BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PROTECT WEST CHICAGO, Petitioner, v. CITY OF WEST CHICAGO, WEST CHICAGO CITY COUNCIL and LAKESHORE RECYCLING SYSTEMS, LLC, Respondents.	)	PCB 23-107 (Third-Party Pollution Control Facility Siting Appeal)
PEOPLE OPPOSING DU PAGE ENVIRONMENTAL RACISM, Petitioner, v. CITY OF WEST CHICAGO and LAKESHORE RECYCLING SYSTEMS, LLC, Respondents.	)	PCB 23-109 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

OPENING BRIEF OF
PEOPLE OPPOSING DU PAGE ENVIRONMENTAL RACISM

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I. INTRODUCTION

The City of West Chicago ("the City") was wrong to conditionally approve Lakeshore Recycling Systems' ("LRS") proposed waste transfer station because the City refused to even consider facts in the record showing the proposal would add unhealthy air pollution to a majority-minority town already experiencing unhealthy levels of air pollution. The Pollution Control Board ("Board") should reverse the City's decision and clearly instruct municipalities and regulated industries throughout the state that the local siting process under 415 ILCS 5/39.2 must include consideration of both *who* will be affected by a proposed pollution control facility and *how* those effects may combine with existing sources of pollution. While the City's erroneously narrow view of section 39.2 may be business as usual in local siting proceedings, it cannot remain as such because it serves as a structural mechanism that allows the concentration of environmental harms in Illinois' most vulnerable populations.

This appeal of the City's decision to grant LRS conditional approval to site a new waste transfer station at 1655 Powis Road in West Chicago was timely initiated by a Petition for Review filed by People Opposing Du Page Environmental Racism ("PODER") with the Board on March 31, 2023.[1] See Pet. For Review, PCB 23-109. PODER registered as a party in the City's hearing on LRS's application and members of PODER will be adversely affected by the City's conditional approval of the application. Pet. for Review at 2–3. PODER is a proper party to bring this appeal.

II. STATEMENT OF FACTS

PODER is a committee of Immigrant Solidarity Du Page ("ISD"), a community organization dedicated to "educating and organizing Du Page County around the rights and the collective struggles of the Latino community." Hr'g Tr. at 30, Sep. 28, 2023. PODER advocates

[1] On April 12, 2023, LRS filed a motion to consolidate this appeal, PCB 2023-109, with another petitioner's, Protect West Chicago, appeal of the same siting decision, PCB 2023-107. That motion was granted on May 18, 2023.

for a healthier and safer environment within Du Page County, particularly in West Chicago, where members of PODER reside. *Id*. at 31, 46–47. PODER is a grassroots group without in-house or regular legal counsel. R. at 6094–95.[2] PODER is comprised of citizens who care deeply about addressing pollution in their community and are committed to organizing in response to threats to the welfare of West Chicago. R. at 6199. PODER seeks to educate the public on and take steps to address West Chicago's history of dangerous pollution, such as the four Superfund sites in town contaminated with radioactive pollution related to the operations of the Kerr-McGee Corporation and predecessor companies. R. at 6202–04. PODER is also concerned with development in West Chicago that brings additional truck traffic into the community. R. at 3169–70.

West Chicago is a majority-minority community in Du Page County. R. at 4240. The most recent census data shows West Chicago's population as 48.9% Hispanic or Latino and 52.7% of residents over the age of five speak a language other than English at home. *Id.* These data stand in stark contrast to statistics on Du Page County as a whole, where only 15% of residents are Hispanic or Latino and 28.4% of residents over five speak a language other than English at home. *Id.* Atop the ethnic and linguistic differences between West Chicago and the rest of the county, the median household income is over $15,000 lower in West Chicago than it is in Du Page County. *Id.*

Pre-Hearing Timeline

On Mexican Independence Day, September 16, 2022, LRS filed an application with the City proposing to expand its existing recycling facility at 1655 Powis Road into a larger municipal waste transfer station. R. at 1, 8. LRS's application included 1,929 pages of reports and exhibits. R. at 1–1929. None of those materials were provided in Spanish.

[2] Record citations are indicated herein with "R." and the page numbers referenced are the page number of the PDF document filed by the City as the "Record of Proceedings" filed on April 18, 2023, in this matter. The "R." page numbers used herein correspond directly to the City-stamped page numbers in the Record, which are the same as the number referenced here with the addition of the letter "C" and leading zeros (i.e. page R. 6094 is stamped C006094).

Immediately, members of PODER were concerned about the proposed facility. LRS's application included materials purporting to show how the proposed facility would comply with each of the criteria listed in 415 ILCS 5/39.2 ("section 39.2"). R. at 1–1929. LRS's Criterion (ii) report contained no discussion about emissions from trucks traveling to or from the proposed facility. LRS's Criterion (i) report touted certain generalized environmental benefits, asserting that the proposed waste transfer station will benefit the entire 640 square-mile service area. R. at 57 (defining "Service Area"), 62–64. Though the two-page section of its report was titled "Reduce Environmental Impacts to the City of West Chicago and the Area," the information LRS provided addressed only reduced truck mileage to and from others the Batavia and Greenwood transfer stations. *Id.* There was no information on how the proposed facility would affect West Chicago as distinct from the broader "Service Area." *Id.* While the Criterion (i) report claimed the proposed facility would reduce truck traffic, it did not consider *where* in the broader Service Area that reduction would occur. *Id.* In fact, LRS's Criterion (vi) report stated that the expanded facility would increase the number of trucks entering and exiting the facility in West Chicago. R. at 1130. However, neither the Criterion (vi) report nor any other portion of LRS's application addressed how the increase in local traffic would necessarily increase harmful diesel emissions from those additional trucks. All of this was especially concerning in light of the proximity of the proposed facility to the DuKane waste transfer station operated by Groot Industries, Inc. less than half a mile away, which already draws a significant amount of truck traffic into West Chicago. R. at 79, 4256.

Members of PODER were also concerned about the timing of the public hearing on LRS's application. On September 19, 2022, three days after the application was filed, two members of PODER, Mr. Steve De La Rosa and Ms. Julieta Alcántar-Garcia, attended a West Chicago City Council meeting and voiced concerns that the public hearing would be scheduled during the

Christmas holidays. R. at 5992. As Ms. Alcántar-Garcia highlighted in later testimony, many West Chicago residents "have many family obligations" related to the Feast of Our Lady Guadalupe beginning in early December "and [are] either travel[ling] or are hosting." Hr'g Tr. at 50, Sep. 28, 2023. At a November 7, 2022, City Council meeting, Ms. Alcántar-Garcia raised objections to the proposed facility based on its potential impacts on public health. R. at 6002.

After PODER and others raised concerns about the timing of the hearing, on December 12, the City Council set the hearing to begin in January 2023. R. at 6007. The City hired Mr. Derke Price as the Hearing Officer. R. at 1932. On December 23, PODER registered as a party to appear at the hearings. R. at 6094–95. At this point, PODER had no legal counsel in this matter, indicating "pending" in the portion of the registration form asking for the party's counsel of record. *Id.* At some point before the hearing, there was a pre-hearing conference between the parties and the Hearing Officer. R. at 2432. PODER was not included at this meeting. R. at 3241.

Before the hearing, Michael Guttman, West Chicago's City Administrator, emailed the City Council to inform them that he had translated some text on the City's website about the LRS application from English to Spanish. Hr'g Tr. at 198, Sep. 28, 2023; PWC Ex. M-13. That text was entitled "City's Role in the Transfer Station Review Process." PWC Ex. M-13. Mr. Guttman "oversee[s] the entire functions of West Chicago City government" and played a large role in coordinating the City's response to LRS's application. Hr'g Tr. at 144, Sep. 28, 2023. He described his decision to translate the document as a "preemptive measure" because the hearing procedures described in the document "might be of interest … to residents of the community … who would want to see it in Spanish." Hr'g Tr. at 199–200, Sep. 28, 2023. He considered this a "strategic" decision because "[i]f calls were to come and the English version was only up there, [the City]

would be behind the eight ball trying to translate it." Hr'g T. at 199, Sep. 28, 2023. He took no other steps to translate the application materials into Spanish or provide translation at the hearings.

Initial Hearing Sessions

Seven hearing sessions were held, beginning on January 3 and concluding on January 19. R. at 1930–2706. PODER initially participated in the hearings without representation by legal counsel. R. at 1956. On January 10, PODER acquired representation from Robert Weinstock of the Northwestern Pritzker School of Law's Environmental Advocacy Center. R. at 2588.

On January 10, in response to an objection by counsel for LRS to evidence introduced by Protect West Chicago ("PWC"), the Hearing Officer informed the parties that he was excluding all evidence related to "environmental justice" from the hearing. R. at 3097–98. The particular evidence offered by PWC, which was admitted into the record as an offer of proof, described how the truck routes proposed by LRS would draw traffic into areas that the Illinois Environmental Protection Agency ("Illinois EPA") had identified as "area[s] of EJ concern." R. at 4134. The evidence also described how the "clustering and disproportionate siting of noxious facilities in low-income communities and communities of color" had led to the creation of the environmental justice movement. R. at 4145; *see also* R. at 4133–4175.

When asked by counsel for PODER to clarify the scope of his ruling, the Hearing Officer refused to do so. R. at 3099–3100. He stated that neither the Illinois EPA nor the state legislature had "well defined" environmental justice. R. at 3100. He continued, "if you read the IEPA website, I don't understand what they think they are getting [at]." *Id.* When asked by counsel for PODER to confirm that, in his view, "[environmental justice] testimony is outside the scope of Criterion 2 reference to public welfare and public health," the Hearing Officer responded, "[y]es." R. at 3101.

Throughout the hearing, PODER attempted to facilitate public access so that other West Chicagoans could understand the LRS proposal. On January 12, counsel for PODER inquired with the Hearing Officer about whether six members of the public could give oral public comment despite failing to pre-register before the hearing began on January 3. PODER PCB Ex. 1 at 2. The Hearing Officer, citing the City's ordinance governing the siting of pollution control facilities, denied those residents the opportunity to give oral public comment. PODER PCB Ex. 1 at 1; *see also* R. at 5972 (ordinance on siting of pollution control facilities).

During the January 12 hearing, Mr. De La Rosa, who was representing PODER without counsel during that session, raised concerns about the lack of English-to-Spanish translation at the hearing. He told the Hearing Officer, "we have no Spanish language translation here for people from the community in a minority-majority community that have an interest in this along with the rest of the people of West Chicago." R. at 2868. The Hearing Officer did not address this concern and no translation services were provided. R. at 2868–69.

On January 16, PODER, now with counsel, again raised the issue of the lack of interpretation. Mr. Weinstock explained that PODER's witness Ms. Alcántar-Garcia was being "forced to participate" in English "without the aid of Spanish interpretation at any point in the process," even though English was not her first language. R. at 3160. Again, the Hearing Officer did not respond to this concern and took no action with respect to translation services.

PODER's Testimony

On Martin Luther King Jr. Day, January 16, the Hearing Officer allowed PODER to present testimony. R. at 3157. PODER offered testimony from two members, Mr. De La Rosa and Ms. Alcántar-Garcia. R. at 3157–3243. Each testified about public health concerns they had about LRS's proposed facility under Criterion (ii). Ms. Alcántar-Garcia addressed air quality issues in

West Chicago. R. at 3161–3218. Mr. De La Rosa, relying on his professional background and certifications, presented concerns about indoor air quality and the lack of a designated safety officer at the proposed facility. R. at 3218–43.

Ms. Alcántar-Garcia focused on concerns about air quality in West Chicago, specifically how additional diesel truck traffic associated with LRS's proposed facility might harm residents' health. Ms. Alcántar-Garcia presented factual evidence on current truck traffic and air quality data that she had collected outside of two facilities in West Chicago, the existing LRS facility at 1655 Powis Road and the nearby Groot facility. R. at 3175–80, 3195–3201. Both facilities currently draw diesel truck traffic to the area, which will increase if LRS's application is approved. R. at 2004–05, 4255–56. Ms. Alcántar-Garcia testified that she stood outside those two facilities and counted trucks entering and exiting. R. at 3170–3180, 4255–56. Ms. Alcántar-Garcia also described how she used a commercially available, portable air quality monitor, a HabitatMap AirBeam, to record the level of pollutants outside of the facilities. R. at 3185–3201, 4257. To collect the data, she recorded basic information like air temperature, and then simply switched the app on and, when prompted, switched it off. R. at 3187. She had been trained to operate the device by Mr. Jeffrey Gahris, a Forest Preserve Commissioner for Du Page County and followed all instructions provided by the manufacturer. R. at 3188.

While presenting the data collected and exported by the AirCasting application associated with AirBeam, counsel for PODER asked the Hearing Officer to take administrative notice of a fact sheet produced by the U.S. Environmental Protection Agency ("U.S. EPA") that describes the health-based air quality standards set by that agency as National Ambient Air Quality Standards ("NAAQS") under the Clean Air Act. R. at 3203, 6322. The Hearing Officer refused to take notice of U.S. EPA's factual description of NAAQS—which set at 12 micrograms per cubic meter the

public-health based air quality standard for Particulate Matter 2.5—because the document also discussed a proposed rulemaking and contained "environmental justice stuff." R. at 3204. Counsel for PODER clarified that the request was to take administrative notice only of the way the agency described the existing, codified NAAQS, but the Hearing Officer refused. R. at 3204–05.

Ms. Alcántar-Garcia stated she collected air quality data outside of the LRS facility on eight separate days; on four of those days, the data automatically output from the AirBeam monitor showed that the average level of Particulate Matter 2.5 ("PM 2.5") exceeded 12 micrograms per cubic meter. R. at 4257. Similarly, during the five days that Ms. Alcántar-Garcia stood outside the Groot facility and turned the monitor on, the average levels of PM 2.5 automatically output from the monitor exceeded 12 micrograms per cubic meter on three of those days. *Id.*

Counsel for PODER asked Ms. Alcántar-Garcia what that data meant to her as "someone who lives in West Chicago, who is active in the community." R. at 3201. Following an objection by LRS, the Hearing Officer prevented Ms. Alcántar-Garcia from answering. R. at 3202. The Hearing Officer stated that he "just did a search," – apparently during Ms. Alcántar-Garcia's testimony – and decided that none of her testimony was "scientifically relevant." *Id.* Furthermore, the Hearing Officer stated that she was "not qualified to talk about how polluted the air is based on an app," and that Ms. Alcántar-Garcia's value at the hearing was "as a mom." R. at 3202–03.

Post-Hearing Timeline & Submissions

Following the hearing, the Hearing Officer asked the parties to submit Proposed Findings of Fact and Conclusions of Law ("Proposed Findings") by February 21, 2023. R. at 3336. February 18, 2023, was the deadline for public comments. *Id.* Per West Chicago's ordinance governing the proceeding, written public comments "shall be mailed or delivered to the West Chicago City Clerk." R. at 5970; *see also* R. at 6163 (pre-hearing notice published).

PODER timely submitted Proposed Findings to the Hearing Officer in accordance with his instructions, arguing that LRS failed to demonstrate the proposed facility met Criteria (ii) and (viii), and that the hearing was fundamentally unfair to both PODER and the public. R. at 6309–43. In particular regard to Criterion (ii), PODER argued LRS had failed to carry its burden to show that its proposed facility would protect the public from air pollution associated with the increase in diesel truck traffic that LRS projected. R. at 6318–25. Additionally, PODER suggested that the City Council could mitigate these air quality concerns by imposing a condition requiring LRS to utilize electric vehicles. R. at 6325–28. PODER also timely submitted a written public comment to the City Clerk, which described the history of environmental injustice in West Chicago, for the City Council to consider in its deliberations. R. at 6199–215.

On February 18, 2023, counsel for LRS emailed two documents to the Hearing Officer and stated, "[t]hese are filed by LRS as post hearing public comment." PODER PCB Ex. 2a at 4–5. The first document was a letter from Canadian National Railway addressed to LRS's consultant and hearing witness, Mr. John Hock. R. at 6195. The second was a letter from another LRS hearing witness describing a study on land use compatibility and real estate impact conducted at LRS's request; this letter included a response to testimony given in opposition to LRS's application during the hearing. R. at 6196–98. Both documents were submitted to the Hearing Officer rather than the City Clerk, in contravention of West Chicago's ordinance. PODER PCB Ex. 2a at 4–5. The documents were considered as public comment by the Hearing Officer. R. at 6010. Although these documents were originally submitted as "post-hearing public comment," the City included these documents as "BRIEFS, ARGUMENTS AND STATEMENT OF PARTIES AND PARTICIPANTS." Certificate of Record on Appeal at 14–15.

On February 24, the Hearing Officer issued a report to the City which recommended granting siting approval to LRS with conditions. R. at 6008–38. The Hearing Officer did not include any mention of air pollution concerns his report's Criterion (ii) analysis. On February 27, the City Council met in a closed session to consider the record and consult with its attorney and the Hearing Officer. R. at 6005. According to the City, no final decision was made during this session. Hr'g Tr. at 217, Sep. 28, 2023. The following day the City Council met in an open session and adopted an ordinance approving LRS's siting application with conditions and incorporating the Hearing Officer's report in full. R. at 6039–84. The City ordinance also failed to address air pollution concerns. The following table summarizes arguments PODER presented in its Proposed Findings, followed by the Hearing Officer's response (or lack thereof), and the City Council's findings (or absence of findings) as to each argument:

Table 1: Consideration of PODER's Arguments by the Hearing Officer and City Council

	PODER's Findings of Fact and Conclusions of Law	**Hearing Officer's Report**	**City Council Ordinance**
Consideration of environmental justice	"[T]he needs and sensitivities of the specific public of West Chicago will necessarily impact how future harms from LRS's proposed expansion will be borne by that community. … Criterion 2 must include an evaluation of environmental justice considerations." R. at 6333.	Ruled that environmental justice is "irrelevant." R. at 6009.	No mention of environmental justice.
Increased diesel emissions and air pollution	"By failing to address local air quality impacts of additional diesel truck traffic in West Chicago … in the context of actual information regarding existing local air quality, LRS has failed to offer any evidence as to a crucial dimension of the public health." R. at 6324.	No mention of air pollution in the Criterion (ii) analysis. In the criterion (i) analysis, found that there was no "competent evidence to contradict" the overall emissions savings. R. at 6019.	No mention of diesel truck emissions.

Conditioning approval on the adoption of electric trucks	"Switching to an all-electric fleet of garbage and container trucks could alleviate some of the air pollution that would otherwise be caused by … [the] proposed expanded facility." R. at 6325.	Found that the evidence showed that "the technology does not exist to require the Applicant to use an exclusively electric-powered fleet of vehicles." R. at 6021.	No mention of electric trucks.
Employee safety at the proposed facility	"LRS did not include any information that specifically addressed the health and safety of the workers in the proposed facility." R. at 6328.	Found that there was no evidence that the applicant's plan "did not comply with the applicable OSHA regulations." R. at 6021.	No mention of employee safety.
Consistency with Du Page County's Solid Waste Management Plan	"[T]he intent of Du Page County in its SWMP is clear …: any additional waste transfer stations should be located so as best to serve the southern portions of Du Page County." R. at 6336.	Did not address PODER's argument. Held that because the county had approved a host agreement with LRS, the proposed facility is consistent with the plan. R. at 6026.	No specific mention. ("The Applicant has demonstrated that the proposed Facility meets Criterion 8"). R. at 6041.

This appeal timely followed. Pet. for Review, Mar. 31, 2023.

III. STANDARDS OF REVIEW

PODER raises three distinct arguments, each of which the Board must consider under a specific standard of review. PODER's first argument, that the City misinterpreted Criterion (ii), is a question of law that the Board must review *de novo*. PODER's second argument, that the City approved LRS's application despite LRS not carrying their evidentiary burdens on Criteria (ii) and (viii), must be reviewed under a manifest weight of the evidence standard. PODER's third argument, that the City proceedings were fundamentally unfair, is reviewed by the Board *de novo*.

A. Questions of Statutory Interpretation Must be Reviewed De Novo.

Statutory interpretation is a question of law reviewed *de novo* by a higher court on appeal. *Accettura v. Vacationland, Inc.*, 2019 IL 124285, ¶ 11. In pollution control facility siting appeals under section 40.1, the Board reviews challenges to the local siting authority's decision and must

interpret the law for itself, applying a *de novo* standard for questions of statutory interpretation. 415 ILCS 5/40.1 (West 2023). Applying a *de novo* standard of review means that the Board owes no deference to the legal judgments of the City or its Hearing Officer.

PODER challenges the City Council's implicit interpretation of section 39.2(a)(ii) ("Criterion (ii)"), as reflected in the findings and recommendations of the City's Hearing Officer that were either incorporated into the ordinance granting LRS conditional approval or simply ignored in the written record of the City Council's decision. R. at 6042. "While…the hearing officer is not the decisionmaker, where the decisionmaker adopts the findings as its own, the report does become an important part of the record". *Waste Management v. Village of Rockdale,* Ill. Pollution Control Bd. Op. 16-54, 16-56 (consol.) at 29 (April 21, 2016). The City erroneously read Criterion (ii) as excluding consideration of existing environmental and demographic conditions when evaluating whether the proposed facility is so "located" to "protect" "public health." Reviewed *de novo*, the Board should apply a correct reading of the statute and, therefore, reverse.

B. Whether the Applicant Met its Burden Under Section 39.2(a) is a Fact Question Evaluated Using the Manifest Weight of the Evidence Standard.

The Board independently evaluates the record created by a local siting authority on questions of fact related to statutory criteria to determine if each criterion is met in light of the manifest weight of the evidence. *File v. D & L Landfill, Inc.*, 219 Ill. App. 3d 897, 901 (1991). The Board should apply its own technical expertise when reviewing the record to determine if it agrees with the local siting authority's decision. *Town & Country Utilities, Inc. v. Illinois Pollution Control Board,* 225 Ill. 2d 103, 123 (2007) (confirming Board decision reversing local siting authority finding that applicant had met Criterion (ii)). If the Board finds that any one of the City's findings as to any one of the statutory criteria was against the manifest weight of the evidence, that "is sufficient to defeat an application for site approval." *Id.* at 109.

PODER challenges the City's finding that LRS demonstrated the proposed pollution control facility meets Criteria (ii) and (viii). If the Board determines that the City Council's findings on Criteria (ii) or (viii) were incorrect, viewing the manifest weight of evidence, then it must reverse the City's approval. LRS did not meet its burden under Criterion (ii) to show that the public of West Chicago would be protected from cumulative air pollution and LRS's proposed location in West Chicago is inconsistent with the Du Page County Solid Waste Management Plan under Criterion (viii).

C. The Fundamental Fairness of the Local Siting Authority Process Is Reviewed *De Novo.*

On appeal of a decision under section 39.2, the Board "shall include in its consideration … the fundamental fairness of the procedures used by [the City Council] in reaching its decision." 415 ILCS 5/40.1(a) (West 2023). When the Board conducts a fundamental fairness review, it is not constrained by the record of the underlying proceedings because relevant evidence is often extraneous to the siting authority's record. *Fox Moraine*, 2011 IL App (2d) 100017, ¶ 58. Accordingly, the Board applies a *de novo* standard to questions of fundamental fairness. *Village of Fairmont City v. Village of Caseyville*, Ill. Pollution Control Bd. Op. 15-65, 15-69 (consol.). at 21 (Dec. 18, 2014). If the Board determines the process was fundamentally unfair, it must overturn the City's determination regardless of the propriety or impropriety of the decisions made evaluating the statutory criteria in section 39.2(a). *Southwest Energy Corp. v. Illinois Pollution Control Board*, 275 Ill. App. 3d 84, 91 (1995).

PODER argues that the City's process was fundamentally unfair for three reasons. First, the City failed to provide translation services despite knowing of the need for translation in West Chicago. Second, the Hearing Officer improperly impeached PODER's witness and excluded relevant testimony. And third, the City applied procedural rules unequally, to LRS's benefit.

IV. A PROPER INTERPRETATION OF SECTION 39.2(a)(ii) REQUIRES CONSIDERING EVIDENCE OF CUMULATIVE AND DISPARATE IMPACTS.

When an applicant proposes to site a facility, Criterion (ii) provides that local siting approval "shall be granted only if … the 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) (West 2023). West Chicago expressly puts the burden on the applicant to demonstrate compliance with the criterion. R. at 5972 (subsection (g)).

Criterion (ii) imposes a broad and site-specific standard, which requires an applicant and local siting authority to consider, among other things: (1) how the facility will affect existing environmental conditions or contribute to existing cumulative burdens of pollution where the facility is proposed to be "located" ("cumulative impacts") and (2) how the facility will impact the health of the particular "public" that will be effected, including impacts disproportionately imposed on protected classes of people or vulnerable groups ("disparate impacts"). An applicant cannot show that its proposed facility is "located" such that the "public health, safety, and welfare will be protected" unless these considerations are addressed in the application. A local siting authority cannot lawfully grant siting approval without taking these considerations into account.

Both the City and the Hearing Officer wrongly interpreted the language of Criterion (ii) to exclude these considerations, which are sometimes described as dimensions of "environmental justice." "Environmental justice" is commonly defined to include an assessment of cumulative impacts and disparate impacts as described above, but these descriptors are not limited to the term of art "environmental justice"—the phrases simply encapsulate ways a facility can impact public health. U.S. EPA defines "cumulative impacts" as "the totality of exposures to combinations of chemical and nonchemical stressors and their effects on health, well-being, and quality of life outcomes." U.S. EPA, EPA/600/R-22/014a, *Cumulative Impacts Research: Recommendations for*

EPA's Office of Research and Development at vii (2022).[3] U.S. EPA describes "disparate impacts," that violate civil rights laws, as occurring when a regulatory decision "disproportionately subject[s] persons to adverse health, environmental, and/or quality of life impacts on the basis of race, color, or national origin." U.S. EPA, *Environmental Justice and Civil Rights in Permitting: Frequently Asked Questions* at 10 (2022).[4] These considerations are within the scope of asking of whether "public health, safety, and welfare will be protected." 415 ILCS 5/39.2 (West 2023).

During the City's hearing on LRS's application, on January 16, 2023, the Hearing Officer stated that he was excluding all evidence related to "environmental justice." R. at 3096–97. The Hearing Officer did not define "environmental justice" and refused to explain the scope of his ruling, even upon the request of the parties that he do so. R. at 3099–101. In his report to the City Council, the Hearing Officer further stated, again without definition, that "environmental justice related issues" were "irrelevant" to the siting process. R. at 6009. The City Council incorporated the Hearing Officer's report in full and did not otherwise address the topic of environmental justice in the ordinance conditionally approving LRS's application. R. at 6042; *supra* Table 1.

The City and the Hearing Officer's incorrect interpretation of the scope of Criterion (ii) was a basis for the conditional approval of LRS's application. LRS presented *no* evidence on how the proposed facility would protect the public from adverse health effects related to the cumulative and disparate impacts of its anticipated increased diesel truck pollution. Without addressing such significant dimensions of public health impacts, the application should have been denied.

[3] https://www.epa.gov/system/files/documents/2023-05/CUMULATIVE%20IMPACTS%20RESEARCH-FINAL%20REPORT-EPA%20600-R-22-014A%20%2812%29.PDF
[4] https://www.epa.gov/system/files/documents/2023-05/CUMULATIVE%20IMPACTS%20RESEARCH-FINAL%20REPORT-EPA%20600-R-22-014A%20%2812%29.PDF

A. Criterion (ii) Requires Consideration of Potential Cumulative Impacts of a Proposed Facility on the Community Where it is to be Located.

The plain language of Criterion (ii) includes consideration of potential cumulative impacts of a facility on the public. In other words, it requires an applicant and local siting authority to consider how environmental burdens associated with a proposed facility will affect public health, safety, and welfare in combination with environmental burdens from other sources and in light of existing environmental conditions.

To construe the meaning of a statute, start with its plain language. *People ex rel. Devine v. $30,700 U.S. Currency*, 199 Ill.2d 142, 150 (2002). Absent statutory definitions, statutory language is given its "plain and ordinary meaning." *Town & Country*, 225 Ill. 2d at 117. Words can be understood in their ordinary, everyday meanings unless context indicates a more technical meaning is imposed. *Dep't of Public Works & Buildings v. Wishnevsky*, 131 Ill. App. 2d 702, 704 (1971), *aff'd*, 51 Ill. 2d 550 (1972). When construing a statute, effect is given to the intent of the legislature by considering the statutory language, the reason and necessity for the law, the evils to be remedied, and the purpose to be obtained. *People v. Haywood*, 118 Ill. 2d 263, 271 (1987).

This section explains that the plain meaning of "public health, safety and welfare" indicates that the legislature intended Criterion (ii) to require a consideration of relevant existing characteristics of the community in which a facility is proposed to be sited. Additionally, the plain meaning of the words "located" and "will be protected" indicate the legislature intended Criterion (ii) to encompass existing environmental conditions and environmental burdens a community already endures. Other provisions of the Environmental Protection Act ("Act") bolster this interpretation of Criterion (ii) because they also include consideration of cumulative impacts in broad language. Finally, beyond the ordinary meaning, the legislative history of the Act supports including cumulative impacts analysis in the existing scope of section 39.2(a)(ii).

i. *The plain meaning of "public health, safety, and welfare" encompasses a consideration of cumulative impacts.*

Criterion (ii)'s plain and ordinary meaning requires consideration of cumulative impacts on the community in which a facility will be located. The phrase "public health, safety, and welfare" in Criterion (ii) is not defined explicitly in the Act. The Act contains no individual statutory definitions for the words "public," "health," "welfare," or "safety." "Public health, safety, and welfare" is best understood as a broad and flexible phrase that requires a site-specific assessment within the proposed facility's geographic and demographic context. Each proposed facility will raise different issues and concerns and the local siting authority is "equally within its statutory authority to base its rejection of a site on similar technical criteria" if the proposed facility presents a "a potential health hazard to the surrounding community." *McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency,* 154 Ill. App. 3d 89, 101 (1987).

1. *The plain meaning of "public health, safety, and welfare" is broad and flexible.*

The phrase "public health, safety, and welfare" is best understood as a unified phrase that encompasses a wide variety of factual considerations, including cumulative impacts, that may relevant in a particular siting decision. Although it is best understood as an overarching phrase, looking at the individual words in the phrase clarifies its broad scope. Here, it is appropriate to employ a dictionary to ascertain the plain and ordinary meaning of the undefined language of section 39.2(a). *See People v. Beachem*, 229 Ill. 2d 237, 244–45 (2008). Health, safety, and welfare are all abstract nouns that are context specific. Black's Law Dictionary (4th ed. 1968) defines "health" as: "[s]tate of being hale, sound, or whole in body, mind or soul, well being … [f]reedom from pain or sickness." That dictionary also defines "welfare" as "[w]ell-doing or well-being in

any respect; the enjoyment of health and common blessings of life…." *Id.* These words could encompass a variety of issues and harms, like poor air quality, that might face the public.

Additionally, this phrase "public health, safety, and welfare," and variations, are employed throughout the Act in contexts that demonstrate the legislature uses the phrase to be broad and context dependent.[5] Reading "public health, safety, and welfare" as a broad, contextual phrase is also consistent with the body of case law interpreting Criterion (ii). No case is identical to another when it comes to what specific evidence is presented by an applicant or otherwise relevant under "public health, safety, and welfare."[6] Regardless of how these cases turned out, the evidence presented is context dependent. In each example, different harms or issues might be relevant to the Criterion (ii) analysis, depending on the context surrounding a proposed facility. The plain meaning of "public health, safety, and welfare" is not limited to harms that exist in isolation from one another—such an interpretation is inconsistent with words that by definition include types of harm that interact with other causes and can only be understood in context.

Requiring that an applicant demonstrate its proposed environmental impacts will not harm public health when they are added to existing pollution—*i.e.*, requiring that cumulative impacts be considered—under Criterion (ii) does not require overruling any prior cases or changing the law.

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[5] *See* 415 ILCS 5/8 (West 2023) (finding air pollution constitutes a menace to *public health and welfare*); *Id.* § 2 (finding hazardous wastes threatens to *public health, safety and welfare*); *Id*. § 3.545 (finding water pollution is harmful to *public health, safety and welfare*); *Id*. § 9.4 (finding that air pollution from municipal waste incineration may constitute a threat to *public health, welfare* and the environment); *Id*. § 9.5 (finding *public health and welfare* may be endangered by the release of toxic contaminants into the air); *Id*. § 20 (finding excessive quantities of waste and improper methods of waste disposal is a hazard to *public health and safety*); *Id.* § 25b–1 (finding that emissions of toxic chemicals are a chronic threat to *public health*).

[6] *See, e.g., Will County v. Village of Rockdale*, 2018 IL App (3d) 160463, ¶¶ 65–71 (analyzing evidence about traffic from queuing trucks and stormwater flooding and runoff); *Timber Creek Homes, Inc. v. Illinois Pollution Control Bd.*, 2015 IL App (2d) 140909-U, ¶ 2 at 3 (analyzing evidence about noise, visibility, pests, and odor) (cited as example, not precedent, per Supreme court Rule 23); *Fox Moraine*, 2011 IL App (2d) 100017, ¶¶ 94–103 (analyzing evidence about leachate, landfill gas, stormwater monitoring, wells); *E & E Hauling, Inc. v. Pollution Control Board*, 116 Ill.App.3d 586, 609–613 (1983) (analyzing evidence about landfill leachate in groundwater); *McHenry County Landfill*, 154 Ill. App. 3d at 100 (analyzing evidence about soil permeability and potential pollution contamination in the groundwater); *Town & Country*, 225 Ill. 2d at 110-13 (analyzing evidence about potential groundwater pollution contamination).

Rather, clarifying the scope of the phrase "public health, safety, and welfare" in this way will instruct local siting authorities and applicants to include an analysis that should have been included in making siting decisions all along. Indeed, West Chicago's Code of Ordinances already provides a particularized list of topics an applicant must address, including traffic and "the procedure by which surface water and air will be monitored (including procedure by which the applicant will establish background levels)." R. at 5967, 5966–69; *Stop the Mega-Dump v. County Board of De Kalb County*, 2012 IL App (2d) 110579, ¶ 12 ("siting authority … may establish its own rules governing conduct of a siting hearing"). "Cumulative impacts" is just a term for considering how new burdens will interact with background levels, so the City has already expressly contemplated this type of analysis in its own code of ordinances.

In this case, the City ignored its own specific Ordinance requirement for air monitoring with reference to background levels as well as community concerns about additional diesel emissions in an area that already fails to meet U.S. EPA air quality standards set to protect public health. *Supra* Table 1. These concerns are squarely relevant to public "health" impacts. In other situations, considering cumulative impacts under Criterion (ii) could implicate different issues as relevant in the backdrop of the specific proposal. For example, conducting groundwater sensitivity modeling might be appropriate if there is concern about how the current groundwater conditions will be impacted by a proposed facility. *Sandberg v. City of Kankakee*, Ill. Pollution Control Bd. Op. 04-33, 04-34, 04-35 (consol.) at 14 (Mar. 18, 2004). Whether the proposed facility is anticipated to cause air, water or groundwater pollution, the point is that its impact on public health is impossible to ascertain without looking at existing conditions in the air, water, or groundwater.

2. *The word "public" qualifies the entire phrase with geographic specificity and clarifies the scope of a Criterion (ii) analysis.*

As discussed above, "public health, safety, and welfare" is broad and flexible, but its scope is still focused by the word "public." Assessing potential impacts on "public" health, safety, or welfare is therefore necessarily focused on the particular "public" who will be impacted. The phrase "public health" is commonly used to mean "one of the objects of the police power of the state…the prevailingly healthful or sanitary condition of the general body of people or the community in mass." Black's Law Dictionary (4th ed. 1968). In this case, in order to properly analyze cumulative impacts, it is necessary to determine who the "public" is that will be impacted.

"Public" must be given specific meaning in light of its context in section 39.2(a)(ii), which should begin with its ordinary meaning. "Public" is defined to mean:

> The whole body politic, or the aggregate of the citizens of a state, district, or municipality. The inhabitants of a state, county, or community. In one sense, everybody; and accordingly the body of the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town, or county; the people. In another sense the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few. Accordingly, it has been defined or employed as meaning the inhabitants of a particular place; all the inhabitants of a particular place; the people of the neighborhood."

Black's Law Dictionary (4th ed. 1968). "Public," like health, safety, and welfare, is broad word whose meaning depends on context. Because section 39.2 provides instructions to a particular political decisionmaker—a county or municipality acting as the "local siting authority"—it follows that the latter definition tied to a particular political subdivision, in this case West Chicago, should apply, as opposed to "everybody" "without reference to the geographic limits of" a municipality.

Understanding "public" as the "inhabitants" of the relevant county or municipality is supported by a comparison to the geographic scopes of the other nine criteria in section 39.2(a). The other criteria in the statute all use geographic qualifiers to cabin their scope and distinguish

each criterion from the others; each is geographically tailored to the particular substantive standard. Criterion (i) uses the phrase "area intended to be served" because it is concerned with the commercial market the facility will serve.[7] Criteria (iii) and (v) use the phrase "surrounding area," which is a flexible, but narrower, spatial term because the facility impacts at issue in those criteria may affect a smaller or larger area depending on circumstances.[8] Other criteria in section 39.2(a) use well-defined terms of art to reference particular physical areas for consideration: the "100-year floodplain" in Criterion (iv) and the "regulated recharge area" in Criterion (ix). Each of these criteria describes a geographic scope precisely relevant to the specific substantive inquiry—if one is to analyze flood risk, look at the floodplain.

In this case, the "public" is the community of West Chicago, who are the inhabitants of the political subdivision in which the facility is to be located. Reading "public" to mean the specific plot of land, the entire county, or the proposed facility's anticipated service area, contravenes the plain meaning of the word and the structure of this section of the Act.

ii. ***The plain language of "located" and "will be protected" further indicate that cumulative impacts are within the scope of Criterion (ii).***

Criterion (ii) contains further directive language that supports requiring consideration of cumulative impacts. A proposed facility cannot be "located" just anywhere it might be operated. Rather, it can only be "located" in a place where public health, safety, and welfare "will be protected. If it is not, the proposal fails Criterion (ii).

When interpreting a statute, one must give independent meaning to each word and avoid readings that would "render other words or phrases meaningless, redundant, or superfluous."

[7] In this case, the Service Area proposed is larger than the municipality where the facility is located, but that is specific to each application.

[8] If "public" is just the surrounding area, then Criterion (ii) is superfluous because Criterion (iii), minimizing incompatibility with the surrounding area, could cover the factors that LRS considered in their application under Criterion (ii). R. at 306–356.

People v. Trainor, 196 Ill. 2d 318, 332 (2001). Therefore, the words "designed, located, and proposed to be operated" in Criterion (ii) should be read to give each independent meaning. "Designed" and "proposed to be operated" relate to architectural, technical, and operational details of a facility. But the statute does not stop at considerations of design or operations. "Located" asks *where* a proposed facility will be situated in a larger geographic context. "Located" cannot just be about the specific plot of land a facility sits on and must address its broader context because it relates to "public health, safety, and welfare," which look at community-level impacts.[9]

"Located," as used in section 39.2(a)(ii), means the inquiry must address whether the specific proposed placement of the facility will protect public health, safety, and welfare. A facility could be both "designed" and "proposed to be operated" in an otherwise acceptable manner, but nonetheless "located" in a place that would fail the protective standard of Criterion (ii), whether that is adjacent to an school or in a town already burdened by pollution. Assessing how a facility's location relates to other Criterion (ii) considerations requires looking outside the facility itself at the people and environmental conditions that already exist in its proposed geographic context.

Criterion (ii) further requires that a location decision must be made such that the public health, safety, and welfare "will be protected," which also indicates that information about the specific, current status of "public health, safety, and welfare" is relevant to the analysis. By using the passive voice, the legislature put the focus on understanding the "public," not just the facility. The legislature did not draft the language to require that "the facility will not harm the public health, safety and welfare" but rather places "public health, safety, and welfare" as the object of the inquiry. In other words, the statutory phrasing is such that the proposed facility need not be the

[9] Indeed, LRS's application recognizes this by including consideration of factors that go beyond the fence line of the property. R. at 320, 329, 338–9 (nearby airport, stormwater control, minimization of vectors of disease).

but-for cause of or primary contributor to any threat to public health: if public health will not "be protected" when the facility is located where it is proposed, that proposal fails Criterion (ii).

iii. *The context of the Act further demonstrates that Criterion (ii) includes consideration of cumulative impacts.*

Although the ordinary meaning of Criterion (ii) would include cumulative impacts, other parts of the Act further demonstrate that cumulative impacts must be considered under section 39.2(a)(ii). In Illinois, the plain meaning of a statutory provision is not determined in a vacuum; rather, courts must look to "the statute as a whole, the subject it addresses, and the apparent intent of the legislature" to determine plain meaning. *People v. Chatman*, 2022 IL App (4th) 210716, ¶ 50, appeal allowed, (2023); see *Roselle Police Pension Board v. Village of Roselle*, 232 Ill. 2d 546, 552 (2009) ("The statute should be evaluated as a whole, with each provision construed in connection with every other section").

Criterion (ii) appears in section 39.2 of the Act, and therefore should be interpreted in the context of the rest of the statute. The "Legislative Declaration" section of the Act provides a directive on how to interpret the statute's substantive provisions: "the terms and provisions of this Act shall be liberally construed so as to effectuate the purposes of this Act as set forth in subsection (b)." 415 ILCS 5/2 (West 2023). Subsection (b), in turn, states that "[i]t is the purpose of this Act … to establish a unified, state-wide program … to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." *Id*. § 2(b).

An interpretation of Criterion (ii) that encompasses cumulative impacts aligns with these stated purposes of the Act. Subsection 2(b) directs that "effects upon the environment [be] fully considered," suggesting that, in siting processes, all relevant evidence which might adversely affect or otherwise impact the quality of the environment must be considered. *Id.* In order to

understand how a new facility or source of pollution may "adverse[ly] effect" "the environment," it is essential to understand levels of pollution already present in "the environment." Construing Criterion (ii) broadly aligns with the stated purposes of the Act to "fully consider[]" environmental impacts and therefore the statute requires consideration of cumulative impacts on "public health, safety, and welfare." See *McHenry County Landfill,* 154 Ill. App. 3d at 96–97 (citing the purposes identified in subsection 2(b) of Act as compelling flexible reading of local siting provisions to fully vindicate "public health concerns").

The concept of cumulative impacts is not foreign to the statutory design of the Act. In particular, when it comes to controlling air pollution "in order to protect health, welfare, property, and the quality of life," 415 ILCS 5/8 (West 2023), the Act states that:

> No person shall … cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, *either alone or in combination with contaminants from other sources*, or so as to violate regulations or standards adopted by the Board under this Act.

Id. § 9 (emphasis added). The phrase—"alone or in combination with"—expressly contemplates that there are instances where emissions from a single source alone would not violate air pollution standards, but where that source still violates the Act when its emissions lead to a violation of standards when combined with others'. In those instances, where impermissible levels of air pollution only emerge after considering the cumulative emissions of a group of sources, the statute still clearly prohibits those emissions.

Criterion (ii)'s standard that "public health, safety, and welfare will be protected" encompasses a larger set of concerns than the specific air pollution prohibition in section 9, but the rationale for analyzing cumulative impacts is exactly the same. Environmental harm can arise from the cumulative impact of a multitude of facilities even though any one single facility might

not cause significant harm if it existed in isolation. Of course, no facility exists in isolation, which is why Criterion (ii) requires consideration of the proposed "location."

For example, the increase in diesel trucks that LRS's facility will bring to West Chicago will contribute to an impermissible level of air pollution. *Infra* Section V.A. This follows because the proposed "location" for the LRS facility already fails to meet public-health based ambient air quality standards and LRS admits its operations will increase diesel truck traffic. R. at 1130, 4257; National Ambient Air Quality Standards for Particulate Matter 78 Fed. Reg. 3086 (Jan. 15, 2013). LRS's increase in diesel truck emissions will fail to protect the public health because LRS's increased traffic will combine with that into and out of existing facilities that already draw diesel trucks traffic to West Chicago and contribute to air quality problems in the area. R. at 4255–56, National Ambient Air Quality Standards for Particulate Matter 78 Fed. Reg. 3086, 3240 (Jan. 15, 2013) ("PM2.5 … is disproportionately influenced by heavy duty (HD) vehicles which are predominantly diesel fueled"). The statute must be read to require this possibility be considered.

Interpreting Criterion (ii) in a way which does not include a consideration of the cumulative impacts of pollution would put the local siting provisions of section 39.2 at odds with the legislative findings and pollution control provisions in the rest of the Act. To read Criterion (ii) harmoniously with the rest the statute, it must be construed to include consideration of how a proposed facility will affect the public health in light of possible cumulative impacts.

iv. *Extrinsic aids to statutory construction demonstrate the legislature intended to allow a consideration of cumulative impacts.*

The legislative history of section 39.2 confirms the legislature intended for Criterion (ii) to include a consideration of cumulative impacts. Courts may look to extrinsic aids to statutory construction only when the plain language of a statute is ambiguous. *People v. Stewart*, 2022 IL

126116, ¶ 13. These aids can include the "legislative history and debates" which accompanied the passage of a statute. *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 398 (2003).

The legislative history of section 39.2 suggests that the legislature granted local authorities a role in the siting of pollution control facilities because local authorities had specific local knowledge that would be relevant, including knowledge of cumulative impacts. While the Illinois Environmental Protection Act was initially passed into law in 1970, section 39.2 of the Act governing siting of pollution control facilities was only added in 1980. Prior to 1980, the Illinois EPA was the initial decisionmaker for pollution control facility siting. In 1980, the legislature transferred the initial decision in facility siting from the Illinois EPA to local authorities largely in response to an Illinois Supreme Court decision holding that the Act preempted local zoning over pollution control facilities in non-home rule municipalities. *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494 (1979); *see also Town & Country*, 225 Ill. 2d at 108.

The legislative debates revealed that many legislators were concerned with communities being forced to host unwanted pollution control facilities. For example, one Senator speaking in support of the bill noted that, under the prior regime, "the EPA could … grant the permit even if the local authorities did not grant it." In his view, the situation was "deplorable, it's a mess." 82d Ill. Gen. Assem., Senate Proceedings, (May 19, 1981), at 173 (statement of Senator Geo-Karis). Similar sentiments were aired in the House. One legislator expressed concern that changes in an amendatory veto would not give adequate "protection … to the communities in which those sites could be located or are now located." 82d Ill. Gen. Assem., House Proceedings, (Oct. 28, 1981), at 13 (statement of Representative Mautino). The legislative history indicates that Criterion (ii) must be read to acknowledge that different communities have different concerns. Local decision-making should assure local knowledge of local conditions, but that clear purpose of the legislature

is only advanced if Criterion (ii) is read to be inclusive and context-specific, and to embrace consideration of cumulative impacts.

Contemporaneously to the bill which eventually became section 39.2, a number of other bills relating to the regulation of solid waste facilities were considered in the General Assembly. Two of these bills demonstrate that the legislature was concerned about the concentration and cumulative impacts of such facilities. Senate Bill 406 would have prohibited, in highly populated counties, "establish[ing] a sanitary landfill site within five miles of any existing site." 82d Ill. Gen. Assem., Senate Proceedings, (May 29, 1981), at 164 (statement of Senator Dawson). House Bill 189 proposed a similar siting radius in order to "cope with [the] very serious problem of a multiplicity of landfills being established within a very short distance of each other." 82d Ill. Gen. Assem., House Proceedings, (Apr. 29, 1981), at 25 (statement of Representative Collins). Neither bill received a final vote, but both received a majority in each house to approve the bills after they were read. *Id.* at 36; 82d Ill Gen. Assem., Senate Proceedings, (May 29, 1981), at 166. The serious consideration each of these bills received demonstrates that the legislature was aware of the problems that could arise when landfills were concentrated in a single area—in other words, the legislature recognized the cumulative impacts problem of concentrating polluting facilities.

The legislature ultimately passed the current version of section 39.2 and did not pass either of these bills, which would have set up an automatic prohibition on siting a landfill within a certain radius of another landfill. However, that does not mean the legislature did not want the problem of the concentration of polluting facilities to be addressed. Rather, it suggests a choice not to create an inflexible statewide solution through an automatic prohibition. Instead, the legislature passed section 39.2 in the same legislative session to flexibly address general problems of siting pollution control facilities. Because cumulative impacts were evidently a problem the legislature was trying

to address at the time it passed section 39.2, the Board should interpret section 39.2 consistent with that legislative concern to include an analysis of cumulative impacts.

B. Criterion (ii) Requires Consideration of Disparate Impacts.

In addition to cumulative impacts, Criterion (ii) also requires consideration of whether a proposed facility will disparately impact certain groups of people. To consider disparate impacts within Criterion (ii), an applicant and local siting authority must assess whether the people who live near the proposed location of the facility are particularly vulnerable to any adverse effects potentially caused by that facility. This analysis necessarily involves understanding the health and demographics of nearby communities to assess whether the people living near the proposed facility are at particular risk for negative health effects or are already subjected to heightened environmental health burdens.

Inclusion of disparate impacts in Criterion (ii) is compelled by the plain language of the statute and confirmed by consideration of related statutes. It is impossible to confirm that a facility is "located" to "protect public health, safety, and welfare," as Criterion (ii) requires, without looking at the health and social characteristics of the specific people who would be forced to live near it. In addition to interpreting the plain language of a statute, statutes on the same subject matter should be interpreted harmoniously, even if the statutes were enacted at different times. *United States Steel Corp. v. Pollution Control Board*, 64 Ill.App.3d 34, 42 (1978). In this case, a more recent statute, the Environmental Justice Act ("EJ Act"), shows that the legislature has recognized that the Act's provisions, at least as historically implemented, have led to disparate impacts, which threaten public health, safety, and welfare. 415 ILCS 155/1 *et seq* (West 2023).

i. Disparate impacts analysis is required by the plain language of Criterion (ii).

The plain language of Criterion (ii) requires an applicant and local siting authority to consider disparate impacts. As was noted above with regards to cumulative impacts, the inclusion of the word "public" suggests that the applicant must consider how the proposed facility will affect the health, safety, and welfare of the specific group of people who live in the relevant municipality rather than just the health of people generally. See *Supra* Section IV.A.i.2. In order to meaningfully evaluate how a proposed facility will affect the health of a community, it is essential to understand the health and demographic characteristics of the people in the relevant municipality.

The word "health" suggests that the characteristics of the specific group of people who will be most affected by a proposed facility must be considered. Black's Law Dictionary defines "health" as "[the state of being hale, sound, or whole in body, mind or soul, well being." Black's Law Dictionary (4th ed. 1968). To understand how pollution will affect a community's health, that community's baseline health status and health history must be considered. An evaluation of how a new source of pollution will affect a community requires answers to questions like: does that community have a prevalence of preexisting conditions which make them especially vulnerable to new pollution? Does the community lack access to high-quality health care which might mitigate any new health problems? Criterion (ii) therefore requires asking whether the "public" includes groups who have historically suffered from higher levels of pollution or barriers to health care.

Reading Criterion (ii) to include the idea that adverse actions will affect the health of different people in different ways, depending on their pre-existing conditions and vulnerabilities, is no radical departure from general legal approaches to understanding health impacts. In particular, the "eggshell skull" rule, a common law torts doctrine, states that a negligent actor may be subject to liability for harm that is greater than was reasonably foreseeable because the specific

person who was harmed was particularly vulnerable. Restatement (Second) of Torts § 461 (1965). This doctrine recognizes that an actor is responsible for the consequences of their action, even when the action would not harm a reasonably healthy person, if it nonetheless harms the health of someone with a pre-existing health condition. In order to give full meaning to the word "health" in Criterion (ii), it should be read to take account of people's particular vulnerabilities, just as the eggshell skull rule does in tort law.

The consideration of location in Criterion (ii) also supports considering disparate impacts. The argument for this interpretation mirrors the argument in Section IV.A.2. as to why Criterion (ii) requires consideration of cumulative impacts. As explained above, to locate means to "set or establish in a particular spot" or to "ascertain the place in which something belongs." Black's Law Dictionary (4th ed. 1968). That Criterion (ii) requires assessment of the proposed location in relation to "public health" leads to the conclusion that some locations cannot host particular facilities because of particular "public health" characteristics of the proposed location. The plain meaning of the language of Criterion (ii) compels specific consideration of who lives in the place where the facility would be located.

ii. Criterion (ii) should be read to include disparate impacts to be harmonious with statutes addressing the same subject matter.

Criterion (ii) should be read to include disparate impacts in light of another statute, the EJ Act. 415 ILCS 155/1 *et seq* (West 2023). The EJ Act, like the Illinois Environmental Protection Act, addresses the topic of environmental safety and permitting and is included in the same chapter of the Illinois code. 415 ILCS 155/5. The legislature found that "certain communities in the State may suffer disproportionately from environmental hazards related to facilities with permits approved by the State; and [that] these environmental hazards can cause long-term health effects." *Id.* The EJ Act established a "Commission on Environment Justice" to "review and analyze the

impact of current State laws" in terms of how they contribute to the inequitable distribution of environmental hazards by "race, national origin, age, or income." *Id.* §§ 5, 10.

The findings of the EJ Act and the task it assigned the commission recognize that the State's environmental law regimes were not fully addressing the problem of environmental hazards causing adverse health effects and doing so in particular communities more than others. These health effects have not been addressed because existing statutes have been interpreted in ways that ignore the fact that some communities bear disproportionate environmental hazards. Recognizing that Criterion (ii) should already require consideration of the characteristics of the specific "public" whose "health, safety, and welfare" must be protected is consistent with the legislature's observation in the EJ Act that past practice has allowed an accumulation of disparate impacts. In order to read it harmoniously with the concerns in the EJ Act, Criterion (ii) must be construed to require specific consideration of how the relevant "public" is burdened by pollution already, to ensure that no community ends up suffering from disproportionate environmental burdens.

Neither LRS nor the City considered *who* the people of West Chicago actually are and *why* the health impacts of its facility might fall particularly hard on them. LRS and the City did not consider that West Chicago is a majority-minority community within predominantly white Du Page County or that the per capita income in West Chicago is just over 34% lower than the per capita income for Du Page County. These characteristics heighten the impact of diesel-related pollution: U.S. EPA's rulemaking establishing public-health based air quality standards acknowledges that race, ethnicity, and socioeconomic status correlate with "PM 2.5-related health effects." Reconsideration of the National Ambient Air Quality Standards for Particulate Matter 88 Fed. Reg. 5558, 5561 (Jan. 27, 2023). The City did not consider the history of pollution in West Chicago, including radioactive contamination that led to four Superfund sites and other existing

sources of PM 2.5 emissions which affect current air quality conditions. R. at 4256, 6202–04. As mentioned during the City's hearing and in public comments, many West Chicagoans already suffer from respiratory problems like asthma, which new diesel truck emissions could exacerbate. R. at 3183, 5955. This context is relevant to understand LRS's proposal under Criterion (ii) and was ignored. Criterion (ii) must include disparate impacts because, without a consideration of who will be affected by a facility, there is no way to ensure public health will be protected.

V. THE CITY'S CONDITIONAL APPROVAL OF LRS'S APPLICATION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED ON SECTION 39.2(a) CRITERIA.

The City Council's approval of LRS's proposed waste transfer station was against the manifest weight of the evidence and the Board should reverse it. Applicants bear the burden of proof to present materials and testimony that demonstrate compliance with the Act. R. at 5972. When reviewing whether a proposed facility satisfies the section 39.2(a) criteria, the Board uses a manifest weight of the evidence standard. *Supra* Section III.B. Failure to meet even one of criteria in section 39.2(a) is sufficient to deny a siting application. *Town & Country*, 225 Ill. 2d at 109 (2007). PODER specifically challenges the City Council's approval of Criteria (ii) and (viii) for as unsupported by the manifest weight of the evidence.

The City's decision on Criterion (ii) was against the manifest weight of the evidence, even if the Board does not require consideration of cumulative or disparate impacts. *See supra* Section IV. The City approved LRS's application despite unrebutted evidence that its proposal would add particulate matter pollution in an area that already fails to meet public-health based standards for particulate matter pollution. With respect to Criterion (viii), LRS failed to show its proposal to add a transfer station in the northwest corner of the county is consistent with the Du Page County Solid Waste Management Plan ("SWMP"), which calls for new waste transfer stations only in the

southern portion of the county. This failure to comply with Criterion (viii) speaks to the general disparate impact problem and the specific inequity in siting the County's second waste transfer station in West Chicago, which already hosts the only other such facility in the County.

A. The City Council's Findings on Criterion (ii) are Against the Manifest Weight of the Evidence Because There was No Evaluation of Air Pollution Impacts on West Chicago.

LRS did not meet its burden under Criterion (ii) because it presented no evidence to address the specific air pollution concerns raised during the City hearing and the City improperly evaluated the evidence under Criterion (ii) when it conditionally approved the facility. The burden of proving compliance with the section 39.2(a) criteria was on LRS who was required to present an application which demonstrated compliance with the Act. R. at 5972. Indeed, the City ordinance governing this proceeding specifically required LRS to include in its application an analysis of air quality, including procedures for how to assess "background levels." R at 5967. LRS did not even attempt to provide that analysis required under the West Chicago Code; the City approved LRS's application anyway. The City's conditional approval was against the manifest weight of the evidence because LRS failed to offer any evidence regarding diesel air pollution West Chicago or address the fact that the area already fails to meet public health-based air quality standards. Moreover, the City ignored unrebutted evidence of potential mitigation measures to address the public health harms of LRS's proposed increased emissions.

On review, the Board must use its own technical expertise to evaluate factual issues. *Town & Country*, 225 Ill. 2d at 123 (2007). Although courts reviewing the Board have in some cases remarked that appellate evaluation of Criterion (ii) is "a matter of assessing the credibility of the expert witnesses," the Board must still apply its technical expertise and must consider all evidence in the particular record. *Will County*, 2018 IL App (3d) 160463, ¶ 55. This is especially true where

the balancing of evidence to be done is not between dueling experts testifying as to a specific issue, but between unrefuted factual data on one hand, and the absence of any testimony (expert or otherwise) on the other.

There is no requirement for the parties to present *expert* testimony under Criterion (ii)—the applicant is required by section 39.2(d) only to present at least one witness who can be cross-examined and "any other witnesses having relevant information" can give testimony. R. at 5971; *see also Hillside Stone Corp. v. Illinois Pollution Control Bd.*, 43 Ill. App. 3d 158, 162, (1976) ("The testimony of private citizens, as opposed to that of experts, is sufficient to sustain a finding that there was a violation of the Act"). That some cases have discussed Criterion (ii) as a matter of weighing competing experts does not render that the only relevant inquiry in every situation. Relevant information includes factual evidence presented by citizens, not just expert testimony.

Here, LRS presented the testimony of John Hock from Civil and Environmental Consultants, Inc., who prepared LRS's application materials, including those related to Criterion (ii). R. at. 1959, 3365–70. There is no evidence that Mr. Hock is an expert on air quality, and he presented no evidence about air quality impacts from diesel trucks in any event. *Id.* There can be no balancing of expert credibility on air quality where there was no relevant expert testimony. Instead, there is, on the one hand, unrebutted factual evidence collected by a commercially available sensor showing that the area outside of the proposed facility is already exceeding the NAAQS, and, on the other hand, there is the absence of any evidence or analysis from Mr. Hock, who has no apparent air quality expertise in any event.

i. *The manifest weight of the evidence shows LRS's proposal will increase air pollution impacts in West Chicago and fail to protect public health.*

When the City approved LRS's application for an expanded waste transfer station, it ignored relevant evidence presented by PODER on public health, safety, and welfare under

Criterion (ii). LRS failed to address in its application or its testimony the fact that local air quality harms will occur in West Chicago as a result of its proposed operations. Even without reading Criterion (ii) to require consideration of cumulative impacts in every situation, here, the City failed to even consider that LRS proposes to increase diesel emissions in West Chicago, despite the undisputed fact that diesel emissions are harmful to public health and the uncontroverted evidence that the NAAQS are already exceeded around the LRS facility.[10]

LRS's proposed facility will increase harmful emissions in West Chicago. LRS touted that truck traffic throughout its Service Area will be reduced by adding this waste transfer station, but LRS also admitted that it does not know where geographically that traffic will be reduced. R. at 2094–95. In fact, LRS's Criterion (vi) submission shows that the expanded facility will bring more diesel trucks to West Chicago. For example, LRS projected an additional thirty-four truck trips, inbound and outbound, during evening peak hours each day of operations. R. at 1130. Diesel trucks contribute to air pollution by emitting pollutants that are detrimental to human health, such as nitrogen oxides, sulfur compounds, and other hazardous air pollutants, including PM 2.5. National Ambient Air Quality Standards for Particulate Matter 78 Fed. Reg. 3086, 3240 (Jan. 15, 2013). As discussed *supra* Section IV.A.i.2, the relevant "public" under Criterion (ii) is West Chicago. Just because overall diesel traffic in the LRS Service Area will decrease, does not mean that the City can ignore these anticipated harms to its own citizens.

The emissions from additional truck trips, harmful in and of themselves, will not occur in a vacuum, but will add particulate matter pollution in a location that already exceeds public health

[10] Per Ill Admin. Code 35 § 101.630, the Board can take official notice of "generally recognized technical or scientific facts within the Board's specialized knowledge." This includes the health-based air quality standard promogulated by the U.S. EPA for PM 2.5, a regulated air pollutant associated with adverse health effects, which is currently set at 12 $\mu g/m^3$. National Ambient Air Quality Standards for Particulate Matter 78 Fed. Reg. 3086 (Jan. 15, 2013).

standards for such pollution. PODER submitted evidence that there are already unhealthy levels of air pollution outside of the pollution control facilities in West Chicago; both the Hearing Officer and the City Council discounted or ignored this evidence. *See supra* Table 1. Ms. Alcántar-Garcia offered factual evidence that her automated air monitor recorded PM 2.5 at levels above the 12 $\mu g/m^3$ standard that U.S. EPA has set to protect public health. R. at 4257. Ms. Alcántar-Garcia was not offered as an expert, but did authenticate the factual data output by the AirBeam monitoring system, which requires no technical expertise to operate—as she explained, you merely switch it on and off. R. at 3185–87. And one does not need to be an expert to compare the numbers generated by the application to the numbers set by U.S. EPA in the NAAQS—the AirBeam output is presented in the same units and measure the same pollution. To the extent one needs specialized knowledge to interpret federal environmental regulations, the Board itself possesses precisely that technical expertise.

Moreover, petitioner PWC also offered an expert witness, Mr. Powell, an environmental engineer who testified on air quality harms and cumulative impacts and explained his previous experience with air quality modeling. R. at 3105–06; 3904–08. Mr. Powell modeled air quality impacts from future increased truck emissions, using the U.S. EPA NAAQS to compare current background levels, future emissions, and cumulative impacts. R. at 3919. When asked if it would have "strengthened your analysis to have monitoring of air quality right at the current LRS facility," Mr. Powell replied affirmatively. R. at 3106. The AirBeam data provides just that.

In contrast, LRS submitted nothing on air quality in West Chicago, neither in its application nor during the Hearings, and there is no evidence its expert is specifically qualified as to air quality issues. R. at 63–64; 3365–70. LRS's expert testimony from Mr. Hock on Criterion (ii) addressed an increase in trucks only in the context of traffic concerns and ignored increased emissions or

background ambient air quality. R. at 2375–2587. When asked about his failure to consider where air emissions would be experienced, Mr. Hock acknowledged he did not assess where the reduced mileage would occur, and that he could not say that West Chicago would experience decreased truck mileage. R. at 2094.

The Board cannot endorse approval of an application that ignores a crucial and disputed public health impact of the proposed facility, especially when the applicant has the burden of proof and offers nothing to rebut serious and evidence-based concerns of other parties. While PODER's air quality data may have been presented by a lay witness, it was evidence nonetheless. R. at 4257, 4258–5727. The City impermissibly decided that *no evidence* on local air quality harms from the applicant somehow outweighed *some evidence* about air quality harms presented by the other parties. The Board should exercise its own judgement and apply its technical expertise to correctly weigh the evidence and reverse the City's approval.

ii. *The City failed to assess the viability of mitigating local air quality impacts and, therefore, failed to include appropriate conditions necessary to satisfy Criterion (ii).*

Even though PODER did not advocate for approval of LRS's application, in the interest of protecting the health of West Chicago citizens to the greatest extent possible, it proposed a mitigating condition: transitioning to electric trucks. R. at 6325–28. Both the Hearing Officer and the City ignored this suggestion, despite it having a strong rationale and basis in fact.

First, the record shows that requiring electric trucks would better protect public health in West Chicago by eliminating harmful diesel emissions LRS proposes to bring to the city. PWC's expert testified that if LRS's proposed facility was used by electric trucks, it would eliminate the harmful particulate matter emissions at the heart of this issue. R. at 3103–04. Though she questioned the availability of electric trucks, LRS's Training and Community Partner, Joy Rifkin,

stated in no uncertain terms that "[w]hen electric trucks are readily available, environmentally sound, and have a longer battery life, LRS will be at the forefront of that transition." R. at 3264.

Second, PODER provided factual support for what LRS should welcome as good news: transitioning to commercial electric truck fleets is already happening in Illinois. PODER provided evidence during post-hearing briefing that ComEd—the electric utility that serves West Chicago—was awaiting approval of a Beneficial Electrification Plan that offers rebates and fleet assessment services to electrify medium- and heavy-duty truck fleets. R. at 6325–28. Since then, the Illinois Commerce Commission has approved ComEd's Plan. *See Commonwealth Edison Co.*, Ill. Comm. Comm'n No. 22-0432 & 22-0442 (consol.) (Order-Final Mar. 23, 2023) (see section beginning on page 39 for discussion of "C&I Program," and its approval on page 69).[11] Fleet electrification is not only possible, but financial and technical support is now available to LRS. Requiring LRS to electrify its fleet would protect public health and hold LRS to its public commitment to be at the "forefront of that transition" to electric trucks. R. at 3264. Accordingly, it was against the manifest weight of the evidence to fail to condition approval on LRS pursuing fleet electrification.

B. The City's Findings on Criterion (viii) are Against the Manifest Weight of the Evidence Because the Location is Not Consistent with the SWMP.

It was against the manifest weight of the evidence for the City to determine that LRS's proposal is consistent with the Du Page County SWMP, as required by Criterion (viii). West Chicago currently hosts the only other similar waste transfer station in Du Page County and approving a second waste transfer station in West Chicago would be inconsistent with the Du Page County's SWMP contemplation of increasing the geographic diversity of transfer stations throughout Du Page County—not concentrating them in the same corner of the county. Relatedly,

[11] Available at https://www.icc.illinois.gov/docket/P2022-0432/documents/335467/files/584484.pdf. Per Ill Admin. Code 35 § 101.630, the Board may take official notice of "[m]atters of which the circuit courts of this State may take judicial notice." The final order of state agency is such a matter.

allowing this inconsistency with the SWMP perniciously compounds the City's refusal to consider disparate impacts, resulting in further concentrating environmental burdens on the City's majority-minority residents, from which the whiter and wealthier parts of the County are spared.

The 1991 Du Page County SWMP and its five updates (1996, 2001, 2007, 2012, and 2017)[12] state that if any additional transfer stations are needed in the county, they would be needed in the *southern portion* of the County, not its northwest corner where West Chicago is located. R. at 1881, 1867. The original SWMP found that "the placement of just one transfer facility in the county would appear to offer no significant disadvantage from a local waste transport standpoint." R. at 1358. Future five-year updates to the SWMP contemplated the possibility of additional transfer stations, but explicitly stated that an additional transfer station would be appropriate only in the southern portion of the County. R. at 1867. In addition, the 2007 update to the SWMP relied on an analysis that concluded that "the only areas that might benefit from a waste transfer station are located in the southern portion of the County." R. at 1848. Reviewed together, the SWMP and its updates show the County's plan is to site any new waste transfer station in the portion of the county with the least access to a waste transfer station—the southern portion. As West Chicago is in the northern part of the county and already hosts the County's only such facility, the siting of a waste transfer station in West Chicago would be inconsistent with the SWMP.

The City apparently ignored this clear call for geographic diversification in the SWMP and based its finding that LRS met Criterion (viii) on an ambiguous letter drafted by a county employee, who had neither authority nor knowledge to speak on what the County Board intended in past updates. R. at 3463, 2714–18. That letter, however, did not—and could not—change the

[12] The Illinois Solid Waste Planning and Recycling Act requires certain counties in the state adopt a 20-year plan for managing solid waste, to be updated every five years. 415 ILCS 15/4(a), 15/5(e) (West 2023). For the purposes of Criterion (viii), these updates are included in the SWMP. *See id.* § 39.2(a)(viii) ("'solid waste management plan' means the plan that is in effect as of the date the application for siting approval is filed").

County's formal policy announced in the SWMP and no other evidence was offered to explain how it is possible that locating LRS's facility a quarter mile from the only existing waste transfer station in the County is consistent with an SWMP that calls for geographic diversity in future transfer station location.

Allowing the only two waste transfer stations for the whole county to be located in the only majority-minority city in a majority-white county not only contradicts the SWMP, but also concentrates harm in a majority-minority community. LRS did not meet its burden to show its application is consistent with the SWMP under Criterion (viii) and the City's decision was against the manifest weight of the evidence.

VI. THE CITY'S PROCEDURE IN REACHING A DECISION ON LRS'S APPLICATION WAS FUNDAMENTALLY UNFAIR.

The City's procedure to reach a decision on LRS's application did not conform with minimum standards of adjudicative due process and was fundamentally unfair to PODER and the public more broadly. The City's procedures discouraged meaningful public involvement from many of the residents of West Chicago and impermissibly favored the applicant. Upon appeal, the Board must consider "the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision." 415 ILCS 5/40.1 (West 2023). Questions of fundamental fairness are mixed questions of law and fact that must be reviewed by the Board under a *de novo* standard. *See supra* Section III.C. If the procedures used by the local siting authority were fundamentally unfair, then the Board must reverse or remand the decision of the local siting authority. *Southwest Energy Corp.*, 275 Ill. App. 3d at 95.

Fundamental fairness requires that a local siting authority's hearing meet "minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence." *Fox Moraine*, 2011 IL App

(2d) 100017, ¶ 60. One court has referred to this as a party's "right to present its case." *Waste Management of Illinois, Inc. v. Pollution Control Board*, 123 Ill. App. 3d 1075, 1082 (1984). In a related context, the Illinois Supreme Court noted that the exact contours of which "due process rights commonly associated with quasi-judicial proceedings must be afforded interested parties depends upon the purpose of the hearing." *People ex rel. Klaeren v. Village of Lisle*, 202 Ill. 2d 164, 184 (2002) (municipal hearing on special-use zoning variance).

The City's process here was fundamentally unfair in at least three ways. First, the City frustrated the public engagement purposes of the hearing by failing to provide Spanish translation. Second, the Hearing Officer failed to adjudicate impartially by improperly excluding and impeaching the testimony of one of PODER's witnesses based on information outside of the record. And finally, the City treated the applicant preferentially by allowing LRS to submit post-hearing testimony without an opportunity for cross-examination. Because the fundamentally unfair procedures utilized by the City and its appointed Hearing Officer prejudiced PODER and the public, the Board must reverse the City's conditional approval of LRS's application.

A. Minimal Standards of Due Process Required That the City Provide Translation So Residents of West Chicago Could Engage with the Hearing.

By failing to provide English to Spanish translation of the application materials and during the Hearing, the City violated minimum standards of procedural due process. In an administrative hearing, certain procedures are necessary to satisfy due process, e.g., adjudication by an impartial tribunal. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill.2d 76, 92 (1992). However, these baseline, necessary procedures are not always sufficient; the exact requirements of due process in any given proceeding must be determined through a fact-specific, contextual inquiry. *Waste Management of Illinois, Inc.*, 175 Ill.App.3d 1023, 1036–37. This inquiry should

consider the "purpose of the hearing" as well as "[t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." *Klaeren,* 202 Ill. 2d at 184. See also *Comito v. Police Board of City of Chicago,* 317 Ill.App.3d 677, 687 (2000) ("procedures [must] be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case").

In *Klaeren,* the Illinois Supreme Court considered the requirements of due process in a quasi-judicial, special-use zoning hearing. 202 Ill. 2d at 183–84. In particular, the Court considered whether the tribunal's decision to not allow interested parties to cross-examine adverse witnesses constituted a violation of due process. *Id.* at 185. The Court employed a functional test which looked to the "purpose of the hearing." *Id.* at 184. After finding that one of the "several purposes" of the hearing was to gather factual information, the Court held that due process required cross-examination. *Id.* at 185.

Here, at least one of the purposes of the public hearing requirement in section 39.2 is to allow members of the public to learn more about the facility and to share their opinions on the siting decision. *McHenry County Landfill*, 154 Ill. App. 3d at 97. The notice requirements in section 39.2 direct the applicant to publish a detailed notice of the hearing in a newspaper of general circulation that alerts the public so that they might attend. 415 ILCS 5/39.2(b) (West 2023). The public comment provisions in section 39.2 also show that the hearing is, at least in part, to solicit input from the public. *Id.* § 39.2(c). As explained above, the legislature moved siting approval from state to local authorities with the specific purpose of engaging and empowering local communities. *Supra* Section IV.A.iv.

These purposes cannot be achieved if more than half of municipal residents primarily speak a language other than that in which the hearing is conducted. In order for the public in West

Chicago to engage meaningfully with the information shared during the hearing, English-to-Spanish translation was necessary. The most recent census report found that 52.7% of residents over the age of five speak a language other than English at home. R. at 4240. That report also noted that over 32% of West Chicago residents were born outside of the U.S. *Id.* Business in West Chicago is commonly conducted in both English and Spanish, reflecting the multilingual nature of the community. Hr'g Tr. at 70, Sep. 28, 2023. Applying the functional test of *Klaeren* to these circumstances, due process required translation. The Court in *Klaeren* looked to the purposes of the hearing, in that case fact-finding, in order to determine the procedures that were required—cross-examination. Here, since a purpose of the hearing is public engagement, the procedures required are those necessary to ensure the opportunity for public engagement. In West Chicago, that means English-to-Spanish translation was required.

The City was aware that its many Spanish-speaking residents might have particular interest in this proceeding, but the City took no action to provide translation at the hearing or of the application materials. Before the hearing was scheduled, Mr. Guttman, the City Administrator, had translated a portion of the text posted to the City's website which described the City's role in the siting process. He did so to be "strategic" because he thought that the document "might be of interest … to residents of the community … who would want to see it in Spanish." Hr'g Tr. at 199–200, Sep. 28, 2023. However, the City never translated the actual application materials or arranged for translation at the public hearing to allow Spanish-speaking residents a chance to understand the proposal or speak on the matter. Whether or not Spanish translation was specifically requested is immaterial here because the City was well-aware of both the language barriers faced by its residents and public interest in the matter. It is the local siting authority's obligation to

ensure fundamental fairness; that burden cannot be shifted to the very people excluded from the process by that entity's choices. 415 ILCS 5/40.1(a) (West 2023).

The fact that translation should have been provided in this case does not mean that translation is required in every administrative hearing or in every local siting hearing conducted pursuant to section 39.2. The requirements of due process are determined by a contextual inquiry into both the purposes of the hearing and "the capacities and circumstances of those who are to be heard." *Comito*, 317 Ill.App.3d at 687. Only when the hearing is targeted to the public and that public largely speaks another language is translation required. Here, in West Chicago, both of these requirements are met, so, to be fundamentally fair, the hearing must have had English to Spanish translation.

B. The Hearing Officer Was Not Impartial in Improperly Excluding and Impeaching Evidence Provided by One of PODER's Witnesses.

The City's hearing was also fundamentally unfair because the Hearing Officer improperly excluded evidence and impeached testimony of a PODER witnesses based on information outside of the record. Though administrative hearings "are not bound by the strict rules of evidence that apply in a judicial proceeding," *Ellison v. Illinois Racing Board*, 377 Ill.App.3d 433, 443 (2007), to satisfy due process, rules must be fairly enforced, and the adjudicator must render "impartial rulings on the evidence," *Daly v. Pollution Control Board*, 264 Ill.App.3d 968, 970 (1994). While the phrase "impartial rulings on the evidence" has not been defined in the specific context of local siting proceedings, in a different context, the Illinois Supreme Court has defined "impartiality" generally as "favoring neither [party], standing indifferent to both, and guided only by law and the evidence." *People v. Stone*, 61 Ill.App.3d 654, 667 (1978).

Here, the Hearing Officer's rulings on the evidence provided by PODER's witness violated that standard of impartiality by improperly excluding relevant evidence based on his personal,

undisclosed cellphone research. During the proceedings on January 16, 2023, Ms. Alcántar-Garcia gave testimony on air pollution data that she had collected outside of existing facilities, including LRS's facility it proposes to expand, using an air quality sensor called a HabitatMap AirBeam. R. at 3185–3206. After presenting the data automatically read-out by the sensor and describing how she followed her training and its instructions for data collection, Ms. Alcántar-Garcia was asked by her attorney to explain what the data meant to her as "someone who lives in West Chicago, who is active in the community, who is a leader at the schools in the community, as a mother in the community, [and as] someone who is trained to use this app." R. at 3201–02. Counsel for LRS objected on unspecified grounds. R. at 3202. The objection was sustained by the Hearing Officer who, when asked why the objection was sustained, responded: "You may not ask why, but I'll tell you why. She's not a trained scientist. The app has not been recognized by any court in the land. I just did a search. None of this is scientifically relevant." *Id.*

Neither in his ruling at the hearing nor in his report did the Hearing Officer distinguish between the data generated by the automated air monitoring device and Ms. Alcántar-Garcia's testimony interpreting it. Indeed, while the Hearing Office refused to consider Ms. Alcántar-Garcia's opinion, he allowed her to testify about how she collected data with the air monitor. R. at 3202 ("I can't stop [air quality data] from coming in as comment or, in this case, testimony"). That factual evidence appears in the record in both the hearing transcript and in PODER's exhibits that the Hearing Officer admitted. R. 3195–201, 4257–5727. In his report issued to the City Council, the Hearing Officer summarily concluded that PODER had "offered no competent evidence" to contradict any of LRS's claims about emissions. R. at 6019. He offered no further insight in that report as to why the evidence presented by PODER was not "competent" or as to the scope of evidence that he had excluded based on his prior ruling.

Ms. Alcántar-Garcia elaborated on the hostility and bias she perceived from the Hearing Officer when she testified during the Board hearing. Hr'g Tr. at 61–65, Sep. 28, 2023. She explained that it felt like the Hearing Officer was trying "to prevent [her] from speaking." Hr'g Tr. at 61, Sep. 28, 2023. Ms. Alcántar-Garcia testified that the Hearing Officer's tone was "very hostile" and that, at one point, he made her cry. *Id.* Ms. Alcántar-Garcia also noted that the Hearing Officer was "looking through his cellphone for reasons [to] exclude the information [she] was providing" during her testimony. *Id.* Ultimately, Ms. Alcántar-Garcia noted that she felt "harassed and humiliated" by the Hearing Officer, and "completely ignored" by the City Council when they disregarded and did not address the evidence she provided. Hr'g Tr. at 63, 64, Sep. 28, 2023.

The Hearing Officer's rulings and conduct during Ms. Alcántar-Garcia's testimony improperly favored the applicant and disadvantaged PODER. When the counsel for LRS objected to Ms. Alcántar-Garcia's testimony on air pollution, he did so without specifying the grounds for the objection or whether he was objecting to her opinion, or the underlying data recorded by the sensor. R. at 3202. Rather than require LRS's counsel to present LRS's position, the Hearing Officer did it for him. The Hearing Officer proceeded to sustain the objection despite its uncertain basis based on a "search" which the Hearing Officer conducted on his cellphone. However, the results of that search were never introduced into the record or shared with PODER. This deprived PODER of the chance to meaningfully contest the objection and exclusion of the testimony because PODER was never given access to the information that the Hearing Officer relied on after he found it in his "search." Indeed, the Hearing Officer even told counsel for PODER that he was not entitled to even ask what the basis of the evidentiary ruling was. R. 3202.

The Hearing Officer's rulings were also improper because they deprived PODER of the opportunity to have the City Council make a final determination on the evidence presented by Ms.

Alcántar-Garcia. In administrative decisions, the "findings of the administrative agency must be based on evidence admitted in the case, and nothing can be treated as evidence that is not admitted as such." *Matlock v. Illinois Department of Employee Security,* 2019 IL App (1st) 180645, ¶ 28. Here, the evidence that the Hearing Officer used to exclude Ms. Alcántar-Garcia's testimony, namely the Hearing Officer's personal cellphone search results, was not included in the record. Thus, the City Council could not have assessed the scope or the propriety of the Hearing Officer's ruling because it did not have the evidence on which he based his conclusions. The City Council's adoption of the Hearing Officer's conclusion that Ms. Alcántar-Garcia's testimony and the underlying AirBeam data was not "competent" was not based on any evidence in the record because the Hearing Officer's initial ruling was not based on evidence in the record.

In short, where a hearing officer engages in the sort of adversarial impeachment one would expect on cross-examination from a party-opponent, and does so based on his personal, undisclosed cellphone research conducted during a witness's testimony and never entered into the record, it cannot be said that the evidentiary rulings were impartial or that the hearing was fundamentally fair.

C. <u>The City and its Hearing Officer Gave Preferential Treatment to LRS in Applying Rules on Public Comment and Post-Hearing Submissions.</u>

The City's procedure was also fundamentally unfair because the City and its Hearing Officer gave the applicant preferential treatment by prejudicially relaxing rules to allow LRS to submit testimonial evidence after the hearing, while strictly applying local administrative rules to exclude public comment. Due process at an administrative hearing always requires "fair and impartial procedure." *Abrahamson* 153 Ill.2d at 92. Once the municipal government has made a rule to govern the proceedings, it is bound by the rule. *Schinkel v. Board of Fire and Police Commission of Algonquin*, 262 Ill.App.3d 310, 318–319 (1994). The "unequal application" of the

rules governing a proceeding is evidence that a hearing was not "fair and impartial." *Anderson v. Human Rights Commission*, 314 Ill.App.3d 35, 43, 49 (2000) (holding that due process was violated in administrative hearing where administrative law judge applied "different evidentiary standards for both parties"). In this case, the Hearing Officer and City bent rules to LRS's benefit and upheld rules with arbitrary strictness to prevent participation by the public—that is a "unequal application" of the rules and fundamentally unfair.

In this case, the Hearing Officer allowed LRS to submit two documents containing new testimonial evidence into the record after the hearing and any opportunity for the other parties to respond to that new evidence. Counsel for LRS submitted these documents as "post hearing public comment" via an email to the Hearing Officer on February 18, 2023. PODER PCB Ex. 2a at 5. The City, though, apparently treated these as formal submissions of LRS, not as public comment. In the certified record for this appeal, the City included both documents under the heading "BRIEFS, ARGUMENTS AND STATEMENT OF PARTIES AND PARTICIPANTS," alongside the parties' proposed findings of fact.[13] Certificate of Record on Appeal at 15.

Neither of the documents from LRS should have been accepted into the record at all by the Hearing Officer. They were new testimonial statements, requested by LRS, which made factual claims related to contested issues. The letter from Canadian National was addressed not to the City Council, but to LRS's testifying expert and offered an opinion as to whether nearby property could be developed into residential property. R. at 6195. Calling this letter a "submission of the party" is particularly farcical given that it is literally a letter from a non-party—that it was submitted by LRS only demonstrates it was intended as belated third-party witness testimony. The letter from

[13] The public comment submitted by PODER was included in the record prepared by the City under the same heading, but unlike the documents submitted by LRS, it was clearly identified as "public comment." Certificate of Record on Appeal at 15.

LRS's consultant improperly supplemented his own hearing testimony to respond to Criterion (iii) testimony provided by one of PWC's expert witnesses. R. at 6196-98. The time for submitting new testimonial evidence ended when the hearing was declared closed almost a full month earlier on January 19. R. at 3336. LRS's post-hearing submission deprived PODER and the other parties of the ability to cross-examine and otherwise test the factual claims that were made. Regardless of whether these documents could somehow be considered "public comment," they should not have been accepted because counsel for LRS failed to follow the procedure laid out in the City's ordinance governing siting that all written public comments "shall be mailed or delivered to the West Chicago City Clerk." R. at 5970. Despite that clear language, LRS emailed its "post hearing public comment" to the Hearing Officer. PODER PCB Ex. 2a at 5. The City ignored the rules that it had created to govern public comment and went out of its way to allow LRS to submit new evidence after the deadline to do so had passed.

All of this stands in stark contrast to how the Hearing Officer treated PODER's inquiry regarding the availability of oral public comment. On January 12, 2023, while the hearing was still in progress, counsel for PODER asked the Hearing Officer about the possibility of six residents of West Chicago providing oral public comment. PODER PCB Ex. 1 at 2. The six residents had not pre-registered as required by the City's ordinance governing the siting of pollution control facilities. *Id.* The Hearing Officer rejected PODER's request that they be permitted to comment because they had not "timely completed the registration for public comment." *Id.* at 1. The Hearing Officer strictly enforced the rules laid out in the City ordinance to exclude these public comments.

These two rulings on public comment and post-hearing submissions illustrate that there were different standards applied to different parties. When LRS masqueraded substantive testimony as "public comment" and failed to follow the City ordinance in doing so, the City

accepted it as evidence, substantively prejudicing the other parties. When PODER asked to allow timely oral public comment from residents of West Chicago, the Hearing Officer denied them that opportunity based on strict adherence to a registration requirement with no clear purpose other than administrative convenience. The holding of *Anderson* makes clear that this sort of preferential treatment applying differing standards to different parties violates minimal standards of due process. To use that court's words, it creates an "atmosphere of futility," and prevented a "fair and impartial hearing." 314 Ill.App.3d 35 at 48, 49.

VII. CONCLUSION

For the foregoing reasons, PODER respectfully requests that the Board reverse the City's conditional approval of LRS's proposed waste transfer station. Doing so, and thereby ensuring the proper interpretation of 415 ILCS 5/39.2, will also ensure that the local siting review process is a means to meaningfully engage impacted communities and to fully and flexibly protect public health, precisely as the legislature intended.

Date: November 13, 2023

Respectfully submitted,

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OPPOSING DUPAGE ENVIRONMENTAL RACISM,	)	
Petitioner,	)	
v.	)	PCB 23-109 (Pollution Control Facility Siting Appeal)
CITY OF WEST CHICAGO and LAKESHORE RECYCLING SYSTEMS,	)	
Respondents.	)	

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the foregoing OPENING BRIEF OF PEOPLE OPPOSING DU PAGE ENVIRONMENTAL RACISM, a copy of which is hereby served upon you.

Date: November 13, 2023

Robert A. Weinstock
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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served on the date of November 13, 2023, the foregoing OPENING BRIEF OF PEOPLE OPPOSING DU PAGE ENVIRONMENTAL RACISM, and Notice of Filing, upon the below-named parties via the email addresses listed below:

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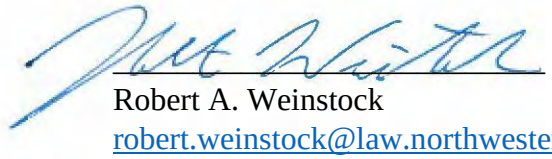
Respectfully submitted,



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