities, testified that there is "no evidence" of leakage at the North Area. Specifically, he stated that "[t]here's groundwater mills [*sic*] around the site and in the undifferentiated a Lacustrine unit, which is the upper zone, and there's no evidence that the north area is leaking." (C6880). The County Board weighed this testimony and found it to be credible.

Joan Underwood testified regarding the hydrogeologic features of the site, and explained "why the ground water immediately east of the North Area has been impacted sufficiently to

warrant a State mandated ground water management system if the North Area is not leaking." (Pet. Br., p. 37). Ms. Underwood testified as follows:

Q. Is there a groundwater management zone associated with the north area?

A. There is a groundwater management zone on the east side kind of towards the south that was placed there because of some gas impacts.

Q. Some gas impacts?

A. Yes?

Q. So there was some kind of gas leak or something on the north area?

A. No. From – it would be from the old area, but it moved towards the east.

(C7216-17). The County Board weighed Ms. Underwood's testimony and found it to be credible.

Petitioner's criticism of Ms. Underwood's local groundwater flow depiction misunderstands the distinction between regional groundwater flows, which develop within regional-scale (miles to tens of miles) topographical systems and which have the deepest and longest flow paths, and local flow systems, which have short, shallow flow paths and develop due to undulations in the ground surface. (Pet. Br., p. 37; C191-94). There is no inherent inconsistency in drawings that depict long, deep, regional groundwater flow paths traveling from west to east while, at the same time, some short, shallow, local groundwater flow paths traveling in the opposite direction. Petitioner presents no evidence to suggest otherwise.

The supplemental County Staff Report addressed Petitioner's concerns regarding the absence of a groundwater impact assessment. The report explained that Petitioner's concerns were related to the potential groundwater impact after the minimum 30-year post closure care period — 76 years after the Expansion's opening. (C8344). The report concluded that the

inward hydraulic gradient at the site was likely to protect the surrounding aquifers from leachate and that there was no reason to believe that a groundwater impact assessment would suggest otherwise. (C8344-45). The report also noted that the proposed overlay liner system to be built over the existing landfill exceeds Illinois regulatory requirements and will reduce leachate generation in the existing portions of the landfill. (C8298).

The County Board did not defer any portion of the public health, safety and welfare determination to the IEPA. (Pet. Br., p. 38). While the supplemental County Staff Report noted that the IEPA would ultimately require a groundwater impact assessment prior to issuing a permit for the Expansion, the Report concluded that the evidence of record indicates that the results of such an assessment will support permitting. (C8345). This is unlike *County of Kankakee*, in which the applicant's design was shown to be based on an inaccurate assumption regarding the surrounding geologic features and the applicant, relying on this inaccurate assumption, failed to properly measure the potential vertical flow of contaminants. PCB 03-31, 03–33, & 03-35 (consol.), slip op. at 27. In that case, the city sought to approve the application with a special condition requiring the applicant to demonstrate to the IEPA that the site would not result in the vertical flow of contaminants. *Id.* In short, the city sought to "paper over" the applicant's proven failure to supply the city with the necessary evidence of public safety by requiring the applicant to supply the evidence to the IEPA instead. In the present case, however, there is no proven failure of the Applicant to supply necessary evidence of public safety, as the supplemental County Staff Report confirms.

Petitioner's remaining criticisms are merely speculative. For instance, no expert testified to the need for soil borings through the North Area or explained what additional, probative

evidence they would have produced. (Pet. Br., pp. 37-38). In fact, Ms. Underwood testified it would be bad practice to drill borings through the liner of the North Area. (3/4/10 Tr. at 102). Furthermore, no expert testified that the slug test data identified by Petitioner, or any other data, for that matter, established that the geologic setting of the Expansion is "precarious" or that the subsurface material will result in the rapid movement of ground water and/or a rapid migration of contaminants. (Pet. Br., p. 38). Petitioner's conclusions to the contrary appear to be nothing more than the unsupported speculation of Petitioner's counsel. Such conclusions and speculations cannot substitute for evidence or expert testimony.

Finally, a review of the record suggests that Mr. Nickodem failed to understand the "leaking landfill" question asked of him. (Pet. Br., p. 39). Mr. Nickodem had already testified that there was no evidence of leakage in the North Area. (C6880). When Mr. Kenney asked Mr. Nickodem if "expanding over a leaking landfill is a good idea" the questioner was, clearly, assuming facts not in evidence. (*Id.*) Mr. Nickodem appears to have answered the question as if the questioner had asked whether it was a good idea to expand over an "existing landfill." (*Id.*)

Although there is no evidence of leaking in the North Area, any such evidence, if it existed, would be entitled to little weight in the current siting proceedings. This Board has held that evidence of past problems with an existing facility "may be relevant to an enforcement action" but "the weight of this information is diminished in the context of evaluating the design and operational aspects of [a] proposed facility." *Hediger v. D & L Landfill, Inc.*, PCB 90-163, slip op. at 12 (Dec. 20, 1990) (affirming local siting approval of vertical expansion of existing landfill).

The County Board reasonably relied on the testimony and evidence presented by the Applicant, Andy Nickodem and Joan Underwood. Petitioner has not demonstrated that the County Board's determination with respect to criterion (ii) is against manifest weight of the evidence and has not demonstrated that an opposite conclusion is clearly evident, plain or indisputable. The County Board's determination was not against the manifest weight of the evidence and should be affirmed.

2. There is no evidence of an ongoing hydrogen sulfide problem at the existing landfill.

Petitioner has presented no evidence that the existing landfill has an ongoing hydrogen sulfide problem. (Pet. Br., p. 39). Even if it had, such evidence would be entitled to little weight in the context of evaluating the Expansion.

Dale Hoekstra testified that, although Waste Management had detected hydrogen sulfide at the existing landfill in 2008, steps were taken to identify and remedy the source of that emission and hydrogen sulfide has not been detected at the existing landfill since those steps were taken. (C7098-99). The County Board weighed this testimony and found it to be credible. Furthermore, as noted above, evidence of past problems with an existing facility are diminished in the context of evaluating a proposed facility. *Hediger*, PCB 90-163, slip op. at 12.

There is no evidence that the existing landfill suffers from an ongoing hydrogen sulfide problem. Environmental Monitoring and Technologies, Inc. ("EMTI") conducted, at the Applicant's request, an air monitoring program during one week of the public comment period. (C7850, C7931-61). Of the 588 air samples collected over that week, only one had any detectible trace of hydrogen sulfide. (C7850, C7932, C7938-61). The single detection was found at a concentration 2,500 times lower than the federally-enforceable standards promulgated

by the Occupational Health and Safety Administration and EMTI was unable to confirm the presence of hydrogen sulfide in follow-up sampling. (C7850, C7932). The County Board weighed this evidence and found it to be credible and persuasive. The County Board reasonably relied upon the reports of EMTI and the County Staff.

The testimony of lay individuals regarding the landfill's odor is insufficient to prove the presence of hydrogen sulfide. Mr. Hoekstra testified that a variety of natural gases, including methane in combination with other gases, could produce a similar smell, although he could understand why parents would wish to have the source of the smell identified. (C6891). At no point did Mr. Hoekstra testify that parents should be concerned regarding hydrogen sulfide at the site or that such a concern was justified by the facts, as Petitioner disingenuously suggests. (Pet. Br., p. 40). The fact that natural gas emissions could produce an odor similar to that of hydrogen sulfide also explains County Administrator Ray Bockman's and County Board Chair Ruth Ann Tobias' statements regarding a "methane" odor at the site as well as any statement by Waste Management regarding the composition of the odorous gas. (Bockman Dep., Ex. 5; Tobias Dep., p. 20:12 - 21:11). The County Staff Report noted that Waste Management had taken steps, in 2008 and 2009, to increase the capture of methane gases and that "the odors reportedly have ceased to be a problem." (C7848).

The County Board weighed these test results of Dr. Aubrey Serewicz and found that it did not prove the existence of ongoing hydrogen sulfide emissions at the existing landfill. Although Dr. Serewicz testified that, if one can smell hydrogen sulfide, the concentration level is already harmful, his testimony was presented without reference to the scientific literature and County Staff, after researching the available scientific literature related to hydrogen sulfide

toxicity, was unable to find any support for Dr. Serewicz's claim. (C7399-400, C7402, C7849-50). Moreover, Dr. Serewicz acknowledged that he had not reviewed the Application and, therefore, was not in a position to render an opinion as to whether the Expansion satisfied criterion (ii). (C7461).

Because of the hydrogen sulfide detection in 2008, the County Board elected to impose a condition on the siting approval requiring the Applicant to put in place a monitoring program to detect hydrogen sulfide at the site perimeter on an ongoing basis. (C7851, C8539-40). The imposition of this condition is irrelevant to whether the Expansion satisfies criterion (ii). Indeed, the Act specifically authorizes local siting authorities to grant siting approval subject to such conditions: "[i]n 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 and as are not inconsistent with regulations promulgated by the Board." 415 ILCS 5/39.2(e).

Contrary to Petitioner's claims, the County Board's imposition of the condition does not constitute an implicit finding that the Expansion fails to satisfy criterion (ii). (Pet. Br., pp. 40-41). Rather, the County Board elected to impose the condition in accordance with its authority under the Act. "Conditions can be imposed 'to accomplish the purposes' of section 39.2 which means that local authorities can impose 'technical' conditions on siting approval." *County of Lake v. Pollution Control Bd.*, 120 Ill. App. 3d 89, 99, 457 N.E.2d 1309, 1315 (2d Dist. 1983). If Petitioner's argument were credited, no local siting authority could ever condition approval of a siting application, since the imposition of such a condition would "automatically" mean that

the proposed facility failed to meet one of the statutory criteria. There is no legal support for this interpretation of Section 39.2.

The County Board reasonably relied on the testimony and evidence presented by the Applicant and Mr. Hoekstra, as well as the reports of EMTI and the County Staff. Petitioner has not produced evidence demonstrating that the County Board's determination with respect to criterion (ii) is against manifest weight of the evidence and certainly has not demonstrated that an opposite conclusion is clearly evident, plain or indisputable. The County Board's determination was not against the manifest weight of the evidence and should be affirmed.

3. There is no evidence to suggest that the Expansion is not designed to withstand seismic events.

Petitioner has presented no evidence, that the Expansion is not designed to provide sufficient protection for the public health, safety and welfare in the event of a seismic impact.

Petitioner presented no evidence proving that the United States Geological Survey raised the peak acceleration standard at the site location during the Application's pendency. (Pet. Br., p. 41). The supplemental County Staff Report stated that staff was unable to confirm this reclassification. (C8343). The County Board reasonably relied upon the County Staff Report in reaching its decision.

In addition to the above, the County Board reasonably relied on the evidence described in the County Board's opening brief. (County Br., pp. 8-10). The County Board reasonably reached its conclusion that the Application satisfied criterion (ii) and an opposite conclusion is not clearly evident, plain or indisputable. The County Board's determination was not against the manifest weight of the evidence and should be affirmed.

C. Criterion (i) - Need

The County Board found that the Expansion satisfied criterion (i). The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

Section 39.2(a)(i) of the Act requires that an applicant for local siting approval demonstrate that the proposed facility "is necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i). This criterion requires that the applicant show that a facility is "reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with any other relevant factors." *Waste Management of Illinois, Inc. v. Pollution Control Bd.*, 122 Ill. App. 3d 639, 645, 461 N.E.2d 542, 546 (3d Dist. 1984) ("*Waste Management III*"). The applicant need not show absolute necessity. *Waste Management of Illinois, Inc.*, 123 Ill. App. 3d 1075, 1084, 463 N.E.2d 969, 976 (2d Dist. 1984) (hereinafter "*Waste Management IV*"). Petitioner mis-cites these cases to suggest that an Applicant must demonstrate an "urgent" need for the new facility.

Petitioner's argument is based on a misreading of *Waste Management IV*. In that case, the court was called upon to construe the holding of *E & E Hauling I*. *E & E Hauling I* had stated:

> The use of 'necessary' in the statute does not require applicants to show that a proposed facility is necessary in absolute terms, but only that the proposed facility is 'expedient' or 'reasonably convenient' *vis-a-vis* the area's waste needs. It would be unreasonable to require petitioners to prove that every other potential landfill site in the region is unsuitable; such a construction would prevent any landfill development if more than one suitable site could be found. This construction of the statute should be avoided as unworkable and implausible.

116 Ill. App. 3d at 609, 451 N.E.2d at 573 (citations omitted). The *Waste Management IV* court, in interpreting this language, stated:

> [a]n expedient is defined as "a means devised or used in an exigency" thereby connoting *an element of urgency* in the definition of need. (Webster's New Collegiate Dictionary 399 (1979).) Reasonable convenience also requires a petitioner to show more than convenience. Recently, the third district of our appellate court defined this higher level of proof as a showing that the landfill be reasonably required by the waste needs of the area including consideration of its waste production and disposal capabilities.

123 Ill. App. 3d at 1084, 463 N.E.2d at 976 (citing *Waste Management III*, 122 Ill. App. 3d at 645, 461 N.E.2d at 546) (emphasis added). The *Waste Management IV* court did not, therefore, require that a siting applicant show an "urgent need" for the proposed facility. Instead, it required only a showing that the facility is "reasonably required."

Thus, the County Board reasonably relied upon the testimony of Sheryl Smith in determining that the Application satisfied criterion (i). Petitioner claims that Ms. Smith's testimony was insufficient because she did not "consider urgency in her approach," but, as noted above, the Applicant is not required to demonstrate an "urgent" need for the new facility. (Pet. Br., pp. 44-45).

Moreover, Petitioner misrepresents the holding of *Waste Management I* when it suggests that a new facility may never be found necessary when existing available capacity exceeds nine years. In that case, the applicant's expert had determined that there existed nine years of available waste capacity in the service area. The court affirmed the local decision-maker's finding that the expert had failed to consider significant additional capacity that was or would soon be available. *Waste Management I*, 175 Ill. App. 3d at 1033-34, 530 N.E.2d at 691. The court was careful to reject the type of test proposed by Petitioner, stating that "[n]either the Act

nor case law suggests that need be determined by application of an arbitrary standard of life expectancy of existing disposal capacities."

Petitioner's remaining criticism of Ms. Smith's testimony was weighed by the County Board and rejected. Ms. Smith was aware of the most recent capacity report from the Illinois Environmental Protection Agency and had incorporated its findings into her report and, nevertheless, found that the Expansion was "reasonably required." (C7004-05, C7838). The County Board reasonably relied upon this evidence.

The County Board also rejects Petitioner's suggestion that Ms. Smith is inherently biased because she has testified in favor of siting applications in those instances in which her analysis led her to conclude that the applications would satisfy criterion (i) and testified against siting applications in those instances in which her analysis led her to conclude that they would not. Expert witnesses are expected to testify only to those conclusions that they are able to support through their own analyses. The County board weighed Ms. Smith's credibility and reasonably found her to be unbiased.

The County Board found that the Expansion is reasonably required by the waste needs of the area intended to be served in reaching its conclusion that the Application satisfied criterion (i) and an opposite conclusion is not clearly evident, plain or indisputable. The County Board's determination was not against the manifest weight of the evidence and should be affirmed.

D. Criterion (vi) - Traffic Patterns

The County Board found that the Expansion satisfies the sixth statutory criterion. The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

Section 39.2(a)(vi) of the Act requires that the applicant establish that "the traffic patterns to or from the facility are so designed as to minimize the impact on traffic flows." 415 ILCS 5/39.2(a)(vi). "The operative word in the statute is 'minimize.' It is impossible to eliminate all problems." *Fairview II*, 198 Ill. App. 3d at 554, 555 N.E.2d at 1186.

The County Board reasonably relied upon the testimony of David Miller and his accompanying traffic study. Contrary to Petitioner's suggestion, Mr. Miller did consider the traffic impact of farm vehicles. Mr. Miller testified that the use of farm vehicles was not constant year-round and that farm vehicles did not pose a significantly different challenge to traffic flows than trucks or other, similar vehicles. (C7270-71). Mr. Miller also testified that the Applicant had committed to paying the expense of building a left-turn lane into the site in order to remove trucks bound for the site from the flow of southbound traffic and to create a wider area for traffic flow. (C7271). Moreover, the County Staff Report noted that the largest one-way traffic impact to a single route from the Expansion would be less than five vehicles in the peak hour, with a maximum average of 1 to 2 vehicles per hour throughout the day, and that this additional traffic "will not impact the current flow of agricultural traffic ... ." (C7869).

Petitioner also misrepresents the record with respect to the impact of the Expansion on school-related traffic. Although the new Cortland Elementary School had not yet opened at the time Mr. Miller performed his study of current traffic, his study did count traffic from the old Cortland Elementary School. (C7335, C7360-61). Mr. Miller noted that the new school would replace the old school and, therefore, would not generate any additional traffic in the study area. (C764). Mr. Miller's traffic counts for 2013, the year the Expansion would enter operation, included school traffic expected to be associated with new Cortland Elementary school. (C7259-

60, C7360-61). In order to provide a conservative analysis, Mr. Miller also assumed that the old school would be replaced with a similar use. (C764, C7868). Accordingly, the County Board reasonably relied on Mr. Miller's testimony and accompanying report.

The County Board also notes that Petitioner supplies no evidence in support of its conclusion that "schools and farm traffic are the two most significant traffic elements in rural communities." (Pet. Br., p. 45).

In addition to the above, the County Board reasonably relied on the evidence described in the County Board's opening brief. (County Br., pp. 16-17). The County Board reasonably reached its conclusion that the Application satisfied criterion (vi) and an opposite conclusion is not clearly evident, plain or indisputable. The County Board's determination was not against the manifest weight of the evidence and should be affirmed.

CONCLUSION

The proceedings below were fundamentally fair. There were no *ex parte* contacts between the Applicant and the County Board and all pre-filing contacts were entirely routine and did not result in prejudgment. Petitioner's entire fundamental fairness argument is based on speculation, innuendo and outright misrepresentations of the record and the law. Indeed, Petitioner continues employing those tactics right through to the end. Petitioner claims, without a shred of supporting evidence, that the County Board and the Applicant "talked at length and in detail about the proposed expansion" during the Host Agreement negotiations and the pre-filing facility tour (Pet. Br., p. 46). Yet, twenty-three pages earlier, Petitioner claimed that "[w]e can never know exactly what was discussed" in these contacts. (Pet. Br., p. 23). Petitioner identified exactly *one* County Board member who testified that she left the facility tour with "positive

impression," but now claims that "they *all* generally testified that they were impressed with the WMII tour." (Pet. Br., pp. 21, 46) (emphasis added). Petitioner's willingness to play fast and loose with the facts truly knows no bounds.

There is no basis for this Board to credit Petitioner's prejudgment arguments with respect to any County Board members but, even if it did, those arguments would provide no basis for either remand or reversal. The County Board approved the Expansion by a sixteen-to-eight vote, yet Petitioner arguably preserved its prejudgment argument with respect to only two County Board members who voted to approve. (C7113-15, C7550-51, C8535). Accordingly, even if those two County Board members were disqualified prior to the County Board's vote to approve, the result of the vote would be the same. It is fundamental that this Board will not reverse on fundamental fairness grounds unless the Petitioner has, in fact, been harmed. A local siting proceeding is only "fundamentally unfair" if the manner in which it was conducted resulted in actual prejudice. *E&E Hauling I*, 116 Ill App. 3d at 604, 451 N.E.2d at 569. Petitioner was not harmed in this case.

Finally, the County Board reasonably relied upon the evidence and testimony provided during the siting hearing, as well as the materials submitted during the public comment period and the County Staff report in reaching its determination that the Expansion satisfied the nine statutory criteria set forth in Section 39.2 of the Act. The County Board reasonably reached its conclusion and an opposite conclusion is not clearly evident, plain or indisputable. The County Board's determination was not against the manifest weight of the evidence and should be affirmed.

Respectfully submitted,
THE COUNTY BOARD OF DEKALB COUNTY,
ILLINOIS

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