ILLINOIS POLLUTION CONTROL BOARD
September 23, 1993

LARRY SLATES, LONNIE SEYMOUR, JAMES KLABER, FAYE MOTT, and HOOPESTON COMMUNITY MEMORIAL HOSPITAL,	)	
Petitioners,	)	
v.	)	PCB 93-106 (Landfill Siting Review)
ILLINOIS LANDFILLS, INC., and HOOPESTON CITY COUNCIL, on behalf of the CITY OF HOOPESTON,	)	
Respondent.	)	

RICHARD J. DOYLE AND JOSEPH C. MOORE APPEARED ON BEHALF OF PETITIONERS;

STEVEN M. HELM AND KEVIN J. O'BRIEN APPEARED ON BEHALF OF RESPONDENT ILLINOIS LANDFILLS, INC.; and

JOHN McFETRIDGE APPEARED ON BEHALF OF RESPONDENT THE CITY OF HOOPESTON.

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

This matter is before the Board on a third-party appeal filed May 27, 1993 pursuant to Section 40.1(b) of the Environmental Protection Act (Act). (415 ILCS 5/40.1(b) (1992).) Petitioners Larry Slates, Lonnie Seymour, James Klaber, and Faye Mott, and Hoopeston Community Memorial Hospital (collectively petitioners)[1] appeal respondent the City of Hoopeston's (Hoopeston) April 27, 1993 decision granting site location approval to respondent Illinois Landfills, Inc. (ILI) for expansion of an existing landfill. The Board held a public hearing in Danville, Illinois on July 26, 27, and 28, 1993. Members of the public attended that hearing.

The Board's responsibility in this matter arises from Section 40.1 of the Act. The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the local

On July 22, 1993, the Board dismissed Citizens Against Ruining the Environment (C.A.R.E.), Hoopeston Industrial Corporation, and William and Mary Regan as petitioners, for lack of standing.

siting approval provision for new regional pollution control facilities, set forth in Section 39.2 of the Act. More generally, the Board's functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Board's sister agency, the Illinois Environmental Protection Agency (Agency) is responsible for carrying out the principal administrative duties, inspections, and permitting. The Agency does not have a statutorily-prescribed role in the local siting approval process under Sections 39.2 and 40.1, but would make decisions on permit applications submitted if local siting approval is granted and upheld.

PROCEDURAL HISTORY

ILI filed its application for site location approval on November 25, 1992. (C1-C435.)[2] ILI seeks approval for expansion of an existing regional pollution control facility located south of Hoopeston. The proposed expansion includes a horizontal and vertical increase of the existing landfill, and will include a previously closed landfill. That previously closed landfill, known as the Tweedy Landfill, would be completely exhumed. The landfill will continue to accept municipal waste and nonhazardous special wastes. The proposed facility also includes a recycling center. (C1.)

In January and February 1993, Hoopeston published notice of its scheduled public hearing on the application. (C650-C652.) The notice stated that the hearing would be held on March 3, 1993, and also stated that:

> The public hearing is open to the public and any person willing to offer oral testimony at the hearing may do so. In addition any person may file written comment with the City Council concerning the appropriateness of the proposed expansion for its intended purpose.
>
> (C650.)

On February 10 and 11, 1993, four people (James Klaber, Larry

[2] Citation to the record filed by Hoopeston will be indicated as "Cxxx", while citation to the transcript of the hearing held by Hoopeston will be indicated as "Tr. at x". "PCB Tr. at x" will refer to the July 26-28 hearing held by this Board, and exhibits introduced at the Board hearing will be designated as "Exh. x". Finally, "Tr. 4/15/93 at x" and "Tr. 4/27/93 at x" will refer to the transcripts of two city council meetings.

Slates, Lonnie Seymour, and Julie Soliday) filed appearances, pursuant to Hoopeston Ordinance 93-16. (C671-C674.)

The local hearing was held on March 3, 1993, before a hearing officer. ILI presented evidence in support of its application. The parties who had filed appearances (except for Ms. Soliday, who did not appear at hearing) cross-examined ILI's witnesses and presented their own exhibits. All members of the public who signed the sign-in sheet were given an opportunity to comment. (Tr. at 10, 305.) On April 15, 1993, after the close of the public comment period, the city council held a special meeting to consider ILI's application. Hoopeston's consulting engineer attended that hearing and answered questions from the city council members. The hearing officer was also present, and he also answered questions from the council members.

On April 27, 1993, the city council met to vote on the application. The city clerk read a proposed resolution to the members, which would approve the application. An alderman moved to add three conditions to the proposed resolution. The proposed resolution, with the three additional conditions, passed by a vote of 5 to 4, with the mayor casting the deciding vote. (Tr. 4/27/93 at 11-12.) Hoopeston then prepared a written decision, which was signed by the mayor and the city clerk. That decision is dated April 27, 1993, which was the date of the vote. (C1151-C1153.) Petitioners then filed this appeal with the Board.

STATUTORY FRAMEWORK

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

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592; E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.) A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. (Harris v. Day (4th Dist. 1983), 115 Ill.App.3d 762, 451 N.E.2d 262, 265.) The Board, on review, is not to reweigh the evidence. Where there is conflicting evidence, the Board is not free to reverse merely

because the lower tribunal credits one group of witnesses and does not credit the other. (Fairview Area Citizens Taskforce (FACT) v. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1195; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505, 507.) Merely because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings. File v. D & L Landfill, Inc., PCB 90-94 (August 30, 1990), aff'd File v. D & L Landfill, Inc. (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228. However, where an applicant made a prima facie showing as to each criterion and no contradicting or impeaching evidence was offered to rebut that showing, a local government's finding that several criteria had not been satisfied was against the manifest weight of the evidence. (Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board (1st Dist. 1992), 227 Ill.App.3d 533, 592 N.E.2d 148.)

Additionally, the Board must review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, 451 N.E.2d at 562.)

JURISDICTION

In their amended petition, petitioners raised two claims relating to Hoopeston's jurisdiction to decide ILI's application for site approval: that ILI failed to properly notify all applicable state officials, and that ILI failed to give proper notice to all property owners within 250 feet of the proposed site. However, petitioners have not addressed these claims in either their opening brief or their reply brief. Thus, the Board finds that petitioner has not carried its burden of proof on these two claims.

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires the Board to review the proceedings before the local decisionmaker to assure fundamental fairness. In E & E Hauling, the appellate court found that although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. (E & E Hauling, 451 N.E.2d at 564; see also FACT, 555 N.E.2d at 661.) Due process requires that parties have an opportunity to cross-examine witnesses, but that requirement is not without limits. Due process requirements are determined by balancing the weight of

the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois Inc. v. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682, 693.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of ex parte contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163.)

Petitioners have raised a number of claims that the proceedings at the local level were not fundamentally fair. The claims can be divided into six different categories, each of which will be addressed separately.

City Ordinances

On September 1, 1992, prior to the filing of ILI's application for site approval, Hoopeston adopted two ordinances addressing local siting proceedings. Ordinance 93-16 is entitled "Ordinance for the Approval of Pollution Control Facility Siting in Hoopeston, Illinois". (Exh. 6 and 7.) Ordinance 93-18 is entitled "Procedural Rules for Public Hearing". (Exh. 6 and 7.) Petitioners contend that certain provisions in these ordinances rendered the local proceedings fundamentally unfair.

First, petitioners argue that the requirements in Ordinance 93-16 that all parties "desiring to participate" in the public hearing must file an appearance at least 21 days prior to the public hearing, and that all parties other than the applicant must file written testimony and exhibits at least 10 days prior to the hearing, are fundamentally unfair. The pertinent portion of Ordinance 93-16 states:

> Any party who desires to participate in the public hearing shall file an entry of appearance, which shall include the address of the party, with the City Clerk at least twenty-one (21) days prior to the public hearing and serve a copy upon the hearing officer. Any party except the applicant shall submit all written testimony to be presented at the public hearing and all other evidence relating to the application requirements ***, including but not limited to reports, studies, and exhibits that the party desires to submit for the record by filing the original and fifteen (15) copies of the same with the City Clerk at least ten (10) days prior to the public hearing and by serving one (1) copy upon the hearing officer and each party. (Exh. 6 and 7, Ordinance 93-16 at 14-15.)

Petitioners maintain that the obligations and burdens placed on citizens by Ordinance 93-16 impeded, if not completely blocked,

the ability to participate openly. Petitioners state that the applicant is exempted from the requirement that testimony and exhibits be filed 10 days prior to hearing, and assert that therefore the objectors had no opportunity to respond. Petitioners allege that the rules overcome the public's right to free and open participation in the process, without any valid purpose.

In response, ILI points out that petitioners do not provide any authority for their claim that the provisions of the ordinance are fundamentally unfair. ILI contends that the preregistration and prefiling requirements are permitted, and note that local authorities are allowed to establish rules for conducting a local siting hearing, as long as those rules are not inconsistent with the statute and are fundamentally fair. (Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682, 125 Ill.Dec. 524.) ILI maintains that the requirements of Ordinance 93-16 are not inconsistent with the provisions of Section 39.2(d) regarding the public hearing. ILI also contends that the ordinance has a valid purpose, and points to testimony from the mayor and an alderman that the ordinance was intended to require parties to make their information available prior to hearing, just as the applicant was required to provide its evidence when filing the application. (PCB Tr. at 232, 504.)

Finally, ILI argues that petitioners' objection that the applicant was "exempted" from the prefiling requirement misses the point. ILI states that it, as an applicant, was required by the statute and Ordinance 93-16 to file a voluminous application containing information on the facility and each of the applicable criteria. ILI states that the application was available for public inspection for more than two months before other parties were required to pre-register and pre-file. ILI notes that in Waste Management, the appellate court upheld a local requirement that the applicant submit all of its information at the time it filed its application. ILI thus contends that a requirement that other parties submit their evidence before hearing cannot be deemed illegal or unfair. ILI maintains that Hoopeston properly balanced its interest in conducting the hearing fairly and efficiently with its interest in allowing members of the public to participate as parties.

After reviewing the record and the arguments of the parties, the Board finds that the preregistration and prefiling requirements of Ordinance 93-16 are not fundamentally unfair. ILI correctly notes that the appellate court has upheld a local ordinance which barred an applicant from introducing written material at hearing, other than material originally filed with the application. The court stated that "[s]uch a rule is consistent with the policy of apprising the county and the objectors of the evidence relied on by the applicant and also

eliminates potential delays in the adjudicatory process." (Waste Management, 530 N.E.2d at 693.) If we switched the references to "objectors" and "applicant", so that the sentence stated that the rule apprised the local decisionmaker and the applicant of the evidence relied on by the objectors, and eliminates potential delays, the court's statement would perfectly fit the instant situation. The Board cannot see how it could be fundamentally fair to require prefiling by the applicant, but somehow fundamentally unfair to require prefiling by other parties, including objectors, as required here.

It is very important to note, however, that the preregistration and prefiling requirements of Ordinance 93-16 did not bar the public from presenting comments and questions at the local hearing. Ordinance 93-18 specifically states:

> After all testimony has been presented, members of the public will be invited to provide comments and questions [sic] the witnesses. Members of the public who wish to comment or ask questions are required to register by providing their full name and current address on a registration sheet. (Exh. 6 and 7, Ordinance 93-18 at 2.)

The notice of hearing also stated that the hearing was open to the public and that any person may offer oral testimony. (C650.) The hearing officer reiterated this provision at the beginning of the hearing (Tr. at 10), and public comments and questions were subsequently heard (Tr. at 305-331). At the close of the hearing, the hearing officer asked if there was anyone else who would like to speak who was not on the sign-in sheet. (Tr. at 330.) The Board makes no decision on whether an ordinance which prevents persons from making any comment at hearing without prefiling is fundamentally fair. We find only that the requirement in Ordinance 93-16 that persons preregister and prefile in order to participate as parties is not fundamentally unfair.

Second, petitioners contend that the two ordinances (93-16 and 93-18) governing the local proceedings are inconsistent. Petitioners state that Ordinance 93-16 requires parties to file appearances 21 days prior to hearing, and to file testimony and exhibits 10 days prior to hearing. Petitioners compare that requirement with Ordinance 93-18, which provides that members of the public wishing to comment must register by providing their full name and current address. Petitioners conclude that these two provisions conflict, and state that the hearing officer wrote a letter to the mayor in an attempt to reconcile the ordinances. (Exh. 8.) Petitioners maintain that the result is total confusion as to who could participate in the hearing.

In response, ILI argues that Ordinance 93-16 sets forth

rules for those who desire to participate as parties to the hearing, while Ordinance 93-18 governs procedures for the hearing itself. ILI contends that the city council thus established different requirements for parties and for members of the public who merely wished to provide comments and question witnesses. ILI maintains that the different requirements are the result of Hoopeston's legitimate desire to expedite the process.

The Board agrees that the provisions of the two ordinances are not as clear as we may wish. However, we do not find that the vagueness of the provisions created any fundamental unfairness in the local proceedings. The ordinances do indeed create different requirements for those who wish to participate as parties, presenting testimony and evidence, than for members of the public who simply wish to comment and ask questions. Petitioners have not presented any authority for their implication that differing requirements for different types of participants creates fundamental unfairness, and we do not find any such problem.

Third, petitioners apparently contend that failure to include the requirements of Ordinance 93-16 in the notice of public hearing was fundamentally unfair. Petitioners state that Hoopeston claims to have published the requirements by posting Ordinance 93-16 on a bulletin board at City Hall, and conclude that a citizen would have to go to City Hall and wade through various ordinances in order to learn about the requirements. Petitioners maintain that this procedure does not meet the intent of publication of a notice of public hearing.

In response, ILI maintains that those members of the public who sought to be involved in the process could and did know of the ordinance. ILI points to testimony by two citizens that they knew of the preregistration requirements of Ordinance 93-16 (PCB Tr. at 165, 598-599), and notes that four members of the public obviously knew of the ordinance because they complied with the preregistration requirement (C671-C674). ILI also notes that a city employee, who is now deputy city clerk, testified that both Ordinance 93-16 and Ordinance 93-18 were posted on the bulletin board at City Hall, and were available for public inspection. (PCB Tr. at 32-34.)

The Board is unsure from the briefs whether petitioners' challenge to the method of notification of the ordinance is a challenge to the fundamental fairness of the proceeding, or a challenge to the sufficiency of the notice of public hearing. Thus, we will address both possibilities. We reject any claim that the local proceeding was fundamentally unfair because of the manner in which the applicable city ordinances were, or were not, publicized. Petitioners have cited no authority for such a claim. City ordinances are presumed to be known to inhabitants of the city and to those having dealings with the city. (DuMond

v. City of Mattoon (4th Dist 1965), 60 Ill.App.2d 83, 207 N.E.2d 320; City of Chicago v. Atkins (1st Dist. 1958), 19 Ill.App.2d 177, 153 N.E.2d 302.) There is no evidence in this record that the ordinance was somehow improperly adopted, or withheld from public inspection. Thus, we find no violation of fundamental fairness arising from the method of notification of the ordinance.

The Board also rejects any claim that the public notice of the hearing published by Hoopeston in two local newspapers is somehow deficient. Section 39.2(d) of the Act requires the local hearing "to be preceded by published notice in a newspaper of general circulation published in the county of the proposed site". (415 ILCS 5/39.2(d) (1992).) The notice of public hearing published by Hoopeston gives the date, time, and place of the public hearing, and summarizes the subject of the hearing. (C650-C652.) Petitioners have not pointed to any requirement of the statute or case law that the notice contain any further details, nor do they claim that the notice was insufficient to notify the public of the location, time, date, and subject of the hearing. We find that the notice of public hearing meets the requirements of the Act.

Hearing Officer Instructions

Next, petitioners contend that the hearing officer gave erroneous instructions to the city council on the burden of proof. Petitioners note that at the April 15 special council meeting, held to discuss the siting application, the hearing officer discussed the burden of proof and how the city council should judge whether the applicant had met that burden. Petitioners maintain that the hearing officer made a number of errors in that discussion, including a failure to emphasize that a lack of evidence or a lack of foundation is a basis for rejecting expert opinion, and that the hearing officer made only passing reference to the fact that the city council may determine whether to believe expert witnesses. Petitioners argue that because the city council received incorrect instructions, this Board should either reverse Hoopeston's decision, or remand to Hoopeston.

ILI contends that petitioners' claims on this issue contain two fundamental flaws. First, ILI argues that there is no authority for petitioners' assumption that the hearing officer was obligated to instruct the city council on every conceivable evidentiary issue and legal burden. ILI also states that there is no authority for the proposition that a hearing officer has an obligation to provide any instructions to the local decisionmaker. Second, ILI maintains that, in answering questions from the council members, the hearing officer properly explained each issue raised. ILI asserts that the transcript of the April 15 special meeting contradicts the claim that the

hearing officer "strongly implied" that the city council could not disbelieve a witness's testimony. ILI argues that the hearing officer properly answered the questions asked of him by council members, and the city council was able to fairly consider the evidence before it. ILI contends that no more is required.

After reviewing the record and the parties' arguments, the Board finds no error in the hearing officer's discussions with the city council. As ILI points out, petitioners have failed to cite any authority for their assumption that the hearing officer is obligated to discuss every possible legal issue and burden raised by a siting proceeding. The fact that the city council members are "laymen", as described by petitioners, does not somehow require the hearing officer to provide exhaustive instructions on all conceivable issues. Additionally, we have reviewed the transcript of the April 15 council meeting (Exh. 1), and we find nothing erroneous in the answers that the hearing officer gave to questions from the council members. We reject petitioners' contention that the hearing officer failed to properly inform the council that they could determine whether to believe a witness. The hearing officer specifically stated that "It's for you to decide whether you believe that person [a witness] or not *** [y]ou as the jury have to decide who is telling the truth or who is -- who you think is a better expert." (Tr. 4/15/93 at 52.) In sum, we find no violation of fundamental fairness caused by the hearing officer's discussions with the city council.[3]

Hoopeston's Consulting Engineer

Petitioners also object to the role of the consulting engineer retained by Hoopeston to provide technical assistance regarding the hydrogeological study submitted by ILI. Petitioners contend that although the engineer, Michael Streff, was retained in January 1993, there was no report made available until after the March 3 public hearing. Petitioners state that Mr. Streff did not testify at the March 3 hearing. Petitioners maintain that "evidence available and received both before and after the March 3, 1993 [p]ublic [h]earing was withheld from the public and severely retarded or eliminated the objectors [sic] ability to question and develop this information as part of the total evidence on the criteria [sic]." (Pet. Br. at 40.) Petitioners assert that the activities surrounding Mr. Streff's involvement were fundamentally unfair.

[3] The Board notes that in their reply brief, petitioners contend, without citation to authority, that the hearing officer had a duty to protect pro se litigants from aggressive tactics by the applicant's attorney. This claim was raised for the first time in the reply brief. Thus, we will not consider that claim.

In response, ILI contends that Mr. Streff's role was proper. ILI argues that petitioners' claims that Mr. Streff should have been required to testify at the March 3 hearing, and that correspondence between the engineering firm and Hoopeston should have been placed in the record, are baseless. ILI maintains that the Board has previously held that a siting authority is not required to file reports prepared by its own experts. (Material Recovery Corporation v. Village of Lake-in-the-Hills (July 1, 1993), PCB 93-11 at 12-13.)

ILI also asserts that petitioners have grossly mischaracterized the testimony given by Mr. Streff regarding his role. ILI maintains that contrary to petitioners' implication, Mr. Streff testified that prior to the March 3 hearing, he had reviewed ILI's hydrogeological report, but had not prepared his own written study or report. (PCB Tr. at 321.) ILI contends that Mr. Streff stated that his role was to respond to written questions from the city council, and not to prepare a report or critique of ILI's hydrogeological report. (PCB Tr. at 327.) ILI argues that Mr. Streff's role in the local proceeding was limited to that of a neutral advisor on ILI's hydrogeological study, and was entirely proper.

The Board finds nothing improper in Mr. Streff's role in the local proceedings. The practice of retaining a technical expert to assist the local decisionmaker has been upheld by the appellate court and by this Board. (McLean County Disposal v. Pollution Control Board (4th Dist. 1991), 207 Ill.App.3d 477, 566 N.E.2d 26; Fairview Area Citizens Taskforce v. Village of Fairview (June 22, 1989), PCB 89-33, aff'd FACT, 555 N.E.2d 1178; Material Recovery Corporation, PCB 93-11.) Although petitioners repeatedly refer to Mr. Streff's "report", the record shows that Mr. Streff did not prepare a written report. (PCB Tr. at 321.) We believe that it is obvious that an expert who does not prepare a written report cannot somehow be required to file such a report.

Likewise, we find no merit in petitioners' objection that although Mr. Streff was not "allowed" to testify at the March 3 public hearing, he was allowed to "testify" at the April 15 "hearing" such that the objectors could not cross-examine him. There is no evidence in the record that Mr. Streff was prevented from testifying at the March 3 hearing. Instead, the record indicates that Mr. Streff was retained in order to advise the city council, not to provide evidence in this proceeding. Petitioners have failed to cite any authority for their claim that technical experts retained by a local decisionmaker are required to appear at the local hearing to testify. In fact, the Board has specifically held that it is not the local decisionmaker's obligation to provide evidence proving or disproving an applicant's assertions. (Material Recovery Corporation, PCB 93-11; Hediger v. D & L Landfill, Inc. (December

20, 1990), PCB 90-163.) As to petitioners' claims regarding the April 15 "hearing", the Board notes that the April 15 gathering was a special meeting of the city council to discuss the application, not a hearing. We find that Mr. Streff's involvement in that April 15 meeting was simply to answer questions from the city council, which was the role for which he was retained. (Tr. 4/15/93 at 19-67.)

In sum, we find that Mr. Streff's role in the local proceeding was proper, and that nothing associated with Mr. Streff's participation rendered the local proceedings fundamentally unfair.

Predisposition and Bias

Petitioners also contend that two voting members of the city council were predisposed or biased in favor of granting site approval. First, petitioners maintain that the mayor, who voted in favor of the application to break a tie, had prejudged the issue. Petitioners assert that in various presentations to the Hoopeston Industrial Corporation (HIC), the Hoopeston Community Memorial Hospital and Nursing Home, and the Hoopeston Planning Commission, the mayor only discussed monetary gain to Hoopeston, the development of a recycling center, and the possible clean up of the old Tweedy Landfill. Petitioners note that this Board and the appellate court had ruled that consideration of monetary gains to a local decisionmaker, standing alone, do not show prejudice or bias. However, petitioners argue that this record shows a complete paucity of evidence that the mayor ever considered the nine statutory criteria, and thus demonstrates the mayor's predetermination in favor of the site approval.

In response, ILI maintains that petitioners' claims are totally unsubstantiated by the record, and that the claims ignore the applicable standard that guides local decisionmakers' conduct during the siting process. ILI states that the appellate court has held that there is a presumption that administrative officials are objective, and that the fact that an official has taken a position or expressed strong views on an issue does not overcome the presumption. (Waste Management, 530 N.E.2d at 695-696.) ILI also points to Section 39.2(d) of the Act, which states that:

> The fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on an issue relating to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue. (415 ILCS 5/39.2(d) (1992).)

ILI contends that the record does not show any evidence sufficient to overcome the presumption of objectivity, since the

record does not reflect any statement that the mayor actually advocated approval. ILI asserts that the mayor's own testimony at the Board hearing demonstrates that he did not prejudge the merits of the application. Finally, ILI argues that petitioners' failure to raise objection to the mayor voting on the application at any time during the original proceeding constitutes a waiver of this issue. (A.R.F. Landfill, Inc. v. Pollution Control Board (2d Dist. 1988), 174 Ill.App.3d 82, 528 N.E.2d 390.)

The Board finds that petitioners have waived any claim of bias or predisposition by the mayor by failing to object at the local proceeding. There are a number of cases in which the courts have held that in order for the question of bias to be raised on appeal, that issue must have been raised prior to or during the local hearings. As the supreme court stated, "To allow a party to first seek a ruling in a matter and, upon obtaining an unfavorable one, permit him to assert a claim of bias would be improper." (E & E Hauling, 481 N.E.2d at 666.) (See also FACT, 555 N.E.2d at 1180-1181; A.R.F. Landfill, 528 N.E.2d 390.)

We note that petitioners allege that the record does not show that petitioners were aware of the issue at the March 3 hearing, and contend that ILI has waived its right to raise the issue of waiver by failing to object to testimony at the Board hearing on the claim of the mayor's alleged bias. We reject both contentions. All of the instances which petitioners contend demonstrate the mayor's bias occurred prior to the filing of ILI's application. For example, the meetings of the Planning Commission, HIC and the hospital at which the mayor appeared occurred between June 29, 1992 and November 19, 1992. (PCB Tr. at 56, 139, 237, 239.) Additionally, the newspaper articles cited by petitioners as evidence of bias were published on July 24, 1992 and July 28, 1992. (Exh. 17 and 18.) The instant application was filed on November 25, 1992. Quite simply, the record does not support petitioners' allegation that they were not aware of the issue at the March 3 hearing. As to the contention that ILI waived its argument on this issue by failing to object at the Board hearing, petitioners cite no authority for such a proposition. A failure to object to the introduction of the evidence on the issue of bias, at the Board hearing, is not the same as a failure to raise a claim of bias at the level where that bias might be cured. As the E & E Hauling court noted, the purpose of requiring objection to alleged bias at the local level is to prevent a party from seeking a ruling and then raising the issue of bias only if the ruling is unfavorable. No such purpose is applicable to a failure to object to the introduction of evidence at the Board hearing.

Second, petitioners contend that the Board hearing developed, for the first time, that Alderman Odell Crabtree should have been disqualified from voting. Petitioners contend

that Alderman Crabtree was contractually employed by ILI or Vermilion Waste Systems (also owned by the Van Weeldens, owners of ILI) during 1992 and 1993 through the construction company he owns. Petitioners maintain that Alderman Crabtree was therefore in a conflict of interest to vote or participate in the siting proceedings. Petitioners assert that they had no access to knowledge of Alderman Crabtree's conflict of interest, and thus could not have been expected to raise the issue at the public hearing.

In response, ILI argues that petitioners' contention that they had no access to knowledge of Alderman Crabtree's alleged conflict of interest is refuted by the record. ILI contends that Alderman Crabtree stated at a Planning Commission meeting in July 1992 that he had worked for the Van Weelden brothers (PCB Tr. at 134, 146, and 366), and that Planning Commission Chairman James Klaber, who is a petitioner in the instant appeal, was present at that meeting (PCB Tr. at 130, 540-541). Thus, ILI maintains that any claim of conflict of interest of Alderman Crabtree could have been raised at the local hearing, and thus petitioners have waived the issue. Further, ILI argues that even if the issue had not been waived, there is no evidence that Alderman Crabtree's vote was the product of bias. ILI contends that the work at issue was not performed while the application was pending, and that there was no connection between the minor construction services performed and Alderman Crabtree's vote on the application.

The Board finds that petitioner Klaber has waived any claim of bias by Alderman Crabtree by failing to object at the local proceeding. We find that the record does indeed show that Mr. Klaber had knowledge of the alleged conflict of interest, since it is undisputed that Mr. Klaber was in attendance at the Planning Commission meeting where Alderman Crabtree disclosed that he had done work for the Van Weelden brothers. (PCB Tr. at 130, 134, 146, 366, 540-541.) Therefore, Mr. Klaber must be held to the standard articulated by the courts, that claims of bias must be raised at the local hearing.

However, we find no evidence that the other petitioners knew or had reaason to know of the alleged conflict of interest prior to the local hearing. Therefore, we find that the other four petitioners have not waived this issue.

After reviewing the record, the Board concludes that Alderman Crabtree did not have a conflict of interest which required his disqualification from the vote. The record shows that HOW Construction, which is partially owned by Alderman Crabtree, was paid $450 for repairing a shed door at Vermilion Waste on July 7, 1992, and $655.08 for construction work in the Vermilion Waste office on September 30, 1992. (Exh. 15.) The record also includes a June 14, 1993 proposal for future work,

estimated at $2,370. Alderman Crabtree testified that HOW was working on that project (raising a scale house on posts) at the time of the Board hearing. (PCB Tr. at 358.) Alderman Crabtree stated that he had no contact with anyone connected with ILI between the filing of the application (November 25, 1992) and the city council's vote on the application (April 27, 1993). (PCB Tr. at 372-373.) Alderman Crabtree further testified that no one promised that HOW would receive additional work from Vermilion Waste or ILI if the application was approved (PCB Tr. at 374), and that he considered only the nine statutory criteria when making his decision on the application (PCB Tr. at 375).

In our decision in Board of Trustees of Casner Township v. County of Jefferson (April 4, 1985), PCB 84-175, the Board held that excavating activities performed by a county board member at the site of the proposed facility, during the pendency of the request for site approval, did not reach the level of a disqualifying conflict of interest. (Casner Township, slip op. at 10-11.) The Board noted that the supreme court has held that a decisionmaker who has a financial interest in the subject matter must recuse himself. (In Re Heirich (1956), 10 Ill.2d 357, 140 N.E.2d 825, 838-839.)

We find that the facts of this case are analagous to those in Casner Township, and that Alderman Crabtree's work for Vermilion Waste prior to the filing of the application did not create a conflict of interest which required that he be disqualified. There is no evidence in the record which suggests that Alderman Crabtree has any financial interest in the expansion of the landfill, and we specifically reject petitioners' speculation that the work performed by HOW after the application was approved was a "reward" for Alderman Crabtree's vote. We note that petitioners point out that the amount of money recieved as compensation in Casner Township ($150) was less that the money paid to HOW ($1105.08 prior to the filing of the application, and $2370 subsequent to the April 27 decision). However, in this case there is no evidence that the work in question was performed during the pendency of the application, as was the case in Casner Township. It is well-settled that there is a presumption that administrative officials are objective and capable of fairly judging a particular controversy. (Waste Management, 530 N.E.2d at 537; Citizens for a Better Environment v. Pollution Control Board (1st Dist. 1987), 152 Ill.App.3d 105, 504 N.E.2d 166.) We find no evidence in the record which overcomes this presumption.

Finally, the Board notes that in arguing that they have not waived the issues of bias and predisposition, petitioners cite to the Board's decision in Gallatin National Company v. Fulton County Board (June 15, 1992), PCB 91-156. Petitioners quote the Board's statement that "[i]t would be absurd to find that although the Board must examine fundamental fairness, the

petitioners are excluded from presenting evidence on these questions." (Gallatin National, PCB 91-256 at 8.) The Board finds that this quote is not relevant to the issue of whether a claim of bias is waived by a failure to raise the issue at the local level. In Gallatin National, the Board was ruling on a motion in limine which sought to prohibit petitioners from calling witnesses or adducing evidence at the Board's hearing on the issue of fundamental fairness. We fail to see the connection to this case.

Evidence Outside the Record

Petitioners next contend that not all evidence and comment were included in the record before the city council. First, petitioners argue that it was fundamentally unfair for the city council to accept the letter and appearance of Samuel Panno, a geochemist, at the October 20, 1992 city council meeting "without including him and his documents in the public record for review by the objectors [sic] March 3, 1993." (Pet. Br. at 39.) Petitioners maintain that this evidence was withheld from the public and severely retarded or eliminated the objectors' ability to question and develop this information. Second, petitioners contend that the omission from the record of approximately 850 letters sent to the city council (Exh. 3) violated the statute, and requires reversal of Hoopeston's decision for failure to consider these written comments.

In response, ILI maintains that because there was no application for siting pending before the city council at the time Mr. Panno appeared, there is no obligation that Mr. Panno's appearance be included in the subsequent record. ILI cites the Board's decision in Hediger, PCB 90-163, for the proposition that the local decisionmaker is not required to prove or disprove the merits of the siting application. ILI also argues that even if there was a requirement to include Mr. Panno's information, petitioners suffered no prejudice, since petitioners cited Mr. Panno's written opinion extensively and introduced a letter from Mr. Panno during the siting hearing. (Tr. at 247-249.)

As to the 850 letters omitted from the record, ILI states that these letters were submitted to Hoopeston before the application for siting approval was filed. ILI argues that petitioners have cited no authority for the proposition that correspondence regarding a potential landfill application received prior to the filing of the application must be made part of the siting record, and notes that Section 39.2(c) requires only that the local decisionmaker consider any comment received no later than 30 days after the last public hearing. In any event, ILI maintains that the record shows that the city council was informed of the existence of the letters, and that the letters were available for review by council members. (PCB Tr. at 32, 287.)

The Board believes that petitioners are challenging the city council's failure to place the Panno documents and the letters in the record for public review during the pendency of the local proceedings. We reject that claim. Petitioners have not pointed to any authority which requires information submitted prior to the filing of an application for site approval be placed in the siting record. Petitioners are technically correct that Section 39.2(c) provides only that correspondence received not later than 30 days after hearing must be considered by the local decisionmaker, and does not say that such correspondence must be received before the application is filed. However, we find that to require that any document related to an application for siting approval, no matter how long it was received before the filing of the application, be placed in the record would cause great uncertainty as to the proper scope of the record. For example, if a local decisionmaker received correspondence regarding an existing landfill some years before that landfill filed an application for approval of an expansion, would that correspondence need to be included in the siting record? The Board finds that Section 39.2 requires only that the record include, and that the decisionmaker consider, all correspondence received from the time that an application is filed, until 30 days after the last hearing.[4]

Written Decision

Finally, petitioners challenge Hoopeston's consideration of the applicable statutory criteria, and subsequent written decision. First, petitioners argue that the record of the city council's meetings on April 15 and April 27 fails to show a review of the nine criteria. Petitioners contend that simply listing the criteria at the beginning of the April 15 meeting, without fully discussing each criteria, is clear error and a disregard of the requirements of the statute. Second, petitioners challenge the sufficiency of the written decision issued by Hoopeston. Petitioners object to the fact that the council members did not have a written resolution of findings of fact before them when the vote was taken on April 27, 1993, and argue that it was insufficient for the written resolution to simply list each criteria, without specific reasons for the decision.

In response, ILI maintains that petitioners are mistaken in believing that Hoopeston was obligated to deliberate separately on each of the applicable criteria. ILI contends that the only

[4] We note that there is no claim that persons who submitted letters prior to the filing of the application were in some way prevented from filing a comment during the pendency of the application.

requirements for decision are that the record be available for review by all members of the siting authority, and that the decisionmaker issue a written decision. (Waste Management, 175 Ill.App.3d at 1044.) As to the sufficiency of the written decision, ILI contends that Section 39.2(e) does not require that decisionmakers actually have a written decision before them when voting, and that Hoopeston is not obligated to explain its reasons for each individual finding of fact. (E & E Hauling, 116 Ill.App.3d at 616.)

The Board finds no error or denial of fundamental fairness in the city council's failure to discuss each criterion separately. The hearing officer specifically reminded the council members that there are nine criteria to be considered, and that the applicant must satisfy those criteria. He then read all nine criteria. (Tr. 4/15/93 at 17.) As the appellate court noted in Waste Management, there is no requirement that the local decisionmaker conduct any debate as long as they have had an opportunity to review the record prior to voting. (Waste Management, 530 N.E.2d at 698.)

The Board also finds that the written decision is sufficient to meet the requirements of Section 39.2. As the appellate court has stated, a local decisionmaker need only indicate that the criteria have or have not been met. (E & E Hauling, 116 Ill.App.3d at 616.) The written decision, dated April 27, makes specific findings that each criterion has either been satisfied, or is not applicable. (C1151-1153.) We find no violation of fundamental fairness associated with the form of the written decision, or the adoption of that written decision.

STATUTORY CRITERIA

Petitioners also attack Hoopeston's findings on six of the nine statutory criteria set forth in Section 39.2. As previously stated, when reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, 566 N.E.2d at 29; E & E Hauling, 451 N.E.2d 555.) A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. (Harris v. Day (4th Dist. 1983), 115 Ill.App.3d 762, 451 N.E.2d 262, 265.) The Board, on review, is not to reweigh the evidence. Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. (FACT, 555 N.E.2d at 1184; Tate, 544 N.E.2d at 1195; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505, 507.) Specifically, petitioners challenge Hoopeston's decision on criteria one, two, three, four, five, and six.

Criterion one

Section 39.2(a) provides that a local decisionmaker must determine whether the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve. Hoopeston found that this criterion had been satisfied, stating in its written decision that "[t]he facility is necessary to accommodate the waste needs of the City of Hoopeston and the Vermilion County Area." (C1152.)

First, petitioners argue that Hoopeston failed to properly set forth criterion one in its written decision. Petitioners point to Hoopeston's finding that the facility is necessary for the waste needs of Hoopeston and the Vermilion County area. Petitioners maintain that ILI was obligated to establish that the proposed facility is necessary to accommodate the waste needs of the 31-county area which ILI proposed to serve, not just Hoopeston and the Vermilion County area. Thus, petitioners assert that Hoopeston's decision can only be interpreted as a finding against ILI for the proposed 31-county service area.

In response, ILI maintains that petitioners simply misinterpret Hoopeston's finding of need for a facility to serve the Vermilion County area. ILI states that Hoopeston had agreed on the definition of the service area in the host agreement entered into between Hoopeston and ILI, and notes that the host agreement lists the 31 counties included in the service area. (C439.) ILI contends that its proposal was for a limited service area of counties within transport range, and defined by the host agreement with Hoopeston. ILI argues that Hoopeston's finding that the facility is needed to accommodate the Vermilion County area is fully consistent with the service area proposed by ILI and agreed to by Hoopeston in the host agreement.

After reviewing the record and the arguments of the parties, the Board finds that Hoopeston's decision on criterion one does not comport with the requirements of the statute. Section 39.2(a) states that local siting approval shall be granted only if the proposed facility "is necessary to accommodate the waste needs of the area it is intended to serve". (415 ILCS 5/39.2(a) (1992) (emphasis added).) It is uncontested that the proposed facility is intended to serve a 31-county area of Illinois and Indiana. (Tr. at 26; C439.) Hoopeston's written decision, however, states that "the facility is necessary to accommodate the waste needs of the City of Hoopeston and the Vermilion County Area." (C1152 (emphasis added).) Thus, Hoopeston's decision finds only that the facility is necessary for a portion of the service area, not the entire 31-county service area. It is well-settled that it is the applicant who defines the service area, and that the local decisionmaker has no authority to amend that service area. (Metropolitan Waste Systems, Inc. v. Pollution Control Board (3d Dist. 1990), 201 Ill.App.3d 51, 558 N.E.2d 785,

787.) Because the statute requires that the local decisionmaker determine whether the proposed facility is necessary to accommodate the waste needs of the service area as defined by the applicant, and because siting approval can only be granted if the decisionmaker finds that all criteria have been met, this Board must reverse Hoopeston's decision granting site approval to ILI.

We are not persuaded by ILI's argument that Hoopeston had agreed to the service area when entering into the host agreement. Quite simply, the definition of the service area is not at issue here. The issue is whether, in making its decision pursuant to Section 39.2(a), Hoopeston found that criterion one was satisfied. The host agreement, which was entered into before the siting application was filed, and the Section 39.2 siting process are separate and distinct. We do not believe that we can somehow infer that Hoopeston really meant to state that the facility was necessary for the entire service area, when the written decision clearly refers only to Hoopeston and the Vermilion County area. It took an affirmative act for the city council to use that language[5], and the result is fundamentally at odds with the requirements of the statute. Section 39.2(e) states that the local decisionmaker's decision must be in writing and "in conformance with subsection (a) of this Section." (415 ILCS 5/39.2(e) (1992).) Subsection (a) contains the nine statutory criteria, and criterion one clearly states that the facility must be "necessary to accommodate the waste needs of the area it is intended to serve." (415 ILCS 5/39.2(a) (1992) (emphasis added).) Thus, Hoopeston's decision is at odds with the requirements of Section 39.2, and the grant of siting approval cannot stand.

Further, we reject any implication that Hoopeston intended the phrase "Vermilion County area" to mean the entire 31-county service area. That 31-county area includes, among others, Cook, Lake, and DeKalb Counties in Illinois, and Lake County in Indiana. (C439.) We do not believe that those counties can logically be construed as the Vermilion County area. We find that in order to find that the application satisfied criterion one, the local decisionmaker must specifically find that the facility is necessary to accommodate the waste needs of the entire service area, not just a portion of that area. Because Hoopeston's written decision finds only that the facility is necessary for Hoopeston and the Vermilion County area, the Board finds that Hoopeston did not conclude that the facility was necessary for the entire service area. We do not believe that our finding in any way cuts against the intent of Section 39.2,

[5] We note that in setting forth its decision on the other eight criteria, the city council used the specific statutory language set forth in subsection (a).

which was in part to allow local decisionmakers to determine whether there is a need for a proposed landfill. Hoopeston had its opportunity to make that decision, and Hoopeston concluded that ILI had only demonstrated need as to Hoopeston and the Vermilion County area. (C1152.) Thus, Hoopeston's decision granting site approval is reversed.

We note that in some instances, where the Board finds an error in a local decision, the remedy has been a remand to the local decisionmaker. Historically, the Board has remanded cases where we have found a violation of fundamental fairness (City of Rockford v. Winnebago County Board (November 19, 1987), PCB 87-92, aff'd (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505), where the decisionmaker voted on only one criterion (Clean Quality Resources v. Marion County Board (February 28, 1991), PCB 90-216), and where we were unable to determine whether the local decisionmaker denied the siting request, or approved the request with conditions (Land and Lakes Co. v. Village of Romeoville (August 26, 1991), PCB 91-7). None of these circumstances are present here. Hoopeston held the required local proceeding, which was fundamentally fair, and made a determination on each of the nine statutory criteria. However, Hoopeston found that the facility was necessary for only a portion of the area intended to be served, instead of for the entire area to be served, as required by Section 39.2. There is no confusion about the decision, and no reason to ask for, or allow, a new decision on criterion one. Thus, remand is inappropriate, and the decision must be reversed.

Having found that Hoopeston's decision on criterion one is fatally flawed, and therefore having reversed the decision granting site approval, the Board would have ended its inquiry here. However, the appellate court has held that this Board has a statutory obligation to conduct a complete review of all challenged criteria. (Waste Management, 530 N.E.2d at 692.) Therefore, we will briefly address the remaining criteria.

Criterion two

Section 39.2(a) provides that the local decisionmaker must determine whether the proposed facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected. Hoopeston specifically found that ILI's proposed facility met that standard. (C1152.)

Petitioners contend that there is insufficient evidence in the record to support Hoopeston's finding that criterion two has been satisfied. Petitioners state that although Gregory Kugler of Andrews Environmental Engineering testified that the safeguards of the design are sufficient to protect the public health, safety, and welfare, Mr. Kugler discussed only a final cap, final cover, and a leachate system. Petitioners maintain

that the record shows that the landfill will be placed directly on top of the Glasford aquifer, which is the primary water source for the area.[6] Petitioners assert that they do not raise a credibility issue, but allege that "[t]here is simply nothing in the record as to what protection will be afforded the public health and safety that is based on competent evidence." (Pet. Reply Br. at 8.)

In response, ILI maintains that a review of the record shows that ILI provided extensive evidence to support a finding that the facility satisfies criterion two. ILI points to information contained in its application, and to the testimony of Mr. Kugler. ILI also contends that the issue of the proximity of the aquifer was raised at the local hearing and in post-hearing submissions to Hoopeston. ILI argues that it is not this Board's role to reweigh Hoopeston's assessment of the evidence, and that the local decisionmaker is to assess the credibility of expert witnesses. (File v. D & L Landfill, 579 N.E.2d 1228.)

After reviewing the evidence and the parties' arguments, the Board finds that Hoopeston's decision on criterion two is not against the manifest weight of the evidence. ILI's application contained a hydrogeologic study, descriptions of leachate collection and gas monitoring systems, and an explanation of the system design. (C1-C435.) Mr. Kugler testified on the placement and purpose of monitoring wells (Tr. at 164-165), methods for determining a breach in the liner system (Tr. at 167-169), the design of the liner (Tr. at 183-187), and leachate collection and disposal procedures (Tr. at 203-204). As to the aquifer, that issue was raised at the local level, and Hoopeston apparently determined that the location of the landfill did not threaten the public health, safety, or welfare. The Board is not to reweigh the evidence, and we are not free to reverse simply because the local tribunal credits one group of witnesses over another. (FACT, 555 N.E.2d at 1184; Tate, 544 N.E.2d at 1195; File v. D & L Landfill (August 30, 1990), PCB 90-94.) Although petitioners allege that they do not raise issues of credibility, we find that petitioners' challenge to the "competency" of the evidence is indeed a challenge to credibility. Based on the record before us, the Board cannot say that Hoopeston's decision was against the manifest weight of the evidence.

Criterion three

Section 39.2(a) requires local decisionmakers to determine

[6] The Board notes that our review of petitioners' argument on this criterion, as with the other criterion, has been complicated by petitioners' failure to provide citations to the record.

whether the proposed facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property. Hoopeston found that the instant facility satisfies criterion three. (C1152.)

Petitioners attack the testimony of Kenneth Cunningham, a real estate appraiser who testified on behalf of ILI. Petitioners state that Mr. Cunningham's evaluation of the comparable sales for the area was limited to agricultural property, and that Mr. Cunningham does not describe the character of the surrounding area and does not mention that the proposed facility is located within a mile of the hospital, high school, and several residential neighborhoods. Petitioners contend that Mr. Cunningham's statement that the landfill will have a positive effect on the area is "an absolutely ridiculous conclusion." (Pet. Br. at 14.)

In response, ILI argues that petitioners misunderstand the nature of this appeal, and states that this Board does not reweigh or reanalyze the evidence. ILI maintains that the persuasiveness of a witness's testimony is for Hoopeston, not the Board, to decide. ILI argues that Hoopeston's decision on criterion three is supported by evidence in the record, and points out that the criterion requires only that the location minimize incompatibility and effect on property values, not guarantee that no fluctuation will result. (Clutts v. Beasley (5th Dist. 1989), 185 Ill.App.3d 543, 541 N.E.2d 844.)

Based on the record before us, the Board cannot say that Hoopeston's decision was against the manifest weight of the evidence. ILI provided a real estate evaluation performed by Mr. Cunningham with its application. (C407-C422.) Mr. Cunningham testified to his conclusions at the local hearing, stating that the highest and best use of the surrounding area would remain the same, and that therefore the property value of that area would not be altered by the expansion of the landfill. (Tr. at 82.) ILI points out that the objectors did not refute Mr. Cunningham's conclusions at hearing, although Ms. Mott did state that she disagreed with those conclusions. (Tr. at 315.) The Board is not to reweigh the evidence, and we are not free to reverse simply because the local tribunal credits one group of witnesses over another. (FACT, 555 N.E.2d at 1184; Tate, 544 N.E.2d at 1195; File v. D & L Landfill (August 30, 1990), PCB 90-94.) After reviewing the evidence and the parties' arguments, the Board finds that Hoopeston's decision on criterion three is not against the manifest weight of the evidence.

Criterion four

Criterion four requires the local decisionmaker to decide if the facility is located outside the boundary of the 100-year

flood plain, or the site is flood-proofed. Hoopeston concluded that ILI's proposed facility is located outside the boundary of the 100-year flood plain. (C1152.) In their brief, petitioners assert, without further argument, that the record is devoid of any evidence on this criterion. However, as ILI points out, the application submitted by ILI includes a certification from the Illinois State Water Survey that the site is not within the flood plain boundary (C234-C237), and Mr. Kugler testified to that conclusion (Tr. at 32). Thus, the Board finds that Hoopeston's decision on criterion four is not against the manifest weight of the evidence.

Criterion five

Section 39.2 also required the local decisionmaker to determine whether the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. Hoopeston found that this criterion has been satisfied. (C 1152.)

Petitioners assert that Mr. Kugler's testimony that this criterion is satisfied is conclusory and without foundation. Petitioners note that ILI's application contains an operations plan and a plan to mitigate accidents, fire and spills, but assert that "[t]he application is not evidence, and the purpose of the hearing was to present evidence to support the application." (Pet. Reply Br. at 10.) Petitioners contend that ILI did not present any competent evidence on this issue.

ILI responds by arguing that the plans included in the application are precisely what the criterion requires. ILI contends that the appellate court has held that challenging an alleged lack of detail in the plans, without any evidence from objectors to demonstrate the inadequacy of the plans, is insufficient to show that the decision is against the manifest weight of the evidence. (FACT, 555 N.E.2d at 1178.)

Initially, the Board must respond to petitioners' assertion that the application is not evidence. Petitioners do not present any authority for this assertion, and the Board hereby specifically rejects such a claim. The application, along with other documents properly filed by the applicant and any other interested person, do indeed constitute evidence in a local siting proceeding.[7] Thus, we find that Hoopeston's decision on criterion five is not against the manifest weight of the evidence. The application includes a plan of operations (C241-C245), and a separate plan for mitigating accidents, fire, and

[7] Of course, we do not imply that the hearing officer or the local decisionmaker cannot exclude improper submittals.

spills (C247-C253). Petitioners have not pointed to any impeaching or conflicting evidence, but merely again challenge the witness's credibility. This Board is not to reweigh the evidence or make decisions on a witness's credibility. That is the province of the local decisionmaker. (Cf. Industrial Fuels & Resources, 592 N.E.2d 148.)

Criterion six

Section 39.2(a) requires the local decisionmaker to decide whether the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows. Hoopeston found that ILI's application met this criterion. (C1152.)

Petitioners contend that ILI's evidence on this criterion was testimony by Mr. Kugler and Mr. Cunningham, which was based on an affidavit submitted by Chris Billing, who did not testify at hearing. Petitioners maintain that there is no evidence whether this affidavit is accurate, and that petitioners had no opportunity to cross-examine the affidavit to establish if the traffic counts are inaccurate. Petitioners argue that the record shows a negative impact on the area, and fails to support Hoopeston's finding on the criterion.

In response, ILI notes that the Billing affidavit was admitted without objection, and contends that the affidavit is persuasive that the facility satisfies criterion six. ILI further maintains that administrative agencies are not required to observe the technical rules of evidence. As to petitioners' contention that the record shows a negative impact on the area, ILI argues that the law does not require that a proposed site have no impact on traffic, but only that the impact be minimized.

After reviewing the record and the parties' arguments, the Board finds that Hoopeston's decision on criterion six is not against the manifest weight of the evidence. It is true that Mr. Billing was not present at the hearing to testify to the conclusions contained in his affidavit. (C658-C665.) However, petitioners have not presented any authority for a finding that use of an affidavit in some way renders a decision against the manifest weight of the evidence. We note that the Billing affidavit is not the only evidence presented by ILI. Mr. Kugler testified that not only did he review the traffic route with Mr. Billing, but that he himself had reviewed the traffic route and obtained traffic counts. (Tr. at 35-39.) Although the presentation of evidence in the form of an affidavit, without the appearance of the affidavit's author at the hearing, may not be the "best" evidence, we cannot say that use of the affidavit renders the decision against the manifest weight of the evidence. It is the province of the local decisionmaker to consider the evidence, and to decide what weight to give to testimony and

exhibits. We find that Hoopeston's decision on criterion six is not against the manifest weight of the evidence.

CONCLUSION

In sum, we find that Hoopeston had jurisdiction to conduct the local proceeding, and that the local proceeding was fundamentally fair. However, the Board finds that Hoopeston's decision on criterion one does not comport with the requirements of the statute, and we therefore reverse Hoopeston's decision granting site approval. As to challenged criteria two, three, four, five, and six, we find that Hoopeston's decision is not against the manifest weight of the evidence.

ORDER

The Board hereby reverses the City of Hoopeston's April 27, 1993 decision granting site approval to Illinois Landfills, Inc.

IT IS SO ORDERED.

R. Flemal dissented, and B. Forcade concurred.

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

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 23rd day of September, 1993, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board