ILLINOIS POLLUTION CONTROL BOARD

BYRON SANDBERG, Petitioner,	)	
vs.	)	PCB 04-33
THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN & COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C. Respondents.	)	(Third Party Pollution Control Facility Siting Appeal)
WASTE MANAGEMENT OF ILLINOIS) INC., Petitioner,	)	
vs.	)	PCB 04-34
THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN & COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	(Third Party Pollution Control Facility Siting Appeal)
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NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on January 9, 2004 there caused to be filed via U.S. Mail with the Illinois Pollution Control Board an original and 9 copies of the following document, a copy of which is attached hereto:

Motion For Leave To File Brief In Excess Of 50 Page Limit

BY: _____
Attorney at Law

****

PROOF OF SERVICE

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

The undersigned, being first duly sworn, state that I served a true and correct copy of the foregoing Notice, together with a copy of each document referred to therein, upon the person(s) indicated via U.S. Mailas indicated in the Service List on the 9th Day of January, 2004.

Pat Wade

SUBSCRIBED and **SWORN TO** Before Me This 9th Day of January, 2004.

Notary Public

"OFFICIAL SEAL"
GENIA FOX
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1/3/08

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BEFORE THE
THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
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STATE OF ILLINOIS
POLLUTION CONTROL BOARD

BYRON SANDBERG, Petitioner, vs. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN & COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C. Respondents.	) PCB 04-33) (Third Party Pollution Control Facility Siting Appeal)
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MOTION FOR LEAVE TO FILE BRIEF IN EXCESS OF 50 PAGE LIMIT

Now comes the Respondents, Kankakee Regional Landfill, L.L.C. and Town & Country Utilities, Inc. (hereinafter "Town & Country"), and move for leave to file a Brief in excess of the Board's 50 page limit. In support thereof, Respondents state as follows:

ILLINOIS POLLUTION CONTROL BOARD

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NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on January 9, 2004 there caused to be filed via U.S. Mail with the Illinois Pollution Control Board an original and 9 copies of the following document, a copy of which is attached hereto:

Brief Of Respondents, Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C.

BY: _____
Attorney at Law

****

PROOF OF SERVICE

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

The undersigned, being first duly sworn, state that I served a true and correct copy of the foregoing Notice, together with a copy of each document referred to therein, upon the person(s) indicated via U.S. Mailas indicated in the Service List on the 9th Day of January, 2004.

Pat Wheeler

SUBSCRIBED and **SWORN TO** Before Me This 9th Day of January, 2004.

_____
Notary Public

"OFFICIAL SEAL"
CINDY COX
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1/3/08

BEFORE THE
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BRIEF OF RESPONDENTS, TOWN & COUNTY UTILITIES, INC. AND KANKAKEE REGIONA LANDFILL, L.L.C

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BRIEF OF RESPONDENTS, TOWN & COUNTRY UTILITIES, INC. AND KANKAKEE REGIONAL LANDFILL, L.L.C.

I. INTRODUCTION

A. Nature Of The Case

On March 7, 2003, the Respondents, Town & Country, Inc., and Kankakee Regional Landfill, L.L.C. (hereinafter "Town & Country") filed an Application with the City of Kankakee for local siting approval of a new regional pollution control facility. That Application proposed a new municipal solid waste landfill of approximately 400 acres with a waste disposal footprint of 236 acres and an estimated service life of 30 years. Town & Country Utilities had previously filed an Application for siting approval for the same described real estate on March 10, 2002. On August 19, 2002, the City Council of Kankakee, Illinois unanimously approved the first Application for siting approval. On review filed by Kankakee County and Waste Management of Illinois, the Illinois Pollution Board (Board) reversed the City Council, holding in its decision of January 9, 2003 that the City Council's unanimous decision on siting criterion ii was against the manifest weight of the evidence. Further review of the Board's decision, including the cross-appeals by Kankakee County and Waste Management of Illinois, Inc., is pending in the Third District Appellate Court. While Town & Country has appealed the Board's previous decision, it is also mindful of its contents. The substantial additional hydrogeologic investigation included in the second investigation addresses the shortcomings identified by this Board. The Board's decision, then, has become the catalyst for a more thorough, different, and better application.

As was the case with the first Application, the County of Kankakee, Waste Management of Illinois, Inc., and Byron Sandberg once against registered as Objectors to the instant siting request. None of the other Objectors from the initial hearing appeared or participated in the hearing on the instant Application. Kankakee County's Brief

suggests, without reference to any fact or citation to the record, that the resources and will of other former Objectors have been depleted. (County Brief, Page 8).

The Town & Country siting Application consisted of the five large bound volumes previously filed and three new volumes as well as supplemental drawings, core samples, core sample observation logs, and modeling data, totaling over 2300 pages of new hydrogeological data. (C-1860).

The public hearing on the Application was conducted over five consecutive days commencing on June 24, 2003 and concluding on June 28, 2003. The hearing was presided over by Robert Boyd, a licensed attorney who was not otherwise employed by, nor connected with, any of the parties to the hearing. (C-1861).

Public comments were received through July 29, 2003. During the public hearing, Town & Country called seven expert witnesses who testified and were cross-examined regarding various aspects of the Application. Kankakee County called Jeffrey Schuh, an engineer whose firm had been retained by the County to review both the Town & Country Application and Waste Management's Application for siting approval of an expansion by the County, and Waste Management of Illinois, Inc. called Stuart Cravens, a geologist.

The City Council also received input from its own consultant, Ronald Yarbrough, a geologist. On August 18, 2003, the City Council adopted Findings of Fact and Conclusions of Law and approved the Application of Town & Country with a number of conditions by a 12 to 1 vote with 1 person abstaining. (C-1890) 1 The City also reviewd

1 References to the transcript of the siting hearing will be by volume and page number as this is consistent with the references used in the County Brief. Other references to the record generated in the hearings before the City will have a "C" designation as set forth in the Certificate of Record filed by the City. References to the PCB Hearing and depositions admitted at that hearing will be as such. The record of the first proceeding before this Board in PCB 03-31 have been incorporated herein by stipulation by the parties, and the occasional citations to portions of that first record will be clearly identified as such.

the previous Board decision.

All three of the Objectors filed timely Petitions For Review by this Board. Those Petitions were consolidated and these proceedings ensued. The parties have agreed to incorporate the entire record of the previous case (PCB 03-31) into this record. Kankakee County filed a rambling, repetitive 109 page Brief which contained scant summaries of the facts and reargued many of the issues decided against the County by this Board in PCB 03-31. Some of the County's arguments are obviously advanced in bad faith as they have no arguable basis in the law. These include, but are not limited to, the County's argument that receipt of certified mail by household members other than the addressee renders the mailing invalid, and that because this Board reversed the City's approval in the first Application as being against the manifest weight of the evidence, that approval, itself, by the City is in need of evidence of prejudgment and bias. The County's Brief is also particularly difficult because many of the Board decisions and Appellate cases cited do not support the propositions for which they are cited. Town & Country is confident that the Board will carefully review the County's legal authorities and see them for what they are. Lastly, the County's Brief is difficult because it contains an unending series of factual exaggerations and hyperbole which are not justified by the underlying record. Waste Management of Illinois adopted the Brief of Kankakee County while many of the issues raised by the County are the same or similar as issues previously raised by them. The right and ability of the public to participate is not an issue in the instant appeal.

This is the third case within one year before this Board involving Kankakee County and the City of Kankakee, unfortunately, as antagonists. Again, Town & Country

is confident that the Pollution Control Board can set aside the rancor and hyperbole and focus on the merits of the its position. The Board is asked to keep the arguments raised by those antagonists and its rulings in those previous cases in mind in considering this appeal. A fair summary of those previous cases is that Kankakee County has taken the position that it, alone, has the right to site a landfill under its sole jurisdiction. The Board, in reviewing the arguments of the County in this case, is asked to remember that Kankakee County has gone on record in all three of the cases before the Board in the last year as well as in its three recent amendments of its Solid Waste Management Plan with the unequivocal statement that the only landfill siting legally possible in Kankakee County is expansion of the existing Waste Management facility due to close in 2004.

B. Standard Of Review

Section 40.1 of the Act requires the Board to review the proceedings before the local decision maker to assure fundamental fairness. In *E & E Hauling*, the Appellate Court found that although citizens before a local decision maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The Court held that standards of adjudicative due process must be applied. *(E & E Hauling, 451 N.E.2d at 564; see also Fairview Area Citizens Task Force (FACT) vs. Pollution Control Board, 144 Ill.Dec. 659, 555 N.E.2d 1178 (3rd Dist. 1990)).* Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. *Waste Management of Illinois, Inc. vs. Pollution Control Board, 175 Ill.App.3d 1023, 530 N.E.2d 682, 693 (2nd Dist. 1988).* The manner in which the hearing is conducted, the opportunity to be heard, the existence of

ex parte contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. *Hediger vs. D & L Landfill, Inc, (PCB 90-163, December 20, 1990).*

The above standard of review had been frequently repeated in the decisions of this Board. However, recent decisions of the Illinois Appellate Courts suggest that the fundamental fairness standard be viewed in the context of the siting authority's role as both a quasi-legislative and quasi-adjudicative body, and that by reason thereof the standard should be restricted rather than expanded. For example, the Third District Appellate Court has stated in *Land & Lakes Co. vs. Pollution Control Board, 309 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000)*:

> "A nonapplicant who participates in a local pollution control facility siting hearing has no property interest at stake entitling him to the protection afforded by the constitutional guarantee of due process. *Southwest Energy Corp vs. Pollution Control Board, 275 Ill.App.3d 84, 211 Ill.Dec. 401, 655 N.E.2d 304 (1995).* However, under Section 401.1 of the Act *(415 ILCS 5/40.1 (West 1998)*, such a party has a statutory right to "fundamental fairness" in the proceedings before the local siting authority. *Southwest Energy Corp,75 Ill.App.3d 84, 211 Ill.Dec. 401, 655 N.E.2d 304.* A local siting authority's role in the siting approval process is both quasi-legislative and quasi-adjudicative. See *Southwest Energy Corp, 275 Ill.App.3d 84, 211 Ill.Dec. 401, 655 N.E.2d 304.* In recognition of this dual role, courts have interpreted the right to fundamental fairness as incorporating minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence. *Daly vs. Pollution Control Board, 264 Ill.App.3d 968, 202 Ill.Dec. 417, 637 N.E.2d 1153 (1994).*"

It is obvious from the foregoing therefore that fundamental fairness is a standard derived from and interpreted in context. As such, fundamental fairness violations should not be found based on isolated incidents, inadvertent problems, or harmless error so long as the "minimal" requirements are satisfied.

While the determination of fundamental fairness is made on a *de novo* basis, the Board acts in an appellate capacity regarding the 9 substantive siting criteria, confining its review to the record made before the local siting authority.

It is has long been established that the decision of the local siting authority in a landfill siting appeal should not be overruled unless it is against the manifest weight of the evidence. *McLean County Disposal, Inc. vs. County of McLean, 207 Ill.App.3d 477, 566 N.E. 2d 26 (4th Dist. 1991).* The Pollution Control Board, in reviewing the factual findings of the local decision maker, is not to reweigh the evidence or make new credibility determinations. *Waste Management of Illinois, Inc. vs. Pollution Control Board, 160 Ill.App.3d 434, 513 N.E.2d 592 (2nd Dist. 1987).* The determination of whether a proposed facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected is purely a matter of assessing the credibility of expert witnesses. *Fairview Area Citizens Task Force vs. Illinois Pollution Control Board, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3rd Dist. 1990). File vs. D & L Landfill, Inc., 219 Ill.App.3d 897, 579 N.E.2d 1228 (5th Dist. 1991).* It is not the duty of the Board to reweigh the evidence, to judge the credibility of the witnesses, or to substitute its opinion for that of the local decision maker. The Appellate Court decision in *Fairview Area Citizens Task Force* can fairly be read as mandating that if there is any evidence to support the local siting authority's decision, that decision must stand.

The fact that a different decision might be reasonable is insufficient for reversal. The opposite conclusion must be clear and indisputable. *Willowbrook Motel vs. Pollution Control Board, 135 Ill.App.3d 343, 41 N.E. 2nd 1032 (1st Dist. 1985).*

II. THE CITY COUNCIL HAS JURISDICTION TO CONDUCT THE SITING HEARING

A. All Property Owners Entitled To Service Of Pre-Filing Notice Were Properly Served

The County argues that Town & Country failed to give notice to all owners of Parcel No. 31-16-23-400-001 (the Skates Parcel). They base their argument on the testimony of Sheila Donahoe, the Chief County Assessment Officer, that the property index record card maintained in her office for this Parcel shows the address of all of the owners except Judith Skates as 22802 Prophet Road, Rock Falls, Illinois. The property index card which one would first access in the County's computer data base, in fact, shows the Rock Falls address as being the address of the property owners. (Board Hearing, Pages 52, 71). As indicated in the Affidavit of Service contained in the Siting Application as well as the testimony of Town & Country President Tom Volini in his deposition, which deposition was admitted as substantive testimony at the Board Hearing (Petitioner's Exhibit 23), Town & Country sent certified mail notice on this Parcel to Judith Skates at 203 S. Locust St., Onarga, IL 60955 and to the other five record owners, (as identified on the property index cards only),c/o of Judith Skates, at the same address. These notices were all received and signed for in a timely manner.

The facts of service regarding the Skates Parcel are not in dispute, and the arguments raised by Petitioners are nothing more than a refined and enhanced version of the arguments previously rejected by this Board in the appeal of the first siting proceeding involving these same parties. In PCB 03-31, this Board specifically found that service on Judith Skates alone was sufficient to satisfy the statutory service requirement, given the conflict between the various authentic tax records of Kankakee

County. (*County of Kankakee vs. City of Kankakee, PCB 03-31, January 9, 2003, Slip Opinion at 16, 17).*

The testimony of the County's Chief Assessment Officer, Sheila Donahoe, revealed that there are three distinct and different authentic tax records relating to the Skates Parcel. The first of these is the property index record card which is generated when the parcel number is input into the Assessor's shared computer database. (Board Hearing, Page 61). The first card which comes up is the name card which shows the names of six owners, including Judith Skates, and shows the address for all of them as being in Rock Falls, Illinois. The second tax record is the change of address form for this Parcel filed by Judith Skates, also an authentic tax record of the County. (Board Hearing, Page 73). This record, included in the attachments to Petitioner's Exhibit 9 is entitled "Name and Address Change Only." It identifies the Parcel number as 13-16-23-400-001, and indicates in the line immediately below the Parcel number, "Skates, Judith and Bradshaw." 2 The third tax record applicable to this Parcel is the real estate tax bill sent out from the Treasurer's Office, which bill is addressed and sent to Judith Skates only at her Onarga, Illinois address. (Respondents' Exhibit #1). This tax bill is also identified by Ms. Donahoe as an authentic tax record of the County. (Board Hearing, Page 78). In contradiction to Ms. Donahoe's inference that the property index card is the master record, Tom Volini testified that shortly before sending out the required notices of intent to file this Application, he was told by a Deputy Assessor and two Clerks in the Assessor's Office that the real estate tax bill for the subject parcel, showing Judith Skates

2. There is an apparent error on Page 74, Line 6 of the Transcript of the Board Hearing of December 2, 2003. Reference at that location to "Judith Ann Bradshaw" should, in fact, have been transcribed as "Judith and Bradshaw." This is made clear by the context to the question which refers to the change of address card for this Parcel and reference to the card, itself, which clearly shows the owners identified as "Skates, Judith and Bradshaw."

as the sole recipient and tax payer, is the most up to date record available. He indicated this was confirmed by a call from the Assessor's Office to the Treasurer's Office and was personally confirmed to him by the Kankakee County Clerk. (Volini Deposition, Pages 66-70).

The foregoing 3 distinct, but authentic, tax records of the County were part of the record in the previous siting proceedings and appeal, and the testimony of Ms. Donahoe is the only new twist by Petitioners. They rely on her conclusion that the change of address form submitted by Judith Skates applied only to her and not to the other five owners. (Board Hearing, Page 63). Accordingly, Ms. Donahoe concluded that as far as she is concerned, the correct address for the other five owners of the Skates Parcel remained in Rock Falls, Illinois. She did, however, acknowledge that she did not know whether any of those other five owners actually lived at the Rock Falls address. (Board Hearing, Page 72). She also acknowledged that the change of address form does not show, on its face, that it is limited to only one owner, and acknowledged that the identifying number on the form is for the entire Parcel. (Board Hearing, Page 77). Moreover, a closer look at the document itself suggests that Ms. Donahoe's conclusion is unreasonable, and that the document is best understood as evidencing an intent on the part of Judith Skates to change the address and mailing information for all the owners of the Parcel. A review of the change of name and address document, which is one of the attachments to Petitioners' Exhibit #9, shows that Judith Skates actually filed changes for two different parcels. The first is for the parcel previously discussed, and the second is for an unrelated parcel where the owners are identified as "Bradshaw, Sara Jane and Skates, Judith." This combined with the fact that the identifying information for the

change of address form on the subject Parcel includes the words "and Bradshaw" unequivocally demonstrates that Judith Skates was intending to file a change of address for more than just herself. There is little logic in Ms. Donahoe's explanation, but her potential bias as an employee of the Petitioner should not be overlooked.

The absurdity of Petitioner's argument that the owners of the Skates Parcel should have been served at the Rock Falls, Illinois address is underscored by the fact that in the first siting proceeding involving these parties, Patricia vonPerbandt, a private process server hired by Town & Country, testified that she, in fact, attempted personal service on all of the listed owners at 22802 Prophet Road, Rock Falls, Illinois, and encountered an individual there who identified herself as the daughter of Judith Skates and indicated that none of the listed owners lived at the Rock Falls address, and that all matters relating to the Parcel were being handled by Judith Skates who lived in Onarga, Illinois. (PCB 03-31, Board Hearing 11/6/02, pages 285-188). This is consistent with the real estate tax bill which identifies Judith Skates at her Onarga, Illinois address as the sole addressee and recipient.

In an apparent attempt to confuse the issue, the County submitted the Affidavits of the owners of the subject Parcel, the Affidavit of Judith Skates stating that she was not authorized by the other owners to receive notices concerning the property, and that she did not forward to those owners the notices which she received. The Affidavits of the other five owners in essence state that they did not authorize Judith Skates to receive notices on their behalf, that Judith Skates did not forward any notices to them, and that they might have objected to the siting of the proposed facility had they been aware of the proceedings.

By way of response, Town & Country points out that these so-called Affidavits were submitted as public comment by the County of Kankakee, and, as such, were not subject to cross-examination. They, accordingly, have no more value than hearsay and, because not subject to cross, it is exceedingly unfair to rely upon them. What is, however, striking about the Affidavits themselves is that none of the Affiants provides his or her address. If any of the Affiants had, in fact, resided in Rock Falls, Illinois, one can be certain that this fact would have been included in that person's Affidavit. Accordingly, the Affidavits, themselves, support the testimony of the private process server, Patricia vonPerbandt, that none of the listed owners were found or resided at the Rock Falls, Illinois address.

Most importantly, however, the Affidavits, themselves, are irrelevant in that they are an improper attempt to go behind the authentic tax records. Owners entitled to notices are, "such persons or entities which appear from the authentic tax records of the county." *415 ILCS 5/39.2 (b).* The authentic tax records of the County provide two conflicting addresses for the owners as well as conflicting information as to who the owners are. Based upon the testimony of Ms. vonPerbandt, the change of address form filed for the Parcel, and the fact that the Treasurer's tax bill goes to Judith Skates in Onarga, Illinois, the address in Rock Falls is clearly an incorrect and obsolete address. Moreover, Ms. Donahoe testified that the property index cards have "mail and notice flags" which specify that the tax bill and all notices regarding the property are to be sent to Judith Skates at the Onarga address where both the Skates and other notices were sent and signed for.. (Board Hearing, Page 80-83). The tax records, therefore, all uniformly

indicate where and to whom notices are to be sent, and these are dispositive, the Affidavits of the owners to the contrary notwithstanding.

Town & Country also points out that unlike in the first siting proceeding when notice was only sent to Judith Skates, in this proceeding notice was actually sent to all six of the owners of the subject Parcel, albeit to the Onarga, Illinois address. Two of the three relevant authentic tax records, the change of name and address form and the real estate tax bill, as well as the information gleaned from County Officers by Mr. Volini, suggest that only Judith Skates was entitled to receive notice. The "mail and notice flags" in the County's tax records confirm this. Town & Country has, therefore, actually done more by way of notice than is required in the statute and than is required in the Board's precedent in its decision in PCB 03-31. Service of registered mail on only one of a number of heirs, when that one person appears to be the designee for receipt of mail, has been approved by both the Board and the Appellate Court with the holding that, "It is true that only one heir received notice, but only that heir was listed by name and address in the tax records to receive that tax statement on behalf of all the heirs." *Wabash & Lawrence Counties Tax Payers and Water Drinkers' Association vs. Pollution Control Board, 198 Ill.App.3rd 388, 554 N.E.2d 1081 (5th Dist. 1990).* This is particularly true in a case such as this where (a) the record demonstrated none of the other heirs lives at the address stated in the superceding County tax records, and (b) the "notice and mailing flags" in those records direct notice to Judith Skates in Onarga. Additionally, the fact that notice may not actually have been received by one or more of the property owners is irrelevant in light of this Board's recent holding in *City of Kankakee vs. County of Kankakee and Waste Management of Illinois, Inc., PCB 03-125, August 7, 2003,* that

service of notice is complete upon mailing.

The County's argument regarding service on the owners of the Skates Parcel is representative of the tone of its entire Brief. In essence, the County is rearguing its own position regarding service which a post Board rejected. The County urges the Board to reverse the City Council based upon a fiction, namely Town & Country's failure to send notice to an address where all of the parties knew that none of the owners lived. The other fiction which the County urges is that notice was not sent to the five owners other than Judith Skates although such notice was not required in this case. The Affidavit of Mr. Volini and his testimony are clear that notice was sent to each of them albeit "c/o of" Judith Skates. This point is actually admitted in the County Brief (County Brief, Page11). This fact distinguishes the instant case from the City of *Kankakee vs. County of Kankakee* case where no notice was ever addressed or sent to Mrs. Keller. 3

Is the County arguing that certified mail notice to the other five property owners would have been more effective if the words "c/o Judith Skates" had been left off the envelope containing the notices addressed and sent to them? Alternatively, the County suggests that the Board read into the statute regarding service the requirement that an applicant actually locate each owner before attempting service. The County argues that Town & Country was not diligent in trying to ascertain the true address of all of the owners other than Judith Skates. However, the statute does not require an applicant to go beyond the tax records. Aside from the fact that in this case two of the three relevant authentic tax records did not even identify the five individuals other than Mrs. Skates as owners; Town & Country identified all of the owners; Town & Country physically

3 There was also no issue in the Waste Management case about the fact that Brenda Keller was a listed owner on all the authentic tax records of the County, and that there was no conflict in such records.

determined that none of them resided at the Rock Falls address; Town & Country learned from the authentic tax records that all notices to these owners were being sent to Judith Skates in Onarga, Illinois; and Town & Country then sent certified mail notice to all the owners at the Onarga, Illinois address. For the Board to require Town & Country, or any other applicant, to go behind tax records to resolve discrepancies between conflicting records, to find missing owners or to locate the actual whereabouts of those owners who have deferred their right to receive legal notices regarding the property to other owners imposes an impossible burden.

Under the County's reasoning, certified mail notice sent to the five owners other than Skates at the Rock Falls address would have satisfied the statutory notice requirement even though the Applicant knew none of the owners resided at that address. Such an approach is consistent with this Board's holding in *City of Kankakee vs. County of Kankakee* regarding when certified mail notice is complete, and the Board's ruling in that regard promises to ease in the future what had become a draconian, and sometimes absurd, burden on applicants regarding service of notice. However, *City of Kankakee vs. County of Kankakee* had not yet been decided at the time that Town & Country served pre-filing notice in this case, and sending all of the notices to all of the owners c/o Judith Skates at her known Onarga address clearly seemed like the best way, short of hiring detectives to search out the addresses of the other five owners, to insure that all of the owners got actual notice of the filing.

The public comment statements of all the owners to the contrary notwithstanding, Judith Skates was pursuant to the tax records the apparent agent for all the owners. She was the only one listed to receive the tax bill, and the Applicant was entitled to rely on

that authentic tax record. Accordingly, testimony of Sheila Donahoe that there is no conflict among the various authentic tax records of the County is contradicted by the content of those records themselves as well as the testimony of Mr. Volini, and the records remain as inconsistent as they were at the time the Board decided this same service question in January of 2003. This designation of Judith Skates on the tax records as the only person to receive the real estate tax bills and all other legal notices regarding the property further distinguishes these facts from the facts relating to Waste Management's failure to serve Mrs. Keller in *City of Kankakee vs. County of Kankakee,* which are argued by the County as being controlling.

B. Notice To The Owners Of All Other Parcels Was Effected Regardless Of Who Signed The Return Receipts

The County devotes almost 4 pages of its 109 page Brief (actually 115 pages when one considers Appendix B which is substantive argument) to an argument made in bad faith and in complete disregard of existing precedent; namely, that return receipts for certified or registered mail signed by an individual other than addressee renders notice ineffective. The County justifies the argument by stating that it is relevant if the Appellate Court overrules the Board in *City of Kankakee vs. Waste Management of Illinois, Inc.* This identical argument was considered by the Board and dismissed in *County of Kankakee vs. City of Kankakee, et al, PCB 03-31 (January 9, 2003, Slip Opinion at pages 17, 18).* The Board at that time declined the County's request to abandon the well established precedent set in *DiMaggio vs. Solid Waste Agency of Northern Cook County, PCB 89-138, (Slip Opinion at 10, 1990)* and *City of Columbia vs. County of St. Claire and Browning –Ferris Industries of Illinois, Inc., PCB 85-177, (Slip Opinion at 13-14, 1986)*, that someone other than the addressee may sign for and accept

the notices required in Section 39.2(b) of the Act. The County acknowledges this point in a footnote in its Brief, but argues that if *County of Kankakee vs. City of Kankakee, PCB 03-31,* is overturned by the Appellate Court, then *Ogle County Board vs. PCB, 272 Ill.App.3d 184, 649 N.E.2d 545* requires that the actual addressees must sign for the notice. This is simply not true or correct as the *Ogle County Board* case dealt with the timing of the sending and receipt of notices and has never been construed as overruling *DiMaggio* or *City of Columbia.*

C. The Siting Application Was Complete For Jurisdictional Purposes

In an argument better related to whether the City's decision in criterion ii was against the manifest weight of the evidence, the County argues that Town & Country's failure to include in the Application additional sensitivity runs of its groundwater impact model rendered the Application incomplete and therefore deprived the City Council of jurisdiction. The cases cited by the County in support of its argument are all irrelevant in that they deal with failure to make filed documents available to the public rather than with the issue of what documents are required to be filed in the first instance. Here the County argues that Town & Country failed to file required information. Neither Section 39.2 of the Act, nor the City Siting Ordinance specify what, if anything, must be filed regarding groundwater modeling, so the County's argument has no basis in statutory requirements. Instead, the County bases its argument on the testimony of its only witness, Jeffrey Schuh, who apparently found the 8 volume, 4,000 page Application of Town & Country insufficient to concur with its conclusion. The City Council in its Findings of Fact noted that Mr. Schuh "did not testify that the facility was not protective

of the public health, safety, and welfare, but only that he felt there was insufficient information to conclude that the issue of public safety was proven." (C-1869).

Regardless of whether they are required, Mr. Schuh's testimony that Town & Country failed to include multiple sensitivity analyses in the Application is simply mistaken. An original baseline model run of the groundwater impact evaluation was submitted with the March , 2002 Application. (Appendix P-2 of 2002 Siting Application). A new and different baseline model run was submitted with the March, 2003 instant siting Application. (Appendix P-2 of 2003 Siting Application). A sensitivity run done to evaluate the effect of increasing the modeled thickness of the Uppermost Aquifer from 10 feet to 50 feet is included in Appendix P-5 of the current siting Application. An additional sensitivity run done to evaluate the effect of the addition of a geo-composite liner to the liner system on the baseline model is contained in Appendix 6 of the current siting Application. Accordingly, the materials filed by the Applicant prior to the hearing contained four iterations of the groundwater model.

Mr. Schuh's blatantly erroneous testimony is not surprising and is consistent with other problems in his testimony. For example, the City Council was concerned that Mr. Schuh had no knowledge of the findings of two employees he supervised in review of the adjacent Waste Management Application for Kankakee County, and that this undermined his credibility. (C-1871). Mr. Schuh's forgetfulness as to what his subordinates approved on behalf of the County in the Waste Management siting Application is perhaps explained by the fact that no sensitivity analysis, whatsoever, were contained in Waste Management's Application. (C-1895).

D. <u>The Application For Siting Aprroval Is Not Subject To The Two Year Prohibition On Re-Filing In Section 39.2(m) Of The Act</u>

415 ILCS 5/39.2(m) states in pertinent part that, "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 criterion (i) through (ix) of Subsection (a) of this Section within the preceding two years." Town & Country previously filed an Application for local siting approval which received unanimous approval from the City Council of the City of Kankakee on August 19, 2002. This Board reversed the City Council's decision, holding that the City Council's finding that the facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected was against the manifest weight of the evidence. (*County of Kankakee vs. City of Kankakee, et al, PCB 03-31, January 9, 2003).* Town & Country's appeal of that decision and the other parties' cross-appeals are still pending before the Third District Appellate Court (Case No. 3-03-0025). Meanwhile, Town & Country has had an opportunity to review the Board's decision in the first case and correct the perceived deficiencies.

Town & Country initially argues that the previous Application was not "disapproved" within the meaning of that term in Section 39.2(m) of the Act. This conclusion is shared by the City Council which found in its decision "that the prior Application was not, in fact, disapproved by the local siting authority." (C-1863). There are no reported cases which address the question of whether reversal by the Pollution Control Board is legally equivalent to "disapproval" as that term is used in the Act, so this is a question of first impression. The concepts of approval and disapproval are

generally applied to the local siting authority's decision-making process. On the other hand, these terms are not generally used to describe the Board's review process. Instead, the Board's review of the local decision on the substantive siting criteria results in that decision being "affirmed" or "reversed." The mere choice of the word "disapproved" by the legislature in this Section implies a legislative intent to apply the two-year prohibition on re-filing only after local disapproval.

The foregoing inference of legislative intent is supported by an obvious public policy consideration, namely that a local municipality should be protected from unwelcome re-filings which can potentially strain its resources. Such a public policy consideration would obviously not be applicable to a case where there is initial local approval which was reversed by the Pollution Control Board due to some error by the local siting authority.

Some guidance is found in the Court's decision in *Turleck v. Pollution Control Board, 274 Ill.App.3d 244, 653 N.E.2d 1288 (1st Dist. 1995).* That case involved a second application for siting approval filed after local approval of the first application was reversed by this Board on fundamental fairness grounds. Therefore, the case is clearly outside the language of Section 39.2(m). Nonetheless, in dicta the Court pointed out that the first application "was approved, not disapproved by Summit. The prohibition upon which Petitioners rely relates to subsequent applications following a disapproved application." *(210 Ill.Dec. at 829).*

In addition, the pending Application is not "substantially the same" as the previous Application. The Appellate Court has held that merely because an application proposes the same facility at the same location as previously, it is not necessarily

"substantially the same." Instead, the trier of fact needs to consider the actual differences between the contents of the two applications. *Laidlaw Waste Systems vs. Pollution Control Board, 230 Ill.App.3d 132, 595 N.E.2d 600 (5th Dist. 1992).*

On remand from the Appellate Court's decision in *Laidlaw*, the Pollution Control Board further remanded to the siting municipality, the Village of Roxanna, for a factual determination of whether the application filed within two years of Roxanna's disapproval of an earlier application was "substantially the same" as the earlier application. The PCB then reviewed the Village's findings that the two applications were not substantially the same on six of the nine substantive siting criteria. The PCB found that there do not need to be differences in all of the criteria in order for the applications to not be substantially the same. The Board actually suggested that differences in the proposed service area alone would be sufficient to render the two applications not substantially the same. (*Worthen v. Village of Roxanna and Laidlaw Waste Systems, PCB 90-137, September 9, 1993).*

Town & Country would note also that the Appellate Court in *Turlek* suggested in dicta that merely changing the daily intake volume at a proposed facility might be enough to render two applications not substantially the same: "There is additional doubt as to whether the two applications are "substantially similar" since WSREC's first application proposed a facility capable of disposing 1,000 tons of waste per day while its subsequent proposal envisioned an 1800 ton per day facility." *(653 N.E.2d at 1291).*

The standard of review for the Board on this issue is to determine whether or not the City's decision that the first and second Application are not substantially the same is against the manifest weight of the evidence. *Worthen v. Village of Roxanna and Laidlaw*

Waste Systems (PCB 90-137, September 9, 1993).

The City Council made specific factual findings regarding the differences between the two siting Applications. These are as follows:

> "(a) Specifically, the service area described by the Applicant is substantially smaller in the current Application than in the prior Application. (b) The current Application contains substantial, additional hydro-geological information including three additional volumes not previously included in the prior Application. (c) The current Application further proposes alternate designs not included in the prior Application including a geo-composite liner, a double 60 ml. liner of the sumps and the v-notches, incorporation of the updated Flood Plain Map, new studies regarding endangered species, biology, fish, and muscles and mammology and archaeological investigations, substantial amounts of groundwater impact monitoring using a two-dimensional model and substantial additional groundwater monitoring data." (C-1863)

Applicant's Exhibit #16 from the local siting hearing graphically illustrates the differences between the two Applications as to hydrogeologic data, alone. A copy of that Exhibit is appended to this Brief for the Board's convenience and to facilitate comparison of the Applications.

The City Council's specific findings regarding the differences between the two Applications are, in fact, supported by the record. Devin Moose, the Applicant's chief engineer, testified that there is a substantial difference in the degree and thoroughness of the hydrogeologic investigation between the first and the second Application. (Hrg. Tr. Volume 3 B, Page 28). These differences are graphically summarized in Applicant's Exhibit #16. In addition, Mr. Moose testified regarding engineering changes including the addition of double 60 ml. liners in all sumps and v-notches. (Hrg. Tr. Volume 3B, Page 32). Dry hydrants were added at the storm detention basins. (Hrg. Tr. Volume 3B, Page 34). Additionally, as pointed out previously, the refiled Application contained four

iterations of the groundwater model whereas the original Application contained only one.

Additionally, the two Applications are substantially different with respect to the proofs regarding their consistency with the Kankakee County Solid Waste Management Plan. This is so because of Kankakee County Board Resolution 03-02-11-725 significantly amending County Solid Waste Management Plan on February 11, 2003. Mr. Moose testified at length describing the Application's consistency with this most recent amendment. (Hrg. Tr. Volume 3C, Pages 46-97)

It is noteworthy that the Applications are substantially different in the areas identified by the Pollution Control Board as being of primary concern in its decision reversing the previous local siting approval. Additional hydrogeologic investigation was performed to address the factual deficiencies cited by this Board in its January 9, 2003 decision. Town & Country argued to the City Council and continues to argue to this Board that the second Application with its new and additional hydrogeological evidence addresses every factual deficiency cited by the Board in its previous reversal. To the extent that the Applications are therefore obviously and significantly different in the area of previous concern to this Board, they cannot conceivably be thought of as being "substantially the same" within the meaning of that term in Section 39.2(m) of the Act.

The degree of the differences on points of previous concern to this Board are illustrative. For example, the Board was previously concerned that only one deep boring had been conducted in the Bedrock in the initial site investigation. The second Application presents the results of twenty-one continuously logged soil borings that penetrate ten feet or more into the Bedrock. In addition, Applicant's Exhibit #16 shows a 170% increase in the number of soil borings within or near the waste disposal boundary.

The second Application contains a five-fold increase in the amount of rock cored during the drilling. To ascertain whether the Bedrock at the site functioned as an aquifer or an aquitard, Town & Country increased the original 10 field permeability tests conducted in the Bedrock to a total of 78 such tests. Ten of these were conducted in competent Bedrock whereas none had originally been conducted in this unit.

Petitioners do not challenge the accuracy of the City Council's specific findings regarding the differences between the two Applications. The facts regarding the differences, and the facts regarding the similarities between the two Applications are really not in dispute. Petitioners, instead, argue that the number of the differences between the two Applications are so small in light of the number of similarities that the Applications should be considered substantially similar as a matter of law. However, they provide no legal support for this contention, nor do they propose an objective standard by which one can judge when the number of differences is sufficient and when it is not. If there is any factual evidence to support the local siting authority's decision, that decision must stand. *Fairview Area Citizens Task Force vs. Illinois Pollution Control Board, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3rd Dist. 1990).* The fact that a different decision might be reasonable is insufficient for reversal. The opposite conclusion must be clear and indisputable. *Willowbrook Motel vs. Pollution Control Board, 135 Ill.App.3d 343, 41 N.E.2d 1032 (1st Dist. 1985).* With this judicially determined standard in mind and the Petitioners unable to articulate a reason as to why the undisputed differences between the Application are insufficient, this Board must find that the two Applications are not substantially the same.

Consistent with the misleading statements and half truths which permeate the

County's Brief, the County erroneously misstates the statutory requirement by arguing that the evidence at the siting hearing showed that the two Applications were "substantially similar" rather than substantially the same. (County Brief, Page 2). In support of its argument regarding the evidence, the County cites eleven specific similarities between the two Applications. Actually, there are thousands, but those similarities, regardless of their number, are of no consequence when one considers the differences. The County Brief summarizes those differences in exactly one sentence, "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." (County Brief, Page 4). This characterization of the three full volumes of additional data filed by the Applicant as well as the quantum increase in the investigation of the Bedrock Till Interface is so misleading as to be simply untrue.

Interestingly, the County dismisses the differences in the service area as having no positive impact on the operation of the landfill and therefore being irrelevant to the reasons why the Board disapproved the first Application. Aside from the fact previously discussed that the term disapproval is inappropriate to describe the Board's action in reversing the City Council, this argument suggests some recognition that differences in the second Application directly related to the reasons for the Board's action of January 9, 2003 would be inherently significant, and by implication, substantial.

III. THE PROCEEDINGS WERE FUNDAMENTALLY FAIR

A. Overview

The County's entire fundamental fairness argument is summarized in a 4 page overview contained at the beginning of the 28 page argument. The County's argument dissects the relationship between Town & Country and the City of Kankakee as well as the City's decision-making process in excruciating detail. In fact, in such detail that the big picture is often lost. The County alleges that the conduct of the City with the Applicant and the conduct of the City in deciding this case cumulatively show a pattern of bias and prejudgment. To reach this conclusion, the County makes many sub-arguments which have all been rejected by this Board or the Appellate Courts in the past. For example, the County cites to the pre-filing discussions on administrative and unrelated matters between the Applicant and the City. The County cites to the fact that the City's consultant and the Applicant had a remote and isolated business contact many years prior to the Application. The County cites to the fact that the Hearing Officer has assistance from other City staff in drafting proposed Findings Of Fact for the City Council. The County cites to the fact that the City received and considered a report from its consultant after the public comment period was closed.

All of these arguments have been previously been rejected as evidence of bias or prejudgment. The County, however, urges that these various acts, while not individually evidence of prejudgment, cumulatively show prior bias and prejudgment by the City. In support, the County cites *American Bottom Conservancy vs. Village of Fairmont, PCB 00-200 (October 19, 2000)*. Few of the cases cited in the County's Brief actually support the proposition for which they are cited, and *ABC* is no exception. *ABC* dealt primarily

with fundamental fairness issues involving public access and participation, and this Board ultimately found that failure to make the Application and hearing transcripts available to the public were fundamentally unfair. *ABC* is, however, of significance in this case because the Board, in *ABC*, rejected Petitioner's claim that the fact that the hearing officer and city attorney were brothers-in-law who shared office space created some bias or conflict of interest on the part of the hearing officer. *(PCB 00-2000, October 19, 2000, Slip Opinion at Page 13).* Such well known precedent notwithstanding, the County urges this Board to infer from the fact that the hearing officer's law firm had interviewed, but not hired, the attorney when he first came out of law school that there is some grand conspiracy.

The County's argument consists entirely of smoke and mirrors. They want the Board to infer that the City Attorney hid or destroyed damaging documents, but there is not a scintilla of evidence to refute the City Attorney's claim that a number of the documents which the County sought were lost when there was a wide spread computer crash in his law office. What is missing from the County's argument is any hard or real evidence of prejudgment or bias. There are no statements in the record by any of the decision makers evidencing or even suggesting bias. There is evidence that Tom Volini frequently talked to the Mayor before the Application was filed, mainly about an industrial park. (Volini Deposition, Pages 11, 19). There is evidence that the City's consultant geologist talked to the Applicant's geologist, but only to obtain a report authored by a witness hostile to the Applicant. (Yarbrough Deposition, Pages 24, 25). There is evidence that the City Attorney made some changes and additions to the Hearing Officer's proposed Findings of Fact, but the Hearing Officer reviewed and approved

them. (Boyd Deposition, Page 20). What all of these individuals have in common is that none of them are decision makers. What is missing in this record is that any of these individuals had inappropriate contacts with the decision makers. There is nothing in this record to overcome the presumption that the City Council, the decision makers, performed their duty diligently and without bias.

The County's Statement of Facts in support of its fundamental fairness arguments is so selective and biased as to border on gross misrepresentation. Rather than restating the facts applicable to fundamental fairness comprehensively, Town & Country will incorporate appropriate facts with relevant citations as to each of the County's arguments.

B. The Role Played By The City Attorney And The Hearing Officer Did Not Render The Proceedings Fundamentally Unfair

The County alleges in fundamental fairness arguments 2d and 2e that the City Attorney and the City, itself, respectively, had improper ex parte communications with the Hearing Officer. (County Brief, Pages 90, 92). The two arguments appear to be the same as they both deal with communications between Chris Bohlen, the City Attorney, and Robert Boyd, the Hearing Officer. Factually, the arguments are premised on the assertion, unsupported anywhere in the record, that the City Attorney acted both on behalf of the City Council and the City staff. While it is true that Mr. Bohlen testified that as the City Attorney he generally represented and gave advice to all of its employees, the Mayor, and the Aldermen, Mr. Bohlen was careful to point out that in this proceeding he never advised the City Council, and he provided legal assistance only to the City staff. (Bd. Hrg. Pages 133, 135, 136). The first factual foundation of the County's argument is therefore lacking.

The County argues also that Mr. Bohlen "advocated" on behalf of Town & Country. This is based primarily upon the fact that he asked questions on behalf of the City staff during the siting hearing. The fact that the County didn't like the tone of the questions hardly means that the City Attorney was advocating. In fact, Mr. Bohlen, by his own previous testimony, is personally opposed to the Town & Country project. (PCB 03-31, Bd. Tr. 11-6-02, Page 355). The County adds that Mr. Bohlen "substantially advised City decision makers while advocating in favor of the Application," noting that "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." (County Brief at Page 92). A careful, rather than cursory, reading of the Council Minutes contained at Pages C-1891 through C-1939 of the record reveals that while Mr. Bohlen spoke on more than 50 occasions that evening, he was merely the staff member leading the City Council through the decision making process. As such, he acted like a Master of Ceremonies explaining the procedure, answering a few questions, and moving from point to point. He offered no opinions, nor did he tell the Council how to vote. It is noteworthy that in the packet presented to the City Council that evening, Mr. Bohlen included not only Mr. Boyd's findings, but also the proposed findings from all of the parties. (Bohlen Deposition, Page 34).

Additionally, the County relies on Mr. Bohlen's assistance in the preparation of the Hearing Officer's findings as evidence that he advocated for the Application. The County Brief alleges that:

> "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." (County

Brief, Page 94).

This statement in the County Brief goes beyond fair argument justified by the facts. It is simply untrue. Chris Bohlen, the City Attorney, testified that at the request of Mr. Boyd he provided him a copy with the City's Findings on the 2002 Application to use as a "template." (Bohlen Deposition, Page 24). These were e-mailed to Mr. Boyd who subsequently made appropriate changes based on the 2003 testimony and e-mailed them back to Mr. Bohlen. (Bohlen Deposition, Page 19). Bohlen then incorporated the references to Dr. Yarbrough's reports and the one special condition for grouting based on his reports, and returned the document to Mr. Boyd. Mr. Boyd then faxed back a couple of additional pages of changes which were incorporated into a final version. (Bohlen Deposition, Page 20). Mr. Bohlen does not remember whether he drafted the sentence finding that the County's Solid Waste Management Plan's prohibition of any landfills other than Waste Management's is an unconstitutional infringement on the City's home rule powers, but he was clear that this had long been the expressed will and feeling of the City Council. (Bohlen Deposition, Page 22).

Robert Boyd confirmed that he drafted the proposed Findings Of Fact. (Boyd Deposition, Pages 19, 22). He added that he reviewed the changes made to his draft and approved them. (Boyd Deposition, Page 20). He approved these changes made to his drafts because "they reflected a position that was consistent with mine based on what I heard and what I had read." (Boyd Deposition, Page 32). Regarding the language in the Findings about the County's Solid Waste Management Plan unconstitutionally infringing on the City's home rule authority, Mr. Boyd didn't recall whether he drafted that specific language, but stated, "I don't recall whether I did or whether I didn't, but that is

consistent with what I feel." (Boyd Deposition, Page 31).

The County bases its argument that the contacts between Mr. Bohlen and Mr. Boyd were improper ex parte contact on the legally and factually unjustified assertion that they represented contacts between a "party" and a hearing officer. A decision maker and a decision maker's technical and legal staff are not, and have never been, a "party" within the meaning of that term as used in all of the cases decided on ex parte contacts. A review of the four cases cited by the County in support of its argument is illustrative. The County first cites *Gallatin National Company vs. The Fulton County Board, PCB 91-256 (June 15, 1992).* In that case, Fulton County was both the applicant and the decision maker where the County Board actually designated a team to act on behalf of the application which it was required to consider. The PCB was critical of that team's lawyer who was assigned specifically to represent the "applicant" because of his frequent ex parte contacts with both the Hearing Officer and the County Board members who made up the siting hearing committee. However, this Board did not find that these contacts rendered the hearings fundamentally unfair because they did not reach the level where "as a result of improper ex parte communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect." *(Citing E & E Hauling, 1215 N.E.2d at 603).* In so finding, the Board emphasized that neither the committee of County Board members assigned as the "hearing committee" nor the hearing officer represented the decision maker, and that the only function of this committee was to preside at the hearing and make a recommendation to the full County Board. *(PCB 91-256, Slip Opinion at Page 13).*

The County next cites to *Concerned Citizens For A Better Environment vs. City of Havanna and Southwest Energy Corporation, PCB 94-44 (May 19, 1994).* In that case, in addition to ex parte contacts between the applicant and the hearing officer, the applicant participated in interviewing the hearing officer prior to her appointment, the applicant was a signatory to the hearing officer's fee agreement, the applicant retained contractually the right to terminate the hearing officer, the hearing officer's invoices went directly to the applicant, and the hearing officer wrote a letter to the applicant describing him as "the primary beneficiary" of her services. The PCB correctly found that this close relationship between the Hearing Officer and the applicant created inherent bias, but that has nothing to do with the instant case where Town & Country was not involved, in any way, with the selection of Mr. Boyd as the Hearing Officer. (Volini Deposition, Page 54). Interestingly, although Mr. Boyd, who was, as Hearing Officer, nothing more than a City employee, had contact with Mr. Bohlen in the preparation of his findings, he testified that he realized that he had to minimize his contacts with the City in order to achieve and maintain independence. (Boyd Deposition, Page 36).

The County notes that one of the primary issues in assessing ex parte communications with a Hearing Officer is "whether the Hearing Officer provided any recommended findings to the siting authority," (County Brief at page 98), and in support of that proposition cites *Citizens Against Regional Landfill vs. Illinois Pollution Control Board, et al., 255 Ill.App.3d 903 (3rd Dist. 1993).* Again, the cited case doesn't support the proposition. In *Citizens Against Regional Landfill*, the Appellate Court approved of the County Environmental Attorney, who also negotiated the Host Agreement with the applicant acting as the Hearing Officer, noting that he was not a decision maker and

adding as an afterthought that he did not make any recommended findings. The Court also pointed out that Petitioners on appeal in that case failed to identify any conduct on the part of the Hearing Officer which affected the outcome of the case *(194 Ill.Dec. at 348)*. It is noteworthy here that the County's Brief is silent as to Hearing Officer's Boyd's conduct during the siting hearing.

Lastly, for the proposition that it is fundamentally unfair for the siting authority's attorney to advocate a position in favor of an application at the same time as he is representing the purportedly impartial decision maker, the County cites *Sierra Club, et al. vs. Will County Board, et al, PCB 99-136 (August 5, 1999)*, a case in which the attorneys in this case represented the siting authority, Will County. Curiously, that decision has nothing to do with a siting authority's attorney advocating in favor of a position. Actually, *Sierra Club* is the case which established the proposition that there is a distinction between a decision maker and a decision maker's staff, and that a decision maker can receive recommendations and proposed findings from its staff (including staff attorneys) after the public comment period is closed. In *Sierra Club*, the County Board received, some two weeks after the public comment period expired, a document entitled "Final Report And Recommendations Of Will County To The Pollution Control Facility Committee Concerning The Prairie View RDF Siting Application" authored by County staff, the Will County Special Assistant State's Attorney, and Engineering Solutions, a hired consultant. The Report recommended 52 special conditions of siting. Except for some modifications in the conditions, the Will County Board explicity adopted this Report as the basis and reasoning for its decision to approve the siting application. *(PCB 99-136, Slip Opinion at Page 4)*.

In arguments uncannily similar to those advanced by the County here, *Sierra Club* contended unsuccessfully that the siting proceeding process was fundamentally unfair because the County Board unfairly considered evidence outside the record, the County Staff Report was filed after the record closed, the County Staff Report referenced evidence and documents that were not properly placed in the record, and the Report contained uncross-examined expert testimony. *Sierra Club* further contended unsuccessfully that the Will County Board's reliance on the County Staff Report was improper because of the bias of the authors of that Report in favor of the applicant. The PCB in *Sierra Club* specifically pointed out that a consultant report or staff recommendation is not binding on the decision maker and, therefore, "even if the County staff and consultants did not review the application with objectivity, the Will County Board did not have to accept the Olson Report findings." *(PCB 99-136, Slip Opinion at Page12).*

The County gives great weight to the fact that Chris Bohlen is Corporation Counsel for the City of Kankakee. There is, however, not a shred of evidence in that record that he ever conferred with or advised any of the City Council members regarding the merits of the pending siting Application, and his testimony that he did not remains unrebutted. If anything, the facts in *Gallatin v. Fulton County Board, PCB 91-256,* demonstrate that it is not the title people carry, but the role they play which is determinative of whether they act properly in a siting proceeding. In that case, where Fulton County was both applicant and decision maker, the PCB found that the County was successfully able to separate those functions and segregate the personnel who performed them.

The County also argues that the City Attorney's assistance to the Hearing Officer in drafting the proposed Findings Of Fact is an unfair violation of the City's own Siting Ordinance. It is well established that the Board is without statutory authority to compel enforcement of a local ordinance, and that failure to strictly comply with local ordinances does not necessarily render a proceeding fundamentally unfair. *Sierra Club vs. Will County, PCB 99-136 (August 5, 1999).* Unless violation of the local ordinance contributes to fundamental unfairness, it will not be considered.

The City Ordinance does call for the Hearing Officer to draft proposed Findings Of Fact, although it does not preclude him from receiving assistance in that endeavor. The County, however, argues that the Hearing Officer's receipt of assistance and input from Mr. Bohlen is a violation of the City Ordinance, and that it rendered the proceedings fundamentally unfair in that it cause Mr. Boyd and his findings to be biased in favor of the Applicant.4

In support, the County cites cases announcing that a Hearing Officer should be disqualified for bias or prejudice if a disinterested observer might conclude that he had, in some manner, prejudged the facts or the law of the case in advance of the hearing. However, the County fails to show that this Hearing Officer was biased or prejudged the Application. On the contrary, Town & Country has already cited Mr. Boyd's testimony that he approved the changes and the additions made to the document which he authored, and that in each case those changes and additions were consistent with his views based

4 Town & Country will not belabor the continuous unsupported references in the County's Brief to the City or Mr. Bohlen actually drafting the proposed Findings. However, references on Page 96 of the County Brief that "at no time before the City Council voted on those purported findings were any of the parties informed that those findings were actually drafted by Attorney Bohlen," and "allowing an active participate and advocate in favor of the Application to author the purported independent and impartial findings," and on Page 97 that "at no time was there a disclosure that the Findings and Conclusions were actually drafted by a party (The City of Kankakee.)" go too far and need to be mentioned as continued examples of the County's chronic distortion of the facts.

upon the evidence. While the County insists on portraying Mr. Boyd as a tool of the unproven collusive alliance between the City and the Applicant, Mr. Boyd's own words regarding his understanding of his role belies that entirely:

> "I didn't know who the players were and who was angry at whom or who was resisting whose advances.
> That's always sort of important, but it dawned on me that this was a statutory thing, that nobody wants a landfill or very few people are willing to accept a landfill, but you got to have them.
> And so, what they done is they cranked up some procedures and regulations and standards, and if you met those, then you get to operate a landfill.
> And I thought it would be a pretty straight forward situation that would not cause me a lot of angst, and I could go up there and at the risk of sounding a little mawkish, make some money and perform some public service." (Boyd Deposition, Page 16)

The County next complains that the City Council was misled by not knowing "that the Findings and Conclusions were actually drafted by the City's attorneys and staff. (County Brief, Page 98). Aside from the fact that this characterization of the Findings' authorship is untrue, Town & Country feels compelled to point out that it doesn't matter, based upon existing law. The City was free to accept or reject these Findings in whole or in part. The fact that the Findings of the Hearing Officer did represent his best effort and contained a balanced, thoughtful, and honest evaluation of the evidence is a bonus, but under the standards set out in *Sierra Club vs. Will County*, it is irrelevant. This is even more clear after the Board's recent decision in *Waste Management of Illinois vs. Kane County Board, PCB 03-104 (June 19, 2003)* never even mentioned the County Brief. In that case, the Board considered a memo by one of the Board members which contained a summary of evidence and alleged references to matters not in the record. Waste Management argued that the memo made inaccurate

legal conclusions and misstated facts and, because the County Board considered it, the siting decision was legislative rather than adjudicative. In rejecting Waste Management's arguments the Board noted that "the decision of a local siting authority is not tainted merely because it adopts the findings and recommendations of persons who may have some bias concerning the merits of the siting application." *(Citing Land & Lakes Company vs. PCB, 319 Ill.App.3d 41, 743 N.E.2d 188, 3rd Dist. 2000).* The Board also affirmed the principle that the siting approval process is both quasi-legislative and quasi-adjudicative.

The foregoing makes the County's next argument, namely that the Hearing Officer did not have access to the entire record before drafting his proposed Findings Of Fact equally irrelevant. Nonetheless, Town & Country is constrained to point out that the County's assertion that Mr. Boyd did not have the public comments is contradicted by the record as a whole. Actually, Mr. Boyd testified initially that he did see the public comments and then went on to say that while he couldn't independently recall all the minutia that constitutes the record in this case, if the City sent him the public comments he saw them. (Boyd Deposition, Pages 44, 45). Mr. Bohlen testified unequivocally that the public comments were, in fact, sent to Mr. Boyd. (Bohlen Deposition, Page 26).

Lastly, the County argues that the proceedings were fundamentally unfair because the Hearing Officer's Report was not placed in the public record. The basis for this argument is that the Report submitted to the City Council on August 18, 2003 was subsequently edited. Additionally, the County argues that this edited, subsequent document does not represent the Findings Of Fact And Conclusions Of Law which were voted upon by the City Council. Neither argument has merit.

During the Council's deliberations of August 18, 2003, which deliberations are recorded verbatim in the minutes of the meeting, Mr. Bohlen was asked several times to correct errors in the document being considered by the Council and, at their request, he told them that he would clean up the document and make appropriate corrections. (C-1915, 1916, 1922). Mr. Bohlen testified that he felt that the Council had directed him to make corrections and clarifications, and that these did not change the substance of the document approved by the City Council. (Bohlen Deposition, Page 50). The City Planner assisted in this process. (Bohlen Deposition, Page 47). All of the changes are appended to the County's Brief, and while one man's substance is another man's fluff, a fair reading of those changes indicates that they did not change the substance or meaning of the document approved. The changes are essentially correction of typos, grammatical changes, syntax corrections, and clarifications of ambiguities. Mr. Bohlen did point out that the final corrected version was sent to all City Council members. (Bohlen Deposition, Page 51). Absent complaint by those City Council members, one can only conclude that the changes conformed to the Council's direction.

For the foregoing reasons, neither the conduct of the City Attorney or the Hearing Officer rendered the proceedings fundamentally unfair.

C .The Hiring Of Dr. Ronald Yarbrough As The City's Consultant And The Receipt And Consideration Of His Reports Did Not Render The Proceedings Fundamentally Unfair

The County makes four fundamental fairness arguments regarding Dr. Ronald Yarbrough and his reports. They argue first that the fact that he was selected by Tom Volini of Town & Country to be the City's consultant rendered the hearings fundamentally unfair. They also argue that his prior business relationship with Mr.

Volini biased his reports. Thirdly, they argue that the receipt of his reports into the record after the close of the public comment period unfairly deprived the County of an opportunity to respond. Lastly, the County argues that the City improperly relied on Dr. Yarbrough's reports in deciding to approve the Application. None of these four arguments have any basis in fact or law.

With regard to the selection of Dr. Yarbrough as the City's geologic consultant, the County, in an extreme example of hyperbole, alleges that:

> "The collusion between the Applicant and the City continued after January 9, 2003 decision of the PCB and before the re-filing on March 7, 2003, when the Applicant acted on behalf of the City in obtaining 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 the individual recommended by Volini to draft reports on which the City Council would rely .... 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 submitted at the hearing." (County Brief, Pages 85, 86)

Every sentence of the foregoing excerpt from the County's Brief is a fabrication, unsupported by the record. There is no evidence whatsoever in the record about collusion between the Applicant and the City at anytime, let alone prior to January 9, 2003. In arguing to a jury, lawyers are restricted to arguing only those inferences which reasonably flow from the evidence. The only evidence in the record regarding communications between the Applicant and the City is restricted to routine and mostly unrelated business communications while no Application was pending (communications which have been approved by every Court which has ever confronted the issue).

Therefore, the inference of "collusion" is not reasonable.

The Applicant did not hire the City's geologic consultant. Dr. Yarbrough recalled that Tom Volini telephoned him and asked him if he would be interested in doing some consulting, but that Volini did not even fully explain his own role in the process. (Yarbrough Deposition, Pages 9, 11, 12). After Yarbrough expressed interest, he remembered that Tom Volini told him he would submit his name to the City. (Yarbrough Deposition, Page 9). Tom Volini's recollection is slightly different, but not entirely inconsistent as he believed he called Dr. Yarbrough to verify that Yarbrough had his resume in with the City. (Volini Deposition, Page 17). That only conversation which Tom Volini had with Dr. Yarbrough lasted less than 10 minutes. (Volini Deposition, Page 37). Mr. Volini further testified that he was aware that the City was considering 3 or 4 consultants. (Volini Deposition, Page 31). His only recommendation to the City was that they not hire a consultant who did significant work for Waste Management. (Volini Deposition, Page 35). Given Waste Management's posture as an Objector to the Application, Mr. Volini's concern seems more than reasonable. Chris Bohlen recalled that Dr. Yarbrough was one of group of consultants whose names had been provided to the City by the IEPA, and that Dr. Yarbrough was ultimately hired at the request of Richard Simms, another City employee, who was Superintendent of the Kankakee Municipal Utilities. (Bohlen Deposition, Page 14, Bd Hrg. Page 131).

There is no evidence that the February 3, 2003 executive session of the City Council was a strategy meeting between the City and the Applicant, or that a decision was made at that meeting to hire a consultant. The County's assertion is nothing more than prejudicial speculation. Mr. Volini acknowledged that he was present for a portion

of the Council's executive session on February 3, 2003 when there was discussion of an appeal of the PCB's decision of January 9, 2003 reversing the first siting approval. (Volini Deposition, Page 12). Volini remembers that he advised the Council during the meeting that he would appeal, and that he also intended to refile the siting Application. (Volini Deposition, Page 21). Mr. Bohlen remembered that Tom Volini was present only for that portion of the executive session when the City's participation in the appeal of the PCB decision was discussed. (Bohlen Deposition, Pages 5, 10). The City had unanimously granted the first siting Application, and the City and Mr. Volini understandably and properly shared a common interest in defending that decision. This, again, goes to the legislative role played by the City Council. The concept that parties who aligned on the same side of a lawsuit would discuss their respective roles is neither surprising nor unusual. The County had no difficulty understanding this when it defended its communications with Waste Management regarding their joint opposition to the Town & Country siting Application, even while Waste Management's siting Application was pending before Kankakee County. (PCB 03-25).+

While the actual record does not even remotely justify the County's statement that the February 3, 2003 executive session of the Kankakee City Council represented a strategy meeting at which a decision was made to hire a consultant selected by Mr. Volini, the County attempts to further support its conspiracy and collusion fantasy by noting that Mr. Bohlen refused to release the minutes of the executive session during discovery in this case. However, the County did not press the issue (presumably because it is well established that the discussion of litigation is an appropriate subject for executive sessions) and never filed a motion to test Mr. Bohlen's claim of privilege and

compel release of those minutes.

The County then argues that the prior business relationship between Dr. Yarbrough and Mr. Volini would have biased Dr. Yarbrough and also proves that he was Town & Country's hand-picked choice to be the City's consultant. The relationship referenced is, however, too tenuous and remote to support such an inference. Dr. Yarbrough remembered that he did some mine subsidence field work for Mr. Volini on a landfill project during the mid-80's (Yarbrough Deposition, Page 13). He also believed that some drilling work on a landfill owned by Mr. Volini in Southern Illinois was contracted to him by Andrews Engineering, and that he may or may not have seen Mr. Volini one time during that work. (Yarbrough Deposition, Pages 14, 15). Other than those two instances, he has had no contact with Mr. Volini. (Yarbrough Deposition, Page 15). He also noted that he did not know who would pay him. He did not bill Mr. Volini, and that ultimately knowing that it was Mr. Volini's Application had nothing to do with his decision making process. (Yarbrough Deposition, Pages 16, 27).

Tom Volini recalled that he has had one contact with Ron Yarbrough in an 18 year period. (Volini Deposition, Page 31), and disputed Dr. Yarbrough's recollection regarding his work for Andrews Engineering as Volini had not yet acquired that facility when the work was done. (Volini Deposition, Page 85).

The foregoing remote contact between the Applicant and the City's consultant can hardly be thought of as prejudicial, nor is it surprising given the fact that landfill siting in Illinois is a rather small and specialized business. The Board can readily verify this by scanning its database to see that at least one of the attorneys representing parties in this case have been involved in almost every major landfill siting case to come before the

Board in the past 10 years.

Thirdly, the County argues that the receipt of Dr. Yarbrough's reports into the record after the close of the public comment period deprived it of the right to cross-examine. They make this argument despite acknowledging the well established principle that a party will not be allowed to cross-examine a person who merely submits written comments. *Southwest Energy Corp. vs. Illinois Pollution Control Board, 275 Ill.App.3d 84, 655 N.E.2d 304 (4th Dist. 1995).* Actually, the PCB went even further in *Sierra Club vs. Will County, PCB 99-136 (August 5, 1999)*, when it held that with regard to the consultant report filed after the close of the public comment period in that case, that "even if the report had been filed during the public comment period, Sierra Club did not have a right to respond to the report or cross-examine the Olson Report's authors." *(PCB 99-136, Slip Opinion at Page 9).*

The County attempts to avoid these legal principles by arguing that Yarbrough's reports were actually new expert testimony and that the proceedings are fundamentally unfair if the parties are not allowed an adequate opportunity to cross-examine the expert witness. In support, they mistakenly cite the *Sierra Club* opinion, when the Board, in fact, only ruled that they did not consider the Olson Report in that case to be expert testimony. *(Slip Opinion at Pages 9, 10).* It is noteworthy that the Olson Report in the *Sierra Club* case was co-authored by a technical consultant, Engineering Solutions. *(Slip Opinion at Page 4).* The Yarbrough Reports are no more expert testimony than the Olson Report. It is a review by a technical consultant of the Application and the testimony for and against the Application, along with recommendations regarding siting approval and suggested conditions of the same.

Lastly, the County argues that the City placed too much weight on the Yarbrough Reports. Although the County doesn't exactly specify how placing too much weight on the Yarbrough Reports is harmful or fundamentally unfair, the fact remains that the County's factual assertion is again incorrect. A review of the City's Findings demonstrates that Dr. Yarbrough's conclusions and recommendations are of minimal significance. The County would have this Board believe that but for the Yarbrough Reports, the City would not have granted siting approval. The City's Findings Of Fact on criterion ii are composed of 5 single-spaced pages, of which 6 lines are devoted to Dr. Yarbrough's reports. (C-1870). The City has 11 Conclusions Of Law on criterion ii, of which one deals with Dr. Yarbrough, and even there Dr. Yarbrough's opinions are only found to be "supportive" and "for the benefit of corroboration" ..." . (C-1872). Lastly, this City's approval on criterion ii is subject to 21 special conditions, only one of which, the pressure grouting of the open joints in the exposed competent Dolomite, related to Dr. Yarbrough's recommendations (C-1875), and that is not a condition sought or welcomed by the Applicant.

D. <u>The City's Council's Actions Did Not Demonstrate Prejudgment Or Bias</u>

The County argues that the City Council demonstrated bias by voting in favor of this siting Application when a previous Application had has been found to be against the manifest weight of the evidence. This presumptuous argument is unsupported by any legal authority, because no such authority exists. Manifest weight of the evidence arguments are better considered in the context of the individual substantive siting criteria and have no place as part of a fundamental fairness argument. It is noteworthy that the County did not depose or call to testify any City Council members, and that the County

could not produce evidence of a single statement or act by any City Council member which would be direct evidence of bias or prejudgment. Once again, the County asks this Board to draw an inference which is unjustified by the facts and unsupported by the law.

With respect to criterion ii, 3 witnesses, including the Dean of the College of Engineering at the University of Illinois, a nationally renowned and relied upon expert in solid waste containment, testified that the proposed facility is protective of the public health, safety and welfare. The witness for the County testified that he couldn't conclude either way, on public health, safety and welfare , and the witness for Waste Management, Stuart Cravens, testified that professionally he could not offer an opinion on the subject. 5 As will be discussed later, the witnesses for the County and Waste Management respectively, both had serious problems with credibility and their own bias.

The County also argues that the City Council demonstrated its prejudgment and bias by authorizing two lawsuits against the County. The first of these was an attempt on the part of the City to enjoin the County from using its landfill Host fees to pay the astronomical legal expenses related to the County's opposition to the City siting proceedings. Again, the County provides no legal support for this proposition, instead arguing that the very fact of this lawsuit proves that the City was intent on granting the Applicant siting approval. The logic is missing here. Residents of the City of Kankakee are also residents of the County, and if those Host fees received by the County are not consumed by attorneys, they could be spent on a myriad of things which will also benefit

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5 Once again, the County so grossly mischaracterizes the facts as to make them untrue. On Page 29 of their Brief, the County states, "Mr. Cravens concluded that in his opinion, "the landfill is unsuitable based on the hydrogeology."" Actually, what he said is as follows: "My personal opinion - professionally I cannot offer an opinion. I understand I am not an engineer. I will not offer a new opinion professionally this year this time around on whether it is suitable or not. I cannot offer an opinion from – as an engineering standpoint since I am not an engineer or designer, but from a personal standpoint I believe the landfill is unsuitable based on the hydrogeology. How that statements relates over to the engineering, I can't go there because I am not qualified as an engineer." (Hrg. Transcript Volume 4A, Page 91).

the residents of the City, such as the development of recycling programs, subsidation of garbage collection expenses, needed public improvements, and the like.

The City's concern about the way in which the County was spending money that would otherwise benefit residents of the City was heightened by the fact that the principle basis for the County's objection to the City's siting activity was that the County has taken the position that its Solid Waste Management Plan, as amended 3 times in anticipation of the City conducting siting proceedings, precluded any political jurisdiction other than the County from siting a landfill. This led directly to the second lawsuit authorized by the City Council, where the City argued that the County's interpretation of its Solid Waste Management Plan as amended is an unconstitutional infringement on the City's home rule powers. The County argues that this, alone, proves that the City was predisposed to grant Town & Country's siting Application, but again the logic is missing. If the County's interpretation of its Solid Waste Management Plan is correct, then the City's siting proceedings are a sham and a nullity because no outcome other than a finding that an application is inconsistent with the County's Solid Waste Management Plan would be possible. It makes perfect sense that the City of Kankakee, as a home rule unit, did not want to be put in a position where it could not meaningfully exercise jurisdiction granted to it by Section 39.2 of the Environmental Protection Act. The City's wanting the right to meaningfully be able to conduct a single hearing is not, in any way, equivalent to the City being predisposed to grant siting approval. The City's lawsuit is, therefore, about the jurisdiction and authority of two competing political subdivisions and nothing more.

The County's argument also ignores the long-standing recognition by the Board and the Courts that political subdivisions charged with siting jurisdiction play both an

adjudicatory and a legislative role. The cases uniformly hold that conduct by a city or county in its legislative capacity does not overcome the presumption that the county or city will act without bias in its adjudicatory capacity. These cases go all of the way back to *E & E Hauling vs. Pollution Control Board, 115 Ill.App.3d 898, 451 N.E.2d 555 (2nd Dist. 1983).* The fact that a governmental unit pre-approved a landfill by ordinance did not overcome the presumption that it would conduct the subsequent siting hearing in an unbiased way, and continue uninterrupted through *Concerned Adjoining Landowners vs. Pollution Control Board, 288 Ill.App.3d 565, 680 N.E.2d 810 (June, 1997).* A good example of this Board's recognition that units of local government can successfully "wear different hats" is found in *Gallatin National vs. Fulton County Board, PCB 91-256 (June 15, 1992)*, where Fulton County owned and operated its own small landfill. The County Board commissioned a study to determine its future course of action regarding that landfill, and the study result recommended an expansion of the existing facility. The Fulton County Board then authorized an application on the part of the County, itself, to expand the landfill and designated funds and individuals to perform that task. When the group so designated filed the application for expansion, the County Board now took on the role of an adjudicatory body and voted on the evidence presented at the expansion hearing.

Perhaps the County's argument which most appallingly distorts and twists the facts (and there were many contenders for this designation) is that "the Yarbrough Reports were based upon improper ex parte communication." (County Brief, Page 102). This argument is based upon a single telephone call which Dr. Yarbrough made to the Envirogen office where he spoke with an unnamed, unknown geologist and request that

he be furnished with a copy of the Cravens' Report. He had been looking for that report, but could not find it in his local library. The unnamed individual he spoke to sent him a copy of the report, and that was the end of the communication. (Yarbrough Deposition, Pages 24, 25). Stuart Cravens was an Objectors' witness at both the first and second hearings, and his "report" is a publication he co-authored while employed with the Illinois State Water Survey. That report was heavily relied upon by Objectors in the first hearing as evidence which they believed tended to refute the Applicant's conclusions. What is so appalling about the County's statement that the Yarbrough Reports were based upon improper ex parte communications is that the single communication cited in support of the statement actually represents an effort on the part of the City's consultant to seek out information that would ensure a comprehensive and objective review.

E. Town & Country Did Not Have Improper Ex Parte Communications With The Decision Makers

The County alleges throughout its arguments on fundamental fairness, and specifically in arguments IIIB2(b)i and IIIB2(n) (which appear to be virtually the same) that Town & Country, through its President, Tom Volini, had extensive improper, pre-filing contacts with the decision makers. The County does not allege any ex parte contacts while the Application for siting approval was pending. Instead, the County points initially to all of the contacts related to the 2002 Application which were found not to be prejudicial by this Board in PCB 03-31.

Next the County alleges extensive improper contacts between Mr. Volini and the City subsequent to the first siting decision and before the filing of the second siting Application. Mr. Volini indicated that his son, Joe Volini, may have been involved in

some of these contacts which were limited to trivial and clerical matters. (Volini Deposition, Page 9). Mr. Volini also indicated that he talked on numerous occasions, primarily with the Mayor, about an industrial park he hoped to develop on nearby land. (Volini Deposition, Pages 11, 19). Lastly, Mr. Volini acknowledged being present for part of the City Council's executive session on February 3, 2003. An appeal of the PCB reversal was discussed.

Pre-filing contacts between an applicant and a decision maker even on matters related to a subsequently proposed landfill are not improper. *Residents Against A Polluted Environment vs. PCB, 293 Ill.App.3d 219, 687 N.E.2d 552 (3rd Dist. 1997).* Even a closed door pre-filing meeting between an applicant and a decision maker is not improper. *Beardstown Area Citizens For A Better Environment vs. City of Beardstown, PCB 94-98 (January 11, 1995).* When even pre-filing reviews of a proposed application by the decision makers technical staff have been approved, *(See Sierra Club vs. Will County),* the innocuous contacts between Tom Volini and various City representatives prior to the filing of the siting Application are not improper in any way.

IV. THE CITY COUNCIL'S DECISION ON THE SUBSTANTIVE SITING CRITERIA WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

A. There Is Ample Evidence To Support The City Council's Finding That The Facility Is So Designed, Located, And Proposed To Be Operated That The Public Health, Safety, And Welfare Will Be Protected

1. Statement of Facts

The basic facts regarding the proposed facility location and design are well known to the Board through the Briefs filed by the parties in PCB 03-31. To summarize those

undisputed facts, Town & Country proposed a 400 acre facility with a waste footprint of 236 acres and projected site life of 30 years on the South side of the City of Kankakee. The site was investigated and the facility was designed by Envirogen under the overall supervision and direction of Devin Moose, a professional engineer and Director of the St. Charles office of that firm. Daniel J. Drommerhausen, a senior hydrogeologist at Envirogen and a registered professional geologist in Illinois, testified regarding the site investigation, and Devin Moose, with 20 years of experience in solid waste engineering, testified regarding the design and proposed operations. Both witnesses presented their direct testimony with Power Point presentations. Mr. Drommerhausen's Power Points are Applicant's Exhibit #5. (C305-C351). Mr. Drommerhausen's direct testimony accompanying the Power Points is found at Volume 1B, Pages 80-128. Mr. Moose's Power Points are identified as Applicant's Exhibit #7. (C353-C418). Mr. Moose's direct testimony accompanying his Power Points is found at Volume 2B, Pages 112- 124 and Volume 2C, Pages 4-81. All of the following basic background information is contained in the Power Points and direct testimony of Mr. Moose and Mr. Drommerhausen and will not be cited by specific page number.

Devin Moose testified that he has experience on 45 landfill projects consulting for both industry and government clients. He has been involved in approximately 30 siting proceedings in the State of Illinois. He is familiar with the levels of required compliance and approval needed to site and permit a landfill as well as all Federal, State, and local site location standards. The facility is immediately West of Interstate 57 on the South side of Kankakee, approximately 2 miles from the Kankakee River. The facility complies with all applicable location standards, including airport setback. It lies outside

the 100-Year Flood Plain, is not in wetlands or waters of the U.S., is not in a fault area or unstable area, and is not in a seismic impact zone. The facility does not impact on wild and scenic rivers, historic and natural areas, or endangered species. It is not a regulated recharge or sole source aquifer area.

The engineered features of the site include excavation of the weathered Dolomite with installation of a composite liner system consisting of a recompacted cohesive soil layer using on-site materials, that layer being recompacted to a maximum hydraulic conductivity of 1 x times 10^{-7} centimeters per second. The top of the recompacted soil liner will be a 60 mil. HDE liner with a minimum of two 60mil. HDPE liners under the leachate lines and sumps. Underneath the recompacted cohesive soil liner, Mr. Moose proposed to place an average of 4.5 feet of structural backfill to serve as the base of the landfill. This would also be recompacted to a maximum permeability of 1 x 10^{-7} centimeters per second.

Mr. Moose also proposed to incorporate into the design a state of the art leachate management system, a landfill gas, collection, and monitoring system and a final cover consisting of 1 foot thick recompacted cohesive soil layer, a textured, double-sided, 40 mil. LLDPE geomembrane, a minimum of 3 feet of protective soil, and a top vegetative layer. Mr. Moose proposed a groundwater monitoring system consisting of 29 monitoring well locations with quarterly monitoring and regular evaluation of groundwater quality data.

Mr. Moose characterized the significant differences in the degree, quantity, and thoroughness of the hydrogeologic investigation from the first Application to the second Application. (Hrg. Tr. Volume 3B, Page 28). Mr. Drommerhausen testified that for the

second Application, 24 additional soil borings were done, more than doubling the 19 that were included in the original Application. (Hrg. Tr. Volume 1B, Page 95). Twenty-one of these soil borings (of which 20 were new) penetrated 10 feet or greater into the Bedrock with 410 linear feet of Bedrock was cored. Packer tests were performed for 37 intervals in 23 boring locations in the Bedrock. (Hrg. Tr. Volume 1B, Page 99). Waste Management's witness, Stuart Cravens, pointed out that 8 of Town & Country's borings actually penetrated 20 or more feet into the Bedrock. (Hrg. Tr. Volume 4A, Page 106). 70% of these tests resulted in "no take," suggesting the presence of low permeability rock. (Hrg. Tr. Volume 1B, Page 101). Two angle borings were performed to investigate for the possibility of vertical fractures. Ten intervals in the angle borings were Packer tested with no take in 8 of those intervals, suggesting that there are no vertical fractures which allow rapid water movement at the site. (Hrg. Tr. Volume 1B, Page 102). Fifty slug tests were performed to measure permeability in the Bedrock system. (Hrg. Tr. Volume 1, Page 104). 28 of the 43 borings at the site penetrated beyond the weathered Bedrock. (Hrg. Tr. Volume 1C, Page 60).

The landfill is proposed to be built in the Dolomite Bedrock below the weathered portion which will be excavated. The upper portion of the Bedrock is low quality, but that quality improves greatly with depth. (Hrg. Tr. Volume 1B, Page 98). The determination of what constitutes "weathered" Bedrock is qualitative, and the Packer tests that did take water were always near the upper part of the Bedrock, thereby supporting this distinction. (Hrg. Tr. Volume 1C, Page 62, Volume 2B, Page 19). Mr. Drommerhausen testified that the distinction between weathered and competent Bedrock is really based on the permeability test results with the area identified as the weathered

zone having an average permeability of 5.3 x 10^{-4} centimeters per second, and the competent zone having a permeability of 1.13 x 10^{-5} centimeters per second. (Hrg. Tr. Volume 1C, Page 115). One cannot visually identify the hydrogeologically weathered Bedrock. (Hrg. Tr. Volume 3C, Page 108).

Mr. Drommerhausen indicated that the uppermost aquifer at the site is the Silurian Dolomite. (Hrg. Tr. Volume 2A, Page 43). Permeabilities in the Silurian Dolomite Aquifer vary greatly depending upon location. (Hrg. Tr. Volume 1B, Page 85). The Dolomite is a confined aquifer under pressure, meaning that the hydraulic heads (water levels) are actually higher than the top of the Bedrock surface. (Hrg. Tr. Volume 1B, Page 113). This is because the low permeability Yorkville Till overlaying the Dolomite acts as a cap, and therefore water levels in wells finished in the Dolomite are higher than the top of the Dolomite surface. (Hrg. Tr. Volume 1B, Page 113). While the upper weathered Dolomite is clearly an aquifer, the competent Dolomite hydrogeologically behaves as an aquitard although permeabilities vary within each zone. (Hrg. Tr. Volume 3A, Pages 17, 18, 20).

Mr. Drommerhausen acknowledged that all the rock materials under the site yield water, and he characterized all of them as an aquifer instead of an aquitard to allay concerns regarding the classification, but the classification is irrelevant because the groundwater impact assessment uses permeability values rather than labels. (Hrg. Tr. Volume 1C, Page 12). The environmental character of a unit depends on permeability numbers, not terms such as aquifer or aquitard. (Hrg. Tr. Volume 1B, Page 119).

Mr. Drommerhausen pointed out that the classifications of aquifer and aquitard don't represent ends of a continuum, but rather represent degrees of permeability, and

that the boundary between an aquifer and an aquitard falls at permeabilities between 1 x 10^{-4} centimeters per second and 1 x 10^{-5} centimeters per second. (Hrg. Tr. Volume 1B, Page 91). He supported this by referencing Freeze and Cherry's seminal textbook, "Groundwater." (Applicant's Exhibit #24, C466-C468). He described this textbook as the Bible for hydrogeologists. (Hrg. Tr. Volume 1B, Page 91).

By constructing the base of the landfill well into the Dolomite, an inward gradient is created. (Hrg. Tr. Volume 1B, Page 116). An inward gradient is nothing more than the difference between the potentiometric head (unconfined water level in surrounding Bedrock) and the level of the leachate in the landfill where the head in the Bedrock is higher. The inward gradient at this site is typically 10 to 15 feet with some water wells in the Dolomite having levels up to 20 feet higher than the base of the landfill. (Hrg. Tr. Volume 1B, Page 114, 127). Mr. Drommerhausen explained that, with an inward gradient, if there is a liner failure in the landfill, water would flow into the landfill from the Bedrock aquifer rather than leachate flowing out of the landfill into the aquifer. (Hrg. Tr. Volume 1B, Page 115). Mr. Moose, in discussing integration of the design with the natural geologic setting, emphasized that the landfill is being placed deep into the aquifer to create a strong, inward gradient. (Hrg. Tr. Volume 2C, Page 10). It is the aquifer, itself, which provides the driving pressure to create the inward gradient, therefore adding to the protection offered by the engineered features of the facility. (Hrg. Tr. Volume 2C, Page 15). The greater the potentiometric head in the aquifer, the stronger the inward gradient will be and the more protective of the environment the landfill will be. (Hrg. Tr. Volume 3B, Page 11).

The last witness to testify on behalf of the Applicant in connection with the location and the design of the facility was Professor David Daniel, Dean of the College of Engineering at the University of Illinois at Urbana/Champaign. His 15 page resume is identified as Applicant's Exhibit #17 (C420-434). Dr. Daniel testified that he has spent almost all of his professional career working on waste containment applications. He has work experience with hazardous waste landfills, solid waste landfills, low level radioactive waste disposal, high level radioactive waste disposal, superfund and remediation sites. He most recently co-chaired a panel for the National Academy of Sciences studying the Yucca Mountain Facility which is the proposed national repository for spent nuclear fuel. (Hrg. Tr. Volume 3B, Page 43). He has performed relevant work for over 100 different companies or agencies, including co-authoring the EPA's guidance manual on construction quality assurance for waste containment facilities. He has chaired the American Society of Civil Engineers and Environmental Geo-technics Committee. He has served as editor and chief of the Journal of Geo-technical and Geo-environmental Engineering for the American Society of Civil Engineers. His research work on flow through clay liners significantly impacted the EPAs decision to designate 2 feet at the minimum thickness of compacted clay liners. He has recently authored a comprehensive report for the EPA assessing the field performance of landfills. (Hrg. Tr. Volume 3B, Page 46). He has authored or co-authored 4 different books dealing with landfill design and waste containment and written chapters in 14 different textbooks commonly used in engineering. (Hrg. Tr. Volume 3B, Page 47).

Dr. Daniel testified that he was retained by the Applicant to essentially peer review and comment on the siting Application. Professor Daniel initially observed that

the number of soil borings, the amount of testing, and the degree of hydrogeologic investigation by Town & Country was well within reason. (Hrg. Tr. Volume 3B, Page 50). He pointed out that there is no question that the Dolomite is an aquifer, and he observed that the geology at the site is well known and that the layering of the various geologic strata is quite consistent. (Hrg. Tr. Volume 3B, Pages 54, 56).

Professor Daniel noted that the inward gradient at this site provides for extraordinarily effective containment. (Hrg. Tr. Volume 3B, Page 58). In addition, he noted that the permeability and thickness of the proposed engineered clay liner exceed minimums. (Hrg. Tr. Volume 3B, Page 59). He saw no problems in building the liner. He noted that the 12 foot thick sidewalls add an additional margin of safety and observed that the site can easily be monitored. (Hrg. Tr. Volume 3B, Page 64).

Professor Daniel observed that he had enjoyed the testimony prior to his regarding the differences in permeability within the Bedrock, but that those differences in permeability are all irrelevant to the safety of the landfill. (Hrg. Tr. Volume 3B, Page 72). He noted that whether the flow in the Bedrock is at the rate measured by the Applicant or some faster rate really doesn't matter, and that with the strong inward gradient higher permeability and faster flow would actually be better because this faster advective flow inward would overcome outward diffusion. (Hrg. Tr. Volume 3B, Page 73). In this regard, he noted that the Applicant made an extraordinarily conservative assumption which bordered on absurdity by modeling groundwater flow away from the landfill when the flow will, in fact, be inward. (Hrg. Tr. Volume 3B, Pages 73, 74). Additionally, Dr. Daniel pointed out that the Applicant in its model made a number of other conservative assumptions including ignoring the recompacted structural fill

underneath the engineered clay liner even though that fill would act as a significant mitigating layer. (Hrg. Tr. Volume 3B, Page 82). Additionally, the Applicant was conservative in modeling in assuming no advective velocity through the composite liner when, in fact, there would be an upward velocity from the aquifer. (Hrg. Tr. Volume 3B, Page 83). He also noted that the Applicant used a positive diffusion coefficient for heavy metals traveling through the geomembrane when, in fact, heavy metals do not diffuse through a geomembrane. (Hrg. Tr. Volume 3B, Page 83). Lastly, Professor Daniel pointed out that the Applicant assumed that outward diffusion would take place over 100% of the liner when, in fact, the design provided for a head of leachate on only a tiny area of the landfill, only a few percent. (Hrg. Tr. Volume 3B, Page 84).

When asked whether in his expert opinion the proposed facility satisfied criterion ii, Professor Daniel stated,

> "Well, I looked at the site, I guess, trying to find reasons why I might say that I felt it was not safe, and I couldn't find any such reasons. So, what I've seen and what I've looked at, all of my conclusions have been consistent with meeting that criterion." (Hrg. Tr. Volume 3B, Page 92).

2. The County's Arguments Regarding The Evidence On Criterion ii Are Unsupported By The Evidence And Show A Lack Of Understanding Of the Facts

a. The Appliant Did Not Mischaracterize The Bedrock

The County's entire argument is an attempt to place the unique facts of this case into the framework of the Board's decision in PCB 03-31. Therefore, the County continuously argues that Town & Country has continued to do this wrong or that wrong referring to specific criticisms of the evidence of the previous hearing found in the Board's decision in PCB 03-31.

The County continues to criticize Town & Country for not acknowledging that the

Bedrock is an aquifer. The basis for this argument is that some of the Applicant's witnesses testified that the lower Bedrock behaved, at times, like an aquitard.

The County's argument misses the entire point of Mr. Drommerhausen's presentation. The concepts of aquifer and aquitard are not the extreme ends of a continuum. Rather, everything is either an aquifer or an aquitard, and, at that point where those designations meet, (permeabilities in the range of 1 x 10^{-4} to 1 x 10^{-5}) the distinctions are not particularly clear. More importantly, at that point labels are not important when actual permeability values are available. Mr. Drommerhausen was well aware before his testimony of the controversy regarding Envirogen's previous characterization of the Bedrock. In his direct testimony, he attempted to put that controversy into perspective:

> "This hopefully will clarify the debate over the Silurian Dolomite Aquifer. As we mentioned earlier, Freeze and Cherrie say that an aquifer has a hydraulic conductivity of 10^{-4} centimeters per second or greater. An aquitard has a hydraulic conductivity 10^{-5} centimeters per second or less, either one or the other, and that's where we fall. At our site, the weathered rock is 10^{-4} centimeters per second, and the competent Dolomite is 10^{-5} centimeters per second. You can see why there are so many opinions. Nothing is right or wrong. We are falling on the boundary, this rough boundary, and I want to point out that this is where most of the confusion came from. (Hrg. Tr. Volume 1B, Page 118).

As a result, Mr. Drommerhausen concluded that a geologic unit can be both an aquifer and an aquitard depending on how it performs (Hrg. Tr. Volume 2B, Page 70).

In terms of the hydrogeologic performance of the Dolomite, there is no disagreement between the experts for the various parties that permeability decreases with depth. Even Waste Management's geologist, Stuart Cravens, acknowledged that after you go about 10 feet below the top of the Bedrock, measured permeability decreases

significantly. (Hrg. Tr. Volume 4A, Page 128). This is significant because it parallels almost exactly Mr. Drommerhausen's testimony regarding where he found a break in permeability (9 feet below Bedrock surface). On behalf of Waste Management, Stuart Cravens drilled a few wells around the perimeter of the proposed facility and conducted his own tests. Regardless of Mr. Cravens' opinions regarding the quality of Town & Country's work, the data generated in Mr. Cravens' investigation is, according to Professor Daniel, consistent with Town & Country's data, and actually compliments the Application. (Hrg. Tr. Volume 5A, Page 126).

In addition to the local variability of the Dolomite aquifer, regional studies, such as that by Csallany and Walton, demonstrate that the productivity of the aquifer regionally decreases as we move from east to west. (Hrg. Tr. Volume 1B, Page 88). Mr. Drommerhausen pointed out that we are toward the western portion of the Dolomite aquifer as evidenced by the increasing amount of Pennsylvanian Shale deposits found intermingled with the Dolomite. (Hrg. Tr. Volume 1C, Page 50).

Based upon the site specific permeability findings by both Town & Country and Mr. Cravens, modeling the upper 10 feet of the Dolomite as the aquifer seems more than appropriate. Additionally, modeling the aquifer in this way turns out to be the most conservative approach. Mr. Drommerhausen explained that modeling the aquifer as only being 10 feet thick for purposes of the groundwater impact assessment means that there will be less water to dilute the theoretical contaminants released from the facility in the model run. (Hrg. Tr. Volume 2B, Page 42). Accordingly, this is a more conservative way to model the aquifer. Mr. Drommerhausen confirmed this fact by also modeling the aquifer as being 50 feet thick in a sensitivity analysis reported in the Application.

(Appendix P-5 of Application).

The Board here needs to distinguish between characterization and modeling. While Mr. Drommerhausen readily admitted that he would characterize the entire Dolomite as an aquifer in order to be conservative and to directly address issues raised by the PCB in its previous decision, his modeling of only the upper 10 feet as the aquifer is not inconsistent with that characterization. (Hrg. Tr. Volume 1C, Page 12). In fact, in a public comment received after the 2002 siting hearings, Joan Underwood, the hydrogeologist working for Waste Management on the proposed expansion of their nearby facility, indicated that modeling the uppermost aquifer as being only 10 feet thick is, in fact, conservative and an IEPA approved method of modeling. (PCB 03-31, C2276-C2282).

The County, at Page 34 of their Brief, mentions that the geometric mean of conductivity used in the groundwater impact assessment by Town & Country is almost 500 times lower than the highest measured hydraulic conductivity in the Bedrock, and cites to Volume 2A, Page 115 of the Hearing Transcript. Volume 2A of the Transcript ends at Page 113, so the reference doesn't exist. Regardless, adjusting the model for the highest permeability value found anywhere in the Bedrock should be no problem because the predicted contaminant concentrations at the required point of compliance in the baseline model are 10,000 times lower than the maximum allowable concentrations. (Hrg. Tr. Volume 2A, Page 64). Although the County is factually incorrect about Town & Country mischaracterizing the permeability in the Bedrock and also about the effect of any such mischaracterization, the last word on the subject was provided by Professor Daniel, who pointed out that the County's concerns about permeability in the Bedrock

would be of far more interest if the landfill were not an inward gradient landfill. (Hrg. Tr. Volume 5A, Page 125).

The County next argues that Town & Country has underestimated the permeability of the competent Bedrock. They point out that some of the competent Bedrock has high permeability, and that this Bedrock is improperly classified by Mr. Drommerhausen as weathered Bedrock thereby skewing the permeability of what Mr. Drommerhausen classifies as the competent Bedrock downward. This argument fundamentally misunderstands the testimony. Mr. Drommerhausen testified that because it is universally agreed that permeability in the Dolomite decreases with depth and because site specific data indicated a clear break in permeabilities at approximately 9 feet below the Bedrock surface, he decided, to be conservative, to include all Bedrock within the upper 9 feet in the hydrogeologically weathered category regardless of whether the rock cores showed that it was physically weathered. (Hrg. Tr. Volume 2A, Page 96, Volume 2B, Page 50). Mr. Cravens' testimony that he observed a rapid decrease in permeability below the upper 10 feet of Bedrock in his own wells is important confirmation here. While Professor Daniel repeatedly testified that this entire debate is irrelevant because, with an inward gradient higher, Bedrock permeabilities only serve to increase the driving force of groundwater into the landfill.

Mr. Drommerhausen, in response to being challenged on classifying the upper 9 feet of the Bedrock as hydrogeologically weathered, performed an additional sensitivity analysis where he used a permeability value averaging all of the Bedrock permeability data. This model passed easily. (Hrg. Tr. Volume 2A, Page 85, Applicant's Exhibit #14, C415A-C418A). The County's argument also ignores the fact that dividing the Dolomite

aquifer into weathered and unweathered zones based upon the actual hydraulic performance of those zones as derived from site specific data is actually more conservative because it increases groundwater velocities in that portion of the aquifer closest to the base of the landfill.

The County next argues that Town & Country failed to account for fracture flow in the Bedrock. This argument has no merit. Based solelyon the testimony of its engineer, Jeffrey Schuh, the County asserts that Town & Country did not test for secondary porosity. Professor Schuh, in his direct examination, opined that only secondary porosity is relevant in the groundwater impact assessment, and that Town & Country's failure to test for secondary porosity was a major flaw in the Application. However, on cross-examination, Mr. Schuh was exposed. When confronted with the truth, he acknowledged that secondary porosity can't be measured, that he has never measured secondary porosity, that Patrick Engineering, for whom he is an executive, has never measured secondary porosity, and that there is no test to measure secondary porosity. (Hrg. Tr. Volume 4B, Page 30, 31). Accordingly, the "major flaw" identified by Mr. Schuh is Town & Country's failure to do the impossible. Such a criticism evidences a shocking lack of either knowledge or objectivity.

Mr. Schuh also acknowledged that in an inward gradient system where diffusion is the only transport mechanism for the migration of contaminants away from the landfill, primary porosity is indeed relevant because contaminants also diffuse through the rock matrix. (Hrg. Tr. Volume 4B, Page 32). Mr. Drommerhausen confirmed that there is no test to measure secondary porosity. He also pointed out that in his groundwater impact assessment, he used an effective porosity of .07, a value approximately 3 times more

conservative than the value of .20 used by Waste Management in the groundwater impact assessment performed in connection with the siting Application for expansion of their nearby facility. (Hrg. Tr. Volume 5A, Pages 29-31).

The County erroneously suggests that Town & Country's permeability tests did not take into consideration the secondary flow characteristics of the Bedrock represented by fractures. Specifically, the County argues that Town & Country failed to characterize the fractures in the lower Bedrock. That vague concept is irrelevant since what is important is assessing the performance of the entire fractured Bedrock System. Dr. Yarbrough, in his reports, pointed out that Packer tests do precisely that in that they "illustrate the conductivity of bedding plains and/or voids." (C1598). To prove the point, consider the fact that Envirogen tested the permeability of intact Dolomite rock samples in the laboratory and found the same to be 3.5 time 10^{-8} centimeters per second. (Hrg. Tr. Volume 1B, Page 108). Since the permeabilities obtained from field scale measurements at the site are approximately 3 orders of magnitude higher, one can easily see that the fractures in the Dolomite increased the permeability of that unit by a factor of at least 1,000.

The County then points out that the measured permeability in the angle borings which were intended to encounter and assess the affect of vertical fractures is higher than in the nearby conventional borings. (County Brief at Page 38). This arguments represents nothing more than data manipulation by Mr. Schuh, who chose to use only the values derived from the 2 Packer tests out of 10 in the angle borings which had a "take." Not only do 2 tests represent a statistically insignificant sample, but Mr. Schuh also ignores the big picture. 100% of the lineal extent of the angle borings was Packer tested,

and in 8 of those intervals the formation absorbed no water whatsoever. Accordingly, Mr. Drommerhausen's conclusion that the permeability tests in the angle borings showed no increase in permeability over other permeability tests is more persuasive. (Hrg. Tr. Volume 2B, Page 17).

Lastly, the County argues that Town & Country did not model the Bedrock as a fractured system. With an inward gradient, the only relevant flow is diffusion, and with a diffusion model fractures have no effect. (Hrg. Tr. Volume 5A, Page 66). Although the inward gradient at the site has not been challenged by any of the Objectors, Town & Country, nonetheless, took what Dr. Daniel characterized as the absurdly conservative step of modeling for advective flow. Even with advective flow, however, Mr. Drommerhausen used the appropriate parameters in the groundwater impact model. He testified that he is familiar with all modeling programs used by the IEPA (Hrg. Tr. Volume 1B, Page 81). He did, in fact, model for advective flow to the point of attenuation. (Hrg. Tr. Volume 1C, Page 37, Volume 2A, Page 46). He indicated, however, that the instructions for Migrate, the model which he used, recommend that for low flow conditions, as exist at the proposed site, the system should be modeled as isotropic. (Hrg. Tr. Volume 2A, Page 48). Mr. Drommerhausen subsequently introduced a portion of the Users' Guide for the Migrate flow model to verify his point. (Applicant's Exhibit #26, C471).

The County next argues that Town & Country failed to account for the vertical flow in the Bedrock. All of Town & Country's experts admitted that in its natural state, there is a very slight downward vertical gradient in the Dolomite. Mr. Drommerhausen characterizes this gradient as so slight that it is at the limit of our ability to accurately

measure it. (Hrg. Tr. Volume 2B, Page 50). He also opined that this downward gradient will be reversed by construction of the landfill. (Hrg. Tr. Volume 2A, page 96). He verified this by performing water budget calculations which proved that the landfill, itself, would cutt off recharge underneath thereby reversing the very slight downward gradient. (Hrg. Tr. Volume 2A, Page 97). Statements in the County Brief that Mr. Drommerhausen failed to provide calculations of the vertical gradient and failed to show that the downward vertical flow will become upward flow after landfill construction are, therefore, simply not correct. (County Brief, Page 27).

Mr. Schuh took issue with Mr. Drommerhausen's conclusions and essentially opined that in his mind the data was insufficient to show that the existing downward vertical flow in the Dolomite would be reversed. Professor Daniel explicitly disagreed with Mr. Schuh. (Hrg. Tr. Volume 5A, Page 128). To prove his point, Professor Daniel compared post-construction flow into the landfill with flow underneath, an exercise he called a "trivial calculation." (Hrg. Tr. Volume 5A, Page 133). He went through this calculation step by step in his testimony and pointed out that the landfill can trap 35 times more water than flows underneath, explaining that this illustrates why inward gradient landfills are properly called "hydraulic traps." (Hrg. Tr. Volume 5A, Page 130). He then performed an on the fly sensitivity analysis of his own calculations showing that if he increased the thickness of the aquifer to 30 feet (a distance that a contaminant particle could traverse through diffusion in 500 to 1,000 years), and even if he increased permeability by an order of magnitude, there is still in adequate margin of safety. (Hrg. Tr. Volume 5A, Page 128-133).

Despite the foregoing and Dr. Daniel's testimony that downward vertical flow is

impossible in an inward gradient condition, Town & Country did model for advective downward flow through the liner. When challenged on whether the Darcy velocity of .008 which he used for this parameter in his model was appropriate, Mr. Drommerhausen correctly pointed out that it was quite conservative since, in reality, this velocity would be a negative number. (Hrg. Tr. Volume 2A, Page 52).

The County's unsubstantiated complaint that Town & Country did not account for vertical flow in the Dolomite propagates itself to two additional arguments. First, the County notes that the proposed groundwater monitoring well locations will not pick up downward flow of contaminants in the Dolomite. This argument is profoundly wrong. First of all the evidence is overwhelming that the only downward flow after construction of the landfill will be through diffusion. Professor Daniel testified that it would take a contaminant particle between 500 and 1,000 years to diffuse downward even 30 feet. Secondly, the argument shows a complete lack of understanding of the purpose of groundwater monitoring. One neither can, nor should, monitor all potential contaminant transport pathways. Instead, one monitors the shortest and most direct pathway. Regardless of whether we call it weathered Dolomite or not, there seems to be consensus that the upper portion of the Bedrock is the most permeable. This means that the velocity of groundwater in the upper portion of the Bedrock will be the fastest. In fact, Mr. Drommerhausen derived seepage velocities from site specific permeability testing, pointing out that while the groundwater seepage velocity immediately below the landfill is 12 feet per year, the seepage velocity in the lower rock is approximately 6 inches per year. (Hrg. Tr. Volume 1B, Pages 125, 126). Since the horizontal movement/seepage of groundwater in the Dolomite is not disputed, it is a matter of common sense that the

earliest possibility of detection of contaminant migration would be horizontally adjacent to the landfill. Mr. Moose showed a slide in his Power Point presentation which illustrated the point, and visually demonstrated why Town & Country is monitoring the upper portion of the Dolomite aquifer. He explained that with diffusive flow, movement is in all directions at approximately the same speed, and, therefore, distance becomes essential in monitoring. One needs to monitor where contamination will be seen first, and in this case that is the weathered zone. (Hrg. Tr. Volume 2C, Page 52-55).

What is somewhat troubling in the County's arguments is that they have taken some comments in the Board's January 9, 2003 decision in PCB 03-31 and are attempting to extend them to the point where they want this Board to become a technical reviewer of the siting evidence. Their criticism regarding monitoring wells is a perfect example. The location and spacing of groundwater monitoring wells has always been an issue carefully scrutinized by the IEPA at the permitting stage. Similarly, the accuracy and sensitivity of a groundwater impact assessment has always been an issue left to the technical staff at the IEPA during the permitting process. Groundwater impact assessments are not even required for local siting approval. Now the County wants the Board to be a technical reviewer of matters heretofore within the sole province of the IEPA.

Town & Country is mindful of the fact that this Board in its January 9, 2003 decision found it significant that the Applicant had no plan to monitor for downward vertical flow of contaminants in the Dolomite. Whether or not Town & Country agrees with that finding, the Board should not be in the technical position of having to scrutinize in every case the groundwater monitoring program to determine whether it is suitable.

Town & Country in this revised Application addressed the Board's concerns regarding monitoring by proving and explaining to the City in this Application that there would be no downward movement of contaminants and by explaining that the purpose of monitoring is to identify the shortest, fastest pathway for migration. Accordingly, there is evidence addressing the Board's prior concern, and it becomes the job of the local decision maker, not this Board, to determine whether that evidence is persuasive.

Similarly, because the Board found in its January 9, 2003 decision that there was no evidence that grouting would work to prevent downward migration of contaminants, the imposition by the City of a condition that visible fractures in the competent Dolomite be grouted prompts the County once again to argue that the City's finding is against the manifest weight of the evidence. In this Application, grouting was not offered by Town & Country as a means to achieve additional protection of the environment. The additional hydrogeologic investigation demonstrated that grouting is not necessary because the inward gradient is completely sufficient to prevent downward migrations in the unlikely event of liner breach. Grouting, therefore, has nothing to do with whether or not there is evidence that the facility, as designed, proposed and located will protect the public health, safety, and welfare. In that context, grouting becomes completely irrelevant.

While the County's argument that grouting will be ineffective is irrelevant, it is also incorrect. The fact that there may not be ASTM standards for pressure grouting does not support the conclusion that the grouting will be ineffective. Since the issue of "effectiveness" as discussed previously is, in this context, not related to safety, effectiveness can be assessed only in terms of its ability to accomplish the intended goal,

namely sealing of the visible fractures at the top of the Bedrock surface. Dr. Yarbrough did, in fact, propose a standard of sorts for this process when he concluded that pressure grouting could be accomplished using a "hell for stout" approach (referencing an old Army Corp of Engineers' term meaning to do the maximum possible and then a little extra.) (C1597). Frankly, the most significant thing about Dr. Yarbrough's grouting recommendation in light of the Applicant's evidence that the same is not necessary is that it tends to prove his independence.

The County feels so strongly that there were insufficient sensitivity analyses in the groundwater impact assessment that they raised the argument as a jurisdictional issue. Town & Country hereby readopts and realleges the arguments made in the jurisdictional section of this Brief where it rebutted Mr. Schuh's testimony that there were no sensitivity analyses by pointing out that the two Applications contained four different iterations of the groundwater impact assessment. In addition, there is the sensitivity analysis done during the hearings by Mr. Drommerhausen to demonstrate that the point of the County's and Waste Management's cross-examination regarding permeability in the Bedrock would not change the result, and there is Professor Daniel's flow calculation done during his rebuttal testimony. Aside from the fact that none of this is required at a local siting hearing and that the County is once again asking the Board to assume the role of the IEPA at the permitting stage, the final word again belongs to Professor Daniel who stated that with all due respect to Mr. Schuh's criticisms, one needs to know when "enough is enough." (Hrg. Tr. Volume 5A, Page 132).

3. <u>The Opposition Witnesses Were Not Credible</u>

Stuart Cravens, a licensed geologist in private practice, testified on behalf of

Waste Management. During his testimony in this hearing and the previous hearing, he has, at various times, called himself a licensed engineer, a senior hydrogeologist with the Illinois State Water Survey, a professional scientist with the Illinois State Water Survey, and a senior professional scientist with the Illinois State Water Survey although his only verifiable title found in the biography appended to one of his publications is "assistant hydrologist." (Hrg. Tr. Volume 4A, Page 21, Pages 70-75, PCB 03-31, Applicant's Exhibit #23 and Hrg. Tr. Pages 1615, 1616). In another striking example of taking a statement or fact out of context so as to completely change its meaning, the County notes that "Mr. Cravens concluded that in his opinion the landfill is unsuitable based on the hydrogeology." (County Brief at Page 29). What Mr. Cravens said immediately thereafter completely changes the meaning:

> "How that statement relates over to the engineering, I can't go there because I am not qualified as an engineer. That is just the personal opinion that I cannot support with engineering or any other evidence." (Hrg. Tr. Volume 4A, Page 91).

In fact, Mr. Cravens went out of his way to emphasize his lack of credentials to opine regarding landfills. Some of his other statements are illustrative:

> "I'm not an expert in landfills. I will not opine on what will happen with the landfill in place at that location. I can only comment on the natural hydrogeology out there and will not comment on engineering or removal of materials, of implacement of materials or leachate systems. I will not. I agree with Darcy's Law, high head to low head. How that affects a landfill, or any landfill design, I am not an expert in this area. ... I am not qualified as you have pointed out so well, to deal with landfill design or what a landfill design – how that will interact with hydrogeology." (Hrg. Tr. Volume 4A, Pages 87,93).

Mr. Cravens supervised the drilling and testing of 5 wells surrounding the proposed facility. The lack of quality and precision in that work stands in sharp contrast to Town & Country's investigative efforts. The boring logs from the Cravens' wells do not contain geologic classifications. (Hrg. Tr. Volume 4B, Page 12). Additionally, the individual who described the materials recovered on behalf of Mr. Cravens was not a licensed geologist. (Hrg. Tr. Volume 4B, Page 19). Elevations in Cravens' boring logs appear to be rounded off to the nearest 1 foot while Town & Country's logs reflect elevations accurate to within $1/10^{th}$ of a foot. (Hrg. Tr. Volume 4B, Page 15, 16). Every one of Cravens' deep borings has 1 or 2 feet of missing data at the critical weathered Bedrock competent Bedrock interface. (Hrg. Tr. Volume 4B, Page 29) This missing data problem is propagated in his slug test computations, all of which miscalculate the elevation at the top of the zone tested. Cravens acknowledged these errors on cross-examination and agreed that it is appropriate to consider his slug test results as measuring both the combination of weathered Bedrock and competent Bedrock, a combination where the higher conductivities expected near the Bedrock surface would tend to dominate the overall result. (Hrg. Tr. Volume 4B, Page 22). With regard to his Packer tests, 2 of them failed because of leakage around the seal and casing, and 1 of them actually showed negative flow. (Hrg. Tr. Volume 4A, Pages 131, 132, Volume 4B, Page 6).

Mr. Cravens was critical regarding Town & Country's failure to run geophysical tests in its borings comparable to the geophysical tests he ran in his borings. Curiously, however, Mr. Cravens admitted that he didn't understand the results of most of the geophysical tests run in his borings. (Hrg. Tr. Volume 4A, Pages 12,121). In

considering the criticism regarding the lack of geophysical testing, Professor Daniel noted that the data in the Town & Country Application is like the cake and downhole geophysics is like the sprinkles on the icing. (Hrg. Tr. Volume 5A, Page 127).

Mr. Schuh offered among his major criticisms the fact that only .6% of the rock samples recovered by Town & Country were lab tested for primary porosity. On cross-examination, however, Mr. Schuh acknowledged that the number of samples tested for primary porosity was sufficient and then opined that his earlier point that only .6% of the samples had been tested was really only information and not a criticism. (Hrg. Tr. Volume 4B, Pages 124, 125, Volume 4C, Page 34). This statements strains credulity. If the amount of rock tested to ascertain primary porosity was sufficient for that purpose, the only value in advising the City Council that this amount represented only .6% of the total rock cored is to leave the false impression that not enough testing was done.

Mr. Schuh was further unable to answer questions about the hydrogeologic similarities revealed in the Waste Management Application which had been reviewed on behalf of the County by Patrick Engineering.

He was also unable to answer questions regarding his subordinate, Steve VanHook's, previous review and testimony regarding the first Town & Country Application.

Mr. Schuh also had a Power Point presentation, and Page 11 of that presentation suggested that Town & Country's groundwater impact assessment failed. (C888). When first questioned about the point on cross-examination, Mr. Schuh, in answer to a question of whether the "groundwater impact evaluation fails," some constituents answered, "yes." (Hrg. Tr. Volume 4C, Page 20). After further cross-examination indicating that the

groundwater impact evaluation did not fail, Mr. Schuh was asked about his previous testimony that the model failed, and he answered, "I don't recall that." (Hrg. Tr. Volume 4C, Page 26).

Most troubling of all, however, is Mr. Schuh's professed lack of knowledge regarding Applicant's Exhibit #14, the sensitivity analysis prepared by Mr. Drommerhausen during the hearings to simulate a hypothetical worst case scenario which arose in his cross-examination. While Mr. Schuh acknowledged the existence of the Exhibit, he stated, "I knew that they handed it out. I don't remember what the values were for porosity." When asked if he looked at the Exhibit, he stated, "There are two pieces of paper that came out. I saw the two pieces of paper. I didn't look at the numbers." When asked if he reviewed the analysis, he stated, "I did not review that analysis." (Hrg. Tr. Volume 4C, Pages 90, 91). That testimony stands in stark contrast to the statement of the County Attorney, Rick Porter, during argument regarding the admission of Applicant's Exhibit #14. Referring to Mr. Schuh who was seated next to him at the time Mr. Porter said, "The engineer to my left has reviewed the document and does not believe it, in any way, addresses the problems that have been pointed out in cross-examination." (Hrg. Tr. Volume 3A, Page 117). Mr. Schuh's statement is inconsistent with Mr. Porter's. Someone's credibility is undermined.

4. <u>Siting A Landfill In A Bedrock Aquifer Is Not Inherently Unsafe</u>

While the County never squarely makes the statement, they argue all around the inference that a Bedrock aquifer is inherently an unsuitable location for a landfill. They also imply that the Board's prior decision in the first case supports this inference. It is undeniable that the proposed facility's proximity to the aquifer was a cause of concern to

this Board in its January 9, 2003 decision. However, decisions regarding the inherent suitability or unsuitability of certain geologic environments are outside the province of the Board's responsibility, and, accordingly Town & Country does not read the Board's previous decision a finding on what is ultimately a regulatory and legislative issue. Instead, Town & Country understands the Board's decision as a mandate to more clearly and persuasively explain how siting in an aquifer can protect the public health, safety, and welfare. The County's inference that siting in an aquifer is inherently unsafe is an adoption of the admittedly unqualified personal opinion of Stuart Cravens. Mr. Cravens may or may not understand the hydrogeologic setting at the site, but to the extent that he admits having no knowledge about how a highly engineered facility will interact with that hydrogeologic setting, his opinions about suitability have no value and are nothing more than expressions of personal fear.

The County plays on and exploits that fear by citing Mr. Cravens as the authority for its statement that "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 risk to the public health, safety and welfare." (County Brief at Page 41). Aside from the fact that Mr. Cravens didn't say this and that he admitted that he isn't qualified to say this, the County has to know that this is not the law, and that for the PCB to draw such a conclusion is outside the scope of the siting review process.

In yet another statement taken out of context, the County continues its fear mongering by stating any release or leak from a landfill built on the aquifer, "would go right into the aquifer that is utilized" with a citation that references the testimony of

Steven VanHook at the first siting hearing. (County Brief, Page 41). While it had been Town & Country's intention not to reargue evidence from the first hearing, the County's quoting a witness from that hearing out of context demands a response. Mr. VanHook also testified at the first hearing that the proposed liner meets State EPA requirements, and the system is, over designed to account for the geologic conditions. (PCB 03-31, Siting Hearing Transcipt 1216). He acknowledged that based on the hydrogeologic investigation at the site, there is a substantial inward gradient and felt that if the landfill is operated correctly, the inward gradient would protect the surrounding area from leachate. He noted that an inward gradient effectively prevents leachate migration from a landfill. (PCB 03-31, Siting Hearing Transcript 1227, 1236-38). Mr. VanHook concluded that the hydraulic head of the uppermost aquifer was so high that the possibility of the inward gradient at the site being lost or reversed and flow going outward from the landfill is not realistic, even in a drought. (PCB 03-31, Siting Hearing Transcript 1261).

Devin Moose, with extensive experience in landfill design and siting throughout the State of Illinois, noted that other landfill in Illinois which have been permitted and are operating, have more permeable Bedrock aquifers underneath than the proposed facility and mentioned the Lee County Landfill as a specific example. (Hrg. Tr. Volume 3B, Page 13). Professor Daniel, who reviewed the Board's decision of January 9, 2003, also inferred from that decision that the Board was moving in the direction of saying that a landfill should not be placed on or in an aquifer. With all of his vast personal knowledge on the subject, he concluded that the Board would be wrong in saying that, because in fact a landfill can be placed on or in an aquifer in a completely safe way. (Hrg. Tr. Volume 3B, Page 89). He reiterated in his rebuttal testimony that this particular landfill

can be constructed and operated safely in a fractured Bedrock aquifer. (Hrg. Tr. Volume 5A, Page 136).

5. The City's Findings Were Thorough And Well Reasoned

The 31 pages of Findings And Conclusions adopted by the City Council on August 18, 2003 are exceptionally thorough with regard to its Findings Of Fact on criterion ii. The Board is asked to remember that this is not an exercise in reweighing the evidence, or an argument about whose evidence was more persuasive. The issue for this Board is to determine whether the City's affirmative decision on criterion ii was against the manifest weight of the evidence. In a case like this where there is conflicting evidence on both sides, a large part of the City Council's function is to weigh the credibility of the competing experts. While cases like *Fairview Area Citizens Task Force* may very well stand for the proposition that if there is any evidence to support an affirmative finding, that finding is not against the manifest weight of the evidence, the detailed findings of the City Council make it obvious that the bulk of the evidence here favored an affirmative decision on the Application.

It is obvious from the fact that a full 20% of the City's Findings Of Fact on criterion ii were devoted to a summary of the testimony of Professor David Daniel that the City Council held his testimony in high regard and gave it special weight. Ironically, Professor Daniel's testimony is hardly mentioned in the County's Brief. Professor Daniel unequivocally made four points which apparently impressed the City Council. These were that the debate regarding permeability of the Bedrock aquifer was irrelevant, because with the strong inward gradient that exists at this site, a higher permeability aquifer would actually increase the driving velocity of groundwater inward thereby

tending to overcome diffusion. Secondly, Professor Daniel was unequivocal that whatever slight downward flow existed in the Dolomite now would be reversed when the landfill was constructed. He squarely took issue with Mr. Schuh on this point and even performed a calculation during his rebuttal testimony to demonstrate mathematically the large margin of safety that exists in the Applicant's conclusion regarding the upward flow. Thirdly, Professor Daniel evaluated the groundwater impact modeling of the Applicant and found it to be extremely conservative in its assumptions. Lastly, Professor Daniel directly addressed the unspoken issue which hovered like a specter over these proceedings, namely whether an aquifer is an inherently unsuitable geologic environment for a landfill. He concluded that this landfill, as designed, could be constructed and operated in a fractured Bedrock aquifer so as to protect the public health, safety, and welfare.

Given the fact that Professor Daniel is the Dean of the College of Engineering at our State University and, based upon his other achievements and credentials, and is undoubtedly one of the world's foremost experts in waste containment, it is hardly surprising that the City Council chose to value his opinions over those of Mr. Cravens, who had difficulty remembering his own credentials and who emphasized in his testimony that he knew nothing about how the geologic environment would interact with the landfill design. The City Council noted in its summary of the evidence that Mr. Cravens own investigative work was somewhat flawed and incomplete. It is also not surprising that the City Council valued the testimony of Professor Daniel over that of Mr. Schuh, who railed against the Applicant in his direct testimony for not conducting secondary porosity tests, but admitted on cross-examination that no such tests exist and

that secondary porosity cannot be measured.

After summarizing the evidence, the City Council actually made a specific finding that Jeffrey Schuh's lack of knowledge regarding the conclusions of employees under his direct supervision on similar issues undermined his credibility.

The City's summary of the testimony of Professor Daniel is so powerful that it merits being included in its entirety in this Brief because it, alone, should put an end to the entire County argument on criterion ii.

> "Dr. David Daniel was called for his opinions by the applicant. Dr. Daniel is the Dean of the College of Engineering of the University of Illinois. He has extensive experience in research And consulting regarding pollution control facility sites including Nuclear waste sites and several federal "superfund" sites.
>
> Dr. Daniel testified that he had conducted a peer review of the hydro-geologic investigation, the site's proposed design and the groundwater impact evaluation. He opined that the inward gradient design was "state of the art" and would assure the protection of the public safety, health and welfare and environment. He testified that the construction of the facility, as designed, would be consistent with the protection of the public health safety and welfare.
>
> He found that the groundwater impact study was extremely conservative and further underscored the protection which the design of the landfill would provide. He further testified that the characterization of the bedrock as an aquifer or an aquitard was not essential to determine the safety of the landfill. Rather the design included the use of the inward gradient assuming and incorporating the assumption that the bedrock was an aquifer.
>
> Dr. Daniel further testified regarding the use of "double liners". He testified that the use of double liners can be counter-productive due to the possibility of damage to the liner during the installation of the secondary liner and further the lack of proof of any benefit to be derived from a double liner. He testified that the use of a double liner was of no benefit in the design of the facility.
>
> Addressing the concerns of the Pollution Control Board, in its decision regarding the previous siting application, that the effectiveness of the inward gradient "is compromised when the aquifer lies below the

> foundation of the landfill", Dr. Daniel testified that the proper analysis required that the Dolomite be considered in its entirety. Once that analysis is accomplished, he said, the data resulting from that analysis discloses that the permeabilities of the Dolomite are high enough to actually increase the upward driving force of the inward gradient. Thus, there is not issue regarding downward vertical migration and the issues raised by the Pollution Control Board are not applicable to this site with this design.
>
> Questioned on the issue of downward flow in the Dolomite to which Mr. Schuh had alluded, Professor Daniel referred to flow calculations which He had performed for the site. Because these calculations were made to Directly address the merit of the issues raised by Schuh, they incorporated those contentions. Relying on those calculations, Professor Daniels stated that the "gradient is inward even in the rock, and the flow is inward in the rock." Explaining why that result occurred, Dr. Daniel referred back to the higher permeabilities shown to be present when the dolomite was considered in its entirety, emphasizing that those higher permeabilities actually increase the upward driving force of the inward gradient." (C1869, 1870).

In another apparent attempt to graft the unique facts of this case onto the findings of the Board in PCB 03-31, the County argues that the City has improperly deferred its decision making responsibility to the IEPA because of the lack of evidence presented by Town & Country. The City Council conditioned its approval on criterion ii on 21 special conditions, the majority of which are detailed and technical. The County complains that Special Condition 9 proves that the City believed that Town & Country didn't provide sufficient evidence. That is not a fair reading of Condition 9 given the tone of the remainder of the findings. The Condition mandating compliance with IEPA permitting requirements and adopting those as the City's is merely boiler-plate, and simply means that the City prudently has decided that it wants to be included, and become the beneficiary, of any additional requirements that the IEPA may impose at the permitting stage. This is really no different than the City's Special Condition 21 where the City finds that a double composite liner is not required, but adds that if, as a result of

subsequent statutory or regulatory changes, such a liner does become required, the City will adopt that requirement as its own.

The County cites no legal authority in support of its argument regarding Special Condition 9.

For the foregoing reasons, it is clear that the City Council's decision was not against the manifest weight of the evidence.

B. The Manifest Weight of the Evidence Supports the City's Findings Regarding Criterion viii

1. Standard Of Review

While the County suggests that the Board should apply a *de novo* standard to its review of criterion viii because it involves a question of law (County Brief, p.48), there is absolutely no Board or court precedent justifying that request. In fact, prior Board decisions and Illinois case law clearly establish that the correct standard for reviewing the local government body's decision on all statutory criterion, including criterion viii, is the manifest weight of the evidence standard. See *Concerned Adjoining Owners v. Pollution Control Board, 288 Ill. App. 3d 565, 680 N. Ed. 2d 810, 818, 223 Ill. Dec. 860 (5th District, 1997)* citing *Tate v. Illinois Pollution Control Board, 188 Ill. App. 3d 994, 1022, 136 Ill. Dec. 401, 544 N.E. 2d 1176 (1989)* ("the manifest weight of the evidence standard is to be applied to each and every criterion on review.")

The County's assertion that the Board should change this well-established standard is based upon the County's citation of irrelevant case law and should be rejected, just as the Board rejected the County's similar attempt to argue for a *de novo* standard in the PCB 03-31, 03-33 and 03-35 proceeding. In support of its assertion, the County

offers two cases, *Fairview Area Citizens Task Force v. Illinois Pollution Control Board, 198 Ill. App. 3d 541, 552, 555 N.E. 2d 1178 (3d Dist. 1990)* and *Land and Lakes v. Illinois Pollution Control Board, 319 Ill. App. 3d 41, 743 N.E. 2d 188 193 (3d District, 2000)*. Neither of these cases stands for the proposition advanced by the County, however.

In *Fairview*, the Third District appellate court does not even mention the *de novo* standard. Rather, it upholds the Board on its determination on all reviewed criterion, to which review the Board applied the manifest weight standard. See *Fairview*, at *555 N.E. 2d 1178* citing *Waste Management of Illinois, Inc. v. Pollution Control Board, 160 Ill. App. 3d. 434, 513 N.E. 2d 592, 112 Ill Dec. 178 (1987)* and *Tate v. Pollution Control Board, 188 Ill. App. 3d 994, 544 N.E. 2d 1176, 136 Ill. Dec. 401 (1989)*.

Similarly, the appellate court's decision in *Land and Lakes* does not offer any support to change the standard of review that should be applied to Board review of a local government's decision on the statutory criterion in a landfill siting case. Rather, *Land and Lakes* involved the appropriate standard for judicial review of Pollution Control Board decisions, where the Board's decision involves a pure question of law. In fact, the court in *Land and Lakes* reiterated the appropriateness of the Board's application of the manifest weight standard: "(A) decision of the local siting authority with respect to an applicant's compliance with the statutory siting criterion will not be disturbed unless the decision is against the manifest weight of the evidence." *Land and Lakes, 743 N.E.2d 188, at 197*, citing *Concerned Adjoining Owners v. Pollution Control Board, 288 Ill. App. 3d 565, 223 Ill. Dec. 860, 680 N.E. 2d 810 (1997)*.

While the courts have adopted a *de novo* standard when reviewing Board

decisions that involve pure questions of law, such a standard is not applicable to Board review of local government's decision for good reason. First, the well-established legislative scheme under Section 39.2 landfill siting clearly calls for the decision on the criterion to be the local government siting authority's, not the Pollution Control Board's. The Pollution Control Board's role is merely one of review; the application of a *de novo* standard would change that scheme in a way that the legislature did not envision and that would take control away from the local decision maker. Second, a determination pursuant to criterion viii, even here, is not purely a question of law, but involves findings of fact. Indeed, the City of Kankakee made 31 separate findings of fact on criterion viii alone. For the County to suggest that the issue before the Board is purely one of law is disingenuous. Thus, the manifest weight of the evidence standard clearly should be applied in the Board's review of the City's decision on criterion viii.

In applying the manifest weight standard the Board cannot reweigh the evidence or substitute its judgment for that of the City. Instead, the Board must review the facts and rationale for the City's decision and, if the decision is supported by the manifest weight of the information and evidence that the City considered, the Board should affirm the City's decision on criterion viii. ("That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable." *Concerned Adjoining Owners, id,* citing *Turlek v. Pollution Control Board, 274 Ill. App. 3d 244, 249, 210 Ill. Dec.826, 653 N.E. 2d 1288 (1995)).*

The Board's long history of applying the manifest weight standard to criterion viii should not be disturbed. Indeed, since the passage of this local planning criterion, the Board has applied the manifest weight standard to this specific criterion in each of the

following cases: *Waste Hauling Inc. v. Macon County Board, PCB 91-233 (May 7, 1992)* (siting denial affirmed); *Worthen v. Village of Roxana, PCB 90-137, September 9, 1993, affirmed on appeal* at *253 Ill. App. Ed 378, 623 N.E. 2d 1058, 191 Ill. Dec. 468 (5th Dist. 1993)* (siting decision affirmed); *Geneva v. Waste Management and County of Kane, PCB 94-58 (July 1, 1994)* (siting decision affirmed); *TOTAL v. City of Salem and Concerned Owners v. City of Salem, PCB 96-82 and PCB 96-79 (cons.), (March 7, 1996) affirmed on appeal* at *288 Ill. App. 3d 565, 680 N.E. 2d 810, 223 Ill. Dec. 860 (5th Dist., 1997)* (siting decision affirmed); *Land and Lakes v. Randolph County, PCB 99-69 (September 21, 2000)* (siting denial affirmed); *Landfill 33 v. Effingham County, PCB 13-43, 03-52 (Cons.) (February 20, 2003)* (siting denial affirmed); *Waste Management of Illinois, Inc. v. Kane County, PCB 03-104 (June 19, 2003) (siting denial affirmed).*

2. Criterion viii First Requires That A County's Solid Waste Management Plan Be Consistent With The State's Statutory Planning Requirements And Process; Kankakee County's Is Not

Criterion viii was not an original criterion under Section 39.2, but was added to the Act in the late 1980's, along with a statutory planning process designed to deal with municipal solid waste. The criterion clearly calls for consistency with that process:

> 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 (emphasis added). *415 ILCS 5/39.2(a)(viii)*

The City's findings of fact concerning the County Board's failure to follow the clear mandates of these legislative enactments find support in the record (See, City Findings). The relevant evidence is set forth at numbered paragraphs 1 - 18 of the City's Findings of Fact concerning criterion viii (City Findings, p. 24 - 27). In sum, the City has

found that the county's planning process has not been in conformity with the legislative enactments upon which criterion viii is based, the Local Solid Waste Disposal Act ("Disposal Act"), *415 ILCS 10/1.1 et. seq.*, and the Solid Waste Planning and Recycling Act ("SWPRA"), *415 ILCS 151 et. seq.* Each of those Acts envision that local planning will be done with the collaboration and agreement among the units of government in the relevant area, with public participation and comment, as well as state review and approval for consistency with statutory requirements. See *415 ILCS 10/1.1* and *415 ILCS 15/2(a)(5).* See also 85th Gen. Assembly, S.B. 1616, Record of Debates, June 17, 1988.

In order to ensure that such collaboration takes place, the SWPRA sets forth a planning scheme that provides:

> (T)hat solid waste planning should be encouraged to take place on a multi-county, regional basis and through inter-governmental cooperation agreements *whereby various units of local government within a region determine the best methods and locations* for disposal of solid waste. *This amendatory Act of 1992 shall not be construed to impact the authority of units of local government in the siting of solid waste disposal facilities.*
> *415 ILCS 15/2(a)(5)* Emphasis added.

In order to ensure that this planning occurs as the legislature envisioned, on a regional basis, through inter-governmental cooperation, the legislature wisely set forth certain planning requirements. It required that all counties submit, to the Illinois EPA, a plan that "shall conform with the waste management hierarchy established as State policy in subsection (b) of [this Act]." *415 ILCS 15/4(a).* Subsection (b) then provides that the Illinois EPA "shall review each county waste management plan to ensure consistency with the requirements of this Act." *415 ILCS 15/4(b).*

Those requirements set forth a planning process in which the county has "primary" but by no means "exclusive" responsibility. Rather, the SWPRA provides that

the Solid Waste Management Plan is to developed every five years and, prior to its adoption, the county is required to hold public hearings, provide a regulatory-like review and comment period, and seek the specific input and participation of "all municipalities within the county." *415 ILCS 15/5(a)(c).* Legislative history is clear that the Solid Waste Management Plan that is referred to in the SWPRA is the same plan that is referred to in criterion viii. Importantly, after this local planning process takes place, the county is required to submit the plan, as well as "any necessary or appropriate revisions" to the Illinois EPA for "review and comment." *415 ILCS 15/5(e).* The Illinois EPA's review is required "to ensure consistency with the requirements of this Act." *415 ILCS 15/4(b).*

As the siting authority, the City must first determine the entirety of the criterion viii requirement. Thus, it must first determine that the plan is consistent with state requirements. The siting authority's finding that the county's Solid Waste Management Plan is not consistent with the statutory planning requirements, as required in criterion viii, is not against the manifest weight of the evidence. Clearly, the amendments of October 9, 2001, March 12, 2002, and February 11, 2003 have not been reviewed and approved for consistency by the EPA and, moreover, the record facts demonstrate that these amendments did not follow the statutorily prescribed process for the development of county solid waste plans. The County's position, that these amendments, particularly the February 11, 2003 amendment, constitute a "county solid waste plan" that forecloses any landfill but the expansion of the County's own Waste Management landfill, is ludicrous and makes a mockery of the carefully crafted legislative scheme concerning local government waste planning. ("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 [in our jurisdiction]." County Brief at p. 52)

Regarding the issue of the county Solid Waste Management Plan's consistency with the statutory planning process, the County offers really only two arguments. Both miss the mark. First, the County suggests that since the Mayor of Kankakee "served on the intergovernmental task force responsible for drafting the Plan" the plan is somehow properly promulgated. (County Brief at. 49). The County's suggestion simply ignores the "consistency" language of criterion viii, as well as the clear language of the Disposal Act and the SWPRA.

Certainly, the Mayor's service on this taskforce does not make the amendment, or the plan it is amending, "consistent" with the SWPRA process or the Disposal Act. Rather, given the statutorily proscribed process, the County is dead wrong to consider its hastily adopted February 11, 2003 amendment, adopted in the wake of the Board's decision in PCB 03-31, 33 and 35, to be part of the official Solid Waste Management Plan. The City's position is, and has always been, clear: the County's "Plan" as the County portrays it (with its recent amendments) is not consistent with the SWPRA and the Disposal Act. Town and County would also argue that, for purposes of criterion viii, a county's Solid Waste Management Plan is not cognizable ("consistent") until it has been, as the legislature envisioned, submitted to the Illinois EPA and deemed to be "consistent" with the statutory planning process.

Obviously, the legislature envisioned a planning process that would take place every five years, and would involve the substantive participation of all local

governments, industries and the public within the county. Only then would a county's Solid Waste Management Plan, which attempts to extent it's influence beyond into own jurisdiction and into that of home rule communities, be valid. Given this legislatively proscribed process, it is clear that the legislature did not envision that a county could hastily act, as Kankakee County has done, in a manner that ignores this process and arrogantly forecloses any local government jurisdiction, other than itself, from ever siting a landfill within its jurisdiction.

In fact, such actions of the county run roughshod over the clear proscription in the SWPRA that it "shall not be construed to impact the authority of units of local government in the siting of solid waste disposal facilities." *415 ILCS 15/2(a)(5)*. That such actions violate the legislative intent behind the local planning process is clear. In debating the Solid Waste Planning and Recycling Act, its potential impact on "home rule" was specifically discussed. On June 28, 1988, just prior to vote in the Illinois Senate, the then presiding officer Senator Savickas stated: "...before we close, on Senator Macdonald's request on the...ruling that this bill provides a comprehensive standard statewide and in so doing does not affect home rule units. It is a statewide plan, it does not involve in any way destruction of local authority." 85th Gen. Assembly, S.B. 1616, June 17, 1988. (See discussion of constitutional implications of county's actions as they apply to a home rule community, found later in this Brief.)

Further, the County's actions also wrongfully foreclose meaningful public participation as well as legitimate business opportunities, and results in a improperly promulgated plan which places the County in the position of being the sole overseer of a one-waste industry town. Such position also presents a myriad of other legal issues,

including a violation of the special legislation clause of the constitution. Ill. Const. 1970, Art. IV, Section 13. See also, *Allen v. Woodfield Chevrolet, Inc. 332 Ill. App. 3d 605, 773 N.E. 2d 1145 (1st Dist. 2002)* and *Best v. Taylor Machine Works, 179 Ill. 2d 367, 689 N.E. 2d 1057 (1997).*

The second argument that the County makes on the point of "consistency" is equally wrong. The County asserts that the City, although it is the siting authority here, has "no authority" to examine how a Solid Waste Management Plan is created or adopted. It states that the Board has ruled that such inquiries are inappropriate in a Section 39.2 siting appeal. In support of this bold presumption, the County cites prior Board orders in a proceeding that involved issues wholly dissimilar to this one, *Residents Against A Polluted Environment v. County of LaSalle and Landcomp Corp, PCB 97-139 (September 19, 1996; June 17, 1997).*

As counsel for the County well knows, the factual context before the Board in the *Landcomp* case was entirely different than the one before it now. It did not involve a local government siting authority's review of the consistency of the plan under criterion viii. Rather, the *Landcomp* case involved a citizens' challenge to the fundamental fairness of LaSalle County's siting proceeding. The Board did not hold that a siting authority could not examine the "consistency" language of criterion viii; rather, it simply refused to entertain the citizens' fundamental fairness claim. The Board's rationale had nothing to do with criterion VII. It simply determined that any alleged communications that might have been made during the planning process were not wrongful *ex parte* communications because those contacts occurred prior to the filing of the application. Accordingly, the Board ruled that the contacts were not appropriate to the Board's review

of the fairness of the proceeding. The *Landcomp* case simply does not stand for the proposition that it is any way improper for a siting authority, here the City, to examine legitimate issues related to criterion viii, including the propriety of the planning process and the Plan's consistency with the SWPRA and the Disposal Act. For the County to cite this case for the proposition that "the City 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" is, at best, misleading.

Rather, the City's authority to make determinations concerning the applicability of all of the statutory criterion is absolutely clear in law (*415 ILCS 5/39.2(a)*) and constitution (Ill. Const. Art. VII, Sections 6(a) and 6(i)). The Board should not be deceived by the County's obvious attempts to paint it otherwise. It is not the County who is the siting authority in this proceeding; it is the City. The Board and courts have previously entertained a myriad of questions concerning criterion viii. For example, where there was no valid county plan, the courts have nonetheless upheld the city's ability to site a landfill. See *Worthen v. Village of Roxana, PCB 90-137, September 9, 1993.* Also, absolute consistency with a Solid Waste Management Plan is not required. See *City of Geneva v. Waste Management and County of Kane, PCB 94-58 (July 1, 1994)* (Board affirms siting authority's interpretation of Solid Waste Management Plan despite challenge from neighboring jurisdiction.) This principle is especially important when the county plan itself is not consistent with the legislatively established and state mandated planning process.

As the Board wisely recognized in PCB 03-31, 03-33 and 03-35, while the plain language of criterion viii presumes that the solid waste management plan is consistent

with the Solid Waste Planning and Recycling Act (SWPRA) or the Local Solid Waste Disposal Act (Disposal Act), "(O)nly when the plan is consistent with the SWPRA or the Disposal Act will the Board assess whether the application is consistent with the plan." *(PCB 03-31, 03-33 and 03-35, January 9, 2003, Slip Opinion at Page 29).* Obviously, that is the City's position in this proceeding as well.

In the earlier City of Kankakee appeal, the Board affirmed the City's determination on criterion viii, finding appropriate the City's overall determination that the application was consistent with the County plan, but did not address the City's remaining arguments. ("Having found that Town & Country's siting application is consistent with the County Plan, the Board need not address Town & Country's remaining arguments regarding the legality of the March 12, 2002 and October 9, 2001 amendments to the County Plan." PCB 03-31, 33 and 35, January 9, 2003, slip. op. at p. 30.) The County's self proclaimed death knell provision, however, was passed on February 11, 2003, in the wake of the Pollution Control Board's decision on the City of Kankakee's earlier siting decision. Thus, the Board has not yet had an opportunity to review the City's determination of its non-application. In this proceeding, the Board should uphold the City's determination that the Solid Waste Management Plan, as recently amended, is not consistent with the relevant statutory requirements, as required by Section 39.2(a)(viii) and, accordingly, is not applicable. Certainly, the controversial amendments are not applicable.

3. The City's Decision That Town And Country's Application Is Consistent With A Relevant Local Waste Planning Is Not Against The Manifest Weight Of The Evidence And Should Be Affirmed.

The City has also found that the application is consistent with the County Plan,

even as it has been most recently amended. As to whether that decision is against the manifest weight of the evidence, the County only makes the following arguments:

(1) The County's recent amendment is crystal clear. It meant to establish the County's "intent that no new landfills be sited in Kankakee County, other than the expansion of the existing Waste Management facility." (County Brief, p. 51). The words "contiguous" and "existing" can not be read any other way;

(2) County approval has been granted for an expansion of Waste Management's landfill. Thus, despite the fact that the Board reversed that approval, the City's decision that "no other siting or expansion has currently been approved for another site within Kankakee County" is against the manifest weight of the evidence;

(3) County approval has not been granted for the applicant's Property Value Protection Program, Environmental Damage Fund, and Domestic Water Fund. Thus, despite the fact that the applicant is going to provide them, as required by the City's plan, the City's decision is against the manifest weight of the evidence because County approval has not been sought or obtained.

The County Plan as recently amended. The County devotes almost a dozen pages to a discussion of the words "contiguous" and "existing" which only become relevant if the Board determines that the County's recent February 11, 2003 amendments are "consistent" with the legislative planning process. In any event, Town & Country suggests that nothing is quite as clear as the County would make it. The plan, even as recently amended, does not contain a definition of either of these phrases and they are, quite commonly, used in different ways depending on the context. Indeed, the very word

"contiguous" has a whole body of law defining it, and the *Webster's Revised Unabridged Dictionary*, 1996, defines it not only as "touching" but also, "adjacent; near; neighboring; adjoining." ("The two halves of the paper did not appear fully divided...but seemed contiguous at one of their angles." -- Sir Issac Newton; SOURCE: Dictionary.com/contiguous.)

While the only person to testify on the issue of the application's consistency with the Solid Waste Management Plan was Town & Country's witness Devon Moose, the County's brief engages in excruciating hairsplitting to explain away his testimony:

> "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 (sic) 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. Northesastern 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 presented that the proposed facility was consistent with the County's Plan. Therefore, this Board should find that the City's Council's decision with respect to criterion eight is against the manifest weight of the evidence." (County Brief, at. p. 60)

First, the Act does not require that someone testify that "the facility is consistent with the plan." The Act requires that the siting authority determine that the application is consistent with a plan that has been developed consistent with the planning requirements of Illinois law. The City has done that, and its decision is indeed supported by the record. Second, if the County wanted to provide testimony concerning "consistency" or, from its perspective, "inconsistency" it could have done so. That it did not leaves the matter open to greater interpretation. Finally, regardless of the Eighth Circuit's statutory construction of federal law referenced above, it is ludicrous for the County to ask the Board to

conclude that Devon Moose's testimony was something other than his opinion that criterion viii had been met.

Other Siting Approval. Likewise, it is ludicrous for the County to ask the Board to conclude that the City's decision on criterion viii is against the manifest weight of the evidence on the point that "no other siting or expansion has currently been approved for any other site within Kankakee County." The County argues that, since it voted in favor of an expansion of the County's Waste Management landfill expansion, the City's finding of consistency with the plan is against the manifest weight of the evidence. However, as the Board knows, the County's "approval" was voided by the Board because of inadequate notice, and Waste Management has a second application for expansion now pending before the County Board. Thus, there is no "approval" of the Waste Management expansion. The City's finding is certainly not against the manifest weight of the evidence and is absolutely consistent with prior Board and court case law. In PCB 03-31, 03-33 and 03-35, when the County made similar arguments, the Board concluded that "it is unreasonable to interpret the plan to require the City to wait indefinitely for the approval or rejection of an application (or amended application) to expand the waste management landfill." *(PCB 03-31, 03-33 and 03, 34, January 9, 2003 Slip Opinion at Page 29).*

County Approval. Finally, the County argues that the application is inconsistent with the Solid Waste Management Plan because, although the application includes all of the programs necessitated by the plan, there has been no evidence presented that these programs have been "approved" by the County. This approval process was mandated with the onset of the recent alleged amendments to the county's plan, particularly the March 12, 2002 amendments. As argued previously, those amendments did not follow

the requisite statutory process, have not been approved by the Illinois EPA as being consistent with that process and, accordingly, are not valid. Thus, county approval of these programs is not a valid "requirement" of the plan.

City's Solid Waste Management Plan. Nonetheless, since the County's plan has not been appropriately developed and established, the City has developed its own plan. This plan contains all the programmatic requirements that the County complains are missing in the Application, except that County approval is not required. This action is responsible, protective and necessary, given the County's unilateral actions. It is certainly well within the City's authority under the Disposal Act and the constitutional authority of a home rule city:

> It is the purpose of this Act and the policy of this State to protect the public health and welfare and the quality of the environment *by providing local governments with the ability* to properly dispose of solid waste within their jurisdictions by preparing and implementing, *either individually or jointly*, solid waste management plans for the disposal of solid and, to the extent technically and economically feasible, to efficiently use products or byproducts generated during the disposal process. (emphasis added).
> *415 ILCS 10/1.1*

Section 2(2) of the Disposal Act defines a "unit of local government" to specifically include a municipality, and Section 2(4) specifically defines "jurisdiction" in the case of a municipality to be "the territory within the corporate limits of the municipality." *415 ILCS 10/2(2) and 10/2(4)*. The Disposal Act defines the jurisdiction of a county to exclude "the corporate limits of any municipality which has adopted or is implementing a plan under this Act..." 415 ILCS 10/2. Accordingly, Kankakee County's jurisdiction may not reach within the boundaries of the City of Kankakee once the City has adopted a solid waste plan.

When the City of Kankakee adopted its Solid Waste Management Plan, any

provision of the County's plan in conflict with the City's Plan became invalid with respect to the City, based upon the provisions of the Disposal Act and the Illinois Constitution. Ill. Const. Art. VII, Section 6(c). In the prior proceeding, the objectors also alleged that the City's decision was against the manifest weight of the evidence based upon a similar argument that the applicant failed to have a host agreement with the County. The Board stated: "the County Plan only indicates that an applicant and the County would agree to a host community agreement (citation omitted.). The Board finds that the County Plan does not require that an applicant enter a host agreement with the County." *(PCB 03-31, 33 and 35, January 9, 2003).* Similarly, the Board should uphold the City's determination here. County approval is simply not required.

4. The County's Position In This Proceeding, And The County's Proffered "Solid Waste Management Plan" Violates The Illinois Constitution As It Is An Improper Infringement And Limitation Upon The Home Rule Powers Of An Independent Local Government Jurisdiction.

The Illinois Pollution Control Board is responsible for the proper interpretation of the Illinois Environmental Protection Act. It is well established that, as an administrative adjudicatory agency, the Board must interpret the Act in a way that is consistent with the constitution and other lawful requirements upon which it's provisions are based. It cannot condone, and accept, interpretations like that of the County's, which constitute an unlawful and unconstitutional application of a carefully proscribed statutory process. It cannot condone unconstitutional applications of a statutory environmental process.

Section 39.2 of the Act clearly grants the City of Kankakee the sole siting responsibility to approve or deny a request for siting approval of a pollution control facility located within its corporate boundaries. Section 39.2(a)(viii) has been carefully crafted so that the siting jurisdiction first determines the Solid Waste Management Plan's

consistency with the statutory process prior to deciding consistency with the plan itself. This is to ensure constitutional correctness. The County's position is constitutionally infirm.

Before the 1970 Illinois Constitution, municipalities and counties only had the authority to act that was expressly given to them by the Illinois legislature. The prior theory of state legislative control of local government (the "Dillon's Rule") was capsized with the new constitution's development of home rule. See *Ives vs. City of Chicago, 30 Ill. 2d 582, 198 NE. 2d 518 (1964)* and *City of Clinton vs. Cedar Rapids and Missouri River Railroad, 24 Iowa 455 (1868)*. Now, the corporate and governmental functions of a local government jurisdiction can be preempted by the state only in the narrowest and most specific of circumstances.

As a home rule local government jurisdiction, the City of Kankakee has substantial constitutional authority to enact ordinances and take other actions which pertain to its government and affairs. The Illinois Supreme Court explained the dramatic constitutional authority of the home rule unit, as follows:

> The concept of home rule adopted under the provisions of the 1970 Constitution was designed to drastically alter the relationship which previously existed between local and State government. Formerly, the actions of local governmental units were limited to those powers which were expressly authorized, implied or essential in carrying out the legislature's grant of authority. *Under the home rule provisions of the 1970 Constitution, however, the power of the General Assembly to limit the actions of home rule units was circumscribed and home rule units have been constitutionally delegated greater autonomy in the determination of their government and affairs.* To accomplish this independence, the Constitution conferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein. *Kannellos vs. Cook County, 53 Ill. 2d 161, 290 N.E. 2d 240, 243 (1972)* (emphasis added).

Neither Section 39.2 of the Illinois Environmental Protection Act nor the Disposal Act nor the SWPRA impose any specific restrictions on the authority of the home rule municipality as explained above. Rather, those statutes have been carefully crafted to take into account the constitutional authority of home rule units of government and should be so construed. As a home rule unit, the City of Kankakee "may exercise any power and perform any function pertaining to its government and affairs..." (ILL. Const. Art. VII, Section 6(a)), and may also "...exercise and perform concurrently with the State any power function of a home rule unit to the extent that the General Assembly by law does not specifically declare the State's exercise to be exclusive. ILL. CONST. Art. VII, Section 6(i).

Nothing in these statutes even remotely suggests that the legislature intended that the authority of local government on the question of siting be usurped by the state or, more to the point here, by a local government jurisdiction of equal authority. Nothing in state law even remotely suggests that a county's authority preempts that of a home rule municipality. Rather, these laws were carefully crafted to *avoid* the very problem that the County of Kankakee brings to this Board.

Clearly, pursuant to both the Illinois Constitution and the delegation by the General Assembly of the responsibility for siting approval, the City of Kankakee may not be prevented, or in any way obstructed, in the exercise of this power within its corporate boundaries by Kankakee County. Any attempt to contend that Kankakee County may, through the guise of amendments to its Solid Waste Management Plan, prohibit the City of Kankakee from approving the siting of a pollution control facility within its corporate jurisdiction is directly contrary to the Illinois Constitution and the authority of *415 ILCS*

5/39.2(a).

A Solid Waste Management Plan may not limit the powers of a unit of local government conferred by the Illinois Constitution or delegated by the General Assembly. To the extent that it attempts to do so, the plan is simply not relevant or effective. Simply put, the Solid Waste Management Plan cannot be used by a county to reserve to itself the sole and exclusive power to site a pollution control facility within the county. There is no valid, recognized preemption of a city's authority, by a county, in this regard. To the extent that an application of criterion viii would be construed to allow Kankakee County this unlawful and unconstitutional usurpation of local authority, such statutory application would render criterion viii unconstitutional. The City of Kankakee, in its siting decision, recognized that. On review, so should the Illinois Pollution Control Board.

V. NONE OF THE ISSUES RAISED BY BYRON SANDBERG REQUIRE REMAND OR REVERSAL

Byron Sandberg, in his single-spaced Brief without citations to the record or legal authority raises no issues not otherwise addressed in Town & Country's response to the Kankakee County Brief except the landfill poses a danger to Minnie Creek, and that the landfill is within the 100-Year Flood Plain. The unrebutted testimony of Devin Moose is that based upon the latest FEMA Flood Plain Maps, the facility is entirely outside the established 100-Year Flood Plain. (Hrg. Tr. Volume 2C, Page 81). The Exhibit from the Illinois Department of Natural Resources attached to Mr. Sandberg's Brief does not support a different conclusion. Mr. Moose also described design features to prevent backflow onto the site if Minnie Creek rises beyond its flood stage. (Hrg. Tr. Volume

2C, Page 67). He reiterated in rebuttal that the design fully takes into account the possibility that Minnie Creek may flood. (Hrg. Tr. Volume 5A, Page 80).

For the foregoing reasons, none of the issues raised by Mr. Sandberg mandate remand or reversal.

VI. CONCLUSION

For the reasons set forth herein, Kankakee Regional Landfill, L.L.C. and Town & Country Utilities, Inc. respectfully pray that this Board affirm the decision of the Kankakee City Council granting siting approval for a new regional pollution control facility.

Respectfully Submitted,
Kankakee Regional Landfill, L.L.C. and
Town & Country Utilities, Inc.,
Respondents.

BY: _____
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Hydrogeological Investigation Compliance Chart

Compared Issue	Kankakee Regional Landfill (Initial Investigation)	Kankakee Regional Landfill (Complete Investigation)	In Compliance With IEPA Guidance?
Total Number of Boring Locations Within or Near the New Waste Boundary (Excluding Nested Well Locations)	14.0	38.0	Yes
Total Number of Acres (Waste Footprint)	236.0	236.0	Yes
Total Number of Acres per Boring Location (Within or Near the Waste Footprint)	16.9	6.0	Yes
Total Number of Borings 10 Feet or Greater into Bedrock	1.0	21.0	Yes
Total Amount of Rock Cored or Drilled with Roto-Sonic Technology (Ft.)	66.8	410.4	Yes
Total Amount of Rock Cored (Ft.)	66.8	410.4	Yes
Total Amount of Rock Core Footage used for Rock Quality Designation (RQD) Measurements	66.8	410.4	Yes
Total Number of Boring Locations With Packer Tests Performed in Bedrock	1.0	23.0	Yes
Total Number of Intervals Packer Tested within Bedrock	5.0	37.0	Yes
Total Footage of Bedrock Packer Tested	40.0	283.1	Yes
Total Number of Boring Locations With Slug Tests Performed in Weathered Bedrock	3.0	20.0	Yes
Total Number of Slug Tests Performed in Weathered Bedrock	5.0	39.0	Yes
Geometric Mean of Hydraulic Conductivity Results for the Weathered Bedrock	2.59E-03 cm/sec	5.30E-04 cm/sec	Yes
Total Number of Boring Locations With Slug Tests Performed in Competent Bedrock	0.0	6.0	Yes
Total Number of Slug Tests Performed in Competent Bedrock	0.0	10.0	Yes
Geometric Mean of Hydraulic Conductivity Results for the Competent Bedrock	-	1.13E-05 cm/sec	Yes
Average Thickness of Recompacted Clay and In-situ Clay Below Liner	7.5	7.5	Yes
Minimum Thickness of Clay (Liner and In-Situ) Between Waste and Uppermost Aquifer	3.0	3.0	Yes
Average Thickness of Recompacted Clay Sidewall Liner	12.0	12.0	Yes
Total Number of Angled Borings Performed at Site	0.0	2.0	Yes
Total Footage of Rock Core Obtained from Angled Borings	0.0	82.5	Yes
Total Number of Angled Boring Locations With Packer Tests Performed in Bedrock	0.0	2.0	Yes
Total Number of Intervals Packer Tested within Bedrock at Angled Boring Locations	0.0	9.0	Yes
Total Footage of Bedrock Packer Tested at Angled Boring Locations	0.0	47.5	Yes
Complete Inward Gradient Across Top of Liner	Yes	Yes	Yes