ILLINOIS POLLUTION CONTROL BOARD
June 22, 1989

FAIRVIEW AREA CITIZENS TASKFORCE, and RICHARD KLEINE, NORMA KLEINE, JOSEPH COMER, MICHELLE COMER, LEWIS NEWCOMB, WALTER NEWCOMB, HARRY POSTIN, DELORES POSTIN, GERALD BALES, VIRGINIA BALES, JOHN BEOLETTO, MICHAEL BEOLETTO, GERALD BALL, BECKY BALL, LYLE UTSINGER, GARY HOLLIS, DIANE HOLLIS, JUNIOR SCHLEICH, MELBA SCHLEICH,	)	
Petitioners,	)	
vs.	)	
VILLAGE OF FAIRVIEW AND GALLATIN NATIONAL COMPANY,	)	
Respondents.	)	PCB 89-33

MICHAEL F. KUKLA (COWLIN, UNGVARSKY, KUKLA, & CURRAN) APPEARED ON BEHALF OF PETITIONERS;

JOHN J. McCARTHY, ATTORNEY-AT-LAW, AND RALPH FROEHLING (FROEHLING, TAYLOR, & WEBER) APPEARED ON BEHALF OF RESPONDENT VILLAGE OF FAIRVIEW; and

THOMAS R. MULROY, JR., RAYMOND T. REOTT, AND REBECCA L. RAFTERY (JENNER & BLOCK) APPEARED ON BEHALF OF RESPONDENT GALLATIN NATIONAL COMPANY.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter is before the Board on a February 16, 1989 petition to contest granting of site approval, filed by the Fairview Area Citizens Taskforce (FACT) and Richard Kleine, Norma Kleine, Joseph Comer, Michelle Comer, Lewis Newcomb, Walter Newcomb, Harry Postin, Delores Postin, Gerald Bales, Virginia Bales, John Beoletto, Michael Beoletto, Gerald Ball, Becky Ball, Lyle Utsinger, Gary Hollis, Diane Hollis, Junior Schleich, and Melba Schleich. (All petitioners will be collectively referred to as FACT.) The petition seeks review of a January 9, 1989 decision of the Fairview Village Board (Village) granting site approval of respondent Gallatin National Company's (Gallatin) proposed regional pollution control facility. This Board held a public hearing on the petition for review on April 11, 1989.

FACT contends that the procedures used by the Village in ruling upon Gallatin's application were fundamentally unfair, thus denying FACT a fair hearing. FACT also argues that the Village's decision to grant site location approval was against the manifest weight of the evidence. Based on the record before it, the Board finds that the procedures used at the local level were fundamentally fair, and that the Village's decision to grant siting approval was not against the manifest weight of the evidence. Therefore, the Village's decision is affirmed.

HISTORY

On July 27, 1988 Gallatin filed its application for siting approval of a sanitary balefill/landfill to be located within the Village of Fairview. Gallatin owns 2,750 acres of land in the Village; this land was annexed by the Village in 1987. The site proposed for approval consists of 995 acres, 80 of which will be used for waste disposal. The Village Board held public hearings on October 29 and November 2, 4, 12, 16, 19, and 20, 1988. Gallatin presented eight witnesses, and FACT, which was represented by counsel, presented five witnesses. All witnesses were cross-examined, and members of the public made oral statements. A written public comment period followed the hearings. A few hundred comments were received by the Village Clerk during that time. Daily and Associates, an engineering firm retained by the Village, submitted its report on the last day of the public comment period.

The Village Board discussed the application at its January 2, 1989 meeting. The Village Board also denied FACT's objection to the engineering report filed by Daily and Associates. That objection was based upon FACT's claims that the report contained references to things outside the record, and that the opinions and interpretations in the report were never subject to cross examination. At a special meeting on January 9, 1989, the Village Board approved Gallatin's application for site approval by a vote of 5-1.

STATUTORY FRAMEWORK

At the local level, the siting approval process is governed by Section 39.2 of the Environmental Protection Act (Act). Ill. Rev. Stat. 1987, ch. 111½, par. 1039.2. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application. Only if the local body (in this case, the Village Board) finds that all applicable criteria have been met can siting approval be granted. The six criteria which are applicable to this case are:

1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

3. the 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;

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

5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents; and

6. the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

Section 40.1 of the Act charges this Board with reviewing the Village Board's decision. Specifically, this Board must determine whether the Village Board's decision was contrary to the manifest weight of the evidence. E&E Hauling, Inc. v. Illinois Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555 (2nd Dist. 1983), aff'd in part 107 Ill. 2d 33, 481 N.E.2d 664 (1985); City of Rockford v. IPCB, 125 Ill. App. 3d 384, 386, 465 N.E.2d 996 (1984); Waste Management of Illinois, Inc., v. IPCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (1984). The standard of manifest weight of the evidence is:

> A verdict is ... against the manifest weight of the evidence where it is palpably erroneous, wholly unwarranted, clearly the result of passion or prejudice, or appears to be arbitrary, unreasonable, and not based upon the evidence. A verdict cannot be set aside merely because the jury [Village Board] could have drawn different inferences and conclusions from conflicting testimony or because a reviewing court [IPCB] would have reached a different conclusion ... when considering whether a verdict was contrary to the manifest weight of the evidence, a reviewing court [IPCB] must view the evidence in the light most favorable to the appellee.

Steinberg v. Petra, 139 Ill. App. 3d 503, 508 (1986).

Consequently, if after reviewing the record, this Board finds that the Village Board could have reasonably reached its conclusion, the Village Board's decision must be affirmed. That a different conclusion might also be reasonable is insufficient; the opposite conclusion must be evident. (See Willowbrook Motel v. IPCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).)

The Board is also required by Section 40.1 to evaluate whether the Village Board's procedures used in reaching its decision were fundamentally fair. E&E Hauling, 451 N.E.2d at 562. Because the issue of fundamental fairness is a threshold matter, the Board will consider that issue first.

FUNDAMENTAL FAIRNESS

Section 40.1 requires that this Board review the proceedings before the Village Board to assure fundamental fairness. In E&E Hauling, the Appellate Court, Second District, found that statutory fundamental fairness requires application of standards of adjudicative due process. 451 N.E.2d at 564. In an analysis of bias or prejudgment, elected and administrative officials are presumed to be objective and to act without bias. The mere fact that an official has expressed strong views or taken a public position on an issue does not overcome that presumption. Nor is it sufficient to show that an official's alleged predisposition resulted from his or her participation in earlier proceedings on the issue in dispute. Citizens for a Better Environment v. Pollution Control Board, 152 Ill. App. 3d 105, 504 N.E.2d 166, 171 (1st Dist. 1987).

A decision must be reversed, or vacated and remanded, where "as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect." E&E Hauling, 451 N.E.2d at 571. Finally, adjudicatory due process requires that decisionmakers properly "hear" the case and that those who do not attend hearings in a given case base their determinations on the evidence contained in the transcribed record of such hearings. 451 N.E.2d at 569.

Predisposition

FACT first argues that the Village Board was predisposed to approve Gallatin's siting application. FACT points to the November 2, 1987 annexation agreement between the Village and Gallatin, which provides for economic benefits to the Village if a landfill subsequently is sited and developed on Gallatin's

annexed property. (PCB Pet. Ex. 1.)[1] Among others, those economic benefits include ten to twenty jobs, free natural gas, and payments of at least $50,000 annually to the Village. (PCB Pet. Ex. 1, pp. 8-11, 18.) FACT maintains that because Fairview is a small village of 550 people which needs economic security badly, the Village Board was predisposed by the economic benefits offered in the annexation agreement to approve Gallatin's siting application.

In response, Gallatin contends that the Appellate Court, Third District, has rejected a claim identical to FACT's argument in Woodsmoke Resorts Inc. v. City of Marseilles, 174 Ill. App.3d 906, 529 N.E.2d 274, 124 Ill. Dec. 454 (3d Dist. 1988). In that case, the appellate court held that the mere existence of an annexation agreement did not preclude the Marseilles board from impartially reviewing an application for site approval. Gallatin also argues that FACT has waived any claim that the Village Board was predisposed by economic benefits, because FACT failed to challenge the Village Board members before the local siting hearings. In support of its waiver argument, Gallatin cites A.R.F. Landfill, Inc. v. Pollution Control Board, 174 Ill. App. 3d 82, 528 N.E.2d 390, 123 Ill. Dec. 845 (2d Dist. 1988.)

The Board agrees with Gallatin that FACT has waived its claim that the Village Board was predisposed by the economic benefit promised in the annexation agreement. The annexation agreement pre-dates the siting application by eight months, and FACT knew of the existence of the agreement. Therefore, any challenge based upon the annexation agreement should have been raised at the local level. A claim of bias must be asserted promptly after knowledge of the alleged disqualification, because it would be improper to allow a party to withhold a claim of bias until it received an unfavorable result. E&E Hauling, 481 N.E. 2d at 666. FACT's allegations of predisposition based upon the annexation agreement could have been raised before the local hearings even began. Thus, the Board finds that the issue has been waived. A.R.F. Landfill, 528 N.E. 2d at 394; Waste Management of Illinois v. Pollution Control Board, 175 Ill. App. 3d 1023, 530 N.E. 2d 682, 694-95, 125 Ill. Dec. 524 (2d Dist. 1988).

Even if the issue were not waived, the Board does not believe that the existence of the annexation agreement, with its promise of economic benefits if a landfill was sited and

[1]Exhibits admitted at the Board hearing on this petition for review are identified as "PCB Ex. _____", and references to the transcript taken at the Board hearing are cited as "Tr. _____." References to the transcript taken at the Village hearings are cited as "R. Vol. _____."

developed, shows predisposition of the Village Board. Woodsmoke Resorts clearly holds that a local governing body is not disqualified from reviewing a siting application where that local body has annexed property and, pursuant to an annexation agreement, stands to gain financially if a landfill eventually operates on that property. The facts in this case are very similar to those in Woodsmoke Resorts; indeed, in Woodsmoke Resorts the City of Marseilles stood to gain at least seven million dollars, an amount far greater than the amount at issue here.[2] (The Board does not imply, however, that the amount of the economic benefit establishes a bias or predisposition.) A claim of predisposition based upon economic benefits to the local governing body was also rejected in E&E Hauling. 481 N.E. 2d at 667-68. As has been pointed out, public officials are presumed to be objective and to act without bias. FACT has not demonstrated that the Village Board had adjudged the facts as well as the law before hearing the case. E&E Hauling; A.R.F. Landfill; Waste Management; Citizens for a Better Environment.

Second, FACT maintains that the Village Board was predisposed to approve Gallatin's application by virtue of its retention of an engineering firm, Daily and Associates, and by the opinions and conclusions expressed by Otis Michels, the Daily engineer assigned to the project. Daily and Associates was retained by the Village Board in January 1988 "to provide engineering services on request for and by the Village to monitor activities, review documents and advise the Village regarding Gallatin National, Inc. preparation of documents for a siting hearing and IEPA permits and related assignments." (PCB Resp. Ex. 1.) FACT contends that Mr. Michels had concluded before the siting hearings were held that the six statutory criteria had been met, and that any open issues were resolved in a meeting attended by Mr. Michels, the Village attorney, Gallatin's engineers, and Gallatin's attorneys in September 1988 (after the filing of the application). FACT maintains that Mr. Michels had pre-approved the siting application, and that the Village Board relied upon Mr. Michels' expertise when deciding to approve the application.

In response, Gallatin argues that the Village was entitled to retain an independent expert to advise it on the complex and technical aspects of the application and the evidence presented

[2]The Board notes that FACT attempts to distinguish Woodsmoke Resorts by pointing out that Woodsmoke Resorts was filed before a a Section 39.2 local siting hearing was held. That is true; however, contrary to FACT's claim, the Woodsmoke Resorts court did not rule that administrative remedies must be exhausted (i.e., proceeding with the local hearing) before such a challenge could be raised.

at the siting hearings. Town of St. Charles v. Kane County Board, 57 PCB 201 (PCB 83-228, March 21, 1984), vacated on other grounds sub nom. Kane County Defenders v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2d Dist. 1985). Gallatin points out that Mr. Michels testified that the September 1988 meeting was held to allow him to raise open issues to Gallatin, and that Gallatin could respond in whatever manner it saw fit. (Tr. 60.) Gallatin further maintains that Mr. Michels was not predisposed in favor of the application. Even if Mr. Michels was predisposed, Gallatin contends that fact would be irrelevant, since he could not vote for or against the application because he was not a member of the Village Board. Gallatin points out that there is no evidence that Mr. Michels or any other employee of Daily and Associates suggested to any Village Board member how they should vote, and that the report prepared by Mr. Michels states that the Village Board must weigh the evidence itself.

This Board finds that the Village Board was not predisposed by virtue of its retention of Daily and Associates or by the opinions and conclusions expressed by Mr. Michels. The Village Board is indeed entitled to hire an expert to assist it in interpreting the technical aspects of the application and evidence presented at hearing. The Board does not believe that Mr. Michels was predisposed in favor of Gallatin's application. More importantly, the Board finds no evidence that the Village Board's decision was based solely upon Mr. Michels' report; thus, it is irrelevant whether Mr. Michels was predisposed for or against the application. Three Village Board members testified that they considered Mr. Michels' report along with all evidence and written comment when making their decision. (Tr. 126, 138-39, 164-65.) Elected officials are presumed to act objectively, and FACT has provided no evidence that the Village Board members acted otherwise. The September 1988 meeting between Mr. Michels and Gallatin's representatives may have some appearance of impropriety, since Mr. Michels was retained by the Village, but there is not even an allegation that any Village Board member attended that meeting.[3] There is no evidence that the Village Board relied improperly upon Mr. Michels' report, and therefore Mr. Michels' alleged predisposition is not relevant. Quite simply, Mr. Michels did not have a vote.

FACT's final claim of predisposition is an argument that a specific Village Board member, Doyal Williams, was predisposed to grant Gallatin's application. At the April 11, 1989 hearing on this petition for review, Kent Schleich, a member of FACT,

[3]The record before this Board does not indicate when FACT learned of the September 1988 meeting, and thus the Board does not know whether the issue should have been raised at the local level.

testified that in March 1988 Doyal Williams told him that he (Mr. Williams) was in favor of the landfill, that nothing would change his mind, and that it was too late to change his mind. (Tr. 190-91.) FACT asserts that Mr. Williams' opinion was not his alone, but was shared by others on the Village Board.

In response, Gallatin first argues that FACT waived any predisposition claim regarding Mr. Williams when it failed to challenge him at the local siting hearings. Gallatin notes that the conversation between Mr. Schleich and Mr. Williams is alleged to have occurred in March 1988, and contends that since Schleich was an active FACT member, any objection to Mr. Williams should have been raised at the local level. Gallatin also maintains that Mr. Schleich's account of Mr. Williams' statements does not overcome the presumption that Mr. Williams was objective. In support, Gallatin cites A.R.F. Landfill, 528 N.E. 2d at 394, for the proposition that the fact an official has taken a public position or expressed strong views on an issue does not overcome the presumption of objectivity.

The Board finds that FACT waived any predisposition challenge to Mr. Williams by failing to raise the issue at the local level. Again, there is much case law which establishes that is improper to allow a party to withhold a claim of bias until it has received an unfavorable result. E&E Hauling; A.R.F. Landfill; Waste Management; Citizens for a Better Environment. Mr. Schleich is a member of FACT, and FACT either knew or should have known of the statements attributed to Mr. Williams by Mr. Schleich before the local siting hearings took place. There was no reason that a challenge could not have been raised at the local level, and thus the issue is waived.

Impropriety In Decision-Making

FACT raises three claims of impropriety in the Village Board's decisionmaking process. First, FACT argues that Village Board members impermissibly considered ex parte contacts when voting on Gallatin's application. At the Board hearing on FACT's petition for review, FACT called several Village Board members as witnesses. Four Village Board members testified to various degrees of contacts outside the siting hearings, such as oral comments from the general public, phone calls, and receipt of postcards from Gallatin. (Tr. 72, 117-19,, 135-36, 158-59.) There is dispute, however, whether some of these contacts took place during the time that Gallatin's application was pending (i.e. between July 27, 1988 and January 9, 1989). (Tr. 89.) FACT contends that this testimony demonstrates that the Village Board members did not consider themselves to be acting in a quasi-judicial manner rather than in their usual legislative manner, and cites this Board's opinion in City of Rockford v. Winnebago County Board, PCB 87-92 (November 19, 1987). FACT maintains that by impermissibly considering these ex parte

contacts, the Village Board failed to limit its consideration of the siting application to the record developed at hearing and to written comments received during the comment period.

In response, Gallatin argues that although some Village Board members may have had contacts regarding the landfill after the application was filed, there is no evidence that the contacts had any prejudicial effect on FACT. Gallatin cites Waste Management, 530 N.E. 2d at 697-98, for the proposition that the complaining party must show prejudice from the contacts. Gallatin also maintains that FACT has failed to prove that the contacts constituted an irrevocable taint on the hearing process. E&E Hauling; City of Rockford.

The Board agrees with Gallatin that FACT has not shown an irrevocable taint caused by the ex parte contacts themselves. The testimony of the Village Board members did not establish the content of those contacts, or who made the contacts. It is impossible to tell from the record whether the contacts were for or against the siting application, and therefore it is impossible to find that FACT was prejudiced by the contacts. This is different than the facts in City of Rockford, where the record before this Board clearly showed that ex parte contacts were against the landfill, and thus prejudicial to the City (the applicant/petitioner in that case). The Board wholeheartedly agrees with the appellate court in Waste Management:

> [E]x parte communications from the public to their elected representatives are perhaps inevitable given a county [Village] board member's perceived legislative position, albeit in these circumstances, they act in an adjudicative role as well. Thus, although personal ex parte communications to county [Village] board members in their adjudicative role are improper, there must be a showing that the complaining party suffered prejudice from those contacts.

530 N.E.2d at 698.

It is not enough to show that ex parte contacts occurred; there must be evidence that those contacts prejudiced the complaining party. It is unrealistic to expect a local official to be able to avoid all ex parte contacts, although such an attempt must be made in good faith.

Second, FACT contends that the Village Board erroneously relied on Mr. Michels' engineering report, which contained information which was not in the record in any other way. FACT maintains that Mr. Michels' report included new evidence on real estate values and the life of mechanical equipment, among other things, and that the report expanded the statutory limitations on the siting process. FACT states that several Village Board

members testified that they considered Mr. Michels' report (Tr. 125-26). FACT asserts that since the Village Board's decision was to be based only upon the six criteria and on the evidence in the record, it is impermissible to allow Mr. Michels' report to expand that scope.

In response, Gallatin argues that Mr. Michels' report and all its contents were made a part of the record when the report was submitted during the 30-day written public comment period. Gallatin points out that the Village's rules for the siting procedure gave FACT seven days after the close of the comment period to respond to the report and all other public comment by filing proposed findings of facts and recommendations to the Village Board, but that FACT submitted only an untimely objection to the report.[4] Finally, Gallatin states that the statements challenged by FACT constitute a very small component of the report, and that there is no evidence that those challenged statements had any impact on any Village Board member.

The Board finds no merit in FACT's claim. All of the information in the report was made a part of the record when it was filed as a public comment, and thus the Village Board was entitled to consider all information. The fact that the report was done for and at the direction of the Village Board does not limit Mr. Michels' ability to discuss and consider all information which he deemed relevant, when all that material was made a part of the record for decision. As this Board has previously noted, the landfill siting process includes a 30-day post-hearing public comment period without including a restriction of the scope of comments to discussion of information already in the record. City of Rockford, PCB 87-92, p. 20 (November 19, 1987). This provision does limit the ability to rebut all on-record information, but that is how the statutory scheme has been established. See Section 39.2(c). Indeed, in this case the Village's rules gave FACT the opportunity to respond to any public comment within seven days after the close of the comment period. The fact that FACT did not do so in a timely manner does not render any of the information in the report improper. The entire report was submitted during the 30-day comment period, and thus was properly part of the record for decision.

Finally, FACT argues that the Village Board did not limit its consideration of the application to the six statutory

[4]As previously noted, the Village Board denied FACT's objection to the report. FACT has not challenged that denial. FACT has also not challenged the filing of the report on the last day of public comment, although it does comment upon the timing of the filing.

criteria, but also improperly considered economic benefit to the community. FACT points to the testimony of three Village Board members that they considered economic benefit when voting in favor of the siting application. (Tr. 69, 138-39, 164.) In support of its claim that this consideration of economic benefit rendered the Village Board's decision fundamentally unfair, FACT again cites this Board's decision in City of Rockford. FACT admits that the Village Board members considered the six criteria, but contends that the issue is whether the application was judged only on the six criteria.

Gallatin responds by pointing out that the Village Board members testified that they relied upon the six criteria in reaching their decision. (Tr. 84, 116, 136-37, 163, 176.) Gallatin contends that the Village Board members' testimony indicates that they carefully considered the evidence. Gallatin also maintains that FACT's questioning at the Board hearing was clearly improper because it invaded the mind of the decision maker, and therefore those questions should be stricken. Ash v. Iroquois County Board, PCB 87-29, July 16, 1987.

Initially, the Board need not decide whether FACT's questions did impermissibly "cross the line" and invade the mind of the decisionmaker. Neither Gallatin nor the Village objected at the hearing when FACT asked the Village Board members if they had considered economic benefit, and therefore the claim is waived. The Board is particularly persuaded that the claim is waived since Gallatin objected to another question at the Board hearing on the grounds that it asked about a Village Board member's mental processes. (Tr. 75.)

The Board does find that Village Board members Linda Downing, Doyal Williams, and Daniel Root admitted that they considered the economic benefit to the community when making their decision. (Tr. 69, 138-39, 164, 177.) However, all three of these Village Board members also specifically testified that they considered the six statutory criteria, and were able to list most of those criteria. (Tr. 84-85, 136-37, 163-64, 176.) Mr. Root stated that "[i]f it didn't meet the six criteria, there wasn't any economic benefit so it wasn't even considered. It had to meet the six criteria." (Tr. 176.) Section 39.2(a) provides that "local siting approval shall be granted only if the proposed facility meets the following criteria." The Board believes that the use of the word "shall" means that approval must be granted if the local body finds that the applicable statutory criteria are met. In this case, it is clear that a majority of the Fairview Village Board found that the six criteria had been met. Therefore, it is not grounds for reversal in this case whether they also considered other related factors in addition to the statutory criteria.

This case is different from the circumstances presented to

the Board in City of Rockford. City of Rockford involved the disapproval of a siting application where it was clear that the local decisionmaker (the Winnebago County Board) considered things other than the statutory criteria. It was impossible for this Board to determine whether the disapproval was based upon a finding that the criteria had not been met or upon consideration of other factors. (This problem was highlighted by the fact that most of the County Board members who testified at the Board hearing could only name one or two of the six criteria.) In a disapproval, the issue is whether the local decisionmaker considered factors other than the statutory criteria in deciding to disapprove the application. In a case involving an approval, however, such as the instant case, the issue is whether the decision was based upon a finding that all of the applicable statutory criteria have been met. And in this case, that has been found by a majority of the Fairview Board Members.

STATUTORY CRITERIA

FACT does not contest the Village Board's finding that criteria four had been met - that the facility is located outside the boundary of the 100 year flood plain or the site is flood-proofed. FACT does challenge the Village Board's findings on the other five applicable criteria of Section 39.2. Gallatin contends that because FACT only challenged criteria one, two and five in its petition to the Board for review, FACT has waived its challenges to criteria three and six. However, a petition for review need not specify any of the particular issues raised by the petitioner, but must merely ask the Board to hold a hearing to contest the local decision. Section 40.1(b) of the Act. Thus, FACT properly raised its challenges to the local decision in its brief, and the Board will address all five challenged criteria.

Criterion 1

The first criterion to be considered by the Village Board is whether "the facility is necessary to accommodate the needs of the area it is intended to serve." FACT contends that this criterion was not met, and maintains that: (1) Gallatin failed to provide any independent analysis of the remaining capacity of landfills in the "local region" but relied solely on Illinois Environmental Protection Agency (Agency) reports, which are seriously flawed; (2) there is no need for the proposed facility in the "local region"; and (3) allowing Gallatin to include northeastern Illinois in the service area, although the Chicago area is distant from the proposed facility, would effectively abolish the need criterion.

In reponse, Gallatin states that the testimony of Gallatin's witness on criterion one and the materials included in the application establish that the proposed facility is necessary to

serve its proposed service areas, and that the Village Board had ample evidence on which to base its decision on criterion one. Gallatin maintains that FACT's allegations directly contradict the record or are not supported by the record. Finally, Gallatin points out that FACT makes its allegations almost totally without citation to the record, making it difficult to determine if the assertions are supported by testimony or exhibits.

The Board is frustrated by FACT's failure to provide citations for the large majority of "facts" used by FACT in its argument on criterion one. Because of the lack of citation, it appears that FACT is arguing facts not in the record. The Board will ignore any factual claims in FACT's brief which are not supported by citations. The Board must also again point out that the standard of review before this Board is whether the Village Board's decision was against the manifest weight of the evidence. This Board does not decide whether the facility is necessary. The Board reviews the Village Board's decision that this criterion was met. Therefore, this is not an appropriate place to argue the relative merits of the evidence presented to the Village Board.

Based upon a review of the record, the Board finds that the Village Board's decision on criterion one was not against the manifest weight of the evidence. As part of its application, Gallatin submitted a report by Wayne P. Pferdehirt on the need for the proposed facility. (Application, Exhibit 13). Mr. Pferdehirt also testified at the local hearings, and specifically stated that the facility is necessary to accommodate the needs of the service area. (R. Vol. III at 6). On the other hand, FACT did not present any direct testimony on criterion one. This Board finds that the Village Board could have reasonably concluded that the proposed facility is necessary to accommodate the needs of the area it is intended to serve.

The Board also rejects FACT's claim that allowing Gallatin to include northeastern Illinois in the proposed service area would effectively abolish the need criterion. FACT alleges that a landfill applicant could always propose accepting a small amount of waste from large urban and industrial areas and thus always establish a need for the proposed facility. FACT's argument misapprehends the intent and the language of the statute. Criterion one is whether "the facility is necessary to accommodate the waste needs of the area it is intended to serve." Section 39.2(a)(1) of the Act. Gallatin has defined the area the facility is intended to serve as Fulton County and five adjoining counties, plus six counties in northeastern Illinois. (R. Vol. III at 6). By finding that criterion one has been satisfied, the Village Board has accepted Gallatin's proposed service area. The landfill siting process in Illinois gives local governments the authority to decide certain issues in that process, including (at least by implication) the area intended to

be served. The statute does not say "local area", or make any implication that the geographical area of service is limited. The Village Board has the power to determine if a proposed service area is acceptable or unacceptable, and the Village Board made an affirmative decision on the issue. This Board will not disturb that decision.

Criterion 2

The second criterion which must be considered by the Village Board is whether the proposed facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. FACT maintains that Gallatin did not meet its burden of showing that this criterion has been met. FACT contends that the facility does not meet this criterion because: (1) there is no natural protection at the site; and (2) Gallatin relies solely on engineered protection features which would fail, resulting in groundwater contamination.

Gallatin responds by first pointing out that the Village Board's decision on the criteria must be upheld unless it is against the manifest weight of the evidence. Gallatin contends that it provided testimony and documentation at hearing an in its application which amply supports the Village Board's determination that criterion two was met. Gallatin notes that FACT also presented several witnesses on criterion two, but maintains that the Village Board chose not to rely on the testimony of FACT's witnesses. Gallatin argues that FACT's "expert" witnesses were neither experts nor conversant with the details of Gallatin's proposal.

The Board must reject FACT's claim on criterion two. FACT contends that Gallatin failed to meet its burden of showing that the proposed facility satisfies criterion two. It is true that at the local level the applicant bears the burden of proving that the criteria are met by the facility. However, that is not the issue before this Board. As the Board has stated numerous times, the issue here is whether the Village Board's decision is against the manifest weight of the evidence in the record. The burden of proving that claim is on FACT as the petitioner before this Board. FACT never really argues that the local decision on criterion two is against the manifest weight of the evidence, and never points out any reasons why the Village Board's finding was erroneous. Instead, FACT has attempted to retry the merits of the evidence on criterion two before the Board. That is not the Board's function on a petition for review of a local siting decision.

Nevertheless, the Board has reviewed the record and finds that the Village Board's decision was not against the manifest weight of the evidence. Gallatin presented four witnesses on criterion two, as well as information contained in exhibits, the

application and a four volume engineering report which accompanied the application. Douglas J. Hermann, an engineer who served as project manager of the proposed facility for the firm which prepared the engineering report, specifically testified that he believed that criterion two was satisfied. (R. Vol. I at 60-61). FACT did present five witnesses who challenged many of the conclusions made by Gallatin's witnesses. However, this Board finds that the Village Board could have reasonably concluded, based on the conflicting evidence before it, that the proposed facility is designed, located, and proposed to be operated so as to protect the public health, safety, and welfare. Thus, the Village Board's decision must be upheld.

Criterion 3

The third criterion of Section 39.2(a) is whether the facility is located so as to minimize incompatability with the character of the surrounding area and to minimize the effect on the value of the surrounding property. FACT argues that the record shows that Gallatin failed to meet its burden of proving that the facility meets that criterion. FACT cites Waste Management of Illinois v. Pollution Control Board, 123 Ill. App. 3d 1075, 79 Ill. Dec. 415, 463 N.E.2d 969 (2d Dist. 1984), in support of its statement that an applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatability. FACT contends that Gallatin's evidence shows only minimal efforts to reduce incompatability, and that therefore that evidence does not justify a conclusion that criterion three has been satisfied. FACT also alleges (without citation) that this proposed facility was conclusively shown to be wholly incompatible with the adjoining owner's reasonable use and enjoyment of their property.

In response, Gallatin maintains that FACT has not shown that it was against the manifest weight of the evidence for the Village Board to conclude that the facility satisfies criterion three. Gallatin points to the testimony of its witness, William A. McCann, and to the information in the application and engineering report, and contends that that evidence established that Gallatin has taken and will take steps to minimize the impact of the facility on the surrounding area. Gallatin also notes that FACT did not introduce any evidence on criterion three.

Once again, FACT argues that Gallatin failed to meet its burden, when the proper inquiry before the Board is whether the Village Board's decision is against the manifest weight of the evidence. Based upon its review of the record, the Board finds that it must affirm the Village Board's decision. Mr. McCann testified that he believed that the proposed facility has been located in a manner which will minimize incompatability with the character of the surrounding area and will minimize the impact on

the value of other property in the area. (R. Vol. II at 59-60). Mr. McCann pointed to the facts that the 80 acre landfill site is to be located within a 995 acre facility, which itself is located within a 2700 acre parcel owned by Gallatin, that the area is rural and largely agricultural in use and characterized by depleted, mined out land, that except for one residence within a half a mile of the facility and one residence within a mile, most residences in Fairview itself are one and a half miles from the site, and that there will be a 500-foot green area with berms. (R. Vol. II at 62-63, 70; Application, Exhibit 16.) On the other hand, the Board has not found any evidence or testimony presented by FACT which rebuts Mr. McCann's testimony. There is evidence in the record which supports the Village Board's decision on criterion three and thus that decision was not against the manifest weight of the evidence.

Criterion 5

Criterion five of Section 39.2 requires that the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. FACT asserts that Gallatin failed to prove that this criterion was met. FACT contends that Gallatin provided no plan for handling of accidents, spills of leachate, or fire. In response, Gallatin states that FACT bears the burden of establishing that the Village Board's decision was against the manifest weight of the evidence. Gallatin contends that the record amply supports the Village Board's determination.

The Board finds that the Village Board could have reasonably concluded that criterion five has been satisfied. The engineering report submitted by Gallatin in conjunction with its application contains a section addressing criterion five. The report discusses fire, security, spills, and other accidents. (Engineering Report, Vol. I, Section 6). On the other hand, FACT introduced no evidence on this criterion, and FACT's challenge appears to be based upon an alleged lack of detail in the plan. FACT does not claim that Gallatin's evidence was flawed or unbelievable. Based upon a review of the record, the Board finds that the Village Board's determination was not against the manifest weight of the evidence.

Criterion 6

The final criterion at issue in this case is whether the traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flows. FACT contends that the evidence presented by Gallatin on this issue was inadequate, and thus Gallatin did not meet its burden of proof. Gallatin responds by arguing that it introduced evidence which more than showed that the traffic pattern minimized any adverse impact on existing traffic. E&E Hauling. Gallatin also states

that FACT has the burden of proving that the Village Board's decision was against the manifest weight of the evidence. Gallatin maintains that FACT has not met that burden.

The Board finds that the Village Board's decision that criterion six has been satisfied was not against the manifest weight of the evidence. Gallatin presented testimony from Matthew C. Sielski, who specifically stated that he believed that criterion six was satisfied. (R. Vol. II at 83-84). Mr. Sielski also submitted a traffic study report, and concluded that traffic accidents are not expected to increase and that the surrounding roads could easily accommodate the expected eight percent increase in daily traffic. (Application, Exhibit 18). FACT did not present any evidence or testimony on criterion six. There is clearly sufficient evidence in the record to support the Village Board's decision.

ORDER

The January 9, 1989 decision of the Fairview Village Board granting site location suitability approval to Gallatin National Company is hereby affirmed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 22nd day of June, 1989, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board