ILLINOIS POLLUTION CONTROL BOARD
January 9, 2003

COUNTY OF KANKAKEE and EDWARD D. SMITH, STATES ATTORNEY OF KANKAKEE COUNTY, Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 03-31 (Third-Party Pollution Control Facility Siting Appeal)
BYRON SANDBERG, Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 03-33 (Third-Party Pollution Control Facility Siting Appeal)
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 03-35 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

EDWARD D. SMITH, STATE'S ATTORNEY OF KANKAKEE COUNTY, CHARLES F. HELSTEN OF HINSHAW & CLUBERTSON, and RICHARD S. PORTER OF HINSHAW & CULBERTSON APPEARED ON BEHALF OF THE COUNTY OF KANKAKEE;

DONALD J. MORAN OF PEDERSEN & HOUPT APPEARED ON BEHALF OF WASTE MANAGEMENT OF ILLINOIS, INC.; and

GEORGE MUELLER OF GEORGE MUELLER, P.C. APPEARED ON BEHALF OF TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

Today, the Board addresses three petitions contesting the City of Kankakee's (City) decision to approve the siting of a proposed landfill within the municipal boundaries of the City. The petitioners allege that: (1) the City lacked jurisdiction over the siting application; (2) the procedures the City used to assess the application were fundamentally unfair; and (3) the applicant, Town & Country Utilities, Inc. and Kankakee Regional Landfill (Town & Country), failed to satisfy three of the nine siting criteria listed in Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2 (2000), *amended by* P.A. 92-0574, eff. June 26, 2002).

For reasons provided in this opinion, the Board finds that the City had jurisdiction, followed fundamentally fair procedures, and correctly determined that the landfill application satisfied the criteria in Section 39.2(a) (v) and (viii) (415 ILCS 5/39.2(a)(viii) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002). However, the Board finds that the City incorrectly determined that the application satisfied the criterion in Section 39.2(a)(ii) because the City's determination - that the proposed landfill was located, designed, and proposed to be operated to protect the public health, safety and welfare - was against the manifest weight of the evidence. *See* 415 ILCS 5/39.2(a)(viii) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002. The Board therefore reverses the City's decision to grant siting for Town & Country's proposed landfill.

Below, the Board provides a brief procedural history, applicable statutory language governing pollution control facility siting, rulings on preliminary evidentiary matters and motions, pertinent facts of the case, and a discussion of the legal issues and the parties' arguments.

PROCEDURAL HISTORY

On September 20, 2002, the County of Kankakee (County) filed a petition pursuant to Section 40.1(b) of the Act requesting the Board to review the City's August 19, 2002 decision approving Town & Country's application to site a pollution control facility. On September 23, 2002, Waste Management of Illinois, Inc. (Waste Management), and Byron Sandberg filed separate petitions also seeking review of the City's decision. The proposed landfill consists of approximately 400 acres located in Otto Township within the municipal boundaries of the City of Kankakee.

The Board accepted all three petitions for hearing and consolidated the petitions in its October 3, 2002 order. County of Kankakee v. The City of Kankakee, PCB 03-31 (Oct. 3, 2002). On October 23, 2002, the City submitted the record of its proceedings. The Board held a

public hearing on November 4 and 6, 2002, before Board Hearing Officer Bradley Halloran in which the parties called witnesses to testify and members of the public provided oral and written public comment.[1]

On November 7, 2002, the Board denied the County's previously filed motion for expedited decision on the motion for summary judgment and memorandum of law in support of the motion for summary judgment. County of Kankakee v. The City of Kankakee, PCB 03-31 (Nov. 7, 2002).

All parties submitted opening briefs to the Board on November 27, 2002. The parties filed response briefs on December 4 and 5, 2002.[2]

STATUTORY BACKGROUND

Section 40.1(b) of the Act provides:

> If the . . . governing body of the municipality . . . grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the . . . governing body of the municipality may, within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the approval of . . . the governing body of the municipality. 415 ILCS 5/40.1(b) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002.

According to Section 39.2(b) of the Act, no later than 14 days before requesting site approval from the City, Town & Country was required to "cause written notice of such request to be served either in person or by registered mail, return receipt requested," on owners of property within 250 feet of the site boundaries. 415 ILCS 5/39.2(b) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002.

No later than 120 days after receiving an application for landfill siting, the governing body of the municipality must hold at least one public hearing. 415 ILCS 5/39.2(d) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002. The procedures followed in that hearing must have been fundamentally fair. 415 ILCS 5/40.1(b) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002.

Before the City could approve Town & Country's application to site a landfill within the municipal boundaries of the City of Kankakee, Town & Country was required to submit

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[1] The City's record will be cited as "R. at __." The Board's hearing will be cited as "11/4 Tr. at __" or "11/6 Tr. at __" depending on which day of the hearing the cited statement pertains. Exhibits admitted at the Board's hearing will be referenced as "Bd. Hrg. Exh. _."

[2] The County's brief will be cited as "Cnty. Br. at __." Waste Management's brief will be cited as "WM Br. at __." Similarly, Town & Country's brief will be cited as "TC Br. at __." The abbreviation "Att. _" will denote a citation to an attached appendix. "Reply" will denote a party's reply brief. Exhibits will be prefaced by the party's abbreviated or full name and "Exh. _."

sufficient details describing the proposed facility to demonstrate compliance with nine criteria provided in Section 39.2(a) of the Act. 415 ILCS 5/39.2(a) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002. The petitioners now contend that the City's conclusion that Town & Country complied with criteria (ii), (v), and (viii) was against the manifest weight of the evidence. Those criteria require:

> (ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
>
> * * *
>
> (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents;
>
> * * *
>
> (viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan. 415 ILCS 5/39.2(a)(ii), (v), (viii) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002.

PRELIMINARY EVIDENTIARY MATTERS

The County contests two evidentiary rulings made at the November 4 and 6, 2002 Board hearing. First, Hearing Officer Halloran sustained Town & Country's objection to the County's attempt to elicit testimony regarding pre-application contacts between Town & Country and the City. 11/4 Tr. at 219. However, the County was allowed to provide an offer of proof. *Id*. Second, Hearing Officer Halloran allowed Town & Country to present supplemental evidence supporting the City's jurisdiction over the siting application. The Board addresses each evidentiary ruling in turn.

Pre-filing Contacts

In its offer of proof, the County educed testimony regarding a Kankakee City Council meeting on February 19, 2002 (council meeting). The minutes of the council meeting are included in the record. 11/6 Tr. at 340-41. However, Town & Country has reserved its objection to the relevancy of the council meeting minutes. *Id*. at 341. The testimony that the County elicited about the council meeting included admissions that the City had annexed the property on which the proposed site is located specifically for the proposed landfill, the City had received input from Town & Country in drafting the City's Solid Waste Management Plan and Regional Pollution Control Facility Siting Ordinance, and the City negotiated with Town & Country to arrive at the terms of the host agreement. The City's primary host agreement negotiator was Christopher Bohlen who served as a city attorney and also as the City's landfill siting hearing officer.

The County contends that Hearing Officer Halloran's ruling of inadmissibility as to evidence of contact between the City and Town & Country before the application was filed (pre-filing contacts) was erroneous. On appeal of a municipality's decision to grant a siting application, the Board generally confines itself to the record developed by the municipality. 415 ILCS 5/40.1(b) (2000), *as amended* P.A. 92-0574, eff. June 26, 2002. However, the Board will

hear new evidence relevant to the fundamental fairness of the proceedings where such evidence necessarily lies outside of the record. Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E 2d 188, 194 (3d Dist. 2000).

Town & Country argues that pre-filing contacts are not indicative of prejudgment bias (Residents Against a Polluted Environment v. County of LaSalle, PCB 97-139, slip op. at 7 (June 19, 1997)), and that pre-filing meetings between the applicant and the decisionmaker do not render the subsequent hearing fundamentally unfair (Southwest Energy v. Pollution Control Board, 275 Ill. App. 3d 84, 97, 655 N.E.2d 304, 312 (4th Dist. 1995)). Also, Town & Country contends that evidence of annexation of land cannot be used to show bias or prejudgment (Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 572-573, 680 N.E.2d 810, 816-817 (5th Dist. 1997)), and that consideration of economic benefit does not show bias (Fairview Area Citizens Task Force v. PCB, 198 Ill. App. 3d 541, 547, 555 N.E.2d 1178, 1182 (3d Dist. 1990)).

Although the evidence of pre-filing contacts may lack weight in the Board's ultimate determination, the cases Town & Country cites do not create a general prohibition against the admission of pre-filing contacts into evidence. The courts in these cases considered certain evidence to determine whether the proceedings were fundamentally fair. On a case-by-case basis, the courts held that the evidence did not render the hearing fundamentally unfair. The courts considered the weight the evidence was entitled rather than the relevance of the information for purposes of evidentiary admission.

In Land and Lakes, 319 Ill. App. 3d at 49, 743 N.E.2d at 194-95, the third district appellate court explained that absent any pre-filing collusion between the applicant and the actual decisionmaker, the county board, the pre-filing contacts in that case did not deprive a siting opponent of fundamental fairness. Land and Lakes, 319, Ill. App. 3d at 49, 743 N.E.2d at 194. The Land and Lakes opinion implies that evidence of pre-filing contacts between the applicant and the actual decisionmaker, in this case the City, may factor into the fundamental fairness calculus. This is so because pre-filing contacts may be probative of prejudgment of adjudicative facts, which is an element to be considered in assessing fundamental fairness. American Bottom Conservancy (ABC) v. Village of Fairmont City, PCB 00-200, slip op. at 6 (Oct. 19, 2000); Hediger v. D & L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990). Consequently, the Board overrules the hearing officer's ruling limiting evidentiary admission of pre-filing contacts. The Board admits as evidence the County's offer of proof of pre-filing contacts between the City and Town & Country as the evidence applies to the issue of fundamental fairness.

We also note that fundamental fairness must include impartial rulings on evidence. ABC, PCB 90-200, slip op. at 6. Therefore, evidence offered to show that Hearing Officer Bohlen failed to rule impartially on the evidence presented at the public hearing is also allowed into evidence for the Board to consider.

Supplemental Evidence of Jurisdiction

At the Board's hearing in this case, Town & Country elicited testimony from Patricia vonPerBandt about jurisdiction. The County now urges the Board to disregard Ms. vonPerBandt's testimony because Town & Country had a duty to present a complete application to the City and should not be allowed to supplement the record on review before the Board.

In the Board's October 3, 2002 order accepting the case for hearing, we stated: "The record before the City will be the exclusive basis for all hearings except when considering issues of fundamental fairness or jurisdiction." County of Kankakee v. The City of Kankakee, PCB 03-31, slip op. at 3 (Oct. 3, 2002). This holds true for the respondents as well as the petitioners. A challenge to jurisdiction may be raised at any time including at the Board's hearing even if the petitioner failed to raise the issue in a petition for review. *See* Ogle County Board v. PCB, 272 Ill. App. 3d 184, 191, 649 N.E.2d 545, 551 (2d Dist. 1995). When a challenge to subject matter jurisdiction is made, the respondent has the right to rebut that challenge. The Board finds that the hearing officer properly allowed Ms. vonPerBandt's testimony.

MOTIONS RAISED IN THE POST-HEARING BRIEFS

Motion to Strike the City's Opening Brief

The County urges the Board to strike the City's opening brief because the City failed to serve the County with a copy of its brief by the November 27, 2002 deadline date. The City did hand deliver a copy of its brief to the Board by the deadline date.

Hearing Officer Halloran's hearing report indicated that the mailbox rule did not apply to any of the respective filings. County of Kankakee v. The City of Kankakee, PCB 03-31 (Nov. 15, 2002). However, neither the hearing report nor a review of Section 101.304 of the Board's procedural rule on service of documents indicate that the City failed to comply with service requirements. *See* 35 Ill. Adm. Code 101.304. Consequently, the Board denies the County's motion.

Motion to Strike Section IV of Town & Country's Opening Brief

The County also urges the Board to strike Section IV of Town & Country's opening brief as untimely and outside the scope of the Board's review. Section IV of Town & Country's brief contends that the October 9, 2001 and March 12, 2002 amendments to the County's Solid Waste Management Plan (County Plan) are contrary to the Solid Waste Planning and Recycling Act (SWPRA) (415 ILCS 15/1 *et seq*. (2000)), the Local Solid Waste Disposal Act (Disposal Act) (415 ILCS 10/1 *et seq*. (2000)), and the Illinois Constitution. Town & Country also argues that to the extent that criterion (viii) of Section 39.2(a) of the Act allows the County to limit the City from exercising its delegated or constitutional powers, Section 39.2 of the Act is unconstitutional.

The County's motion to strike is denied. Town & Country did not have the opportunity to raise the arguments in Section IV in advance of the brief now before the Board. Furthermore, Town & Country's arguments are not outside the scope of the Board's review. In our analysis, we will consider the parties' briefs and arguments as necessary.

FACTS

Annexation and Host Agreement

Months before Town & Country applied to site a pollution control facility within the municipal boundaries of the City of Kankakee, Town & Country representatives contacted Kankakee Mayor Donald Green and City attorney Bohlen. 11/4 Tr. at 209-10; 11/6 Tr. at 158-60. In the late summer or early fall of 2001, Town & Country contacted Mayor Green and Mr. Bohlen regarding the possibility of annexing property into the City so that a landfill could be developed on the land. 11/4 Tr. at 211-12. The property, located within Otto Township, was about a mile from the streets of the City. *Id*. at 224. The property is connected to the City by a railroad easement. *Id*. at 225. The annexation of the property became final in late 2001. *Id*. at 227. Also within Otto Township lies an operating Waste Management landfill. That landfill was the only operating landfill in the County of Kankakee at the time of the landfill siting public hearing.

During the period of land annexation, Mr. Bohlen negotiated a landfill host agreement with Town & Country. *Id*. at 229. The negotiations included several versions of the agreement. *Id*. at 241. The host agreement was executed on February 19, 2002. *Id*. at 229. The host agreement provided economic benefits to the City, including potential compensation of four to five million dollars per year for the life of the facility. *Id*. at 232.

Before Town & Country filed the siting application, Town & Country took city council members on a bus trip to view nearby landfills. 11/4 Tr. at 270.

February 19, 2002 City Council Meeting

At the council meeting, Tom Volini appeared on behalf of Town & Country. Cnty. Br. Att. 2 at 7. Mr. Volini was accompanied by the applicant's attorney, George Mueller, and "experts" who spoke before the City. *Id*. at 9-28.

During the council meeting, Mayor Green announced a "special presentation" by Town & Country concerning the siting of a landfill within the City limits. *Id*. at 5-6. Mr. Volini told the City:

> [T]he reason we want to be able to have this unfettered opportunity to talk to you without the filter of lawyers, without the rancor and back and forth that, unfortunately, the lawyers bring to the process is we want to be able to speak with you person to person about things we believe in, concepts that we've proved and environmental protection that we've achieved. *Id*. at 7.

Mr. Volini then introduced Mueller as "the dean of landfill siting in Illinois." *Id*. Mr. Volini also introduced members of a "team" of "the best experts [Town & Country could] find." *Id*. Of these experts, Devin Moose and Jaymie Simmon would address the City that evening. During the presentation, Mr. Volini distributed a "package" of information that included the notice of intent to file a siting application (to be filed the following day), aerial photographs of the site, landfill cross-sections, an operational screening, a property value protection plan, and a schedule for siting and developing the landfill. *Id*. at 15-18.

During his presentation, Mr. Volini explained that the package showed the jobs that the proposed landfill would create (*Id*. at 19), the overall economic impact of the landfill (*Id*.), the final form of the landfill (*Id*. at 24), the leachate pumping system of the landfill (*Id*. at 21-23), the fund established for closure of the landfill (*Id*. at 25), possible uses of the land after closure (*Id*.), and a pledge to cooperate with and compensate a City lawyer if the City approved the application and that approval was appealed (*Id*. at 27).

Mr. Mueller talked to the City about the criteria in Section 39.2 of the Act (*Id*. at 9), the City's responsibility to make a decision based on the evidence (*Id*.), the procedure governing a siting application (*Id*. at 10), the inappropriateness of *ex parte* communication after filing the siting application (*Id*. at 27), and the right of objectors to participate in a public hearing (*Id*. at 28).

Mr. Moose discussed each of the Section 39.2 criteria. *Id*. at 11-14. Specifically, Mr. Moose talked extensively about criterion (ii) of Section 39.2 (*Id*. at 12-14) and discussed his professional oath to protect the public health, safety, and welfare (*Id*. at 12), the leachate containment system (*Id*. at 13), management of stormwater (*Id*.), and the management of air pollution (*Id*.). In addition, Mr. Moose represented that his evidence would be comprehensive and would demonstrate public health, safety, and welfare protection. *Id*. at 14.

Mr. Simmon spoke to the City about what to expect at the public hearing. *Id*. at 15. He informed the City that passionate landfill opponents from outside the community might appear to contest the application. *Id*. Moreover, Mr. Simmon told the City that environmentalists would use partial quotes and out-of-context quotes to create controversy and cause confusion. *Id*. Finally, Mr. Simmon urged the City to make a decision based on science. *Id*.

Although the city council meeting was a public meeting, the public did not receive notice that Town & Country would be making a special presentation on the soon-to-be-proposed landfill.

Notice to Landowners

On February 18, 2002, Mr. Volini sent notice by registered mail to property owners within 250 feet of the proposed landfill lot line. R. App. Exh. at 2. The notice revealed Town & Country's intent to request siting approval for a pollution control facility. *Id*. To ensure that all owners were identified, Mr. Volini increased his search to owners within 400 feet of the lot line. *Id*. To identify the owners, Mr. Volini examined the records of the Kankakee County Supervisor of Assessments (assessor's office). *Id*.

All owners accepted delivery of the notice on or before February 23, 2002, except for five owners. R. App. Exh. at 2. Mr. Volini's affidavit indicates that return receipts for those remaining owners were subsequently received. *Id*. However, no return receipts were received for five owners listed in Mr. Volini's affidavit at parcel number 13-16-23-400-001 (Skates parcel). The owners listed in the affidavit are Gary L. Bradshaw, James R. Bradshaw, Jay D. Bradshaw, Ted A. Bradshaw, Denise Fogle, and Judith Skates. *Id*. The only address listed is 22802 Prophet Road, Rock Falls, Illinois 61071. *Id*. The only return receipt contained in the affidavit for the Skates parcel is signed by a Richard Skates at 203 South Locust, Onarga, Illinois 60655. *Id*.

At the Board hearing, Patricia vonPerBandt testified that she went to the Kankakee Treasurer's Office and obtained a tax bill for the Skates parcel. 11/6 Tr. at 290. The Kankakee County Real Estate Tax Bill was sent to "Bradshaw, James & Bradshaw, Ted *et al*., Skates, Judith A" at 203 S. Locust Street in Onarga, Illinois 60955-1224. Bd. Hrg. TC Exh. 2. The return stub for the Tax Bill lists only Judith Skates at the Onarga address. *Id*. A change of name and address form from the assessor's office showed Judith Skates' address to be 203 South Locust. *Id* at 292.

Filing of the Application

On March 12, 2002, the day before Town & Country applied for landfill siting, Mr. Mueller sent a letter to City attorney Bohlen. Bd. Hrg. Pet. Ex. 2. That letter discussed what kind of communications between the City and the parties as well as the public would be proper after Town & Country applied for siting. *Id*. The letter also discussed an amendment to the City's Facility Siting Ordinance to create a "round table" cross-examination procedure. *Id*. Mr. Mueller provided an amendment draft. *Id*. The letter indicated that Mr. Mueller previously drafted the Rules and Procedures for the City's landfill siting hearing, which the City adopted. *Id*.

A City ordinance instructed the City Clerk to immediately deliver one copy of the landfill siting application to the County Board Chairman and one copy to the Kankakee County Waste Director. 11/6 Tr. at 237-38. The City Clerk, however, failed to comply with the ordinance. *Id*. About six weeks after the application was filed, a County engineering consultant procured a copy of the application after completing a Freedom of Information Act request. *See* Bd. Hrg. City Exh. 1.

Registration of Participants

Published notices regarding participation in the landfill siting public hearing conflicted. The City siting ordinance indicated that "any person or attorney representing such person, or entity wishing to testify, present witnesses and cross-examine witnesses must file a written appearance in the Office of the City Clerk not less than five (5) days prior [to the] first date set for public hearings pursuant to the Siting Ordinance." R. at 3237. However, Town & Country published a newspaper notice indicating that participant registration continued until the day of the hearing. TC Exh. at 6. Complicating matters further, the City Clerk informed members of the public that the language of the City Siting Ordinance controlled and that registration within five days of the hearing would not be permitted. R. at 1549. As a result, Darrell Bruck was informed, when he contacted the City Clerk within five days of the hearing, that he could no longer register as a participant. R. at 1549.

Patricia O'Dell visited the City Clerk's office five days before the hearing. Ms. O'Dell informed the City Clerk that she wished to participate at the hearing. The City Clerk told her that she needed to submit a letter saying that she wished to "speak" at the hearing. 11/6 Tr. at 37. Ms. O'Dell did so. R. at 2230. Six other members of the public wrote similar letters indicating a wish to speak at the hearing. R. at 2223-28.

The Public Hearing

The City Council chambers were overcrowded on June 17, 2002, the first evening of the eleven-day public hearing. The hearing began at 8 p.m. Because the capacity of the room (as determined by the fire code) had been met, between 50 and 150 members of the public were unable to enter the chambers when the hearing began. 11/4 Tr. at 362; 11/6 Tr. at 97. Consequently, members of the public had to stand in the foyer and in the stairwells. 11/4 Tr. at 66. Two policemen stood at the entrance to the chambers to control overcrowding. *Id*. at 67, 128. Those standing in the foyer and the stairwells could not see or hear the proceedings inside the chambers. *Id*. at 75, 125.

Upon examining the written requests to participate, speak, and give public comment at the hearing, Hearing Officer Bohlen decided that only those written requests indicating a request to participate would be treated as participants. 11/4 Tr. at 332. Participants were able to present witnesses and cross-examine witnesses. All others were only allowed to provide public comment. According to the Kankakee Siting Ordinance, individuals intending to provide public comment were not required to file any notice with the Clerk's office. R. at 3237. Nevertheless, because of Hearing Officer Bohlen's decision, Ms. O'Dell and others who had supplied a written wish to speak were not treated as participants. 11/6 Tr. at 333. On the third day of the hearings, Ms. O'Dell told Hearing Officer Bohlen she wished to participate. 11/6 Tr. at 84. He then put her name on the list of participants. 11/6 Tr. at 86.

Before the hearing began, Hearing Officer Bohlen announced that interested individuals wishing to participate could register to participate throughout the first evening of the hearing. R. at 12. Hearing Officer Bohlen instructed City attorney, A. Patrick Power, to inform those in the foyer of his decision. 11/4 Tr. at 327. Mr. Power testified that he made the announcement. 11/6 Tr. at 386. Individuals in the foyer and the stairwell, however, did not hear the announcement. 11/4 Tr. at 108; 11/6 Tr. at 55.

Before a witness was called, a motion was made to adjourn the public hearing until a facility with sufficient room to accommodate the public was obtained. R. at 37-39. Although Hearing Officer Bohlen recognized that people were congregated outside the city council chambers, he denied the motion. R. at 39-40. At the February 19, 2002 council meeting, Mr. Simmon told the City to expect a crowded public hearing. Cnty. Brief. Att. 2 at 15. Before the council meeting, a member of the public, Doris Jean O'Connor had asked Mr. Bohlen whether there was a "back-up plan" in case of overcrowding. 11/4 Tr. at 359.

The first evening of the hearing was scheduled to last until 10 p.m.; however, it continued until 12:30 a.m. Some members of the public who were unable to enter the chambers because of overcrowding left the building before or around 10 p.m. 11/4 Tr. at 103. Darrell Bruck was unable to enter the hearing room until after 10 p.m. *Id*. at 107. He attended the hearing on the next two evenings and provided public comment on the tenth day of the hearing. *Id*. at 109, 112. On the evening scheduled for public comment, the hearing location was changed to a local school to allow all interested members of the public to make public comment. *Id*. at 109.

On the second day of the hearing, chairs were placed in the foyer, another room was set aside to accommodate the public, and a speaker system provided audio to those outside the chambers. 11/6 Tr. at 67. This practice was continued throughout the remainder of the hearing.

Witness Examination Procedure

During the first evening of the hearing, only one witness, Allen Shoenberger, testified. R. at 47-203. Mr. Shoenberger testified as an expert witness regarding criterion (viii) of Section 39.2 of the Act. Participants cross-examined Mr. Shoenberger that evening, but he was not available on subsequent hearing dates. Ms. O'Dell was unable to cross-examine him because she was not recognized as a participant until after the first hearing date. 11/4 Tr. at 333. Cross-examination for all other witnesses called by Town & Country was delayed until Town & Country had completed its direct examination of remaining witnesses. This occurred on the fourth evening of the hearing. R. at 385-1207. In contrast, Hearing Officer Bohlen allowed cross-examination of witnesses called by participant "objectors" immediately following individual testimony. R. at 1207-1469.

Testimony on Criterion (ii) of Section 39.2 of the Act

Envirogen, Town & Country's consultant, performed a site hydrogeologic investigation for the proposed landfill in two phases. The first phase consisted of a regional hydrogeologic study based on available published data and soil borings. R. at 10087. The second phase was a site-specific investigation. *Id*. Devin Moose, Envirogen's engineer, testified that the investigation was not the same as the three-phase site hydrogeologic investigation required under the State's landfill regulations. R. at 266. He opined that while additional work needed to be done to meet the State regulatory requirements, there was enough information to characterize the hydrogeologic setting to develop a preliminary design for the landfill. *Id*.

Phase 1 – Regional Hydrogeologic Study

Envirogen's characterization of regional hydrogeology was based on a review of existing published information, which consisted of water well logs obtained from the Illinois State Geologic Survey (ISGS) and the Illinois State Water Survey (ISWS), and statewide and regional reports and maps available from the United States Geologic Survey. R. at 10091. Envirogen obtained water well logs on file with the ISGS and ISWS for all wells within approximately two miles of the proposed site. R. at 10091, 30004. In Kankakee County, the surficial soil (unconsolidated deposits in the uppermost five feet) consists of moderately permeable to rapidly permeable soils that formed in sandy and loamy glacial outwash. R. at 10092. The uppermost bedrock is mainly Silurian age (formed 400-440 million years ago) dolomite. The Silurian dolomite under the proposed site is approximately 300 feet thick. R. at 10099. The upper part of the bedrock ranges from very competent to areas exhibiting signs of weathering. *Id*.

Stuart Cravens, an expert witness called by a landfill objector at the public hearing, testified that Envirogen did not use a principal ISWS study concerning the regional assessment of groundwater. R. at 1357-58. According to Mr. Cravens, the ISWS Report entitled "Regional Assessment of Ground-Water Resource in Eastern Kankakee and Northern Iroquois Counties," which he co-authored (R. B&W Exh. 29), provides detailed hydrogeologic information about shallow and bedrock aquifers in the area. R. at 001358. Mr. Cravens described the Silurian dolomite as a major regional aquifer used as a groundwater resource in counties of Kankakee, Will, DuPage, and Cook. R. at 001389. The ISWS report stated that the aquifer also extends into Indiana. *Id*.

Mr. Cravens explained that water in the Silurian dolomite is transmitted through fractures, bedding planes and openings in the dolomite. R. at 001368. Furthermore, groundwater in the Silurian dolomite aquifer occurs in cavities formed by the chemical dissolution of the rock along horizontal bedding plains and vertical stress fractures. The ability of the dolomite to allow groundwater flow through these cavities is known as secondary permeability.[3] R. B&W Exh. 36 at 14. The primary permeability of the bedrock matrix is so low that it does not contribute to the overall productivity of the aquifer. *Id*. The frequency and size of water-bearing openings is greatest at the top of the dolomite where preglacial weathering was greater. *Id*. The ISWS reports note that although Silurian dolomite may be as thick as 450 feet in places, the predominant water yielding openings typically occur in the upper 100 feet. R. B&W Exh. 29 at 11, Exh. 36 at 15.

Phase 2 – Site-specific Investigation

The site-specific investigation involved collecting, testing and interpreting hydrogeologic data from soil borings, piezometers, and monitoring wells.[4] Nineteen soil borings were advanced at the proposed site, one of which was advanced 50 feet into the bedrock below the upper most aquifer. R. at 10113. A total of 19 open standpipe piezometers and monitoring wells were installed at fourteen of the nineteen boring locations. R. at 10114. Samples from the borings were tested in the laboratory to classify the properties of the soils and bedrock to aid in characterizing different geologic units. R. at 10119. Water level measurements were taken from the piezometers and monitoring wells. R. at 10116. In-situ hydraulic conductivity was measured using packer and slug tests.[5] R. at 0117.

Envirogen reported that the uppermost site geology consists of glacial till, and sand and gravel deposits overlying the dolomite bedrock. R. at 10121. The depth to the top of the bedrock ranged from 7.8 feet to 32 feet. *Id*. The uppermost portion of the bedrock was slightly to severely weathered dolomite. Envirogen estimated that the thickness of the weathered dolomite to be five feet across the site. R. at 10122.

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[3] Permeability is a measure of a geologic material's ability to transmit fluids. *Glossary of Geology* 495 (3d ed. 1987). Permeability is a measure of the rate at which groundwater moves through geologic material. A highly permeable material, such as sand allows fluids to flow at a faster rate than a low permeability material, such as clay. While the permeability of sand ranges from 10^{-3} cm/sec to 10^{-4} cm/sec, the permeability of clay ranges from 10^{-6} cm/sec to 10^{-8} cm/sec. Permeability is also referred to as hydraulic conductivity. The ability of fluid to move through a substance is known as "primary" permeability, whereas the ability of a fluid to move around a substance through cavities, fissures, fractures, or bedding planes is known as "secondary" permeability.

[4] A soil boring is a borehole extended into the ground to obtain subsurface geologic information. A piezometer is a device used to measure the pressure head of groundwater. A monitoring well is a well used to determine groundwater quantity or quality. 415 ILCS 30/3 (2000).

[5] Packer test is an in-situ test that is used to assess the variability of a borehole as it intersects various hydrogeologic units. The results of packer tests help in understanding the detailed hydrogeologic properties of various horizons.

Below the weathered zone, Mr. Moose concluded that the unweathered dolomite is competent and exhibits a low hydraulic conductivity or permeability. *Id*. Mr. Moose explained that the dolomite bedrock has two zones. The upper weathered zone, which has a lot cracks and fissures, serves as the uppermost aquifer. He stated that the uppermost aquifer serves the wells in the area. R. at 268.

Envirogen evaluated the physical properties of the Silurian dolomite by geotechnical testing of bedrock samples from a single deep boring. R. at 10122. The permeability of the bedrock was determined to be 7.48×10^{-8} cm/sec. *Id*. In addition to laboratory testing, Envirogen performed double packer tests[6] over several intervals in the bedrock boring. Packer tests did not take water and indicated that the bedrock was competent and exhibited low hydraulic conductivity. *Id*. Envirogen concluded that the upper five feet of the Silurian bedrock is sufficiently weathered to bear water and the bedrock below that is an aquitard.[7] *Id*.

Landfill Design

The landfill site area is approximately 400 acres with the landfill "footprint" filling 236 of those acres. R. at 20009. The design features of the proposed landfill include a composite liner, leachate and gas collection systems, and final cover. The liner system is to be keyed into the Silurian dolomite bedrock after all unconsolidated materials and weathered dolomite are excavated. R. at 10137. The composite liner would consist of a 60-mil (1.5 mm thick) high density polyethylene (HDPE) overlying recompacted soil with a maximum permeability of 1×10^{-7} cm/sec that is three feet thick on the landfill base and 12 feet thick on its sides. R. at 10137.

The proposed landfill was designed as an inward gradient landfill. R. at 10139. An inward gradient design places the base grade of the liner below the piezometric levels of groundwater found within the shallow water bearing zones and underlying aquifer. *Id*. An inward gradient is designed to drive groundwater towards the landfill to provide an extra factor of safety. *Id*.

Envirogen performed a groundwater impact evaluation (GIE) to assess the design and hydrogeologic setting of the proposed landfill. To perform the GIE, Envirogen used hydrogeologic site investigation results, the proposed landfill design, and a computer model. R. at 10232. Envirogen developed a conceptual model of the site stratigraphy and hydrogeological conditions, and then assigned physical characteristics and engineering properties to the principal material types, which were used as the model input parameters. *Id*. The GIE model assumed that the weathered upper five feet of the Silurian dolomite was the uppermost aquifer. R. at 10236. Below five feet, the modeling treated the dolomite bedrock as an aquitard. Hence, groundwater movement was modeled only horizontally. *Id*. Envirogen stated the GIE demonstrated that the landfill was located and designed to protect the public health, safety, and welfare and that the landfill would not adversely impact groundwater quality. R. at 10247.

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[7] An aquitard is an area of low permeability geologic formation that retards, but does not prevent the flow of water to or from an adjacent aquifer. It does not readily yield water to wells or springs but may serve as a storage unit for groundwater. *Glossary of Geology* 33 (3d ed. 1987).

Testimony on Criterion (v) of Section 39.2 of the Act

Mr. Moose stated that the application contained the necessary plans and procedures to minimize the impact of fire and other accidents. R. at 305-6. The application contains a health and safety plan. R. at 10397-10406. However, Mr. Moose did not review Town & Country's fire and emergency services plan with the City Fire Department. R. at 517-18.

Testimony on Criterion (viii) of Section 39.2 of the Act

The County adopted a Solid Waste Management Plan (County Plan) in 1993 and re-adopted it in 1995. R. Exh. 3. The Illinois Environmental Protection Agency (Agency) reviewed the County Plan for compliance with the provisions of the Solid Waste Planning and Recycling Act. *Id*. The Agency concluded that the County Plan was developed in accordance with the planning process required in the SWPRA. *Id*.

On October 9, 2001, the County amended its Solid Waste Management Plan. R. Exh. 1. The City adopted its own Solid Waste Management Plan (City Plan) on January 22, 2002. R. Kennedy-Shepherd Exh. IV. Then, on March 12, 2002, the County amended its Solid Waste Management Plan a second time. R. Exh. 2. This amendment, in part, provided the following language in "Section VI: Available Landfill Capacity in Kankakee County":

> a. Kankakee County has a single landfill owned and operated by Waste Management of Illinois, Incorporated. This landfill has provided sufficient capacity to dispose of waste generated in Kankakee County and its owner has advised the County that it plans to apply for local siting approval to expand the facility to provide additional disposal capacity for the County. Operation of the landfill has been conducted pursuant to a Landfill Agreement signed by the County and Waste Management in 1974, and subsequently amended from time to time. In the event siting approval for an expansion is obtained, the landfill would provide a minimum of twenty (20) years of long term disposal capacity through expansion of the existing landfill.
>
> b. An expansion of the existing landfill, *if approved*, would then satisfy the County's waste disposal needs for at least an additional 20 years, and in accord with the Kankakee County Solid Waste Management Plan (as amended), as well as relevant provisions of the Local Solid Waste Disposal Act and the Solid Waste Planning and Recycling Act, no new facilities would be *necessary*. R. Exh. 2 (emphasis added).

The March 2002 amendment also altered the recommendations appearing at the end of Section VI of the County Plan. R. Exh. 2. That amendment changed paragraph six to require an environmental contingency escrow fund or some other type of payment or performance bond or environmental impairment insurance. *Id*. Also, the amendment requires an applicant to establish a property value protection plan, whereas the original language merely required the applicant to *offer* to establish a plan. *Compare id*. *with* R. Exh. 3 at 345. The amendment did not alter the original recommendation that the applicant should enter a host agreement with the County. R. Exh. 3 at 345.

Mr. Shoenberger was presented as an expert witness regarding criterion (viii) of Section 39.2 of the Act. He opined that Town & Country's application was consistent with the County Plan. R. at 71. In addition, he testified that the portions of the October 9, 2001 and March 12, 2002 amendments to the County Plan, designating a particular potential landfill applicant as a preferred applicant, were unconstitutional. R. at 56. However, Hearing Officer Bohlen struck Mr. Shoenberger's testimony on the legality of the amendments to the County Plan. R. at 3284. The City did not consider this testimony. *Id*.

Mr. Moose testified that he considered himself and his firm to be experts in the area of County Solid Waste Management Plans. R. at 520. He later opined that Town & Country's application comported with the County Plan since an application to expand the nearby landfill operated by Waste Management had not been approved. R. at 1204-7.

The Chairman of the Kankakee County Board, Karl Kruse, provided written public comment addressing criterion (viii) of Section 39.2 of the Act. R. at 2295-97. In his comment, Mr. Kruse stated that the March 12, 2002 amendment to the County Plan "indicated that if Waste Management received siting and permitting approval for its proposed expansion, no further facilities would be necessary to meet the long-term disposal needs of this County." R. at 2296. Furthermore, Mr. Kruse wrote:

> Based upon what I witnessed during those deliberations [regarding the October 9, 2001 and March 12, 2002 amendments], and based further upon my role as the Chief Executive of this County's government, I firmly believe that unless and until the proposed expansion of the Waste Management facility is not approved, no further proposed facilities are needed to meet the long-term waste disposal needs of this County, and those proposed facilities do not comport with the County's Solid Waste Management Plan. R. at 2296-97.

Mr. Kruse continued:

> I believe that the affirmative vote of twenty some of my colleagues on the County Board on two occasions bears out the fact that it is the clear and overwhelming intent of the County Board to avoid the unnecessary additional impacts that may occur if a second or third landfill were to be located within this County. R. at 2297.

After the public hearing, 13 of the 14 aldermen voted to approve siting for the proposed Town & Country landfill. R. at 3261-92. One alderman abstained. The Board will include other facts pertinent to the parties' arguments within its analysis.

DISCUSSION

The Board now assesses the merits of (1) the County's challenge to the City's jurisdiction; (2) the County's and Waste Management's fundamental unfairness arguments; and (3) the County's, Waste Management's, and Mr. Sandberg's contentions that the City's determination that Town & Country satisfied Section 39.2 of the Act is against the manifest weight of the evidence.

Jurisdiction

The notice requirements of Section 39.2(b) are jurisdictional prerequisites, which must be strictly followed to vest the City with the power to hear a landfill proposal. *See* Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746 (2d Dist. 1985). The County contends that the City lacked jurisdiction because Town & Country failed to properly serve notice to landowners of its intent to file an application to site a new pollution control facility. The County argues that Town & Country failed to properly serve notice in three instances: (1) not all individuals listed as owners of the Skates parcel were served; (2) the Illinois Central Railroad was not served at least 14 days before Town & Country filed its application; and (3) the owner's signature does not appear on several returned receipts. In each instance, the Board finds that Town & Country adhered to the requirements for service under Section 39.2(b) of the Act.

The Skates Parcel

According to Section 39.2(b) of the Act, service must be performed on property owners within 250 feet of the proposed landfill lot line. Owners are "such persons or entities which appear from the authentic tax records of the County." 415 ILCS 5/39.2(b) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002.

The County contends that not all persons identified as owners of the Skates parcel received notice. The records at the assessor's office indicated that there were six owners of record at the Skates parcel. However, the Treasurer's office listed Judith Skates as an owner of record at the Skates parcel. Town & Country admits that only Judith Skates was served notice. But Town & Country argues that the records maintained by the assessor's office and the Treasurer's office are both authentic tax records for purposes of Section 39.2(b) of the Act. T&C Br. at 6-7.

In Bishop v. PCB, 235 Ill. App. 3d 925, 933, 601 N.E.2d 310, 315 (5th Dist. 1992), the appellate court held that the authentic tax records of Montgomery County included records maintained by the treasurer's office. However, records were kept by the county clerk's office and the county assessor's office as well. The court stated that "[a]ll three offices play a role in the collection and record-keeping functions of the taxing process." Bishop, 235 Ill. App. 3d at 932, 601 N.E.2d at 315. The facts in that case revealed that the county clerk held the most current records while the treasurer held the least current records. The applicant used the treasurer's records to determine owners that needed to be served notice. Bishop, 235 Ill. App. 3d at 927-29, 601 N.E.2d at 311-13.

In this instance, Mr. Volini went to the Kankakee County Recorder and the assessor's office to determine the authentic tax records for Kankakee County. R. TC Exh. 2. He was told that the assessor's office maintained the most accurate and up-to-date records of ownership. *Id*. However, the record also contains an affidavit from the treasurer's office indicating that the treasurer's office maintained the "official taxpayer records for the County of Kankakee." R. at 2715. There is nothing in the record to suggest that only one of these offices maintains the authentic tax records. Consequently, as in Bishop, the Board finds that both the assessor's office and the treasurer's office maintain authentic tax records for the county.

The records maintained at the assessor's office and the treasurer's office conflict. However, because service to Judith Skates only was consistent with the records at the treasurer's office, Town & Country has satisfied the requirements for service under Section 39.2(b) of the Act. The Board has repeatedly stated that "as long as notice is in compliance with the statute and places those potentially interested persons on inquiry, it is sufficient to confer jurisdiction on the county board." Bishop, 235 Ill. App. 3d at 933, 601 N.E.2d at 315. The Board finds that Town & Country has met this standard and that the failure to notify the other five owners of the Skates parcel appearing on the assessor's office records did not divest the City of jurisdiction over the landfill siting application.

Illinois Central Railroad

The notice requirements of Section 39.2 are to be strictly construed as to timing, and even a one-day deviation renders the county without jurisdiction. Browning-Ferris Industries of Illinois, Inc., v. PCB, 162 Ill. App. 3d 801, 805, 516 N.E.2d 804, 807 (5th Dist. 1987). Property owners within 250 feet of the lot line of the landfill property must be served notice of the application "[n]o later than 14 days before" the governing body of the municipality receives the application. 415 ILCS 5/39.2(b) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002.

The County contends that because the return receipt for Illinois Central Railroad Co., C/O CTS Corp. (Illinois Central Railroad) was signed on March 6, 2002, Town & Country failed to provide notice to all pertinent landowners at least 14 days before Town & Country filed the landfill siting application. However, Illinois Central Railroad does not appear as the owner of record at any of the properties within 400 feet of the landfill lot line as reported in Mr. Volini's affidavit. R. TC Exh. 2. There is nothing in the record to suggest that Town & Country was required to serve notice to Illinois Central Railroad. On the other hand, ICC Railroad (not Illinois Central Railroad) is listed as the owner of record for three parcels. *Id*. ICC Railroad was served notice on February 20, 2002, well before 14 days prior to the filing of the application. *Id*. Therefore, the Board finds that the City did not lose jurisdiction based on alleged untimely service of ICC Railroad.

Receipt Signatures

The County contends that the City lacked jurisdiction since Town & Country failed to acquire return receipts signed by the owner of the property or an authorized agent of the owner. The County adds that Town & Country failed to provide any evidence that certain individuals who signed the return receipts were authorized agents of the owner. Cnty. Br. at 39-40.

Section 39.2(b) of the Act provides:

> No later than 14 days before the date on which the . . . governing body of the municipality receives a request for site approval, the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested." 415 ILCS 5/39.2(b) (2002), *amended by* P.A. 92-0574, eff. June 26, 2002.

The statutory language does not specify whether the listed owner of the property or an authorized agent must sign the return receipt. In Ogle County Board, 272 Ill. App. 3d at 196, 649 N.E.2d at 554, the second district appellate court held that the "return receipt requested" provision of section 39.2(b) of the Act reflects the intent of the legislature to require actual receipt of the notice, as evidenced by the signing of the return receipt. The Board has previously held that someone other than the addressee may sign for and accept the notice according to Section 39.2(b) of the Act. DiMaggio v. Solid Waste Agency of Northern Cook County, PCB 89-138, slip op. at 10 (1990); City of Columbia v. County of St. Clair and Browning-Ferris Industries of Illinois, Inc., PCB 85-177, slip op. at 13-14 (1986).

The County urges the Board to abandon the line of precedent regarding proper service according to Section 39.2(b) in favor of the rule controlling service in IEPA v. RCS, Inc., AC 96-12 (Dec. 7, 1995) and Trepanier v. Board of Trustees of the University of Illinois at Chicago, PCB 97-50 (Nov. 21, 1996). RCS involved service of an administrative citation, a type of enforcement proceeding, according to Section 31.1 of the Act. Section 31.1 of the Act requires service of an administrative citation upon a person or such person's authorized agent. 415 ILCS 5/31.1(b) (2000). Service in Trepanier, a citizen enforcement action, was controlled by the Board's now defunct procedural rule at Section 103.123 (35 Ill. Adm. Code 103.123). That rule required that a complaint must "be served personally on the respondent or his authorized agent, or shall be served by registered or certified mail with return receipt signed by the respondent or his authorized agent." Trepanier, PCB 97-50 slip op. at 4. In Trepanier, service was attempted in person, rather than by registered mail, but service was not performed on the respondent or his authorized agent. Trepanier, PCB 97-50 slip op. at 4.

In contrast to Section 31.1(b) of the Act and now defunct Section 103.123, Section 39.2(b) of the Act does not require service upon the individual owner or authorized agent. Service is proper if sent by registered mail, return receipt requested. 415 ILCS 39.2(b) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002. Thus, the standard for service according to Section 31.1(b) of the Act and procedural rule 103.123 is more strict than that contemplated by Section 39.2(b) of the Act. The Board finds that a signature of the owner or a registered agent was not necessary to confer jurisdiction to the City. Town & Country satisfied Section 39.2(b) of the Act by causing written notices to be timely served by registered mail at the proper addresses.

Fundamental Fairness

The County and Waste Management argue that the procedures the City followed before and during consideration of Town & Country's landfill siting application were fundamentally unfair. The arguments fall into three categories: (1) pre-filing contact between the City and Town & Country; (2) procedures followed by the Kankakee City Clerk; and (3) events transpiring just before and during the landfill siting public hearing. We address each in turn.

In an administrative hearing, due process is satisfied by procedures that are suitable for the nature of the determination to be made and that conform to the fundamental principles of justice. Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 693 (2d Dist. 1988). The Board must consider the fundamental fairness of the procedures used by the City in reaching a decision. 415 ILCS 5/40.1(a) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002.

Pre-filing Contacts

The County and Waste Management contend that Town & Country's special presentation at the February 19, 2002 city council meeting resulted in the City's prejudgment of the landfill siting application. Waste Management argues that the intent of Town & Country's special presentation was to give the City a favorable impression of the company and its siting request. WM Reply at 4. According to Waste Management, the risk of prejudgment permeated the proceedings. *Id*. at 8. The County argues that Town & Country's special presentation was not merely an opportunity to discuss landfill siting hearing procedures, but rather a calculated effort to present evidence, argue that its witnesses were credible, and argue that opposing witnesses could not be trusted. *See* Cnty. Br. at 55.

Public officials should be considered to act without bias. E & E Hauling, Inc. v. PCB, 107 Ill. 2d 33, 42, 481 N.E.2d 664, 668 (1985). There is no inherent bias created when an administrative body is charged with both investigatory and adjudicatory functions. E & E Hauling, 107 Ill. 2d at 43, 481 N.E.2d at 668. However, collusion between the applicant and the actual decisionmaker resulting in the prejudgment of adjudicative facts is fundamentally unfair. *See* Land and Lakes, 319 Ill. App. 3d at 51, 743 N.E.2d at 196. Where a municipal government "operates in an adjudicatory capacity, bias or prejudice may only be shown if a *disinterested observer* might conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." Concerned Adjoining Owners, 288 Ill. App. 3d at 573, 680 N.E.2d at 816 (emphasis added).

In E & E Hauling, 107 Ill. 2d at 43, 481 N.E.2d at 668, the Illinois Supreme Court concluded that even if the decisionmakers had already formed opinions about the proposed landfill, those opinions did not equate to a *per se* prejudgment of adjudicative facts. Here, the County and Waste Management complain that Mayor Green publicly supported the landfill at the council meeting. Cnty. Br. at 50; WM Reply at 4. In this instance, Mayor Green was not a decisionmaker; the 14 aldermen on the city council were the decisionmakers. The record does not reveal that Mayor Green's public support would have caused a disinterested observer to conclude the aldermen prejudged adjudicative facts.

Furthermore, contrary to Waste Management's argument, the presumption that the City acted without bias was not overcome by a "fact-finding preview of the evidence" at the council meeting. *See* WM Br. at 17. Town & Country notes that the council meeting was open to the public and that Mayor Green opened the meeting to questions from the planning commission and the press. *See* Cnty. Br. Att. B. at 6. This was not a case of a closed-door meeting between an applicant and a siting authority. *See* Beardstown Area Citizens for a Better Environment v. City of Beardstown, PCB 94-98 (Jan. 11, 1995). Regardless, the appellate court has held that a pre-filing closed-door meetings between the applicant and the siting authority was not fundamentally unfair. Southwest Energy, 275 Ill. App. 3d at 97, 655 N.E.2d at 312.

In this case, Mr. Moose spoke about each criterion of Section 39.2. Mr. Moose's discussion was general. His comments were couched in a manner suggesting that Town & Country's siting application and testimony at the public hearing would satisfy each Section 39.2 criterion. His speech did attempt to belittle the reputation of objectors and enhance the

reputation of Town & Country's witnesses. However, he did not present evidence in support of the application.

Mr. Simmon's testified that landfill objectors and environmentalists would engage in a "concerted effort, really, to create controversy and cause confusion." Cnty. Br. Att. 2 at 15. His speech served to bolster the credibility of Town & Country and to minimize the credibility of potential future objectors. However, Mr. Simmon presented no evidence.

Although Mr. Moose and Mr. Simmon did not present evidence, Mr. Volini did. Mr. Volini's package of information, distributed to the City, included aerial photographs of the site, landfill cross-sections, an operational screening, and a property value protection plan. However, this information was presented at the public hearing, which allowed the public to review the information, engage in cross-examination, and present public comment. Consequently, the Board finds that any prejudice that the special presentation may have caused the public was subsequently cured.

The testimony presented during the special presentation was one-sided. Nonetheless, a disinterested observer would not have concluded that the City had prejudged adjudicative facts or the law based on the special presentation. Moreover, the Board does not find that Mr. Moose's and Mr. Simmon's opinionated testimony actually created a bias against landfill objectors. Therefore, Town & Country's presentation was not fundamentally unfair in this instance.

Next, the County complains of pre-filing contacts other than the council meeting. The County contends that Mr. Mueller's interaction on behalf of Town & Country with City attorney Bohlen and Mayor Green regarding the siting ordinance and the Host Agreement rendered the proceedings fundamentally unfair. Cnty. Br. at 49-51. The County also objects to a letter written by Mr. Mueller sent to Mr. Bohlen by facsimile the day before Town & Country applied for siting approval. Cnty. Br. at 57-58. Finally, the County argues that the bus trip, attended by city council members and sponsored by Town & Country, to nearby landfills created bias. Cnty. Br. at 51-52.

Town & Country's involvement with the City in the creation of its siting ordinance and the rules governing the landfill siting hearing did not create bias. *See*, *e.g.*, Residents Against a Polluted Environment v. PCB, 293 Ill. App. 3d 219, 223, 687 N.E.2d 552, 555 (3d Dist. 1997) (holding that applicant's involvement in amending the county's solid waste management plan did not create bias). The Board finds that there is no evidence suggesting that Town & Country's assistance with drafting these documents resulted in the City prejudging adjudicative facts. The same is true with respect to negotiations relating to the Host Agreement.

The County argues that Mr. Mueller's March 12, 2002 letter to Mr. Bohlen was an improper *ex parte* contact. However, at the Board's hearing, Mr. Bohlen testified that he received the letter by facsimile on March 12, 2002, the day before Town & Country applied for siting approval. At the close of the Board's hearing, Hearing Officer Halloran reported that the credibility of the witnesses was not at issue. County of Kankakee v. The City of Kankakee, PCB 03-31 (Nov. 15, 2002). Consequently, the Board concludes that the letter was received before the application was filed and was a pre-filing contact rather than a post-filing *ex parte* contact. The Board finds that Mr. Mueller's letter to Mr. Bohlen, which discussed the propriety and

impropriety of *ex parte* contacts and draft language for the siting ordinance, did not result in prejudgment of adjudicative facts and did not render the landfill siting process fundamentally unfair.

As for the bus trip to the nearby landfill, very little evidence exists in the record. The trip took place before the application was filed. At the Board's hearing, Mr. Bohlen testified that he did not participate in the trip, but he did not know whether opponents of the landfill attended. 11/6 Tr. at 322.

Ex parte contacts between the local governing body and the applicant in the form of expense-paid tours of model facilities have been held to be fundamentally unfair. Southwest Energy Corp. v. PCB, 275 Ill. App. 3d 84, 92, 655 N.E.2d 304, 310 (4th Dist. 1995). In Southwest Energy, opponents to the incinerator were not invited on the tour. The appellate court stated in dicta: "We do not deprive local governing bodies of this essential information (touring of existing facilities); indeed, we encourage such trips. Fundamental fairness merely requires that representatives of all parties to the siting proceeding be given an opportunity to accompany the local governing body when it takes such a tour." Southwest Energy, 275 Ill. App. 3d at 94, 655 N.E.2d at 310. That court further explained that "the trip was fundamentally unfair because the incinerator opponents were not given equal access to information obtained by the council members." Southwest Energy, 275 Ill. App. 3d at 95, 655 N.E.2d at 311.

In contrast to the facts of Southwest Energy, the contact between the City and Town & Country occurred *before* the application was filed. Furthermore, the record does not clearly indicate whether members of the public were invited to attend the Town & Country-sponsored bus trip to nearby landfills. Consequently, the Board finds there is insufficient evidence to determine whether there was equal access to information obtained by the council members, and the petitioners have failed to prove that the bus trip was fundamentally unfair.

The Kankakee City Clerk

The City Clerk failed to immediately deliver a copy of the Town & Country application to the chairman of the Kankakee County Board and the County of Kankakee Solid Waste Director as the Kankakee siting ordinance directed her to do. Additionally, instead of routinely providing the public with information about the public hearing procedures, witnesses to be called at the hearing, and the hearing dates, the City Clerk required individuals to file Freedom of Information Act (FOIA) requests. The County maintains that the City Clerk's conduct was fundamentally unfair. Cnty. Br. at 47-49.

First, the County alleges that the City Clerk purposefully withheld a copy of the application from the chairman of the Kankakee County Board and the County of Kankakee Solid Waste Director because the City knew that the County would contest the application. Though nothing in the record supports this accusation the City did fail to abide by its own siting ordinance.

The County relies on ABC for support. In ABC, PCB 00-200, slip op. at 16, the Board held that the petitioners' inability to view the siting application until two weeks before the public hearing was fundamentally unfair. Although the chairman of the Kankakee County Board and

the County of Kankakee Solid Waste Director did not receive a copy of the application, no evidence suggests that they could not have viewed the application at the City Clerk's office.

The County was not prejudiced by the City Clerk's failure to forward a copy of the application. Consequently, the Board finds that the City Clerk's failure to abide by the siting ordinance was harmless error and did not render procedures fundamentally unfair.

Second, the County contends that it was fundamentally unfair for the City Clerk to demand a FOIA request before revealing routinely available landfill siting information. The County argues that this procedure resulted in the County not receiving the names of the parties and witnesses until the first day of the hearing. Cnty. Br. at 55-56.

At the Board hearing, the City Clerk testified that she did not read the siting ordinance prior to the landfill siting public hearing. 11/6 Tr. at 232. The City Clerk stated that office policy required a FOIA request before forwarding any documents. *Id*. at 239. However, the City siting ordinance did not require submission of a FOIA request. The City Clerk thought her duties with regard to the City's siting hearing only included accepting filings from the parties, accepting letters from the public (*Id*. at 246) and taking roll call (*Id*. at 231). Although the City Clerk failed to perform her duties as outlined in the city ordinance, the Board finds that her failure did not render the proceedings fundamentally unfair.

The Public Hearing

A public hearing before a local governing body is the most critical stage of the site approval process mandated by Section 39.2 of the Act. Land and Lakes, 245 Ill. App. 3d at 642, 616 N.E.2d at 356. The County and Waste Management collectively make the following allegations of fundamental unfairness: (1) the contradictory registration notices resulted in exclusion of citizen participants; (2) many members of the public could not access the hearing room on the first night of the hearing; (3) the City's hearing cross-examination procedures treated witnesses unequally; and (4) the hearing officer was biased. The Board addresses each argument in turn and finds that each argument lacks merit.

Registration and Recognition of Participants. The parties agree that two public notices published contradictory information about participant registration. The City Clerk told members of the public that they could not register as a participant after five days before the public hearing. Hearing Officer Bohlen later ruled that he would allow participants to register during the first day of the hearing.

The City Clerk told Darrell Bruck, an interested citizen, that he could not register to participate within five days of the hearing. At the hearing, Mr. Bruck did not hear Hearing Officer Bohlen's participant registration ruling because overcrowding stopped Mr. Bruck from entering the city council chambers until about 10 p.m. Mr. Bruck attended the hearing on the next two evenings, but he never heard an announcement regarding participant registration.

Patricia O'Dell informed the City Clerk that she wanted to participate. The City Clerk told her to submit a letter indicating her wish to "speak." Ms. O'Dell did so, but was not recognized as a participant because Hearing Officer Bohlen ruled that only those letters indicating a wish to "participate" would be recognized as participants. Ms. O'Dell was unable to

enter the city council chambers before 10 p.m. because of overcrowding during the first night of the hearing. Ms. O'Dell did not hear any announcements about registration that evening. Because she was not recognized as a participant she was not able to cross-examine Town & Country's first witness, Mr. Shoenberger. Mr. Shoenberger did not return on any subsequent hearing dates.

Although conflicting information was given to the public regarding participant registration, the Board finds that the proceeding was not fundamentally unfair. Hearing Officer Bohlen's ruling to accept additional participant registration on the first evening of the hearing resolved much of the confusion that the conflicting publications and the Clerk's office caused. Both Mr. Bruck and Ms. O'Dell were able to enter the city council chambers by 10 p.m. and stayed until the hearing adjourned at 12:30 a.m. Both Mr. Bruck and Ms. O'Dell had ample opportunity to request to be recognized as participants. Although they could not hear the first two hours of the proceedings, the transcript was made available to the public. If they had read the transcript, they would have discovered that Hearing Officer Bohlen allowed members of the public to register that evening. R. at 12. On the third evening of the hearing, Ms. O'Dell did participate in cross-examination of witnesses. Mr. Bruck was present on that evening and presumably could have registered as well.

Because Ms. O'Dell was not recognized as a participant until the third evening of the hearing, she was unable to cross-examine Mr. Shoenberger. However, Mr. Shoenberger's testimony regarding the legality of the County Plan was stricken. This ruling eliminated the overwhelming majority of Mr. Shoenberger's testimony from the City's consideration. Ms. O'Dell could have also addressed Mr. Shoenberger's testimony by submitting public comment at the hearing. The Board finds that Ms. O'Dell's inability to cross-examine Mr. Shoenberger did not render the proceeding fundamentally unfair.

Access to the Hearing. Fifty to 150 people were unable to attend the first evening of the City's hearing because of inadequate seating capacity. The hearing was scheduled to terminate at 10 p.m.; however, it continued until 12:30 a.m.

In City of Columbia, about 75 people were unable to access the hearing room because of overcrowding. City of Columbia, PCB 85-177, slip op. at 6. There was evidence of a sound amplification system in the hallway. The hearing lasted until 2:30 a.m. Also, the hearing officer restricted public comment. The Board held that neither the lack of capacity, the lack of sound amplification, nor the restriction of public comment rendered the proceeding fundamentally unfair, but the combination of the factors had a "dampening and prejudicial effect on the hearing attendees." City of Columbia, PCB 85-177, slip op. at 14.

Here, some of the 50 to 150 people who were initially unable to access the hearing room were nonetheless able to enter the hearing room by 10 p.m. Some others left the building before they were able to enter the hearing room. On the first evening of the hearing, no sound amplification system existed in the hallway. However, unlike the circumstances in City of Columbia, the hearing in this case lasted for another 10 days. During those hearing days, there were no capacity problems and a sound amplification system was provided for those outside the hearing room. Also, the transcript of the first evening of testimony was provided to the public for general review two days later. Consequently, no information was withheld from those that were unable to access the hearing room on the first evening of testimony. Furthermore, any

interested member of the public was allowed to make a public comment. Even so, a number of citizens testified at the Board's hearing that they were frustrated and disgruntled with the proceedings. However, after examining the record, the Board finds that in this instance the lack of capacity on the first night of the hearing was not fundamentally unfair.

Moreover, the hearing officer's failure to halt the hearings at the published 10 p.m. time did not render the proceedings fundamentally unfair. As noted, those interested members of the public that could not attend after 10 p.m. had the opportunity to review the transcript and attend subsequent hearing days. Consequently, no one was completely excluded from the proceedings. Thus, the Board finds that the inadequate capacity and late ending of the first evening of the hearing did not render the proceedings fundamentally unfair.

Cross-Examination Procedure. "Siting proceedings are not entitled to the same procedural protection as more conventional adjudicatory proceedings." Southwest Energy, 275 Ill. App. 3d at 92, 655 N.E.2d at 310. Although citizens before a city council in siting proceedings may insist the procedure comport with fundamental fairness, they are not entitled to constitutional due process. Southwest Energy, 275 Ill. App. 3d at 92, 655 N.E.2d at 310.

Waste Management contends that the irregular, burdensome, and exclusive method of cross-examination was unfair to participants. WM Br. at 20. In this case, cross-examination of Mr. Shoenberger immediately followed his testimony. However, cross-examination of all other witnesses called by Town & Country occurred only after all the witnesses had testified on direct examination. Nonetheless, participants did have the opportunity to cross-examine all adverse witnesses. The Board finds that the cross-examination procedure did not violate the principles of fundamental fairness.

Hearing Officer Bias. The County contends that Hearing Officer Bohlen was biased and failed to make impartial rulings on motions. Specifically, the County points to pre-filing contacts between Bohlen and Town & Country and argues that these contacts would make a disinterested observer conclude that Bohlen was biased. Cnty. Br. at 56-57.

The Board disagrees. The record does not reflect that Hearing Officer Bohlen favored the applicant more than the participants. He ruled impartially on the evidence and liberally admitted participant exhibits. He also allowed members of the public to register as participants during the hearing, and allowed for flexible scheduling of witnesses. Furthermore, he was not the application decisionmaker and there is no evidence that he colluded with Town & Country. The Board finds that the hearing officer was unbiased and that his actions did not result in a fundamentally unfair proceeding.

Cumulative Effect

Finally, the County and Waste Management contend that the cumulative effect of the City's errors throughout its consideration of the Town & Country application has rendered the process fundamentally unfair. In ABC, PCB 00-200, slip op. at 17-18, the Board held that a pattern of errors rendered the proceedings fundamentally unfair. The errors included failing to make a siting application and a hearing transcript available for inspection and the hearing officer failing to admit certain exhibits at the hearing. In this instance, we have concluded that the City Clerk's failure to deliver copies of the application to county officials as well as Hearing Officer

Bohlen's failure to recognize Ms. O'Dell as a participant on the first evening of the hearing were harmless errors. Even when considering these factors in combination, the Board finds that the proceedings were fundamentally fair.

Section 39.2 Criteria

A party seeking siting approval for a pollution control facility must submit sufficient details of the proposed facility to meet each of nine statutory criteria. 415 ILCS 5/39.2(a) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002; Land and Lakes, 319 Ill. App. 3d at 45, 743 N.E.2d at 191. In this instance, the petitioners contend that Town & Country failed to submit sufficient details to meet criteria (ii), (v), and (viii).

The City's decision to approve Town & Country's application, with respect to Town & Country's compliance with the statutory siting criteria, will not be disturbed unless the decision is contrary to the manifest weight of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain or indisputable. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. All of the statutory criteria must be satisfied before siting can be granted, and the manifest weight of the evidence standard applies to each and every criterion on review. Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818.

Criterion (ii)

Criterion (ii) of Section 39.2 of the Act requires the applicant to show that "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002. After reviewing the record, the Board finds it is clearly evident that the City's conclusion that the design of the landfill will protect the public health, safety, and welfare is against the manifest weight of the evidence because the evidence overwhelmingly establishes that the landfill is located on an aquifer and Town & Country's design does not adequately address that fact. The Board will now discuss the parties' arguments, review the evidence, and state the Board's reasoning and finding.

Arguments and Evidence. The County, Waste Management, and Mr. Sandberg all argue that the City's conclusion that Town & Country's satisfied criterion (ii) is against the manifest weight of the evidence. Cnty. Br. at 70-73; WM Br. at 21-22; Sandberg Br. at 1-3. The petitioners contend that Town & Country erroneously concluded that the Silurian dolomite underlying the site is an aquitard instead of an aquifer. Waste Management also argues that Town & Country's proposed groundwater monitoring system will provide no warning of groundwater contamination because it is not designed to monitor the downward flow of leachate into the Silurian dolomite aquifer. WM Br. at 22.

The petitioners' aquifer argument is principally supported by Mr. Cravens' testimony; Mr. Cravens provided expert testimony on behalf of a landfill objector. Relying on the 1990 ISWS report, which he co-authored, as well as information extrapolated from well logs in the region surrounding the site, Mr. Cravens concluded that the competent Silurian dolomite under the site is an aquifer rather than an aquitard. During the siting hearing, Mr. Moose did not attempt to refute Mr. Cravens' regional characterization of the Silurian dolomite, but argued that

the site-specific information supports the characterization of the competent dolomite as an aquitard. In effect, Town & Country relies on the study of a single boring extending 50 feet into the Silurian dolomite in the 236 acre waste footprint of the site to prove, for siting purposes, that the landfill is designed, located, and proposed to be operated to protect the public health, safety, and welfare.

Town & Country's landfill was designed as an inward gradient landfill. According to this design, Town & Country proposed to excavate the surface soils and the weathered dolomite so that the landfill liner would be immediately above the competent Silurian dolomite bedrock. Evidence admitted at the siting hearing revealed that the inward gradient design would adequately protect aquifers whose piezometric levels are located above the landfill liner. Town & Country identified the weathered portion of the dolomite as the uppermost aquifer. However, if the competent dolomite is an aquifer rather than an aquitard, Town & Country's current design is flawed because the groundwater impact evaluation assumed that the competent dolomite acted as an aquitard. Consequently, whether the proposed landfill is located, designed, and proposed to be operated to protect the public health, safety, and welfare hinges on the hydrogeologic characterization of the bedrock.

In phase one of Town & Country's two-phase assessment of the Silurian dolomite, Town & Country relied on background information from a 1966 study that concluded the upper bedrock aquifer system is generally not a dependable source of groundwater. R. at 10112. Town & Country's characterization of the competent dolomite bedrock as an aquitard was based mainly on the phase two hydrogeologic testing results from one deep boring that was advanced 50 feet below the top of the bedrock. Town & Country used the hydraulic conductivity test results from this deep boring to characterize the bedrock underlying the 236-acre waste footprint as an aquitard.

However, Town & Country failed to address Cravens' co-authored 1990 Illinois State Water Survey groundwater resources report (ISWS report). R. B&W Exh. 29. The ISWS report rejected earlier contentions that the Silurian dolomite was not an aquifer. In fact, the aquifer extends into Will, DuPage and Cook counties. R. at 1389-90. Mr. Cravens testified at the hearing that the aquifer supplies domestic potable water to over 2,000 wells. R. at 1391.

Furthermore, the ISWS report established that groundwater within the Silurian dolomite occurs in cavities formed by chemical dissolution of the rock along horizontal bedding planes and vertical stress fractures. R. B&W Exh. 29. Town & Country examined only the primary permeability of the Silurian dolomite. Notably, the primary permeability of the Silurian dolomite rock matrix is so low that it does not contribute to the productivity of the aquifer. R. B&W Exh. 29. However, Town & Country failed to consider the secondary permeability of the dolomite, which accounts for the flow of groundwater through the cavities and openings in the Silurian dolomite. The Board finds that Town & Country's phase one assessment of the Silurian dolomite was outdated and inaccurate.

Nonetheless, Town & Country argues that the test results from the deep boring trumps the ISWS report on the Silurian dolomite aquifer. However, the evidence does not support Town & Country's position. Under the facts of this case, the Board finds that a single boring into the 236-acre waste footprint cannot reliably provide a geologic characterization of the entire site. In addition to the published regional geologic information, the ISWS/ISGS well log data for 89

wells within a 2-mile radius of the proposed site indicate that the wells are drawing water from depths ranging from 22 to 268 feet with an average depth of 94 feet. Although Town & Country contends that well log data include inaccurate information, the well log data clearly indicate that wells in the vicinity of the proposed site draw water from the Silurian dolomite at depths greater than the weathered portion of the dolomite.

The City's Conclusion. After the landfill siting public hearing, the City concluded that "[e]ven if the Silurian Dolomite acts as an aquifer, there is sufficient evidence in the record to show that the design is adequate to assure the lack of movement of contaminates. This is not only based upon the liner system but also based upon the inward gradient engineering design." R. at 3271. The City added the following additional condition regarding criterion (ii): "Adequate measures shall be taken to assure the protection of any and all aquifers from any contamination as required by the IEPA through its permitting process. Upon the determination of the necessary measures, said measures shall be also approved by the City of Kankakee." R. at 3273.

The Board's Reasoning. First, the City's conclusion is ill-conceived. The liner system was only modeled and evaluated under the assumption that the competent dolomite is an aquitard. There is no evidence in the record measuring the effectiveness of the liner when situated above the competent dolomite aquifer. Furthermore, the inward gradient design is specifically designed to contain leachate leaks when the piezometric level of the groundwater is above the foundation of the landfill. The effectiveness of the inward gradient design is compromised when the aquifer lies below the foundation of the landfill. Thus, there is no evidence to support the City's conclusion.

To protect the public health, safety, and welfare, Town & Country's landfill design must account for the impacts of both horizontal and vertical flow of contaminants. Town & Country indicated it would fill any cracks in the bedrock with grout. R. at 1105. However, the effectiveness of the grout to restrict vertical flow was not measured. Because Town & Country assumed the competent dolomite bedrock to be an aquitard, the modeling and groundwater impact evaluation failed to measure vertical flow of contaminants into the Silurian Dolomite aquifer. Thus, even though some of these issues might be addressed during the permitting process before the Agency, the evidence in the record makes it clearly evident that Town & Country did not design and locate the facility such that the public health, safety, and welfare will be protected. Consequently, the Board must overturn the City's decision on criteria (ii).

Second, the City's additional condition regarding criterion (ii) does not cure the lack of evidence in the record showing that the landfill is designed to protect the public health, safety, and welfare. To receive siting approval, Town & Country was required to submit sufficient details of the proposed facility demonstrating that it meets each criteria listed in Section 39.2(a) of the Act. Land and Lakes, 319 Ill. App. 3d at 45, 743 N.E.2d at 191. The City cannot simply defer to the Agency when there is insufficient evidence to support an applicant's siting request. *See*, *e.g.*, Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 438, 513 N.E.2d 592, 594-95 (2d Dist. 1987) (holding that the siting authority cannot defer to the Board on technical issues but must use its fact-finding authority to address technical information to assess the effect of the proposed facility on the public health, safety, and welfare).

Conclusion. Town & Country failed to address research indicating that the Silurian dolomite, upon which the proposed landfill would rest, is an aquifer. Town & Country also

failed to consider well log data within a 2-mile radius of the site that indicated area wells draw water from the Silurian dolomite aquifer. This evidence belies the findings of the tests on the single boring taken from the 236-acre waste footprint. Town & Country's scientifically unjustified assumption regarding the identity of the Silurian dolomite resulted in the use of inaccurate information in its modeling and groundwater impact evaluation. Consequently, Town & Country did not present sufficient details to show the landfill was located, designed, and proposed to be operated to protect public health, safety, and welfare. The evidence Town & Country did present was unreliable. Therefore, the Board finds it is clearly evident that the City's determination that Town & Country met the requirements of criterion (ii) of Section 39.2 of the Act is against the manifest weight of the evidence.

Criterion (v)

Criterion (v) of Section 39.2 of the Act requires that the application's "plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operations accidents." 415 ILCS 5/39.2(a) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002.

At the City's siting hearing, Mr. Moose testified that the application contained plans and procedures that would minimize the impact of fire and other accidents. Appendix S of the application contains Town & Country's health and safety plan. R. at 50175-191. That plan includes a Fire Prevention plan. R. at 50189-191. In the "Responding to Fires in Building and Shops" subsection, the fourth procedure reads: "If the fire is determined to be too large for a portable fire extinguisher, the Kankakee Fire Department must be notified immediately at 911 and the building or area of immediate danger must be evacuated." R. at 50191. However, Mr. Moose testified that he did not speak with the Kankakee Fire Department to determine if they were capable of addressing a fire or other emergency at the proposed landfill. R. at 517-18. The County argues that Town & Country did not satisfy criterion (v) since it failed to contact the fire department. Cnty. Br. at 73.

Criterion (v), however, does not require Town & Country to confer with the fire department before site approval. The plain language of the criterion simply requires a plan of operations. Town & Country has presented that plan. Furthermore, Town & Country would speak to the fire department upon approval of the application as required by condition in the siting approval. R. at 3279. The County has presented no evidence that Town & Country's design and procedures are inadequate; therefore, the Board finds that that the City's determination that Town & Country satisfied criterion (v) of the Act is not against the manifest weight of the evidence. *See* Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 554, 555 N.E.2d 1178, 1186 (3d Dist. 1990).

Criterion (viii)

Criterion (viii) of Section 39.2 of the Act states the following: "[I]f the facility is to be located in a county where the county board has adopted a solid waste management plan *consistent with* the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan." 415 ILCS 5/39.2(a)(viii) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002 (emphasis added). The County contends that Town & Country's application is not consistent with the County Plan as

amended by the March 12, 2002 amendment to the County Plan. Cnty. Br. at 60-65. Town & Country argues that the October 9, 2001 amendment and the March 12, 2002 amendment to the County Plan are invalid. The Board finds that Town & Country's argument lacks merit but that Town & Country's application is consistent with the County Plan.

Legality of the County Plan Amendments. Town & Country contends that the Board should not consider either the October 9, 2001 or the March 12, 2002 amendments to the County Plan because the amendments are unconstitutional, violated the Solid Waste Planning and Recycling Act (SWPRA), and conflict with the Local Solid Waste Disposal Act (Disposal Act). TC Br. at 38-43. The County and Waste Management argue that the Board does not review the validity of solid waste management plans but simply considers whether the application is consistent with the plan. Cnty. Reply at 30-31; WM Reply at 11-12.

The plain language of Section 39.2(a)(viii) assumes that the county solid waste management plan is consistent with the SWPRA or the Disposal Act. Only when the plan is consistent with the SWPRA or the Disposal Act will the Board assess whether the application is consistent with the plan. After considering the language of the County Plan in conjunction with the requirements of the SWPRA and the Disposal Act, the Board finds no disagreement between the plan and the statutes.

Agreement with the County Plan. The language of the County Plan's Section VI (a) and (b) is ambiguous. Although the plan indicates that an expansion of the existing landfill, if approved, would satisfy the county's waste disposal needs for another 20 years, the plan does not provide a deadline date for approval. Furthermore, the import of the phrase "no new facilities would be necessary," if the expansion application was approved, is unclear.

The City found that since an expansion of the existing Waste Management landfill in Kankakee County had not been approved, the City was free to site a landfill within its municipal boundaries. R. at 3285-86. Mr. Moose's testimony and Mr. Shoenberger's testimony supported this conclusion. When the City approved the application, it knew that Waste Management's landfill expansion application was pending. R. at 3285. Nonetheless, the expansion application had not been approved.

Mr. Kruse, chairman of the Kankakee County Board, stated that the intent of the County Plan was to avoid the unnecessary additional impacts that may occur if an additional landfill was located within Kankakee County. He also stated that unless and until Waste Management's expansion application was not approved, no further proposed facilities were needed to meet the county's disposal needs.

Mr. Kruse's comments did not resolve the vague nature of the County Plan. The Board finds it is unreasonable to interpret the plan to require the City to wait indefinitely for the approval or rejection of an application (or amended application) to expand the Waste Management landfill.

Waste Management also argued that Town & Country failed to enter a host agreement with the County in accord with the County's Plan. WM Br. at 24. However, the County Plan only indicates that an applicant and the County should agree to a host community agreement. R.

Exh. 3 at 345. The Board finds that the County Plan does not require that an applicant enter a host agreement with the County.

Finally, the County and Waste Management argue that Town & Country failed to provide a Property Value Guarantee Program or environmental contingency escrow fund. Cnty. Br. at 66; WM Br. at 24. The Board disagrees. Town & Country did provide for a Property Value Protection Plan and agreed to purchase and maintain for the life of the host agreement a liability insurance policy of $5,000,000 per occurrence and a combined limit of $10,000,000. R. at 3285; R. at 10388 (property value protection plan), 20238-64 (land options providing property value protection); R. Exh. Kennedy-Shepherd at 27 (host agreement warranting acquisition of insurance). The liability insurance policy satisfies the environmental contingency escrow fund. R. Exh. 2 at 4. The Board finds that the City's determination that Town & Country met criterion (viii) was not against the manifest weight of the evidence. Having found that Town & Country's siting application is consistent with the County Plan, the Board need not address Town & Country's remaining arguments regarding the legality of the March 12, 2002 and October 9, 2001 amendments to the County Plan.

CONCLUSION

After our careful review of the record, the Board concludes that the City had jurisdiction over Town & Country's application to site a new pollution control facility and the procedures the City followed to address the merits of the application were fundamentally fair. Additionally, the Board finds the City's determination that Town & Country met the requirements of criteria (v) and (viii) of Section 39.2 of the Act was not against the manifest weight of the evidence. However, the Board finds the City's determination that Town & Country's landfill was designed, located, and proposed to be operated to protect the public health, safety and welfare as required by Section 39.2 of the Act was clearly against the manifest weight of the evidence.

This opinion and order constitutes the Board's findings of facts and conclusions of law.

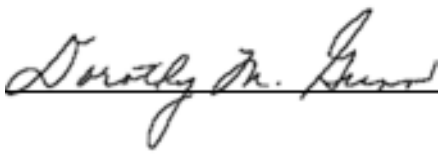
ORDER

The decision of the City of Kankakee approving Town & Country's application to site a new pollution control facility is reversed for the reasons expressed in the Board's opinion.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 9, 2003, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board