BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BYRON SANDBERG, Petitioner, vs. CITY OF KANKAKEE, ILLINOIS, THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	Case No. PCB 04-33
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner, vs. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	Case No. PCB 04-34
COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, Petitioners, vs. TY OF KANKAKEE, ILLINOIS, THE CITY `KANKAKEE, ILLINOIS CITY COUNCIL, WN AND COUNTRY UTILITIES, INC., KANKAKEE REGIONAL LANDFILL, C., Respondents.	Case No. PCB 04-35

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POST HEARING BRIEF OF PETITIONERS, COUNTY OF KANKAKEE AND EDWARD D. SMITH

NOW COMES Petitioners, COUNTY OF KANKAKEE and EDWARD D. SMITH, and as and for their Post-Hearing Brief, states as follows:

I. THE CITY OF KANKAKEE DID NOT HAVE JURISDICTION TO HEAR THE LANDFILL SITING APPLICATION.

A. The March 7, 2003 Application was Substantially the Same as the Application Filed on March 13, 2002, Which was Disapproved by the Illinois Pollution Control Board for Failing to Meet Criterion ii.

The authority of the City of Kankakee ("City") to hear the request of the applicant, Town and Country Utilities, Inc. ("T&C") is derived solely by a legislative grant set forth in Section 39.2 of the Illinois Environmental Protection Act ("the Act"). 415 ILCS 5/39.2 (2002); *Turlek v. Village of Summit*, PCB 94-19, 94-21, 94-22, Slip op. at 3 (May 5, 1994); *Daniels v. Industrial Commission*, 201 Ill.2d 160, 165 (2002); *City of Elgin v. County of Cook*, 169 Ill.2d 53, 61, 64-65 (1995). Section 39.2(m) of the Act prohibits the City from hearing a siting application, which is substantially the same as one that was disapproved within the preceding two years. 415 ILCS 5/39.2(m).

Section 39.2(m) of the Act provides:

> An Applicant may not file a request for local siting approval which is substantially the same as a request which was disapproved pursuant to a finding against the Applicant under any criteria (i) through (ix) of subsection (a) of this Section within the preceding two years.

415 ILCS 5/39.2(m).

Furthermore, Section 7(c) of the City of Kankakee Pollution Control Facility Siting Ordinance 2003-11 provides:

> An Applicant may not file an application for site location approval which is substantially the same as a request which was disapproved, pursuant to a finding against the Applicant under any criteria (1) through (9) of Section 6(e), above and with Section 39.2(a) of the Act, within two years.

See City of Kankakee Siting Ordinance attached hereto as Appendix A. The ordinance has also been filed with the PCB as public comment.

The two year prohibition against refiling a substantially similar application begins to run on the date that the prior application is disapproved by the local governing body or the PCB. *Laidlaw Waste Systems v. Pollution Control Board,* 230 Ill.App.3d 132, 136, 595 N.E.2d 600, 602-603 (5th Dist. 1992; see also *Turlek*, Slip Op at 6 (noted that Section 39.2(m) would have applied if the PCB had remanded based on failure to satisfy criterion). An application does not have to be identical to a prior application to be disallowed under Section 39.2(m); rather, it need only be substantially the same. *Worthen v. Village of Roxana*, PCB 90-137, Slip op. at 5 (Sept. 9, 1993). The question of whether an application is substantially the same is to be determined by reviewing the two applications and assessing whether there are sufficiently significant differences between the applications. *Laidlaw Waste Systems Inc. v. Pollution Control Board*, 230 Ill.App.3d 132, 136, 595 N.E.2d 600, 602-03 (5th Dist. 1992).

The application filed on March 7, 2003, by Town & Country was substantially the same as the application filed on March 13, 2002 with the City of Kankakee, which was disapproved by the PCB on January 9, 2003 for failing to meet criterion ii. *County of Kankakee v. City of Kankakee*, PCB 03-31, 03-33, 03-35, Slip. op at 27-28 (Jan. 9, 2003), (hereinafter, *"Town and Country"*).[1]

The evidence presented at the Section 39.2 hearing clearly established that the applications were substantially similar and, therefore, the City of Kankakee did not have jurisdiction to hear the application filed on March 7, 2003. During the pendency of the hearing,

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[1] The County of Kankakee incorporates by reference as though stated verbatim herein the motion to dismiss the application for local siting filed by Waste Management, Inc. at the Section 39.2 hearing and which was adopted orally by the County of Kankakee during the Section 39.2 siting hearing. The County further adopts any and all arguments it raised concerning this issue in the post hearing brief of the County of Kankakee and its proposed findings of facts and conclusions of law. (PCB II, C1626-1666).

two of T&C's own witnesses, Devin Moose and David Daniel, conceded that the design of the landfill was substantially the same, the location of the landfill is exactly the same, and the operating plan of the landfill is substantially the same. T&C II, 6/26/03 Tr. Vol. 3-A, 41, T&C II, 6/26/03 Vol. 3-B, 117.

The 2002 application, the public hearing transcripts and exhibits developed for the application are included verbatim in the 2003 application. See T&C II, App., cover letter to A. Dumas, dated March 7, 2003; PCB II, Pet. Ex. 22).[2] At the commencement of the siting hearing, Waste Management and the County moved to dismiss the application because the 2003 application was substantially the same as the 2002 application. The Hearing Officer, Robert Boyd, denied the motion, but made it clear that "at this stage I am not prepared based on what I have read and what I have heard [to find] the current application is substantially the same as the previously filed application." T&C II, 6/24/03 Tr. Vol. 1-A, 51(emphasis added). During the siting hearing itself, it became blatantly obvious that indeed the applications were substantially the same. Specifically, in addition to the admission by the Applicant's own expert witness that the design, location and operating plan of the landfill were all substantially the same, additional evidence was admitted by the parties establishing that the design was the same in all material respects and in particular, as follows:

1. The inward hydraulic gradient was the same T&C II, 6/26/03 Tr. Vol. 3-A, 30.
2. The Capacity of the landfill proposals are the same. (50.9 million cubic yards). *Id.* at 28.
3. The waste footprint of both proposals are the same at 236.3 acres. *Id.* at 29.

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[2] The transcripts to the Section 39.2 siting hearings in front of the City Council or the City of Kankakee will be cited as T&C I or T&C II, by the date of the hearing, the volume of the transcript; and the page of the testimony. For example, "T&C II, 6/26/03 Tr. Vol. 30-A, 33". The transcripts for the Section 40.1 Illinois Pollution Control Board hearings will be cited as PCB I or PCB II and by the date of the hearing and the page number of the testimony. The Exhibits to the City of Kankakee siting hearings will be referenced T&C I or T&C II and the exhibit number. The exhibits to the IPCB hearing will reference PCB I for the 2002 hearing and PCB II for the 2003 hearing.

4. The composite liner of three foot compacted soil and 60 millimeter geomembrane was the same for both proposals. *Id.* at 30-31.

5. The liner system keyed into the bedrock was the same. *Id.* at 33.

6. The excavation of liner grades were the same. *Id.*

7. The leachate collection system was the same. *Id.* at 32;

8. The landfill gas management and monitoring system was the same. *Id.*

9. The final contours and cover configuration were the same. *Id.*

10. The storm water management system was the same. *Id* .at 29.

11. And the groundwater monitoring system was the same. T&C II, 6/25/03 Tr. Vol. 2-A, 54-59.

The location of the landfill was exactly the same as proposed in the 2002 application. T&C II, 6/26/03 Tr. Vol. 3-A, 28. The legal description and size of the property was exactly the same. *Id.* The proposed operation with the receipt of 3500 tons of waste per day was the same. *Id.* at 29-33, 64. Even the reports that were included with the re-filed application were exactly the same as the 2002 application with regard to Criteria iii, iv, vi, vii, and ix. T&C II, 6/24/03 Tr. Vol. 1-B, 15-15, 24-25, 36.

As to criterion i and ii, the Applicant included some additional text in its reports which referenced some minor additional data regarding hydrogeologic conditions, service area waste capacity and waste generation. However, this information was merely offered to support the very conclusions, which were reached in the 2002 Application and did not alter the application in any significant way. To the contrary, the only differences between the 2003 application compared with the 2002 application is that the refiled application contained an "optional" geosynthetic clay liner (GCL) and it involved a slight reduction in the service area.

First, the "optional" GCL composite was not even recommended by the Applicant. That GCL composite was not a double composite liner as described in Representative Novak's

proposed legislation. T&C II, 6/26/03 Tr. Vol. 3-A, 42-46. Further, T&C's experts testified that the GCL composite was neither necessary nor appropriate for the facility. T&C II, 6/26/03 Tr. Vol. 3-A, 38-42. In fact, the four mil. geomembrane which was mentioned by the Applicant (while at the same time indicating that it was unnecessary) is not even being manufactured. T&C II, 6/26/03 Tr. Vol. 3-A, 48. The GCL composite was simply offered as an alternative to a double composite liner in the event the City felt inclined to impose a condition requiring some additional protection beyond the liner proposed by T&C. T&C II, 6/26/03 Tr. Vol. 3-A, 39-42.

As it turned out, the City followed T&C's recommendation and did not impose a condition that the four mil. GCL be utilized, nor any condition relating to a double composite liner. Therefore, any reference in the application concerning the optional GCL is mere surplusage, as it is not included in any design that was approved by the City of Kankakee. Obviously, a design feature which is not proposed or recommended by the Applicant, is not imposed as a condition by a siting authority, and will not be included in the final landfill design does not constitute a substantial change in the application.

Similarly, the reduction in the size of the service area is not a significant change in the 2002 application. While the Applicant touted the change as a 40% reduction in the geographic size of the service area, it actually only represents a 4% reduction in the amount of waste generated in the service area. T&C II, 6/24/03 Tr. Vol. 1-B, 48. Furthermore, the reduction in the volume of waste generated in the service area does not in any way affect the amount of waste that T&C intends to accept each day, or the capacity of the landfill or its operating life. The change in the geographic size of the service area will have absolutely no positive impact upon the landfill. Therefore, the change in the service area in no way affects the fact that the landfill was disapproved by the PCB for failing to meet Criterion ii. The Applicant still intends to accept

3,500 tons of waste per day, with a facility capacity of 50.9 million cubic yards and a site life of 30 years. Therefore, it is obvious that this very minor change in the service area does not affect the fact that the Application is substantially the same.

Although T&C did make slight changes to the section of its Application concerning criterion viii, those changes were merely necessitated by the County of Kankakee's amendment to its Solid Waste Management Plan ("Plan"). Merely responding to a change in the County's Solid Waste Management Plan does not render an application sufficiently different so as to avoid the effect of Section 39.2(m). In fact, T&C is arguing, just as it did in its 2002 application that somehow the language in the Plan is ambiguous, such that it is unclear whether the County wanted to limit the landfilling within its borders to the expansion of the existing landfill. This is the exact same tactic that was taken in regard to the March 7, 2003 application and, thus, the applications are substantially the same.

The Applicant's own chief engineer, Devin Moose, admitted that the location, operating plan and design are substantially the same. T&C II, 6/26/03 Tr. 3-A, 41. The Applicant has only added some additional soil borings taken at the site in an attempt to bolster its 2002 application. However, as discussed *infra* in regard to criterion ii, these additional borings do not in any way change the fact that this particular site is not designed to protect the health, safety and welfare and, indeed, these borings did not address the deficiencies that were raised by the PCB in reversing the City Council's prior approval of the application. In fact, the Applicant once again attempts to mischaracterize the results of these borings by indicating that the dolomite below the landfill will act as an aquitard. A close review of the boring results establishes that such a conclusion cannot be reached, and the Applicant skewed its findings as to the hydraulic conductivity of the bedrock. (See criterion ii discussion below). Merely adding some additional

underlying data in support of an application does not result in any substantial difference between the two applications. If such could be the result, then an applicant could always avoid the import of Section 39.2(m) merely by running additional repetitive soil borings at a site or re-running tests on borings that were already done, or performing some other meaningless task in an effort to mask the fact that an application is substantially the same.

The *Worthen* case establishes what is necessary for an Applicant to prove that its application is different from a previous application. *Worthen v. Village of Roxana*, PCB 90-137 (Sept. 9, 1983). In *Worthen,* the PCB upheld the Village of Roxana's finding that a 1987 application for 154 acre landfill expansion filed by GSX Corporation was not substantially the same as a 1990 application for a 94 acre landfill expansion filed by Laidlaw Waste Systems. *Worthen,* Slip op. at 6. In *Worthen* significant differences were involved, including the fact that the Applicant was different, the size of the expansion was substantially different (159 acres versus 94 acres), the liners were different (10 foot clay versus composite liner), the location of the facility was different (in that the new facility was proposed to be a horizontal and vertical expansion as opposed to just a horizontal expansion), and the design of the facility would be substantially different (in that the latter application incorporated ground water drainage systems, gas flaring system, a monitoring plan, and a recycling composting facility, all of which were not included in the first application). *Id.*; *Village of Roxana* resolution dated March 1, 1993 at 3-5. Furthermore, the *Laidlaw* application contained numerous analyses that were not part of the first GSX application, including a needs analysis with data on population increases; a solid waste needs assessment; an earthquake analysis; a real estate evaluation study and a description of the characteristics of the surrounding area. *Id.*

Unlike the application at issue in *Worthen*, the 2003 application here is proposed by the exact same Applicant, and it is for the exact same location, size, design and operation as proposed in the 2002 application. Though there are some very minor differences between the 2003 and 2002 applications, these are in no way material or substantive differences. Section 39.2(m) does not require that the two applications be exactly the same. It is difficult to conceive of a situation where the two applications could be more substantially the same than those at issue in this case other than an applicant merely refiling the exact same application.

Obviously, the purpose of Section 39.2(m) is to avoid the unnecessary financial and personal drain upon the resources of the public, as well as the siting authority. This case is a perfect example of why the 39.2(m) must be followed. At the first Section 39.2 siting hearing there were literally hundreds of people that wanted to attend or participate, such that scores of people were unable to hear the first night of the proceedings due to a lack of seating capacity of the hearing room. However, after the lengthy appellate process of *Town & Country I* and the re-filing of *Town & Country II*, at the second hearing, only a handful of the most diligent objectors were able to take the time out of their lives to attend the renewed siting hearings. An Applicant should not be allowed to obfuscate the testing of its application merely by turning the process into a marathon whereby a well heeled applicant continues to churn the process until all of the objectors fall from exhaustion.

The Applicant's own attorney, Mr. George Mueller, provided an astute definition of a substantive change to an Application. Section 39.2(e) of the Act provides that "at any time prior to completion by the Applicant of the presentation of the applicant's factual evidence, the applicant may file not more than one amended application upon payment of additional fees." 415 ILCS 5/39.2(e). During the course of the hearing, the County sought a ruling from the City

Council that certain testimony by an Applicant's witness relating to sensitivity analyses which were not included within the application constituted an amendment, as contemplated by Section 39.2(e). The Applicant's counsel argued that inclusion of the sensitivity analyses in oral testimony (when they have not been physically included in the application) was not an amendment to the application on the grounds that "to the extent that it doesn't change the design, that it doesn't change the proposal, [it] is not an amendment to the application" (T&C II, 6/28/03 Tr. Vol. 5-A, 59). (Emphasis added). Using the Applicant's own definition, the scant additional borings that were included in the application by the Applicant did not change its design or its proposal and, thus, did not even constitute an amendment of the application under Section 39.2(e). Thus, clearly the application filed on March 7, 2003, which in no way changes the design, operating plan, or location of the landfill, is substantially the same as the application filed on March 13, 2002, and the City Council did not have jurisdiction to hear the landfill application. Accordingly, the City Council decision should be reversed by the PCB.

B. The City of Kankakee Did Not Have Jurisdiction Because the Applicant Failed to Send Proper 39.2(b) Notices.

1. Facts

The Chief County Assessment Officer for Kankakee County, Sheila Donahoe, was called as a witness at the Section 40.1 Illinois Pollution Control Board (PCB) hearing in this matter. PCB II, 12/2/03 Tr. 52. Ms. Donahoe performed a search of the authentic tax records for Parcel 13-16-23-400-001 (also referred to as the Bradshaw Farms or the Bradshaw/Skates property) to determine the identities of the owners of that property. *Id.* at 53. She reviewed the property record card that is contained in the computer database shared between the Assessor's and Treasurer's/Tax Collector's office. *Id.* at 53, 62; PCB II, Pet. Ex. 9, and attachments. The owners of the property which appear in the authentic tax records are Gary Bradshaw, James

Bradshaw, Jay Bradshaw, Ted Bradshaw, Denise Fogle and Judith Skates. *Id.* at 55, 61-62; PCB II, Pet. Ex. 9.

The authentic tax records show the address of Gary Bradshaw, James Bradshaw, Jay Bradshaw, Ted Bradshaw and Denise Fogle as 22802 Prophet Road, Rock Falls , Illinois. The address of Judith Skates is identified by the authentic tax records as 203 South Locust Street, Onarga, Illinois. Those addresses have been the same since Mr. Volini performed his search around February 7, 2003 through today's date. *Id.* at 56.

Also within the computer database is a scanning of an address change card for Judith Bradshaw Skates, to the Onarga, Illinois address which was scanned into the system on March 7, 2002. *Id.* at 62. Once an address change card is scanned into the computer, the specific owner's address is also changed in the shared database. *Id.* Ms. Skates could not have changed the address of the other owners because the County would not have adjusted any of these addresses unless Ms. Skates held a power of attorney or actual authority to do so. *Id.* at 62-63.

The affidavit of Mark Frechette, who is the treasurer of Kankakee County and *ex officio* tax collector, was filed as public comment. PCB II, H.O. Ex.1, PCB II Pet. Ex. 10. Mr. Frechette confirmed that he reviewed the authentic tax records for the County which showed that the property was owned by Gary Bradshaw, James Bradshaw, Jay Bradshaw, Ted Bradshaw and Denise Fogle, who all had a Rock Falls address and Judith A. Skates, who had an Onarga, Illinois address. He also attached the computer printouts in the shared database which identify all of the owners for that property. Finally, Mr. Frechette indicated that at no time did his office ever indicate to anyone that the address of Gary Bradshaw, James Bradshaw, Jay Bradshaw, Ted Bradshaw or Denise Fogle was anything other than the Rock Falls address.

Mr. Tom Volini testified that he understood that the Treasurer and Assessor's Office shared a database. PCB II, Pet. Ex. 23, p. 48. He never sent any Section 39.2(b) notices to 22802 Prophet Road, Rock Falls, Illinois. *Id.* at 49. The record is also clear that he sent two notices to Ms. Skates at her Onarga address and one such notice was addressed only to Ms. Skates and the second notice was referenced the five other owners' names but was sent "c/o Judith Skates." T&C II App, Appen. B, Exs.. A&C.

Mr. Volini was specifically asked whether he determined if there were any conflicts among the records maintained by the Clerk's office, the Assessor's office, or the Treasurer's office regarding the ownership of the property in the County. He essentially refused to answer that question, and never identified any specific conflict or inconsistency. *Id.* at 71-76. Mr. Volini eventually conceded that he had no information that the Kankakee County Assessor deleted the names of James Bradshaw, Jay Bradshaw, Ted Bradshaw and Denise Fogle as owners of the Skates property. *Id.* at 82.

Judith Skates and each of the other owners of the Bradshaw property filed affidavits in this case. PCB II, H.O. Exs. 2-7. These affidavits establish that Ted Bradshaw, James Bradshaw, Jay Bradshaw, Gary Bradshaw and Denise Fogel never received any Section 39.2(b) notices. *Id.* Ms. Skates did not forward the notice to her siblings, and each of them would have appeared and participated, or at least filed public comment, in opposition to the landfill, if they had known the proceedings were taking place. *Id.*

2. Argument

Section 39.2(b) requires that:

> No later than fourteen days prior to request for location approval, the Applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested on the owners of all property within the subject area, not solely owned by the Applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said

> owners being such persons or entities which appear on the authentic tax records of the County in which such facility is located, provided, that the number of all feet occupied by all public roads, streets, alleys, and other public ways shall be excluded in computing the 250 feet requirement, provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys, and public ways. 415 ILCS 5/39.2(b)(2002).

If an owner is identified on the authentic tax records then that owner must be provided with the applicable pre-filing notice. *Wabash and Lawrence County Taxpayers and Water Drinkers Association v. Pollution Control Board,* 198 Ill.App.3d 388, 555 N.E.2d 1081 (5th Dist. 1990). The notice of requirements of Section 39.2(b) are jurisdictional pre-requisites which must be strictly followed to vest the City with power to hear a landfill proposal. *Kane County Defenders, Inc. v. Pollution Control Board,* 139 Ill.App.3d 588, 593, 487 N.E.2d 743, 746 (2d Dist. 1985); *Town & Country I,* Slip. Op. 16 (Jan. 9, 2003); *City of Kankakee, et al. v. County of Kankakee and Waste Management of Illinois*, PCB 3-125, 133, 134, 135, Slip op. 14 (Aug. 7, 2003). The question of whether or not a local siting authority had jurisdiction is a question of law and is reviewed *de novo* by the PCB. *City of Kankakee v. Waste Management,* PCB 03-125, 133, 134, 135, slip op. 14. Section 39.2(b) has three distinct elements. "First, property owners listed on the authentic tax records must be served notice. Second, property owners who own property within 250 feet of the lot line of the proposed facility must be notified. Third, service on those property owners must be effectuated using certified mail return receipt or personal service." *Id.* at 14-15.

In *City of Kankakee v. Waste Management,* the PCB explicitly found, just this year, that even though an Applicant made nine separate attempts to serve an owner of a parcel of property and effectuated service through a spouse who lived at the same residence and co-owned the property, the failure to send a separate notice to each owner resulted in the County of Kankakee not having jurisdiction to hear Waste Management's application. *Id.* In that case, the Applicant

attempted to serve Robert and Brenda Keller, who were co-owners of a parcel of property and entitled to notice. The PCB found that because only Mr. Keller was sent a certified mailing, Mrs. Keller was not sent a mailing that no service was affected upon her and, therefore, the County of Kankakee lacked jurisdiction. *Id.* at 15-16.

The PCB rejected the argument that under the *Wabash* case service was effective when accomplished upon only one property owner listed on the authentic tax records. The Court noted that in *Wabash* only the property owner that was served was listed by name on the tax records. *Id.* at 16. The only exception that the PCB has recognized is where the County's authentic tax records are contradictory as to who is an owner of a parcel of property. *Id.* (citing *Town & Country I)* Therefore, if the authentic tax records clearly indicate that there is more than one owner of the property, each owner must be served. *Id.*

T&C submitted its pre-filing notices as Appendix B to its March 7, 2003 application. T&C II App., Appen. B. Attached to Appendix B is the affidavit of Mr. Thomas A. Volini which provides that he used a Sidwell map of the surrounding area to determine the parcel identification numbers of all parcels within 400 feet of the lot line of the subject property. *Id.* at Affidavit, Par. 5. Volini asserts he then consulted the office of the Kankakee County Supervisor of Assessments, and "obtained the identity and addresses of the owners of each parcel" and the results of his search are disclosed on Exhibit A, attached to Mr. Volini's affidavit. *Id.*

a. The Applicant Failed to Send Notices to Each of the Owners of Parcel No. 13-16-23-400-001.

It is undeniable that the authentic tax records at issue in this case clearly identify six different owners to Parcel No. 13-16-23-400-001. See T&C II App., Append. B, Ex. A; see also PCB II, H.O. Exs. 2-7; see PCB II, Pet. Ex. 9 and attachments; PCB II, H.O. Ex. 1, and the attachments; PCB II, Pet. Ex. 10; PCB II. 12/2/03 Tr. 53-55. Mr. Volini himself identified Gary

Bradshaw, James Bradshaw, J.D. Bradshaw, Ted A. Bradshaw, Denise Fogle and Judith Skates all as owners of this parcel of property. T&C II App., Append. B, Ex. A. However, for some reason, Mr. Volini only sent notice to Ms. Judith Skates by way of two mailings to her Onarga, Illinois address. One mailing was addressed only to Ms. Skates and the other mailing referenced all of the names of the other owners on the return receipt "c/o of" Ms. Skates. *Id* at Ex. C.

Mr. Volini never interviewed Judith Skates to determine if she was indeed the agent for service of process of Gary Bradshaw, James Bradshaw, Jay Bradshaw, Ted Bradshaw, or Denise Fogle. PCB II, Pet. Ex. 23, pp. 49-50. He further never determined the actual addresses of any of these people. *Id.* at 51.

The testimony and affidavits of the Supervisor of Assessments for Kankakee County, Sheila Donahoe, and the Treasurer/Tax Collector, Mark Frechette, clearly provide that the two offices share a computer database which lists all six owners of the parcel of property. PCB II, Pet. Exs. 9,10; PCB II, H.O. Ex. 1. Thus there is no "conflict" in the assessor's records when compared to the Treasurer/Tax Collector's records – because they are the same records. Those records identify six owners of the parcel of property and Mr. Volini only served one owner.

Section 39.2(b) requires that the identity of every owner of the parcel of property be determined by the authentic tax records. 415 ILCB 5/39.2(b) (2002). In this case, the Applicant undeniably failed to send a separate notice to each landowner of the Bradshaw/Skates property as identified in the authentic tax records, as required by *City of Kankakee v. Waste Management* and 39.2(b). Section 39.2(b) at no time provides that the addresses of an owner are to be determined by the authentic tax records; rather the requirement is that the identities of the owners be determined by the authentic tax records. 415 ILCS 39.2(b)(2002). In this case, all six owners were identified by Mr. Volini – but he only served one of them. Furthermore, the Applicant did

not even send any notice to the Rock Falls address, which was the last known address of Gary, James, Jay and Ted Bradshaw as well as Denise Fogle, as identified by the authentic tax records of Kankakee County. Furthermore, the Affidavit of Judith Skates makes it absolutely clear that she was not the agent for service of process by her siblings and co-owners of the property. PCB II, H.O. Ex. 3. Ms. Skates did not forward the notice that she received on to her siblings. *Id.* Each of the siblings testified by affidavit that they are an owner of the property and did not receive any 39.2(b) notice and that they would have liked to have had the opportunity to comment or participate in the public hearings as each was opposed to the development of the landfill near the property that they own. PCB II, H.O. Exs. 2, 4, 5, 6, and 7.

The Applicant's only defense to failing to notify all of the owners is Mr. Volini's assertion that when T&C was attempting to notify owners regarding its 2002 Application that the secretary of the attorney representing the Applicant (who also claims to be a process server) went to the Rock Falls address and was informed by an unnamed individual that none of the owners of the 13-16-23-400-001 property lived at that residence. PCB II, Pet Ex. 23, p.50. This unnamed person also allegedly told the secretary that tax notices were to be sent to this unnamed person's mother, Judith Skates, at her Onarga address. *Id.* It is based upon this single conversation which took place in connection to the 2002 application, and not the 2003 application, that Mr. Volini decided to only send the pre-filing notice to Judith Skates at her Onarga address and did not attempt to find any of the other owners of the parcel of property. Mr. Volini did not even send certified mail notice to the last known address via the authentic tax records, which was 22802 Prophet Road, Rock Falls, Illinois. PCB II, Pet. Ex. 23, p. 51.

It is likely that the applicant will try to argue that the PCB has already determined in *Town & Country I* that service upon only Judith Skates of the pre-filing notices is proper.

However, in *Town & Country I*, the Board's conclusion was based upon the testimony of Mr. Volini that there was a conflict in the in the records held by the Treasurer and the Supervisor of Assessments. *Town & Country I*, Slip. op. at 16-17. However at Town & Country II, the Supervisor of Assessments testified clearly (and the Treasurer/Tax collector agrees) that there was no conflict when Mr. Volini performed his 2003 search because the Treasurer and Assessor share a database which clearly identifies that there are six owners to the property. PCB II, Pet. Ex. 9; PCB II, Pet. Ex. 10; PCB II, H.O. Ex. 1; PCB II 12/2/03 Tr. 54-55.

Furthermore, there was absolutely no conflict of the records of the Treasurer and the records of the Supervisor of Assessment as to the last known address of Gary L. Bradshaw, James R. Bradshaw, Jay D. Bradshaw, Ted A. Bradshaw and Denise Fogle was 22802 Prophet Road, Rock Falls, Illinois 61071. PCB II Pet. Exs. 9, 10; PCB II 12/2/03 Tr. 55-56, H.O. Ex. 1

Section 39.2(b), as well as the *City of Kankakee v. Waste Management* case, clearly require that each of these owners be served notice by either certified mail or personal service. In this case the Applicant had no reason to believe any of the five other owners lived with their sister in Onarga, Illinois. In other words, five out of six of these owners were not sent any notice whatsoever. The Applicant admits that he has no idea what their addresses were and did not make any effort whatsoever to determine their actual addresses. PCB II, Pet. Ex. 23, p.51. Adding insult to injury, the Applicant did not even send certified mail receipts to their last known addresses as identified by the authentic tax records.

It is anticipated that the Applicant will argue that the authentic tax records somehow suggest that Section 39.2(b) notices may be sent only to Judith Skates at her Onarga address because the Supervisor of Assessment's computer program has mailing flags indicating that Gary Bradshaw, James Bradshaw, Jay Bradshaw, Ted Bradshaw and Denise Fogle were not to be sent

the tax bill, nor any delinquent notice, exemption notice or change notice. (PCB II, Pet. Ex. 9 attachments). The records do indicate that Judith Skates was to be sent the tax bill, any delinquent notice, exemption notice and change notice. *Id* The problem with the Applicant's argument is that Section 39.2(b) does not in any way provide that if someone has agreed that a tax bill is to be sent to only one specific owner that somehow negates the responsibility of an individual attempting to site a landfill from providing Section 39.2(b) notices to all other owners. The fact that an owner has agreed to have his/her tax bill sent to a certain address does not establish that the owner does not want to receive notice that someone intends to build a landfill near the property owned by that individual. Indeed, the authentic tax records only identify that certain specific notices need not be sent to those owners, and there is no reference that any other notices, such as Section 39.2(b) pre-filing notices, are in any way being waived by a specific landowner. PCB II, 12/2/03 Tr. pp. 83, 87. It is perfectly reasonable for the five owners of the property to waive being sent a copy of the tax bill, but still insist on receiving the requisite statutory notice when someone tries to build a landfill next door to their property. In fact, the affidavits of each of these landowners clearly indicate they wished to receive pre-filing notices, and they object to the City of Kankakee and the Applicant to attempting to develop a landfill near their property without providing notice and an opportunity to respond.

It is particularly egregious that the Applicant failed to serve these five owners when this particular parcel of property was a hotly contested subject of *Town & Country I.* By the time the application was refiled, the Applicant was well aware of Judith Skates' address, and could have sent a process server or an investigator to speak with her to determine the addresses of her siblings. There could have been a variety of methods employed by the Applicant to determine the addresses of the other owners, including but not limited to, receiving some type of an

agreement from those owners that Judith Skates could accept pre-filing notices. At no time did the Applicant ever attempt to acquire such an agreement and, instead, elected to ignore the fact that six different people were identified as owning the parcel of property and that notice was only being sent to one owner. At a minimum, under *City of Kankakee v. Waste Management*, separate notice should have been sent to each owner of record at the Skates address.

It is clear that *City of Kankakee v. Waste Management,* 3-125, 133, 134, 135, (Aug. 7, 2003) is controlling, as the efforts employed by T&C to serve these owners were far less diligent than those employed by Waste Management in regard to its application. In *City of Kankakee*, Waste Management not only sent a certified mailing to the very address where Mrs. Keller resided with her husband, but also sent notices by regular mail directly to Mrs. Keller, attempted personal service on five occasions and even firmly affixed a notice to the residence of Mrs. Keller. *Id.* at Slip. op. at 14. In this case, the Applicant never sent notice to the last known address of Gary Bradshaw, James Bradshaw, Jay Bradshaw, Ted Bradshaw or Denise Fogle. Furthermore, Waste Management knew from the authentic tax records that Mrs. Keller actually resided with Mr. Keller, and accordingly sent a certified mailing to that address. *Id.* This was still found to be insufficient because two separate notices were not sent to that residence. *Id.*

In this case, T&C had absolutely no evidence that these five owners resided with Ms. Skates, and, regardless, T&C only sent one notice. Worse yet, Ms. VonPerbandt (T&C's purported process server) testified at *Town & Country I* that it was her understanding that these owners did not reside with Mrs. Skates, and many of them were out of state. PCB I, 11/6/02 Tr. 286-287. Therefore, the Applicant actually knew that its notice would not be received by these owners, but nonetheless sent it to the Onarga address anyway.

The Applicant cannot argue that somehow the decision in *Town & County I* is *res judicata* to this issue. The Applicant has already argued that somehow this application is not substantially the same as the first application and, therefore, this is a completely different matter to which notice was required. Furthermore, in the underlying case, the Applicant improperly suggested that there was some conflict between the Treasurer and the Assessor's records when indeed there was no conflict. Finally, the knowledge of the Applicant at the time it was providing notice of the 2003 application was different than the knowledge that it had at the time of the 2002 application in that the Applicant was undeniably aware that there were six owners, and that they did not reside with Judith Skates. Because the Applicant failed to serve each owner of the Bradshaw/Skates property, the City of Kankakee did not have jurisdiction to hear the siting application, and the decision should be reversed.

b. The Applicant Did Not Effectuate Actual Service Upon Numerous Owners of Property Entitled to Service.

As explained above, the Pollution Control Board has now unequivocally ruled that once an Applicant identifies the owner of a property, the Applicant need only send that owner a certified mail receipt at his present address and that service is effective upon sending even without evidence of actual receipt. *City of Kankakee v. Waste Management,* Slip op. 14. However, if at some point the appellate court or the PCB overrules the decision in the *City of Kankakee v. Waste Management*, then the City still does not have jurisdiction because there is no evidence of actual receipt by numerous owners.

i. Return Receipts of Numerous Parcels Were Signed by Individuals Other Than the Owner of the Property.

The Applicant failed to provide sufficient evidence that these owners of record, as evidenced by the authentic tax records of the County, actually received the notice required by Section 39.2(b). Specifically, notice was improper as to the following parcels:

The following Registered Letters to landowners were not signed by the addresses, its agent or even an apparent family member:

1. Registered letter sent to Gary L. Bradshaw, James R. Bradshaw, Jay D. Bradshaw, and Denise Fogle, in care of Judith A. Skates was signed for by Judith Skates as addressee.

2. Registered Letter addressed to Linda Skeen was signed for by Coralee Skeen, who did not declare herself as her agent. Coralee Skeen also signed for Registered Letters addressed to Geraldine M. Cann, Shirley A. Marion, Delmar L. Skeen, Robert S. Skeen, Norma J. Stauffenberg, Judith M. Trepanier, and Skeen Farms, but did not declare herself as agent for any of the above. Robert S. Skeen later signed for a Registered Letter himself at 1590 W. 3500 S. Rd., Kankakee, IL 60901. Coralee Skeen had previously signed a Registered Letter for Robert S. Skeen at that same address.

3. Registered Letter addressed to Willie Walker was signed for by Leslie Wilson, Jr., who was not declared as an agent.

4. E. Paquette signed for Registered Letters addressed to David Ledoux, Rebecca Ledoux, and Norman L. Paquette, but did not declare herself as an agent of them. E. Paquette did sign for her own Registered Letter.

5. Registered Letters addressed to Frederick Forte and Mary Thompson were signed for by Lana Forte, who did not declare herself as an agent of either.

6. Registered Letter addressed to Kankakee Federal Savings Bank was signed for by Karen Clutz, who did not declare herself as its agent.

7. Registered Letters addressed to ICC Railroad and Illinois Central Railroad Co. Real Estate Tax Dept. were signed for by R. Jedlinski, who did not declare himself as agent of either.

8. Registered Letter addressed to Leland Milk was signed for by a third person who *did not* declare himself as an agent.

9. Registered Letter addressed to Milo Fleming was signed for by Nancy Davenport, who did not declare herself as his agent.

10. Registered Letter addressed to Charles R. Burke was signed for by Mary Grace, who did not declare herself to be his agent.

The following Registered Letters were sent to government personnel, but not signed for by agents:

1. Registered Letter addressed to Pat Welch, State Senator, was signed for by L. Bland, who did not declare herself agent.

2. Registered Letter addressed to Debbie Halvorsen, State Representative, was signed for by Jeanne Mathy, who did not declare herself as her agent.

3. Registered Letter addressed to Lawrence Walsh, State Senator, was signed for by Beverly Edman, who did not declare herself as his agent. The Registered Letter to Mr. Walsh was not on the Notice List but was found in the return receipts.

4. Registered Letter addressed to John Novak, State Representative, was signed for by Colleen Priebal, who did not declare herself as his agent.

The following Registered Letters were signed by apparent family relations, and who were not declared or demonstrated to be agents:

1. Registered Letter addressed to Michael P. Belluso was signed for by Yolanda M. Belluso, who did not declare herself as his agent.

2. Registered Letter addressed to Lawrence L. Horrell by was signed for by Patti Horrell as addressee.

3. Registered Letter addressed to William Ohrt was signed for by Marilyn Ohrt, but she did not declare herself as his agent.

4. Registered Letters addressed to Jeannine Kinkin and Russell Kinkin were signed for by Danny Kinkin, who did not declare himself their agent.

5. Registered Letter addressed to Jill A. Hansen was signed for by Kevin Hansen, but he did not declare he was her agent. A Registered Letter addressed to Kevin Hansen contained a different address than it was addressed to: 876 E. 3100 N. Rd., Clifton, IL 60927, but it was signed for by Kevin Hansen.

6. Registered Letter addressed to Bessie Jordan was signed for by Jake Jordan, who did not declare himself as her agent.

7. Registered Letter addressed to Rose Perkins was signed for by Domesha Perkins, who did not declare herself as her agent.

8. Registered Letter addressed to Louise Gutierrez was signed for by Adrian Gutierrez, who did not declare himself as her agent. This occurred twice.

9. Registered Letter addressed to Donald Benoit was signed for by Barbara Benoit, who did not declare herself as his agent.

On each of these parcels the box on the return receipt which indicates that the signor was the agent of the addressee was not marked. Therefore, each such receipt on its face, *prima facie*, indicates the signor was not the agent of the addressee. No further documentation was submitted by the Applicant to confirm either: (1) that the individual who did accept service for a specific

parcel was the authorized agent of the owners of that parcel; or (2) that the owners that appear in the authentic tax records of the County actually received the pre-filing notice in a timely fashion.

The following were signed by individuals other than the owner, but the "agent" box on the receipt was checked:

1. Registered Letter addressed to Minnie Creek Drainage District was signed for by Bret Perreautt as agent.

2. Registered Letter addressed to Ron Thompson, Otto Township Supervisor, was signed for by Betty Thompson as agent. A new address was indicated: 803 E. Rosanne Cir., Kankakee, IL 60901.

3. Registered Letter addressed to Dr. Shari L. Marshall, Superintendent of Schools for Central Community Unit District #4, was signed for by Cindy Saxson as agent.

4. Registered Letter addressed to IDOT was signed for by Patrick Woulfe as agent.

5. Registered Letter addressed to Mary K. O'Brien, State Representative, was signed for by Mike McGuire as agent.

6. Registered Letter addressed to Katie Cooper was signed for by Charles Cooper as her agent.

7. Registered Letter addressed to Randy Tobenski was signed for by Randy Tobenski as agent.

8. Registered Letter addressed to John F. Mullin was signed for by Rita Mullin as agent.

9. Registered Letter addressed to Bret Perreault was signed for by Margaret Perreault as agent. Also listed was a different address: 4527 S. 5000 W, Kankakee, IL 60901

10. Registered Letter addressed to Margie A. Hartman was signed for by Gerald Hartman as agent and addressee.

Though the "agent" box was checked on these return receipts, there was no testimony at the hearing regarding whether the individual was the legally recognized agent for service of process. Merely signing the return receipt card is insufficient to establish agency. *IEPA v. RCS, Inc. and Michael DuVall,* AC 96-12, 1995 WL 747 694 (Dec. 7, 1995); *Trepanier v. Board of Trustees of the University of Illinois Chicago,* PCB 97-50 (Nov. 21, 1996).[3] Therefore, the

[3] The PCB rejected this argument in *Town & Country I* based on *DiMaggio v. Solid Waste Agency of*

Kankakee City Council was not vested with jurisdiction as the Applicant failed to show that the owner or its authorized agent received the required pre-filing notices and the City Council should issue a finding that it had no jurisdiction.

C. The City Council Did Not Have Jurisdiction Because the Applicant Failed to Submit a Complete Application.

Section 39.2(c) requires the Applicant to file a copy of its request with the municipality and "[t]he proposal shall include the substance of the Applicant's proposal." 415 ILCS 39.2(c). All such documents must then be made available for public inspection. *Id.* There is a presumption of prejudice when an application and other required filings are not available to the public. *American Bottom Conservancy v. Village of Fairmount and Waste Management of Illinois, Inc.*, PCB 00-2000 (Oct. 19, 2000). The unavailability of public materials required to be filed as part of the siting application is fundamentally unfair. *Residents Against a Polluted Environment v. County of LaSalle*, PCB 96-243 (Sept. 19, 1996).

In this case, the Applicant failed to submit the sensitivity analyses which are necessary to determine the accuracy of the assumptions that the Applicant made to conclude that the landfill protected the public health, welfare and environment, including failing to file the sensitivity analyses regarding the hydraulic conductivity of the dolomite beneath the landfill. Sensitivity analyses were particularly important in this case because, as further discussed in regard to Criterion ii below, the Applicant erroneously excluded from the calculation of the hydraulic conductivity any dolomite that was within nine feet of the surface, even if that dolomite was visually noted as being unweathered and competent. Therefore, the Applicant actually skewed the hydraulic conductivity results of the dolomite beneath and surrounding the landfill.

Northern Cook County, PCB 89-138 (Jan. 11, 1990). However, if *Town & Country I* or *City of Kankakee v. Waste Management* are overturned, the *Ogle County* decision, which was decided by an Appellate Court of Illinois, clearly establishes that actual service must be acquired. *Ogle County*, 272 Ill.app.3d 184, 649 N.E.2d 545.

As Engineer Schuh pointed out, even the tests performed by the Applicant actually showed that the hydraulic conductivity of the bedrock on the landfill is highly variable with variations up to 60,000 times. T&C II, 6/27/03 Tr. Vol. 4-B, 114-115. Mr. Schuh explained that using a geologic mean without considering the sensitivity of that geologic mean, especially when the variations are up to 60,000 times, could result in the analysis of the safety of the landfill in "being way off." *Id.* at 121. Furthermore, the Applicant only ran one specific gravity test on one rock core to determine the primary porosity of the bedrock at the site of the landfill, rather than considering the secondary porosity (i.e. the porocity through the fractures that the Applicant determined do exist at the site by its angle borings). Ultimately, Mr. Schuh pointed out that the porosity figure that was used by the Applicant was simply the wrong number. *Id.* at 125-126. Furthermore, the Applicant failed to include any sensitivity analyses in regard to the bedrock porosity. *Id.* at 126.

Mr. Schuh also pointed out that Applicant's Exhibit G 31, clearly shows that the groundwater flow is to the east, north and south, in other words it is variable at the site. *Id.* at 127-128. It is uncontroverted that the vertical gradient is twelve times greater than the horizontal gradient. *Id.* at 133. However, the Applicant modeled the site as if there was no real vertical gradient. *Id.* In fact, the lower gradient was not modeled at all, which should have been part of the sensitivity analysis. *Id.* at 133-134.

The Applicant did not perform sensitivity analyses for porosity, gradient, dispersion coefficient, or leachate strength. T&C II 6/27/03 Tr. Vol. 4C, p. 15. Mr. Schuh noted that even with the non-conservative hydraulic conductivity assumptions used by the Applicant, the application "exceed(s) some of the leachate parameters such that they would have to do additional monitoring." *Id.* at 16. Mr. Schuh was particularly concerned that if the Applicant

had performed the appropriate sensitivity analyses, the results could have been even worse than were already found. *Id.* at 17. Mr. Schuh reiterated that "the point was that no sensitivity was done on porosity and you don't know what the number is, and you didn't run any sensitivity analyses to see what effect the model has by changing the porosity." *Id.* at 35.

In response to the testimony of Mr. Schuh, the Applicant attempted to have its hydrogeologic expert testify that certain sensitivity analyses were performed although they were not included in the application. This testimony was the subject of extensive argument between counsel on the grounds that if such analyses were so important to determine whether the health, safety and welfare were protected by this proposal, then this data should have been included in the application for review by the objectors, the City Council, and the interested public. PCB II, 6/28/03 Tr. Vol. 5-A, 38-62.

The only explanation offered by the Applicant for not providing such vital information was that it would have involved four or five additional binders to the application. *Id.* at 62. First, that is not a valid reason for an incomplete application. Second, the Applicant's expert, Mr. Drommerhausen, admitted that at a minimum he could have provided a short summary of his results, and "in hindsight now, I think I would include it" in an application. *Id.* at 77. (Emphasis added). Therefore, the Applicant's own hydrogeologic expert admitted that the sensitivity analyses in this case were imperative to the substance of the proposal and should have been included the application.

Therefore, under Section 39.2(c) the application was incomplete, and the City of Kankakee did not have jurisdiction.

II. THE CITY COUNCIL'S DECISION THAT THE APPLICATION MET THE SECTION 39.2(A) CRITERIA IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

All of the statutory criteria set forth in section 39.2(a) of the Illinois Environmental Protection Act (Act) must be satisfied before siting approval for a regional pollution control facility may be granted. *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 160 Ill.App.3d 434, 442-43, 513 N.E.2d 592 (2d Dist. 1987); *A.R.F. Landfill Inc. v. Pollution Control Board*, 174 Ill.App.3d 82, 90, 528 N.E.2d 390, 395 (2d Dist. 1988). If an applicant fails to establish any one of the criteria, the application must be denied. *See Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 175 Ill.App.3d 1023, 520 N.E.2d 682, 689 (2d Dist. 1988).

A. Standard of Review

The Pollution Control Board must reverse the decision of a local siting authority if that decision is against the manifest weight of the evidence. *Land and Lakes Co. v. Illinois Pollution Control Board*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3d Dist. 2000); *Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board*, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist. 1992). A decision is against the manifest weight of the evidence if the opposite result is clearly evident. *Land and Lakes*, 319 Ill.App.3d at 48, 743 N.E.2d at 191.

The Kankakee City Council's granting of siting approval to T&C must be reversed because the City Council's decision was against the manifest weight of the evidence as T&C failed to meet criteria (i), (ii) and (viii) set forth in section 39.2(a) of the Act.

B. Statement of Facts Regarding Criterion ii and viii

With respect to Criterion ii, five witnesses testified, three on behalf of T&C, one on behalf of Waste Management and one on behalf of the County of Kankakee. Daniel Drommerhausen, a hydrogeologist paid by T&C, was the first to testify with respect to criterion

ii. Mr. Drommerhausen admitted that there were fractures and possibly even joints in the dolomite located below the proposed site, but he did not depict them on the diagram of the proposed site contained in the application. T&C II, 6/24/03 Tr. Vol. 1-C, 24-25; T&C 6/25/03 Tr. Vol. 2-B, 21. Mr. Drommerhausen also admitted that the uppermost aquifer is hydraulically connected to the competent dolomite. T&C II, 6/25/03 Tr. Vol. 2-A, 40. Mr. Drommerhausen further admitted that there was a downward gradient measured at the site; however, he failed to provide a calculation of vertical hydraulic conductivity in the application. *Id.* at 50, 74, 96; App. 2.2-43. Mr. Drommerhausen admitted that he failed to include any analyses in the Application establishing that the downward vertical flow would become an upward flow after the landfill is completed. T&C II, 6/25/03 Tr. Vol. 2-A, 97. He also failed to include any sensitivity analyses in the Application. *Id.* at 87; T&C II 6/28/03 Vol. 5-A, 39.

Devin Moose, a civil engineer, was also retained by T&C to again provide testimony in support of criterion ii of the Application. Mr. Moose testified that the only monitoring system for the site would be located in the uppermost portion of the bedrock aquifer. T&C II, 6/25/03 Tr. Vol. 2-C, 11-12, 47-48. Mr. Moose explained that since T&C's filing of its previous application in 2002, additional testing showed that vertical fracturing exists in the bedrock below the site. T&C II, 6/26/03 Tr. Vol. 3-A, 25. Mr. Moose asserted that even though the dolomite below the landfill may be considered an aquifer "in the big picture," he testified that based on its permeabilities at the locations he tested, the dolomite below the site "could be considered an aquitard." *Id.* at 74.

David Daniel, a professor, also testified on behalf of T&C with respect to criterion ii. T&C II 6/26/03 Tr. Vol. 3-B, 40-41. Mr. Daniel testified that regionally dolomite is an aquifer, but that the hydraulic conductivities of the dolomite below the proposed facility fell in gray areas

between an aquifer and aquitard. *Id.* at 54-55. Nevertheless, Dr. Daniel stated that he would probably characterize the area below the site as an aquifer. *Id.* at 55. Dr. Daniel also admitted that there was presently a downward flow at the site. *Id.* at 116.

The County of Kankakee presented the testimony of a well-qualified engineer with substantial experience in hydrogeological study and landfills, Mr. Jeffrey C. Schuh, P.E. T&C II, 6/27/03 Vol. 4-B, 103-138; T&C II 6/27/03 Vol. 4-C, 7-131. Mr. Schuh testified that he was retained by the County to provide an honest and objective opinion regarding the safety of the proposed landfill that would be presented in a public forum. T&C II, 6/27/03 Tr. Vol. 4-B, 109-110, 112-113. Mr. Schuh found that T&C failed to adequately characterize the bedrock beneath the landfill, which he explained is absolutely necessary in order to create a valid conceptual model. *Id.* at 116. Mr. Schuh testified that in his professional opinion there was simply not proper analyses performed by T&C for one to responsibly state that the landfill was safe. T&C II, 6/27/03 Tr. Vol. 4-C, 18. Mr. Schuh explained that because no sensitivity analyses were contained in application, it was impossible for T&C to establish that the landfill will protect the public health, safety and welfare. *Id.* at 14-15. Based on the evidence presented, Mr. Schuh concluded that T&C failed to provide sufficient evidence to demonstrate that the landfill was safe. *Id.* at 18.

Mr. Stuart Cravens, a certified groundwater professional and licensed professional geologist, testified on behalf of Waste Management. Mr. Cravens conducted a site-specific study to characterize the hydrogeology in the immediate vicinity of the proposed landfill. T&C II, 6/27/03 Tr. Vol. 4-A, 25-26. Mr. Cravens criticized the study performed by T&C because T& C did not perform any downhole geophysic logging, a pump test or an isotopic analysis, which are all important in obtaining a clear picture of the hydrogeology of a site. *Id.* at 32-41. As a result

of his study, Mr. Cravens concluded that there was evidence of factures to a depth of at least 50 feet and that the fractures connected the weathered zone and the underlying weathered zone, creating a hydraulic connection between those zones. *Id.* at 59-67. Mr. Cravens explained that the failure to account for the existence and characteristics of fractured aquifers is a prescription for serious misinterpretation of the flow dynamics of the entire media because if the fractures and connection of the fractures are not understood, any type of modeling or monitoring well construction placement could be incorrect. T&C II 6/27/03 Tr. Vol. 4-B, 73. Mr. Cravens concluded that in his opinion, "the landfill is unsuitable based on the hydrogeology." *Id.* at 91. He also concluded that the additional work performed by T&C following this Board's denial of T&C's 2002 Application "just wasn't sufficient . . . to have the full picture." *Id.* at 100.

Additionally, Mr. Yarborough, a geologist recommended by Tom Volini, was paid and hired by the city to review the hydrogeology information in T&C's 2003 Application and submit various reports. Mr. Yarborough did not testify at the public hearing, and was not subjected to cross-examination, but instead, he submitted three separate written reports, dated April 14, 2003, May 1, 2003 and July 24, 2003. Those reports were not submitted until after the close of the public comment period. The April 14, 2003 report recommended that all exposed joints be grouted. PCB II, Pet. Ex. 3. However, none of his reports established a method for grouting or method of testing its effectiveness.

With respect to criterion viii, the evidence established that the County of Kankakee had first adopted its Solid Waste Management Plan ("Plan") in 1993 and readopted it in 1995. PCB II C 1626-1776, Public Comment of the County of Kankakee. The Illinois Environmental Protection Agency (IEPA) reviewed the 1995 Plan and found that it was developed in accordance with the planning process required in the Solid Waste Planning and Recycling Act.

Id., letter from IEPA dated 10/2/95. Thereafter, in 2000, Kankakee County reviewed and updated its Plan, and the IEPA concluded that "Kankakee County's five-year plan update has been completed in accordance with the provisions required in the SWRPA." *Id.*, letter from IEPA dated 10/2/00. Kankakee County made amendments to the Plan on October 9, 2001, March 12, 2002, and February 11, 2003. *Id.*

The pertinent March 12, 2002 amendments established a new requirement that the owner/operator of any new or expanded regional pollution control facility "post and maintain for the life of such regional pollution control facility either: (1) an environmental contingency escrow fund of a minimum of $1 million dollars based upon an annual payment not to exceed five (5) years, or (2) some other type of payment or performance bond or policy of onsite/offsite environmental impairment insurance in a form and amount acceptable to the County." *Id.*, Resolution 01-10-09-393. The amendment also required the owner or operator of a proposed new landfill or landfill expansion in the County to "establish a property value guarantee program . . . to be prepared by an independent entity satisfactory to the County." *Id.* The February 11, 2003 amendment is quoted in its entirety in the argument below, but it provides in pertinent part: "It is the intent of Kankakee County that no landfills or landfill operations be sited, located, developed or operated within Kankakee County other than the existing landfill located southeast of the Intersection of U.S. Route 45/52 and 6000 South Road in Otto Township, Kankakee County, Illinois." See Appendix C.

Devin Moose testified on behalf of T&C on criterion viii. T&C II, 6/26/03 Tr. Vol. 3-C, 12-97). While Mr. Moose testified that the terms "contiguous" contained in the Plan were ambiguous, he admitted that the proposed facility and the existing Kankakee County facility would not be contiguous. *Id.* at 58-59. Mr. Moose also testified that the phrase "existing

landfill" was ambiguous when read in isolation, but that by looking beyond one clause, the most logical conclusion was that the phrase "existing landfill" referred to the Waste Management facility, especially since the Waste Management facility was the only operating facility in the County. *Id.* at 57-58, 81-82.

C. The City Council's Finding that the Proposed Landfill Met Criterion ii is Against the Manifest Weight of the Evidence.

Section 39.2(a)(ii) requires that "The facility [be] located, designed, and operated to protect the public health, safety, and welfare." T&C failed to establish this criterion; therefore, the City Council's conclusion that this criterion was met was against the manifest weight of the evidence.

As explained above, in 2002, T&C filed a substantially similar Application to the one filed with the siting authority in this case. After reviewing the 2002 Application and testimony provided by T&C in support of that Application, this Board found that City Council's decision that the facility met criterion ii was against the manifest weight of the evidence because of deficiencies in the design and location of the proposed landfill. *See Town & Country I,* slip op. at 25-28. Specifically, this Board found that T&C failed to establish that the facility would protect the public health, safety and welfare because it would be located in an aquifer. *Id.* at 27-28. Furthermore, the Board found that the design of the landfill failed to account for the impacts of both the horizontal and vertical flow of contaminants because while "Town & County indicated it would fill any cracks in the bedrock with grout[,]" . . . "the effectiveness of the grout to restrict vertical flow was not measured." *Id.* at 27. Finally, the Board concluded that the City Council's condition that "[a]dequate measures shall be taken to assure protection of any and all aquifers from contamination as required by the IEPA through its permitting process" was insufficient to "cure the lack of evidence" presented by T&C. *Id.*

T&C contends that its 2003 Application addresses "each and every one of the perceived weaknesses which the Pollution Control Board identified in its decision." T&C II, 6/24/03 Tr. Vol. 1-A, 60. However, in fact, the 2003 Application does not cure any of the problems that plagued the design and location of this same facility in 2002. This is true because T&C has asserted that the dolomite below the site is a fractured aquifer. T&C II, 6/25/03 Tr. Vol. 3-A, 25, 70. In light of this concession, and the potential for impact to the aquifer and area water supply, T&C has completely failed to demonstrate that the aquifer will be protected from the impacts of vertical flow of contaminants on this site. Furthermore, the City Council has once again weakly (and improperly) attempted to cure these deficiencies through a condition that places the responsibility of ensuring that the facility is protective of the health, safety and welfare in the hands of the IEPA, rather than the City Council, where it belongs.

1. T&C Once Again Failed to Properly Characterize the Bedrock Below the Site.

In its most recent application, T&C has characterized the upper nine feet of the Silurian Dolomite as highly permeable or "weathered." T&C II, 6/25/03 Tr. Vol. 2-A, 13. T&C characterized the portion of the Silurian Dolomite below the weathered zone as competent bedrock, or an aquitard. T&C II, 6/24/03 Tr. Vol. 1-C, 9-10; T&C II, 6/26/03 Tr. Vol. 3-A, 73-74. However, the manifest weight of the evidence establishes that the competent bedrock is actually an aquifer, as was specifically found by the City Council. PCB II, Pet. Ex. 1, p. 12, para. 1. In fact, T&C's own witness even admitted that the landfill will be located in the aquifer. (T&C II 6/26/03 Tr. Vol. 3-B, 55.

However, instead of simply readily admitting that the proposed landfill is sited on an aquifer, T&C continued to assert at the siting hearing that the lower zone of the bedrock is competent, or relatively impermeable, and will therefore provide an additional barrier for the

landfill. T&C II, 6/24/03 Tr. Vol. 1-C, 9-10; T&C II 6/26/03 Tr. Vol. 3-A, 73-74. Because of T&C's mischaracterization of the bedrock beneath the proposed landfill, T&C has again designed its landfill to be constructed on and within an aquifer, which is not protective of the public health, safety and welfare.

In attempting to show that the area under the proposed landfill is an aquitard, T&C dramatically underestimated the hydraulic conductivity of the dolomite that will be left in place and in contact with the landfill. This underestimation is significant because the design of a landfill is based on the geologic and hydrogeologic conditions at the site. T&C II App., pp. 10130-10131; T&C II, App., pp. 2.3-2, 2.7-1. Without an accurate hydrogeologic characterization, the necessary foundation for the development of an environmentally protective landfill design does not exist.

T&C grossly underestimated the hydraulic conductivity of the bedrock by mischaracterizing numerous slug test results as being representative of "weathered" bedrock when actually the slug tests were performed on unweathered bedrock that will remain below the landfill. After performing 49 slug tests in the bedrock at 26 well locations T&C II App., p. 2, 7-4, T&C then used certain slug test results to determine the hydraulic conductivity of the bedrock below and surrounding the landfill. However, T&C inexplicably excluded all slug test results for tests that had a screen interval within nine feet of the surface, even though the field engineers determined that much of the dolomite was unweathered and competent. T&C II, 6/25/03 Tr. Vol. 2-A, 82-83. This is particularly troubling because T&C admitted it will only remove the dolomite within the first nine feet that it visually determines is "weathered." *Id.* at 89. Consequently, T&C has excluded the test results of bedrock that may remain in direct

communication with the landfill and, therefore, T&C came to an erroneous conclusion of the hydraulic conductivity of the bedrock which will interface with the landfill.

Mr. Jeff Schuh testified that by utilizing T&C's data (Appendix H.3), as well as the testimony of Mr. Drommerhausen as to those wells constructed in unweathered bedrock that were erroneously listed in the weathered bedrock table, the bedrock remaining after construction will actually have a coefficient of hydraulic conductivity ranging from 1×10^{-7} cm/sec to 6×10^{-3} cm/sec, for a difference of over 60,000 times. T&C II, 6/27/03 Tr. Vol. 4-B, 115. The geometric mean used by T&C to computer model contaminant transport in the unweathered dolomite was 1.13×10^{-5} cm/sec, or almost 500 times lower than the highest measured hydraulic conductivity for the rock that will remain below the landfill after construction. T&C II, 6/25/03 Tr. Vol. 2-A, 115. As a result, T&C failed to examine the effect the higher hydraulic conductivity would have on the movement of contaminants, which is a significant issue, as found by this Board in *Town & Country I.*

T&C also misrepresented its data and conclusions from the slug tests in the bedrock by assigning test results to the wrong bedrock zones. While T&C considered 20 of these test results to represent the hydraulic conductivity permeability in the upper weathered bedrock (*first nine* feet), only three of those wells were actually constructed entirely within the weathered zone. Nevertheless, T&C chose to used the results from all 20 wells to characterize the permeability of the weathered bedrock. T&C II, 6/24/03 Tr. Vol. 1-C, 67-68. Consequently, the interpreted permeability of the unweathered bedrock was based on a significantly reduced number of tests. Thus, the permeabilities in the lower unweathered zone were understated, supporting Town and Country's theory that the lower zone was not an aquifer, but an aquitard. T&C II, 6/27/03 Tr. Vol. 4-B 118-20. If the test results were assigned to the appropriate zones that were actually

tested, the reported hydraulic conductivity in the lower unweathered zone would increase significantly. That higher permeability is comparable to the permeability in the weathered dolomite, and indicates that the unweathered dolomite is a fractured bedrock aquifer. T&C II, 6/24/03 Tr. Vol. 1-C, 76-90.

The overwhelming evidence establishes that the area directly beneath the proposed landfill is an aquifer. In fact, boreholes that encountered water-bearing fractures had zones with hydraulic conductivity values of 10^{-3} cm/sec indicative of a productive fractured bedrock aquifer. T&C II, Waste Management Ex. 2, p. 5-1. Additionally, scientific studies and published research confirm that the dolomite in the area of the proposed landfill is a regionally significant fractured bedrock aquifer. T&C II, 6/27/03 Tr. Vol. 4-A, 66-67; T&C II Waste Management Ex. 2, pp. 5-2, 6-1, 6-2; Public Comment, Illinois State Water Survey Letter dated 5/21/03 to Larry O'Connor and Mark Benoit).

It is clear that in this Application, T&C has again failed to properly characterize the bedrock below the site because even though T&C's own witness admitted that the bedrock is an aquifer, he qualified that statement by contending it a low-producing area. T&C II, 6/26/03 Tr. Vol. 3-A, 37-38. However, the water well log information contained in the Siting *Application* establishes the presence of over 300 water wells within two miles of the site. T&C I App., pp. 30013-30061. More than half of these wells are drawing water from the lower zone of the Silurian Dolomite that Town & Country characterized as an aquitard. T&C I App., pp. 30013-30054; T&C I, 6/24/02 Tr., 112-140; T&C II, 6/27/03 Tr. Vol. 4-A, 68-69. This evidence clearly establishes that the aquifer is producing significant amounts of water and that T&C's characterizations of the bedrock communicating with the site are grossly inaccurate.

Just as the Board found with respect to T&C's 2002 Application, the evidence presented in its 2003 Application still "overwhelmingly establishes that the landfill is located on an aquifer and Town & Country's design does not adequately address that fact." *Town & Country I*, slip op. at 25. Because T&C does not accurately characterize the area beneath the landfill, T&C has once again failed to adequately examine what effect that location has on this facility. As a result, T&C has not established that this facility is designed and located to protect the public health, safety and welfare, and the City Council's finding that criterion (ii) was met is against the manifest weight of the evidence.

2. T&C Again Failed to Adequately Consider the Impact of Vertical Flow of Contaminants on the Site.

Just as in its 2002 Application, T&C has again failed to account for the vertical flow of contaminants into the aquifer, which will occur through fractures in the bedrock and the downward gradient present on the site. T&C has also failed to adequately account for vertical flow because of its insufficient study of the porosity of the bedrock.

It is clear that fractures in the dolomite aquifer must be identified in order to understand groundwater flow and contaminant transport in fractured rock systems. T&C II, Waste Management Ex. No. 2, p. 1-2. Failure to account for the existence and characteristics of fractures in bedrock aquifers leads to a misinterpretation of flow dynamics, which prevents the development of reliable models for groundwater impact evaluation and assessment. *Id.*

Based upon the data obtained from four deep wells that penetrated over 200 feet of dolomite, Mr. Cravens determined that the Silurian Dolomite in the area including the proposed landfill is a fractured bedrock aquifer to a depth of at least 50 feet below the top of the bedrock. T&C II, 6/27/03 Tr. Vol. 4-A, 66-67. He stated that T&C's characterization of the unweathered or "competent" bedrock was not sufficient, in that the weathered and unweathered zones are

hydraulically connected, with vertical movement between them through fractures. T&C II, 6/27/03 Tr. Vol. 4-A, 66, 100; T&C II, Waste Management Ex. 2, p. 5-2. In addition, T&C did not adequately characterize the location and extent of fractures in the dolomite, resulting in the mischaracterization of the dolomite. T&C II, 6/27/03 Tr. 4-A, 113-114.

T&C's failure to characterize the fractures in the lower bedrock undermines its groundwater impact model and precludes an accurate or reliable groundwater impact evaluation. As a result of this mischaracterization, T&C has assumed no vertical flow in its groundwater model, despite the undeniable hydraulic connection in the weathered and unweathered zones and vertical flow in the dolomite. T&C II, 6/27/03 Tr. Vol. 4-B, 130-133; T&C II, Waste Management Ex. 2, p. 5-2. In reaching his conclusion that there will be no vertical flow, Mr. Drommerhausen ignored data collected on November 8, 2002, which demonstrated a significant downward gradient at this location. The presence of a downward gradient is also shown in T&C's Figure G31. T&C II, 6/27/03 Tr. 4-B, 129-130. This exhibit shows piezometric contours closing on themselves, indicating that there is a vertical downward flow in the southwest portion of the landfill footprint and within the zone of attenuation. *Id.* at 129. Therefore, it is clear that T&C deliberately ignored the downward flow direction in the uppermost aquifer in coming to its conclusions, and it is clear that the City Council relied on this mischaracterization by finding that there was no "need to model downward movement of contaminants." T&C II, Pet. Ex. 12, para. 4.

It is also clear that T&C mischaracterized the potential for vertical fracture flow because Mr. Drommerhausen testified that T&C's test data did not indicate any noticeable difference in flow rates in the areas with and without vertical fractures. T&C II, App., p. 2.7-4. However, this statement directly conflicts with the results of Packer tests performed in angle boring AB-1 and

Packer tests performed in nearby borings B-27 and B-28. T&C II, 6/27/03 Tr. Vol. 4-B, 117. The geometric mean of the hydraulic conductivity measured in the angle borings was 16 times greater that the geometric mean of the horizontal hydraulic conductivity measured in the nearby vertical borings. *Id.* This data, in conjunction with the data demonstrating downward vertical flow, indicates that T&C has not adequately characterized the flow at the site or adequately considered the fractures present at this site. These failures establish that T&C has not met its burden of proving that its proposed facility is designed and located to protect the public health, safety and welfare.

Finally, T&C has failed to account for the vertical flow of contaminants because T&C failed to perform a proper analysis of porosity. Mr. Drommerhausen testified that the porosity used in the Groundwater Impact Evaluation (GIE) was not the secondary porosity, but was instead the primary porosity of the uppermost aquifer. Therefore, T&C did not consider the potential for the porosity to vary with depth and lateral extent, and performed all analyses using the estimated porosity without regard for natural variation. Secondary porosity was neither measured nor estimated. T&C II, 6/27/03 Tr. Vol. 4-B, 125. Because secondary porosity was never measured, T&C failed to consider that contaminants may be able to flow through cavities and openings in the dolomite aquifer.

Because of the failures identified above, T&C did not meet its burden of proving that its proposed facility was designed and located to protect the public health, safety and welfare.

3. T&C Has Failed to Protect Against the Vertical Flow of Contaminants on the Site, and the City's Condition Requiring Grouting of All Fractures Does Not Alleviate That Deficiency.

In defense of its 2002 application, T&C indicated it would fill any cracks in the bedrock with grout, which was insufficient according to this Board because T&C failed to measure if the grout would be effective in restricting the vertical flow of contaminants. *See Town & Country I,*

slip op. at 27. Possibly because of this Board's criticism of T&C's failure to determine the effectiveness of the grouting, T&C did not recommend grouting in its 2003 Application. However, T&C's failure to include grouting in its new application not only did not cure the problem in the earlier Application, but it actually compounded the problem, as the current Application again contains no protection against the vertical flow of contaminants even though it is clear that there needs to be some protection against that problem, as emphasized by Mr. Ronald Yarborough, a geologist retained by the City.

In his April 14, 2003 report, Mr. Yarborough stated that "[t]he Silurian Dolomite has 'intrinsic permeability' which is due to primary openings formed with the rock, bedding and vugs -- and secondary openings created after the rock was formed (joints -- solution channels)." T&C II, Pet. Ex. 3, p. 3; C1595. Mr. Yarborough explained that "[t]he Silurian Dolomite relies on 'fractures--joints or bedding' openings to be classified as an aquifer." *Id.* at p. 4; C1596. He stated further that "[i]t is known that the weathered dolomite and competent dolomite are aquifers with the greatest variability in the competent dolomite." *Id.* at p. 5; C1597. Mr. Yarborough concluded that the proposed landfill would not affect the groundwater in the area surrounding the landfill so long as exposed joints in the "competent" bedrock invert were grouted. *Id.* at p. 1; C1612. Although Mr. Yarborough stated that all exposed joints be grouted, he did not propose a method for doing so. *Id.* at p. 5, C1597. Moreover, he admitted that "[t]his writer does not know of a means to test sealing of the joints." *Id.* at p. 5, C1597.

As a result of Mr. Yarborough's conclusions, the City Council imposed a condition that required T&C to grout. That condition provides: "The applicant shall cause the pressure grouting of all open joints found in the exposed competent Dolomite on the landfill invert as

those open joints are discovered upon removal of the weathered rock and prior to the installation of any liner consistent with the application previously filed." T&C II Pet Ex. 1, p. 16, para. 20.

Despite the clear need for some type of protection of the exposed joints in the bedrock, T&C's application failed to establish any layer of protection. As a result, T&C's Application is fatally deficient. The fact that the City Council imposed a condition that required grouting does not cure T&C's deficiency because T&C was required to submit an Application that demonstrates that the facility meets each of the criteria set forth in section 39.2(a) of the Act. *See Land and Lakes*, 319 Ill.App.3d at 45, 743 N.E.2d at 191. Clearly, T&C failed to do so, and the City Council had to supplement T&C's design. It is the duty of T&C to design a facility that is protective of the health, safety and welfare, and not the duty of the siting authority to help create such a facility through various conditions.

Moreover, the City's creation of the grouting condition does not necessarily make T&C's facility more protective of the health, safety and welfare because, just as in *Town & Country I*, no one has measured or determined the effectiveness of grouting to restrict vertical flow. See *Town & Country I*, slip op. at 27. In fact, nothing in Mr. Yarborough's reports substantiates the City's condition that grouting all open joints found in the exposed Silurian Dolomite bedrock would render T&C's proposed landfill safe. The record is completely devoid of any facts or information to establish whether grouting is a practical or effective means of protecting the groundwater. There is also no evidence that the grouting will support, rather than impair, the present design of the facility because grouting was not considered by T&C. As a result, there is no competent evidence to establish that the grouting imposed by the City will protect the public health safety and welfare.

Because T&C has failed to design a facility that adequately protects against the vertical flow of contaminants, T&C's facility is not protective of the public health and safety. Furthermore, the materially deficient design of the facility cannot simply be overcome by an unsubstantiated condition imposed by the City, especially since there is no testimony or evidence to establish that such a condition will render the proposed site safe. As such, the City Council's decision that the proposed facility met criterion ii was against the manifest weight of the evidence.

4. The Design and Location of this Landfill is Not Protective of the Public Health, Safety and Welfare Because it is Located Directly Within the Fractured Aquifer Which Will Not Be Adequately Monitored.

Despite T&C's attempt to argue that the landfill's location on top of an aquifer has no negative impact, it is clear that building a landfill on top of and within an aquifer is a poor design that presents a significant threat to the public health, safety and welfare. T&C II, 6/27/03 Tr. Vol. 4-A, p. 91. This is especially true because there is not an adequate buffer between the facility and the aquifer below. By designing the landfill to be placed directly on and within the bedrock aquifer, T&C proposed no barrier or other protective layer between the base liner of the landfill and the aquifer. T&C II. App., p. 2.3-2. There is no safety buffer below the landfill to prevent contaminant migration in the event of a release. T&C II. App., p. 2.3-2. Any release or leak from the landfill "would go right into the aquifer that's utilized." T&C I 6/25/02 Tr., 89.

The City erroneously found that T&C's reliance on the composite liner and its inward gradient design was sufficient to protect against any releases or contaminant migration from the landfill. However, this finding ignores the Board's concern as pointed out in *County of Kankakee*, slip op. at 27, namely that T&C did not evaluate how the liner will perform for any vertical or downward flow of contaminants. *Id.* at 92. The liner was not modeled to evaluate downward flow or to determine the impact of the landfill on the unweathered portion of the

bedrock aquifer. T&C II, 6/27/03 Tr. Vol. 4-B, 130. Downward flow of contaminants is an extremely important public health and safety consideration especially, when, as here, the landfill will sit directly on and within the aquifer and there is no impermeable barrier between the landfill liner and the aquifer. If there is a release, the aquifer within the Silurian Dolomite is immediately at risk. T&C I, 6/26/02 Tr., 151.

Moreover, the design and location of this facility are clearly not protective of the public health, safety and welfare because T&C failed to design an adequate groundwater monitoring system. A groundwater monitoring system is essential for the protection of the public health and safety because it is intended to provide assurance that the facility is functioning as designed and is not having any adverse impact in groundwater quality. T&C II App., p. 2.8-1. T&C's landfill is proposed to be constructed on and within what it calls the lower zone of "competent" bedrock. T&C II App., p. 2.3-2. T&C proposes to monitor only the weathered dolomite in its groundwater monitoring program. T&C II App., pp. 2.8-1 - 2.8-5. However, the evidence does not support T&C's characterization of the Silurian Dolomite as consisting of an upper zone of weathered bedrock that functions as an aquifer, and a lower zone of competent bedrock that functions as an aquitard. Because T&C's hydrogeologic study mischaracterizes the lower zone of the Silurian Dolomite bedrock as an aquitard, the groundwater monitoring system is flawed because it does not propose to monitor the bedrock directly under the landfill. It proposes only to monitor the upper zone of weathered dolomite. T&C II App., p. 2.8-2. Hence, any contaminants released from the facility would not be detected before reaching the aquifer. This is a fundamental deficiency with the groundwater monitoring system. *See A.R.F. Landfill, Inc v. Pollution Control Board*, 174 Ill. App. 3d 82, 528 N.E.2d 390, 397 (2d Dist. 1988) (groundwater

monitoring system did not sufficiently provide "early warning system" for persons with wells located near the site).

Like the other features of the landfill, the groundwater monitoring system is not designed to address this Board's important concerns about vertical and horizontal flow. See *Town & Country I*, slip op. at 27. Mr. Drommerhausen implies that because the weathered dolomite has a mean hydraulic conductivity 45 times higher than the competent bedrock, the weathered bedrock is the only material that needs to be monitored. T&C II, 6/24/03 Tr. Vol. 1-B, 126. However, that assumption is not consistent with the measured downward gradient, which is 12 times the horizontal gradient. T&C II, 6/27/03 Tr. Vol. 4-B, 132-33. Because of that downward gradient, there is potential for seepage to move vertically into the competent bedrock before it reaches the perimeter of the site where it can be detected in the wells.

The design of the proposed facility without an impermeable clay barrier or buffer between the bottom of the landfill and the bedrock aquifer and with a groundwater monitoring system that does not monitor the lower zone of the dolomite aquifer is not safe. These design deficiencies threaten the public health and safety, and establish that Town & Country has not satisfied Criterion (ii). *McLean County Disposal v. County of McLean*, 207 Ill. App. 3d 477, 566 N.E.2d 26, 32 (4th Dist. 1991); *A.R.F. Landfill, Inc. v. Pollution Control Board*, 174 Ill. App. 3d 82, 528 N.E.2d 390, 397 (2d Dist. 1988); *McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency*, 154 Ill. App. 3d 89, 506 N.E.2d 372, 381 (2d Dist. 1987). Evidence that the design of the facility is flawed from a public safety standpoint is a basis to deny the application. *Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board*, 227 Ill. App. 3d 533, 592 N.E.2d 148, 157 (1st Dist. 1992) (local decision that criterion 2 was not met was reversed where there was no evidence that facility design was flawed from public safety

standpoint); *Tate v. Illinois Pollution Control Board*, 188 Ill. App. 3d, 994, 544 N.E.2d 1176, 1196 (4th Dist. 1989) (local siting body may reject site if proposed facility presents a potential health hazard to the community, even if all technical requirements of the Illinois Environmental Protection Agency and the Board are met). Because it is clear that the location and design of this facility are not protective of the public health and safety, the City Council's decision that this facility met criterion (ii) is against the manifest weight of the evidence and must be reversed.

5. T&C Failed to Include Sensitivity Analyses in its Application and Failed to Adequately Establish Inward Flow.

In addition to the deficiencies provided above, in its 2003 Application T&C has failed to establish that the proposed facility will protect the public health, safety and welfare because T&C failed to include sensitivity analyses in its Application and failed to adequately establish inward flow at the site. These deficiencies establish that once again "[t]he evidence Town & Country did present was unreliable." *Town & Country I*, slip op. at 28.

T&C's Application is dependent upon its assumption of inward flow at the proposed facility, an assumption that was relied upon by T&C in performing the Groundwater Impact Evaluation (GIE). T&C II App. 2.7-15. However, T&C's conclusion of flow reversal under the landfill was not analyzed or corroborated. T&C's expert testified that the site will have inward gradient conditions and that groundwater flow in bedrock will be reversed after the landfill is constructed. T&C II, 6/25/03 Tr. Vol. 2-A, 50. However, the analyses used to reach that conclusion are flawed because they are based on the worst case scenario, assuming the clay liner is only 3 feet thick (when on average, the combined clay liner will be 7.5 feet thick), there are holes in the HDPE liner equal to 0.05% of the total surface area (with a hole of over 4,000 square feet) and an inward gradient is the maximum measured over the entire site. T&C II App., Append. K. The analyses provided in Appendix K of the Application were prepared for the sole

purpose of sizing the leachate collection system for all sources of water, not for the assessment of actual seepage from the bedrock aquifer into the landfill. As such, those analyses were improperly used to determine if inward flow of water through the composite liner system will cause the existing downward gradient to be reversed and, therefore, there is no competent evidence establishing that the natural flow of groundwater will be reversed by landfill construction. T&C II, 6/27/03 Tr. Vol. 4-C, 13.

In addition, T&C failed to support its conclusion that diffusion will be pushed back to the landfill. T&C portrays that diffusion will be arrested by the inward gradient into the landfill. Dr. Daniel testified that a velocity of 1 x 10^{-7} cm/sec or more is adequate to push-back the diffusion of chemicals into the landfill. T&C II, 6/26/03 Tr. Vol. 3-B, 70. However, Dr. Daniel's testimony that the inward seepage rate is adequate to push back contamination directly and irreconcilably conflicts with the Application. The Application provides that the seepage rate into the landfill through the clay and HDPE liner system is 5.84 x 10^{-11} ft/sec. or 1.78-9, or more than 50 times lower than the velocity needed to push back the diffusion. T&C II App., Append. K). However, the analyses in Appendix K of the Application are for the highest hydraulic conductivity and the highest inward gradient. If the liner is compacted to provide a lower hydraulic conductivity, and the clay liner is thicker than 3 feet (of which both will more than likely be true) and if a double liner is used, the seepage rate into the landfill will be significantly lower than 1.78 x 10-9 cm/sec., thereby making it questionable whether diffusion into the landfill will actually exist.

Finally, the Groundwater Impact Evaluation did not include a sensitivity analysis on the major parameters incorporated into the GIE. As Mr. Schuh testified, the application did not include sensitivity analysis of the hydraulic conductivity of the uppermost aquifer, even though

the site-specific values varied by over 60,000 times. T&C II 6/27/03 Tr. Vol. 4-B, 126. The application did not consider the potential for fracture flow to govern contaminant transport. The application also did not include sensitivity analyses to consider the variation in hydraulic gradient across the site or changes due to normal water level fluctuations caused by draught and precipitation. Furthermore, the application contained no sensitivity analyses to consider changes in dispersion coefficient, leachate quality, and other parameters that could affect the ability of the landfill design to protect public health, safety, and welfare. The absence of these sensitivity analyses makes it absolutely impossible to establish that the facility is designed and located to protect the public health and safety. T&C II, 6/27/03 Tr. Vol. 4-C, pp. 14-15.

Because T&C failed to present adequate data and evidence to establish that its facility was designed and located to protect the public health and welfare, the City Council's decision that criterion (ii) was met is against the manifest weight of the evidence and must be reversed.

6. The Kankakee City Council Again Improperly Deferred to the IEPA Because of the Lack of Evidence Presented by T&C in its Application.

After reviewing the Application and testimony provided in the local siting hearing, the City Council of Kankakee again deferred to the IEPA to determine if the facility at issue is protective of the public health, safety and welfare. In fact, the City Council added exactly the same condition as it did with respect to the 2002 Application, stating: "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." T&C II, Pet. Ex. 1, p. 15, para. 9. Clearly, the City Council found that this criterion was necessary because T&C failed to present sufficient evidence to establish that the facility was designed and located to protect the public health, safety and welfare because the landfill was located on the aquifer.

Just as was the case in 2002, "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." *Town & Country I*, slip op. at 27. As set forth by this Board in that decision, the City is not allowed to simply defer to the IEPA when there is insufficient evidence to support the siting request because it is the duty of the siting authority to address technical information assess the effect of the proposed facility on the public health, safety and welfare. *Town & Country I*, slip op. at 27, *citing Waste Management of Illinois v. PCB*, 160 Ill.App.3d 434, 438, 513 N.E.2d 592, 594-95 (2d Dist. 1987).

The City Council not only deferred to the IEPA in the condition provided above, but it also deferred to the IEPA in other portions of its Findings of Fact and Conclusions of Law, in that the City Council stated: "In the event that additional borings determine that additional protection of any aquifer that may exist, it is the understanding and expectation of the City that the technical expertise of the Illinois Environmental Protection Agency make such additional requirements of the applicant, as said technical expertise shall determine is necessary." T&C II, Pet. Ex. 1, p. 13. This statement also clearly establishes that the City was simply deferring to the IEPA because there was insufficient evidence presented by T&C to establish that the location and design of the facility were protective of the public health, safety and welfare.

It was the duty and obligation of T&C to present sufficient details to establish that all of the criteria set forth in 39.2(a) are met. *See Land and Lakes*, 319 Ill.App.3d at 45, 252 N.E.2d at 191. However, T&C clearly failed to present evidence to establish that criteria (ii) was met, necessitating the conditions imposed by the City Council. Because T&C failed to carry its burden of proving that criterion (ii) was met, the City Council's siting of the facility must be reversed.

D. The City Council's Finding that the Proposed Landfill Met Criterion viii is Against the Manifest Weight of the Evidence.

Section 39.2(a)(viii) provides that an applicant for local siting approval of a pollution control facility must demonstrate that:

> If the facility is to be located in the 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 39.2(a)(viii)(2002).

In evaluating whether a proposed facility is consistent with a solid waste management plan, the City Council must look to the language of the plan. *T.O.T.A.L. v. City of Salem*, PCB 96-79 and 96-82 (cons.), slip op. at 24 (March 7, 1996). If the proposed facility is inapposite of the plan, the proposed facility is not consistent and has not satisfied criterion eight. *See City of Geneva v. Waste Management of Illinois, Inc.*, PCB 94-58, slip op. at 22 (July 21, 1994). Although this Board usually uses a manifest weight of the evidence standard to review decisions of a local siting authority, compliance with criterion viii should be reviewed de novo because it involves a purely legal interpretation. See 415 ILCS 5/41(b); *Fairview Area Citizens Task Force v. Illinois Pollution Control Board*, 198 Ill.App.3d 541, 552, 555 N.E.2d 1178 (3d Dist. 1990); *Land and Lakes*, 319 Ill.App.3d at 48, 743 N.E.2d at 193. However, even under a manifest weight of the evidence standard, the City Council's decision should be reversed.

In its Findings of Fact and Conclusions of Law, the Kankakee City Council concluded with respect to criterion viii: "T&C has established that Kankakee County has not adopted a solid waste plan which is consistent with the planning requirements of the Local Sold [sic] Waste Disposal Act or the Solid Waste Planning and Recycling Act. Alternatively if such a plan does exist, T&C has established that the application is consistent with the plan." T&C II, Pet. Ex. 1, p. 24. These conclusions are improper and contrary to the manifest weight of the evidence.

Based on the undisputed facts presented at the hearing, it is clearly evident that T&C failed to satisfy the requirements of criterion viii. Therefore, this Board should reverse the City of Kankakee's siting approval.

1. The City Council Improperly and Erroneously Concluded that the Solid Waste Management Plan Adopted by Kankakee County was Invalid.

In its Findings of Fact and Conclusions of Law, the City Council of Kankakee improperly found that "Kankakee County has not adopted a solid waste plan which is consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act." *Id.* However, the City Council had no authority to make such a determination because it is improper to examine how a Plan is created or adopted in a Section 39.2 proceeding. *Residents Against a Polluted Environment v. County of LaSalle and Landcomp* Corp, PCB 97-139 (June 19, 1997) (citing *Residents Against a Polluted Environment v. County of LaSalle and Landcomp* Corp, PCB 96-243 (July 18, 1996)).

Even if the City Council could reach such a conclusion the City Council failed to explain why the Plan was inconsistent with the Acts. While the City Council asserts that Kankakee County failed to provide notice to municipalities when it drafted its plan, this is patently untrue as documents presented by the County of Kankakee unequivocally establish that the City of Kankakee not only had knowledge of the County's plan, but that the City of Kankakee's own mayor actually served on the intergovernmental task force responsible for drafting the Plan. PCB II, C1626-1776, Public Comment of the County of Kankakee. Therefore, the City Council's conclusion that amendments to the County of Kankakee's Solid Waste Management Plan were not properly enacted is against the manifest weight of the evidence.

The City Council's conclusion that Kankakee County's Waste Management Plan was not consistent with the planning requirements of the Local Solid Waste Disposal Act (Disposal Act)

or the Solid Waste Planning and Recycling Act (SWPRA) is also against the manifest weight of the evidence based on this Board's decision in *County of Kankakee.* In *County of Kankakee,* T&C argued that the County Plan, as amended on October 9, 2001 and March 12, 2002, was invalid because it violated the SWPRA and was in conflict with the Disposal Act. *Id.* at 29. However, this Board held that "[a]fter considering the language of the County Plan in conjunction with the requirements of the SWRPA and the Disposal Act, the Board finds no disagreement between the plan and the statutes." *Id.* Because this Board has already concluded that the County's Plan is consistent with the SWPRA and Disposal Act, the City Council's finding is against the manifest weight of the evidence and must be reversed.

Furthermore, it is beyond the scope of this Board to even consider if the Plan is consistent with the SWPRA or the Disposal Act because that would require this Board to examine how the plan was adopted, and this Board has held that it is not within the scope of its review to consider how a Plan is adopted. *Residents Against a Polluted Environment v. County of LaSalle and Landcomp* Corp, PCB 97-139 (June 19, 1997) (citing *Residents Against a Polluted Environment v. County of LaSalle and Landcomp* Corp, PCB 96-243 (July 18, 1996)). As a result, this Board should refuse to even consider whether the County's Plan is consistent with the applicable Acts and find that the City Council's consideration on that matter was inappropriate.

Just as it is improper for this Board to examine how the Plan was adopted, it was clearly improper for the City Council to consider the legality of Kankakee County's Waste Management Plan because that is beyond the scope of a 39.2 hearing, as was expressly decided by the hearing officer in this case. T&C II, 6/26/03 Tr. Vol. 3-C, pp. 4-6. During the local siting hearing, T&C's attorney filed a Motion, seeking to have Kankakee County's Solid Waste Management Plan declared invalid, illegal, void, unconstitutional and unenforceable. *Id.* at 4-5. In denying

the Motion, the hearing officer refused to consider whether Kankakee County's Solid Waste Management Plan was valid because "whether it is or not is a question that I don't think is properly before us at this time in this proceeding" because "this hybrid type of a hearing is by the statute that created it limited in the matters it may address and, as a result, I think that this motion is to be denied because we have no jurisdiction to hear it." *Id.* at 6.

As the hearing officer in this case properly found, whether the County's Solid Waste Management Plan is valid or not is not something that can be decided in a 39.2 hearing, as such a proceeding is restricted to only the issues expressly provided for in 39.2 of the Act. Clearly, the legality or validity of a County's Solid Waste Management Plan are not issues that are to be addressed by a siting authority, pursuant to 39.2. Therefore, like the hearing officer in this case, the City Council was without authority and jurisdiction to consider the legality or validity of the County's Waste Management Plan, and the City Council's decision that the County's Waste Management Plan was invalid cannot be upheld.

2. The City Council's Finding that the County Plan was Consistent with the Proposed Facility was Against the Manifest Weight of the Evidence.

The City Council's alternative finding that the Application was consistent with Kankakee County's Solid Waste Management Plan ("Plan") is also against the manifest weight of the evidence because the County's Plan clearly establishes the County's intent that no new landfills be sited in Kankakee County, other than expansion of the existing Waste Management facility.

At hearing, on this matter, a copy of the Solid Waste Management Plan and most recent amendment to that plan, created on February 11, 2003, were admitted into evidence by Kankakee County. The Plan, as amended, provides:

> It is the intent of Kankakee County that no landfills or landfill operations be sited, located, developed or operated within Kankakee County other than the existing landfill located southeast of the Intersection of U.S. Route 45/52 and 6000 South Road in Otto Township, Kankakee County, Illinois. The only exception to this

> restriction on landfilling is that an expansion of the existing landfill would be allowed under this Plan. The expansion or development of a landfill on the real property contiguous to the existing landfill would limit the impacts of landfilling activity in the County. According, the development of any other landfills in the County on land that is not contiguous to the existing landfill is inconsistent with this County's Solid Waste Management Plan. A noncontiguous landfill is inconsistent with this Plan regardless of whether it is, or to be, situated upon, unincorporated County land, incorporated municipal land, village land, township land, or any other land, within the County borders that is not contiguous and adjacent to the existing landfill.

PCB II, C472-871; see also Appendix C.

The language of this February 11, 2003 Amendment superseded and clarified the previous amendments to the Plan to make clear that the Kankakee County Plan was to exclude all landfilling except for a possible expansion of the existing facility being operated at U.S. Route 45/52 at 6000 South Road.

The "Whereas" clauses of the February 11, 2003 Amendment explain the intent of Kankakee County in drafting the amendment and provide:

> Whereas, the County hereby seeks to avoid a second non-contiguous landfill being developed;
>
> Whereas, the County wishes to limit the impacts of landfilling within the County, while at the same time providing the benefit of additional landfill capacity within the County, the County hereby amends its Solid Waste Management Plan such that no other landfills should be developed in the County with the limited exception that the existing landfill may be expanded;
>
> ***
>
> Whereas, the County Board has reviewed the decision of the Illinois Pollution Control Board in PCB-03-31 dated January 9, 2003 and the County Board seeks to dispel any question or ambiguity, and further affirm that it is its intention to limit the landfilling within the County only to the existing landfill, and any expansion of that landfill in an area contiguous to the existing landfill, as well as affirm that no other landfills are planned for or desired within the County, and the siting or development of any other non-contiguous landfill within the County is inconsistent with this plan.

Id.

It is obvious from the Amended Plan that the County intends for only one landfill to be operating within its borders, and that no additional landfill space should be developed in the County, save a possible expansion of the existing operating Kankakee County landfill. Despite the plain language of the Amendment and the clear intent of the County to limit landfilling in Kankakee County to an expansion of the existing landfill, the City Council employed a strained and disingenuous reading of the Plan to find that T&C's proposed facility was somehow consistent with the Plan. Such a finding is clearly nonsensical and against the manifest weight of the evidence because Waste Management's own witnesses admitted that the proposed facility was not contiguous to the existing and operating Waste Management facility, the location of which was specifically identified in the Plan.

Mr. Devin Moose was the only witness of T&C to testify on Criterion viii. However, his testimony should be given absolutely no weight whatsoever, as it was strictly an attempt at statutory interpretation, which constituted improper legal opinion. *See Brennan v. Wisconsin Control, Ltd.*, 727 Ill.App.3d 1070, 1082, 591 N.E.2d 502 (2d Dist 1992). Mr. Moose admitted that he did not have the training to provide legal opinions about the Plan and testified "I am not attorney, I do not intend to give legal opinions, I don't know what the law is." T&C *II*, 6/26/03 Tr. Vol. 3-C, 52. Nonetheless, Mr. Moose provided unqualified legal opinions by offering his own statutory interpretation that certain isolated words or phrases in the Plan and its Amendments could somehow be construed in such a way as to render the application consistent with the County Plan. Such legal conclusions are clearly improper. However, even if Mr. Moose's testimony could be relied upon, his testimony does not support the City Council's conclusions.

a. T&C's Proposed Facility is Not Contiguous to the Kankakee County Landfill.

The City Council, in its Findings of Fact, concluded: "The site proposed by this application is contiguous to an existing landfill and the Waste Management, Inc. operating landfill, in that it is in close proximity as the proposed site is within two miles of the operating and an existing landfill." T&C II, Pet. Ex. 1, p. 28, ¶30. This finding is clearly against the manifest weight of the evidence because the testimony at the hearing conclusively establishes that the proposed facility was about two miles from the existing facility and, thus, not contiguous.

Mr. Moose argued that the word "contiguous" is ambiguous because one dictionary he consulted included a secondary definition of the word of "in close proximity without touching." However, the primary definition in that dictionary was "touching; in contact," and the synonyms were identified as "bordering, adjoining, abutting." See Webster's New Universal Unabridged Dictionary, p. 316 (1994); T&C II, 6/26/03 Tr. Vol. 3-C, 25; C872-74. The other dictionary used by T&C only defined contiguous as "neighboring" and "touching." See The New Shorter Oxford English dictionary, p. 493 (1993); T&C II 6/26/03 Tr. Vol. 3-C, 28. Furthermore, reading the word "contiguous" in context clearly establishes that only an expansion of the existing landfill on real property adjacent to that landfill is intended.

The Illinois Supreme Court has explained that when construing a legislative enactment, it is necessary to first look at the language contained in the legislative enactment, giving the terms their "plain and ordinary meaning." *Vicencio v. Lincoln-Way Builders, Inc.* 204 Ill.2d 295, 789 N.E.2d 290 (2003); *Paris v. Feder*, 179 Ill.2d 173, 177, 688 N.E.2d 137 (1997). Illinois Courts hold that the plain and ordinary meaning of the word "contiguity" is "having a substantial common boundary" or "touching or adjoining in a reasonably substantial physical sense." *Grais*

v. City of Chicago, 151 Ill.2d 197, 220, 601 N.E.2d 745, 756 (1992); *In re Petition to Disconnect Certain Territory from the Frankfort Fire Protection District*, 275 Ill.App.3d 500, 501-02, 656 N.E.2d 434, 435 (3d Dist. 1995). Mr. Moose conceded that the proposed landfill does not touch or share any existing boundary with the existing Waste Management facility. T&C II 6/27/03 Tr. Vol. 3-C, 87, 89.

Furthermore, T&C's own land planning expert, Michael T. Donahue, testified that he deals with contiguity all the time in the area of zoning and planning, and a recognized definition of "contiguous" is "adjacency." T&C II, 6/24/03 Tr. Vol. 1-B, pp. 16-37. He further testified "adjacency" means "abutting" and that the proposed landfill does not physically abut the Waste Management facility. *Id.* at 17. Therefore, giving the word "contiguous" its plain and ordinary meaning as provided by the dictionary definitions of the term that have been accepted by the Illinois Courts, and as recognized by T&C's own land planner, the landfill proposed by T&C is not "contiguous" to the existing landfill and cannot be consistent with the County's Solid Waste Management Plan.

Even using Mr. Moose's ridiculously strained definition of "contiguous," as "close to but not touching," the proposed facility is clearly not in any way, shape, manner, or form "contiguous" to the Waste Management facility. Mr. Moose testified that the proposed facility is one and three-quarter miles from the Waste Management facility, rather than nearly touching the existing facility. T&C II, 6/27/03 Tr. Vol. 3-C, p. 57. Mr. Moose further testified that neither he, nor any other planner, has referred to property one and three-quarter miles apart as being "contiguous." *Id.* at 58-59. Therefore, even if one were to improperly ignore the context of the word "contiguous", ignore the Illinois Court rulings as to the meaning of contiguity, and ignore the plain and ordinarily understood meaning of the term (i.e., touching, directly next to,

adjoining) and instead employ Mr. Moose's convenient and myopic definition, the evidence at the hearing establishes that the proposed landfill is still not contiguous. Therefore, the City Council's finding that the proposed landfill is consistent with the Plan because it is contiguous to the Waste Management facility is against the manifest weight of the evidence.

Furthermore, in reaching his conclusion that the proposal is contiguous because it is allegedly "near" the existing facility, the City Council ignored the context of the word "contiguous." The amendment itself provides that "a non-contiguous landfill is inconsistent with this Plan regardless of whether it is, or to be situated upon ...any other land within the County borders that is not contiguous and adjacent to the existing landfill." The City Council completely failed to consider that an expansion is only allowable if it is upon land that is not only contiguous but also adjacent to the existing landfill in Kankakee County. The words "contiguous" and "adjacent" both have primary definitions which provide that a condition of "adjoining" is necessary to be contiguous or adjacent. See Webster's p. 18; Oxford, p. 27; PCB II, County Ex. 2. Because the landfill proposed by T&C was clearly not contiguous and adjacent to the existing Waste Management facility, the City Council's finding that the proposed facility was consistent with the County's Plan was against the manifest weight of the evidence.

The fact that the word "contiguous" is not ambiguous is bolstered by the fact that Section 39.2 of the Act contains the word "contiguous," and no definition of that term is provided. *See* 415 ILCS 5/39.2(d). Section 39.2(d) of the Act provides that notice shall be provided to "every municipality contiguous to the proposed site or contiguous to the municipality in which the proposed site is to be located." 415 ILCS 5/39.2(d). Clearly, the General Assembly would not have used an ambiguous term without defining what that term meant. Therefore, it is clear that the General Assembly intended for that word to have its usually understood meaning of

"touching." It is well settled that section 39.2(d) requires that municipalities only be given notice if they are directly adjacent to a proposed site or a municipality where a proposed site is located. (Cite) Section 39.2(d) clearly does not require notice to be given to every "nearby" municipality within a few miles of the proposed site or the municipality in which the proposed site is located. Because the legislature saw fit to use the term "contiguous" in a statute without defining it, it is clear that "contiguous" is not ambiguous but is readily understood to mean "adjacent."

b. The "Existing Facility" Referred to in the Amendments is Clearly the Kankakee County Landfill Owned by Waste Management.

The City Council's additional findings of fact with respect to criterion eight are also against the manifest weight of the evidence. After finding that the proposed facility was somehow consistent with the County's Plan, the City Council went on to find that the Plan was "ambiguous on its face" because it stated that the County's desire was to avoid a "second non-contiguous landfill" and allowed for "the expansion of 'the existing landfill' when in fact the undisputed evidence establishes that more than 20 landfills exist within Kankakee County." PCB II, Pet. Ex. 1, p. 28, para. 31. As explained above, it is clear, based on the entirety of the Plan and its most recent amendment, that the County of Kankakee intended that there be no landfills developed that were not contiguous to the existing and operating Waste Management facility. Furthermore, it is clear that the Plan's reference to "the existing landfill" was not ambiguous because it clearly referred to the Waste Management Facility.

After reading only one "Whereas" clause, Mr. Moose stated that it was not clear what "existing landfill" meant; however, the exact location of the existing landfill (at the intersection of Route 45/52 and 6000 South Road, Otto Township) was identified in the Amendment itself. T&C II, 6/27/03 Tr. Vol. 3-C, 34. In fact, later in his testimony, Mr. Moose conceded that by looking beyond that one clause, the most logical conclusion was that the phrase "existing

landfill" referred to the Waste Management facility. *Id.* at 81-82. Despite this self-damning admission, the City Council still found that the phrase "existing landfill" was ambiguous because there was more than one landfill existing in Kankakee County even though the evidence established that the Kankakee County landfill was the only operating landfill in the County and its location was specifically referred to in the Amendment.

It is well settled that when ascertaining the meaning of a legislative enactment, such as the Amendment at issue, it must be read as a whole with all relevant parts considered. *See Kraft, Inc. v. Edgar,* 138 Ill.2d 178, 189, 561 N.E.2d 656, 661 (1990). Instead of examining the entire document and determining the meaning of the amendment as a whole, the City Council focused on isolated words and phrases that they found caused ambiguity. If the City Council had examined the entire amendment as a whole, it would have seen that no ambiguity existed in the phrase "existing landfill" which was the facility at U.S. Route 45/52 and south Road ("Kankakee County Landfill") and that only expansion of that facility would be consistent with the intentions of the County. This is true because the Amendment specifically provided:

> It is the intent of Kankakee County that no landfills or landfill operations be sited, located, developed or operated within Kankakee County other than the existing landfill located southeast of the Intersection of U.S. Route 45/52 and 6000 South Road in Otto Township, Kankakee County, Illinois. The only exception to this restriction on landfilling is that an expansion of the existing landfill would be allowed under this Plan.

Although T&C argued that there were more than 20 landfills within Kankakee County, Mr. Moose had to concede that only the Waste Management landfill was operating. T&C II, 6/26/03 Tr. Vol. 3-C, pp. 57-58. He was also forced to concede that the Amendment clearly defines the existing landfill by identifying its exact location at the intersection of U.S. Route 45/52 and 6000 South Road. *Id.* at 81-82. Mr. Moose also conceded that he was unaware of whether the proposed landfill will be located next to any landfill (whether open or closed), let

alone the current operating landfill. *Id.* at 87. Therefore, even if the "existing landfill" had not been identified by its exact location, the application would still be directly inconsistent with the Plan. Because the Plan clearly identifies what is meant by "existing landfill," the City Council's finding that the Plan was ambiguous is against the manifest weight of the evidence.

c. The Kankakee County Waste Management Plan is Clearly Unambiguous.

The City of Kankakee has already admitted that it understands that the meaning of the February 11, 2003 Amendment is to exclude all landfills in Kankakee County, other than an expansion of the Waste Management facility based on its Findings of Fact and Conclusions of Law. The City Council's conclusion that the facility at issue is consistent with the County's Plan is directly contrary to the City Council's conclusion that "the plan, as repeatedly amended by Kankakee County constitutes an illegal and unconstitutional infringement upon its statutory authority to site a solid waste disposal facility and upon its constitutional authority as a Home Rule Unit of Government." T&C II, Pet. Ex. 1, para.5. In order to find that the Plan was illegal and unconstitutional, the City Council must have concluded that the Plan explicitly and clearly prohibited the siting of any landfill other than an expansion of the Waste Management Facility. Therefore, the City Council's conclusion that the T&C facility is somehow consistent with that plan is entirely disingenuous.

In another proceeding, the City of Kankakee has also admitted that it understands that the Plan intends for no landfills other than expansion of the Waste Management facility. This is true because the City filed an injunctive case, wherein it made the judicial admission that no landfills can be sited in the County "anywhere but adjacent to the County's landfill." T&C II, Pet. Ex. 12, p. 5. Furthermore, the City acknowledged that "the Kankakee County Solid Waste Management Plan prohibits siting and development of a landfill within Kankakee County unless it is

contiguous with the currently operated landfill in Kankakee County." T&C II, Pet. Ex. 5. The City of Kankakee further admitted that "Waste Management also owns and/or controls all of the land contiguous to the current site." *Id.* Therefore, the City of Kankakee had no problem understanding the County Plan when it filed its injunctive action against the County. It would be disingenuous, and evidence of extreme bias, for the City to now hold some few weeks later that the County Plan is ambiguous or capable of any reading that would allow the siting of a new landfill.

Finally, the City Council's conclusion that the Application was consistent with the Plan because "no other siting or expansion has currently been approved for any other site within Kankakee County" T&C II, Pet. Ex. 1, p. 29, para. 4 is also against the manifest weight of the evidence. In fact, at the time of the hearing, the expansion of the Waste Management facility had been approved by the local siting authority. Although that siting was later reversed by the IPCB for lack of jurisdiction, that does not negate the fact that there was local approval for the expansion of that facility. Furthermore, the fact that there was no current approval of the Waste Management expansion at the time the City's decision was made does not negate the clear intent of the plan, which is to have no new landfills other than an expansion of the existing Waste Management facility.

It is clear that the City Council's conclusion that the Application was somehow consistent with the County's Solid Waste Management Plan is illogical and unsupportable. It also not based on the evidence or testimony presented because no one ever testified that the proposed facility was consistent with the Plan. Rather, Mr. Moose testified that as he understood the County Plan, "we are not inconsistent with that plan." T&C II, 6/26/03 Tr. Vol. 3-C, 52. He did not testify, as the Act requires, that "the facility is consistent with that plan." 415 ILCS 5/39.2(a)(viii). The

two standards are logically and factually distinct. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 747 (8th Cir. 1986) (for purposes of statutory construction, "not inconsistent" is not the same as "consistent"). As a result, there was no evidence even presented that the proposed facility was consistent with the County's Plan. Therefore, this Board should find that the City Council's decision with respect to criterion eight is against the manifest weight of the evidence.

3. There Is No Evidence That An Independent Entity Prepared The Property Value Protection Program Contained Within The Application Or That The County Approved It.

Pursuant to the March 12, 2002 Amendment, any application for a proposed facility must include a Property Value Guarantee Program "prepared by an independent entity satisfactory to the County." PCB II, C1626-1776, Public Comment of the County of Kankakee. However, no evidence was contained in the application or presented by T&C in the hearing that such a program was established by an independent entity. Furthermore, no evidence was introduced by T&C that the County ever approved the independent entity that was to develop the program. No expert testimony was offered by T&C that these Plan requirements were met.

To the contrary, Mr. Karl Kruse, the Kankakee County Board Chairman, filed an affidavit which explicitly provides that "at no time has T&C sought the County's review and approval of an independent entity to prepare a property value guarantee program." T&C I, Affidavit of Karl Kruse, para. 5. Because T&C failed to present expert testimony of consistency with this requirement, and because the evidence is irrefutable that T&C failed to meet this requirement of the Plan, the City Council's conclusion that the application is consistent with the County Solid Waste Management Plan is against the manifest weight of the evidence.

4. There Was No Evidence That Any Environmental Damage Fund Or Insurance Was Accepted, Or Even Offered To The County, For Approval, Nor Was A Domestic Water Well Protection Program Submitted To Be Approved By The County.

The Solid Waste Management Plan explicitly required that any entity that intended to operate a landfill within its borders provide either an environmental contingency escrow fund with a minimum deposit of one million dollars ($1,000,000) or some other type of payment or a performance bond or policy approved by the County. PCB II, C1626-1776, Public Comment of the County of Kankakee. The application entirely fails to address the requirement of County approval, and T&C offered no expert testimony on the issue.

Furthermore, Mr. Kruse's affidavit affirmatively establishes that "at no time has T&C submitted a performance bond or policy of onsite/offsite environmental impairment insurance to the County for its review and approval". T&C I, Affidavit of Karl Kruse, para. 3. Likewise, "at no time has the County reviewed or approved any environmental contingency escrow fund or other type of payment, performance bond or insurance policy." *Id.* at para. 4. The Plan required any applicant to submit to the County a domestic water well protection program for review and approval. However, T&C presented no evidence that this occurred, and Mr. Kruse testified by affidavit it did not occur. Id. at para. 6. Therefore, the City Council's decision that Criterion viii was met is against the manifest weight of the evidence because the Application is inconsistent with the County Solid Waste Management Plan.

III. THE CITY COUNCIL PROCEEDINGS WERE FUNDAMENTALLY UNFAIR

A. Facts

1. Improper Communications Of The Applicant And Collusion With The City Council That Occurred After The Last Application Was Approved And Before It Was Refiled On March 7, 2003.

Mr. Thomas Volini admitted that since August 19, 2002, agents of T&C have had numerous communications with the City. PCB II, Pet. Ex. 23, p. 8. These communications included discussions regarding the refiling of the Application, the transmission of a revised siting ordinance, and numerous communications regarding the industrial park that is proposed to be attached to the landfill. *Id.* at 9-12, 17-18. Mr. Volini met with the City Council on February 3, 2003, in an "executive session" meeting to discuss an appeal of the PCB decision disapproving the application. *Id.* at 12, 19. In the middle of February 2003, he also communicated with the Mayor and the City Attorney again about refiling the application and the notices that would be filed. *Id.* at 12-13. He also admitted to communications in January of 2003 with the City about the City hiring a geological consultant. *Id.* at 16. Mr. Volini even telephoned several companies on behalf of the City of Kankakee to determine their interest and qualifications in acting as a consultant for the City. *Id.* at 16-17. Mr. Volini also had numerous communications with the Mayor regarding the industrial park. *Id.* at 17-18.

Mr. Volini was invited to the February 3, 2003 meeting by the Mayor's secretary. Mr. Volini had already told the City that he intended to refile the application and, therefore, the purpose of the February 3 meeting was to discuss appealing the PCB decision. *Id.* at 19. Newspaper reporters and members of the public were expelled from the City Council Chambers and City Attorneys Mr. Bohlen, Mr. Power, the Mayor and the City Council then met with Mr. Volini in closed session. *Id.* at 19-20. Mr. Volini discussed with the City Council his intention to appeal the PCB decision and at the same time file a renewed application for site location

approval "on the same property as the first case." *Id.* at 21. He also recalled several of the councilmen being "incensed at the County's action and Waste Management's action." *Id.* at 21.

Mr. Volini admitted that Mr. Yarborough had worked for Mr. Volini in the mid-1980's. *Id.* at 31. Mr. Volini admitted that he personally spoke to Mr. Yarborough on behalf of the City. *Id.* at 33. He also contacted several other individuals on behalf of the City, including Andrews Engineering, George Litwinishen, and several individuals from Harza Engineering. *Id.* at 34-35. Mr. Volini dissuaded the City from hiring any consultant who had ever done significant work for Waste Management, Inc. *Id.* at 35. Mr. Volini told Mr. Yarborough that Envirogen was the engineer on the project and had done the boring work in two or three phases. He told Mr. Yarborough if he needed to get further information he could get it from Envirogen and he mentioned Devin Moose as a contact person. *Id.* at 36. Mr. Volini does not know if Mr. Yarborough contacted Envirogen. *Id.* at 38.

2. Testimony Of Hearing Officer Boyd Re: Improper Procedures And *Ex Parte* Communications

The deposition of Hearing Officer Robert Boyd was taken and admitted at the PCB hearing as substantive evidence. PCB II, Pet. Ex. 15. That deposition is very telling as to the improper contacts between the attorney for City staff (who also represented the City Council) and the hearing officer. When Mr. Boyd was retained to act as the hearing officer in this case, he actually resided in Florida. *Id.* at p. 5. Mr. Boyd explained that he had practiced in Kankakee for decades and he has known the Mayor of Kankakee for over 25 years, and has known the City Attorneys, Christopher Bohlen, Pat Power, and Kenneth Leshen that long as well. *Id.* at 5-7. In fact, City Attorney Bohlen interviewed with Hearing Officer Boyd's law firm when Mr. Bohlen first came to Kankakee. *Id.* at 9.

When Mr. Boyd was hired by Mr. Bohlen to be the Hearing Officer for T&C's refiled application, Mr. Boyd "knew that they [the City] had been trying to get a new landfill." *Id.* at 11. Mr. Boyd also admitted that before he was hired by City Attorney Bohlen, he had "absolutely no familiarity" with landfill siting law. *Id.* at 12. At no time was Mr. Boyd ever provided a copy of the PCB decision reversing the prior siting approval of the City of Kankakee. *Id.* at 13. Mr. Boyd was asked "When you were initially hired you were aware that the City was in favor of siting, correct?" to which he first responded, "Yeah I guess so." *Id.* at 15. Mr. Boyd later changed his answer, indicating that he was not sure when he first became aware that the City of Kankakee was in favor of it, but he nonetheless acknowledged that by the time the hearing started he was aware that Mayor and the City in general were in favor of siting. *Id.* at 16-17.

Before the hearings commenced, Mr. Boyd reviewed the City siting ordinance and was aware that it called for him to draft proposed findings of fact and conclusions at law. *Id.* at 18-19. Mr. Boyd did not draft the proposed findings of fact and conclusions of law, but instead relied upon 28-29 pages of the document were the work product of the City attorneys and staff and perhaps two to three pages of his own work product. Mr. Boyd initially testified that he drafted the proposed findings of fact and conclusions of law. However, Mr. Boyd later explained that Mr. Bohlen sent him the findings of fact and conclusions of law that were issued in regard to the 2002 application (drafted by Attorney Bohlen), and then Mr. Boyd "made the changes that I thought were appropriate based on what I had heard and sent them back to them" (the city). *Id.* at 19-20. They made some changes, as I remember, and sent it back and, you know, I reviewed the changes and they seemed okay to me and I said okay." *Id.* at 20.

Mr. Boyd believed that the initial findings of fact and conclusions of law were sent to him by Mr. Bohlen or a secretary in the law department for the City of Kankakee. *Id.* at 20. Mr.

Boyd could not recall whether the 2002 Findings of Fact and Conclusions of Law sent to him had been amended to reflect the evidence introduced at the 2003 hearing. *Id.* at 22. Mr. Boyd's best recollection is that he reviewed the 2002 findings of fact, typed up 2-3 pages of additional changes and sent them back to Mr. Bohlen or someone at his office. *Id.* at 25-26, 29. However, Mr. Boyd denied that he still possessed any copies of the Findings and Conclusions that Bohlen sent him. He also denies having any copy of his two to three page additions and changes. He examined his computer, and testified he could not find any of his proposed changes to the Findings of Fact or Conclusions of Law, nor could he find any reference to the document on the computer. *Id.* at 27-28.

Mr. Boyd got the document back from the City of Kankakee, at which time the City had changed it. Mr. Boyd testified the City had "a consultant or somebody up there that added some things they thought were appropriate or modified them and then sent them back." *Id.* at 32. Mr. Boyd had "no earthly idea" who the consultant was. *Id* at 36. Mr. Boyd believed that he signed the document, but eventually conceded he may never have signed it. *Id.* at 32.

At no time did Mr. Boyd provide an opportunity to any parties, other than the City of Kankakee, to review and amend Mr. Boyd's Findings of Fact and Conclusions of Law. The City actually never filed any proposed findings of fact with the City Clerk, and, rather, the only document that was provided to the City Council was the document which was purported to be the work product of Hearing Officer Boyd. PCB II, Pet. Ex. 14, p.20.

Mr. Boyd does not know if the copy that he eventually approved was the copy that was actually presented to the City Council for review. PCB II, Pet. Ex. 15, p. 38. Boyd does not know if the copy that was ultimately signed by the Mayor was the copy that he had in fact

approved. *Id.* 38. Mr. Boyd did not attend the meeting of the City Council where the vote was taken concerning the landfill application. *Id.* at 46.

Mr. Boyd had no explanation as to why his computer did not contain any reference to the Findings of Fact and Conclusions of Law. *Id.* at 28. Interestingly, his computer only contained notes of the summarized evidence recap, which was sent by the Attorney for the Applicant, George Mueller. *Id.* Mr. Boyd did not know if the proposed Findings of Fact and Conclusions of Law that he approved were part of the record, though he assumed so. *Id.* at 39. In fact, that document (T&C II, Pet. Ex. 2) was never made part of the public record, and rather, only the Findings of Fact and Conclusions of Law that were ultimately signed by the Mayor were put into the record. T&C II, Pet. Ex. 1. The evidence is also clear that those Findings of Fact and Conclusions of Law were substantially amended by Mr. Bohlen after the City Council vote. See Appendix B.

The only documents that Hearing Officer Boyd recalled being sent to him for review by the City after the hearing and before the drafting of his findings were the transcripts of the 39.2 hearing, the proposed findings of fact of the parties, and the findings of the 2002 hearing. *Id.* at 43. Mr. Boyd had no recollection of the public comments being sent to him for review before he approved the Findings of Fact and Conclusions of Law that were drafted on his behalf. *Id.* at 45. Mr. Boyd also does not recall ever seeing any of the Yarborough reports, despite the fact that the Findings of Fact and Conclusions of Law rely heavily upon those reports. *Id.* at 39, 40, 45. Mr. Boyd testified that other than reviewing statutes and annotations, he limited his review of documents at the time he made his additions to the Findings of Fact to the documents that were in the public record as of July 28, 2003. *Id.* 42-43. The City of Kankakee has admitted that the

Yarborough reports were not in the public record at the time it closed on July 28, 2003. PCB II, Pet. Ex. 24; PCB II, 12/2/03 Tr. 141.

3. Testimony of Attorney Bohlen Regarding Substantive and Prejudicial *Ex Parte* Communications, Pre-adjudication of the Merits and Improper Procedures.

The City Attorney, Christopher Bohlen, was deposed on December 1, 2003, and his deposition was admitted at the PCB hearing as substantive evidence. PCB II, Pet. Ex. 14. Mr. Bohlen testified that on February 3, 2003, Thomas Volini attended a portion of the executive session of the City Council. *Id.* at 3. Mr. Bohlen refused to produce the minutes of the executive session meeting based upon an unspecified privilege even though Mr. Bohlen acknowledged that Mr. Volini was not a client of the City Attorney's. *Id.* at 5 The executive session meeting was attended by the alderman, the Mayor, the City Clerk, possibly Richard Simms of the City Engineering Department, as well as Mr. Volini. *Id.* at 6. The only individual present who was not an employee or agent of the City was Mr. Volini. *Id.*

Mr. Bohlen refused to answer whether the City discussed suing the County at that meeting on February 3, 2003. *Id.* at 6. Mr. Bohlen admitted that the City and Mr. Volini had a discussion "regarding the strategy" concerning who would file an appeal to the Third District Appellate Court of the PCB's decision in *Town & Country I*, and what the City's role would be in that action. Mr. Volini discussed his intention to "refile a new application." *Id.* at 9.

The City Counsel authorized lawsuit 02-CH-400 in the Kankakee County Circuit Court to be filed against Kankakee County, seeking to bar the County from using its solid waste funds to pay its legal fees associated with the City siting hearings and appeals. *Id.* at 11. The City Council also authorized the filing of the injunctive action 03-CH-166, in that same court, just two weeks before the City siting hearing was scheduled to commence. *Id.* at 12. That lawsuit

sought to enjoin the County from enforcing its Solid Waste Management Plan. PCB II, Pet. Ex. 12.

Mr. Bohlen was involved in retention of Ronald Yarborough, Ph.D., by the City of Kankakee. PCB II, Pet. Ex. 14, p. 13. The City Council was never made aware that Mr. Yarborough had been employed by Mr. Volini previously. *Id.* Mr. Bohlen discussed with the alderman the retention of Mr. Yarborough to provide geological consulting to Mr. Simms. *Id.* at 16.

Mr. Bohlen admitted that he drafted part of the Hearing Officer's Proposed Findings of Fact and Conclusions of Law that were voted upon by the City Council. *Id.* at 18. Mr. Simms, City employee, also had input, conditions he drafted that were contained in the 2002 Findings of Fact were also incorporated into the 2003 Findings of Fact. *Id.* at 54-55. Mr. Bohlen initially maintained that his involvement in drafting the Hearing Officer's Proposed Findings of Fact and Conclusions was limited to the references within the document to Mr. Yarborough, the Yarborough reports, or the condition requiring grouting. *Id.* at 18, 21. However, on further examination Mr. Bohlen admitted that he may have drafted other sections of the report including the references to the purported improper infringement of the City of Kankakee's home *rule* authority found in Paragraph T on Page 3 of the Findings that were ultimately signed by the Mayor. *Id.* at 22, PCB II, Pet. Ex. 1. Mr. Bohlen maintained that all drafts of the Findings of Fact and Conclusions of Law that were exchanged between Mr. Boyd and Mr. Bohlen's office before they were tendered to the City Council were destroyed, including all copies of the documents that were contained in e-mails, computer programs, telefaxes, and hard copies. *Id.* at 20, 38, 43-44.

The 2002 Findings of Fact, as well as the proposed findings submitted by the parties, were sent to Mr. Boyd in early August with a cover letter from Nancy Smithburg, stating that she hoped he enjoyed his reading. *Id.* at 19. Mr. Bohlen testified that Mr. Boyd then contacted Mr. Bohlen to ask if there was any way that the 2002 findings could be sent electronically, and the document was sent to Mr. Boyd by e-mail. *Id.* at 19. At that point, Mr. Boyd e-mailed back to Mr. Bohlen's office the proposed findings of fact placed into a form appropriate for the 2003 hearing. *Id.* at 19-20. Mr. Bohlen's office created a "hard copy", and made revisions to Mr. Boyd's proposed findings and e-mailed back the entire document (which included references to Yarborough's conditions). *Id.* Mr. Bohlen denied still having any "hard copies", the computer copies or e-mails of that version. Mr. Boyd ultimately faxed back "a couple of pages with additional changes" to be incorporated into the final document. Those changes were then made and that document was then given to the City Council. *Id.* at 19-20.

Mr. Bohlen denied that he now has the e-mails that were sent back and forth to Mr. Boyd, even though they were requested in this litigation. *Id.* at 20. Mr. Bohlen provided two reasons; one that he intentionally deleted the e-mails, and second, the computer system in his office went down, has been subsequently replaced, and the old e-mails (prior to October of 2003) are no longer available. *Id.* at 20-21. On further examination. Mr. Bohlen admitted that after he e-mailed the 2002 findings, Mr. Boyd e-mailed back a document (purported to be proposed findings for 2003), which included a number of changes.

When he received the e-mail from Mr. Boyd, he opened the document and inserted references to the Yarborough reports. *Id.* at 39. It made sense to Mr. Bohlen that he would have saved the document before he would have input changes to it. *Id.* at 40. However, Mr. Bohlen asserted that he did not save the proposed findings on his company's office server and, instead,

downloaded it to his own hard drive and then lost all of the documents on his hard drive. *Id.* at 40-41. Mr. Bohlen either e-mailed or faxed the document to Mr. Boyd after adding the references to the Yarborough report. Mr. Boyd then made some additional changes, and it was at that time that Mr. Bohlen believes Mr. Boyd wanted two additional pages of inserts included in the document. Mr. Bohlen recalls those two pages being faxed to him. *Id.* at 42.

That fax was not retained, but was given to one of Mr. Bohlen's secretaries or legal assistants to input into the master document. *Id.* at 42. Mr. Bohlen denied that the document was on his assistant's computer and instead maintained that she made the changes on his computer even though she has her own computer. *Id.* at 43. He offered no explanation as to why his secretary would have used his computer rather than her own. *Id.* Soon after stating that his secretary made the changes on his computer, Mr. Bohlen admitted that he did not know whether she made the changes on her or his computer. *Id.* at 44. Mr. Bohlen also testified that the "virus" that affected his computer also caused her computer to "crash" and wiped out the documents on those computers. *Id.* at 44. The general documents of his firm that were held on the server were not lost, but Mr. Bohlen denies that any of the communications he had with Hearing Officer Boyd or any version of the "Hearing Officer's" Findings of Fact and Conclusions of Law were contained on that general server. *Id.* at 40-41. After his secretary made the two pages of changes from Mr. Boyd, Mr. Bohlen thinks she faxed it back to Mr. Boyd. No copy of that fax document has been produced either, nor has a fax cover sheet been produced. It is Mr. Bohlen's recollection that at that time Mr. Boyd approved the document, which was then submitted to the City Council. *Id.* at 45.

Mr. Bohlen testified that the document submitted to the City Council was Deposition Exhibit 2 (PCB II, Pet. Ex. 2). At no time did the City draft proposed findings of fact which

were filed with the City Clerk before the close of the public comment period. PCB II, Pet. Ex. 14, p. 30. The City Council was informed that Mr. Boyd had drafted the Findings of Fact and Conclusions of Law that they were given to vote upon. *Id.* Mr. Boyd supplied a cover letter to the proposed Findings of Fact that was given to the City Council which provided:

> Consistent with my service as hearing officer for the public hearing held to determine the sufficiency of the application for approval of a new landfill filed with the City of Kankakee by Town & Country Utilities, Inc. and Kankakee Regional Landfill, LLC I have prepared certain findings of fact.
>
> *(Id.* at 33; PCB II, Pet. Ex. 7) (emphasis added).

Mr. Bohlen admitted that nowhere within the letter does it indicate that the Findings and Conclusions were drafted by anyone other than Mr. Boyd. Mr. Boyd's letter also states that the findings "incorporate my conclusion resulting from my review of the evidence and testimony presented at the hearing." *Id.*

The August 18, 2003 City Council minutes indicate that Mr. Bohlen and the Mayor explicitly informed the City Council that the findings of fact that they were to work off of was drafted by Hearing Officer Boyd. PCB II, C1907. There is no reference within the Finding of Facts and Conclusions of Law that it was drafted in large part by City staff and Mr. Bohlen. The City Council was not informed on August 18, 2003 that Mr. Bohlen had been communicating with Mr. Boyd regarding the Findings. PCB II, C1907-1927.

Mayor Green told the City Council "Mr. Boyd, of course, is not here, but Mr. Bohlen is going to go through the recommendation of the Hearing Officer." PCB II, C1907. Mr. Bohlen also told the City Council "it is basically the document that the Hearing Officer has...he is required to make recommended findings of fact." *Id.* Mr. Bohlen then solicited a vote upon every page of the "Hearing Officers" Findings of Fact and Conclusion of Law. *Id.* at 1907-1927.

The City Council subsequently approved and adopted every page of the "Hearing Officer's" Findings. *Id.*

Throughout the August 18, 2003 meeting, the City Council posed numerous questions to Mr. Bohlen and City Staff, which were responded to with information outside of the record. *Id.* For example, Mr. Bohlen advised the alderman that certain legislation that had been proposed by Representative Novack had died. *Id.* at C1910. Mr. Simms then advised the City Council that there was insufficient evidence that a double liner should be required by the EPA. *Id.* at C1911. The Mayor also advocated in favor of the Applicant when he indicated: "I think one thing we have to remember is if at any time a change is made legislatively, and the Illinois EPA says that that is what must be done then that is what will be done by the developer. There is not question in our mind." *Id.* at C1913. As to criterion viii, Mr. Bohlen advocated to the City Council that the County plan was not appropriately passed. Id. at C1923.

Mr. Bohlen entered an appearance on behalf of the City of Kankakee at the siting hearings. PCB II, Pet. Ex. 14, p.26. He did not draw any distinction between representing the City Council or the City Staff or the Mayor and, rather, represented the City as a whole. *Id.* at 26-27. He had represented the City Staff and the City Council from the date the application was filed through the date of his deposition (though he believed his representation would be curtailed now that the City had disclosed him as a witness). *Id.*[4]

Mr. Bohlen admitted that the copy of the document signed by the Mayor as the Findings of Fact and Conclusions of Law of the City Council was actually different than the copy that the City Council voted upon on August 18, 2003. *Id.* at 46-47. The document marked as Deposition

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[4] The fact that Mr. Bohlen was representing the City Council at the same time he was representing the City staff was not discovered until the afternoon of December 1, 2003, and the PCB hearing commenced on December 2, 2003. Therefore, the County of Kankakee did not have the opportunity to further investigate Mr. Bohlen's communications with the City Council by, for example, taking the depositions of the City Council.

Exhibit No. 2 (PCB II, Pet. Ex. 2) was the document that was actually tendered to the City Council as Mr. Boyd's proposed Findings of Fact and Conclusions of Law. *Id.* at 46. The document actually was not entitled "proposed" findings and was rather simply entitled Findings of Fact and Conclusions of Law. PCB II, Pet. Ex. 2.

After the City Council meeting, Mr. Bohlen prepared another draft, which he said was based upon some comments of minor typographical errors mentioned by the City Council. *Id.* at 48. However, a comparison of the document signed by the Mayor (PCB II, Pet. Ex. 1) to the document which was actually adopted by the City Council (PCB II, Pet. Ex. 2) shows numerous substantive changes. See Appendix B hereto. David Schaeffer, who is the City Planner for the City of Kankakee, suggested numerous changes and amendments to the new document that had been drafted by Mr. Bohlen after the City Council meeting. PCB II, Pet. Ex. 8; PCB II, Pet. Ex. 14, p. 48. Mr. incorporated most of the changes suggested by Mr. Schaeffer. PCB II, Pet. Ex. 14, p. 49; see also Appendix B hereto. The document was then signed by the Mayor, and the City Council was not reconvened to vote on the amended document prepared by Mr. Bohlen and Mr. Schaffer. *Id.* at 52.

The new document drafted by Mr. Bohlen after the vote changes the references of "existing landfill" (referring to the Waste Management facility which is presently operating in Kankakee County) to "current" or "operating landfill" *Id.* at 51; see also PCB II, Pet. Ex 2, as compared to PCB II, Pet. Ex. 1, and Appendix B hereto. Furthermore, the document that was adopted by the City Council did not make any specific individual finding that criteria 3 through 9 were met, but Mr. Bohlen nonetheless added that specific finding to each of these criteria, without being advised by the Council to do so. PCB II, Pet. Ex. 14 at 52.

4. Testimony Of Ronald Yarborough Re: His Communications With Applicant And The Secret Opinion Testimony He Provided To The City.

The deposition of Ronald Yarborough, Ph.D., was admitted at the PCB hearing as substantive evidence. PCB II, Pet. Ex. 16. Mr. Yarborough is a registered geologist in the State of Illinois, has a Ph.D. in economic geography and economics, but is not an engineer. *Id.* at 6. He first became involved in the T&C landfill application after he received a telephone call from the President of T&C, Tom Volini, on February 3, 2003. *Id.* at 9. Mr. Yarborough had known Mr. Volini for over 20 years and had worked for him on two different occasions in the past. *Id* at 12-15. He also worked for Andrews Environmental Engineering (whom Mr. Volini had hired in the past) as well as Weaver, Boos and Gordon (the original engineer on this project before Envirogen took over). *Id.* at 8, 12-15. Mr. Yarborough has also testified on behalf of Mr. Volini in the past. *Id.* at 14.

On February 3, 2003 (which was the day that Mr. Volini met with the City Council), Mr. Volini asked Mr. Yarborough if he would be interested in reviewing some information on the landfill for the City of Kankakee. *Id* at 9. Mr. Yarborough responded that he would do so, and Mr. Volini submitted Yarborough's name to the City Council. *Id.* Mr. Yarborough was then contacted by City Attorney Bohlen on February 11, 2003, who requested Mr. Yarborough's curriculum vitae, which was then faxed to attorney Bohlen. *Id.* at 9-10. In late February to early March of 2003, Mr. Yarborough received a telephone call from an engineer for the City, Richard Simms. Mr. Yarborough met with Mr. Simms on March 14, 2003 at which time Mr. Simms brought boxes of documents for Mr. Yarborough to review. *Id.* at 10.

When Mr. Volini telephoned Mr. Yarborough in February of 2003, Mr. Yarborough understood that Mr. Volini was affiliated with the Applicant. *Id.* at 11. Mr. Yarborough also understood that Mr. Volini was in favor of siting being approved. *Id.* at 27. In April of 2003,

Mr. Yarborough telephoned Mr. Simms, who gave him the telephone number of the Applicant's experts at Envirogen to contact to obtain a copy of the report of Stuart Cravens. *Id.* at 24.

Mr. Yarborough sent opinion letters to Richard Simms of the City on April 14, May 1, and July 24, 2003. PCB II, Pet. Exs. 3-5. Those correspondences were filed with the City Clerk after the close of the public record. PCB II, Pet. Ex. 24. Mr. Yarborough also sent an e-mail on May 2, 2003, which was not produced by the City of Kankakee. The May 2, 2003 e-mail criticizes the well logs performed by Envirogen. PCB II, Pet. Ex. 16, p 19; PCB II, Pet. Ex. 11. Mr. Yarborough never sent his correspondences to the City Clerk to be put into the public record but, rather, sent them to Richard Simms. PCB II, Pet. Ex. 16, p 26.

Mr. Yarborough's main report is dated April 14, 2003, and he ultimately concluded that the application should go forward because the Illinois Environmental Protection Agency would have to take a harder look at it. *Id* at 28. He also "felt very, very strongly" that grouting be performed on any open joints that were visible in the bedrock before the landfill liner was constructed. *Id.* at 31. However, no analysis or testing was done as to the feasibility of grouting or its affect on the liner system or the purported inward gradient. At no time was Mr. Yarborough ever asked to testify at the siting hearing by the City of Kankakee. *Id.* at 29-30. Interestingly enough, shortly before his deposition commenced on November 14, 2003 he was contacted by Mr. Volini and Mr. Volini's attorney, George Mueller who prepared him for his deposition. *Id.* at 22. The City of Kankakee did not attend the deposition preparation meeting.

5. Stipulated Testimony Of City Clerk Anjanita Dumas.

The City stipulated that, if called, the City Clerk would testify that the Yarborough reports were not put into the record before the public comment period closed. PCB II, Pet. Ex. 24. Instead, the April 14, May 1, and July 24, 2003 correspondence was not filed with the City Clerk by the City Attorney's office until July 31, 2003, which was after the public record closed

on July 28, 2003. *Id.* Mr. Bohlen has also admitted that the Yarborough reports were not available to the public until after the close of the public comment period. PCB II, 12/2/03 Tr. 144. However, Mr. Simms admitted that he spoke with the Applicant about the reports during the siting hearing. T&C II, 6/28/03 Tr. Vol. 5-A, 21.

It was also stipulated that the public comment filed by the County was timely filed. PCB II, Pet. Ex. 24. The City had no choice to so stipulate, as the County possessed the file stamped copies of its public comment dated July 28, 2003. The public comment was filed at the same time as the County's Post Hearing Brief and Proposed Findings of Fact and Conclusions of Law. The Certificate of Record drafted by Mr. Bohlen and the City Clerk erroneously indicates that the Proposed Findings and/or additional public comment were filed after the close of the record. PCB II, Cert. of Record.

6. Improper Communications And Evidence Of Pre-Adjudication That Occurred Before The Filing Of The March 13, 2002 Application.

The Mayor of Kankakee, Donald Green, testified that he realized at some point that funds could be generated for the City by negotiating a Host Agreement with a landfill operator. PCB I, 11/6/02 Tr. 169. However, the land that T&C proposed to build a landfill upon was not within the City of Kankakee and instead was located in the unincorporated County lands over a mile from the city streets of the City of Kankakee. PCB I, 11/4/02 Tr. 229. Therefore, the City, through Mayor Green and Mr. Bohlen, assisted T&C in seeking the annexation of the property which was not contiguous to the City of Kankakee except for a narrow railway strip that extended from the City out into County property. PCB I, 11/4/02 Tr. 225. The proposed area of the landfill is actually surrounded by County properties that are not annexed into the City. PCB I, 11/4/02 Tr. 224-227; PCB I, 11/6/02 Tr. 153. There were numerous communications between the City and the Applicant concerning the annexation of the land and renegotiation of the Host

Agreement, PCB I, 11/4/02 Tr. 158-241. Mr. Bohlen and Mayor Green were aware that once the property was annexed into the City that the City would be the siting authority instead of the County. PCB I, 11/6/02 Tr. 153; PCB I, 11/4/02 Tr. 224. No other explanation for the annexation has been provided.

At the time Mr. Bohlen was assisting the Applicant in the annexation process, he reviewed the county solid management plan that existed at the time and "believed even that then it did call[ed] for only one landfill." PCB I, 11/6/02 Tr. 222. He also knew that there already was a landfill operating within the County. *Id.* at 222-223.

At the same time, Mayor Green and City Attorney Bohlen were also in the process of negotiating a Host Agreement with T&C. *Id.* at 227-229. This agreement provided an estimate that in the first ten years of operation the landfill would generate between $4 million and $5 million per year for the life of the facility, which was estimated to be 25 to 30 years. *Id.* at 236. The Applicant also assisted in drafting the City's Solid Waste Management Plan, and drafted the City's Ordinance and Rules and Procedures for the siting hearings. *Id.* at 249; PCB I, Pet. Ex. 2

On or about February 19, 2002, the Applicant, its attorney, the project engineer and other Applicant witnesses met with the entire City Council. PCB I, 11/4/02 Tr. 229. Mr. Volini explained that the Applicant wanted an "unfettered opportunity to talk to you without the filter of lawyers, without the rancor and the back and forth and that, unfortunately, the lawyers bring to the process is we want to be able to speak with you person to person about things that we believe in, concepts that we've proved and environmental protection that we've achieved." PCB I, C3145 (emphasis added) The Applicant then had its experts speak about the purported compliance of the soon to be filed Application with the section 39.2 criteria. *Id.* at C3149-3152. The Applicant also provided "expert testimony" that the formal 39.2 hearing and the objectors'

witnesses could not be trusted. *Id.* at C3153. Mr. Volini closed by stating "you'll hear this without so much emotion and with a bunch of lawyers fighting with each other in about 120 days, but we wanted you to hear it from us first." *Id.* at C3156.

At no time did the City voice any objection to any of those statements, nor did they at any direct the City Council to disregard any statements made by the applicant and its agents. PCB I, 11/4/02 Tr. 310; PCB I, 11/6/02 Tr. 184. No notices were sent to the County or other potential objectors, nor individuals within 250 feet of the landfill, about the February 19, 2002 meeting, as required by Section 39.2(b). PCB I, 11/6/02 Tr. 188, 190.

B. Argument

1. Overview.

When one views the totality of the process employed by the City of Kankakee and the Applicant, it is abundantly clear that the County and the public at large were not provided a fundamentally fair hearing. The City of Kankakee and the Applicant conspired to create a completely unfair process whereby the City prejudged the merits of the case before the public hearings occurred in June of 2003. The record contains ample evidence of improper pre-filing contacts that occurred before the 2002 application. These contacts included extensive meetings between the Applicant and the City regarding a host agreement with the City, the Applicant assisting the City in drafting its own siting ordinances, including the Applicant drafting the rules and procedures for the City's siting hearing, and the City Council allowing the Applicant to make a presentation of its witnesses and evidence concerning the criteria before the first application was ever filed on March 13, 2002. The applicant went so far that during that 2/19/02 City Council hearing the Applicant informed the City Council that at the "formal" hearing, the objectors' witnesses could not be trusted.

At the 2002 hearing, the Mayor, who is a known advocate in favor of the project, appointed himself as hearing officer and only stepped down after motions to disqualify were filed. He then appointed his right hand man, City Attorney Christopher Bohlen, to act as hearing officer even though Mr. Bohlen had been communicating with the Applicant for many months on a variety of issues. At the siting hearing in June of 2002, ample evidence was submitted that undeniably established the applicant mischaracterized the bedrock, which was in immediate communication with the landfill liner as being an aquitard when in reality it is a well known aquifer. In spite of this, the City Council found that all of the criteria were met. This decision was rightly overturned by the IPCB, which correctly found that the manifest weight of the evidence established that criterion ii had not been met.

The City's determination to site a landfill regardless of the evidence continued after the PCB disapproved the original application when the City Council met with Mr. Volini on February 3, 2003 in "executive session." The City barred all members of the public from participating in the meeting with Mr. Volini, and, at that time, discussed an intention to refile the application. The fact that the City was bound and determined to site this landfill regardless of the evidence was made abundantly clear when the City decided to take the offensive against the County of Kankakee by filing two separate civil actions in an effort to bar the County from participating in the siting process. First, the City filed an injunctive and declaratory action seeking to bar the County from using its Solid Waste Management Funds to pay legal fees associated with the City's siting hearings. Next, just two weeks before the siting hearings were scheduled to commence, the City filed another frivolous lawsuit against the County this time seeking to "bar the County from attempting to interfere with the siting by the City." PCB II, Pet. Ex. 12. Therefore, since the City formally announced its intention of "siting" the landfill in

pleadings even before the 2003 hearings started, it is undeniable that the City prejudged the merits of the application. Of course, both suits were ultimately dismissed.

More unfair conduct occurred during and after the 2003 siting hearings by the City's Attorney, who represented both the City Staff and the decision maker, while advocating strongly in favor of the landfill application. The improper conduct continued when the City Attorney had *ex parte* communications with the hearing officer and actually drafted substantial portions of the hearing officer's proposed Findings of Fact and Conclusions of Law. Those Findings and Conclusions were then presented to the City Council and the public and parties as if they were the sole work product of the allegedly independent, unbiased hearing officer. Those findings were ruled upon and adopted by the City Council.

This was particularly egregious because the hearing officer's proposed Findings of Fact and Conclusions of Law were in large part grounded upon certain reports of a Mr. Ronald Yarborough (misidentified in the Findings and Conclusions as Ralph Yarborough) when those reports were never made part of the public record, and the hearing officer admitted in his sworn testimony that he never saw the reports. Therefore, the City Council was led to believe that the hearing officer found Mr. Yarborough's testimony to be very persuasive and in support of the application when, in reality, the hearing officer, and none of the parties (other than the City itself) had ever seen the reports.

It was not until the discovery process for the Section 40.1 hearing that the parties learned that it was the City Attorney who actually drafted much of the alleged Hearing Officer's Report. Worse yet, all of the communications through e-mail and by written drafts between the City Attorney and the Hearing Officer were conveniently destroyed, or "misplaced" by the City Attorney, his office staff, and the Hearing Officer. Coincidentally, the Hearing Officer, the City

Attorney, and his secretaries all lost not only the hard copies of the documents, but all e-mail and computer copies as well.

Perhaps the most blatant example of the unfair procedures employed throughout this process occurred after the vote of the City Council. After the City Council voted to adopt every page of the "Hearing Officer's" proposed Findings and Conclusions, the City Attorney substantively amended the approved findings without any authorization from the City Council to do so, and no new vote was ever taken. It was not until discovery at the 40.1 hearing that the parties learned that the Findings and Conclusions which were signed by the Mayor and put into the PCB record (PCB II Pet. Ex. 1) were actually never reviewed or voted upon by the City Council. Shockingly, the very findings of compliance with criteria 3-9 were added by Attorney Bohlen without ever being voted upon by the City Council.

Even though a specific occurrence or practice may not rise to the level of fundamental unfairness, the combination of events may render the whole proceeding fundamentally unfair. *American Bottom Conservancy (ABC) v. Village of Fairmont City*, PCB 00-200 (Oct. 19, 2000); *City of Columbia v. St. Claire*, PCB 85-177 (April 3, 1986). In this case, like *ABC* and the *City of Columbia,* the combined unfair practices resulted in an obviously fundamentally unfair proceeding. There simply was no way that the County of Kankakee could ever convince the City of Kankakee to deny the application regardless of the clear evidence presented. The County of Kankakee relies upon and incorporates all of the arguments it made in regard to the prior 2002 hearing of evidence of the pre-adjudication by the City of Kankakee. Though these arguments were rejected by the PCB in *Town & Country I*, the conduct of the Applicant and the City since January 9, 2003, when considered with the prior conduct reveal the inevitable conclusion that the

City of Kankakee prejudged the merits of the applications and the process was wholly unfair. See PCB II, Pet. Ex. 22 at C452-604 and C747-787.

2. The City Council Pre-Judged The Merits Of The Application, Had Improper Communications and Employed Unfair Proceedings.

A Section 39.2 hearing is required to be fundamentally fair to all participants. 415 ILCS 5/40.1 (2002); *Indy Hauling, Inc. v. Pollution Control Board*, 116 Ill.App.3d 586, 596, 451 N.E.2d 555, 564 (2nd Dist. 1983), *aff'd* 107 Ill.2d 33, 481 N.E.2d 664 (1985). If the siting authority has an unalterably closed mind in matters critical to the disposition of a siting proceeding, then such proceeding is fundamentally unfair. *Citizens for a Better Environment v. Pollution Control Board*, 152 Ill.App.3d 105, 112, 504 N.E.2d 166, 171 (1st Dist. 1987). If the siting authority is biased or prejudiced such that a disinterested observer might conclude that the administrative body had in some measure adjudged the facts, as well as the law of the case, in advance of the hearing, then such a proceeding is fundamentally unfair. *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill.App.3d 1023, 1040, 530 N.E.2d 682 (1st Dist. 1988).

a. The City's Prior Refusal To Follow The Evidence At The 2002 Hearing Is In Itself Evidence Of Pre-Adjudication Of The Merits.

It is undeniable that the City's finding that criterion ii was met in *Town & Country I* was against the manifest weight of the evidence. The fact that the City Council members ignored the manifest weight of the evidence to find compliance with criterion ii (as well as criterion viii) in and of itself is evidence of pre-adjudication of the merits. Every single one of those City Council members that voted in favor of the application at the prior hearing voted in favor at the 2003 hearing. The City again willfully disregarded the evidence admitted at the 2003 hearing as is evidenced by the discussion of the criteria below. The PCB should not limit its review of whether or not the City pre-judged the merits of this application to the 2003 evidence as one

must look at the totality of the circumstances here, and it is undeniable that the City Council previously ignored the manifest weight of the evidence in regard to the 2002 application.

b. The City And The Applicant Continued Their Course Of Improper Conduct After The August 19, 2002 Approval By The City And Before The Applicant Refiled On March 7, 2003.

i. Improper Communications

The City approved the prior application on August 19, 2002. In its answers to interrogatories, the Applicant admits that it had numerous conversations with the City of Kankakee after that date and before refiling, which are "too voluminous to recall with the exception that Thomas A. Volini specifically recalls appearing at the Kankakee City Council meeting February 3, 2003." PCB II, Pet. Ex. 21, Answer No. 4. "Tom Volini had numerous conversations with various City officials after August 19, 2002 and prior to filing the instant siting application." PCB II, Pet. Ex. 17, Answer No. 2. "Tom Volini participated in an executive session of the City Council of Kankakee on February 3, 2003, at which time, he informed the City Council the likelihood of the intent to file an application for siting, among other things." *Id.* Mr. Volini and T&C produced the minutes for part of the February 3, 2003 meeting. However, the minutes for the executive session were withheld by the City. PCB II, Pet. Ex. 20.

Attorney Bohlen, representing the City Council and City staff, refused to produce the executive session minutes even though he admits that Mr. Volini was never his client, and, therefore, the attorney-client privilege cannot be asserted. PCB II, Pet. Ex. 14, pp 12-13, 18-21. Mr. Volini admits that during the executive session there was a discussion about T&C's s intent to refile its application and admits that at no time did the City object to any such refiling. PCB II, Pet. Ex. 14, p. 14. Prior to even going to the meeting he had already informed the City of his intent to "refile or file a new application". *Id.* at 19.

The fact that the Applicant and the decision-maker were collaborating in deciding to appeal the PCB decision and refile the application is another example of the collusion and pre-adjudication that occurred in this case. If the City was actually an impartial tribunal, why was it meeting with the Applicant to discuss the strategy on how to accomplish siting the landfill, and why would the City Council have been incensed at the County's actions in merely pursuing its statutory right to appeal to the PCB, and doing so successfully? Should not the natural reaction, if it was an unbiased tribunal, to be relieved that the PCB stopped an application which clearly did not protect the health, safety and welfare?

Mr. Volini also testified that there were several other communications he had with the Mayor and City Council after the disapproval by the PCB on August 19, 2002 and before the refiling of the application. Since it is undeniable that the Applicant had already communicated its intention to refile the application with the City, these communications were obviously improper. The PCB has found that there is no bright line test as to when it becomes improper to communicate with the decision maker. *Town & Country I*, slip op. at 19-21. Rather, the test should be that when the siting authority becomes aware that an application is imminent and knows it will be called upon to be a tribunal rather than just a legislative body, communications with a party to the forthcoming action should be barred. In this case, the Applicant and City communicated so many times that they are too numerous to recall.

ii. The Applicant Acted On Behalf Of The City Attorneys And Staff In Retaining A Consulting Expert.

The collusion between the Applicant and the City continued after the January 9, 2003 decision of the PCB and before the refiling on March 7, 2003, when the Applicant acted on behalf of the City in retaining the City's purportedly impartial consulting expert. Apparently as a result of the strategy meeting between the City and the Applicant on February 3, 2003, it was

decided that the City should retain a witness who would support the application that the City could later claim was an "independent" consultant. Unbeknownst to any of the objectors, the City did indeed retain an individual recommended by Volini to draft reports upon which the City Council would rely. This individual (Ronald Yarborough) was first contacted on February 3, 2003, by Mr. Volini on behalf of the City Council (which was the same day Volini met with the City).

The Applicant's retention of a consulting expert on behalf of the City is just another example of the collusion between the Applicant and the City to site this landfill regardless of the evidence admitted at the hearing.

iii. The City Of Kankakee Sued The County In An Effort To Keep The County From Continuing Its Opposition To The City's Attempts To Site A Landfill.

While the appeal to PCB on *Town & County I* was being briefed, the City of Kankakee filed a lawsuit against the County of Kankakee, 2-CH-400, which alleged that the use of certain funds collected by the County of Kankakee pursuant to 415 ILCS 5/22.15(j) of the Illinois Environmental Protection Act were being used to "reimburse the general fund of Kankakee County for expenditures involved in the litigation against the City of Kankakee." PCB II, Pet. Ex. 13. The City alleged that "an actual controversy exists in that said funds are currently being used for reimbursement of legal expenses related to the siting of a landfill by Kankakee County, as well as in opposition to the siting of a landfill by the City of Kankakee." *Id.* at par 15. The City sought an injunction prohibiting the County of Kankakee from further expending said sums for this matter. *Id.* at para. 19.

The Complaint filed by the City of Kankakee in the Circuit Court is evidence that the City pre-adjudicated the merits of the siting application, which was filed on March 7, 2003. The City Complaint was filed on November 26, 2002, which was, coincidentally, the very same day

that the County's initial brief in *Town & Country I* was to be filed with the PCB. The County was forced to file a motion to dismiss the frivolous complaint of the City of Kankakee at the same time it was in process of drafting its response briefs in *Town & Country I*. Therefore, the Complaint was not only an improper attempt to infringe upon the efforts of counsel to adequately respond in the *Town & Country I* appeal, it is also explicit evidence that the City of Kankakee viewed itself as an advocate in favor of siting the T&C landfill and was pursuing any means it could to obstruct the County from continuing to object to the City's siting of the landfill. The City's Complaint was dismissed with prejudice.

iv. The City Filed A Civil Action Against The County Seeking To Enjoin The County From Defending Its Solid Waste Management Plan At The City's Siting Hearing.

The City's obvious pre-adjudication of the merits of this application culminated with the City filing another civil action against the County of Kankakee, 3-CH-66, seeking to enjoin the County of Kankakee from objecting to T&C's refiled application. PCB II, Pet. Ex. 12. The hearing on the T&C II application was scheduled to commence on June 24, 2003. On June 11, 2003, the City of Kankakee filed a Complaint for Injunctive Relief and a Motion for Preliminary Injunction against the County of Kankakee. *Id.*

The Complaint filed by the County of Kankakee asserted that the Kankakee County Solid Waste Management Plan (the "County Plan") violated the City of Kankakee's home rule authority to site a landfill within its municipal boundaries. The Complaint makes numerous references to the City's "authority to site" a landfill. *Id.* at para. 30, 31, 32, 34, and Prayer I, p. 5. The City of Kankakee petitioned the Court to enjoin the County of Kankakee from "attempting to interfere with the siting by the City." *Id.* at Prayer I, page 5. The City of Kankakee stated that the "Kankakee County Waste Management ordinance does restrict the City's right to site a facility within its boundaries." *Id.* at Points and Authorities, p. 4. This language clearly shows

that the City of Kankakee intended to approve and site the landfill even before any evidence was admitted at the siting hearing.

In addition, the City of Kankakee, in its Complaint stated that its enforcement of the County of Kankakee's Waste Management Plan "would cause the City irreparable harm because the County Plan "specifically provided for only one landfill." *Id.* at para. 36, 52. The City of Kankakee went on to complain that the amendment to the County Plan, providing for only one landfill site in the County, would "irreparably" harm the City by excluding any other landfill from being sited within the County. *Id.* at para. 53-56. The City also asked for a preliminary injunction preventing the County from enforcing its plan. *Id.* at para. 2. Obviously, the only way the City could be irreparably harmed by the County Plan is if it had already decided that the application should be approved, save for the County Plan which called for only one landfill.[5]

The City of Kankakee, in its supporting briefs in 03-CH-166 explicitly acknowledged its pre-determined intent to site the landfill by stating "Kankakee County has no authority to prohibit the City of Kankakee from siting a landfill within the City's territorial boundaries". PCB II, Pet. Ex. 12, Points and Authorities, p. 1. (Emphasis added). The injunctive case explicitly sought an order that "the County be enjoined from attempting to interfere with the siting by the City." *Id.* Therefore, not only did the City acknowledge that it was its intent (even before the hearing commenced) to site the T&C landfill, but it explicitly sought an order enjoining the Country from "interfering with the siting" barring the County from "enforcing its Plan." In other words, the City was actually seeking an order enjoining the County from participating in a siting hearing which it has an absolute statutory right to do. 415 ILCS

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[5] As it turned out, the City of Kankakee ignored the judicial admissions it made in the pleadings concerning 3-CH-166 that Solid Waste Management Plan "restrict[ed] the City's right to site a facility within its boundaries" because it somehow ultimately found that the County plan was vague or ambiguous as to the County intention to restrict all landfilling except for the expansion of the existing landfill.

5/39.2(d). Though the complaint filed by the City was rightfully dismissed with prejudice, it is nonetheless powerful evidence of the undeniable pre-adjudicative intent by the City of Kankakee.

Though a presumption exists that an administrative official is objective and capable of judging a particular controversy fairly, the presumption will be overcome when shown by clear and convincing evidence that the official has an unalterably closed mind in matters critical to the disposition of the proceeding. *Citizens for a Better Environment v. Illinois Pollution Control Board,* 152 Ill.App.3d 105, 111-112, 504 N.E.2d 166, 171 (1st Dist. 1987), If a local siting authority is biased against, or for, an application, such necessarily impacts fundamental fairness. *E&E Hauling, Inc. v. Pollution Control Board*, 116 Ill.App.3d 586, 596, 451 N.E.2d 554, 564, (2d Dist. 1983), *aff'd* 107 Ill.2d 33, 481 N.E.2d 664 (1985). Landfill siting hearings operate in an adjudicatory capacity, and bias or prejudice may be shown if a disinterested observer might conclude that the administrative body had in some measure adjudged the facts as well as the law of the case in advance of the hearing. *Waste Management of Illinois v. Pollution Control Board*, 175 Ill.App.3d 1023, 1040, 540 N.E.2d 682 (1st Dist. 1988).

Waste Management of Illinois establishes that there need not be direct testimony from a City Council member that he prejudged the application but rather, the test is whether a disinterested observer might conclude such occurred. *Id.* The filing of an injunctive action by the adjudicatory body against one of the parties, seeking to bar the party from opposing the application, is the most blatant and bald faced evidence of pre-adjudication of merits that could possibly be imagined. Obviously, a disinterested observer would conclude that the City of Kankakee pre-judged the merits of its application and that the proceedings were fundamentally unfair.

c. The City Attorneys Improperly Represented The City Council While At The Same Time Representing The City Staff And Advocating In Favor Of The Application.

Attorney Bohlen admitted that throughout the siting process he represented both City Staff and the City Council. *Waste Management v. Sierra Club*, PCB 99-136, 99-139 (Aug. 5, 1999), establishes that it is improper for a siting authority's attorney to advocate in favor of a position of City Staff, while continuing to represent the decision maker. *Id.* This is necessarily so; otherwise the agent of the decision maker is advocating a position rather than "donning the hat" of the judge and impartially determining whether the criteria were met. The fact that the City Council allowed its attorney to represent the City Staff at the same time that the attorney was representing the City Council is yet more evidence proving that the City Council pre-judged the merits of this application.

d. The City Attorney Had Improper *Ex Parte* Communications With The Hearing Officer.

If a party's attorney communicates with the local siting hearing officer, outside of the presence of the other parties, about the substance of an application, such is an improper *ex parte* communication. *Concerned Citizens for a Better Environment v. City Havana,* PCB 94-44, 1994, Illinois Environmental Lexis, 668 at 20-27 (May 19, 1994); *Gallatin v. Fulton County Board*, PCB 91-256 (June 15, 1992), Slip Op. *8-9. If such improper *ex parte* communications with the hearing officer occurred, the question then becomes whether "as a result of improper *ex parte* communications, the [siting authority's] decision making process was irreparably tainted so as to make the ultimate judgment of the [siting authority] unfair, either to an innocent party or to the public interest which the [siting authority] was obliged to protect." *Gallatin*, Slip Op. *9, quoting *E&E Hauling, Inc. v. PCB,* 116 Ill.App.3d 586, 594, 451 N.E.2d 555, 603 (2nd Dist. 1983), *aff'd.* in part, 107 Ill.2d 33, 481 N.E.2d 664 (1985). To determine if the *ex parte*

communications irrevocably taint the decision making process a number of considerations may be relevant including (1) the gravity of the *ex parte* communications, (2) whether the contacts may have influenced the ultimate decision, (3) whether the party making the improper contacts benefited from the ultimate decision, and (4) whether the contents of the communications were unknown to opposing parties and they, therefore, had no opportunity to respond. *Id.* (quoting *E&E Hauling*, 451 N.E.2d 603).

It is undeniable that improper *ex parte* communications occurred between the City Attorney Mr. Bohlen (who represented both City staff and the City Council) and the hearing officer. Mr. Bohlen was an active advocate during the hearing process in favor of the application. Mr. Bohlen has admitted that he appeared at the Section 39.2 hearing on behalf of the City of Kankakee. PCB II, Pet. Ex. 14, p. 26; see also T&C II 6/24/03 Tr. Vol. 1-A, 16). He also personally opposed motions to disqualify a certain City council member and motions to quash the proceedings (T&C II 6/24/03 Tr. Vol. 1-A, 21-23, 32-35).

Mr. Bohlen also questioned witnesses, while obviously advocating in favor of the application. For example, in regard to the Applicant's witness on criteria viii, Mr. Bohlen asked a line of questions which essentially tried to lay out an ambiguity argument against the County Plan. T&C II, 6/26/03, Vol. 3-C, 90-97. Furthermore, the City of Kankakee filed two causes of action in the Civil Court attempting to bar the County from enforcing its Solid Waste Management Plan at the siting hearing. Finally, the City of Kankakee in its decision stated that it was "supportive of the motion" of the applicant which sought to declare the Solid Waste Management Plan of the Kankakee County unconstitutional. PCB II, Pet. Ex. 1, p. 4. (Emphasis added). The City went on to improperly find that it "agree(s) that the attempt of Kankakee County to deny the City of Kankakee the ability to site a solid waste facility in the City of

Kankakee is an improper infringement of its home rule authority and is inconsistent with the intent and purpose of the Act." *Id.*

Therefore, it is absolutely undeniable that the City of Kankakee was an active participant and advocate in favor of the siting application and in opposition to the County plan (which called for no new landfills to be erected in Kankakee County other than a possible expansion of the existing landfill at its present location). The record is also clear that Mr. Bohlen substantially advised City decision makers while advocating in favor of the application. Even a cursory review of the August 18, 2003 meeting clearly establishes that Mr. Bohlen advised and addressed the City Council on no less than 50 occasions on that one evening alone. The record also reflects that Mr. Bohlen represented the City Council on February 3, 2003 in an executive session meeting with Tom Volini, a meeting to which Mr. Bohlen has refused to provide the minutes, asserting some sort of privilege which obviously does not exist. PCB II, Pet. Ex. 14, 6-7; see also PCB II, Pet. Ex. 19, Answer No. 9.

It is fundamentally unfair for the siting authority's attorney to advocate a position in favor of an application at the same time that he is representing the purportedly impartial decision maker. See *Sierra Club et al. v. Will County Board, et al.* PCB 99-136, 99-1-139 (Aug. 5, 1999); see also *Gallatin v. Fulton County Board*, PCB 91-256. In this case, it was obviously improper for Mr. Bohlen to represent City Staff and the decision makers at the same time. This is particularly true because Mr. Bohlen not only advocated against the County and in favor of siting, but also because he advised the City Council during their deliberations.

e. The City of Kankakee had Improper *Ex-Parte* Communications with the Hearing Officer.

The record is absolutely clear that the City Attorney, who had entered an appearance at the Section 39.2 hearing questioned witness and advocated in favor of the application, had

numerous communications with the Hearing Officer after the close of evidence. Both the Hearing Officer, Robert Boyd, and the City Attorney, Christopher Bohlen, collaborated in drafting the Hearing officer's proposed Findings of Fact and Conclusions of Law. It is well established that communications directly with the Hearing Officer are ex-parte communications. See *Gallatin,* at *7-8; *Concerned Citizens for a Better Environment v. City of Havana,* PCB 94-44 (May 19, 1994). Both *Gallatin* and *Concerned Citizens* established that it is an improper communication for the City Attorney to be communicating directly with the hearing officer. *Gallatin* points out that an attorney representing a siting authority should be aware of the danger of *ex-parte* contacts once the siting application has been filed. See *Gallatin* at *8. In *Concerned Citizens,* the PCB noted that the issue is not whether the hearing officer was biased, but rather whether the extensive contacts with the Hearing Officer contributed to fundamentally unfair procedures. *Id.* at *22. The PCB found that there was an inherent bias created by the communications with the Hearing Officer even though there had been no specific evidence or allegation of bias. *Id.*

One of the primary issues is whether the Hearing Officer provided any recommended findings to the siting authority. *Citizens Against a Regional Landfill (CARL) v. Illinois Pollution Control Board, Waste Management of Illinois, and County Board of Whiteside County,* 255 Ill.App.3d 903, 907 (3d Dist. 1993), *Concerned Citizens,* at *5; *Gallatin* at *9. In *Gallatin* the contacts of the siting authority's attorney with the Hearing Officer were not prejudicial because the only duty of the Hearing Officer was to preside over the proceedings; therefore the Hearing Officer never commented in any form with the siting authority about the merits of the case. *Id.* at *9. In this case, the Hearing Officer did indeed have the responsibility of drafting a recommendation to the City Council, and that recommendation was the only document that was

voted upon by the City Council. Furthermore, there were direct substantive communications between the City's attorney and the Hearing Officer, and the City Attorney actually drafted, in large part, the Findings and Conclusions of Law for the Hearing Officer. Obviously there could never be a more severe or prejudicial contact than drafting the very findings of the Hearing Officer. For one party (the City) to have unfettered communications with the Hearing Officer on the substance of the case and to even draft the very Findings and Conclusions of the Hearing Officer is obviously fundamentally unfair.

A disinterested observer should definitely conclude that the Hearing Officer had adjudged facts as well as the law of the case in advance of the hearing because his proposed findings of fact and conclusions of law contain material and substantive materials never admitted at the hearing. See *Waste Management of Illinois v. Pollution Control Board*, 175 Ill.App.3d 1023, 1040, 530 N.E.2d 682 (1st Dist. 1988). Furthermore, even if the standard employed in *E&E Hauling* (which requires a consideration of whether or not the decision was biased) is employed, obviously there was bias in this case. First, the *ex parte* communications between the City Attorney and the Hearing Officer were indeed grave. They communicated to the point that the City literally drafted his Findings of Fact and Conclusions of Law for the Hearing Officer. Those conclusions made a recommendation on each and every one of the criteria, as well as the motions that had been presented at the hearing. These motions included a motion to disqualify one of the alderman and a motion to quash the siting hearing based upon pre-judgment by the City of Kankakee. The City of Kankakee actively opposed those motions at the hearing, and it is simply ludicrous for the City to have now drafted the Hearing Officer's conclusions for him. Obviously, these communications with the Hearing Officer are of an extremely grave nature.

Second, the contacts clearly influenced the ultimate decision. Mr. Bohlen testified that Petitioner's Exhibit 2 is the document that was characterized as Hearing Officer Boyd's Findings of Fact and Conclusions of Law, and given to the City Council. That document clearly memorializes the City's position in every respect. The document denies the motion to disqualify Alderman Schwade, it denies the motion to quash the proceeding due to pre-adjudication of merits, and it denies the motion to dismiss based upon the refiling of a substantially similar application. PCB II, Pet. Ex. 2. It even supports a motion filed by the Applicant which was actually denied by the Hearing Officer at the hearing. *Id.* at p. 4, para. T. In that motion the Applicant sought a ruling that the County plan was unconstitutional based on the City's Home Rule authority. *Id.* The "Hearing Officer's" proposed findings and Conclusions actually provide that the City is supportive of the motion and "finds affirmatively that it does agree that the attempt of Kankakee County to deny the City of Kankakee the ability to site a solid waste facility in the City of Kankakee is an improper infringement of its Home Rule authority and inconsistent with intent and purpose of the Act." *Id.* Therefore, the City had so much influence over the Hearing Officer that he actually approved a Proposed Findings of Fact and Conclusions of Law that include a statement that the City Council supported a motion that the Hearing Officer himself denied.

Furthermore, with regard to criterion viii, it is obvious that those findings were drafted by Mr. Bohlen, as he described them in detail to the City Council, and even stated: "We don't mention Waste Management in the findings". PCB II, C1921. (Emphasis added). Bohlen also indicated "we also make reference to the fact that we believe...". *Id.* (Emphasis added). Thus, it is extremely likely that Mr. Bohlen also drafted the findings as to criterion viii, which once again shows the plenary and summary influence that the City Staff and City Council's attorney

exercised over the Hearing Officer (who was supposed to make an impartial recommendation as to each of the criteria and objective Conclusions of Law).

Third, obviously the City of Kankakee benefited from the Hearing Officer's ultimate decision (as embodied in his proposed Findings of Fact and Conclusions of Law), as it advocated the City's position in every respect. Mr. Bohlen admitted that the City did not draft its own Proposed Findings of Fact and Conclusions of Law to be filed with the City Clerk, which it could have done under the siting ordinance. The City ordinance explicitly provided that the parties, the Applicant and the City may draft a Proposed Findings of Fact and Conclusions of Law and file them with the City Clerk. That same ordinance also provided that the Hearing Officer shall draft his own proposed Findings of Fact and Conclusions of Law, and submit it to the City Council. The fact that the City of Kankakee never drafted its own proposed findings of fact (and instead collaborated with the Hearing Officer) is undeniable evidence that the City obviously benefited from its collusion with the Hearing Officer.

Finally, the contacts between the City and the Hearing Officer were totally unknown to the County of Kankakee, or any of the other objectors, or apparently the City Council itself until discovery occurred at the PCB hearings, at which time it was learned that Attorney Bohlen was the primary author and founder of the purported Findings of Fact and Conclusions of the Hearing Officer. At no time before the City Council voted on those proposed findings were any of the parties informed that those findings were actually drafted by Attorney Bohlen (as opposed to the Hearing Officer). PCB II, 6/24/03 Tr., Vol. 1-A, pp. 21-23, 32-36). The procedure employed of allowing an active participant and advocate in favor of the application to author the purported independent and impartial Findings of Fact and Conclusions of the Hearing Officer is an

embarrassingly egregious example of fundamental unfairness. Accordingly, the decision should be reversed.

f. The City Attorneys and the Hearing Officer Improperly Misled the Decision Makers and the Parties into Believing that the Hearing Officer's Proposed Findings of Fact and Conclusions of Law was his own Independent Work Product.

The PCB has determined that a hearing officer should be disqualified for bias or prejudice if a disinterested observer might conclude that he had in some measure adjudged the facts or the law of the case in advance of the hearing. *Concerned Citizens for a Better Environment v. City of Havana*, PCB 94-44 at *20 (May 19, 1994) (citing *CARL v. Whiteside County*, 139 PCB 523, PCB 92-156 (Feb. 25, 1993). *Land and Lakes v. Pollution Control Board,* 319 Ill.App.3d 41, 50, 743 N.E.2d 188, 195 (2d Dist. 1995) establishes that so long as a siting authority is aware of the possibility of bias, it is not improper for the authority to adopt findings and recommendations proffered by a person predisposed toward a siting application.. However, in this case, the City Council had actually been advised by the Mayor, Attorney Bohlen, and the Hearing Officer himself that the findings were those of the Hearing Officer. C1907.

At no time was there a disclosure that the Findings and Conclusions were actually drafted by a party (the City of Kankakee). This was a *prima facie* violation of the City siting ordinance, as the ordinance provides, "the Hearing Officer shall draft his or her own proposed findings of fact and conclusion of law and shall submit them and copies of such other proposed findings of fact and conclusions of law as may have been filed, to the City Council." Appendix A, para. L (emphasis added).

The Hearing Officer drafted a cover letter with the proposed findings of fact that were tendered to the City Council. PCB II, Pet. Ex. 7. That cover letter explicitly stated that "I had

prepared certain Findings of Fact". *Id.* (Emphasis added). That letter also provided that "those Findings of Fact are required by the governing statute, and are a result of, and incorporate my conclusions resulting from my review of the evidence and testimony presented at the hearing." *Id.* It also provided "the Findings of Fact are attached hereto and are hereby presented to the City Council and City of Kankakee for their consideration and review." *Id.* At no point did this cover letter indicate that the findings and conclusions were actually drafted by the City's attorneys and staff. To the contrary, there is an explicit indication that Mr. Boyd personally drafted the Findings of Fact and Conclusions, which was erroneous and misleading. Furthermore, Mr. Boyd references the statute which required him to draft his own Findings and Conclusions. Therefore, it is undeniable that the City Council must have concluded that this was the work product of an independent hearing officer, rather than the work product of the attorney for the Mayor's office and his staff (who were known advocates in favor of the landfill). Furthermore, all of the other parties and the public were led to believe that this was an independent report of the Hearing Officer.

g. The Proposed Findings of the Hearing Officer were Never Put Into the Public Record.

The proposed findings of the Hearing Officer were discovered only in the 40.1 hearing and marked as Petitioner's Exhibit 2. PCB II, Pet. Ex. 2. At no time were those Findings and Conclusions of Law actually put into the public record. The City Council did vote to adopt the specific findings that the Hearing Officer proposed as to each criterion as written in Petitioner's Exhibit 2. However, after that vote, material changes were made to the proposed findings by Attorney Bohlen and Mr. Schaffer, City of Kankakee Planner and then Mayor, signed the new document entitled "Findings of Fact and Conclusions of Law of the City of Kankakee." That is the document that appears in the public record as established by the City of Kankakee. PCB II,

Pet. Ex. 1. The City Council never voted to approve this new version. PCB II, Pet. Ex. 14, pp. 50-52. At no time did the City of Kankakee file the proposed Findings and Conclusions of Hearing Officer Boyd, which were actually reviewed and voted upon by the City Council.

This Board has held that if a report reviewed and relied upon by the decision maker does not contain opinion evidence, it may be submitted by the staff of the siting authority and the staff's counsel after the close of the public comment, as long as it is placed in the public record. *Sierra Club et al. v. Will County Board, et al.* PCB 99-136, PCB 99-139, at Slip Op. 9 (August 5, 1999). In this case, the Hearing Officer report was never put in the public record.

h. The Hearing Officer did not Have Access to the Entire Record for Drafting his Proposed Findings of Fact that were Relied upon by the City Council.

Hearing Officer Boyd testified that he was sent the transcripts, the findings of the 2002 hearing, and the proposed findings of facts of the parties, including a recap of evidence created by Mr. Mueller on behalf of T&C. PCB II, Pet. Ex. 15, p. 43. At that time, Mr. Boyd resided in Florida and all of the documents he received were sent to him by Mr. Bohlen. Mr. Boyd had no recollection of being sent the Yarborough reports, nor any of the public comments that were filed. *Id.* at 39-40, 44-45. It was fundamentally unfair to the parties and the public that the Hearing Officer drafted his proposed findings of fact and conclusions of law, which were ultimately relied upon and adopted by the City Council, when that Hearing Officer did not have access to the public comments. Obviously, the City Council put much weight on the Hearing Officer's report as the City Council voted to approve every section of it. The report was drafted and tendered to the City Council nearly three weeks after the close of the public comment period, so there is no reason to believe that the City Council was aware that Mr. Boyd had actually never seen the Yarborough report, nor the comments that had been filed by members of the public.

i. The Proposed Findings of Fact of the Hearing Officer were Fundamentally Unfair as it Heavily Relied Upon an Opinion Report of Dr. Ronald Yarborough, which the Hearing Officer Never Saw.

Mr. Boyd testified that he does not recall ever seeing the Yarborough reports, and did not even know who Ronald Yarborough was when he was posed that question at deposition. PCB II, Pet. Ex. 15, pp. 39-40. Mr. Bohlen then admitted that he was the one that actually included all of the information concerning the Yarborough report into Mr. Boyd's proposed Findings of Fact and Conclusions of Law. *Id.* Therefore, the City Council was left to believe that Mr. Boyd, a retired judged and seasoned attorney in good repute in the Kankakee area, had reviewed Mr. Yarborough's report and relied upon it in arriving at his conclusion that criterion ii had been met, and that certain conditions should be imposed. In reality, Mr. Boyd never even saw the report. Therefore, it was absolutely unfair to the objectors that a procedure was employed by the City that improperly bolstered the conclusions of the Applicant's experts that the landfill would protect the health, safety and welfare and meeting criterion ii.

One can only assume that the City's blatant disregard for its own ordinance (requiring the Hearing Officer to draft his own findings of fact, and allowing the City to draft its own separate findings of fact) was an effort to improperly bolster the opinions of the Applicant's witnesses and/or provide the impression to the public that the Application had been considered adequate by an independent hearing officer. Clearly, this was a fundamentally unfair procedure, requiring the reversal of the City's decision.

j. The City Council Improperly Relied upon the Reports of Dr. Ronald Yarborough which were not put in the Record Before it Closed.

The City of Kankakee stipulated that the Yarborough reports were not inserted into the public record until after the close of the public comment period. PCB II, Pet. Ex. 24; PCB II 12/2/03 Tr. 138. The July 24, 2003 letter of Ronald Yarborough is file stamped by the City

Clerk on July 31, 2003. The April 24 and May 1, 2003 reports are not file stamped by the City Clerk . Mr. Bohlen testified that he believed that all three of the reports were taken to the City Clerk on July 31, 2003. PCB II 12/2/03 Tr. 137-138. Regardless, the public record closed on July 28, 2003.

Although parties to a siting hearing will not be allowed to cross examine a person who merely submits written comments, they must be given an opportunity to "present evidence and object to evidence presented." *Southwest Energy Core v. Illinois Pollution Control Board,* 275 Ill.App.3d 84 , 655 N.E.2d 304, 310 (4th Dist. 1995). It is improper for a siting authority to fail to disclose critical evidence during a siting hearing. *Land and Lakes Company v. Pollution Control Board*, 245 Ill.App.3d 631, 643-44, 616 N.E.2d 349 (3rd Dist. 1993). In order for a hearing to be fair, it must provide the parties "the opportunity to be heard, the right to cross examine adverse witnesses, and impartial rulings on evidence." *Daley v. Pollution Control Board,* 264 Ill.App.3d 968, 637 N.E.2d 1153, 1155 (1st Dist. 1994).

Though it is undeniable that a siting authority may hire persons to advise it regarding the evidence submitted at a hearing, or that a person hired for this purpose could be allowed to write a proposed opinion for the decision maker to consider, if such a report contains new expert testimony that was not provided at the hearing, then the proceedings are fundamentally unfair, as the parties were not allowed an adequate opportunity to cross examine that witness. *Sierra Club v. Will County Board,* PCB 99-136, 99-139 at slip op. 9 (August 5, 1999) (held that a report submitted after the close of the public comment period was not fundamentally unfair because it did not contain new expert opinion testimony, but rather was a summary of the testimony and public comments and/or recommendation of the authors of the report). See also *Fairview*

Citizens Task Force v. Illinois Pollution Control Board, 198 Ill.App.3d 548, 555 N.E.2d at 1182-1183); *Material Recovery v. Village of Lake and Hills,* PCB 93-11 (July 1, 1993).

This case is unlike *Fairview,* 198 Ill.App.3d 541, 555 N.E.2d 1178, where an expert report which was reviewed by the decision makers was put into the public record before it closed, thereby allowing the Petitioners an opportunity to respond. *Id.* at 1182. In this case, the Yarborough reports were not put into the record before the close of the public comment period and, therefore, none of the objectors had the opportunity to review and respond. Indeed, if they had been put into the record, there would have been many responses to those reports, as: (1) they were grounded in large part upon a grouting plan for which no study had been performed, and (2) Mr. Yarborough seemed to erroneously abdicate any responsibility the City Council may have by providing that IEPA will conduct a thorough analysis as to the propriety of the site if it is approved by the City.

Furthermore, the Yarborough reports were based upon improper *ex parte* communications.

Mr. Yarborough explicitly testified that he contacted Envirogen in April of 2003, which was several weeks after the application was filed. He was telefaxed documents from Envirogen and specifically the report of an objector's witness, Stuart Cravens. Undoubtedly, Mr. Yarborough did not contact Stuart Cravens directly because the City wanted to keep Mr. Yarborough's identity secret (except to the Applicant who recommended him and for whom he had worked in the past). If Mr. Yarborough's identity and reports had been disclosed to the objectors in timely fashion, and he had been subjected to cross examination, the City Council would have been made aware that Mr. Volini had actually contacted Mr. Yarborough on behalf of the City Council, and that he had known Mr. Volini for over 20 years. The first any objector

ever heard of Mr. Yarborough was on the last day of the hearing, when Mr. Simms admitted he in fact had an improper *ex parte* communication with the Applicant about the Yarborough report. T&C II, 6/28/03 Tr. Vol. 5-A, 21. At that time (June 2003) Mr. Bohlen promised to immediately put the reports into the record, but curiously enough, they were not put into the record until after the close of the public comment period.

k. The Certificate of Record prepared by the Circuit Clerk for the City of Kankakee Erroneously Indicates that the Additional Public Comment Filed by Kankakee County was "Filed After the Record Closed Without Leave".

The Certificate of Record, which was prepared by Attorney Bohlen and the City Clerk, provides that the County filed its public comment late. T&C II, Cert. of Record filed by Anjanita Dumas on October 23, 2003, Item 22. The Additional Public Comments of the County of Kankakee were filed on July 28, 2003, which was the last day for filing the public comment records. The public comment has been file stamped by the City Clerk and dated July 28, 2003. PCB II, Pet. Ex. 24; PCB II, C1626-1776. When the City attorneys were confronted with this unequivocal evidence, they stipulated that the City Clerk would testify that indeed the public comments were timely filed. PCB II,. Pet. Ex. 24. Therefore, the City Counsel may have ignored or failed to consider, or given less weight, to the public comments filed by the County of Kankakee based on the City attorney's assertion that it was not timely filed, which was erroneous and fundamentally unfair.

l. The Findings of Fact and Conclusions of Law which were Signed by the Mayor were Never Duly Considered or Properly Voted Upon by the City Council.

Adding to the unfair nature of the proceedings, the Mayor, City Attorney and City Clerk have included in the record of the PCB a Findings of Fact and Conclusions of Law that was actually never considered or voted upon by the City Council. The record is absolutely clear that

the precise document that was presented to the City Council and actually voted upon was marked as Petitioner's Exhibit 2. That document has never been made part of the City of Kankakee record. That document was later amended by Attorney Bohlen and again by City Planner Schaffer before it was fully signed by the Mayor. PCB II, Pet. Ex. 1. The City Council never voted on the changes made by Attorney Bohlen and Mr. Shaffer. PCB II, Pet. Ex. 14; PCB II, Tr. pp. 50-52.

The City may attempt to argue that changes were authorized by the City Council; but they were not. There was a singular suggestion by a City Council member that certain text be made in bold in regard to criterion vii. PCB II, C1920. There was also a request that certain renumbering be done. *Id.* at C1922. However, there were no other requests for any changes to the text of the document before each specific section was voted upon. *Id.* at C1907-1927.

However, when one compares Petitioner's Exhibit 2 to Petitioner's Exhibit 1, there are numerous changes that subsequently occurred, many of them substantive. See PCB II, Pet. Ex. 1 and 2. A list of the changes that were made after the vote is included in Appendix B to this Brief. Many of the amendments that were made to the Findings of Fact and Conclusions of Law of the City of Kankakee after the vote can be seen in Petitioner's Exhibit 8, which show the comments and amendments proposed by City Planner Schaffer to Attorney Bohlen. PCB II, Pet. Ex. 8. Many, if not most, of those changes were incorporated into the final document. PCB II, Pet. Ex. 8, compared to PCB II, Pet. Ex. 1. Though some of the post-vote changes were indeed merely grammatical or correcting typographical errors, many of the changes are substantive. Perhaps the most egregious change is that Mr. Schaffer and the City Attorney took it upon themselves to incorporate into certain findings as to criteria iii, iv, v, vi, vii, viii, and ix that each of those specific criterion was either met or not applicable. No such findings were contained in

the document that the city council considered and voted upon on August 18, 2003. PCB II, Pet. Ex. 2; PCB II C1907, C1927. The City Council only voted to adopt the Findings of Fact and Conclusions of Law submitted to them by the Hearing Officer; they did not vote as to whether each of the specific criteria were met. *Id.* This addition by Attorney Bohlen completely and prejudicially changed the findings of the City Council.

Furthermore, there were numerous references within the document that the City Council voted to approve that refer to the Waste Management facility as the "existing landfill." All of these references were changed by Mr. Bohlen and Mr. Schaffer to "operating landfill." Mr. Schaffer makes explicit notes within his marked up copy to Mr. Bohlen counseling against use of the word "existing." PCB II, Pet. Ex. 8, PCB II, Tr. 17, 26, 27. Mr. Schaeffer's and Mr. Bohlen's obvious concern was that the City Council had voted to make a specific finding that the term "existing landfill" used in Kankakee County's Solid Waste Management Plan was ambiguous, but clearly, based on the language contained in the City Council's own document, the City Council had apparently concluded that the "existing landfill" was the Waste Management facility. Removing that concession from the Findings of Fact without any authority to do so is highly prejudicial and improper.

There are other substantive changes that were made by Mr. Bohlen. At Page 11, Mr. Bohlen adds a finding that "there is not [sic] issue regarding downward vertical migration and the issues raised by the Pollution Control Board are not applicable to this site with this design." PCB II, Pet. Ex. 8. There simply was no such finding in the document that the City Council voted upon. Additionally, at Page 15, para. 14, the reconstituted findings now require the Applicant to submit a dewatering plan to the City of Kankakee for not only review, but approval by the City, while the City Council only voted to require a review. *Id.* On Page 27, para. 25 Mr.

Bohlen has again amended the language concerning the "existing landfill," but this time, surprisingly his amendment makes it absolutely clear that he, as the City Attorney, was aware that the Kankakee County landfill was the existing landfill. Specifically, he changed that language of that paragraph which provided "that no expansion of the Kankakee landfill has been approved" to "no expansion of any 'existing' landfill has been approved." *Id.* Therefore, once again Mr. Bohlen has materially changed the meaning and import of what was voted upon by the City Council. Furthermore, in this particular instance he has made it clear that at least he was aware that the Kankakee County landfill was the existing landfill, and that term was not then ambiguous.

On Page 28, in the second to last paragraph in the Findings of Fact, the City Council voted to acknowledge that the "existing landfill" is indeed a Waste Management landfill when it voted to approve the language "the site proposed for this application is contiguous to the existing landfill." *Id.* Once again Mr. Bohlen's deletion of the term "existing landfill" and his insertion of the term "operating landfill" is highly prejudicial to the County of Kankakee, and materially changes the actual meaning of the City's findings.

Section 39.2(e) provides that "[d]ecisions of the governing body of the municipality are to be in writing, specifying for the decision, such reasons to be in conformance with subsection (a) of this Section." 415 ILCS 5/39.2(e). Section 39.2(e) was violated first because in this case the City Council never made any specific finding that criteria 3 through 9 were met. That finding was added without vote by Attorney Bohlen without a City Council vote. Second, the document that the Mayor signed is not a decision of the governing body; rather, it is simply the reworked, after-the-fact decision of Mr. Bohlen. Third, the City's decision was not filed in writing in the City Record. Rather, only Mr. Bohlen's revised Findings are in the Record.

These procedures were not only fundamentally unfair to the parties, but were a complete derogation of the legislative process. The City Council members voted to adopt certain language, and Mr. Bohlen, either by himself or in collaboration with Mr. Schaffer and the Mayor, decided that they wanted other legislation passed and surreptitiously changed that language without any notice to the public, the City Council, or to the parties to this proceeding. There is simply no way that such a procedure could ever be considered fundamentally fair.

m. City of Kankakee's Failure to Follow its own Siting Ordinance was Fundamentally Unfair.

The failure to follow a siting ordinance is relevant to a determination of whether proceedings were fundamentally unfair. The Siting Ordinance provides as follows:

> The Hearing Officer shall at the Hearing Officer's discretion and to the extent reasonably practicable, permit the City, the Applicant, and any party to file proposed findings of fact and conclusions of law. The Hearing Officer shall draft his or her own proposed findings of fact and conclusions of law and submit them, and copies of such other proposed findings of facts and conclusions of law as may have been filed, to the City Council.

See Ordinance No.2003-11, Sec. 6, par. 5, copy of the Ordinance is attached hereto as Exhibit A. (Emphasis added).

The Hearing Officer did not draft his own findings, and, therefore, violated the Siting Ordinance. The failure of the Hearing Officer to follow the Ordinance was severely prejudicial to the other parties to this case, as it supplanted the City Attorney's opinions for those of the hearing officer.

None of the parties, nor the decision maker of the City Council, were informed that Mr. Bohlen actually drafted the hearing officer's proposed findings. All of the parties and the City Council could only presume that Hearing Officer Boyd actually drafted his own findings, as that is what was called for by the Siting Ordinance; and, indeed, that is what they were told by the Mayor, City Attorney Bohlen, and Mr. Boyd himself in his cover letter. The Siting Ordinance

was very clear that the City was allowed to draft its own opinion and that the hearing officer was required to draft his own opinion. The failure to follow the Siting Ordinance resulted in a fundamentally unfair proceeding.

n. There were Extensive Improper Communications Between the Applicant and the Decision Maker Before the Original Application was filed on March 13, 2002.

The Mayor, Attorney Bohlen and the City Council had numerous meetings before the March 13, 2002 application was filed, which evidenced pre-adjudication of the merits. The City and Applicant conspired to annex a strip of land that "jutted out" into the County, thereby establishing the City as a siting authority while subjecting County residents to the impact of a second landfill. The City negotiated a lucrative host agreement. The Applicant drafted the City's siting Ordinance. The City even allowed the Applicant to present its case to the City Council on February 19, 2002 without sending any required 39.2(b) notices and allowed the Applicant to disparage the formal 39.2 hearing and any objectors' witnesses. All of these improper acts should be considered with the subsequent improper conduct to conclude that the overall proceedings were fundamentally unfair.

o. The Proceedings were Fundamentally Unfair Because the City Council Once Again Ignored Irrefutable Evidence that Criteria ii and viii Were Not Met.

For the reasons set forth in the specific discussion of the manifest weight of the evidence, the underlying proceeding should also be reversed because the City Council prejudged the merits of the application, deliberately ignored irrefutable evidence, and was biased in favor of the application. This is evidenced not only by all of the instances of preadjudication and improper conduct that have been mentioned throughout this brief, but also by the fact that once again the City Council ignored clear and unequivocal evidence that: (1) the applicant mischaracterized the bedrock in order to come to a conclusion that criterion ii was met, and (2) the Applicant has

made a completely ridiculous argument that somehow its landfill is "contiguous" to the existing landfill (when it is in fact two miles from the existing landfill). Obviously, the willful disregard of the manifest weight of the evidence by the City Council is further strong evidence of the pre-adjudication which took place in this case, and the fundamentally unfair nature of the proceedings.

IV. CONCLUSION

For the foregoing reasons, Petitioners , County of Kankakee and State's Attorney Edward D. Smith, pray that the Illinois Pollution Control Board issue an Order reversing the decision of the City of Kankakee which approved the Landfill Siting Application of Respondent, Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C.

Respectfully Submitted,

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