BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY	)	
	)	
Petitioner,	)	
	)	**PCB 06-184**
v.	)	**(Pollution Control Facility Siting**
	)	**Appeal)**
PEORIA COUNTY BOARD,	)	
	)	
Respondent.	)	

BRIEF OF RESPONDENT PEORIA COUNTY BOARD

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NOW COMES Respondent, Peoria County Board, (hereinafter the "County" or "Respondent"), by and through its attorneys, David A. Brown and William A. Atkins, and as and for its post-hearing Brief, states as follows:

INTRODUCTION

Peoria Disposal Company, Inc. ("PDC", "applicant" or "Petitioner") filed a siting application seeking to locate a hazardous waste landfill in the County of Peoria directly over a drinking water aquifer and immediately adjacent to fully developed neighborhoods. A public hearing was held over the course of six (6) days, covering some 50 hours of testimony and comment. After a complete and exhaustive review of the siting application, testimony, exhibits, and all public comments, the County Staff identified numerous issues and problems with the design and location of the proposed landfill, and recommended approval only after putting together a lengthy list of special conditions. Following the close of the public comment period, the site hearing sub-committee held a hearing on April 3, 2006, lasting some four (4) hours to review the information provided in the staff report, at which the County Administrator, Patrick Urich, stated that County Staff had concluded that absent the extensive special conditions, the proposed hazardous waste landfill did not meet the nine statutory criteria.

The County's Regional Pollution Control Site Committee, consisting of the entire

County Board, conducted a meeting on April 6, 2006, lasting almost 3 hours, to discuss the record and develop a recommendation and proposed findings of fact. Finally, on May 3, 2006, the County Board held a special meeting for the sole purpose of addressing the siting application and the proposed findings of fact. At that May 3rd meeting, the County Board voted against approving the application, and adopted the proposed findings of fact denying the application.

The proceedings before the County were some of the most open, transparent, and therefore fair, ever conducted on a siting application. The entire application, all of the transcripts of all of the hearings and meetings, all of the public comments, the power point presentation of the applicant at the public hearing, everything was posted to the County's website. The website provided a wealth of information to the public, including PDC, throughout the proceedings. This information was available free of charge to everyone, and allowed unprecedented access to information concerning the proposed facility and the process. The openness and transparency of the proceedings resulted in wide spread public awareness of the application for a hazardous waste landfill. That public awareness turned into significant public participation in the siting process. Most of that participation was in accordance with the County's rules for conducting the hearings and making public comment. Unfortunately, during the discovery process in this appeal it has become apparent some of the public's participation was outside of those rules.

The openness and transparency of the entire process no doubt led to increased public participation. While PDC may not think public participation is good, it is the very essence of the local siting process. As articulated by County Staff in its Staff Report and at the April 3, 2006, sub-committee meeting, the participation of the public was critical to the success and validity of the process, and they contributed significantly thereto. A number of the special conditions recommended by Staff were taken out of, or developed pursuant to, public comments. Without the openness and transparency, PDC may have been able to sneak through its application without many of the defects being highlighted. The *ex parte* contacts of which PDC complains are merely those which are inevitable in an open and transparent siting process involving a hazardous waste landfill which is

sought to be located over a drinking water aquifer and within a few hundred feet of residential neighborhoods.

The reason PDC's application failed was not because of any *ex parte* contacts, or any alleged misunderstanding of the County Board's role, or some claim of the County holding PDC to an alleged improper standard of proof. The problem with PDC's application was, and is, the site PDC chose for the location of the hazardous waste landfill lies directly over a drinking water aquifer, and that aquifer is hydraulically connected to the San Koty aquifer, the primary source of drinking water for the citizens in the County as well as other communities in Central Illinois. The proposed site also lies a mere few hundred feet from fully developed residential neighborhoods, and borders the City of Peoria, with a population in excess 100,000. In addition, the proposed site consists of naturally occurring glacial tills that contain sand and gravel seams and lenses, some of which are continuous and/or connected at various locations on the site.

After thoroughly reviewing the application, holding hours and hours of public hearings, and combing through thousands and thousands of pages of public comments, the County Board definitively denied the siting application filed by Petitioner, Peoria Disposal Company, (hereinafter "PDC" or "Petitioner). The denial was based upon the merits of the application and the evidence in the record, and was rendered within the statutory 180 day period.

There was, and is, ample evidence in the record on both sides of the disputed criterion upon which the County Board could, and did, make findings of fact. The record fully supports the County's findings of fact and its decision on the disputed criterion, and the Board must uphold the County's decisions on the criterion. PDC had a full and fair opportunity to present its case for expansion, and the application was denied by the County Board based upon the merits.

I. FINAL DECISION TIMELY MADE BY COUNTY

As and for its Statement of Facts as well as its legal arguments regarding the first question raised by PDC in this appeal concerning whether a timely decision was made by the County, reference is made to, and the County hereby adopts and incorporates, the

County's Response to PDC's Motion for Summary Judgment (415 ILCS §5/39.2(e)), the statements of facts contained therein, and the memorandum in support thereof which was filed with the Board on December 14, 2006.

PDC's reference to the transcript from the January 8, 2007, Pollution Control Board hearing has no relevance to the issues raised and addressed regarding the final decision issues.

II. FACTS RELATING TO FUNDAMENTAL FAIRNESS

It is important to note that PDC's argument regarding fundamental fairness relates only to claims concerning *ex parte* contacts. There are no allegations that PDC was prevented from presenting evidence or testimony or otherwise prohibited from fully participating in the siting process. In fact, at the close of the public hearing, counsel for PDC stood up and complimented the County and everyone involved on how fair the hearing and proceedings had been.

The County acknowledges that *ex parte* contacts were made by local citizens to Members of the County Board. The discovery process of this appeal, has demonstrated as much, and the County cannot contest that fact. However, despite PDC's protestations to the contrary, that is not the end of the inquiry. When the contacts are viewed in the context of the Board's and the appellate court's framework for analyzing such contacts, it becomes clear there was no prejudice to PDC. As is demonstrated herein, PDC has not met its burden of proof of showing prejudice.

Many of the *ex parte* contacts alleged by PDC, were in fact made a part of the Record before the County. The ones that were not part of the record, were consistent with those in the record. PDC was well aware of the public comments that started early and continued throughout the application review process. PDC had the opportunity to respond to the public comments, and in fact did so. Furthermore, as was brought out during the depositions, the *ex parte* contacts were apparently going both ways. Brian Meginnes, PDC's own attorney throughout the siting process and this appeal, made a direct *ex parte* contact to Board Member Elsasser, (Elsasser Dep. 1, 18/3-23) and others made contacts on behalf of PDC (see Mayer Dep. 3, 22/7-24, 23/1-7).

A. Understanding of Role.

A fair reading of the depositions of the County Board Members whose depositions were taken is that they were advised by counsel as to how to deal with communications from the public, including the applicant. Almost every one of the Board Members indicated they knew they were not supposed to discuss the pending application with anyone outside of the Record and were not to formulated an opinion before the close of the evidence, but they acknowledged as elected officials, they really had no way of stopping or preventing the citizens from contacting them. As good elected officials, they felt they had to listen to the comments. Despite listening, they still understood the decision was to be based on the facts developed during the public hearing and presented into the Record.

In fact, some of the County Board members appear to have appreciated the concepts better than PDC's attorneys. Much of the questioning done by PDC during the depositions attempted to mislead the County Board members into thinking they could not consider public comments. Throughout the depositions, PDC's attorneys asked questions that assumed the County could not to take into consideration public comments. When asked those types of the questions, the County Board Members consistently stated they thought they could take into account public comments and sentiments. PDC claims such comments show a lack of understanding by the County Board Members of the process. However, the entire process of local siting review is designed to obtain the input of the local community. The process allows for public input before, during and after the public hearing. In fact, one entire day of the public hearing, lasting some eight hours and covering 253 pages of transcripts, was devoted solely to public comment. In addition, after the close of the public hearing, thousands of pages of documents were filed with the County Clerk as public comment, including many filed by PDC. As part of the record, the County Board was certainly entitled to take into consideration all of those public comments. Therefore, when the County Board Members answered in the affirmative about being able to take into consideration public comments, they were correct.

PDC's opening statements in section III of its brief are incorrect, and even if correct, do not support its argument. The County Board Members were advised early on in the process that they were not to have communications outside of the Record regarding the application. (See e.g., Salzer Dep. 8, 10/9-11/24; Mayer Dep. 3, 17/11-18/21; Thomas Dep. 9, 16/3-22). Furthermore, the County Board Members had been advised that they were to turn in any such contacts to the County Clerk, and many of them did so. (Trumpe Dep. 10, 9/12-17, 15/22-24; Pearson Dep. 5, 12/5-24). Whether they understood their function as quasi-judicial or not, really has no bearing on this appeal. There is no requirement that the siting authority members understand such an inane concept -- one which the appellate courts have struggled with defining over the years – as long as they understood the basic concept that the decision is to be based upon the facts and evidence in the record. The record in this case demonstrates they so understood their role.

PDC's reference to Board Member Elsasser's deposition is taken out of context and/or inaccurate. He said he assumed he would get phone calls from opponents and proponents both. (Elsasser Dep. 1, 12/12-14. But, more importantly, he stated he thought the information gathered at the public hearing would be the most important information. Id., 13/6-8. In addition, he acknowledged that he was supposed to maintain, or at least try to maintain, letters and e-mails that he received. Id., 12/24-13/1.

PDC also mischaracterizes Board Member Joyce's testimony. In fact, Mr. Joyce stated as follows:

> "… I kept any meetings to a minimum other than my general meetings for county business. I didn't see any personal contact with any of them, any constituents or anyone for that matter during that time. I always tried to keep an open mind on anything that I have to make a decision on."

(Joyce Dep. 2, 9/10-16). He then went on to say:

> "… We could take general information up to – what was it? – the 28th of March, I believe was the date. But when I say "general information" that had to be registered – anything that came to us or anything that come in by way of testimony had to be registered with the county clerk and was made matter of public record."

(Joyce Dep. 2, 10/8-14). The reference to March 28th was a reference to the public comment cut off date. His reference to information being "registered" was simply a reference to being in the public record kept by the County Clerk. While Mr. Joyce might not have used terms which counsel and the Board may use when describing evidence, the record, etc., any reasonable interpretation of his comments was that he understood he was not to make up his mind until after all of the information was in, and he was to consider only that evidence which was filed (i.e., "registered") with the County Clerk.

Mr. Joyce's deposition also includes the following exchange:

> Q So it's your testimony that you actively made it a point to avoid receiving information outside of the hearing?
>
> A Oh, yes, sir. Yes, sir. I didn't want to appear to have any outside influence or anything that was going to weigh in my decision that was prejudicial.

(Joyce Dep. 2, 11/9-14). The following exchange also took place:

> Q Did you look at or research any information about the nine criteria that was outside of the materials admitted at the hearing?
>
> A No, sir. No.

(Joyce Dep. 2, 14/16-19).

PDC also attempts to mischaracterize County Board Member Lynn Scott Pearson's deposition testimony. In fact, PDC's brief cites to a question in an attempt to support its position that Ms. Pearson didn't understand her role in the process. Whereas, in fact, her testimony was that she understood that she was "[t]o be a judge, to make [the decision] based upon the evidence that they had given us." (Pearson Dep. 5, 24/1-2).

County Board Member Phelan was clear in his testimony that he was not permitted to discuss the application or the information relating to the application with the public. (Phelan Dep. 6, 7/9-10). He did state that he understood the public was allowed to weigh in on the issues. However, that understanding is correct. In fact, the whole idea of having local siting, a public hearing, and a 30 day public comment period is so as to allow the public to weigh in on the issues. Furthermore, Mr. Phelan, when questioned about a telephone call he received, stated as follows:

> "I believe the first conversation was I think she wanted to know how I was going to vote and explained to her that I base my vote on the facts and the facts

weren't all in. We had to go through the process and that that's what I was going to do."

(Phelan Dep. 6, 16/3-8).

County Board Member Salzer, when asked whether the views expressed by the public were useful in making his decision, he responded as follows:

"A Not really.

Q How so not really?

A It was a waste of time in some cases."

(Salzer Dep 8, 12/13-15).

County Board Member Thomas simply stated that he thought it was his obligation as an elected official to listen to their point of view. Otherwise, he did not do any talking or discussing of the issues. However, he did say he listened. (Thomas Dep. 9, 17/23-24 and 18/1-3, 10-14). Mr. Thomas very clearly stated that he understood the difference between a quasi adjudicatory role and a quasi legislative role, and that he also understood he was to base his decision solely on the evidence. (Thomas Dep. 9, 20/1-18). When asked why he would listen to public comments when he was to base his decision solely on the evidence, he responded as follows:

"We were instructed that while we could not discuss in the sense of giving opinions that it was all right to listen to constituents.

There's obviously nothing we can do to stop them sending a letter by they were to be – what did I say, set aside in the sense that while it's – your know, it's constituent opinion, it's simply opinion, and that the decision could not have anything to do with these opinions.

You – we were not to express any preferences one way or another until we had heard all of the facts and made a formal vote."

(Thomas Dep. 9, 21/4-15).

Board Member Trumpe, likewise understood her role in the process to be that she could listen to public opinion but not take it into consideration in her decision. (Trumpe Dep. 10, 9/24-10/8). When asked what the purpose of receiving public comments when she was supposed to consider them, she explained as follows:

"A It's a matter of courtesy. If someone sends you a letter, you don't know its coming, you just receive it. Or if someone calls you, you don't hang up on them. You listen, but you don't respond with any of your opinion.

Q So it's your position that you understood that you were not to consider whatever opinions or facts you received from the public outside the hearing process?

A That's right.

Q Would the same be true for facts and expressions of opinion received from your constituents?

A. No difference."

(Trumpe Dep. 10, 10/12-24).

Board Member Watkins stated as follows when asked what his understanding was regarding contact with the public:

"A Well, as time went, we got orders from the attorney, that we could not listen to nobody.

(Watkins Dep. 11, 11/14-15).

Board Member Williams' deposition contains the following exchange:

"Q Would it be correct that Mr. Coulter actually met with county representatives as early as 2003 to discuss the feasibility of seeking a landfill expansion?

A I believe that is correct, yes.

Q At that time, you indicated that you thought it was a good project and that you would support it?

A I thought it was a good project. I never commit my vote before that. I never said I would vote yes or nay.

Q What was your impression upon visiting the facility?

A I was impressed. Basically, all the plaques on the wall from IEPA, knowledge of how the whole thing worked, they took their time and answered questions.

Q Did you ever communicate to any other board member during the hearing process the fact that you had been at the facility and were impressed with the operations as you witnessed it?

A No.

Q Is there a reason why you chose to withhold that information.

A Well, we was told, you know, to limit conversation among ourselves and to the citizens, just to listen and not make a commitment to get into – add on to the discussion.

Q You were told to listen, though?

A Yes.

Q Was that listening to everybody or only listen to the public?

A Listen to everybody. We don't have a choice whether he calls, you call. We've got – you know, we going to take the call. We'll tell you the same thing. We can't discuss this. I can't tell you how I'm going to vote because I haven't heard the case yet.

Q But if let's say – do you know Chris Coulter?

A I met him once. I think, yes.

Q Let's say if Chris Coulter had called you back in March of this year to give you some what he thought was insider information about something, you would have listened to him? You wouldn't have told him you're not supposed to be talking to me?

A I would have told him if he's adding information to the stuff that's not on the record I can't listen to that. If wants to give me his opinion that he thinks it's a good thing to do, then that's different. Generic statement is one thing. If he's trying to add information to that's not part of the record, then I would have to cut him off. I can't worry about anything else. I can't listen to this."

(Williams Dep. 12, 12/3-14/9).

One of the most enlightening exchanges during the course of the depositions took place during County Board Member Mayer's deposition. In response to questions about whether the County Board Members were instructed in what procedures would be and

what their responsibilities would be on the decision-making process, the following exchange took place:

> "Q I take you were a recipient, though, of those explanations?
>
> A I was a recipient of explanations including verbal explanations of the county board, ….
>
> Q Based upon what you learned about the procedures and the roles of county board members, what was your understanding as to the receipt of communications regarding the expansion by board members outside of the hearing process?
>
> [….]
>
> A … I understood that the landfill proceedings were at least in some ways an administrative hearing, if not a quasi-judicial hearing, and that my decisions could only be based on information contained in the record and that ex parte communications could not be considered by me in arriving at my decision.
>
> Q There have been some board members who have testified in depositions in the last few days that they understood the rules regarding *ex parte* communications to be that they were not to express an opinion as to what they thought but were free to receive *ex parte* communications from the general public.
>
> Was that your understanding?
>
> A I think that's a crude statement because I don't think I would say I can receive communications: however, I think that members of the public may have a constitutional right to petition their government or communicate with elected representatives.
>
> I understand that as it was an administrative or a judicial hearing I couldn't consider things that were not part of the public record in arriving at my decision. …"

(Mayer Dep. 3, 17/11-19/15). Mr. Mayer then went on to describe how he handled *ex parte* contacts, saying:

> "A I'll tell you what I told everyone who I actually either talked to on the phone or ran into on the street that talked to me about the PDC expansion

> which is that I can only consider things that in the record when I make my decision."

(Mayer Dep. 3, 22/7-11). Mr. Mayer's testimony demonstrates that the County Board was instructed on the appropriate rules relating to its decision making and how to handle *ex parte* communications. The fact that other County Board Members, who are not trained attorneys, did not articulate their understanding quite as clearly as did Board Member Mayer does not diminish the fact that they were instructed and understood their role in the process.

B. *Ex Parte* Contacts.

While the County admitted during discovery that certain documents were received by one or more County Board Members, and were not filed with the County Clerk, the County does dispute the accuracy of PDC's figures. A significant number of the documents PDC presented to the County during discovery were in fact part of the record filed with the County Clerk. Of the contacts which PDC complains, many are duplicative in that the same e-mail was sent to every County Board Member, and a number of them were the same document, but were merely printed out in a different format. Just a cursory review of the e-mails shows that some citizens sent a broadcast e-mail to all 18 of the County Board Members. This causes it to appear that there were more e-mails or communications than there really were.

Furthermore, the vast majority of the contacts were made after the April 6, 2006 (documents number 169 through 379), Committee Meeting at which a majority of the County Board voted to recommend denying the application. In other words, most of the communications of which PDC complains had absolutely no affect on the outcome because the County Board had already determined it was going to deny the application at the April 6th Committee Meeting, and before the communications were ever made. Once those documents generated after the April 6th meeting are eliminated, the total of *ex parte* documents is greatly reduced, and only a mere thirty some were sent out prior to the close of the public comment period. As mentioned above, many of which documents of which

PDC complains are duplicate documents as well – the same letter or e-mail simply addressed to a different Board Member(s).

Of the documents that were apparently sent out prior to the April 6th Committee meeting, virtually all of them merely say "vote no" or some similar sentiment or opinion. None of the documents include any new or different information than that which had already been articulated in the record before the close of the public comment period. Some refer to the site being over the aquifer -- a fact which was admitted by PDC. Some refer to health issues – which were thoroughly presented at the public hearing. Some simply say "vote no" -- another theme prevalent at the hearing and in the public record. It is also interesting to note that none of the documents sent out prior to the close of the public comment period were authored by the "opponents" which PDC deposed as part of this appeal, and therefore may not have known of the prohibitions on *ex parte* contacts.

The e-mails and letters which the County produced during discovery in this appeal are in the record of this appeal, and are addressed herein. However, PDC also alleges phone calls and in-person contacts constitute *ex parte* contacts. PDC's allegations with regard to these types of contacts are general in nature. PDC is unable to present any substantive information as to what was discussed, when the calls took place, and between whom. As is demonstrate in some Board Member's depositions, many of the so-called "telephone calls" of which PDC complains were merely messages left on answering machines. (See e.g., Pearson Dep. 5, 17/6-11). PDC has the burden of not only proving the existence of *ex parte* contacts, but also the substance of the alleged contacts and the prejudice that allegedly arises out of the contacts. PDC has failed to meet its burden of proof that the contacts were in fact *ex parte* in nature and that they resulted in any prejudice to PDC.

C. PDC's Attempt to Disqualify Board Members.

At no time during the proceedings, including at the May 3, 2006, County Board meeting, did PDC ever object to any County Board Member sitting on the Committee and/or voting on the application. Therefore, PDC has waived any issues of bias and/or disqualification. Furthermore, PDC appears to misapply the concepts regarding *ex parte*

communications. PDC's appeal claims *ex parte* communications caused the proceedings at the County to become fundamentally unfair. Whether the proceedings where fair or not, may also have something to do with whether Board Members had a disqualifying bias or conflict of interest. However, the *ex parte* communications in and of themselves don't demonstrate or prove disqualifying bias or prejudgment by a Board Member. There is absolutely nothing in the record to suggest that any Board Member prejudged the information or application, or was biased against PDC. PDC's argument is basically one that the Board Members who voted against PDC's application must have been biased against PDC because they voted against it. There is no support for the proposition that after the vote, when there is no objection at the local siting hearing, that the Pollution Control Board can re-tally the vote numbers based upon who did or did not receive *ex parte* communications.

1 & 2. Allen Mayer and James Thomas.

As set forth in PDC's brief, the issue of membership in the Sierra Club was brought up at the May 3, 2006, County Board Meeting. Not only was the issue raised, but it was fully discussed and the two (2) Board Members who stated they were Sierra Club members were questioned by the Assistant States Attorney presiding at the meeting as parliamentarian. (Tr. 5/3/06, 25/5-17, C13717 and 29/8-11, C13718). The two (2) Board Members were found not to have a conflict that would interfere with their ability to make a decision based solely on the evidence. In fact they stated on the record that they would make their decisions based upon the facts and evidence in the record. PDC was present and represented by competent counsel at that May 3, 2006, County Board Meeting, and PDC did not object or bring any motion to disqualify, at that meeting or any other time, to the two (2) Board Members voting on the application. Therefore, PDC has waived this issue, and even if it has not, there was not disqualifying interest or bias.

3. Eldon Polhemus.

The County acknowledges that Mr. Polhemus' method of making his decision was not consistent with the procedures set forth in the County's ordinance, or under state statute.

4. Tom O'Neil.

Other than Mr. O'Neil's vote against the application, the only item which PDC points to in reference to Mr. O'Neil is a newspaper article which misquotes Mr. O'Neil. In Mr. O'Neil's deposition, the following exchange took place:

> "Q [The news paper article dated May 5, 2006] has been marked as Exhibit Number 30. You appear to be familiar with it?
>
> A Yes.
>
> Q All right. Is there something you want to say about the article based upon your familiarity with it?
>
> A What's printed is not what I said.
>
> Q That's what I was getting at. Your position is you were misquoted?
>
> A Yes, it is.
>
> Q What did you say?
>
> A She asked if I was contacted by constituents, and I told her, "Yes." And she asked me if that changed the vote, and I said, "No.""

(O'Neil Dep. 4, 23/1-14). Under questioning, Mr. O'Neil went on to clarify that he had received some phone calls (less than 20) and had been contacted by only two (2) neighbors, and when asked if there was any additional information that he considered between April 6th committee meeting and the May 3rd County Board Meeting, he said "[n]o, not that I considered." (Id., 26/3).

The alleged *ex parte* contacts of which PDC complains concerning Mr. O'Neil relate to only to a period of time after the close of the public comment period and after the Committee vote. In fact, Mr. O'Neil voted in favor of the application at the Committee meeting. Even if the newspaper article were correct, which Mr. O'Neil and the County dispute, the allegations do not substantiate a claim that Mr. O'Neil had prejudged the application or was biased against PDC. Furthermore, a newspaper article which purports to quote a siting authority member, but which the siting authority member disputes in testimony, is not sufficient to meet PDC's burden of proof of prejudice with regard to *ex parte* contacts. This type of allegation has been previously reviewed and rejected by the Board in Waste Management of Illinois v. Lake County Board (Dec. 17, 1987), PCB 87-75. In that case, a county board member was alleged to have made

statements to a newspaper reporter, and in testimony he testified that he was misquoted. Id at p. 18 (addressing Mr. Beyer's alleged bias). The Board found that the county board member's testimony adequately rebutted the statements. The same should hold true for the allegations in this case concerning Mr. O'Neil as well.

5. Brian Elsasser.

PDC alleges that Board Member Elsasser "predetermined" his position regarding the Application, and then cites to portions of Mr. Elsasser's deposition. However, the statement by PDC is in no way supported by the references to the deposition transcript. It is just this type of reckless statement or allegation that should give the Board great concern in reading any portion of PDC's brief. A reasonable review of the record demonstrates the fallacy of PDC's positions.

PDC makes three (3) separate allegations concerning an alleged predisposition by Mr. Elsasser: (a) family experiences, (b) a telephone call by Mr. Elsasser to Kim Converse, and (c) inquiries Mr. Elsasser made outside of the record regarding two issues. PDC fails to demonstrate that any one of the three items shows a prejudgment or bias on the part of Mr. Elsasser.

First, PDC references statements made by Mr. Elsasser at the April 6, 2006, Committee Meeting where he made reference to his concern about potential air emissions from the hazardous waste landfill, which was proposed to be located immediately adjacent to residential neighborhoods. This statement was made after the close of the public comment period and during the Committee deliberations, and thus cannot constitute an adjudication of facts and law prior to the hearing which would show bias or prejudgment. It is also worth noting there is no indication from the statements at the April 6th committee meeting that Mr. Elsasser had decided the issue prior to the hearing.

Mr. Elsasser never said his family experiences were the "reasons for his vote recommending denial," as claimed by PDC. As stated in Mr. Elsasser's deposition, he raised that issue during the April 6th committee meeting when making a comment, and the comment was simply his personal, real life experience with contaminants migrating in the air. He stated his experience was with farm chemicals, and he acknowledged his experience was not with the types of materials handled by PDC. (Tr. 4/6/06 104/10-105/15, C13436). If PDC truly felt the comment constituted a disqualifying bias, it could

have, and should have, raised that issue at that time, or at least prior to the vote by the full County Board. PDC did not raise that issue, and as a result has waived it. Furthermore, the statute specifies that a statement of position by a siting authority member does not disqualify them. (415 ILCS 5/39.2(d)). In this case, Mr. Elsasser did not even publicly express an opinion, but merely asked questions and made a statement of concern regarding family experience as a reason for questions about public safety.

Despite PDC's claim to the contrary, Mr. Elsasser did not admit he formulated an opinion before the close of the record. In fact, Mr. Elsasser's deposition testimony, which is uncontroverted by PDC, states the opposite. The following exchange is directly out of Mr. Elsasser deposition transcript cited in PDC's brief:

> "Q Did you tell Carol Trumpe early on in the hearing process that you were going to vote no?
>
> A I don't know how early that would have been, but I was probably leaning that way.
>
> Q I think my question, sir, is did you tell her you were going to vote no?
>
> A I don't recall whether I told her I was going to vote no. I didn't think it was appropriate to make up your mind that quickly.
>
> Q So if her recollection was that you told her early on that you were going to vote no, her recollection would be mistaken?
>
> A No, I said – my recollection that I said I was leaning toward voting no.
>
> Q That's before the hearings were even completed, isn't that true?
>
> A I don't remember when that was. The hearings were probably completed but the March 29th thing probably wasn't over with."

(Elsasser Dep. 1, 22/18-23/12). Only PDC's question could be read to suggest that Mr. Elsasser had prejudged the matter. Mr. Elsasser, despite bullying by the questioner, steadfastly held his ground and clearly said he thought it would be inappropriate for him to prejudge the information before the close of the public comment period, but he was "leaning" in the direction of voting "no." It should also be noted that in her deposition,

Board Member Trumpe never said that Mr. Elsasser had indicated that he was going to vote no, let along "early on." (See, Trumpe Dep. 10, 43/23-44/24).

PDC's reference to a phone call by Mr. Elsasser to a citizen group member asking for a person's telephone number shows no prejudice, bias or disqualifying conflict of interest, of any type. There may be a perfectly reasonable and innocent explanation for Mr. Elsasser seeking the telephone number totally unrelated to the siting application. However, PDC never asked Mr. Elsasser about the phone call. Therefore, there is nothing in the record that supports PDC's suspicions or speculation about the purpose of the call. Clearly, PDC has not carried its burden of proof to show any disqualifying issue with regard to that phone call.

The final argument raised by PDC concerning Board Member Elsasser relates to his statement during his deposition that he made two (2) phone calls during the review process asking two (2) questions about concerns he had about the application. The County concedes that making such inquiries outside of the record is inappropriate. However, Mr. Elsasser's inquiries do not support PDC's claims of bias or prejudgment. In fact, only the opposite conclusion is reasonable to draw based upon the inquiries. If, in fact, Mr. Elsasser was biased against PDC's application, or had prejudged the application, there would be no need for him to make any inquiries at all. The fact that he was making inquiries suggests that he had not made up his mind and was trying to find out more information. Admittedly, his method of trying to find more information was inappropriate for a siting proceeding. However, it does not show bias or prejudgment.

Furthermore, the phone calls were not *ex parte* contacts because they were not with someone who was interested in the siting proceeding. In addition, there is absolutely no prejudice to PDC by the inquiries. Mr. Elsasser stated that the information he received in response to both questions addressed his concerns and allowed him to rule out those concerns. (Elsasser Dep. 1, 27/6). In other words, there was no prejudice to PDC by Board Member Elsasser making those calls. In fact, it appears those calls may have helped PDC's position in those regards.

6. Mike Phelan.

As with the other County Board Members, PDC attempts to "disqualify" Mr. Phelan based upon some type of argument that he did not understand his role in the

process. During questioning in his deposition, he stated that he understood he was not to discuss the matter with members of the public. (Phelan Dep. 6, 7/9-10). He then went on to say:

> "I don't believe I had an understanding that I was to take their testimony into account on the facts, but I do – the way I understood the process that the public was allowed to weigh in on this."

(Phelan Dep. 6, 8/1-4). This statement shows Mr. Phelan understood the process, perhaps better than counsel for PDC. Counsel for PDC in the depositions and in its arguments appears to be arguing that the public could not weigh in on the matter. Whereas, the statute and the County's ordinance make it clear the public was able to comment on the application, and in fact did so before, during and after the public hearing. Despite the confusion apparently caused by PDC's questioning, whether intentional or not, Mr. Phelan apparently understood he was to give their comments some weight, but perhaps not the same as the "facts." In fact, when asked if it was his understanding that the decision was to be based only on the evidence that came in at the public hearing, Mr. Phelan responded "[t]he evidence and the facts, yes." (Phelan, Dep. 6, 8/23-9/1-2). Clearly, Mr. Phelan understood his role in the process.

7. Phil Salzer.

PDC contends Mr. Salzer should be disqualified because, PDC alleges: (1) he did not understand his role in the proceedings, and (2) he asked a fellow County Board Member one question. As with PDC's argument about other Board Members, a fair reading of the entire deposition transcript of Mr. Salzer reveals he understood his role in the proceedings (Salzer Dep. 8, 20/8-21), he kept an open mind (Salzer Dep. 8, 12/23-24), he did not prejudge anything (Id. 15/2-4), and he wasn't to consider *ex parte* communications (Id. 20/8-16). In fact, the following exchange took place during his deposition:

> "Q Was it your belief, Mr. Salzer, … that you could and should take the content of the phone calls, letters and E-mails that you were getting or at least the content in those phone calls, letters and E-mails that you thought was worthy and not crackpot into consideration in making your decision?

A No, I didn't.

Q What did you think then about what you should do with the content of the communications you were receiving from constituents?

A As long as they weren't from the public record, I was just listening.

Q You were just listening?

A I would just listen to these people.

Q What was the point of listening if you weren't going to consider it?

A I think you satisfy your constituents by listening to what they have to say. I don't want to, you know, just turn somebody off.

Q So the phrase you've got to listen to your constituents means that – let me ask it a different way.

When I read your statement you've got to listen your constituents, I perceive that as meaning you cannot ignore the desires of your constituents.

Is that a fair interpretation?

A You might interpret it that way, but that's an expression oftentimes to just let people know that you're listening to them. It doesn't mean that you have to vote their wishes."

(Salzer Dep. 8, 20/8-21/16). Mr. Salzer clearly stated that he knew he was not to take into consideration anything that was not in the "public record," and he was listening to public comments in an effort to be a good elected official. While he perhaps should not have been "listening" to *ex parte* communications in a siting proceeding, the fact he knew he was not to take the comments into consideration unless they were in the record shows there was no prejudice.

8. Lynn Scott Pearson.

PDC argues Board Member Pearson (1) did not understand that she was not to consider *ex parte* communications, and (2) placed special value on the opinion of an opponent. Once again, PDC's contentions are misleading. Board Member Pearson's deposition testimony includes the following exchange:

"Q … Did you understand your responsibility in this case to be acting like a legislator, to make a policy decision, or like a judge, to make a decision based on evidence?

A To be a judge, to make it based on the evidence that they had given us.

Q And you also said that you waited to make up your mind until you had read everything that you could get your hands on; is that right?

A Everything that was presented to me, yes.

Q And that would include all the e-mails that your got?

A Oh, yes.

…

Q What was you understanding or belief at the start of the hearing process about whether people with opinions on the application could communicate with you and whether you could communicate with them?

A That I was not supposed to communicate with them.

Q How about their communicating with you?

A Yes. They could communicate with me. I'm a public servant.

(Pearson Dep. 5, 23/18-24/24). As with Board Member Salzer, Ms. Pearson was able to articulate that she was to be open minded, act like a judge, base her decision on the facts in the record, but that as a public servant she was obligated to listen to public comments. In fact, she stated that when she received e-mails that purported to contain facts, she disregarded them (Pearson Dep. 5, 10/24-11/2), and while she received a number of telephone messages on her answering machine at home, most of which simply asked her to vote no, she did not return the calls. (Id. 17/6-11).

PDC also argues that Ms. Pearson "placed special value on the opinion of Joyce Blumenshine." (PDC Brief at p. 25). This is another prime example of how PDC takes statements out of context and attempts to manipulate them to its advantage. In fact, Ms. Pearson testified that while she placed some value on Joyce Blumenshine's opinions regarding Planned Parenthood, Ms. Pearson did not respect Ms. Blumenshine's opinion on landfill expansion. (Pearson Dep. 5, 29/5-13).

STANDARD OF REVIEW AND APPLICABLE LAW

I. FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires the Board to review the proceeding before the County to assure fundamental fairness. In E&E Hauling, Inc. v. Pollution Control Board, 116 Ill.App.3d 586, 594, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part, 107 Ill.2d 33, 481 N.E.2d 664 (1985), the appellate court found that although citizens before a local decision maker are not entitled to fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. Residents Against a Polluted Environment v. County of LaSalle, (Sept. 19, 1996) PCB 96-243 (hereinafter "RAPE"), citing Waste Management of Illinois v. Pollution Control Board, 175 Ill.App. 1023, 530 N.E.2d 682, 692-693 (2d Dist. 1988). The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, the prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness.

A. Standard for *Ex Parte* Contacts.

In making the determination whether improper *ex parte* contacts rendered the proceedings fundamentally unfair, the Board must first determine whether an alleged contact is an improper *ex parte* contact. An *ex parte* contact has been defined as one which takes place without notice and outside the record between one in a decision making role and the party before it. RAPE citing Town of Ottawa v. PCB. The appellate court in Waste Managements, 175 Ill.App.3d 1023, 530 N.E.2d 682, determined that contacts between county board members and constituents, which took place outside the presence of the applicant, and which were clearly in support of the position held by various objectors who were parties to the siting proceeding, constituted *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 other parties to the proceeding. RAPE at p. 8.

The mere occurrence of *ex parte* contacts does not, by itself, mandate reversal of the local siting authority decision. RAPE at 8. The applicant must show that the *ex parte* contacts actually caused it some harm or prejudice. Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill.App.3d 541, 555 N.E.2d 1178, 144 Ill.Dec. 659 (3d Dist. 1990) (hereinafter "FACT"). In that case, the court stated:

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

FACT, 198 Ill.App.3d at 549.

As stated in E&E Hauling, 116 Ill.App.3d 586, 451 N.E.2d 555, when determining whether *ex parte* contact warrant reversal:

> "A court must consider whether, as a result of improper *ex parte* communications, the agency's decision making process was irrevocably tained so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect. In order to make this determination, a number of considerations may be relevant: the gravity of the *ex parte* communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were known to opposing parties, who therefore had an opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose."

116 Ill.App.3d at 606-607.

B. Standard for Disqualifying Bias or Predisposition.

As part of the Board's review of claims of violations of fundamental fairness, the Board may review claims of bias, predisposition or prejudgment. However, public officials should be considered to act without bias or prejudgment. E&E Hauling, Inc. v. Pollution Control Board (1985), 107 Ill.2d 33, 42, 89 Ill.Dec. 821, 481 N.E.2d 664. Where a municipal government operate in an adjudicatory capacity, bias or prejudice may only be shown if a disinterested observer might conclude 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, et al. v. PCB (5th Dist. 1997), 288 Ill.App.3d 565, 573, 680 N.E.2d 810,816.

In E&E Hauling, Inc. v. Pollution Control Board (1985), 107 Ill.2d 33, 89 Ill.Dec. 821, 481 N.E.2d 664, the Illinois Supreme Court considered a claim of conflict of interest and bias. The Court initially determined that the claims had been waived, but decided to consider them anyway because of the likelihood of recurrence. See, Fiarview Area Citizens Taskforce v. Illinois Pollution Control Board (3rd Dist. 1990) 198 Ill.App.3d 541, 545, 555 N.E.2d 1178, 1180, 144 Ill.Dec. 659, 662. An issue of disqualifying bias or predisposition must be raised prior to or during the local hearings. Id., citing A.R.F. Landfill, Inc. v. Pollution Control Board (1988), 174 Ill.App.3d 82, 123 Ill.Dec. 845, 528 N.E.2d 390. The Illinois Supreme Court has stated on the issue of waiver that:

> "Generally, of course, a failure to object at the original proceeding constitutes waiver of the right to raise the issue on appeal. [citation omitted] A claim of disqualifying bias or partiality on the part of a member of the judiciary or an administrative agency must be asserted promptly after knowledge of the alleged disqualification. [citation omitted]. The basis for this can readily be seen. To allow a party to first seek a ruling in a matter and, upon obtaining an unfavorable one, permit him to assert a claim of bias would be improper. It can be said that that was the situation here. The village did not claim that it was unaware of the alleged bias before the board hearing was concluded."

E&E Hauling, 170 Ill.2d at 38-39, 89 Ill.Dec. 821, 481 N.E.2d at 666.

II. BOARD'S ANALYSIS OF CRITERIA

Upon appeal, the Board may review a local authority's decision on the nine statutory criteria. In so doing, the longstanding Board opinions and appellate case law provides that the 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, 29 (4th Dist. 1991); Waste Management of Illinois, Inc. v. Pollution Control Board, 160 Ill.App.3d 434, 513 N.E.2d 592 (2d Dist. 1987); E&E Hauling, Inc. v. Pollution Control Board (2nd Dist. 1983) 116 Ill.App.3d 586, 451 N.E.2d 555, 71 Ill.Dec. 587, aff'd 107 Ill.2d 33, 481 N.E.2d 664, 89 Ill.Dec. 821.

After the filing of PDC's brief and prior to the filing of this brief, the Supreme Court of Illinois issued its opinion in Town & Country Utilities, Inc. v. The Illinois Pollution Control Board, Docket Nos. 101619, 101652 cons. (2007 WL 851608). That case addresses only the issue of whether the courts review the Board's decision or the siting authority's decision based upon the manifest weight of the evidence. It does not address the Board's standard of review of the local siting authority's decision.

In the Town & Country opinion, the Court specifically stated the central issue in the case was whether on appeal the courts are to apply the manifest weight of the evidence standard to the local siting authority's decision or the Board's decision. The Supreme Court decided the courts' review was to apply to the Board's decision. However, the Court did not address, and therefore did not over-rule, the long standing line of opinions and cases which hold that the Board's review of the siting authority's decision is also to be based upon a manifest weight of the evidence. Therefore, the long-standing line of Board opinions and appellate court cases still stand for the proposition that the Board's review of the siting authority's decision is based upon a manifest weight of the evidence.

A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evidence, plain or indisputable. Waste Management of Illinois, Inc. v. County Board of Kane County (June 19, 2003), PCB 03-104, citing to Land and Lakes Co. v. PCB, 319 Ill.App. 3d 41, 53, 743 N.E.2d 188, 197 (3rd Dist. 2000). All of the statutory criteria must be satisfied before siting can be granted, and the manifest weight of the evidence standard applies to each criterion on review. Concerned Adjoining Owners, et al. v. PCB, 288 Ill.app.3d 565, 576, 680 N.E.2d 810, 818 (5th Dist. 1997).

The Board is not to re-weigh the evidence. Waste Management of Illinois, PCB 03-104, at p. 9, citing Fairview Area Citizens Taskforce v. PCB, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3rd Dist. 1990).

In anticipation of the Supreme Court's decision, PDC argued that the Board is to determine what evidence before the siting authority was "competent, relevant and scientifically valid." PDC's brief at p. 58. While that argument is interesting, it lacks any support. There is absolutely nothing in the Supreme Court's decision in that regard, and there is nothing in over twenty (20) years of Board decisions to support such a position. As the Board has previously stated:

> "The law is well settled that the [siting authority] must weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses …. That the Board could reach a different conclusion is not sufficient to warrant reversal. [citations omitted].
>
> Therefore, the Board cannot and will not reweigh the evidence, but will examine the record to determine if the decision by the [siting authority] is against the manifest weight of the evidence."

Rochelle Waste Disposal, L.L.C. v. City Council of the City of Rochelle (April 15, 2004), PCB 03-218, at p. 43.

Therefore, while the Supreme Court decision in Town & Country has put to rest the issue of whether the courts will review the siting authority's decision or the Board's decision, it did not over rule or even criticize the Board's longstanding body of Opinions and Orders in which the Board utilized the against the manifest weight of the evidence standard for reviewing the siting authority's decision.

ARGUMENTS

I. FINAL DECISION

As and for its arguments regarding the first question presented by PDC for review by the Pollution Control Board (i.e., whether the County Board's Decision was made within the 180 day deadline), the County adopts and hereby incorporates the facts cited

and the memorandum of facts and law in its Response to Petitioner's Motion for Partial Summary Judgment (415 ILCS §5/39.2(e)) and Memorandum in Support thereof, filed with the Board on December 14, 2006.

II. FUNDAMENTAL FAIRNESS

The Pollution Control Board is vested with the power to review the fundamental fairness of the proceedings for local siting approval. As stated in PDC's brief, the County is to make its decision based upon the Record. As is fully demonstrated in the Record of the proceedings before the County as well as developed during the discovery on appeal, PDC received a full and fair hearing on the merits. These were fundamentally fair proceedings. In fact, PDC's attorney at the conclusion of public hearing, "… I think it's been a fair hearing. I think both sides will agree everybody had a chance to have their say, and that is what this hearing was for." (Tr. 2/27/06, 418/1-4, C7881).

Whether individual County Board Members understood their role as quasi-adjudicatory, or even whether they had ever heard that term, is immaterial. What is clear, however, is (1) they were instructed that they had to make the decision based upon the record, (2) at the May 3, 2006, County Board Meeting, they were asked whether they could make their decision based solely on the Record, and (3) they all said clearly and unequivocably that they could and would do so.

In PDC's brief, it attempts to argue, without any case law support, that somehow there is a presumption of prejudice or bias because *ex parte* contacts occurred. This is clearly contrary to a long line of Board opinions and Illinois Appellate Court and Supreme Court cases. In any case involving a claim of *ex parte* contacts, the person complaining of the contacts must demonstrate that *ex parte* contacts actually occurred, and that prejudice resulted from the contacts. Only if prejudice results can the Board find there was a problem with fundamental fairness.

PDC's brief acknowledges, at the bottom of page 62 and onto the top of page 63, the 5-part test for analyzing *ex parte* contacts and determining whether prejudice resulted. However, after reciting the framework for the analysis, PDC totally ignores the

framework, and appears to attempt develop some new type of analysis which is neither clear nor based upon any case law support.

A. Understanding of Roles.

One of PDC's major points appears to be that because the County Board Members did not understand their role to be quasi-judicial, their decision should be overturned by the Board. Putting aside for the moment that the factual record does not support PDC's claim of misunderstanding, there is absolutely no support in Board or court opinions for the proposition that a siting authority member must understand his or her role as "quasi-judicial" or that failure to understand his or her role renders the siting proceedings fundamentally unfair. A fair reading of Board and court opinions is that a lack of understanding of the siting authority members' role in the process can lead to *ex parte* contacts. However, a lack of understanding alone does not render the proceedings fundamentally unfair. Furthermore, there is no indication in the record that any County Board Members actively engaged in any improper *ex parte* activities, such as, but not limited to, participating in raido call-in shows, going to opposition group meetings, taking a tour of the facility while the applicant was pending, putting up yard signs, wearing buttons or hats. Those are the types of activities which siting authority members tend to participate in when they don't understand the nature of the process. In this case, there was no such activity. If anything, the *ex parte* contacts of which PDC complains could best be characterized as passive, in that the County Board Members received the contacts, but did not actively participate in them. These are the type of contacts which the Board and the courts have acknowledged are inevitable in these types of proceedings. Therefore, the Board would still must perform the analysis using the 5-part framework set forth in the case law. Furthermore, even if the Board were to find the proceedings fundamentally unfair, the remedy is to remand for further proceedings, not to approve the siting application, as appears to be requested by PDC.

B. No Presumption of Prejudice.

Not surprisingly, PDC fails to provide any Board or court opinion which supports, or even implies, there is some presumption of prejudice. PDC's arguments in that regard are merely a poor attempt to shift the burden of proof because it has no evidence of actual prejudice from the alleged contacts. Once again, PDC simply fails or refuses to perform the 5-step analysis set forth in the case. PDC is represented by competent, well-experienced attorneys who have handled dozens of these types of cases. The only logical conclusion for their utter failure to follow accepted case law, case law which they even cite in their brief, is that they know they cannot successfully do so. As the Petitioner, PDC has the burden of proving the alleged *ex parte* contacts and also the burden of showing it was somehow prejudiced by the contacts. Clearly, PDC has failed to demonstrate prejudice pursuant to relevant case law, and as a result, its claims regarding fundamental fairness should be rejected on that basis alone. Finally, the Board decisions and appellate court case law make it clear the local siting authority members are presumed to act without bias. E&E Hauling, Inc. v. Pollution Control Board (1985), 107 Ill.2d 33, 42, 481 N.E.2d 664, 668, 89 Ill.Dec. 821, 825.

PDC's brief discusses billboards and yard signs. These are traditional avenues of free expression by the public. The mere presence of signs in the community cannot constitute improper *ex parte* contacts, and certainly does not create unfairness or prejudice. If that were the case, the hundreds of PDC trucks driving around the County with the PDC signs on them, and the thousands of PDC dumpsters throughout the County with the PDC sign on them, would automatically create fundamental unfairness against any opponents. Furthermore, if the Board were to rule that yard signs or billboards were, in fact, prejudicial *ex parte* contacts, that determination could be subject to abuse and manipulation. For instance, any time a participant in a siting proceeding wanted to create an appealable issue, it could simply put up a sign, even one purporting to be by the opposing party. Once again, what PDC does is point to something and then say it creates unfairness, without performing the necessary analysis about *ex parte* contacts and prejudice. Certainly, there is no automatic prejudice just by the presence of some yard signs and billboards.

Interestingly, PDC also brings up the Peoria Families Against Toxic Waste website as part of its claim and/or argument. What PDC fails to disclose in its brief is

that every board member who was asked by PDC in his or her deposition stated they did not view that website or any other opposition related websites during the proceedings. (Joyce Dep., 2, 25/14/21; Mayer Dep. 3, 30/19-21, 49/4-9; O'Neill Dep. 4, 21/4-7; Phelan Dep. 6, 19/17-24; Polhemus Dep. 7, 17/10-11; Thomas Dep. 9, 32/2-7). Even so, during the public hearing, PDC's witnesses repeatedly refered to the website.

C. Not *Ex Parte* Contacts.

Some of the contacts of which PDC complains, simply are not *ex parte* contacts as defined by the Board and the courts. For instance, PDC points to the public comment period at each monthly County Board Meeting during the time the application was pending. In fact, PDC even complains of public comments before the filing of the application and after the final decision by the County Board. However, what PDC fails to inform the Board of is the fact that PDC's attorneys and representatives were present at every County Board Meeting, or virtually every one, during that period of time. Since PDC was present through representatives, the contacts were not outside the presence of PDC. Furthermore, as was demonstrated by PDC's submission of the County Board Meeting records as part of its evidence at the public hearing, any and all statements made at those County Board Meetings were recorded and available to the public. Public comment is part of the regular board meeting procedures, and during most, if not all, of the meetings, PDC's representatives were present. These public comments are no different than those in Land and Lakes v. Randolph county Board of Commissioners (Sept. 21, 2000), PCB 99-69, at p. 15. In that appeal, the Board found such comments were merely expressions of public sentiment and did not render the hearing fundamentally unfair.

In its brief, PDC complains about yard signs and billboards. It is difficult to tell whether PDC is arguing the signs constitute *ex parte* communications, but to the extent it is, those arguments must fail. Nowhere does PDC cite to any case law that says signs somehow constitute improper *ex parte* communications. As set forth above, such a ruling would be wholly unmanageable. Would messages on hats and shirts also be improper? What about all of the signs on PDC's garbage collection trucks or dumpsters throughout

the County, or its advertisements at sporting events? Where would the line be drawn on such a rule. Clearly, the signs do not constitute improper *ex parte* contacts.

Likewise, PDC complains about the Peoria Families Against Toxic Waste website. Despite the fact that every County Board Member who was asked about it during his or her deposition stated clearly they never viewed the website (see discussion above), PDC still makes arguments about it. It is also interesting to note that it was PDC's witnesses at the public hearings who first referenced the Peoria Families website, and attempted to address a number of the items on the website. (See, Lannert testimony, Tr. 2/21/06, 171/12, 172/10, C7310; Edwards testimony, Tr. 2/21/06, 70/6-8, C7285 (addressing a photo on the website which incorrectly labeled the leachate collection sump risers as "toxic stacks"), 81/8-9, C7287; Armstrong testimony, Tr. 2/21/06 210/2-3, C7320, 231/18-19, C7325).

D. Allegations of Bias.

PDC appears to confuse two (2) separate concepts – bias and *ex parte* contacts. Board decisions and appellate court opinions make clear the two are separate concepts with different standards for review. If proven, bias or prejudgment may give rise to disqualification of the siting authority member. The test has been stated as "whether a disinterested observer might fairly conclude that the decision maker had adjudged the facts as well as the law of the case in advance of the hearing." Waste Management of Illinois v. Lake County Board (Dec. 17, 1987), PCB 87-75, at p. 14, citing Cinderella Career and Finishing Schools, Inc. v. F.T.C., 138 U.S.App.D.C. 152, 425 F.2d 583, 591 (D.C.Cir. 1970); E&E Hauling, Inc. v. IPCB, 116 Ill.App.3d 586, 71 Ill.Dec. 587, 451 N.E.2d 555 at 556. The Board has also noted the importance of recognizing that elected officials are presumed to be objective and to act without bias, and the mere fact that an official has taken a public position or expressed strong views on the issue does not over come that presumption. Waste Management of Illinois, PCB 87-75 at p. 15.

PDC, for the first time in these proceedings, makes allegations that all of the County Board Members who voted against its application were "biased" against PDC. At no time did PDC raise any concern, allegation or claim of bias during the proceedings

before the County Board. At no time did PDC ever bring a motion to disqualify any County Board member based upon a claim or allegation of bias. PDC's claims now appear to be an after thought because it recognizes it cannot establish prejudice under relevant case law framework, so it desperately is trying to conjure up some argument, however weak or unsupported by case law, for the Board to somehow overturn the County Board's decision. Not because PDC was actually prejudiced by some bias, but because PDC simply didn't like the County Board's decision.

Failure to raise allegations of bias constitutes waiver. See, E&E Hauling, Inc. v. PCB (1985), 107 Ill.2d 33, 481 N.E.2d 664. The Board has previously noted that a party can, by inaction in the proceeding before the local siting board, waive its right to raise the issue on appeal to the Board. See, also, Concerned Citizens for a Better Environment v. City of Havana and Southwest Energy Corporation, PCB 94-44, at p.7, citing Fairview Area Citizens Task Force v. IPCB (3rd Dist. 1990), 144 Ill.Dec. 659, 555 N.E.2d 1178. Allegations of bias are precisely those types of allegations which the Board and the courts have deemed waived when raised for the first time on appeal. The failure to raise the issue at the time of the siting proceedings effectively prevents the County from being able to evaluate and address the allegations, and, if possible, cure any deficiency.

PDC's argument about Board Members Mayer and Thomas being biased because they are members of the Sierra Club borders on the ridiculous. PDC was fully aware of their membership during the siting proceedings, and failed to object. Furthermore, as is amply demonstrated by the transcript of the May 3, 2006, County Board Meeting (5/3/06 Tr. 25/10-17 and 29/9-11, C13717-C13718), as well as in their depositions (Mayer Dep. 3, 26/24-29/1, and Thomas Dep. 9, 43/10-44/18), their memberships in the Sierra Club were non-substantive. They paid annual dues to the national organization and received the national organization magazine and a local group newsletter. Neither of them attended any local meetings, and certainly not any meetings at which the application may have been discussed. The Assistant States Attorney handling the May 3rd Board Meeting fully explored the issue with questions, and obtained the commitment from those two Board Members that they would make their decision based solely on the Record. There is absolutely no case law support cited by PDC for the proposition that mere membership in an organization such as the Sierra Club disqualifies an elected official from voting on a

siting application. In other situations, the Board has rejected claims of bias based upon relationships. See, e.g., Landfill 33, Ltd v. Effingham County Board (Feb. 20, 2003) PCB 03-43, at p. 24.

PDC does not stop with its ridiculous argument that membership in some national organization automatically creates bias against PDC. It goes on to make an outrageous claim that the two (2) County Board Members somehow engaged in "concerted attempts to conceal such membership." See page 73 of PDC's brief. There is absolutely nothing in the Record either at the County Board level or as part of this appeal which supports PDC's allegation that the two either (1) acted in concert, or (2) made any efforts to "conceal" their memberships. When asked the first and only time about membership in the Sierra Club, both answered truthfully and on the record. When the two Board Members answered the questions, PDC, who was represented by its attorneys and a number of its principal shareholders and officers who were sitting in the front row at the County Board Meeting, failed to object to the two (2) Board Members participating in the votes on that date or any other date. The failure to object to the memberships at the time of the proceedings constitutes a waiver of that issue. Fairview Area Citizens Tasforce v. IPCB (3rd Dist. 1990) 198 Ill.App.3d 541, 548, 555 N.E.2d 1178, 1182, 144 Ill.Dec. 659, 664. Such baseless and inflammatory allegations about elected officials somehow engaging in a conspiracy to conceal information should not be tolerated by the Board.

Despite PDC's reckless allegations, there is no evidence in the record that shows that any of the Board Members were predisposed against or prejudged the application in any way. Local officials are presumed to be objective and the presumption is not overcome by the mere fact that an official has taken a public position or expressed a strong view on a siting proposal. See, E & E Hauling v. PCB, 481 N.E.2d 664, 668 Ill. 1985); Waste Management of Illinois v. PCB, 530 N.E.2d 682, 695-696 (2nd Dist. 1988); Citizens for a Better Environment v. PCB, 504 N.E.2d 166, 171 (1st Dist. 1987). In fact, the statute specifically allows participation in the siting decision by a member who has publicly expressed an opinion. See 415 ILCS 5/39.2(d). PDC does not even allege or reference any incident or alleged incident where a County Board Member made such a public statement. In fact, virtually every County Board Member who was deposed said they understood that they were not supposed to state an opinion or position on the

application, or make up their mind, until after the close of the public comment period. Finally, at the May 3, 2006, County Board Meeting, all of the County Board Members stated on the record that they would make their decision based upon the facts in the record. (Tr. 5/3/06 23/12-29/19, C13717-C13718).

E. PDC Also Engaged in *Ex Parte* Contacts.

As stated by the appellate court in the E&E Hauling case, the issue is whether improper *ex parte* communications irrevocably tainted the ultimate judgment of the siting authority "unfair, … to an innocent party" E&E Hauling, Inc. v. Pollution Control Board (2nd Dist. 1983), 116 Ill.App.3d 586, 606-607, 415 N.E.2d 555, 71 Ill.Dec. 587. In this case, PDC claims to have been harmed by the *ex parte* communications. However, PDC is by no means "an innocent party."

While the County conducted no discovery of its own on this issue, a number of witnesses volunteered information relating to PDC's *ex parte* contacts. As previously set forth in this brief, PDC's own attorney contacted one of the County Board Members for the express purpose of trying to provide information outside of the record. That County Board Member, who PDC now claims should be disqualified because he was allegedly listening to *ex parte* contacts, declined to return Mr. Meginnes' telephone call. That doesn't sound like someone who misunderstood the rules of the proceedings. It sounds more like PDC's attorneys misunderstood the rules.

In addition, Board Member Mayer described in his deposition being contacted by the State Senator Shadid, a Democrat from Peoria, who told Mr. Mayer he was calling on behalf of PDC. (Mayer Dep. 3, 22/19-24).

Finally, and perhaps most blatant of all, PDC filed its "Response to the Committee of the Whole Vote" after the close of the public comment period. (C13461-C13522). Whereas most of the citizens who sent in public comment to the Board Members after the public comment cut off might not have known of the prohibitions on *ex parte* contacts, PDC obviously knew the rules, and decided to directly contravene those rules. No only did it file the "Response", the Response contained all types of new

information and/or changes to its application, and was filed at a time when the citizen groups did not have an opportunity to fully and fairly respond on the record.

As was clearly demonstrated in the depositions of some of the individuals opposing the expansion, their communications were, at least in part, spurred on by PDC's *ex parte* communications. (See, e.g., T. Bucklar Dep. 18, 10/25/06, 34/9-22, 38/16-20; K. Converse Dep. 20. 10/24/06, 35/5-36/1). Therefore, PDC created, to some extent, the problem of which it now complains.

F. Proper Analysis of *Ex Parte* Contacts.

The appellate court has acknowledged that *ex parte* contacts between the public and its elected representatives are inevitable. Southwest Engergy Corp. v. PCB, 275 Ill.App.3d 84, 92, 655 N.E.2d 304, 310 (4th Dist. 1995). The courts have upheld the intergrity of a siting proceeding although members of the board received petitions, letters, personal contacts and telephone calls from constituents expressing opposition to a siting application. Waste Management v. PCB, 175 Ill.App.3d 1023, 1043, 530 N.E.2d 682, 697-698 (2nd Dist. 1998). Likewise, the Board has routinely acknowledged that the mere existence of strong public opposition does not render a hearing fundamentally unfair, if the application is given a full and complete opportunity to offer evidence and support its application. See, e.g., Rochelle Waste Disposal, L.L.C. v. City Council of the City of Rochelle (April 15, 2004), PCB 03-218, at p. 26.

Pursuant to relevant case law, neither the Board nor the court will reverse a siting decision due to improper *ex parte* communications unless the party complaining of the communications is able to prove the communications irrevocably tainted the decision making process so as to make the ultimate decision unfair to the innocent party. 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. The courts have laid out a framework for determining improper *ex parte* communications tainted the decision making process. The relevant considerations include:

(1) The gravity of the *ex parte* communications;

(2) whether the contact may have influenced the ultimate decision;

(3) whether the party making the improper contacts benefited form the ultimate decision;

(4) whether the contents of the communications were unknown to opposing parties who therefore had no opportunity to respond; and

(5) whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

E & E Hauling, at 606-607. This Board and the courts have upheld the intergrity of a siting proceeding although members of the siting authority received petitions, letters, personal contacts and telephone calls from constituents expressing opposition to a siting application. Waste Management v. PCB, 175 Ill.App.3d 1023, 1043, 530 N.E.2d 682, 697-698 (2nd Dist. 1998). Likewise, the Board has routinely acknowledged that the mere existence of strong public opposition does not render a hearing fundamentally unfair, if the application is given a full and complete opportunity to offer evidence and support its application. See, e.g., Rochelle Waste Disposal, L.L.C. v. City Council of the City of Rochelle (April 15, 2004), PCB 03-218, at p. 26.

1. Gravity of Communications.

The County cannot deny the discovery process in this appeal has disclosed a number of *ex parte* communications. However, number alone, despite PDC's arguments, does answer the question of whether there was any prejudice to PDC. In order to evaluate the gravity of a communication, it is helpful to break down the communications a number of ways – timing, content, and who initiated the contact.

First, one must look at the timing of the communications. The majority of the communications of which PDC complains took place after the close of the public comment period. As the Board and courts have stated consistently, there is no right to respond to matters after the close of the public comment period. Despite the fact there is no right, PDC still attempted to respond by filing its Response to the Committee of the Whole Vote. County Board Members did receive communications prior to the close of the public comment period, but the vast majority of those were forwarded into the public

record either directly by the sender or by the Board Members. Despite PDC's arguments, many of those were forwarded into the record by County Board members.

Of the documents presented by PDC during discovery, some 70 of them were, in fact, submitted into the record. Of those that were not in the record, the vast majority were dated, as pointed out by PDC, after the close of the public comment period. The public comment period closed on March 29, 2006. After the close of the public comment period, there were only eight (8) days before the Committee met on April 6th to review the record. At that Committee meeting, the Committee, which was comprised of the entire County Board, voted against the application 10 against, and 7 in favor of recommending approval. Therefore, any communications after that point in time had little opportunity to affect the outcome.

Prior to that April 6th meeting, PDC is able to point to only a very limited number of documents to substantiate its claim of *ex parte* communications. While PDC references yard signs, and phone calls, and other communications, it fails to specify the time frame in which the communications were sent and/or received. Failure to prove the details and contents of the communications makes it impossible to perform an analysis of whether the communications resulted in prejudice. It is PDC's burden to prove the communications as well as the claimed prejudice. Therefore, while PDC alleges thousands of *ex parte* contacts, what it is actually able to prove is much less, and what communications actually had any ability to affect the outcome are much, much less.

Virtually all of the communications to which PDC cites involved mere statements of public opinion wherein the person simply asks the County to "vote No". These types of communications do not contain any factual information, and the record of the proceedings was replete with these types of comments before, during and after the public hearing. Therefore, in no way could these types of communications be prejudicial. PDC clearly was aware of the sentiment of a significant portion of the public against the proposed expansion. In fact, PDC's opening statement at the public hearing indicated it was well aware of the opposition to the application. PDC offered numerous "special conditions" at the beginning of the hearing, before any evidence or testimony was offered. According to PDC's attorney, it was doing so in response to public comments.

Second, the few communications that did reference facts, did so only or primarily in reference to items that were already in the record. As is clearly demonstrated by the citizens' deposition transcripts, any references to facts were merely highlighting facts that were already in the record. Some of the facts, such as the fact that the site lies over an aquifer which is hydraulically connected to the main drinking water aquifer for the entire region, were placed into the record by PDC's own documents and witnesses.

Furthermore, it should be noted that there is only one alleged communication complained of by PDC apparently initiated by a County Board Member. That communication was a telephone call by Board Member Elsasser to a citizen opponent wherein the Board Member asked for a person's telephone number. There was no indication in the record that any matter of substance relating to the landfill was discussed in that telephone call, and there is no indication why Mr. Elsasser desired the telephone number. Otherwise, all of the communications were by citizens to their elected officials. This is not a case where the siting authority members took any affirmative action to initiate or participate in communications or actions opposing the proposed expansion. The County Board Members did not participate in a radio call-in show, did not go on a tour of a facility while the application was pending, did not wear buttons, hats or shirts, did not put up yard signs, and did not send out letters on County stationery.

While PDC attempts to argue that the County should have somehow stopped all of the communications, it presents not even the slightest suggestion as to how to do so. As PDC's brief demonstrates, the citizen groups who participated in the process knew they were not supposed to be contacting the County Board. As many of the deposed County Board Members stated, they couldn't simply not open mail or e-mail or not answer their phones for 6 months. They are elected officials who receive input on a regular basis from their constituents. When the phone rings, they have no way of knowing who is calling or why. Likewise, with letters, they can't tell from an unopened letter who is writing or why. E-mails can present another situation if they have a subject line. Some County Board Members stated that if they saw a subject line relating to the landfill, they either didn't open the e-mail or simply transferred it into a separate file. (See, e.g., Joyce Dep. 2, 10/15-18). Likewise, almost every one of the deposed board

members stated that they attempted to avoid contacts with individuals who wanted to talk about the landfill expansion.

2. No Influence on Decision.

The County Board Members' deposition transcripts make clear they did not discuss the *ex parte* contacts, either among themselves or with others.

PDC's brief references numerous communications that took place after the Committee's April 6, 2006, meeting and before the County Board's May 3, 2006, meeting. The Committee, pursuant to County ordinance, was made up of the entire County Board. At the April 6th meeting, the Committee voted ten (10) against and (7) in favor, with one (1) Board Member (Polhemous) absent. At the May 3rd meeting, twelve (12) voted against the application (including Polhemous who was absent at the first meeting), and six (6) voted in favor of the application. Therefore, assuming that the communications which took place between April 6th and May 3rd satisfy the other criteria for analysis, which the County disputes, it is clear they had no appreciable affect on the decision. In fact, only one (1) Board Member changed his vote from in favor to against during that interim period of time, and he testified in his deposition that *ex parte* communications did not cause him to change his vote. Even if his vote were to be excluded, it would not change the outcome of the vote.

Furthermore, the importance of basing its decision solely on the record was reinforced to the County Board a number of times at the May 3, 2006, County Board Meeting, as well as other times during the hearings and meetings. When discussing the proposed findings of fact which were before the County Board at the meeting, the Assistant States Attorney, Mr. Atkins stated that a certain finding relating to population figures which was proposed by a Board Member was not included because Staff could not find a reference to it in the record. Mr. Atkins also stated, "[t]hat is done so that we make sure that we are not in any way taking evidence from outside of the record." (Tr. 5/3/06 18/7-9, C13716). A few minutes later, Mr. Atkins stated as follows:

> "I'm going to ask all of you whether you can be fair and impartial and make your decision based solely on the evidence that has been presented in the

hearing process and in the documents that have been submitted for public comment or in the public comment period.

So is there anyone here who thinks, any of the board members who think there is anything that would bias your decision? If any of you feel that there is any reason that you would be unable to decide based solely on the evidence presented to you, and I'd ask for you to point that out at this time."

(Tr. 5/3/06 23/19-24/8, C13717). Following that, each and every County Board Member stated, before they voted on the application, that they would base their decisions upon the facts and evidence in the record. (Id. 25/10-29/17, C13717-C13718).

The County Board Members were well aware they were to base their decision on the record. The transcript from Lynn Scott Pearson's deposition is a good illustration. During that deposition the following exchange too place:

"Q In terms of factual allegations that you might have found in some of those e-mails. Maybe I can distinguish a little bit. Some of the e-mails that we've seen are in the nature of, "Thank you for your no vote on April 6th. Keep up the good work." You probably recall receiving some of those?

A I had some of those.

Q And some of them are in the nature of, "Here's some additional facts that you should be aware of." I'm thinking specifically for Joyce Blumenshing and the Sierra Club sent some e-mails like that. Do you remember receiving some like that?

A Yes.

Q Did you take the contents of those into consideration in your deliberations?

A No."

(Pearson Dep. 5, 10/11-11/2). Likewise, Mr. Salzer said he received communications that were not useful:

"Q Is it your belief that you were – while you weren't supposed to talk to anyone and express your views, it was useful to get the view of the everyone including your constituents?

A Not really.

Q How so not really?

A It was a waste of time in some cases.

Q I couldn't agree with you more. In other cases, though, you did receive useful information from constituents and members of the public outside the hearing process, right?

A I can't say that I absolutely did."

(Salzer Dep. 8, 12/9-20). Board Member Trumpe also stated that she understood it was inappropriate to incorporate public opinions into her decision-making process. (Trumpe Dep. 10, 10/5-8).

3. No Benefit from the Communications.

The communications of which PDC complains were all from local citizens exercising their right to participate in the siting process. None of these individuals benefited personally, financially, or professionally in any way from the communications. In fact, as their deposition transcripts demonstrate, a number of the individuals devoted not only significant amounts of their time to the process, but also significant amounts of their own money. In no way, can they be said to have gained by the communications, except perhaps from the idea that they participated in a public, governmental process, and that for many of them, the side for which they were advocating prevailed.

4. PDC Had Full and Fair Opportunity to be Heard.

PDC was apparently fully aware of communications and public sentiment throughout the siting process. In his opening statement at the public hearing, PDC attorney Brian Meginnes statements:

"[W]e feel it's unfortunate that other groups have tried to ignore the rules, prejudice the County Board, but more importantly, the community against the company." (Tr. 2/21/06, 18/23-19/2, C7272).

"There has already been alot of misinformation spread about this expansion application, for example, opponents have stated that the PDC facility is landfilling many of the most toxic compounds known to man." (Tr. 2/21/06, 19/13-17, C7272).

"Opponents have also alleged that air pollution flowing from gas emissions present a danger to residents living downwind from the facility." (Tr. 2/21/06, 20/5-8, C7272).

"I could go on and on about the misstatements being made about Peoria Disposal Company …." (Tr. 2/21/06, 20/16-17, C7272).

"Now, we know that a number of concerns have been brought up by opponents to the expansion. We understand that many of the opponents are passionate about protecting the environmental. To alleviate their concerns, their fears, PDC is willing to make certain accommodations to their concerns. Therefore, we are proposing, voluntarily proposing, that certain restrictions be placed on the approval to address these concerns." (Tr. 2/21/06, 25/10-18, C7273).

PDC is unable to point to any communication which raises even the slightest bit of new or prejudicial information that was not already in the public record. As previously shown, PDC was fully aware of the growing citizen opposition to its application. The opposition had formed years before it filed for siting, and grew in the months following the filing of the application. In fact, opponents of the application were present, along with PDC's attorneys, at County Board meetings throughout the process, as well as at the public hearing. The arguments and positions put forth by the citizens groups and individuals did not change appreciably over the course of the proceedings.

A review of the communications referenced by PDC show either the communications were merely "say no" opinions, or were reiterations of the arguments, positions or questions raised at the public hearing. There is no dispute, question or debate that PDC had a full and fair opportunity at the public hearing, and during the 30 day public comment period to fully address those concerns. At the close of the public hearing, PDC's attorney stated as follows:

"… I think it's been a fair hearing. I think both sides will agree everybody had a chance to have their say, and that is what this hearing was for."

(Tr. 2/27/06, 418/1-4, C7881). Not only did PDC have a full and fair opportunity to "have their say" at the public hearings, but they also submitted information in the record during the 30 days following the public hearing, responded to other filings within that period of time, and even, in fact, went beyond the 30 day public comment period, and filed its Response to the Committee of the Whole Vote, as discussed previously. Therefore, PDC had more than fair and adequate opportunity to address the concerns raised in the communications. See, e.g., Land and Lakes v. Randolph county Board of Commissioners (Sept. 21, 2000), PCB 99-69, at p. 15.

5. Whether Remand Would Serve a Useful Purpose.

For the reasons set forth above, the County strongly disputes PDC's claim that there was any prejudice as a result of the *ex parte* communications. Even if there may have been some prejudice, PDC had plenty of opportunities to address the substance of the communications, and in fact did address them. Second, County Board Members have already stated that their decision at the May 3, 2006, County Board Meeting was on the facts and evidence in the record. Therefore, remanding the matter to the County would not serve a purpose and the decision should be upheld.

In the alternative, the County would argue that if the Board finds there was prejudice as a result of the communications, the proper remedy would be to remand to the County for inclusion of the communications into the record, and for a new vote by the Committee and/or County Board based upon the supplemented record, with the instruction that the County cannot take into consideration anything that is not in the record. See e.g., City of Rockford v. Winnebago County Board (November 19, 1987), PCB 87-92. Despite PDC's unsubstantiated arguments to the contrary, there is no showing of bias, prejudgment, or predisposition, and remand to hold an additional hearing on the known *ex parte* contacts would remove any procedural clouds from the proceeding.

Finally, there is absolutely no support in the Act, the case law, or the Board's rules for PDC's claim for money damages. As set forth in the County's Motion to Strike, the documents attached to its brief were not introduced as part of the record of the proceedings before the County, and were not entered into evidence at the Board's hearing

on this appeal. Therefore, the documents do not constitute evidence which the Board can consider, and should be stricken from the record of these proceedings. As is amply demonstrated in this brief, the County took reasonable measures to counteract *ex parte* contacts, and the *ex parte* contacts which did take place caused or created no prejudice to PDC. Therefore, the concept of the County paying money to PDC is ludicrous, and must be denied.

III. THE DECISION WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

As detailed in the County's Response to PDC's Motion for Summary Judgment (415 ILCS §5/39.2(e)), and in the Memorandum in Support thereof filed on December 14, 2006, the County Board clearly did take final action on the application within the statutory 180 days, and the decision was rendered in writing as evidence by the detailed, writing findings of fact approved by the County Board.

The Record in this appeal is clear, the County Board voted down the application at its May 3, 2006, County Board Meeting. At that same meeting, the County Board approved the detailed, writing Findings of Fact which were filed in the record on April 27, 2006, subject only to one (1) minor modification which is clearly evident in the transcripts of the meeting, and which were shown on a separate sheet prepared by staff and incorporated into the County Board records by the County Clerk. The findings of fact were based upon and supported by the record that was developed during the siting process.

A. County Board's Decision.

PDC's search for a cause for the County Board's decision looks everywhere except where the inquiry should be placed – squarely on PDC. PDC simply failed to present sufficient evidence to the County Board to convince the County that siting a hazardous waste landfill within a few hundred feet of fully developed residential neighborhoods, over the region's primary drinking water supply, and immediately

adjacent to a very large population center was necessary or appropriate, would be protective of the public health, safety and welfare, and was compatible with those immediately adjacent land uses. It's as simple as that.

The County did not hold PDC to an impossible burden of "perfect proof" and absolute assurances. The County merely held PDC to its burden of proof as set forth in the statute. PDC attempted to "boot-strap" the proposed expansion siting based almost entirely upon the notion that a landfill was already present at the location, and therefore it must be acceptable. As is clearly set forth in Board opinions, the fact that a facility already exists is not, in and of itself, sufficient to satisfy any of the nine (9) statutory criteria.

B. Criterion i: Need.

As set forth in the detailed, written findings of fact adopted by the County at the May 3, 2006, County Board Meeting, PDC failed to demonstrate a need for the facility. As is evident from the findings adopted by the Board, the Board did not believe the conclusions reached by PDC's expert witness. The local siting authority is not required to accept any and all testimony presented by the applicant.

The County is not obligated to merely accept any expert testimony that is presented. As with any other testimony, the siting authority has not only the authority, but the obligation to determine whether the testimony is sufficient, believable, or should be accepted. Even where the evidence on a criterion is unrebutted or unimpeached, the trier of fact is not required to find that the applicant has met its burden on that criterion. For example, the local siting authority may conclude that even uncontroverted evidence or testimony is insufficient or deficient, such as because an analysis did not factor relevant information or because the analysis is invalid or is otherwise not credible. See, CDT Landfill Corp. v. City of Joliet, PCB 98-60, 1998 WL 112497. Just like in the CDT Landfill case, the County was not compelled to accept the word of PDC's witness in this case.

As pointed out during questioning and cross examination of PDC's witness, the testimony of the witness was based upon a study the witness conducted containing

several fundamental flaws which undermine the validity of its conclusions, and which indicate that the expansion is not necessary. First, and as admitted by PDC in its brief, the testimony did not take into account the most recent and available information. While the failure to incorporate the information in the initial report may be excusable due to timing, the inability of the witness to answer basic questions about how the updated information might affect her analysis and/or conclusions was troubling, and certainly undermined the confidence in her report and testimony.

There was evidence in the record that representatives of PDC had made statements to the effect that there were market pressures causing tipping fees to decline. Such statements are directly contradictory to the witness' assumptions and findings. The report and testimony of the witness was to the effect that there was declining disposal capacity and that the waste volumes available for disposal were not declining. Furthermore, as is demonstrated by the witness' testimony, the witness simply accepted the applicant's data and information regarding waste streams, volumes, etc. and apparently undertook no independent efforts to verify the information. Basic supply and demand economics would suggest that if the witness was correct, and the same amount of waste was being generated (same amount of demand), when there is a decrease in supply (i.e., landfills closing), the price of disposal should be increasing. However, according to PDC's statements, the price has been declining. The only reasonable explanation for decreasing prices would be either increased competition (more landfill space coming on line) or decreasing demand (i.e., less waste being generated), both of which are contrary to the witnesses' testimony or assumptions.

Likewise, the general lack of reliability of the testimony and report was revealed when the witness was questioned by a citizen about the conclusions concerning claims of increased costs for local companies if the expansion was not granted. In response to questioning, the witness admitted that she concluded the local companies would have increased costs due to transportation expenses, but she did not do an analysis of whether there would actually be any increase in total costs. (Tr. 2/23/06, 165/4-166/24, C7498-C7499). Likewise, the witness admitted that she has reviewed U.S.EPA and/or the Army Corps of Engineers reports regarding whether there is adequate hazardous waste landfill capacity in the U.S. looking out for 15 or 20 years, but the witness apparently did not

consider those reports in preparing her report or giving her testimony. (Tr. 2/23/06, 167/1-169/9, C7499).

Also, during questioning by the Committee, the witness admitted that her analysis assumed a "static" amount of hazardous waste generation. This was despite one of PDC's other witnesses testifying to the fact that the general trend is toward a declining amount of hazardous waste being generated. That assumption is also contrary to the reported statements of PDC regarding declining markets and declining tipping fees. The witnesses' only explanation as to why she used a static number was because "it's the most current data that is available." (Tr. 2/23/06, 202/20-21, C7508). Despite recognizing that the hazardous waste market was dynamic and subject to many economic factors that would affect hazardous waste volumes available for disposal, she admits she failed to take any of those into consideration in her analysis. The line of questioning by the Committee made it clear the witness had failed to take into account important market trends of the waste industry, thereby seriously undermining the credibility and usefulness of her report and testimony.

Finally, at no time did the witness testify as to whether any other landfill capacity was being developed in the service area or how long it would take to bring such new capacity on-line. As the Board stated in its Opinion and Order, Supplement, in the Winnebago siting appeal, "need is also largely contingent upon the time necessary to bring additional capacity into existence." City of Rockford v. Winnebago County Board, PCB 88-107, Supplemental Statement (December 1, 1988), at p. 3. In this case, PDC offered no testimony as to whether additional disposal capacity was being developed or how long it would take to develop additional capacity.

The County's detailed written findings of fact were based upon and supported in the record, and are not against the manifest weight of the evidence.

1. Applicant failed to use the most recent USEPA date on hazardous waste generation. This fact is not really disputed. PDC admits, due to timing, that its witness did not utilize information in her report that was available at the time of the public hearings, because it was not available when she prepared her report. Therefore, her analysis did not include the most up-to-date information available at the time of the public hearing in this proceeding. While it was excusable for the witness not to have

included that information in the application, it was to be expected she would have fully studied the information and analyzed it against her report for her testimony. However, her testimony did not suggest she had done so.

2. USEPA data from 2003 reported in 2005 shows a significant decline in hazardous waste generation rates in their hazardous waste service area. While PDC might disagree with the County's finding about how significant the decline, PDC's response admits there was a decline in waste generation rates in the service area.

3. During cross-examination by County staff, Applicant's expert Smith testified that there was a reduction in hazardous waste generated in the service area from 2001 to 2003. This is an accurate statement, and PDC's response does not attempt to dispute the statement.

4. Applicant's expert Smith testified that there are a decreasing number of hazardous waste landfills in both the service area and the nation. Once again, PDC does not dispute this statement. PDC's argument that the County should use common sense in analyzing the information is well taken. In fact, this finding corresponds with the County's other findings regarding the use of common sense when analyzing the supply and demand information.

5. Applicant's employee and expert, Ron Edwards, is quoted in a newspaper article included in the public record as saying that Applicant's tipping fees have decreased from an average of $100.00 per ton to an average of $80-$85.00 per ton. Price has just as much relevance as supply and demand. As mentioned above regarding common sense relating to demand, common sense relates to price as well. If price is falling, common sense would suggest that either supply is increase or demand is decreasing. The record suggests that supply is decreasing, therefore demand must be decreasing at an ever faster rate based upon price. The statement against interest is reliable and not speculative.

6. While not subject to cross-examination, Applicant's statement about price is deemed reliable as a statement against interest. PDC does not dispute the statement was made or that it is a statement against interest. Therefore, the County was free to consider it as part of its decision-making process.

7. A decrease in price during a time period when the number of hazardous waste landfills is decreasing suggesting decreasing demand for disposal capacity. PDC challenges this finding upon the ground that the newspaper article is hearsay. The strict rules of evidence in court proceedings do not apply to siting proceedings. None the less, the statement against interest is a valid and common method of determining credibility and reliability in a courtroom, and is equally applicable in this proceeding. As mentioned under number 6 above, PDC does not dispute the statement was made or that it is reliable. As stated by PDC regarding item 4 above, common sense shows the relationship between this finding and the others.

8. On cross-examination, Applicant's expert, Dr. David Daniel, testified that over the last two decades, there has been a gradual reduction in the amount of hazardous waste generated. PDC admits this statement is accurate.

9. Daniel was qualified by Applicant as a national expert on hazardous waste and landfill design and technology. PDC admits that statement as accurate.

10. In her report, Applicant's expert Smith assumed a constant rate of hazardous waste generation in the service are from 2001 until 2029. PDC does not dispute that accuracy of this statement. The best argument PDC can come up with on this finding is that somebody else should have proved there will actually be further declines in the future. PDC fails to appreciate that it had the burden of proof on this issue, and its witness failed to take into account basic information that another of its witnesses stated were fact.

11. However, the evidence provided by USEPA data, Applicant's public statement about prices and the testimony of Applicant's own experts indicates a reduction in the amount of hazardous waste generated in the service area. PDC does not dispute this, it merely attempts to argue the reduction is "minimal." However, it offered no proof or definition as to what is minimal. Furthermrore, this line of findings by the County shows the flawed methodology of PDC's witness.

12. An annual reduction in hazardous waste generation in the service area of between one and two percent and therefore, consistent with USEPA data, would reduce the capacity shortfall that Applicant's expert Smith estimated in her

report for hazardous waste by hundreds of thousands or even millions of tons. PDC does not dispute this finding, and in fact appears to adopt it as true.

13. Estimating the disposal capacity, Applicant's expert Smith assumed that hazardous waste landfills outside the service area would not utilize greater percentage of their capacity for hazardous waste generated within the service area than they did in 2001, but supplied no evidence or data to support that assumption. This again shows the flawed nature of PDC's analysis. PDC appears to be arguing that the County must accept everything Ms. Smith stated as true because there were no other experts that provided testimony on the topics. However, as mentioned above, one of PDC's own experts testified contrary to Ms. Smith's report and analysis. In addition, the County is not forced or compelled to accept Ms. Smith's testimony and report when the analysis is shown to be fundamentally flawed.

14. The Applicant's expert Smith failed to fully consider potential substitutes for a new hazardous waste landfill in the service are, including increased recycling of the type of waste codes accepted by Applicant, continued waste reduction in the service area and increased disposal of hazardous waste generated in the service area in landfills outside the service area. PDC does not dispute this finding, except to say that its witness elected not to consider them because she did not deem them relevant. Once again, the County is not compelled to accept as true testimony that is shown to be fundamentally flawed.

For the foregoing demonstrates the County's finding of fact with regard to criterion i are based upon the record, and its decision to deny the application for failure to meet criterion i is not against the manifest weight of the evidence.

C. Criterion ii – Design, Location and Operation.

Criterion ii requires the applicant to prove that the proposal is not only designed and planned to be operated in a safe fashion, but that it is also located so as to protect the public health, safety and welfare. PDC failed to prove its choice of location for the hazardous waste landfill was protective of the public health, safety and welfare. In

addition, County Staff raised serious issues and concerns regarding PDC's design in the older portions of the landfill over which it sought vertical expansion.

1. Location.

The location of the proposed hazardous waste landfill was problematic from a number of different perspectives. The Record before the County Board includes many uncontroverted facts that reasonably led the County to deny the requested landfill siting. First, and foremost, all of the parties agreed that the number one issue before the County was protecting the groundwater aquifer below the site, and that PDC's proposed landfill is located directly over a groundwater aquifer that is hydraulically connected to the San Koty aquifer. (See e.g., Tr. 2/2/7/06, 24/8-25/1, C7782; PDC's Brief at p. 103). It is also undisputed that the San Koty aquifer is a "major regional source of drinking water" for Central Illinois, including the City of Peoria. (PDC's Brief at p. 103). If nothing else, the proposed siting of a hazardous waste landfill directly over an aquifer raises legitimate questions concerning whether the proposed facility is "located" so as to be protective of the public health, safety and welfare, and justifiably gave the County great concern. The aquifer over which the proposed hazardous waste landfill was to be sited was not just an aquifer, but a drinking water aquifer that was connected to the main drinking water aquifer for the region.

To further complicate matters, PDC's own witnesses testified that eventually the engineered barriers which make up the landfill design will fail. How quickly the barriers will fail was subject to considerable debate, but whether they would fail was not. In addition, at no time was there any evidence or testimony that the hazardous constituents in the waste would no longer present a risk. In fact, one of PDC's witnesses, Dr. Daniels, testified to the fact that the heavy metal contaminants found in much of the wastes, and which make those wastes hazardous, are stable elements and would be expected to be around for thousands of years. There was no evidence or testimony that at some time in the future the need for the drinking water aquifer would diminish or disappear. In other words, the County was presented with a proposal to locate a hazardous waste landfill over a drinking water aquifer with the prospect that the landfill's engineered barriers will fail at some time in the future.

PDC attempted to soften that harsh reality by claiming the naturally occurring glacial till at the site provided additional protection. However, there was considerable conflicting testimony as to whether the naturally occurring glacial till actually provided any additional protection of the aquifer. What was not disputed however, was that the glacial till under the site overlies a major aquifer which provides drinking water to thousands of people. Likewise undisputed is the fact that the glacial till includes sand and/or gravel lenses and seams, as indicated by site borings, and as even represented in drawings presented by the applicant. Whether there is continuity between these lenses and seems was disputed by the experts. According to the expert testimony of Mr. Chuck Norris, the sand lenses and seems do interconnect and allow for rapid transport of water through the till, further raising questions of the site's suitability.

To further complicate the decision for the County, the site is located within close proximity to the Pleasant Valley Public Water District's regulated recharge area. While the County recognizes that the actual site for the proposed hazardous waste landfill is not within the regulated recharge area, the testimony was that the proposed site is with approximately 1 mile of the regulated recharge area. (Tr. 2/21/06, 192/2-193/1, C7315). The regulated recharge area is designed to protect the water quality of drinking water wells, and that Pleasant Valley recharge areas is the only one in the entire state.

Finally, it had been, and continues to be, the long-standing policy of the County to oppose the disposal of hazardous waste over an aquifer in Peoria County. In 1985, the County Board passed a resolution declaring such. (C139599). This siting proceeding was the first opportunity the County had to evaluate the location of the landfill. The landfill evaded siting when SB172 was initially passed. Therefore, there should be, and can be, no presumption or implication that the proposed location was previously found to be acceptable since there is an operating landfill.

2. Design of the Existing Cells.

While it was generally acknowledged that the design for the lateral expansion (cell C-5) met or exceeded standards for new landfills, as detailed in the March 27, 2006, Staff Report, County Staff identified a number of issues and/or concerns relating to the design of the existing cells. Of particular concern to staff was the design of the leachate collection manholes and sumps which are concrete manholes wrapped with plastic liner.

These manholes extend into the lower portions of landfill, and actually penetrate the primary liner. (See, Staff Report at p. 15, C12109). The penetration of the primary liner results in there being no leak detection for the manholes and sumps. As a result, the landfill is designed so that the leachate drains into these sumps, but there is no leak detection system for these critical areas. PDC's witness, Dr. Daniels testified that leak detection should be installed below the manholes. (Tr. 2/23/06, 12314-17, C7488). Therefore, the design is not protective. Likewise, there is no leak detection system for the surface impoundment which is used to store leachate. However, PDC did offer to remove the surface impoundment if it obtained siting, apparently acknowledging the risk presented by its design.

3. Theories of Charles Norris Are Credible and Supported by Facts.

The credibility of witnesses is directly the purview of the County during the siting process. In this case, it is obvious the County decided the testimony of Charles Norris was not only credible, but more credible than that of some of PDC's witnesses. While PDC attempted to impeach the credibility of Mr. Norris at the public hearing, just as it attempted to do so in its brief, Mr. Norris was able to point to certain of PDC's own groundwater monitoring data related to the site, which supported his opinion and conclusions. Included among that data was the presence of unsaturated sand lenses in the glacial till (Tr. 2/24/06 139/3-21, C7605), seasonal fluctuations in unsaturated groundwater levels corresponding closely with seasonal rainfall (Tr. 2/24/06, 133/6-136/18, C7603-C7604), the presence of organic contaminants in both shallow and deep monitoring wells (Tr. 2/24/06, 138/2-140/19, C7605), lack of uniform glacial till, including some areas with almost continuous sand (Tr. 2/24/06, 141/20-142/10, C7605-C7606). In summary, Mr. Norris stated "[t]he geology and hydrogeology of this site do not provide safety backup to the engineer containment systems." (Tr. 2/24/06, 157/24-158/2, C7609-C7610).

One of the more important points regarding Mr. Norris' testimony was pointed out by PDC's brief. During his testimony, Mr. Norris discussed the presence of organic contamination in both shallow and deep monitoring wells. Those wells, admittedly, are located upgradient of the portion of the active landfill facility which was the subject of the expansion application, and, apparently the facility has attributed the organic

contamination to a possible off-site source. However, the relevance of his testimony regarding this organic contamination relates not to the source of the contamination but to the fact that manmade organic contaminants were found in the shallow monitoring wells somehow made their way down into the deep monitoring wells. According to PDC's witnesses, if there was a release from the engineered structures at the facility, it would take hundreds or thousands of years for a contaminant to migrate down through the allegedly almost impermeable glacial till, and during that time the concentrations of the contaminants would be attenuated by the natural properties of the clays. The problem with PDC's witnesses' theories and testimony is that manmade organics have been found in the monitoring wells. Manmade organics have not been in existence for hundreds or thousands of years. If the conditions were as PDC's witnesses testified and opined, there is no possibility these chemicals would be found at both shallow and deep wells in the same location. In other words, the presence of organic compounds in the deep monitoring wells directly supports the testimony of Mr. Norris, and directly contradicts the testimony of PDC's witnesses.

In addition, there was considerable testimony by PDC's witness, Kenneth Liss, as well as questions from the County Staff, regarding increased chloride and sulfate concentrations in the groundwater and how that contamination may or may not related to the landfill. In particular, Mr. Liss testified to the fact that the leachate extracted from the landfill has elevated levels of sulfate and chloride. (Tr. 2/24/06, 246/15-19, C7632). He also testified that sulfate and chloride are generally indicator parameters to determine whether a disposal facility has impacted groundwater. (Id. 246/20-24 and 247/1-6, C7632). Mr. Liss, upon questioning, testified to higher concentrations of chloride and sulfate in wells down gradient of the landfill as compared to upgradient of the landfill. (Tr. 2/24/06, 248/8-2, C7632). Mr. Liss listed some possible explanations unrelated to the landfill which might cause the higher concentrations down gradient, but was unable to point to any definitive source of those increased indicator parameters.

The March 27, 2006, Staff Report contains a thorough analysis of the chloride and sulfate issues in the groundwater. Staff concluded that chloride and sulfate concentrations wells downgradient from cell C-1 indicate impacted groundwater quality. (3/27/06 Staff Report at p. 23, C12117). Staff identified such trends in both shallow and

deep wells. Id. In addition, Staff noted that the chloride and sulfate concentrations downgradient of cell C-1 increased over time, and then leveled off after 1998 and hovers near drinking water standards, the approximate time cell C-1 was closed. (Id. at p. 25, C12119). PDC's witness, Mr. Liss, attempted to attribute the chloride and sulfate contamination to off-site sources, and provided a number of different theories as to what those source might be. However, he also testified that chloride and sulfate are not evaluated at the landfill, and no location of offsite sources was identified in the application or were provided in the testimony at the public hearing. On or about March 22, 2006, PDC filed a supplemental report as public comment in response to questions raised at the public hearing. After extensively reviewing the information and data contained in the report, County staff found that some of the chloride and sulfate concentrations in the downgradient wells were likely to be attributed to naturally occurring sources. However, after reviewing the anions on the Piper plot for well R128, County Staff concluded that elevated chloride concentrations in well R138 was not from naturally occurring brackish water in the underlying share, but in fact could be attributable to either landfill sources upgradient of the active units or the landfill operations in and around Trench C-1. (3/27/06 Staff Report, at p.25-26, C12119-C12120).

As mentioned above, after the close of the public hearing, PDC submitted additional information into the public record regarding its analysis of the chloride and sulfate in the down gradient wells. County Staff's review of that information suggested that it helped rule out some, but not all of the down gradient increases in chloride. However, as stated in PDC's brief, documents submitted into the public record after the close of the public hearing, are merely public comment, and not subject to the same weight and consideration given to sworn testimony subject to cross-examination. Therefore, while County Staff may have given additional weight to the studies PDC submitted after the public hearing, the County Board was free to give them only such weight as it deemed appropriate for public comment.

As previously stated, if the geological conditions at the site were, in fact, as PDC's witnesses testified, there would be no possibility of a contaminant migrating from the landfill, which was only a few decades old, through the glacial till, being subject to all

the natural attenuation forces, and finding its way into the groundwater at detectible levels. However, if the geological conditions at the site were as Mr. Norris testified, finding such contamination would be possible. Therefore, the elevated levels of an indicator parameter in the groundwater below the site lent further credibility to the expert testimony of Mr. Norris, and did not support the testimony of PDC's witnesses.

Mr. Norris and County Staff both criticized the groundwater modeling presented by PDC and its witnesses. First, according to the March 27, 2006, Staff Report, it appeared some sand lenses in the glacial till were continuous from boring to boring, but were not incorporated into the modeling, which could have affected the results. (3/27/06 Staff Report at p. 26, C12120). Second, the application contained a report which included a sensitivity analysis showing hydraulic conductivity of the till was critical. However, the ranges of hydraulic conductivity used in the model were not representative of the site conditions. (Id. at p. 27, C12121). The HELP model inputs were also called into question by the staff. (Id. at p. 28, C12122). Finally, PDC's witness Dr. Barrows testified that he made an error in how the model was run, and when he corrected his error, it changed his conclusions on sensitivity. (Tr. 2/27/06, 70/2-5, C7794). On March 17, 2006, PDC submitted a corrected sensitivity analysis as public comment. However, County Staff was unable to determine what, if any, changes were made to the model. As a result, staff concluded the impact of chlorides in the sand aquifer at well R138 may not correspond with PDC's modeling. (3/27/06 Staff Report at p. 29, C12123).

Mr. Norris testified extensively regarding certain areas of the site which are saturated at times, and not saturated at other times, depending upon the seasons and the amount of rainfall, pointing out how that would not be the case if the glacial till was as impermeable as PDC claimed. He also referenced information in the record regarding perched sands that were partially saturated, and how they demonstrated water was draining out of them. (Tr. 2/24/06, 139/3-21, C7605). He was able to point to boring logs to substantiate his claims of sand seams and lenses, and widely varying conditions. (Tr. 2/24/06, 141/1-142/24, C7605-7606). He was also able to point out to changing groundwater levels coinciding with the capping (or partial capping) of cell C-1. Mr. Norris suggested the capping of C-1 acted much as an umbrella. (Tr. 2/24/06, 145/12-146/18, C7606-C7607). He concluded that if there glacial till really was as impervious as

PDC claimed, it would have already been acting like an umbrella, and when cell C-1 was capped there would have been no observable difference in the wells. (Tr. 2/24/06, 147/9-21, C7607). He concluded that "the geology and hydrogeology of the site do not provide safety backup." (Id. 157/24-158/1, C7609).

All of the undisputed facts plus the conflicting and contradictory expert testimony regarding whether the geologic setting was conducive to a hazardous waste landfill location were squarely before the County to evaluate and decide. PDC's witnesses claimed the geologic setting was conducive to development of a landfill. The citizen groups' witness claimed it was not. Faced with this contradictory testimony, it was the County's responsibility to resolve that conflict. As set forth above, there was ample evidence and testimony in the record supporting the testimony and theories of the citizen's witness, Mr. Norris, and which called into question the conclusions reached by PDC's witnesses.

The County resolved that conflict on the side of finding the location was not protective. In these regards, this case is very similar to situation addressed by the Board in its Opinion and Order in the City of Rockford v. Winnebago County Board, PCB 88-107 (Nov. 11, 1988 Opinion and Order) and in Rochelle Waste Disposal, L.L.C. v. City Council of the City of Rochelle (April 15, 2004), PCB 03-218, at p. 26. The determination of whether criterion ii was met is purely a matter of assessing the testimony of the expert witnesses. The case law, as well as Board Opinions and Orders, make it clear that the siting authority is responsible for making determinations of fact, and evaluating the credibility of witnesses, particularly contradicting expert witnesses.

4. PDC's Perpetual Care Fund.

PDC's opening line in this section of its brief highlights the problems with many if not all of PDC's claims and allegations. The perpetual care fund was a concept entered into the proceedings by PDC during the course of the public hearing. (See, Tr. 2/27/06, 6/11-8/17, C7778). It was not something "the County Board wanted" or even asked for. As indicated in the transcript, the concept of a perpetual care fund was totally PDC's. By all indications the perpetual care fund was offered because PDC realized it had not met the requirements of the County's ordinance and/or satisfied many of the concerns about the safety of the site, many of which were raised by PDC's own witnesses. PDC's

witness, Dr. Daniels, testified about the fact that the cover was a key component of the landfill design, and that it would readily degrade if it was not maintained. Despite this, PDC had no long-term plan for maintenance and repair of the cap. The County's ordinance required only that the applicant include a plan for the perpetual care of the facility, not some type of fund. These questions were raised, and the perpetual care fund offered by PDC, well before Mr. Lee's report was even submitted into the record. The perpetual care fund was a desperate attempt by PDC to keep its application alive in light of the testimony and public comment.

5. Findings of Fact.

The County's findings of fact are fully supported by the record, as demonstrated as follows:

1. There is evidence that the existing landfill may already be leaking into the aquifer. As outlined in more detail above, County Staff conducted a detailed and thorough review of the groundwater monitoring data included with the application, and identified downgradient wells with elevated (above upgradient wells) concentrations of chloride and sulfate. (3/27/06 Staff Report at p. 23, C12117). PDC's witness, Mr. Liss, testified that the leachate from the landfill has high levels of chloride and sulfate, and that those are commonly used as good indicator parameters. (Tr. 2/24/06, 246/20-247/1, C7632). After reviewing the testimony provided by the applicant, as well as the additional information provided as public comment, County Staff was able to rule out some of the areas of the landfill as being the source of elevated chloride, but concluded that "the current Trench C-1 may be responsible to [sic] the elevated levels of chloride in groundwater monitoring well R-138." (3/27/06 Staff Report at p.26, C12120). Therefore, there was ample evidence that the landfill may already be leaking into the acquifer.

2. If the existing landfill is already leaking, the facility and the proposed facility which relies upon the existing liners and leachate collection systems is not designed to be protective of the public health, safety and welfare. As demonstrated above, County Staff concluded Trench C-1 may be responsible for elevated chloride concentrations in the groundwater, and chloride is a good indicator parameter for leaking landfills. The chloride/bromide ratios supplied by PDC as public comment did not rule

out Trench C-1 as the source of the chloride contamination. Therefore, the County Board was faced with determining whether Mr. Liss' lists of potential, but unproven, sources of chloride were the source of contamination or Trench C-1. Under the circumstances, in order to be protective of the health, safety and welfare of the public, the County Board reasonably concluded the design was not protective. This is similar, if not identical to the approach taken by the Board to protect the groundwater resource in the Town & Country case recently decided by the Illinois Supreme Court.

3. The liner systems presently in use at the facility and proposed to be used in the vertical expansion, by the Applicant's own experts' testimony will fail at some time in the future. It is important to note that PDC does not dispute this fact. It is in fact true that PDC's witnesses testified to this effect. In addition, PDC's witness testified that the heavy metals contained in the majority of the waste proposed to be disposed of at landfill are stable elements, and would be expected to be around for thousands of years. It is also undisputed that the proposed site is located over an aquifer connected to the major regional source of drinking water. As with the rest of the findings of fact, while this one might not, by itself, justify denial, when combined with all the facts, they compel denial.

4. When those liners fail, leachate will begin migrating through the site, and will eventually reach the groundwater under the site. Once gain, PDC does not dispute this fact. It may draw its own conclusions from the fact, but it does not dispute the fact. PDC's response in its brief is not supported by the record, and is in direct conflict with Dr. Daniel's testimony that heavy metals are stable elements.

5. The groundwater aquifer located under the site is, but the Applicant's own expert's testimony, hydraulically connected to the Sankoty aquifer which is the primary drinking water aquifer for the area. Again, note that PDC does not dispute this fact. As a matter of fact, PDC states as much just two (2) pages earlier (page 103) of its brief. None the less, PDC at page 105 argues that this statement is "completely unsupported speculation."

6. If the drinking water wells for the area are contaminated, the cost of replacing the water supply will be enormous. Once again, PDC does not dispute this fact.

7. The risk of contamination of the area's drinking water is not worth the short-term economic benefits of allowing expansion of the landfill. PDC does not dispute this fact, but instead attempts to shift the burden of proof to the County to quantify the risks associated with PDC's proposed expansion. Furthermore, this statement is consistent with the long-standing policy of the County opposing disposal of hazardous waste over a known aquifer, which dates back to the County's 1985 Resolution.

8. The old areas of the site are not constructed to modern regulator standards and present unreasonable risks to the public. The County recognizes the older, closed areas of the landfill are not part of the proposed expansion. However, this finding not only relates to those closed areas, but also the older designs in the C trenches as well. Dr. Daniels testified that he reviewed the design documents of the application, and did not state that he conducted a thorough review of the closed sections which were not a part of the application. Therefore, any comments he may have made about the older, closed sections would not be competent.

9. The location of a hazardous waste disposal site over the aquifer is against the stated policy of the Peoria County Board. This is true. The County's resolution from 1985 was part of the record, and certainly something the County could take into consideration.

10. The design of trench C1 is inferior to present "state-of-the-art" technology in the waste field, and allowing the Applicant to remove the existing cover from that trench presents an unreasonable risk to the public and the aquifer under the site. There is evidence that the design of C1 is inferior. That was the conclusion of the Staff in its report, and Dr. Daniels testified that there needed to be leak detection under the manholes and leachate sumps which penetrate the primary liner. While PDC indicated in its Response to the Committee of the Whole document, which was filed after the close of the public comment period, that it would be willing to abandon its attempt to vertically expand over C1, that offer was made after the close of the PDC's case in chief, at which time it could no longer amend its application. Such an admission or offer after the close of the public comment period was not competent evidence upon which the County Board could rely.

11. The testimony of opponent's expert, Charles Norris, was that fissures in the clayey till, weathering of the till and continuous sand seams all contribute to the rapid transport of liquids through the glacial till underlying the site and will, and have, resulted in leachate releases of other contaminants migrating into the groundwater from the glacial till. As is demonstrated in more detail previously, these conclusions of Mr. Norris were supported by the evidence.

12. The testimony concerning the organic contaminant found in a shallow monitoring well located in the upper till in the northeast corner of the facility, and the subsequent discovery of the same contaminant in a monitoring well located in the lower sand aquifer in the same area suggests the rapid migration of contaminants at the site, in direct conflict with the testimony of applicant's experts, and in support of Mr. Norris' testimony. As is demonstrated in more detail previously in this brief, these facts are well established in the record. While the County acknowledges the wells were upgradient of the proposed expansion, the fact that man-made chlorinate organics are present in the lower sand aquifer does suggest rapid transport through the till. Such manmade organics have not been in existence for the hundreds or thousands of years it would take to migrate if the conditions were as PDC's experts estimonated.

13. The increased levels of chlorides in the monitoring well down-gradient of trench C1 also suggest the same conclusion. This issue was covered in more detail in previous sections of the brief. Despite PDC's attempts to identify a handful of other "potential" sources of the elevated chloride concentrations, it was unable to present any proof that those other sources were, in fact, the cause of the increased concentrations.

14. The close proximity of residential neighborhoods to the east of the proposed facilities raises numerous questions concerning whether the location of the proposed facility is protective of the public health, safety and welfare. Hundreds of concerned citizens included their concerns in the record, including during the hearing and as public comment before and after the hearing. In addition, medical doctors testified at the hearing as to the potential health effect. PDC did not present any evidence that demonstrated the proposed facility, which was to be located within three hundred (300) feet of fully developed residential neighborhoods would not present any health issues.

PDC did not present any risks assessments or other reports or documents to disprove or dispel the concerns and information submitted by the citizens.

15. The facility, at its closest location, is a mere 300 feet from the nearest residential property. Again, PDC does not dispute this fact.

16. The close proximity of the residences raises serious concerns regarding the potential adverse health effects the proposed landfill may cause to residents. Citizens and doctors did comment and testify about the potential health effects arising out of exposure to heavy metals and organics. The pathways identified by the citizens and doctors was by or through dispersion through the air. PDC did not present any evidence to dispel or disprove this fact.

17. The medical community has spoken out against the proposed expansion due to the potential health risks posed by placing large volumes of hazardous waste so close to residents of the County. Once again, PDC does not dispute this fact, but argues that the citizens should have presented proof. PDC had the burden of proof at the siting, and failed to meet that burden of proof by failing to present evidence that there was no risk.

18. The Applicant did not present any data, studies, or reports concerning the potential health affects on the citizens, or any risk assessments or epidemiological studies or date concerning the proposed facility. None of PDC's witnesses were qualified as experts regarding health risks associated with hazardous waste disposal facilities. Therefore, any comments they may have made regarding expose pathways and the like would have been the equivalent of public comment.

19. Due to the close proximity and the hazardous nature of the materials being disposed of and proposed to be disposed of at the facility, the proposed facility presents an unwarranted risk to the public. This finding is precisely that type of finding the local siting authority is to make, and contains no speculation. The purposes of siting is to determine whether the site is appropriate for a new pollution control facility, not just whether it meets the EPA standards.

20. Opponents' primary comments were that the liner systems would fail at some point in the future, and this commentary was largely supported by the

testimony of Applicant's witnesses, the major difference being when the liner systems would begin to degrade. Once again, this is true.

21. Applicant and opponents agree that protection of the groundwater is the primary concern at the proposed facility. This statement is accurate. None the less, PDC's argument regarding this finding is enlightening of PDC's views of the proceedings. PDC believes it is more protective of the aquifer under the site to pile up 2 million tons of hazardous waste above the aquifer, while common sense would suggest otherwise.

22. However, there is considerable difference of opinion between the parties as to the magnitude and likelihood of a risk to the groundwater presented by the proposed facility. While PDC finally disputes one of the findings, its dispute is misplaced. It is true there were and are differences of opinion regarding the risks. That really cannot be disputed in good faith. While PDC may maintain its position was better supported, that obviously was not how the County Board came down on the issue.

23. One area of concern for the County Staff was the groundwater impact assessment conducted by PDC's experts, Dr. Barrows and Ken Liss. County Staff did "quarrel" with the results of Dr. Barrows' work. In fact, in its 3/27/07 Staff Report, County Staff concluded that the impact of chlorides in the aquifer may not correspondence with Dr. Barrows' modeling, and Staff was unable to verify much of the supplemental information submitted into the record as public comment. (C12123).

24. The type of groundwater modeling done by Dr. Barrows is appropriate for this type of application and for determining future potential impacts to groundwater as required by IEPA for permit applications. Indicative of PDC's contest everything attitude, it even contests a finding which says one of its witnesses performed the correct modeling.

25. IEPA requires this type of modeling to determine the impacts up to 100 years after the closure, but Applicant did the modeling for 500 years after the closure. For the first time, PDC does not dispute one of the County's findings.

26. At the public hearing, Dr. Barrows was asked about his modeling and his sensitivity analysis, and he stated in his testimony that the report on his sensitivity analysis was incorrect, and that the most sensitive parameter was flux

through the liners as opposed to the hydraulic conductivity of the clayey till underlying the site. It is not clear, but it appears PDC does not dispute this finding.

27. After the public hearing, and before the close of the public comment period, Dr. Barrows submitted a supplemental report detailing his corrected findings regarding the sensitivity analysis, but County Staff was not able to independently verify his corrected conclusions. Once again, this finding is correct. While the conclusion was unchanged, the basis for the conclusion changed substantially, and could not be confirmed or verified.

28. Because County Staff was not able to independently verify his corrected conclusions, the County is unwilling to accept the results of the modeling as a method for ruling out the possibility that the C trenches are or have released contaminants at the site. This position is perfectly reasonable under the circumstances. As set forth elsewhere in this brief, the County is not compelled to simply accept expert testimony, but is entitled to consider it and give it the appropriate weight based upon the circumstances. The circumstances of Dr. Barrows' testimony is he stated his report was incorrect, and then he proceeded to testify about complex, technical modeling at the public hearing. He obviously had detected his error prior to the hearing, but failed or refused to submit any corrected data or report for the County to review prior to the hearing. Therefore, the County was at a distinct disadvantage to understand and fully appreciate his testimony when he testified about a new basis for his conclusions. After the close of the hearing, the materials he submitted as public comment did not adequately address the questions and concerns of the County with his evolving and changing report.

29. Mr. Liss testified for the Applicant tha thte groundwater monitoring data demonstrates the existing facility is not contributing contamination to the groundwater at the site. While this finding is accurate, PDC's response is not. This statement was rebutted by the questioning of Mr. Liss concerning the elevated chloride and sulfate concentrations in downgradient wells, as well as the testimony and submittals of Mr. Norris.

30. Mr. Norris disputed that conclusion by pointing to TOX sampling data. While PDC may dispute Mr. Norris' conclusions regarding the TOX sampling and whether it TOX data is reliable, this finding is accurate. Mr. Norris did, in fact, dispute

Mr. Liss' conclusion and discussed the use of TOX as a valid indicator parameter. There was conflicting expert testimony on this matter, and the County's finding is clearly supported by the record.

31. The County finds the surface impoundment presently located at the facility and used for the collection and storage of leachate is less protective of the public health than other areas of the facility because it is only double lined, and has no effective means of leak detection. Once again, this finding is correct. This finding does not, as PDC claims, suggest a lack of understanding by the County, but is merely a recitation of what is fact. Whether PDC proposed to remove it as a special condition or not, does not change the fact.

32. A number of opponents and their witnesses call into question the safety of the inactive portions of the site. This finding is an accurate statement.

33. County Staff indicated upon questioning at the April 3, 2006, hearing that it was their opinion that the Application as submitted did not satisfy criterion two. County Staff indicated that only with the imposition of numerous special conditions could criterion tow be satisfied. This also is an accurate statement. It does not, however, demonstrate that PDC has proven its case. It merely reflects that the evidence presented in the application and at the hearing did not, in County Staff's opinion, demonstrate satisfaction of the criterion. County Staff attempted to craft sufficient special conditions which would add sufficient measures of protection to overcome the deficiencies in the application and testimony, but whether those special conditions were sufficient was a matter for the siting authority (i.e., the County Board) to decide, not the County Staff. Therefore, the County Staff's statement at the April 3rd meeting confirms the County Board's decision.

D. Criterion iii: Compatibility.

Criterion (iii) imposes upon the applicant the obligation to minimize the incompatibility of the facility on the surrounding area. The applicant must demonstrate more than minimal efforts to reduce the landfill's incompatibility. File, 219 Ill.App.3d at 907. In fact, 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. It is well established that 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. CDT Landfill Corporation v. City of Joliet, (March 1998) PCB 98-60. In the present case, PDC did not even attempt to propose any efforts or actions to minimize the impacts on nearby (within a few hundred feet) surrounding neighborhoods. The applicant offered nothing to minimize views, nothing to minimize noise, nothing to reduce or eliminate potential releases to the air. The applicant proposed absolutely nothing.

As pointed out previously, there is no dispute that PDC proposes to locate a hazardous waste landfill within a few hundred feet of residential housing. Not just a residence, but whole neighborhoods full of houses and apartment buildings. The proposed location of the landfill is on the doorstep of the City of Peoria. If not for the existing hazardous waste landfill at the location, there is no way anybody, PDC included, would be proposing to locate a new hazardous waste landfill so close to the population center of the City of Peoria and the County, not to mention directly over the drinking water aquifer that supplies drinking water to the vast majority of the residents. Pursuant to applicable Board and appellate opinions, even with expansions of existing facilities, the applicant must prove the proposed facility is designed to minimize incompatibility with the existing and surrounding land uses. PDC failed to do so.

It is important to note that the County did not previously approve the site of the existing landfill. Back in the early 1980s, the County was denied the opportunity to conduct siting proceedings regarding the original hazardous waste landfill. However, at that time, as previously mentioned, the County Board passed a resolution, stating it was the County's policy to oppose the disposal of hazardous waste over the drinking water aquifer in the County. (C139599). Therefore, it has been the County's longstanding position that this site would not be an acceptable site for a hazardous waste landfill. As a result, it should come as no surprise that in its first opportunity to weigh in on the location, the County found it unacceptable.

While PDC contends the site will be "virtually" invisible from "most" residential areas, the testimony of its witness, Mr. Lannert directly contradicts that statement. During his testimony, Mr. Lannert stated as follows:

> Q … did I hear you correctly when you said you don't think that another five stories going up in the air in the back yards of those people abutting that area will be noticed ?
>
> A Oh, no, you'll notice it. Because again, you can see in the before picture it had the horizon on the existing land form at this location, and then after the 45 feet was added it came up to this height. So you, you will see that progression of growth as you view it from your windows if you are particularly in that apartment complex. And there are some scattered views from the other cul-de-sacs surrounding that area.

(Tr. 2/23/06, 263/4-17, C7523). Mr. Lannert also testified that "you will see the land form start to grow." (Id., 255/6-7, C7521). He also stated "[s]o it will be a dirt project until it's finished and then covered." (Id., 255/18-19, C7521). While Mr. Lannert testified that "he liked watching [a landfill] being built" from his house since that was his "business", it was certainly within the County's discretion to discount that type of testimony. (See, Tr. 2/23/06, 237/9-11, C7516). Mr. Lanner's testimony calls into question the reasonableness of all of his conclusions regarding compatibility.

It is hard to imagine most citizens of the City of Peoria and/or Peoria County desire a 15 year construction project taking place in plain site of their backyard, and particularly not when it is an operating hazardous waste landfill. Certainly, the vast majority of the public comment from the citizens was that they did not want such a facility in close proximity to the large population center. Perhaps the proposed expansion would be compatible for someone like Mr. Lannert who is in the business and enjoys watching long-term constructions projects from his backyard. But, that should not be the standard for the community, and clearly is not a standard the County had to accept. Despite the obvious visual impacts testified to by PDC's witness, the facility did not propose any efforts of any type to minimize conflicts with surrounding properties. Not even screening berms were proposed in the application.

At least in Waste Management of Illinois, Inc. v. IPCB (2nd Dist. 1984), 123 Ill.App.3d 1075, 463 N.E.2d 969, 79 Ill.Dec. 415, the applicant proposed screening berms and vegetation. That case involved a proposed expansion of an ordinary sanitary waste landfill, not a hazardous waste landfill. The facility when full, would consist of a 30 acre mound with a height above grade of 70 to 90 feet. There were "several homes" within 500 feet of the site, 45 homes within 1,000 feet, and 935 homes and several apartments within one mile. Id., 123 Ill.App.3d at 1089, 463 N.E.2d at 980. The county found that the applicant had not satisfied criterion iii. The Board concurred finding Mr. Lannert's testimony was insufficient to establish the compatibility component of criterion iii, even though the berms were proposed.

In the instant case, the County was dealing with a hazardous waste landfill located within a few hundred feet of fully developed residential neighborhoods, thousands of homes within a mile, and a final elevation of hundreds of feet above grade, and the applicant did not even propose screening berms. If the local siting authority's finding of failure to satisfy criterion iii was upheld in Waste Management case, the County's decision in this case certainly should be upheld as well.

PDC's brief argues the Board should "apply its superior technical expertise to determining what evidence was competent, relevant and scientifically valid." While the County disputes that the Town & Country decision changed the Board's standard of review of the local siting decision, even if PDC's argument were to be accepted by the Board, it would not apply to criterion iii. Compatibility or incompatibility of land uses is not something for which the Board has technical expertise. In fact, if anybody has expertise in this area, it would be the County Board, which deals with zoning issues and compatibility issues on a regular and continuing basis. Therefore, even if the Board is free to exercise its own review of the facts based upon its technical expertise, it should still give great deference to the siting authority's decision regarding compatibility.

The County's detailed findings of fact on criterion iii are fully supported by the record, as demonstrated as follows:

1. Surrounding land uses are a mix of open space, agriculture, industrial and residential. Amazingly, PDC does not contest this finding of fact.

2. The testimony and report in the record state the site is separated from surrounding land uses by natural buffers, vegetative screening, and natural topography, but with an expansion the natural buffers are not as effective. The evidence is that the site is visible as it presently stands, prior to any vertical or horizontal expansion. The photographs offered both by PDC's witness as well as by citizens shows the present landfill form in plain view from residential properties. As demonstrated above, once the expansion begins, the activities will be in full view of these residences which are as close as 300 feet from the landfill. The best Mr. Lanner could testify to about the views during the winter months when the leaves are off the trees was that the view would be "filtered." This does not make the landfill "virtually invisible."

3. A significant portion of the residential property is in relative close proximity to the proposed facility. PDC's response admits the truth of this finding. In other site proceedings, ordinary landfills were found to be incompatible with a few residences some 500 feet away, and a transfer station was found to be incompatible with open use when it wasn't screened from view. This is a hazardous waste landfill, already in view, sitting virtually on top of residential neighborhoods, and the applicant wants to make it some five (5) stories higher.

4. A 45 fot increase in vertical height of this landfill will have a noticeable and demonstrable effect on surrounding properties. There is ample evidence in the record to this effect. The site is not "virtually invisible" and certainly won't be if the expansion is granted. PDC's offer to abandon its proposed expansion over Cell C-1 was not part of the record and could not be considered by the County, since it was offered after the close of the public comment period.

5. The County did note that during the Applicant's presentation certain before and after images of what the proposed facility will look like from various positions in the neighboring residential areas showed that in a few locations the top of the proposed facility will be visible to neighboring residential properties. As set forth above, this finding is accurate and true, and further supports the County's decision on this criterion.

6. Numerous individuals commented during the public comment period that they were totally unaware of the facility until the siting process started, but are aware now. This statement is accurate.

7. A 45 foot increase in vertical height of this landfill will have a noticeable visual impact on surrounding residential properties. This is a logical and rational conclusion for the County Board to draw from the evidence in the record. The record contains photographs and computer generated images which clearly show the vertical expansion of the landfill will be readily visible on surrounding residential properties. It certainly cannot be stated that such a conclusion is against the manifest weight of the evidence.

The foregoing review of the County's findings of fact demonstrate that they were clearly based upon the record, and substantiate the County's decision that criterion iii had not been met. Furthermore, as previously stated in this brief, even if the Board finds that it has the authority to utilize its technical expertise regarding environmental regulation and permitting of pollution control facilities to re-weigh the evidence which the County has already analyzed and weighed, it should not re-weigh the evidence on this criterion because the County has the expertise, experience, and insight into issues of compatibility of conflicting land uses. Therefore, the Board should defer to the County's determination on this criteria and uphold the County's decision as consistent with the manifest weight of the evidence.

E. Criterion v: Plan of Operations.

As and for its statement of facts and law and argument regarding PDC's appeal of the County's decision regarding criterion v, the County hereby adopts and incorporates by reference the facts set forth in the County's Response to PDC's Motion for Partion Summary Judgment (Criterion v) and the Memorandum in Support thereof, filed with the Board by the County on October 5, 2006.

F. Decision Supported by Manifest Weight of the Evidence.

The Board's review of the County's decisions regarding the disputed criterion is based upon the manifest weight of the evidence. 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. The Board, on review, is not to reweigh the evidence. 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. Pollution Control Board (3rd Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1195. Merely because the County 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. (August 30, 1990), PC 90-94, aff'd File v. D&L Landfill, Inc. (5th Dist. 1991, 219 Ill.App.3d 897, 579 N.E.2d 1228. As amply demonstrated above, there was contradictory and impeaching evidence offered to rebut PDC's witnesses. As such, the County's findings of fact must stand.

PDC's brief references and attempts to incorporate the Board's brief filed with the Illinois Supreme Court in the Town & Country Utilities case. PDC appears to attempt to use the Board's brief to argue that the local siting authority's decision is not to be given any weight, and that it is up to the Board to make findings of fact and determinations of credibility. Clearly, the proposition articulated by PDC is contrary to the long standing, well established principals of review set forth in the Board's numerous opinions and order, as well as the relevant appellate court opinions. In fact, the Board's brief at the top of page 26 specifically states that "[t]he Board is not to reverse the local siting authority's decision unless that decision is against the manifest weight of the evidence." Citing File v. D&L Landfill, Inc. 219 Ill.App.3d 897, 901, 579 N.E.2d 1220 (5th Dist. 1991). The Board's brief in that case does not advocate for a new standard of review by the Board of the siting authority's decision, it merely purports to clarify what decision a reviewing appellate court reviews. What PDC argues is exactly what the Board's brief says it is not trying to do – i.e., diminish the role of the local siting authority.

Furthermore, PDC's argument has been raised, "addressed and rejected on numerous occasions." McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991) 207 Ill.App.3d 477, 487, 566 N.E.2d 26, 33, 152 Ill.Dec. 498,505. The court in that case directly addressed the argument that the county board does not have the expertise to resolve technical issues, and therefore the Board should do so. As stated by the court in that case:

> "The county board has been charged by the legislature with the primary responsibility for deciding the public health ramifications of landfill siting. The PCB may not reweigh expert testimony to decide which expert is more qualified and more believable. [citations omitted]"

Id.

In the present case, the dispute criterion were hotly contested throughout the proceedings by the applicant and by the citizen groups. There was plenty of evidence submitted into the record in support of both sides on the disputed criterion. County Staff, assisted by environmental engineering consultants, fully analyzed all of the data, testimony, and evidence in the record, and concluded that PDC had not met its burden of proof in satisfying the nine statutory criterion. Staff concluded that only with numerous special conditions, including a perpetual care fund which PDC originally offered at the hearing but now attempts to throw out as impermissible, could the Staff recommend approval to the County Board. Based upon the conflicting expert testimony, the County Staff reports, and all of the evidence in the record, it cannot be said the Board decision was against the manifest weight of the evidence.

PRAYER FOR RELIEF

WHEREFORE, Respondent, the Peoria County Board, prays that this Board deny Petitioner's request for relief in this appeal, and dismiss its Petition with prejudice, and award Respondent, Peoria County Board, such other and further relief as is deemed appropriate under the circumstances.

Respectfully submitted,

By:_____
One of its attorneys

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY	**)**	
	)	
Petitioner,	**)**	
	)	**PCB 06-184**
v.	**)**	**(Pollution Control Facility Siting**
	)	**Appeal)**
PEORIA COUNTY BOARD,	**)**	
	)	
Respondent.	**)**	

AFFIDAVIT OF SERVICE

The undersigned, being duly sworn upon oath, states that a copy of the attached Brief of Respondent Peoria County Board, was served upon the following persons by enclosing such documents in separate envelopes, addressed as follows, and depositing said envelopes in the U.S. Postal Service mail box at Morton, Illinois on the 5th day of April, 2007, before 5:00 p.m., with all fees thereon fully prepaid and addressed as follows:

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Hearing Officer
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Peoria, IL 61602

Dated: April 5th, 2007.

_____
David A. Brown

Subscribed and sworn to before me, a Notary Public, in the County and State as aforesaid, this 5th day of April, 2007.

_____
Notary Public

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY	**)**	
	)	
Petitioner,	**)**	
	)	**PCB 06-184**
v.	**)**	**(Pollution Control Facility Siting**
	)	**Appeal)**
PEORIA COUNTY BOARD,	**)**	
	)	
Respondent.	**)**	

NOTICE OF FILING

PLEASE TAKE NOTICE THAT on the 5th day of April, 2007, David A. Brown, on the attorneys for Respondent, Peoria County Board, filed its Brief of Respondent Peoria County, via electronic filing as authorized by the Clerk of the Illinois Pollution Control Board.

Respectfully submitted,
PEORIA COUNTY BOARD

BY: _____
One of its attorneys

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