ILLINOIS POLLUTION CONTROL BOARD
April 15, 2004

ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-218
	)	(Pollution Control Facility
CITY COUNCIL OF THE CITY OF ROCHELLE, ILLINOIS,	)	Siting Appeal)
	)	
	)	
Respondent.	)	

MICHAEL F. O'BRIEN OF MCGREEVY, JOHNSON & WILLIAMS, P.C. APPEARED ON BEHALF OF ROCHELLE WASTE DISPOSAL, L.L.C.; and

RICHARD S. PORTER AND CHARLES F. HELSTEN OF HINSHAW & CULBERTSON APPEARED ON BEHALF OF THE CITY COUNCIL OF THE CITY OF ROCHELLE.

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

On May 21, 2003, Petitioner Rochelle Waste Disposal, L.L.C. (Rochelle Waste) filed a petition asking the Board to review an April 24, 2003 decision of the City Council of the City of Rochelle, Illinois (City). The City's decision denied Rochelle Waste's proposed lateral and vertical expansion of the Rochelle Municipal Landfill No. 2 at 6513 South Mulford Road, Rochelle, Ogle County.

Rochelle Waste alleges that the procedures followed during the landfill siting public hearing were fundamentally unfair and that the City's decision was against the manifest weight of the evidence on five of the nine criteria listed in Section 39.2 of the Environmental Protection Act (Act). 415 ILCS 5/40.1 (2002).

After considering the evidence and arguments before it, the Board finds that the City followed fundamentally fair procedures, that its decision on criterion (i) was against the manifest weight of the evidence, but that the decisions on criteria (ii), (iii) and (vi) were not. Accordingly, the City decision to deny siting is affirmed.

PROCEDURAL BACKGROUND

On June 5, 2003, the Board accepted Rochelle Waste's petition for hearing. On December 10, 2003, a hearing was held. Rochelle Waste and the City each presented witnesses. On January 8, 2004, Board Hearing Officer Bradley Halloran issued a hearing report that directed Rochelle Waste's brief to be filed on or before January 16, 2004; the City's brief to be

filed on or before February 6, 2004; and Rochelle Waste's reply brief to be filed on or before February 13, 2004. Public comments were due to be filed on or before January 5, 2004.

Twenty-four public comments were received. The parties filed briefs according to the set schedule.

FACTS

Rochelle Waste is seeking to expand its existing pollution control facility in Rochelle both vertically and horizontally. Rochelle Waste first filed an application on January 21, 2000. A hearing was held that year, but the application was withdrawn after the hearing officer in that case issued a recommendation that there be a finding of failure to meet criteria (i), (ii), and (vi). Rochelle Waste refilled its application on November 22, 2002. C6658.[1]

The proposed facility is to be located within the corporate limits of Rochelle, and located near the Village of Creston. The site is physically bounded by Mulford Road, Creston Road, the Union Pacific Railroad and Locust Road. C7025. The 2002 application seeks both horizontal and vertical expansion of the existing 80-acre municipal waste landfill located in Rochelle. C0001-0004, 41. The existing 80-acre facility is owned by the City and operated by Rochelle Waste, and consists of an older, unlined area and a new landfill area. C0041. Rochelle Waste seeks to expand to a 320-acre facility, and increase the elevation of the current facility by 84 feet, from 876 feet currently permitted elevation to 960 feet. *Id*. Currently, the property not already used as a landfill is predominantly in agricultural production with a small area devoted to farmsteads, woodlots and an antenna. C0004.

A public siting hearing was held before the City from February 24, 2003 through March 4, 2003. The Concerned Citizens of Ogle County (CCOC) participated at the siting hearing as an objector. CCOC is a voluntary association of citizens in the community of Rochelle. CCOC filed a petition to intervene in this matter that was denied in a July 10, 2003 order of the Board. At the siting hearing Rochelle Waste called a number of witnesses to support its application. CCOC called one witness in opposition.

After the siting hearing, the hearing officer recommended approval of siting subject to conditions, finding, as suggested by the city staff, that all the statutory criteria had been met. C8155-8210; C8049-8150. On April 24, 2003, the City Council voted to deny siting, finding that criteria (i), (ii), (iii), (vi) and (ix) had not been met. Four days later, on April 28, 2003, the City Council reconvened and found that criterion (ix) had not been met. At that time, the City Council also voted to impose the conditions proposed by the hearing officer if the Board or an appellate court reversed the decision and approved the application. C8245.

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[1] The City Council's record will be cited as "C__."; the Board's hearing will be cited as "Tr. at __"; Rochelle Waste's brief will be cited as "RW at __."; the City's brief will be cited as "City at __."; CCOC's brief will be cited as "CCOC at __."; Rochelle Waste's reply brief will be cited as "Reply at __."

At the hearing, the following testimony was adduced:

Criterion (i)

Rochelle Waste presented the testimony of Ms. Sheryl Smith. Ms. Smith is a solid waste consultant with 20 years of experience in the industry, and has reviewed or prepared need reports for 15 waste disposal facilities. C6963-64.

Ms. Smith determined the projected population for each county in the service area over the projected 25 year life of the expansion, and reviewed those counties' solid waste plans to determine the expected per person waste generation rates. C6965. She next reduced the figure in accordance with recycling goals and by a "waste capture rate" based on the likelihood that the waste from any specific county in the service area would actually be disposed of at the expansion. C6967.

Ms. Smith testified that during the anticipated life of the expansion, the service area would actually have a shortfall of between 17,360,954 million tons and 67,978,296 million tons of solid waste depending upon whether or not each county met its recycling goal. C6970A-71. Ms. Smith determined that more than half of the 37 disposal facilities serving the service area would be closed by 2006 when the expansion opens. C6970. Ms. Smith concluded that a need for the expansion's capacity of 17,274,000 tons exists because, in part, recycling goals will likely not be achieved. *Id*.

Ms. Smith testified that a nearby facility, Onyx, has capacity for an additional 16 years and is currently receiving waste from Ogle County. C6988. Ms. Smith also testified that siting approval has been granted to facilities in the service area, including facilities in Will County, and in Streator and Bartlett. C7004. She testified that Livingston Landfill, serving approximately 55% of the service area, has an application for expansion pending. C7007.

Criterion (ii)

Rochelle Waste presented the testimony of three witnesses: Mr. Daniel L. Zinnen, Mr. Steven Stanford and Mr. Clyde Gelderloos. Mr. Zinnen is the engineer who designed the landfill. He testified on location standards, landfill design and the proposed plan of operations. Mr. Stanford's testimony concerned the location from the standpoint of hydrogeology. Mr. Gelderloos testified on the plan of operations. In opposition, CCOC presented Charles F. Norris, a hydrogeologist.

Mr. Zinnen is a professional engineer licensed in Illinois, Indiana, Wisconsin and Michigan. He is also an Illinois professional land surveyor and has worked extensively in the field of environmental and solid waste engineering since 1985. C7023. He graduated from the University of Illinois and has worked with several consulting engineering firms in the field of environmental and solid waste engineering. C7023. Mr. Zinnen first became involved with the landfill in 1993, when he was employed by a firm that had been hired by the City to study the feasibility of continuing operations. C7024.

Mr. Zinnen testified that the design of the landfill is such that public health, safety and welfare will be protected if the expansion is permitted. C7047. He testified that the landfill is designed to include engineered control systems like the bottom composite liner system, the leachate collection and disposal system, the final cover system, the landfill gas management system and storm water management system. C7027; App. Ex. 111. Mr. Zinnen testified that all of those systems are designed and constructed pursuant to quality control standards. C7031-37. He testified that many aspects of the expansion have been designed to exceed what is required by the minimum state standards, citing as an example, the interior drainage system which has been designed with an excess storage capacity of 61 acre feet over that required for the 100-year, 24-hour storm while the regulations only require the design be able to hand a 25-year, 24-hour storm. C7044. Mr. Zinnen testified that under other geotechnical evaluations, the expansion met all of the factors of safety required by the regulations. C7045.

Mr. Zinnen testified that there are three different kinds of location standards – natural conditions, manmade conditions and natural conditions potentially impacting the landfill's performance. C7027. Mr. Zinnen testified that the expansion impacts no natural conditions such as preserves, nature areas, historic sites, wild/scenic rivers, endangered species, habitat or water quality management areas. C7027. He testified that the expansion complies with all applicable manmade location standards such as setbacks from schools, dwellings and wells. C7027. Mr. Zinnen also found no natural conditions that could potentially impact the landfill's performance and concluded that his review of the location standards indicated the expansion meets or exceeds all applicable regulatory location standards. C7028-29.

Mr. Zinnen testified that although he had experience with High Density Polyethylene (HPDE) membranes, he did not know the typical warranties on those types of liners. C7055. He said that the HDPE membrane can be compromised by certain chemicals under certain conditions. C7056-59. Mr. Zinnen testified that the leachate collection pipe is surrounded by a granular layer and then wrapped in a geotextile, which could become clogged. C7061. He testified that nothing was in place to monitor the percentage of clogging in any particular location and that he did not determine if the geotextile could be unclogged. *Id*.

Mr. Zinnen testified that the leachate collection-holding tank will hold 126,000 gallons of leachate and was adequate, but that he did not know the current leachate production at the facility, and that his calculations did not take into account leachate from cover runoff. C7065-67. Mr. Zinnen testified that he calculated the slope of the cover, using a 33% figure. C7071. He testified that using the minimum design slope for the facility (6%) 4.6 times as much water would percolate through the drainage system. C7209. Mr. Zinnen testified that the vertical extent of leachate seepage into the underlying soils is unknown and that no method is identified in the application for determining whether soil below has been impacted by leachate. C7078.

Mr. Zinnen testified that his conclusion that criterion (ii) was met is based on the exhumation of Unit 1 and that the Agency must issue a permit before that exhumation occurs. C7090.

Mr. Stanford is a hydrogeologist employed by Weaver Boos Consultants as a senior project manager. Mr. Stanford has a B.S. degree in geology from Indiana University and a M.S.

degree in hydrogeology and geochemistry from Purdue University. C7256. He is a licensed professional geologist in Illinois and Indiana. *Id.* He testified on the expansion's location from the standpoint of the subject site's geology and hydrogeology. C7257-58. Mr. Stanford prepared three reports for the application; a description of the hydrogeology, a groundwater impact assessment (GIA), and a groundwater monitoring program (GMP). The GIA and GMP are not required as part of local siting applications, but are required by the Agency before a permit is issued. C7287.

Mr. Stanford testified that the site is an excellent location for a landfill as proposed by the applicant and that the proposed facility is so located from a geologic and hydrogeologic standpoint to meet the requirements of criterion (ii) and protect the public health, safety and welfare. C7285. He testified that the subject site has thick and laterally-continuous deposits of highly impermeable Tiskilwa clay till that serves as an effective aquitard and separates the base of the landfill from the top of the uppermost aquifer. C7286. He testified that the uppermost aquifer is separated from the sandstone aquifer by the lower dolomite aquitard or fine granite tills in the bedrock valley at the north central part of the site. *Id.*

Mr. Stanford testified that the development of the landfill would reduce the already low rates of vertical recharge and further slow the rates of groundwater movement. C7286. He stated that the site is, from a hydrogeological standpoint, an excellent location for a landfill and that the site geology and hydrogeology is the most favorable he had ever seen for such a facility. C7294. Mr. Stanford said the till is 50-100 feet thick over much of the site and will be a minimum of 18 feet thick under the base of the proposed landfill, acting as an aquitard or confining unit through which groundwater would move only very slowly. C7260. He explained that the site had been investigated via 118 borings at 79 separate locations forming a grid across the site and that he had never seen as many borings at any proposed landfill site. C7263. He characterized the characterization of the site as the most extensive he had ever seen, more than is typical for local landfill siting approval and more than the Agency would require for a construction permit. C7268.

Once he determined the geology of the site, Mr. Stanford prepared potentiometric surface maps of the water table, the uppermost aquifer and the Glenwood/St. Peter formation in order to better understand the geology. App. Ex. 66-68. He testified that the flow is east to west (away from the Creston wells). C7280. He also testified that the maps indicate a downward vertical gradient with head levels getting lower in the lower aquifers - thus indicating that the aquifers are confined and not directly connected to one another and that the direction of flow is downward, not upward. C7280-82.

Mr. Stanford testified that he calculated the rate of flow horizontally in the uppermost aquifer and concluded that the rate horizontally is from four inches to four feet per year – 12 to more than 200 times faster than the vertical flow rates. C7282-83. He testified that this makes the uppermost aquifer the best formation to monitor because any contaminants leaking from the landfill would move more quickly laterally than vertically in that formation. He concluded that the proposed expansion is so located from a geologic and hydrogeologic standpoint that the public health, safety and welfare will be protected if expansion is allowed. He confirmed that opinion with the GIA.

A GIA is a conservative analysis performed with computer modeling to demonstrate that even if the landfill does leak, groundwater will not be impacted 100 feet from the waste boundary for at least 100 years after closure of the landfill. C7286-87. Despite making a number of highly conservative assumptions, Mr. Stanford determined through the GIA that there would be no groundwater impact on either the uppermost or the lower sandstone aquifer for more than 100 years after closure. C7290. In fact, the GIA showed that there would be no impact on the uppermost aquifer for more than 200 years and no impact on the Glenwood/St. Peter formation for more than 300 years after closing. C7290. Mr. Stanford testified that he assumed only two pinhole defects in the HDPE per acre, and did not consider any leaks in the clay liner when he performed the GIA. C7303 Because of leachate degradation and real world retardation, Mr. Stanford testified that this landfill would never impact groundwater in the uppermost aquifer. C7291.

Mr. Stanford testified that he assumed all background constituent levels to be zero, and that factoring in the actual background level of ammonia would result in a concentration level of ammonia higher than what is allowable, based on applicable groundwater quality standards. C7305. Mr. Stanford testified that he did not know the actual potentiometric surface of flow direction at the site below the uppermost portions of the site. C7327.

Mr. Zinnen testified about the operating plan he has prepared for the expansion. The operating plan is set forth in the application, and deals with litter control, odor control, dust control, mud tracking, vector control, noise control, hours of operation, waste placement procedures, daily cover, load checking procedures, landfill gas monitoring procedures, and groundwater monitoring procedures. C7045. Mr. Zinnen testified that the facility is designed, located and proposed to be operated to protect the public health, safety and welfare. C7047.

Mr. Gelderloos testified that day-to-day operations with respect to how the expansion is proposed to be operated will protect the public health, safety and welfare, and will minimize the danger to the surrounding area from fires, spills and other operational accidents. C7141-42.

Mr. Gelderloos testified that the vegetation along Mulford Road serves as the facility's noise control plan. C7145. He testified that the facility has two types of load checking programs; an accident prevention plan and a spill control plan. C7146. Mr. Gelderloos admitted that the facility has had violations or deficiencies in the past including those relating to blowing litter or an inadequate daily cover. C7137-38.

Mr. Norris testified on behalf of CCOC. He is a licensed geologist, and lists among his qualifications a Ph.D. in Hydrogeology, with all but the dissertation completed. C7445-46. He testified that the GIA did not accurately model existing site conditions or accurately predict post-development conditions for monitoring purposes. C7410. He also testified that the Tiskilwa till did not offer the degree of protection that Rochelle Waste asserted and that the GMP would not be able to monitor the potential escape of contaminants. C7434.

Mr. Norris testified that the calculations made in the GIA demonstrate that this facility built on this site in this geologic and hydrogeologic setting will not always meet the performance

criteria. C7404. He testified that the amount of ammonia in the intra-well till sand aquifer would exceed the applicable groundwater quality standards when the background concentration is calculated into the final concentration. C7404.

Mr. Norris testified contrary to Mr. Stanford, that the Tiskilwa till was not an impermeable layer, because he found groundwater contained in an interceptor trench on the facility as well as a monitoring well in Unit 1 were impacted by contaminants. He testified that he disagreed that the Tiskilwa till is a major geologic component that enhances the protection of the public health, safety and welfare because the Tiskilwa is not capable of retarding the flow to the extent that Rochelle suggested. C7416. Mr. Norris testified that the flow systems were more interconnected than the applicant showed in terms of vertical flow and efficiency of vertical connections. C7422. He testified that it was inappropriate for the applicant to use an average vertical gradient for the site because multiple changing gradients actually exist. C7423.

Mr. Norris testified that he thought the data set at the site and cross sections, potentiometric and contour maps contained inaccurate information. C7426-28. He testified that he found other irregularities and problems with the application, including the omission of important leachate levels. C7431-32. He testified that the monitoring program proposed by the applicant does not adequately monitor potential escapes of contaminants from the proposed facility. C7433.

Criterion (iii)

Mr. J. Christopher Lannert testified regarding compatibility and property value. Mr. Lannert is a landscape architect and urban planner. He owns The Lannert Group. C6717. He is a registered landscape architect in the State of Illinois and has practiced in the field of land planning, landscape architecture, and community consulting. C6718. He graduated from Michigan State University with a B.S. in landscape architecture/urban planning. *Id.* He has testified in over 25 solid waste landfill-siting proceedings. C6717.

Mr. Lannert evaluated the expansion with specific attention to land use and zoning within approximately one mile of the site. C6723. Utilizing an aerial photograph, Mr. Lannert testified that the site is approximately 319 acres large, has an underlying zoning of I-2 General Industry, and that most of the surrounding property is used for farm field and is zoned agricultural. C6724. He testified that 80% of the land within a one mile radius is either used or zoned for agricultural purposes, and that another 14-15% is used or zoned for industrial purposes. C6725.

Mr. Lannert also testified that approximately 100 residential properties are located within a mile of the facility, the distance he used to examine the compatibility of the landfill. C6745, C6753. He testified he did not provide photos from the backyards of any homes within a mile of the facility or from the home nearest the landfill. C6744-46.

Using computer landform models, Mr. Lannert determined that the finished expansion would adequately blend into the surrounding, undulating land and fence rows. C6730.

Mr. Lannert testified that the proposed expansion is compatible with the character of the surrounding area. In making that determination, he cites the surrounding land use, that the nearest residential unit is over 725 feet from the waste boundary, that the existing railroad to the north and other surrounding roadways will provide adequate setback and buffer, and that the site is located in an I-2 General Industry zone.

Mr. Peter J. Poletti is a real estate appraiser. He owns Poletti Associates, Inc., a real estate appraisal and consulting firm. He testified regarding the expansion's effect on property values. C6772. Mr. Poletti is an appraiser and member of the Appraisal Institute, awarded the MAI designation by that organization. C6773. He is a Certified General Appraiser in Illinois, Missouri, Iowa, Tennessee, Kentucky and Indiana. C6774. He is the Township Assessor of Collinsville Township, Madison County. C6773.

Mr. Poletti has a B.S. degree from the University of Illinois, a M.S. degree in geography from Southern Illinois and a Ph.D. in American Studies from St. Louis University. C6772.

Mr. Poletti compared the sale prices of properties within a target area to the landfill with the sale prices in a control area. C6780. In making his comparison, he looked at appreciation rates and prices per square foot. C6781-82. He found that the target area appreciation rate was 7.2% per year, whereas the control area was only 4.2% per year. App. Ex. 30. He identified ten sales within the target area, and 80 sales in the control area. The average price per square foot in the target area was $78.52, while the price in the control area was $78.97. C6788. Mr. Poletti found no statistical difference in sales price between properties within the target and control areas. *Id.*

Mr. Poletti testified that he did not perform any studies regarding what percentage of the asking price homeowners received in the control area compared to the target area. C6810. He testified that house sale prices in Creston are lower than those for houses farther from the landfill even though Creston residents have a higher income. C6805. He admitted on cross-examination that the target area sale prices for houses sold since the first application for expansion was filed were lower than the average. C6824.

Mr. Poletti testified that neither farmland nor larger residential tracts have any apparent difference in value as a result of being located near a landfill. C6791. He testified that the proposed expansion is so located as to minimize any impacts on property values in the surrounding areas.

Criterion (vi)

Michael A. Werthman testified regarding criterion (vi). He is a traffic engineer and expert, having practiced in that profession for 13 years. He holds a B.S. in civil engineering from Michigan State University and is a partner in the firm of Kenig, Lindregn, O'Hara, Aboona, Inc. C6833. He is a registered professional engineer in Illinois. *Id.* He initially became involved with the Rochelle Landfill after being hired by the City in 2000 to review a traffic report. C6835.

Mr. Werthman testified that he conducted a field investigation, driving the roadways and visiting the site approximately ten to eleven times. C6836. He also investigated traffic counts, accident data, and proposed improvements and development. He spoke with officials regarding ongoing concerns with the existing roadway system. C6837.

Mr. Werthman testified that I-88, I-39, Illinois 38, Mulford Road and Creston Road would serve as access to the expansion. C6838. He testified that I-39 is a limited access freeway with a full access interchange with I-88 and Illinois 38. *Id*. He testified that the Illinois Department of Transportation (IDOT) has plans to improve the Mulford Road/Illinois 38 intersection, including widening the intersection by separate left turn and right turn lanes on both approaches of Illinois 38 servicing Mulford Road. C6840. He opined that the design (scheduled for completion in 2003) represents a significant improvement to the operation of the intersection both from an efficiency and safety standpoint. C6841.

Mr. Werthman testified that IDOT performed a sight distance analysis along Illinois 38 and Mulford Road, concluding that adequate sight distance exists so that vehicles can enter and exit out of Mulford Road safely and efficiently to Illinois 38. C6839-40.

To assess traffic impact, Mr. Werthman conducted a traffic study. Traffic counts were conducted for morning and evening peak hours at four intersections within the vicinity of the subject site. C6843. Peak counts were extended one hour in the morning and evening peaks because of concerns of community representatives. C6843. Mr. Werthman determined that approximately three quarters of the traffic generated by the college is generated from the east towards DeKalb, and only about 25 to 30% is generated towards Rochelle. C6844.

A 24-hour classification count on Illinois 38 west of Mulford Road showed that Illinois 38 carries 7,400 vehicles per day. C6847. Mr. Werthman testified that the Union-Pacific Railroad indicates that the track north of the site has approximately 53 to 55 trains per day.

Mr. Werthman testified that the data available for this traffic study was more than adequate. C6847. He testified that the current road system is operating well and efficiently, and that volumes on the roadway system are relatively low, particularly considering the capacity of the existing roadway system. He anticipates that traffic will increase from the two basic markets the expansion is expected to serve if expansion is granted – a local market typically transporting to the landfill by single unit packer trucks and a transfer station market utilizing transfer trailers. C6848-49.

Mr. Werthman looked at a maximum day of 3,500 tons per day (tpd) of waste – 40% more than the anticipated average. C6850. Using this figure, there would be approximately 221 inbound and outbound trips, with 19 – 25 inbound and outbound trips generated in the morning peak hour and 10 – 15 inbound and outbound trips generated in the evening peak hour. *Id*.

Mr. Werthman testified that all the intersections and roadway sections have sufficient capacity with one exception. C6854. If the 2022 traffic volumes are realized, the intersection of the southbound ramps of I-39 and Illinois 38 is projected to operate at an unacceptable level of service during evening peak hours, and traffic on those ramps will have to wait longer than what

is considered acceptable. C6855. Mr. Werthman testified that a traffic signal might be required at that point, but that the need for such a signal would not be the landfill, but the other growth in the area, because the 2022 traffic volumes at that intersection indicate that the landfill will only account for one percent of the traffic. *Id.*

Mr. Werthman testified that a gap study done to ensure the existence of adequate gaps for traffic entering the traffic stream from a side road or cross street on Illinois 38 show there are more than sufficient gaps to accommodate the traffic that will be turning into and out of Mulford Road to and from Illinois 38. C6857-58.

Mr. Werthman testified that a traffic signal is not required at the intersection of Mulford Road and Illinois 38, and that IDOT refused to install one for that reason. C6857. Mr. Werthman testified that the expansion has been designed to minimize the impact on existing traffic flow. C6861.

Mr. Werthman admitted on cross-examination that his conclusions were based on an assumption that there would be a widening and improvement of Mulford Road and Illinois 38, allowing for a left turn and right turn lane which was planned by IDOT, but was not yet existing at the time of the siting hearing. C6900. He admitted that he did not consider construction traffic on the site even though there will be additional truck traffic due to construction. C6877-78, 6901.

Finally, he admitted on cross-examination that the worst traffic movement at Route 38 and Mulford Road is currently graded a "C" for level of service, but that in 2022 when the expansion is added, the intersections will be operating at a "D" level of service – the lowest acceptable grade in the industry. C6892-93.

Public Comments

A number of public comments against the siting of the proposed expansion were accepted at the local and Board level. The Board finds that consideration of public comments during the siting process is appropriate. However, public comments are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination. Public comments receive a lesser weight. City of Geneva v. Waste Management Inc., PCB 94-58 (July 21, 1994); Browning Ferris Industries v. Lake County Board of Supervisors, PCB 82-101 (Dec. 2, 1982).

The public comments submitted by interested persons from the surrounding community at the local level and at the Board level are evidence in the record properly considered by the decision-making body. But, these public comments are entitled to less weight than is sworn testimony subject to cross-examination. The Board will assess public comments in this light when deciding whether or not the City Council's decision is against the manifest weight of the evidence or fundamentally unfair.

PRELIMINARY MATTERS

The parties raised a number of issues at hearing and in their post-hearing briefs that require the Board's consideration. The Board will address each preliminary matter in turn.

Concerned Citizens of Ogle County *Amicus Brief*

On February 10, 2004, CCOC filed a motion for leave to file an *amicus curiae* brief in this matter, accompanied by its brief. To date, no response to the motion has been received by the Board. If a party files no response to a motion within 14 days, the party will be deemed to have waived objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d). The motion for leave to file is granted, and the brief is accepted.

Agreed Motions to Exceed Page Limits

On January 14, 2004, Rochelle Waste filed a motion to exceed the 50-page limit on their post-hearing brief, and to file a brief not to exceed 80 pages. In the motion, Rochelle Waste asserts that counsel for the City does not object to the motion.

On February 9, 2004, the City filed a motion to exceed the 50-page limit on their brief because, in part, of the need to respond to Rochelle Waste's 76-page brief. The City asks for leave to file a brief of not more than 75 pages. In the motion, the City asserts that Rochelle Waste has agreed to allow the City to exceed the page limit.

The Board grants both motions to exceed the page limit, and accepts both briefs.

STATUTORY BACKGROUND

Section 40.1(b) of the Act provides:

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

Before the City could approve Rochelle Waste's application, Rochelle Waste was required to submit sufficient details describing the proposed facility to demonstrate compliance with nine criterion provided in section 39.2(a) of the Act. 415 ILCS 5/39.2(a) (2002). Rochelle Waste contends that the City's conclusion that Rochelle Waste did not demonstrate compliance with criteria (i), (ii), (iii), (vi), and (ix) was against the manifest weight of the evidence. Those criteria require that:

(i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;

(ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

(iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

* * *

(vi) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;

* * *

(ix) if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met. 415 ILCS 5/39.2(a)(i),(ii),(iii),(vi) (ix) (2002).

REVIEW OF LOCAL SITING DECISIONS

Under Illinois law, local units of government act as siting authorities that are required to approve or disapprove requests for siting of new pollution control facilities, including new landfills. Section 39.2 of the Act governs the process. 415 ILCS 5/39.2 (2002). In addition, Illinois law provides that siting decisions made by the local siting authorities are appeasable to this Board. Section 40.1 of the Act governs the appeal process. 415 ILCS 5/40.1 (2002).

Section 39.2(a) provides that the local siting authority, in this case the City Council of the City of Rochelle, is to consider as many as nine criteria when reviewing an application for siting approval. 415 ILCS 5/39.2(a) (2002). Section 39.2(g) of the Act provides that the siting approval procedures, criteria, and appeal procedures provided for in Section 39.2 are the exclusive siting procedures for new pollution control facilities. However, the local siting authority may develop its own siting procedures, if those procedures are consistent with the Act and supplement, rather than supplant, those requirements. *See* Waste Management of Illinois v. PCB, 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 692-93 (2nd Dist. 1988). Only if the local body finds that the applicant has proven by a preponderance of the evidence that all applicable criteria have been met, can siting approval be granted. Hediger v. D & L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990).

When reviewing a local decision on the nine statutory criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. McLean County Disposal, Inc. v. County of McLean, 207 Ill. App. 3d 352, 566 N.E.2d 26 (4th Dist. 1991); Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987); E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983), *aff'd* in part 107 Ill. 2d 33, 481 N.E.2d 664 (1985). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. CDT Landfill Corporation v. City of Joliet, PCB 98-60, slip op. at 4 (Mar 5, 1998), citing Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262, 265 (4th Dist. 1983).

This Board, on review, may not reweigh the evidence on the nine criteria. Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits

one group of witnesses and does not credit the other. Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3rd Dist. 1990); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989); Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 82, 543 N.E.2d 505, 507 (2nd Dist. 1989). Because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings. File v. D & L Landfill, Inc., PCB 90-94, (Aug. 30, 1990), *aff'd*, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

In addition to reviewing the local authority's decision on the nine criteria, the Board is required under Section 40.1 of the Act to determine whether the local proceeding was fundamentally fair. In E & E Hauling, Inc. v. PCB, 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. E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d at 596, 451 N.E.2d at 564; *see also* Industrial Fuels & Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (4th Dist. 1992); Tate v. PCB, 188 Ill. App. 3d at 1019, 544 N.E.2d at 1193. 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 v. PCB, 175 Ill. App. 3d 1023, 1037, 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 v. D & L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990).

FUNDAMENTAL FAIRNESS

The Board will first address the issues concerning fundamental fairness, providing the arguments of each party before reaching a decision. Once the Board determines whether the proceedings were fundamentally fair, it will address the challenged criteria.

Standard Regarding *Ex Parte* Communications

At the Board hearing, both parties submitted briefs regarding *ex parte* communications. *See* Hearing Officer Exhibits 1 and 2. The parties also addressed the issue at hearing, and in their post-hearing briefs. Essentially, Rochelle Waste argues that council members should not be allowed to testify that they were not influenced by *ex parte* communications, or that they relied exclusively on the record in making their decision. A summary of each party's arguments follows.

Rochelle Waste

Rochelle Waste asserts that any testimony by council members that they were not influenced by *ex parte* communications and did not consider such communications in making their decision is clearly inadmissible. RW Hearing Brief at 1. Rochelle Waste acknowledges that the Board has admitted such testimony in the past, but highlights that the Board has only done this in the absence of an objection. *Id*.

Rochelle Waste argues that such self-serving testimony is inadmissible and also creates an untenable situation in which a violation of fundamental fairness cannot be based on an *ex parte* communication without a showing of prejudice. Further, asserts Rochelle Waste, victims of the communication have been precluded from probing the decision-maker's internal thought processes but the decision-makers themselves have been improperly permitted to testify that the *ex parte* communication supposedly did not affect their decision or that they relied exclusively on the record. RW Hearing Brief at 1-2. Rochelle Waste argues that the five-part test contained in E & E Hauling, Inc. v. PCB, to determine whether or not an improper *ex parte* contact has rendered a process fundamentally unfair has not been appropriately used by the Board or, in some instances, courts, because of this untenable situation. Tr. at 12.

Rochelle Waste contends that the mental processes of decision-makers are not a proper subject of inquiry, but that the notion that the decision-makers themselves should be able to testify that they relied on the record or were uninfluenced by suspect communications is wrong. RW Hearing Brief at 2; Tr. at 12. Rochelle Waste argues that the inadmissibility of a decision-maker's mental processes is not a privilege of the decision-maker to be waived. RW Hearing Brief at 3. Rochelle Waste likens the situation to mental processes of a juror who may testify to the fact of the communication, but not to the effect it had on him. RW Hearing Brief at 4. Rochelle Waste argues that it is just as inappropriate for the decision-maker to dispel the inference or implication of prejudice by testifying they were not influenced by the evidence or communication as it would be to invade the decision-maker's mental process. Tr. at 78.

Rochelle Waste argues that the Board should consider whether the *ex parte* contact may have influenced the ultimate decision, not whether the decision-maker claims it did not. RW Hearing Brief at 5. The question is, asserts Rochelle Waste, whether a thoughtful observer aware of all the facts would conclude that the communication carries an unacceptable potential for compromising impartiality. RW Hearing Brief at 6; RW at 7. Rochelle Waste urges that the Board use an objective test (whether a reasonable person would question the communication) rather than a purely subjective one. *Id.*

Rochelle Waste asserts that a local siting body acts as a quasi-judicial body and engages in adjudication, not rulemaking. RW at 5. Rochelle Waste argues that the precedent suggesting that a local siting authority is legislative, rather than quasi-judicial, is misguided and leads to the aforementioned situation where the victims of *ex parte* communications must prove prejudice without being permitted to explore internal thought processes, but decision-makers have been permitted to testify that the *ex parte* communications did not affect their decisions. RW at 5-6. Rochelle Waste cites a recent Illinois Supreme Court case in asserting that the siting hearing in this matter is clearly quasi-judicial and not legislative because the property rights of the interested parties are at issue. RW at 8, citing People ex rel. Klaeren v. Village of Lyle, 202 Ill. 2d 164, 781 N.E.2d 223 (2002).

Rochelle Waste argues that if hearings continue to be treated as partly legislative, siting applicants who comply with the ban against *ex parte* contacts will be deprived of the first amendment rights exercised by those who choose to ignore those quasi-judicial restrictions, and if an indispensable part of siting approval is a successful lobbying effort, the hearing process will

become little more than a sham. RW at 9. Rochelle Waste asserts that once siting hearings are properly viewed as quasi-judicial, it necessarily follows that council members should be held to the same standard of impartiality as a judge involved in any adjudication of property rights or valuable privilege. RW at 10.

Rochelle Waste argues that reversal should be required without any showing of actual prejudice if the *ex parte* contacts may have influenced the decision in that a disinterested observer might question the decision-makers' impartiality or the *ex parte* contacts create an appearance of impropriety. RW at 6. In quasi-judicial matters, asserts Rochelle Waste, a mere appearance of impropriety will require reversal, as opposed to quasi-legislative matters in which the test for improper interference was whether the action actually affected the decision. RW at 12.

In its reply brief, Rochelle Waste asserts that although Klaeren may have left undefined the exact contours of the process due to parties in quasi-judicial proceedings before municipal bodies, it made clear that the parties have the right of due process which precludes local decision-makers from engaging in *ex parte* communications or announcing their decision, is based on the expressed public will. Reply at 2. Rochelle Waste argues it is properly contending for a revision of the prejudice standard in order that local siting hearings are conducted with fairness and due process. Reply at 6.

City

The City argues that Rochelle Waste's claim that the standard should be changed from requiring a showing of actual prejudice to a mere appearance of impropriety should be disregarded because it is not supported by Illinois law. City at 43. The City contends the authority cited by Rochelle Waste concerns only a Wisconsin federal trial court and has no bearing on the Board, as the Board has acknowledged that it must follow Illinois Appellate Court decisions. City at 43-45. The City argues that even if the standard urged by Rochelle Waste were accepted, no possibility of prejudice or any appearance of impropriety exists in this case. City at 46.

The City asserts that Klaeren, the Illinois Supreme Court case cited by Rochelle Waste, is not applicable because it is limited to special use zoning hearings. City at 47. The City further argues that Klaeren held merely that interested parties should have a right to cross-examine witnesses, and that ample opportunity to do so did exist in the instant case. *Id.* The City contends that there is no discussion in Klaeren about *ex parte* contacts, political influence over decision-makers, or the necessity of showing actual prejudice. *Id.*

The City disagrees with Rochelle Waste's assertion that Klaeren overrules E & E Hauling, stating that Klaeren explicitly acknowledged that the extent to which due process rights associated with quasi-judicial proceedings must be afforded to interested parties depends on the purposes of the hearing. City at 47-48. The City argues that Klaeren is clearly irrelevant to the present case and in no way changes the long standing acknowledgement by the courts that all of the elements of due process allowed at a trial need not be allowed at the Section 39.2 siting hearing. *Id.* The City concludes that Rochelle Waste has not cited even one Illinois case stating

that actual prejudice need not be shown to determine if an *ex parte* contact should result in remand. *Id*.

The City asserts that it is inappropriate to delve into the mental processes of the County Board members, and that the Board has specifically held that the integrity of the decision making process requires that the inquiry not be extended into the mental processes of decision-makers. City Trial Br. at 1. The City contends that an applicant can probe facts relevant to fundamental fairness, but cannot elicit testimony from the decision-maker that probes the mental processes behind the decision when a formal written decision exists. City Trial Br. at 2.

The City contends that the Illinois Supreme Court has affirmed that it is inappropriate to delve into the mental processes of local decision-makers in determining whether a pollution control facility met the criteria in Section 39.2(a) of the Act. City Trial Br. at 2.

Discussion

The Board finds that Klaeren does not overrule the long-standing line of cases requiring a showing of actual prejudice to support a finding that *ex parte* contact has resulted in a lack of fundamental fairness. A review of Klaeren finds that the court explicitly acknowledged that to what extent due process rights associated with quasi-judicial proceedings must be afforded to interested parties, depends on the purposes of the hearing. The Board has recently reiterated the well-established principle that siting approval proceedings are quasi-adjudicative and quasi-legislative, rather than purely adjudicative. Waste Management v. County Board of Kane County, PCB 03-104 (June 19, 2003). Further, siting proceedings are not entitled to the same procedural protection as more conventional adjudicatory proceedings. Southwest Energy Corp v. PCB, 275 Ill. App. 3d 84, 655 N.E.2d 304 (4th Dist. 1995). In Southwest Energy, the appellate court discussed the issue, noting that "although a local siting proceeding more closely resembles an adjudicatory proceeding than a legislative one, the local governing body is not held to the same standards as a judicial body." Southwest Energy, 275 Ill. App. 3d at 91. The appellate court construed the 1992 amendment to Section 39.2 of the Act (Pub. Act 87-1152, Sect. 1, eff. Jan. 1, 1993) as demonstrating the General Assembly's understanding that it has called upon local elected officeholders on municipal or county boards – not judges – to adjudicate whether the siting criteria in section 39.2(a) of the Act are present in a given case. *Id* at 92. The appellate court concluded that the legislature recognized that standards governing judicial behavior cannot and do not apply to such local office holders. *Id*.

The Board has previously held that the integrity of the decision making process requires that the mental processes of decision-makers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made. *See* Land and Lakes Co. v. Village of Romeoville, PCB 92-25 (June 4, 1992); Dimaggio v. Solid Waste Agency of Northern Cook County, PCB 89-138 (Jan. 11, 1990). Nothing has been presented in this case to change that conclusion. It is true that the possibility may exist wherein decision-makers are themselves permitted to testify concerning their mental processes when testifying that an *ex parte* communication did not affect their decision or that they relied exclusively on the record. However, it remains inappropriate to delve into the mental processes of the decision-maker absent a strong showing of bad faith or improper behavior, and it is

inappropriate regardless of the purpose. Thus, any testimony that so delves is inadmissible and cannot be elicited at hearing, if a formal written decision exists, even testimony offered by the decision-maker herself. What constitutes inappropriate testimony regarding mental processes of the decision-maker must be judged on a case-by-case basis while keeping uppermost in mind the sanctity of the mental processes of decision-makers. In the instant case, Hearing Officer Halloran consistently disallowed such testimony. The Board finds his rulings were correct.

Rochelle Waste's Fundamental Fairness Arguments

Rochelle Waste identifies three manners in which the proceedings were fundamentally unfair. Rochelle Waste asserts that (1) the City made a legislative decision based on political considerations rather than the evidence; (2) that the Council's decision-making process was tainted by inappropriate *ex parte* communications between council members and opponents of the applications; and (3) that after the hearing had ended and a final decision was rendered, the City met to reconsider and revise the decision without notice to the petitioner. RW at 3.

Decision Made for Political Reasons

Rochelle Waste asserts that immediately after the April 24, 2003 meeting where the City denied siting, two members of the council informed a reporter that they had decided the case in accordance with public opinion. RW at 3. Rochelle Waste cites Mr. Kissick who stated immediately after the vote that "my job up there is to represent the majority of the public . . . . The public opinion against this was overwhelming. It wasn't even close." RW at 3, citing Pet. Ex. 2. Rochelle Waste asserts that Mr. Bubik decided to deny for the same reason, stating after the meeting that, "I voted the way the citizens of this town wanted it to go." *Id*.

Rochelle Waste asserts that an analysis of *ex parte* communications or political pressures must focus on the nexus between the pressure and actual decision-maker. RW at 13. Rochelle Waste contends that the nexus in this proceeding is crystal clear in that two council members immediately announced that they had voted in accordance with what they perceived to be the wishes of their constituents, strongly suggesting they had not made the decision based on the evidence, but on public clamor. *Id*.

Ex Parte Communications

Rochelle Waste contends that CCOC President Frank Beardin contacted Mr. Kissick on approximately six occasions after the application was filed to express CCOC's opposition to the expansion. RW at 13. Rochelle Waste admits that Mr. Kissick and Mr. Beardin testified differently at the Board hearing, but maintains that the interrogatory answer in question (Pet. Ex. 1.) is a binding judicial admission. RW at 13.

Rochelle Waste asserts that Mr. Beardin also twice contacted Mr. Colwill after the application had been filed to express CCOC's opposition to the expansion. RW at 14. Rochelle Waste asserts that CCOC encouraged such *ex parte* contacts, organizing an extensive letter writing campaign, whereby dozens of letters were sent to the council members expressing opposition to the expansion. RW at 14. Rochelle Waste further asserts that Mr. Beardin went to

the homes of Mr. Bubik and Mr. Hann, and possibly also to those of Mr. Kissick and Mr. Colwill, to ask them to view a video he felt might influence them to vote against the siting. RW at 14.

Rochelle Waste contends that Mr. Beardin made contact with up to four of the council members and offered them a religiously-oriented video dramatizing precisely his political argument that government should worry more about the environment and the future generations than about the potential host fees. RW at 15. Rochelle Waste argues that Mr. Bubik's decision not to watch the video is not as important as the fact that CCOC, a party to the proceedings, initiated *ex parte* contacts with the council members during the hearing in order to influence the decision politically, and to remind to decision-makers of CCOC's involvement and strong – even religious – beliefs in the matter. RW at 15-16. Rochelle Waste asserts that Mr. Bubik was also warned by another local merchant that if he voted in favor of siting, he might well end up sitting alone in church. RW at 16.

Rochelle Waste contends that Ken Roeglin gave Mr. Bubik an article from a Florida newspaper stating unequivocally that landfill liners often fail over time, allowing leachate to leak into the aquifer. RW at 16. Rochelle Waste asserts that after the decision, Mr. Bubik explained to Tom Hilbert that one of the reasons he had voted against the expansion was because he had seen that article. *Id*. Rochelle Waste contends there was no sworn testimony that landfill liners leak, and the only testimony in the record was exactly to the contrary. RW at 16.

Rochelle Waste argues that the council did not discuss the issues, confer with one another or their legal counsel, confer with their environmental consultants, and issued findings on the criteria without providing any reasons for those findings. RW at 16-17. Rochelle Waste argues that such procedures may pass muster under E & E Hauling, but not after Klaeren. RW at 17. Rochelle Waste argues that here, where the City went against their legal and environmental council's recommendations without giving any explanation, there is a clear appearance of impropriety; and an objective observer would question whether the *ex parte* contacts may have influenced the decision. RW at 17-18. Rochelle Waste argues that such a decision should be reversed because it violates due process and is fundamentally unfair. RW at 18.

Rochelle Waste argues that the five-part test contained in E & E Hauling has been incorrectly applied, because decision-makers have been improperly permitted to testify *that ex parte* contacts did not influence them, even though the victims of such contacts have been precluded from proving the opposite. RW at 18. In discussing the five-part test, Rochelle Waste asserts that with respect to the gravity of the communications, it is relevant that many of the *ex parte* communications were by a party to the proceedings – CCOC. RW at 19. Rochelle Waste contends that the contacts were not disclosed until after the hearing, instead of immediately, as is appropriate. RW at 19.

Rochelle Waste argues that parties, like CCOC, should not be permitted to use these tactics or benefit from their misconduct. RW at 20.

April 28, 2003

Rochelle Waste asserts that on April 24, 2003, a final decision was made to deny the application, and that four days later, without notice to the petitioner, the council reconsidered its decision and reversed the obviously erroneous finding under criterion (ix) that the site was in a regulated recharge zone. RW at 20. In addition, Rochelle Waste contends, the council purported to impose special conditions it had failed to impose at the time of the final decision on April 24, 2003. *Id*.

Rochelle Waste contends that the reconsideration of an already final decision was illegal and in violation of fundamental fairness, in that the council's purported action was designed to correct an obvious error in the siting decision, and to make it appear as though the council had actually based its decision on the record, rather than political influence. RW at 20.

Rochelle Waste asserts that on the day of the reconsideration, Mr. Helsten had called one of the in-house attorneys for the petitioner (not the attorney who handled the siting proceedings and was counsel of record for the petitioner), and told him that the City was concerned about the clearly erroneous finding on criterion (ix), that he would appear that evening to suggest changes, but that no action could be taken by the council until April 30, 2003. RW at 21.

Rochelle Waste argues that the reconsideration was illegal because a council may not reconsider a final action once the meeting at which the action occurred is adjourned. RW at 21, citing City of Kankakee v. Small, 317 Ill. 55, 61-64, 147 N.E. 404, 407-408. (1925). Rochelle Waste argues that the reconsideration is unfair because it evinces an effort to cover up and conceal what really happened – the council, influenced by inappropriate *ex parte* contacts, sought to give an appearance of legitimacy to its decision which it did not deserve. RW at 21. Further, Rochelle Waste argues, the reconsideration was designed to create an appearance that the council based its decision on the record, but was ineffective because the petitioner's right to show that the decision was based on political pressure, not the record, had intervened. RW at 22, citing Village of North Barrington v. Village of Lake Barrington, 8 Ill. App. 3d 50, 288 N.E.2d 242 (2nd Dist. 1972).

The City's Fundamental Fairness Arguments

The City believes that the proceedings were conducted in a fundamentally fair manner. The City contends that the basis of the applicant's fundamental fairness claims merely revolve around public opposition to the landfill. City at 28. The City contends that the leading case on communications between a decision-maker and a party to the siting hearing is E & E Hauling, which provides that a court will not reverse a local government's decision because of improper *ex parte* contacts without a showing that the complaining party suffered prejudice from these contacts. City at 28-29, citing E & E Hauling, 116 Ill. App. 3d at 607, 451 N.E.2d at 572, Waste Management v. PCB, 175 Ill. App. 3d 1023, 1043, 530 N.E.2d 682, 697 (2nd Dist. 1980).

The City argues that the existence of strong public opposition does not invalidate the City's decision where the applicant was given an ample opportunity to present its case, and where the applicant has not demonstrated that the City's denial was based upon the public opposition rather than the record. City at 30, citing City of Rockford v. County of Winnebago, 186 Ill. App. 3d 303, 542 N.E.2d 423, 431 (2nd Dist. 1989).

The City asserts that the applicant was given ample opportunity to present its case, and has offered no evidence to the contrary. City at 30. The City argues that the decision was clearly based on the record rather than public opposition, and that each and every council member that voted against a criterion testified at the Board hearing that he did not consider any communication from outside the hearing process to be evidence. City at 31. The City argues that if the decision is derived from the evidence in the record, communications from the public to the council are not prejudicial, and remand would serve no purpose. *Id*. The City asserts that each and every council member testified that the very few unsolicited statements they heard from members of the public, including the form letters sent to council members, were no different than the evidence and public comments admitted during the underlying hearing. *Id.*

The City asserts that Rochelle Waste's only argument that the decision was based on something other than the record, are the statements made in a newspaper article after the vote was taken by Mr. Kissick and Mr. Bubik that indicated the decision was consistent with the public's opinion. City at 31. The City contends that Mr. Kissick explained the statements were made only to indicate that he kept an open mind when considering the evidence, and that Mr. Bubik explained that the public opposition was voiced during the hearing. *Id*. The City maintains that Rochelle Waste was aware of the opposition and had the opportunity to present evidence and testimony to rebut that opposition. City at 32.

The City asserts that Rochelle Waste has not met its burden of showing irrevocable taint using the E & E Hauling factors. City at 32. E & E Hauling, contends the City, establishes that there must be evidence that the alleged *ex parte* contacts prejudiced the decision – that the decision was based upon the communications rather than the record – and provided a five-part test that even the applicant acknowledges is reasonable. *Id*.

The City argues that communication to a member of the decision-making body that relates to non-substantive matters and does not discuss the merits of the case is not grave. City at 33, citing Gallatin National Bank v. Fulton County, PCB 91-256 (June 15, 1992). The City asserts that there is no evidence in the record that there were any *ex parte* communications between CCOC and a decision maker after the application was filed and before decision. *Id*. The City asserts that Mr. Beardin testified that he did not recall communications after the application was filed, and that the council members testified that whenever someone would speak to them about the landfill, they would refuse to discuss the issue. City at 34.

The City contends that there is no evidence that any of the form letters were sent by a party to the proceeding, but that the evidence shows they were sent by the public on a form passed out by CCOC. City at 34. The City argues that the mere fact that the communication in question is by, or on behalf of, a party cannot be a basis for an allegation that the communication was grave because it is a necessary element to a finding that an *ex parte* communication occurred. City at 34-35.

The City asserts that the only arguably consummated communications that took place outside of the hearing were the unsolicited form letters that contain absolutely no substantive evidence or a discussion of the merits but merely state that the sender does not support the

expansion of the dump. City at 35. The City argues that this is mere lay opinion and not grave. *Id*.

The City contends that the communications in question did not influence the decision, and that every decision-maker testified that any statements made outside the public record were not considered evidence. City at 35. The City argues that there is no evidence that any substantive testimony was received by a council member outside of the hearing process. *Id*.

The City argues that it is well established that a siting authority's consultant's report or staff recommendation is not binding on the decision-maker, and that a consultant's report (including staff and hearing officer reports here) need not be part of the record or provided to the applicant. City at 36, citing Sierra Club v. Will County Board, PCB 99-136, 99-139 (Aug. 5, 1999). Thus, states the City, it is clear that the council does not have to follow its consultant's recommendations, as those recommendations do not even have to be filed as public comment. *Id*.

The City asserts that even when decision-makers have contacts with the constituents of a party and members of the general public outside the hearing process, there still must be evidence of prejudice because elected officials are presumed to act objectively. City at 36. The City notes that the Board has held that *ex parte* communications upon a minority of board members that do not affect the vote of the majority of members are irrelevant. City at 36, citing Waste Management v. Lake County Board, PCB 88-190 (Apr. 6, 1989); National Company v. Fulton County Board, PCB 91-256 (June 15, 1992).

The City asserts that no party benefited from the alleged *ex parte* contacts, in that there is no evidence that any party (including Mr. Beardin) to the hearing effectuated an actual communication with a council member. City at 37. The City contends that no useful purpose would be accomplished by reversing or remanding the decision. City at 38. The City argues that if, indeed, the proceedings were found unfair based on *ex parte* communications, the remedy is merely to place the communications on the record and that this has already been accomplished in this case. *Id*. The City maintains that since all the communications that the applicant complains of have been placed in the record, there would be absolutely no purpose in remanding the matter. *Id*.

The City asserts that Board Hearing Officer Halloran did not allow any decision-maker to testify regarding whether or not an alleged *ex parte* communication affected their decision and that the parties were, therefore, on equal footing. City at 39. The City argues that even though the hearing officer did not allow any testimony by council members that an out-of-court statement had no affect or prejudice on their decisions as made in offers of proof, the testimony could have been allowed pursuant to E & E Hauling and Land and Lakes Company where decision-makers were allowed to so testify. *Id*.

The City claims no evidence of prejudice exists in this case and that after extensive discovery, only very limited unsolicited communications were found. City at 39. Three individuals, the City contends, attempted to talk to Mr. Bubik but he refused to talk about the

landfill. Mr. Kissick could not recall exactly when Mr. Beardin attempted to phone him, and Mr. Beardin denied ever speaking to a council member after the application was filed. *Id.*

The City asserts that Mr. Kissick explained his statement made in the interrogatory response that Mr. Beardin attempted to contact him on six occasions after the application was filed, as possibly mistaken because he does not recall when Mr. Beardin made the calls. City at 39. The City argues that since Rochelle Waste did not object to the testimony at hearing or move to strike, the Board may consider the testimony. City at 39-40.

The City contends that the interrogatory answer cannot be considered to be an admission of any *ex parte* communication, because it explicitly provides that Mr. Kissick informed Mr. Beardin that he was not at liberty to discuss the pending application – thus providing that no communication took place. City at 40. Thus, posits the City, even if Rochelle Waste had not waived the objection to the testimony at hearing, there is simply no judicial admission that Mr. Beardin personally spoke to Mr. Kissick after the application was filed about his opposition to the landfill. *Id.* The City asserts that Rochelle Waste failed to meet its burden of showing any communication took place after the application was filed which prejudiced the decision. City at 41.

The City summarizes that the alleged improper communications here amounted to no more than three attempted statements to Mr. Bubik, some possible attempted statements to Mr. Kissick and Mr. Colwill, and receipt of form letters stating opposition to the landfill. City at 42. The City argues that the videotape and Florida newspaper article should be completely disregarded, because there is no evidence that any council member ever saw the video, and the newspaper article was part of the public record. *Id.* The City contends that these minor, inevitable contacts do not rise to the level of irrevocable taint requiring a remand of the hearing. *Id.*

The City argues that Rochelle Waste has admitted it suffered no prejudice as a result of the April 28, 2003 meeting. City at 48. The City asserts that Rochelle Waste admitted the only reason it takes issue with the change in decision is because it wanted to use the fact that the council found against it on criterion (ix) to argue the proceedings were fundamentally unfair – something that it has not been barred from doing. *Id.* The City contends the original decision on the criterion could be reinstated and the Board could issues a finding it was against the manifest weight of the evidence, but that such a finding should have no import because the Board should affirm the City's decision on the other challenged criteria. *Id.*

As to the conditions imposed at the April 28, 2003 meeting, the City claims that Rochelle Waste has admitted it is ready and willing to meet those conditions and that the imposition of those conditions caused them no prejudice. City at 49, citing Tr. at 167. The City asserts that the imposition of conditions only becomes an issue if the Board overturns the City's decision and was merely an extremely cautious measure of the council. City at 49. The City argues that the April 28, 2003 decision on the conditions was not a reconsideration because the matter had never been brought up before the April 28, 2003 meeting, and, therefore, the cases relied upon by the Applicant to suggest the City's reconsideration was void, do not apply to the imposition of conditions. *Id.*

The City denies that the April 28, 2003 meeting was *ex parte* arguing that an *ex parte* communication is one with a tribunal without the presence or knowledge of the other party. City at 50. The City contends that Rochelle Waste was made aware of the meeting and even attended the meeting and, therefore, cannot complain that the meeting was *ex parte. Id.*

CCOC'S Fundamental Fairness Arguments

CCOC asserts that neither of the two city council members who made comments after the siting decision was made, stated that he disregarded the evidence in order to conform to the overwhelming public opinion against the siting. CCOC at 1. CCOC asserts that to the extent a "no" vote based on the evidence is also consistent with the public will, the council members who correctly performed their duty are also entitled to "claim their reward." CCOC at 1-2. CCOC contends that the statements to the press were nothing more than that, and do not overcome the presumption that the members acted without bias in their adjudicatory capacity. CCOC at 2.

CCOC asserts that Rochelle Waste is making the mistake of confusing public debate with deliberation, and that no requirement exists that a city council must publicly debate a siting decision. CCOC at 2. CCOC argues that Rochelle Waste's reliance on Klaeren is misplaced because the supreme court was very careful to restrict its holding only to proceedings regarding the issuance of special use permits. CCOC at 3.

CCOC contends that Rochelle Waste's position that a siting proceeding should be strictly adjudicatory and not legislative is inconsistent with its position at the siting hearing where Rochelle Waste noted that the facility will bring $120,000,000 in direct economic benefits to the community, and in its trial brief where it argued that economic benefits are a legislative type of consideration that should be received by the counsel. CCOC at 3. CCOC asserts that parties are not entitled to the same procedural and substantive due process safeguards as they would receive in a trial and that a local siting authority is not held to the same standard of impartiality as a judge. CCOC at 5. CCOC argues that Rochelle Waste was a major contributor in creating the "political" atmosphere of which it complains by maintaining an internet web page concerning expansion and economic benefits, and by paying for a newspaper advertisement touting the economic benefits of expansion both during the pendency of the proceedings. *Id*.

Rochelle Waste's Reply

Rochelle Waste contends that when decision-makers announce immediately after their decision that they have voted in accordance with the public clamor, that creates an obvious appearance of impropriety that cannot be dispelled by the decision-maker's self-serving statement that they were uninfluenced by matters outside the record, or by the *ex parte* political pressures brought to bear. Reply at 3.

Rochelle Waste takes issue with the City's assertion that Mr. Bubik was only approached by three people after the application was filed and before a decision was rendered, because Mr. Bubik admits in his deposition that he did not remember how many people had contacted him to express their opposition to the landfill after the hearing began. Reply at 4. Rochelle Waste

asserts that Mr. Bubik testified he didn't recall if it had been as many as 20 people or even as many as 100 people. *Id*.

Rochelle Waste contends that the City misstates the evidence concerning the newspaper article, stating that its offer of proof establishes that Mr. Bubik had in fact read the article and that it did influence his decision. Reply at 5. Rochelle Waste argues that the Board should determine that its attorney (John Holmstrom) was informed by Mr. Helsten that no action would be taken by the council on April 28, 2003, because of the contemporaneous memorandum of the conversation that Mr. Holmstrom prepared. Reply at 5, citing Pet. Ex. 22. Mr. Helsten's recollection, asserts Rochelle Waste, has been inconsistent in his description of what was said. Reply at 5.

Discussion

In an administrative hearing, due process is satisfied by procedures that are suitable for the nature of the determination to be made, and that conform to the fundamental principles of justice. Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 693 (2nd Dist. 1988). In reviewing a Section 39.2 decision on site approval, the Board must consider the fundamental fairness of the procedures used by the City Council in reaching its decision. 415 ILCS 5/40.1(a) (2002).

The courts have held that the public hearing before the local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App. 3d 631, 616 N.E.2d 349, 356 (1993). The manner in which the hearing is held, opportunity to be heard, whether *ex parte* contacts existed, prejudgment of adjudicative facts, and the introduction of evidence are important, not rigid, elements in assessing fundamental fairness. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000); citing Hediger v. D & L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990). The Board must consider the fundamental fairness of the procedures used by the City in reaching a decision. 415 ILCS 5/40.1(a) (2002).

Rochelle Waste alleges that it was deprived of fundamental fairness in this case in three manners: (1) that the City made a legislative decision based on political considerations rather than the evidence; (2) that the Council's decision-making process was tainted by inappropriate *ex parte* communications between council members and opponents of the applications; and (3) that after the hearing had ended and a final decision rendered, the City met to reconsider and revise the decision without notice to the petitioner.

Decision Made on Political Considerations Rather Than the Evidence

Public officials should be considered to act without bias. E & E Hauling, Inc. v. PCB, 107 Ill. 2d 33, 42, 481 N.E.2d 664, 668 (1985). There is no inherent bias created when an administrative body is charged with both investigatory and adjudicatory functions. *Id*. However, collusion between the applicant and the actual decision-maker resulting in the prejudgment of adjudicative facts is fundamentally unfair. *See* Land and Lakes, 319 Ill. App. 3d 41, 51, 743 N.E.2d 188, 196. Where a municipal government "operates in an adjudicatory capacity, bias or

prejudice may only be shown if a disinterested observer might conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." Concerned Adjoining Owners, 288 Ill. App. 3d 565, 573, 680 N.E.2d 810, 816.

In E & E Hauling, the Illinois Supreme Court concluded that even where the decision-makers had approved the landfill application by ordinance, that approval did not amount to prejudgment of adjudicative facts. E & E Hauling, 107 Ill. 2d at 43, 481 N.E.2d at 668. Likewise, in Waste Management of Illinois, Inc., the court held that the fact that a public official has taken a position or expressed strong views on an issue does not overcome the presumption that the official will fairly and objectively decide the controversies before them. Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1040, 530 N.E.2d 682 (1988).

In this instance, Rochelle Waste is arguing that the council members' announcement, immediately after their decision that they have voted in accordance with the public clamor creates an obvious appearance of impropriety. Mr. Kissik stated that public opinion against the expansion was overwhelming. Pet. Ex. 2. Mr. Bubik stated that he voted the way the citizens of the town wanted it to go. *Id*. At hearing, Mr. Kissick and Mr. Bubik – the two members who made such comments – addressed their statements. Mr. Kissik stated that he meant he was "to listen to all the pros and cons and to keep an open mind, people that were for it, people that were against it prior to the filing of the application, to keep an open mind." Tr. at 123. Mr. Bubik said that many members of the public voiced their concerns at the siting hearing, and that those comments are part of the record. Tr. at 87-88.

After considering the entirety of the record, the Board finds a disinterested observer would not conclude, based on the post-decision statements, that the City Council prejudged the adjudicative facts of the application. The comments do not create an appearance of impropriety. Neither statement indicates, explicitly or implicitly, that a council member's decision was made because of public opinion or other than in accordance with the evidence contained in the record. The Board finds that Rochelle Waste's allegations do not overcome the presumption that the City acted on the merits of the application without prejudging the law or facts.

Ex Parte Communications

The second allegation contains a number of communications that Rochelle Waste deems suspect. As previously stated, the Board has found that Klaeren has not overruled the long-standing line of Board and appellate court cases addressing *ex parte* contacts.

"In the context of a siting proceeding, then, an *ex parte* contact is a contact between the siting authority and a party with an interest in the proceeding without notice to the other parties to the proceeding." Citizens Opposed to Additional Landfills v. G.E.R.E., PCB 97-29 (Dec. 5, 1996). Further, the Board will not reverse the local siting authority's decision because of improper *ex parte* contacts with members of the local siting authority absent a showing that the complaining party suffered prejudice from these contacts. Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 555 N.E.2d 1178, 144 Ill. Dec. 659 (3rd Dist. 1990); E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 607, 451 N.E.2d 555 (1983), *aff'd* 107 Ill. 2d 33, 481 N.E.2d 664 (1989).

The Board does not find that the contacts prejudiced Rochelle Waste. First, the Board considers the alleged *ex parte* communications that Rochelle Waste argues occurred when Mr. Beardin, the president of CCOC, contacted Mr. Kissick and Mr. Colwill after the application was filed. Initially, the evidence as to whether such contacts occurred is questionable. At the Board hearing, Mr. Beardin testified that he did not recall making any communications after the application was filed. Most importantly, however, Rochelle Waste has not shown that they have suffered prejudice from these contacts as the council members allegedly contacted, have all testified that any time someone would speak to them about the landfill they would refuse to discuss the issue.

The appellate court has acknowledged that *ex parte* contacts between the public and its elected representatives are inevitable. Southwest Energy Corp. v. PCB, 275 Ill. App. 3d 84, 92, 655 N.E.2d 304, 310 (4th Dist. 1995). In the second district, the appellate court upheld the integrity of a siting proceeding although several members of the county board received a petition, letters, personal contacts, and telephone calls from constituents expressing opposition to a landfill application. Waste Management v. PCB, 175 Ill. App. 3d 1023, 1043, 530 N.E.2d 682, 697-698 (2nd Dist. 1998).

In this situation, Rochelle Waste has not shown it suffered prejudice from the contacts even if they did occur. The mere existence of strong public opposition does not render a hearing fundamentally unfair, if the hearing committee provides a full and complete opportunity for the applicant to offer evidence and support its application. Waste Management, 175 Ill. App. 3d 1023, 1043. In this case, Rochelle Waste was given a complete and full opportunity to support its application.

Similarly, the alleged *ex parte* contacts that occurred regarding Mr. Beardin's attempt to distribute the "Touched by an Angel" video and the form letters sent to the council did not result in any prejudice to Rochelle Waste. A review of the record reveals that no council members watched the video, and the form letters stated only that the sender did not support the expansion. The letters themselves were not sent by CCOC, but by individual members of the public. Further, the record indicates that the letters do not contain information or sentiment that was not given in the form of public comment during the hearing itself. As in Waste Management, the various telephone calls, letters, and personal contacts were merely expressions of public sentiment to county board members on the issue of the application. Waste Management, 175 Ill. App. at 1043. Accordingly, the Board finds that no prejudice resulted as a result of these contacts. Finally, the newspaper article given to Mr. Bubik by Ken Roeglin was part of the public record at the siting hearing and did not result in any prejudice to Rochelle Waste.

As previously stated, a court will not reverse a local government's decision because of *ex parte* contacts with members of that local government, absent a showing that prejudice to the complaining party resulted from these contacts. E&E Hauling v. PCB, 116 Ill. App. 3d 586, 607, 451 N.E.2d 555, *aff'd* (1985), 107 Ill. 2d 33, 481 N.E.2d 664. No showing that prejudice to Rochelle Waste resulted from the contacts in this case was made. Accordingly, the Board finds that the contacts in this matter did not render the proceedings fundamentally unfair.

April 28, 2003 Hearing

Rochelle Waste asserts that four days after the initial decision was made, the council, without notice to the petitioner, reconsidered its decision and reversed the obviously erroneous finding under criterion (ix) that the site was in a regulated recharge zone. The council purported to impose special conditions it had failed to impose at the time of the final decision on April 24, 2003. Rochelle Waste contends that this action was illegal and in violation of fundamental fairness.

The Board finds that the additional determination did not render the proceeding fundamentally unfair. Although the record is unclear as to whether or not Rochelle Waste was told that no action would be taken at the April 28, 2003 meeting, Rochelle Waste was informed that the meeting would occur and did have representation at the meeting. Rochelle Waste was not prejudiced by the city council's reversal of its decision that Rochelle Waste did not meet criterion (ix). Rochelle Waste's primary concern appears to be the motive of the city council in reconsidering its earlier decision: Rochelle contends that the council sought to give an appearance of legitimacy to its decision that it did not deserve.

This very issue was considered by the appellate court in Town of Ottowa v. PCB, 129 Ill. App. 3d 121, 472 N.E.2d 150 (3rd Dist. 1984). In that case, the court addressed whether fundamental fairness was violated by the allowance of reconsideration at the local level. The court held that it was not, stating "administrative bodies should be free to reconsider their decisions," and "the prejudice to the public by an incorrect decision . . . transcends any possible prejudice to the opponents." Town of Ottowa, 129 Ill. App. 3d at 125.

The imposition of the special conditions could be viewed as prejudicial to Rochelle Waste, but any potential prejudice in this regard is outweighed by the prejudice to the public were an incorrect decision made. In addition, Rochelle Waste has testified that it would be willing to meet the imposed special conditions were siting granted.

The Board finds that the reconsideration was not illegal, and did not render the proceedings fundamentally unfair.

SITING CRITERIA

Having found the proceedings to be fundamentally fair, the Board will now address the challenged siting criteria.

Rochelle Waste's Arguments

Rochelle Waste challenges five of the siting criteria. Their arguments on each issue will be summarized below:

Criterion (i)

Rochelle Waste asserts that the only witness who testified on criterion (i) was its witness Ms. Smith. RW at 23. Rochelle Waste argues that the City's determination that it failed to prove need is clearly erroneous, because there was utterly no testimony to the contrary, and that

the arguments made by the attorney for CCOC were essentially political. RW at 26. Rochelle Waste notes that the hearing officer had determined that the petitioner had successfully proven compliance with criterion (i) and recommended that the council find the facility was necessary to accommodate the waste needs of the area it was intended to serve. RW at 26.

Rochelle Waste asserts that the hearing officer correctly noted that consideration of Ogle County's need alone would be inappropriate and would result in any special condition limiting the service area or a reversal of the denial of the siting. RW at 26. Further, Rochelle Waste notes that the hearing officer also correctly found that it is inappropriate to consider unpermitted capacity in determining the available disposal capacity. RW at 27. Rochelle Waste contends that the City's staff attorney also concluded that the petitioner had satisfied criterion (i). *Id.* Rochelle Waste concludes that the City's decision on this criterion was contrary to the unrebutted expert testimony establishing need, was based on political considerations, not evidence, and against the manifest weight of the evidence. *Id.*

Criterion (ii)

Rochelle Waste argues that there was no rebuttal testimony regarding the design and operations of the expansion, and that the council concluded that the petitioner had proved compliance with criterion (v) – plan of compliance. RW at 27. This, posits Rochelle Waste, means it is apparent the City based its criterion (ii) decision on the hydrogeology aspect of the location element of that criterion which was, according to the hearing officer, the real issue. *Id.*

Rochelle Waste asserts that CCOC called only one witness on this criterion (Charles Norris) who testified to concerns regarding the hydrogeology, but who failed to offer any opinion as to whether or not there was compliance with criterion (ii). Rochelle Waste offered the testimony of Mr. Zinnen who stated that the expansion meets or exceed all applicable location standards. RW at 32. Rochelle Waste offered the testimony of Mr. Stanford. He testified, among other things, that the proposed expansion is so located from a geologic and hydrogeologic standpoint that the public health, safety and welfare will be protected if expansion is permitted. RW at 41. Rochelle Waste argues that Mr. Stanford found the expansion to be well designed and well matched to the hydrogeologic conditions at the site. RW at 44. Rochelle Waste argues that Mr. Stanford testified that he is unaware of any landfill similar to the proposed expansion leaking anywhere in the United States. RW at 42. Rochelle Waste asserts that the Dean of the University of Illinois Engineering School also recently confirmed that to be the case. *Id.*

Rochelle Waste asserts that Mr. Norris offered no opinion to rebut Mr. Stanford's opinion that the expansion met criterion (ii) and would protect the public health, safety and welfare, and that the cross-examination of Mr. Zinnen and Mr. Stanford provided no impeachment of these witnesses' positive opinions as to design and location. RW at 45.

Rochelle Waste argues that although CCOC questioned groundwater impacts in the Unit 3 French drain along the uncertain Unit 1 boundary, such impacts might be expected from such an obsolete unlined area. RW at 45. The more important point, Rochelle Waste asserts, is that a RCRA, subtitle D landfill does exist at the site which has been proved protective of public heath, safety and welfare. *Id.*

Rochelle Waste refutes Mr. Norris' suggestion a GMP cannot be designed until the reduced post-construction recharge has been modeled, by pointing to Mr. Stanford's testimony that the GIA did conservatively model that impact by retaining the faster rates of flow, *resulting in* sooner groundwater impacts. RW at 48. Rochelle Waste asserts the Mr. Norris conceded that the methane gas impacts found in the R-107 monitoring well is likely due to nothing more than Unit 1 and the well R-107 being connected by the granular or sand unit in which that well is screened. RW at 48-49. Rochelle Waste points to the hearing officer's recognition that the issue provides utterly no basis for suggesting that the Tiskilwa till is less permeable than set forth in the application. *Id*. Rochelle Waste highlights Mr. Stanford's testimony that if the units were directly connected, there could not be (as there clearly are) three distinctly different water tables. RW at 49, citing C7281.

Rochelle Waste argues that if the aquifers were connected – as testified by Mr. Norris – there would not be different water tables. RW at 40. Rochelle Waste notes that Mr. Norris has never designed or operated a landfill, performed a hydrogeological study for the development of a landfill, performed a GIA, prepared an application for a permit to develop a landfill, or conducted a site characterization for the proposed development of a landfill. RW at 51-52. Rochelle Waste asserts that in each of the six prior siting cases that Mr. Norris testified for CCOC's counsel, he also testified that the siting criteria were not met – something he did not do in this case, never offering any opinion as to whether or not this application meets criterion (ii). RW at 53.

Rochelle Waste asserts that the hearing officer stated that Mr. Norris appeared to be advocating from the witness stand, and felt that because of his frequent testifying for CCOC's attorney in opposition to pollution control facilities, felt his credibility was suspect. RW at 56.

Criterion (iii)

Rochelle Waste argues that criterion (iii) does not require proof that the applicant can assure an odor-free facility or roads utterly devoid of stray papers, but instead calls for the facility to be located so as to minimize the incompatibility, and does not allow siting refusal simply because there might be some reduction in value. RW at 58. Rochelle Waste asserts that Mr. Lannert testified that the proposed expansion is compatible with the character of the surrounding area, the bases of his opinion being that 80% of the surrounding land use is either agricultural or open space; the nearest residential unit is over 725 feet from the waste boundary; that the existing railroad to the north and surrounding roadways to the east, south and west provide adequate setbacks; that the expansion is located in a general zoning district; and that the facility is properly screened and buffered from the surrounding area. RW at 61-62. Rochelle Waste notes that no rebuttal testimony was offered. RW at 62. Rochelle Waste contends that Mr. Poletti's testimony is that the proposed expansion is so located as to minimize any impacts on property values in the surrounding areas. RW at 65.

Rochelle Waste asserts that the City's staff and the hearing officer recommended that that the council find the petition had met criterion (iii) establishing both a minimization of incompatibility with the surrounding area and a minimization of the effect on the value of the

surrounding properties. RW at 65. Rochelle Waste argues that the City's decision to the contrary evinces a disregard of the evidence and results from the fact that the council members never conferred with the City's staff or each other. *Id.*

Criterion (vi)

Rochelle Waste asserts that it called Mr. Werthman to testify regarding this criterion and that no rebuttal testimony was offered. RW at 66. Rochelle Waste asserts that Mr. Werthman conducted a field investigation and visited the site approximately 10 times, as well as investigating historical traffic and roadway information. RW at 67. Rochelle Waste contends that Mr. Werthman looked at traffic patterns in 2005, 2012, and 2022 using a conservative ambient growth estimate of 3% per year, even though IDOT used a 1.75% estimate in a recent study. RW at 72. Based on his study, Rochelle Waste contends, Werthman's opinion is that the traffic to and from the facility has been designed to minimize the impact on existing traffic flows. RW at 74.

Rochelle Waste asserts that Werthman explained that the improvements to the site access are a major advantage of the present application over the application filed in 2000. RW at 74. Rochelle Waste notes that both the City staff and the hearing officer recommended that the council find the petitioner had proven compliance with criterion (vi) suggesting the imposition of certain conditions. RW at 74.

Criterion (ix)

Rochelle Waste asserts that there was no controversy regarding petitioner's compliance with criterion (ix), but the City Council still concluded the criterion had not been met. RW at 75. Rochelle Waste notes that Mr. Zinnen testified without contradiction that the only regulated recharge area designated in Illinois is near Peoria and that, therefore, the expansion meets criterion (ix). *Id*. Rochelle Waste argues that the council's finding that the petitioner failed to prove compliance with criterion (ix) is probably the best evidence that the council completely disregarded the record, paid no attention to the City's staff report, and disregarded the hearing officer's excellent report. RW at 75.

The City's Arguments

The City argues that the applicant bears the burden of establishing each and every criteria and that if any one criterion is not met, the application must be denied. City at 50. The City asserts that if any evidence supports the decision of the local siting authority that decision is not against the manifest weight of the evidence and must be affirmed. City at 51.

The City disagrees that Rochelle Waste presented a prima facie case on each of the criteria, and asserts that there was contradicting testimony on criterion (ii) and the testimony provided on the other denied criteria was based on erroneous data and improper assumptions as highlighted by CCOC's closing argument and proposed finding of fact at the underlying level. City at 51.

The City argues that because there was conflicting evidence presented at the siting hearing, the case is not analogous to Industrial Fuels as Rochelle Waste suggests, and that it was only because of a complete lack of evidence that the court reversed the siting decision in that case. City at 52. The City asserts that even where no conflicting expert testimony was presented, the City was free to find that Rochelle Waste failed to meet the criteria because the trier of fact determines what weight should be accorded to expert testimony. City at 53. While the trier of fact cannot arbitrarily reject expert testimony, the City urges, it can disbelieve such testimony and it is the province of the siting authority, not the Board, to weigh the evidence and assess the credibility of the witnesses. *Id*.

The City argues that the Board should disregard Rochelle Waste's implication that the council's decision was against the manifest weight of the evidence merely because it was contrary to the recommendations of its consultants and the hearing officer, noting that decision-making authority rests solely with the local government and its consultant's report or staff recommendations are not binding on the decision-maker. City at 53. The City contends the Board should disregard any and all references to the recommendations made by the hearing officer and environmental consultant. City at 54. However, the City contends that even if the reports were considered, they actually establish that the presentation was lacking, as both the hearing officer and staff recommended that at least 49 conditions be placed on approval. *Id*.

Criterion (i)

The City asserts that this criterion requires that the applicant show a facility is reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with any other relevant factors. City at 54. Where an applicant establishes nothing more than convenience, the applicant fails to establish criterion (i) is met. City at 55.

The City asserts that Ms. Smith admitted she had been paid $35,000 to $40,000 to prepare her needs report and to testify for Rochelle Waste and that the council could have concluded that her testimony was not credible or should not be given much, if any, weight. City at 55. The City contends her credibility is further diminished because in all of the 13 needs reports she has drafted, she has never prepared a report not finding need existed. *Id*. The City asserts that her computations on distances between the proposed facility and other facilities were contradicted by Mapquest which positioned each of those facilities approximately seven to eight miles closer than what Ms. Smith indicated in her needs report. *Id*.

The City argues that the basis for Ms. Smith's conclusion that the proposed facility was necessary was also called into question because she based her calculations on a zero percent recycling rate even though all counties are recycling above that rate. City at 56. Further, contends the City, she did not fully consider that the Onyx facility could provide waste disposal to a great deal of the area intended to be served – she testified that she didn't know how much of Ogle County's waste was currently being transported to that facility. *Id*.

The City takes umbrage at Ms. Smith's conclusion because it is based on the premise that landfill capacity in Illinois is decreasing, but that capacity in Region 1 (where Ogle County is

located) actually increased from 2001 to 2002. City at 56. Further, the City contends that Ms. Smith made the erroneous assumption that no additional capacity would be available to the service area despite the fact that siting approval has been granted to facilities in the service area, including facilities in Will County, Streator and Bartlett. *Id*. The City points also to Livingston Landfill, which serves approximately 55% of the proposed facility's service area and has an application for expansion pending. *Id*.

The City argues that it is appropriate to consider proposed facilities if they will be capable of handling a portion of the waste disposal needs of the county and will be capable of doing so prior to the projected expiration of current disposal capabilities within the county such that the needs of the county will continue to be serve. City at 57, citin*g* Waste Management, 175 Ill. App. 3d at 1032, 530 N.E.2d at 690. The City contends that although Ms. Smith found economic advantages to the expansion, such a consideration is irrelevant to need.

The City asserts that the Board has found it appropriate for decision-makers to find an application did not meet criterion (i) even if no contradicting expert testimony was offered if the testimony that was offered did not take into consideration sufficient facts and circumstances. City at 58, citing Waste Management v. PCB, 234 Ill. App.3d 65, 69, 600 N.E.2d 55, 57-58 (1st Dist. 1992.) The City argues that Ms. Smith exaggerated the need for this facility by overestimating the amount of waste that would be provided in the service area and failing to consider facilities that currently exist or will exist. City at 58-59.

Criterion (ii)

The City argues that the determination of whether criterion (ii) is met is purely a matter of assessing the credibility of expert witnesses. City at 59. The City asserts that in the instant case, there was testimony from a geologist asserting that problems with the proposed site, specifically that the site had not been adequately characterized geologically because of an improper groundwater impact assessment, and the monitoring system was not adequate to monitor and protect against possible contamination existed. City at 60. The City contends it was not necessary for Mr. Norris to specifically state the proposed expansion did not meet criterion (ii), but it was enough to assert that the applicant failed to properly characterize the geology and not create an adequate groundwater monitoring system. *Id*.

The City argues the council was faced with contradictory testimony regarding this criterion and it was the role of the council to resolve that conflict. City at 60. Because there was evidence supporting the council's decision, the City argues, it was not against the manifest weight of the evidence. *Id*. The City argues that in re-hashing the testimony of the various witnesses, Rochelle Waste is asking the Board to reweigh the credibility of the witnesses – something the Board does not have the authority to do. City at 61.

The City contends that Mr. Zinnen used an improper slope to perform his calculations and when the correct slope was used, there was 4.6 times as much water percolating through the drainage layer than what Mr. Zinnen had indicated. City at 61. The City asserts that Mr. Zinnen's conclusion is based on the assumption of the exhumation of Unit 1, but that the Agency

mustprovide a permit before that takes place. City at 62. The City argues that Mr. Stanford's limited experience in reviewing the geology of landfills makes his testimony less reliable. *Id*.

The City contends that Mr. Stanford did not use actual permeabilities in determining how fast contaminants would move under the site, but assumed they would move at the same speed throughout the entire system. City at 63. The City maintains that Mr. Stanford did not use conservative assumptions in his groundwater impact model because, in part, he did not assume any leaks in the clay liner. *Id*.

The City argues that it is disingenuous for Rochelle Waste to downplay Mr. Norris' concerns about the improper characterization of the site and inadequate monitoring system because Stanford testified that a hydrogeologic investigation is necessary to assess the performance of the proposed landfill with regard to impacts on groundwater quality. City at 64. The City argues that Mr. Norris' concerns are significant because they directly refute the bases upon which Mr. Stanford concluded the facility was located to protect the public health, safety and welfare. *Id*.

The City also argues that the council could have appropriately concluded that the plan of operations was inadequate and not protective of public health, safety and welfare in light of the substantial problems the operator has had in the past with violations and deficiencies. City at 64-65.

Criterion (iii)

The City asserts that the council's finding that the facility was not located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property is not against the manifest weight of the evidence. City at 65. The City asserts that Mr. Lannert's credibility is suspect because in 34 of 35 landfill hearings he testified that the facility was compatible with the surrounding area; in the one case that he testified a facility was not compatible, he was paid by an objector to say so. City at 66. The City also argues that Mr. Lannert admitted he was hoping to do the landscaping for the expansion if it was sited. *Id*.

The City asserts Mr. Lannert placed substantial reliance on the berm to minimize the impacts and make the facility compatible with the surrounding area, but admitted the berm was located off-site and not within the facility boundary. City at 66. Further, states the City, Mr. Lannert skewed his testimony to emphasize the facts supporting his position, specifically testifying that he believed the landfill was compatible with the surrounding area because so much of it is zoned agricultural and industrial, but admitting there are approximately 100 residential properties within a mile of the facility. *Id*.

The City argues that Mr. Lannert only considered compatibility by looking at a one-mile radius around the proposed facility even though other studies have examined compatibility up to five miles from the proposed site. Based on the massive size of the facility it was reasonable for the council to find the facility was not located to minimize incompatibility especially based on an inadequate study that did not examine a large enough area, the City contends. City at 67.

The City asserts that the testimony of Mr. Poletti was questionable because out of the 20 – 25 times he testified in a siting hearing, he has always found the facility is located to minimize the effect on the value of the surrounding property. City at 67. The City contends that despite data skewed by questionable decisions, Mr. Poletti's study revealed that properties nearest the landfill were selling for $1.40 less per square foot than those further away. City at 68. The City argues that while Mr. Poletti found no statistical difference, a 1,500 square foot home located within a mile of the facility would be worth $2,100 less than if it were located farther from the facility, and based on such evidence the council could have reasonably found the facility was not designed to minimize the effect on the value of the surrounding property. *Id*.

Further, the City contends, the two most recent sales in the target area had the lowest rate of appreciation, and the council could have reasonably considered that property values in close proximity to the landfill would continue to be negatively impacted based on the expansion of the facility. City at 68. The City asserts that Mr. Poletti found a 3% higher appreciation rate in property in the target area versus the control area, but that no conclusion could be drawn from that study because the number of houses analyzed in the target group was insufficient. City at 68-69.

The City contends that Mr. Poletti failed to take into account the effect of the expansion on the facility which would result in a four-fold increase in the facility size and a ten-fold increase in capacity, and that it is well settled that an applicant cannot establish compatibility based on a pre-existing facility. City at 69 citing Waste Management, 123 Ill. App. 3d 1075, 1088, 463 N.E.2d 969, 979 (2nd Dist. 1984). The City concludes that the evidence in this case establishes that the property nearest the landfill is being negatively impacted and that Rochelle Waste has done nothing to reduce such impacts, thus the council's decision regarding criterion (iii) was not against the manifest weight of the evidence.

Criterion (vi)

The City argues that the finding regarding traffic patterns to or from the facility was not against the manifest weight of the evidence. The City contends that Mr. Werthman admitted his conclusion was based on the assumption that there would be a widening and improvement of Mulford Road and Illinois 38, allowing for a left turn lane, which was planned by IDOT but not yet in existence at the time of the hearing. City at 70. The City contends that Mr. Werthman's study is based on the expansion taking 3,500 tons of garbage each day but that the facility does not have a tonnage cap and could possibly take up to 5,000 tons of garbage per day. *Id*.

The City argues that because Mr. Werthman did not consider construction traffic on the site, specifically calculate additional truck traffic that will result from the intermodal facility being developed in Rochelle, or perform an analysis during snowy or rain conditions his study is inherently unreliable. City at 71.

The City asserts that Mr. Werthman admitted the expansion will have an adverse effect on traffic in the area because the presence of landfill traffic and the road improvements necessary to accommodate such traffic will downgrade the level of service at the intersection of Route 38

and Mulford Road from a grade "C" to a grade "D" – the lowest acceptable level. City at 71. The City contends that this generally means that drivers will have to wait longer at the intersection, which could lead to more frustrated and impatient drivers and could, in turn, lead to more accidents and less safe roadways. City at 71-72.

The City argues that the evidence is clear that traffic flows will increase based on the over ten-fold increase in vehicles entering and exiting the proposed facility. City at 72. The City contends that it is clear traffic will not be minimized because despite Mr. Werthman's belief that a stoplight at the intersection of Mulford Road and Illinois 38 would be beneficial, no stoplight will be installed. City at 72. The City notes that he council also heard numerous public comments concerning an increase of traffic and that the members were free to use their own knowledge and familiarity with local traffic to determine that the criterion wasn't met. *Id*.

CCOC'S Arguments

CCOC asserts that this case is not of the type decided in Industrial Fuels where the applicant's experts are uncontradicted, but that extensive cross-examination exposing weaknesses and inconsistencies in the testimony of Rochelle Waste's witnesses, along with an opposing expert witness with regard to criterion (ii) exist in this case. CCOC at 6.

Criterion (i)

CCOC asserts that the evidence of need in this case demonstrates the kind of mathematical manipulation so unrealistic that the City should draw the conclusion that no need for the proposed facility exists. CCOC at 7. CCOC asserts Smith does essentially the same report in every need assessment project she works on. *Id*. CCOC argues that by including metropolitan Chicago in the service area and excluding those counties with substantial sited capacity, one can always guarantee the outcome of a need computation. CCOC at 8.

Further, CCOC contends that the condition of zero recycling assumed by Smith does not exist anywhere in the service area and that Ogle County actually recycled at a 30% rate last year. CCOC at 8. CCOC asserts that Smith did not know the dimensions, or center, of the proposed service area. CCOC at 9

Criterion (ii)

CCOC argues that direct conflicting evidence exists on this criterion, namely the testimony of Mr. Stanford, the hydrogeologist for Rochelle Waste, and Mr. Norris, the hydrogeologist for CCOC. CCOC at 9. To the extent that the City Council weighed this conflicting testimony and chose to give credit to Norris, CCOC asserts, the Board's job in reviewing this decision should be finished. *Id*. Notwithstanding, argues CCOC, the testimony of Mr. Stanford was not credible and the testimony of Mr. Norris was fatally damaging to the application. CCOC at 10.

CCOC attacks Mr. Stanford's testimony, asserting that he minimized the amount of sand located underneath the proposed site in his cross-sections, and classified observation wells with

virtually identical elevations and identical depths into bedrock as being in different geologic units based solely upon the permeability determined in slug testing of those wells. CCOC at 9-10.

Further, CCOC asserts that Mr. Stanford's gross inability to even identify and classify the top of the bedrock renders his conclusion about the quality of the geologic setting completely meaningless. CCOC at 11. CCOC notes that Rochelle Waste argues that a GIA is not even required at a siting hearing, but CCOC argues that if it is presented, its accuracy and believability become an important consideration in assessing the credibility of the witness. CCOC at 12. Mr. Stanford, contends CCOC, acknowledged that he did not even use the site specific permeability data in performing the GIA. *Id*.

CCOC disputes Rochelle Waste's assertion that Mr. Norris is "puffing" regarding his credentials, noting that Mr. Norris is licensed in multiple states, has over 30 years of experience in the area, is past president of the Colorado Groundwater Association, and was manager of the Industrial Relations Consortium of the Laboratory for Supercomputing in Hydrogeology at the University of Illinois for a number of years. CCOC at 13. CCOC contends that Norris emphasized that Rochelle Waste's conclusions regarding the abilities of the Tiskilwa Till to act as a barrier between the bottom of the landfill and the uppermost aquifer are totally unwarranted and contradicted by the site specific data. *Id*.

Although Rochelle Waste describes Mr. Norris' criticisms of the application as trivial, CCOC claims Mr. Norris was deeply troubled by the fact that the application and Mr. Stanford have failed to correctly identify and describe the uppermost aquifer immediately under the site. CCOC at 14. This is significant, CCOC asserts, in that Mr. Norris identified a nearby municipal water supply at immediate risk of contamination from landfill leachate releases, specifically computing that water will travel from the ground surface at the site to the Creston municipal wells in 169 years. CCOC at 14-15.

CCOC asserts that Rochelle Waste has historical operational problems and has continuously refused to acknowledge and address problems. CCOC at 16. CCOC contends that in 41 inspections between February 1999 and November 2001, deficiencies were noted on 35 occasions. *Id*. CCOC argues that given Rochelle Waste's pattern of conduct, Rochelle Waste is properly characterized as a non-compliant party and litigious operator who would not be proactive in ensuring environmental safety. CCOC at 17.

Criterion (iii)

CCOC contends that the testimony of Rochelle Waste's two witnesses was seriously flawed and anything but persuasive. CCOC at 17. Most troubling about Mr. Lannert's testimony, CCOC asserts, is that his conclusions were based in large part on an off-site screening berm between the proposed facility and the Village of Creston, and he did not know who owns the land on which the berm is located or how it is regulated. CCOC at 17-18.

CCOC asserts that Mr. Polletti conceded that Creston has an 11% higher household income than Rochelle but has lower property values. CCOC at 18. CCOC contends that Mr.

Polletti's testimony was undermined by the serious and unjustified rate manipulation required to reach his conclusions. *Id*. CCOC specifically noted that he analyzed every fifth sale out of 370, but the total of 80 indicates that other sales were added; and included a sale in the target area that was outside the time parameters for his study that had the highest rate of appreciation of any sale in the target area. CCOC at 18-19.

CCOC argues that despite the selective inclusion and exclusion of sales information, Mr. Polletti's numbers suggest there will be an impact on property values. CCOC at 19. CCOC asserts that Mr. Polletti acknowledged that lot sizes in target area of Creston were larger than those of Rochelle in the control area, but disputed that there is a correlation between prices and lot size. *Id*. CCOC asserts that he also admitted that if the residential sales in the target area were looked at sequentially, every single sale has a lower rate of appreciation than the previous sale, and that the last four sales in the target area since the first application for expansion was filed have a significantly lower average price than the sales prior to the filing. *Id*.

Rochelle Waste's Reply

Rochelle Waste asserts that the City and CCOC make arguments that could be made in essentially any landfill siting case, confident that the legislative actions of the City will be upheld under the manifest weight of the evidence standard of review as long as any colorable defense of that action can be mounted. Reply at 1.

Criterion (i)

Rochelle Waste argues that CCOC effectively concedes that need was established when it stated that regional facilities such as proposed in this case are necessary. Reply at 6. Rochelle Waste assert that the City and CCOC rely on vagaries in the law when they argue Smith should have considered proposed facilities which have not yet received an Agency permit even though Board and court decisions have suggested that such unpermitted capacity is too speculative to be considered in a needs analysis. Reply at 7, citing Tate v. PCB, 188 Ill. App. 3d 994, 1019-20, 544 N.E.2d 1176, 1193-04. Rochelle Waste argues that authority can be dredged up for either position, which means the City's political decision could be upheld regardless of the evidence and in the face of an obvious need for the expansion. Reply at 7-8.

Rochelle Waste asserts that the City makes claims that can be made with respect to any needs analysis. For example, contends Rochelle Waste, expert witnesses are rarely asked to prepare formal reports where their preliminary conclusions are unhelpful to the retaining party, and that Smith has declined to participate in connection with two landfill-siting applications as to which she was not asked to prepare a report. Reply at 8. Further, Rochelle Waste notes, Smith was challenged for not considering the Livingston landfill – a facility that is projected to be depleted by 2004. Reply at 9.

As to recycling rates, Rochelle Waste asserts that Smith projected a range of capacity shortfalls depending on whether there was no recycling or recycling goals were met. Reply at 10. Rochelle Waste asserts that the City's argument that Smith did not fully consider the fact that the Onyx facility could provide waste disposal to a great deal of the area intended to be

served by the proposed facility is disingenuous. Reply at 10. Rochelle Waste asserts that the Onyx Orchard Hills Landfill was specifically considered in the need report and the provincial question of how much of Ogle County's waste is disposed of in that facility is neither particularly relevant nor even very likely determinable. Reply at 11. Rochelle Waste stresses that it is the need of the service area, not the need of the county where the siting authority is located, that is the issue and that it is the applicant who determines the service area, not the local decision-maker. *Id.*

Rochelle Waste argues that the need for this facility was evident from Smith's report and testimony and that no picayune objections can deny what CCOC has admitted to be evident - that any regional facility such as that involved in this case is necessary to serve the service area which includes metropolitan Chicagoland. Reply at 11.

Finally, Rochelle Waste asserts that the Agency reports are a matter of public record and that the Board knows a slight increase (1.4%) in the capacity for Region 1 in 2001 was more than offset by the 1.8% decrease the following year. Reply at 12.

Criterion (ii)

Rochelle Waste argues that the City and CCOC ignore the larger picture and use outright misrepresentations and isolated examples of data anomalies to suggest that the site characterization in the instant case is incorrect. Reply at 13. For example, Rochelle Waste contends, CCOC argues that the sand lenses in the till should have been drawn as continuous, but Mr. Stanford testified the sand lenses were drawn in accordance with convention and shown as discontinuous because sand lenses at other locations were of different textures. Reply at 13. Further, Mr. Stanford testified they were drawn partially on observation during the excavation of the site and also on the literature information indicating these bodies are discontinuous. *Id.*

Rochelle Waste asserts that the when CCOC claims to cite examples that Mr. Stanford intentionally minimized negative features, it is actually referring to one piece of ambiguous data (Well G-34-D) that required Mr. Stanford to make a judgment call that does not result in any material difference to the overall analysis. Reply at 13-14.

Rochelle Waste also argues that CCOC's attempt to show that Mr. Stanford is incorrect in stating the Till is an impermeable barrier between the bottom of the landfill and the uppermost aquifer must fail because Mr. Stanford testified that well G-68-1 is connected with the sand layer above and it was entirely appropriate for Mr. Stanford to not treat the well as an indication of the permeability of the Tiskilwa Till. Reply at 14.

Rochelle Waste asserts that CCOC is off base in suggesting Mr. Stanford is unable to identify and classify the top of the bedrock at the site. Reply at 14. Rochelle Waste argues that how the computer program used by Mr. Stanford contours a surface which is not known (and clearly set forth in the report as being unknown) is not something that calls his overall interpretation into question. Reply at 15. Rochelle Waste disagrees that the GIA was flawed because Mr. Stanford did not determine the permeability of the Tiskilwa layer, arguing that Mr.

Stanford explained that the geometric mean permeability of the layer is 1.4 x 10-6 centimeters per second. *Id.*

Rochelle Waste asserts that in creating the GIA, Mr. Stanford assumed the presence of two installation defects per acre, each with an open area of 1.0 square centimeter that is 55 times the open area of the supposed pinhole defects the City claims Mr. Stanford assumed. Reply at 16. Further, Rochelle Waste contends that the leakage rate assumed by Stanford of .0005682 meters per annum is far more conservative than that contained of .0002979 utilized in the Agency's 1992 Instructional Notes to Practitioners of GIAs. Reply at 17.

Rochelle Waste also refutes the City's assertion that Mr. Stanford did not consider any leaks in the clay liner when performing the GIA, noting that Mr. Stanford assumed the clay liner would actually leak at a variety of flux rates all of which are, again, more conservative than the figures in the Agency's Instructional Notes. Reply at 17. Rochelle Waste asserts that any claims that Mr. Stanford miscalculated the concentration level of ammonia is completely wrong and that the predicted concentration of ammonia for the uppermost intra-till granular unit is just less than the applicable groundwater standard. *Id.* Rochelle Waste further notes that the intra-till granular until at issue is only 1.3 feet thick and does not meet the definition of an aquifer let alone the uppermost aquifer for which compliance with the groundwater protection standard must be demonstrated. Reply at 18.

Rochelle Waste contends that Mr. Stanford has been an environmental hydrogeologist from more than 17 years, logging over 15,000 feet of exploratory borings, and personally supervising the installation of more than 300 monitoring wells. Reply at 18.

Rochelle Waste argues that although the HDPE membrane can be compromised by certain chemicals under certain concentrations as asserted by the City, the application includes laboratory testing showing that in the actual concentrations found in leachates from landfills, those chemicals have no deleterious on HDPE membranes. Reply at 19.

Rochelle Waste asserts that although Mr. Zinnen initially used a slightly improper calculation for the final cover slope, he corrected the calculations during the hearing, and that the minor error was entirely immaterial resulting in the flow through the drainage layer increasing from .00041 inches to .00194 inches per year – an inconsequential difference. Reply at 20.

Criterion (iii)

Rochelle Waste points out that the City's assertion that the berm is planned to be constructed on land not owned or controlled by the application is flatly wrong, the land in question having been purchased from the Village of Creston in a purchase agreement dated April 16, 1999 as included in the application. Reply at 21. Although the property is not specifically within the facility boundary, Rochelle Waste asserts, it is subject to that land purchase agreement that includes a covenant requiring the berm as a visual screen between the facility and the Village of Creston. *Id.*

Rochelle Waste asserts that the City's and CCOC's claims that Mr. Lannert always testifies for the proponent of a siting application notwithstanding, neither of the parties have offered any substantive reason that Mr. Lannert's testimony is challengeable. Reply at 22. Rochelle Waste reiterates that this is an agricultural and industrial area separated by roads and a railroad track from the nearest village. *Id*.

Rochelle Waste disagrees that because a very few recent sales have been lower since the first application was filed, it somehow proves that the landfill is impacting property values. Reply at 23. Rochelle Waste also disputes that because Creston has a higher average income but lower property values its proximity to the landfill is affecting property values. Reply at 24. Rochelle Waste highlights Mr. Polleti's testimony that a variety of factors could reduce property values in Creston, such as its distance from shopping and secondary education, its sewer impact fees and its lack of curb and gutter that could result in higher property values in the city of Rochelle. *Id*.

Criterion (vi)

Rochelle Waste asserts that the City misrepresents Mr. Werthman's testimony and report regarding the change of the traffic grade from a "C" to a "D" at the intersection of Mulford Road and Illinois 38. Reply at 25. Rochelle Waste asserts that his testimony makes clear the intersection would remain at a "C" level of service for more than 10 years and that it would not drop to a level "D" until 2022 because of projected ambient growth, not because of the landfill. Reply at 25.

Rochelle Waste disputes the City's contention that Mr. Werthman is relying on improvements that are not a certainty at that intersection, asserting that Mr. Werthman testified that IDOT had said the improvements would commence in the year 2003 and were planned for completion in that year. Reply at 26. Rochelle Waste asserts that it is not at all clear that off-site soils will be required for construction at the landfill, so that Mr. Werthman's decision not to includeconstruction traffic in his study is not a problem. *Id*. Further, Rochelle Waste argues, even if the 665,000 tons that might be required were brought onto the site it would occur over a 25 year life of the landfill and simple mathematics will demonstrate the number of trucks involved in any such construction would not be significant. *Id*.

Rochelle Waste contends Mr. Werthman did consider the truck traffic that would be involved in Rochelle's intermodal yard. Reply at 26.

Operating Record

Rochelle Waste disputes CCOC's claims concerning the operating record at the landfill. Reply at 27. Specifically, Rochelle Waste asserts that CCOC's claim that in 41 inspections deficiencies were noted on 35 occasions is a blatant misrepresentation and that Hilbert testified unequivocally that, as set forth in the application, since 1995 the existing facility has only received five notices of violation and two administrative warnings. Reply at 27-28.

Rochelle Waste asserts that CCOC similarly misrepresents that Rochelle Waste walked away from the problem of Unit 3's groundwater interceptor trench, asserting that the trench is monitored every three months and the results submitted to the Agency. Reply at 29.

Rochelle Waste contends that although CCOC has made political hay over Rochelle Waste's violation of the supposed Agency directive to close Unit 1, the obligation does not exist because of an indefinite extension granted by the Agency. Reply at 31. Rochelle Waste asserts that every one of the claims made by CCOC concerning the operating record is a misrepresentation. *Id*.

Discussion

The Board will now assess the merits of Rochelle Waste's contentions that the council's determination that Rochelle Waste did not satisfy certain criteria of Section 39.2 of the Act is against the manifest weight of the evidence.

A party seeking siting approval for a pollution control facility must submit sufficient details of the proposed facility to meet each of the nine statutory criteria. 415 ILCS 5/39.2(a) (2002). Rochelle Waste contends that the City's decision on criteria (i), (ii), (iii) and (vi) was against the manifest weight of the evidence.[2]

The Board cannot reweigh the evidence. The Board may only reverse the City Council's decision on the criteria if the decision was against the manifest weight of the evidence. Waste Management of Illinois, Inc. v. PCB (1987), 160 Ill. App. 3d 434, 513 N.E.2d 592. A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262. Merely because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford v. PCB and Frank's Industrial Waste, (2nd Dist. 1984) 125 Ill. App. 3d 384, 465 N.E.2d 996.

Initially, the Board will discuss the recommendations and reports of the City's environmental consultants and the hearing officer. Rochelle Waste asserts that the both recommended that expansion be sited because the application met all nine criteria. The Board notes that the decision-making authority rests solely with the local government. A local government's consultant report or a staff recommendation is not binding on the decision-maker. CDT Landfill v. City of Joliet, PCB 98-60 (Mar. 5, 1998); Hediger v. D & L Landfill, Inc., PCB 90-163 (Dec. 20, 1990); McLean County Disposal Company, Inc. v. County of McLean, PCB 89-108 (Nov. 15, 1989). The testimony of the hearing officer and the City's environmental consultants is, however, is a part of the underlying record before the City Council at the time of decision. The Board will consider the testimony of the City's staff and consultant to that extent.

Criterion (i)

[2] Having found the April 28, 2003 meeting legal and fundamentally fair, the City Council decision to deny criterion (ix) is valid. Accordingly, any consideration of a decision finding that criterion (ix) was not met is moot, and will not be further addressed.

Section 39.2(a)(i) of the Act provides that local siting approval shall only be granted if the facility is necessary to accommodate the waste needs for the area it is intended to serve. The applicant is not required to show absolute necessity in order to satisfy criterion (i). Fairview Area Citizens 198 Ill. App. 3d at 551, citing Tate v. PCB, 188 Ill. App. 3d 994, 544 N.E.2d 1176 (4th Dist. 1989); Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844 (5th Dist. 1989). The Third District Appellate Court has construed "necessary" as a degree of requirement or essentiality, and found that a landfill must be shown to be reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capability, along with any other relevant factors. Waste Management, Inc., v. PCB, 122 Ill. App. 3d 639, 644; 461 N.E.2d 542 (3rd Dist. 1984).

After careful review of the record, the Board finds that the City Council's finding that that the expansion was not necessary is against the manifest weight of the evidence. The record on this criterion is clear and contains nothing to justify the City Council's decision.

The City and CCOC make a number of arguments to discredit the unrebutted testimony presented by Rochelle Waste. However the arguments do not change the clear showing of need for the expansion. The generic attacks on Ms. Smith's credibility include the fact that she was paid for her services and that she has never prepared a report not finding need existed. Neither argument is persuasive.

The record reveals that a number of the issues with Ms. Smith's testimony raised by the City and CCOC are misstated. For instance, Ms. Smith did project a range of capacity shortfalls taking into account whether or not recycling or recycling goals were met. Smith did consider the Onyx facility in her needs report. Rochelle Waste is correct in stressing that it is the need of the service area not the need of the county where the siting authority is located that is the issue in criterion (i), and the applicant determines the service area. Metropolitan Waste Systems, Inc. v. PCB, 201 Ill.App. 3d 51,55, 558 N.E.2d 785, 787 (3rd Dist. 1990). The Board is similarly unpersuaded that the weight of Ms. Smith's testimony is lessened because the website Mapquest positioned facilities Ms. Smith referenced to be closer by seven or eight miles than what Ms. Smith indicated in her needs report.

The applicant is not required to show absolute necessity in order to satisfy criterion (i). Rochelle Waste has shown that the expansion is reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capability. In considering the record, the Board finds Rochelle Waste's application and testimony mandate that a result opposite to the City Council's decision is clearly evident, plain, or indisputable. Thus, the City Council's decision that Rochelle Waste did not meet its burden of proof on the need criterion is against the manifest weight of the evidence, and reversed.

Criterion (ii)

Criterion (ii) of Section 39.2 of the Act requires the applicant to show that "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will

be protected." 415 ILCS 5/39.2(a)(ii) (2002). The law is well settled that the City Council must weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses in this siting case. That the Board could reach a different conclusion is not sufficient to warrant reversal. *See* City of Rockford v. PCB and Frank's Industrial Waste, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2nd Dist. 1984); Waste Management of Illinois, Inc. v. PCB, 22 Ill. App. 3d 639, 461 N.E.2d 542 (3rd Dist. 1984); Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

Therefore, the Board cannot and will not reweigh the evidence, but will examine the record to determine if the decision by the City Council is against the manifest weight of the evidence. After reviewing the record, the Board finds that the City Council's conclusion on criterion (ii) is not against the manifest weight of the evidence.

In this case, the City Council heard contradictory expert testimony. Mr. Norris, testifying on behalf of CCOC, raised issues concerning the geological characterization of the site, the GIA and the monitoring system. CCOC's expert offered testimony that contradicted the conclusions of Rochelle Waste's expert, specifically finding that the Tiskilwa layer was not impermeable and retardant and that the flow systems were interconnected – not separate as Stanford testified for Rochelle Waste. Further, the CCOC expert testified that water contamination from landfill leachate releases could travel from the ground surface at the site to the Creston municipal wells in as little as 169 years C7470-72. The City Council properly relied on this testimony in reaching its decision, and the Board cannot and will not reweigh the testimony or credibility of the respective experts. Therefore, the Board finds that the City Council's decision on criterion (ii) was not against the manifest weight of the evidence.

Criterion (iii)

Criterion (iii) requires the applicant to minimize the incompatibility of the facility on the surrounding area and to minimize the effect on property values. This criterion requires an applicant to demonstrate more than minimal efforts to reduce the landfill's incompatibility. File, 219 Ill. App. 3d at 907; Waste Management, 123 Ill. App. 3d at 1089. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. Waste Management, 123 Ill. App. 3d at 1090. However, an applicant cannot establish compatibility based upon a pre-existing facility, and the compatibility of an expansion must be considered as a new and separate regional pollution control facility. Waste Management, 123 Ill. App. 3d at 1088.

Rochelle Waste argues that the facility must be located so as to minimize the incompatibility, but that siting should not be rejected simply because there might be some reduction in value. At the hearing, Rochelle Waste offered testimony that 80% of the surrounding land use is either agricultural or open space, and that the nearest residential unit is over 725 feet from the waste boundary, as well as testimony that that the proposed expansion is so located to minimize any impacts on property values in the surrounding areas. RW at 65.

The Board finds that the decision on criterion (iii) was not against the manifest weight of the evidence. Sufficient evidence exists on the record to support the decision that impact will

result from the siting of the expansion. The City Council could have based its decision on a number of factors. Specifically, recent sales nearest the landfill have been lower since the first application was filed, and the nearby Village of Creston has a higher average income but a lower average property value. Although Rochelle Waste offered expert testimony that addressed these factors, the City Council could have reasonably decided that this criterion was not proved.

Because an opposite result is not clearly evident or indisputable from a review of the evidence, the Board, thus, concludes that the City's decision on criterion (iii) is not against the manifest weight of the evidence.

Criterion (vi)

Criterion (vi) requires the applicant to show that traffic patterns to or from the facility are designed to minimize the impact on existing traffic flows. The statute does not refer to a traffic plan, but instead requires that traffic patterns to and from the facility be designed to minimize impact on existing traffic flow. Fairview Area Citizens, 198 Ill. App. 3d at 553. Complaints about traffic noise and dust do not pertain to a proposed facility's effect on traffic flow. Fairview Area Citizens, 198 Ill. App. 3d at 553; Tate, 188 Ill. App. 3d at 1024; File, 219 Ill. App. 3d at 908.

Rochelle Waste argues that the unrebutted testimony offered by Mr. Werthman proves the traffic to and from the facility has been designed to minimize the impact on existing traffic flows. A review of the record, however, reveals sufficient evidence to support the City Council's decision that this criterion was not met. For instance, Mr. Werthman testified at the siting hearing that the intersection of Mulford Road and Illinois 38 will be downgraded from a "C" level of service to a "D" level when the landfill is accepting 3,500 tons of waste per day and when there is 60% growth in the area. Mr. Werthman also testified that his ultimate conclusion concerning impact is based upon the widening and improvement at Mulford Road and Illinois 38 – a project that had not occurred at the time of the hearing.

The Board finds that the City Council's decision that Rochelle Waste did not show that traffic patterns to or from the facility are designed to minimize the impact on existing traffic flows is not against the manifest weight of the evidence. Accordingly, the City's decision on this criterion is upheld.

CONCLUSION

After careful review of the record, the Board concludes that the procedures the City Council followed to address the merits of the application were fundamentally fair. Additionally, the Board finds that the City Council's determination that Rochelle Waste failed to meet the requirements of criteria (ii), (iii), and (vi) of Section 39.2 of the Act was not against the manifest weight of the evidence. However, the Board finds that the City Council's decision that Rochelle Waste failed to meet the requirements of criterion (i) was against the manifest weight of the evidence.

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

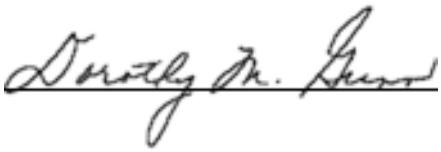
ORDER

The decision of the City Council of the City of Rochelle to deny Rochelle Waste Disposal's application for expansion of its existing landfill is affirmed.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 15, 2004, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board