

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

FOX MORaine, LLC)	
)	
Petitioner,)	
)	
v.)	PCB 07- 146
)	
UNITED CITY OF YORKVILLE,)	
CITY COUNCIL)	
)	
Respondent.)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on this 24th day of September, 2008, George Mueller, one of the attorneys for Petitioner, Fox Moraine, LLC, filed via electronic filing of the attached **Motion to Compel Answers to Deposition Questions** with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

FOX MORaine, LLC

By: /s/ George Mueller
One of its Attorneys

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Fox Moraine, LLC v. United City of Yorkville
PCB No. 07-146
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CERTIFICATE OF SERVICE

I, Sharon Twardowski, a non-attorney, certify that I served a copy of the foregoing **Notice of Filing** and **Motion to Compel Answers to Deposition Questions** to the Hearing Officer and all Counsel of Record listed on the attached Service list, by sending it via Electronic Mail on September 24, 2008, before 5:00 p.m.

/s/ Sharon Twardowski

- [x] Under penalties as provides by law pursuant to ILL. REV. STAT. CHAP. 110-SEC 1-109, I certify that the statements set forth Herein are true and correct

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MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

NOW COMES Fox Moraine Landfill, LLC hereinafter (“Fox Moraine”), by its attorneys, George Mueller and Charles Helsten and moves for an order compelling deponents Jason Leslie and Wally Werderich to answer certain questions previously put to them in discovery depositions and in support thereof state as follows:

1. That Jason Leslie and Wally Werderich were Yorkville aldermen who voted to conditionally deny the Fox Moraine Siting application. However, the record is unclear as to how the aldermen voted on individual siting criteria. Their depositions were taken on September 19, 2008, at which time Leo Dombrowski, one of the attorneys for the City of Yorkville, instructed them multiple times not to answer questions concerning the public deliberations on the sitting application, the council vote on the siting application, their intentions as compared to a subsequently prepared resolution and other matters. Relevant excerpts of those depositions are attached hereto and made a part hereof as Exhibit A.

2. On May 23, 2007, the city council met for public deliberations on the siting application. Various aldermen gave statements expressing personal opinions on various aspects of the evidence. These statements were diverse and followed no

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particular outline. This process continued on May 24, 2007, at which time the city council was handed a draft resolution which apparently resolved to deny the siting application with conditions. This Resolution (a copy of which has never been made a part of this record or seen by Fox Moraine) was orally amended prior to its adoption, directing the city attorney to draft a final Resolution including or omitting special conditions as he deemed fit and appropriate. The resulting final Resolution was not reviewed by the city council and the same is attached hereto as Exhibit C. The transcript of the city council deliberations on May 24, 2007 regarding amendment and adoption of a resolution (Tr. May 24, 2007 pp 32-41) is attached hereto as Exhibit B.

3. During the deliberations on May 23 and May 24, 2007, there was never a vote on whether any individual statutory siting criteria had been proven, nor were there any written prepared finding of facts adopted. The individual aldermen did not universally express opinions with regard to each siting criterion. Additionally, there was never any vote to adopt, endorse, or incorporate any particular expression of personal opinion on the evidence from any particular alderman.

4. On May 23, 2007, the city council also received final reports including proposed findings of fact and recommendations of law from the hearing officer, Larry Clark and from the city expert technical staff. Said staff report was authored by staff attorney, Derke Price. Both of these reports recommended approval of the application with conditions.

5. On May 23, 2007, Alderman Wally Werderich advised the entire city council that if an application does not meet the statutory siting criteria on its face and

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without conditions, it must be denied. (Tr. May 23, 2007 pp 88-89) Attached hereto as Exhibit D.

6. The Resolution denying siting included all the conditions of approval recommended by the Clark report and the Price report plus some additional conditions asked for by various aldermen.

7. The Resolution tendered to Fox Moraine as the final decision of the city council (Exhibit C) recites Fox Moraine's alleged failure to prove statutory siting criteria 1, 2, 3, 5, 6, 8, 9 and 10, with criterion 10 being the operator experience. (See 415 ILCS 5/39.2(a)(i -ix)). In the prior personal statements by aldermen, there was little or no discussion on several of these substantive criteria.

8. In the foregoing context, the deposition questions in Exhibit A were asked. There is ample reason to believe from the entire record and the references cited herein that some or all of the aldermen did not know what they were voting on, that there was no majority for the legal finding that one or more siting criteria had not been met and that no findings of fact were ever adopted.

9. The basis for the refusal of aldermen Leslie and Werderich to answer certain questions as directed by one of the City's attorneys is that said questions allegedly invaded the deliberative process privilege. The Illinois Supreme Court has ruled that there is no deliberative process privilege which protects public officials from disclosures. People, ex rel Joseph Birkett vs. City of Chicago, 184 Ill. 2nd 521, 705 NE 2d 48 (1998). (Attached hereto as Exhibit E) In *Birkett* the Court also found that privileges exempting disclosure under the Freedom of Information Act are not applicable to disclosure in litigation. Lastly, the Court found that refusal to disclose information by public officials

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is not favored, that claims of privilege are not favored and that accordingly privileges exempting disclosure cannot be created by judicial decision but only by the legislature.

10. Even if there is some limited deliberative process privilege applicable here (and Fox Moraine maintains that prior PCB precedent to that effect has been overruled by *Birkett*), the questions put to Alderman Leslie and Werderich, which are the subject of this motion, did not invade that privilege. The questions did not ask the aldermen why they voted a certain way or how they arrived at a certain decision or why they believed certain evidence and not other evidence. Instead, the questions merely asked the aldermen what they believed to be the facts and more relevantly what they believed that they were voting on. Given the procedural and logical inconsistencies created by attempting to deny an application with conditions and by not voting whether individual criteria had been proved, the questions represent a fair inquiry into whether Aldermen Leslie and Werderich even knew what was happening, both procedurally and substantively, on May 23 and May 24, 2007. Petitioner has the right to know how the aldermen intended to vote and whether the record, which purports to be a denial on all but two criteria, is an accurate reflection of their intentions. Additionally, the questions sought answers to a line of inquiry regarding whether the aldermen voted in a manner consistent or inconsistent with their public statements. This would be probative of whether they understood or failed to understand what they were voting on. An inquiry into whether a recorded vote as expressed in a Resolution prepared after the fact accurately expresses the intent of the voter is clearly appropriate. Furthermore, questions regarding the aldermen's agreement or disagreement with various aspects of the hearing officer's report and the expert staff's report are appropriate in light of the fact that the

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recommended conditions of approval from those reports were incorporated in the final resolutions.

WHEREFORE, Fox Moraine prays for an order directing Aldermen Leslie and Werderich to answer the questions set forth in Exhibit A and similar questions related to the answers provided.

Respectfully submitted,

FOX MORaine, LLC

By: /s/George Mueller
 One of its attorneys

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Deposition excerpts

LESLIE EXCERPTS
Deposition taken Sept. 19, 2008

1. Q Do you have any criticisms of Larry Clark and/or his recommendations?

MR. DOMBROWSKI: Well, I am gong to object to the form of the question. I am also going to object and instruct he witness not to answer. You are crossing the line here and invading the deliberative process privilege.

Pp 44, 45

2. Q Now, at some point, you were given an opportunity to discuss your feelings concerning the application and that occurred on May 23rd. Do you recall what you said that night?

A I believe I stated what criterion, what I felt, A, we made a vote and I believe I referenced the criteria that I, that were the basis of my vote specific to the 9/10 criteria.

Q Okay. And do you recall which criteria you believe to have not been met?

MR. DOMBROWSKI: All right. I am going to instruct the witness not to answer.

Pg 58

3. You don't know which board members believe or belied as of May 23rd or 24th that Criterion 1 was not met, do you?

MR DOMBROWSKI: Object on the same basis and I am instructing the witness not to answer.

Pg 61

4. Q Which City Council members voted no as to Criterion 1?

MR. DOMBROWSKI: Object to the form of the question. Instruct the witness not to answer.

EX A

Pg 61

5. Q Was any specific vote taken as to Criterion 1?

MR. DOMBROWSKI: Same objections. Instructing the witness not to answer.

Pg 62

6. Q And which specific criteria were you concerned about?

MR. DOMBROWSKI: I am going to object to the form of the question and instruct the witness not to answer.

Pg 65

7. Q Your statement, your comments on May 23, 24 2007, which are contained in the transcript indicate that you chose Criterion Nos. 3, 6 and 8. What did you mean by you chose Criterion 3, 6 and 8?

MR. DOMBROWSKI: Again, I am going to instruct the witness not to answer on the same basis.

Q Isn't it true that the only criteria that you believed had not been met were Criterion 3, 6 and 8?

MR. DOMBROWSKI: Again, this is totally improper and I am instructing the witness not to answer.

Pg 65, 66

8. Okay. At no time did you make any comments that you did not believe Criterion 1 for need had not been met; is that correct?

MR. DOMBROWSKI: Same objections and I am instructing the witness not to answer.

Pg 67

9. You don't know which aldermen, if any, agreed with you that Criterion 3 had not been met, correct?

MR. DOMBROWSKI: Same objections. Also calls for speculation and I am instructing the witness not to answer.

...

Q Do you know whether any other of the aldermen voted to find the Criterion 3 had not been met?

MR. DOMBROWSKI: Same objections. I am instructing the witness not to answer.

Pp 67, 68

10. Q You never intended to vote that Criterion 1 had not been met, correct?

MR. DOMBROWSKI: Same objections and I am instructing the witness not to answer.

...

Q And did you intend to vote no as to Criterion 2?

MR. DOMBROWSKI: Same objections.

Pp 68, 71

11. Q As to Criterion 4, did you intend to vote no to Criterion 4?

MR. DOMBROWSKI: Same objections and I am instructing the witness not to answer.

BY MR. PORTER:

Q As to Criteria 5 through 8, did you intend to vote no as to any one of those specific criteria?

MR. DOMBROWSKI: Same objections, and I am instructing the witness not to answer.

12. Q As you sit here today, you do not know if the majority of the City Council members believed the Criterion 1 had not been met, correct?

MR. DOMBROWSKI: I will object and instruct the witness not to answer. It's also been asked and answered.

...

Q I am going to ask the same question as to Criterion 2 through 9. As you sit here today, you do not know if a majority of the City Council members believed that any of the specific Criteria 2 through 9 had not been met?

MR. DOMBROWSKI: Same objections and I am instructing the witness not to answer.

Pp 87, 88

13. Q Why did you vote the way you voted?

MR. DOMBROWSKI: I object and I'll instruct the witness not to answer.

Pg 89

WERDERICH EXCERPTS

Taken from the
Discovery Deposition of Walter Wederich
September 19, 2008

1. Q Well, let me move on. Did you have a chance to review Larry Clark's report and recommendations before you voted?

A Yes.

Q Was there anything in his report and recommendations that you disagreed with?

MR. DOMBROWSKI: I object to the question. That invades the deliberative process privilege. I am going to instruct the witness not to answer.

Pg 64

2. Q Did you review the report of the city staff as authored by Derke Price?

A Yes.

Q Was there anything in that report that you disagreed with?

MR. DOMBROWSKI: Same objections and I am instructing the witness not to answer.

Pp 64

3. Q Well, do you believe this accurately expresses your sentiments at that time?

A This is what's on the record for what I had to say.

Q And I interpret as what you are reading to be that the application in your opinion should have been denied if it didn't meet the criteria on its face even if it could have met the criteria with special conditions?

MR. DOMBROWSKI: I am going to object to the question and instruct the witness not to answer. You are asking him why he wrote it the way he wrote it.

...

Q Then let me, to make it clear, ask you, why did you say what should be taken into consideration is the fact that the application must be judged on its face, not based upon the conditions which are suggested to be included by either Derke Price or the hearing officer?

MR. DOMBROWSKI: What is the question?

MR. MUELLER: Why did he say that.

MR. DOMBROWSKI: All right. I am instructing him not to answer based on what I've just said. Also, it's the people of the City Council who are entrusted by the Statute to make the decision. Not the hearing officer and not Mr. Price.

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MR. MUELLER: Well, I don't think this has anything to do with who is making the decision. I think it has to do with whether an application that satisfies the criteria with conditions ought to be denied.

MR. DOMBROWSKI: Same objections.

MR. MUELLER: Are you instructing him not to answer any questions along this line of inquiry?

MR. DOMBROWSKI: You are correct.

Pp 67, 68, 69

1 feelings toward anyone here tonight or after.

2 Thank you.

3 (Applause.)

4 MAYOR BURD: Do we have any other

07:43PM 5 comments?

6 MR. ROTH: If there is no further

7 deliberation, then I think it is appropriate that

8 a motion be made for or against or with

9 conditions. And based upon that in a second,

07:44PM 10 there can be further deliberation on that or you

11 give us the direction as to how you would like to

12 revise the resolutions that we have put before

13 you.

14 Again, I want to emphasize that we

07:44PM 15 prepared resolutions for your consideration based

16 upon what we heard last night. Obviously more has

17 been stated tonight and those resolutions, if you

18 direct, will need to be revised. And what I would

19 recommend is that you vote on one measure or

07:44PM 20 another, give us direction, we will prepare the

21 resolution, and then the mayor can sign it

22 tomorrow.

23 MAYOR BURD: I would like to entertain a

24 motion --

EX B

1 MR. PLOCHER: I would like to make a
2 motion to approve the denial resolution with
3 restrictions, including all new restrictions.

4 MAYOR BURD: Do I have a second?

07:44PM

5 MR. WEDERICH: Second.

6 MAYOR BURD: We have a second? Alderman
7 Wederich, okay. Could we have discussion, please.

8 MR. MUNNS: Is this the middle ordinance
9 you wrote, the denial with conditions?

07:45PM

10 MR. ROTH: Yes.

11 MR. MUNNS: There is three. This is the
12 middle one of the three?

07:45PM

13 MR. ROTH: Yes. Mayor, if I may make a
14 comment, and I think it is for the benefit of the
15 city in the process. While we will certainly
16 respect whatever direction you give us, I think
17 you need to be careful about setting conditions
18 that would not be permissible by law. And I can
19 tell you that the purpose of establishing

07:45PM

20 conditions is to -- is to allow for reasonable,
21 necessary, and appropriate conditions in order to
22 meet the siting criteria. It is the siting
23 criteria. So there are certain things that I
24 think are out of the jurisdiction of the city to

1 determine. Now, that doesn't mean that if you
2 include them in the resolution that you are
3 proposing, that that resolution is going to fail.
4 But I want to caution you against having this
07:45PM 5 matter quickly sent back based upon certain
6 conditions, and there was a couple of them there
7 that I want to be clear about.

8 One, it is the petitioner's or the
9 applicant's right to determine what the service
07:46PM 10 area is and it is not for the city to make that
11 determination for them, even by way of a
12 condition. So to make a -- set a condition, for
13 example, that the City limits -- that the service
14 area be limited to Kendall County, if that's not
07:46PM 15 what the petitioner has so directed, I don't think
16 that's appropriate.

17 Second, the courts have evaluated
18 the standard of what is reasonable and appropriate
19 conditions, and they have -- they have considered
07:46PM 20 other governing bodies in position of conditions
21 that established extraordinarily high financial
22 requirements that were not rationally related to
23 specific siting criteria, so I would caution you
24 against a condition, for example, that sets a

1 \$10 million flat fee.

2 Next, as to the condition that's
3 recommended that a court of jurisdiction would
4 only be included with the court of Kendall County,
07:47PM 5 I would caution you against that. That kind of a
6 term would be decided by the law and couldn't be
7 decided by the City.

8 And, finally, certain of these
9 criteria or conditions that you have -- that
07:47PM 10 members have spoken about are clearly related to
11 the host agreement and the host agreement speaks
12 for itself on that. So obviously there were a
13 number of operational, siting, design conditions
14 that were articulated tonight, and so I understand
07:47PM 15 the resolution to include those that I have not
16 specifically mentioned.

17 MS. SPEARS: May I ask a question
18 regarding Kendall County?

19 MR. ROTH: Yes.

07:48PM 20 MS. SPEARS: Could we say rather than
21 going to an arbitration board, that we could just
22 go to a -- it goes to court?

23 MR. ROTH: I think that what I am
24 understanding you to say is that you are speaking

1 to terms of the host agreement rather than to the
2 terms of the enforcement of your resolution of
3 ordinances.

4 So, again, the court of
07:48PM 5 jurisdiction is going to be the county court, but
6 there are exceptions under the law where it is
7 sometimes the right of one party or another to
8 take a case outside of this county, and that is
9 not going to be for us to say. That would be for
07:48PM 10 a judge to say. And, again, what I understand you
11 to be speaking to is the host agreement anyway,
12 and I don't think that this is the appropriate
13 place to establish terms for a host agreement.

14 MS. SPEARS: Okay, thank you.

07:49PM 15 MR. MUNNS: Madam Mayor, I have one
16 question too on the process for Mr. Roth. If this
17 is appealed and it goes to the state, does it ever
18 come back to us to re-discuss or vote?

19 MR. ROTH: Well, it is within the
07:49PM 20 Pollution Control Board's authority to remand a
21 case, so it could reverse and then the case could
22 go directly to the Appellate Court or it could be
23 remanded or it could be remanded by order of the
24 Appellate Court. So it is possible, not highly

1 common but it is possible, that the matter could
2 come back to the City. And that's the reason that
3 we are recommending that if it did, there be a
4 clear message as to strong conditions that be
07:49PM 5 required.

6 MR. MUNNS: So you recommend keeping
7 some of this information we have instead of
8 throwing it all away.

9 MR. ROTH: Yes, I do.

07:49PM 10 MR. MUNNS: Thank you.

11 MAYOR BURD: I would like to ask the
12 aldermen to amend the conditions, or -- to this
13 resolution to allow the attorney to make sure that
14 they are in compliance with what conditions should
07:50PM 15 be so that we don't add anything that's not
16 allowable that does not pertain to the host
17 agreement, the annexation agreement, that is not
18 supposed to be in this resolution. So if that
19 would be possible, I would like to amend it.

07:50PM 20 Could -- would one of you make a motion to amend?

21 MR. ROTH: If I may suggest -- I think
22 there is a motion on the -- well, there is not a
23 motion on the table yet.

24 MAYOR BURD: Yes, there is.

1 MR. ROTH: There is. Excuse me, there
2 is a motion on the table, that's right.

3 MAYOR BURD: Okay. Do I have a motion
4 to amend? Aldermen Plocher. Do I have a second?

07:51PM 5 MR. WEDERICH: Second.

6 MAYOR BURD: Okay. Could we have a roll
7 call on the amendment?

8 MS. PICKERING: Werderich.

9 MR. WEDERICH: Aye.

07:51PM 10 MS. PICKERING: Munns.

11 MR. MUNNS: Aye.

12 MS. PICKERING: Plocher.

13 MR. PLOCHER: Aye.

14 MS. PICKERING: Spears.

07:51PM 15 MS. SPEARS: Aye.

16 MS. PICKERING: Sutcliff.

17 MS. SUTCLIFF: Aye.

18 MS. PICKERING: Besco.

19 MR. BESCO: I'm sorry? What are we --
07:51PM 20 all of the conditions that were placed? Is that
21 what we are --

22 MAYOR BURD: The amendment is to allow
23 our attorney to remove any illegal conditions, any
24 of them that pertain to the host agreement, the

1 annexation agreement, anything that we cannot
2 legally ask for.

3 MR. BESCO: Right. Aye.

4 MS. PICKERING: Leslie.

07:51PM 5 MR. LESLIE: Aye.

6 MS. PICKERING: Golinski.

7 MR. GOLINSKI: Aye.

8 MAYOR BURD: All right. Now we are back

9 to discussion on the resolution itself. Does

07:52PM 10 anybody want to speak to the resolution on the

11 floor? The resolution is on the floor with the

12 appropriate conditions, so we will move ahead then

13 with the roll call vote.

14 MS. SPEARS: Excuse me, can you clarify

07:52PM 15 that one more time for us?

16 MAYOR BURD: Okay. What we are voting

17 on is denial -- where is it -- denial of siting

18 application from Fox Moraine, LLC for proposed

19 landfill in the United City of Yorkville with

07:53PM 20 conditions. And it has been amended with all the

21 conditions that were stated here tonight except

22 those that are illegal and should not be included.

23 MS. SPEARS: And that's only if it is

24 returned, correct?

1 MAYOR BURD: Right. That's the one you
2 are voting on. Is everybody okay with that?
3 We're all set? We all know what we're -- with
4 restrictions, denial resolution with restrictions.
07:53PM 5 Anybody have any other questions? It is to
6 include all of the added conditions that were
7 proposed tonight except for those that are illegal
8 and should not be included, okay?

9 MS. PICKERING: Munns.

07:53PM 10 MR. MUNNS: Aye.

11 MS. PICKERING: Plocher.

12 MR. PLOCHER: Aye.

13 MS. PICKERING: Spears.

14 MS. SPEARS: Aye.

07:53PM 15 MS. PICKERING: Sutcliff.

16 MS. SUTCLIFF: Aye.

17 MS. PICKERING: Besco.

18 MR. BESCO: Nay.

19 MS. PICKERING: Leslie.

07:54PM 20 MR. LESLIE: Aye.

21 MS. PICKERING: Golinski.

22 MR. GOLINSKI: Aye.

23 MS. PICKERING: Werderich.

24 MR. WEDERICH: Aye.

1 MAYOR BURD: Okay, motion carries. We
2 have no other business before us tonight. I would
3 entertain a motion to adjourn.

4 MR. LESLIE: So moved.

07:54PM

5 MS. SPEARS: Second.

6 MAYOR BURD: All in favor?

7 (Chorus of ayes.)

8 MAYOR BURD: Any opposed?

9 (No response.)

07:54PM

10 MAYOR BURD: We are adjourned. Thank
11 you very much.

12 - - -

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RESOLUTION NO. 2007-36

**DENIAL OF SITING APPLICATION FROM
FOX MORaine, LLC FOR A PROPOSED LANDFILL
IN THE UNITED CITY OF YORKVILLE**

WHEREAS, Fox Moraine, LLC (the "Applicant"), pursuant to the Illinois Environmental Protection Act (415 ILCS 5/39.2 *et seq.*) (the "Act") and the United City of Yorkville Pollution Control Facility Siting Ordinance (City Code Title 8, Chapter 14) (the "Ordinance") filed an application on December 1, 2006 for siting approval for a proposed landfill (the "Application") in the United City of Yorkville to be named the Fox Moraine Landfill (the "Landfill"); and

WHEREAS, pursuant to the Ordinance, Mr. Larry M. Clark was appointed as Hearing Officer; and

WHEREAS, in compliance with the Act and the Ordinance, public hearings were held regarding the Application beginning on March 7, 2007 and continuing from time to time until April 20, 2007 for a total of 23 days of public hearing, comment, and argument; and

WHEREAS, the City Council has reviewed the Application; and

WHEREAS, the City Council has received into evidence and reviewed numerous exhibits, Power Point presentations, and other relevant documents; and

WHEREAS, the City Council has received and reviewed public comments from numerous residents, non-residents, entities and political subdivisions both supporting and opposing the Application; and

WHEREAS, the City Council has received and reviewed a report from counsel for the city staff regarding the Application; and

WHEREAS, the City Council has received and reviewed the hearing officer's report and recommendations regarding the Application; and

WHEREAS, under Section 39.2 of the Act, the City Council may grant siting approval to the Applicant only if the proposed Landfill meets all of the statutory criteria set forth in Section 39.2 of the Act; and

WHEREAS, after consideration of the public record in this matter, including but not limited to the hearing testimony, oral comment, evidence, and written comment timely submitted, and the criteria set forth in Section 39.2 of the Act and in the Ordinance, the City Council has found and determined that the criteria set forth in Section 39.2 of the Act have not been satisfied by the Applicant.

NOW, THEREFORE, BE IT RESOLVED by the United City of Yorkville that:

EX C

1. The Application of Fox Moraine, LLC for siting approval for a landfill in the United City of Yorkville is hereby denied; and
2. The United City of Yorkville finds, for the reasons set out in the record of these proceedings, including but not limited to the reasons stated at the Special Meetings of the Yorkville City Council held on May 23 and May 24, 2007, that the following criteria, as set forth in Section 39.2 of the Act, were not met (i), (ii), (iii), (v), (vi), (viii) and (ix) (previous operating experience and past record of the Applicant, Fox Moraine, LLC and its proposed operator, Fox Valley Landfill Services, LLC; this is also commonly referred to as the "Tenth Criterion."); and
3. The certified transcription of the deliberations and decision on the Application conducted by the City Council of the United City of Yorkville at its Special Meetings held on May 23 and May 24, 2007, at which this Resolution was approved, be attached hereto as Exhibit "A" and repeated and incorporated herein as part of the written decision of the United City of Yorkville on the Application; and
4. Should this decision of the City Council be reversed and remanded with instructions to approve the Application, the Host City Agreement dated September 26, 2006 between Fox Moraine LLC and the United City of Yorkville shall become a condition and shall become a contract binding upon both the City and Fox Moraine LLC., and such approval shall be also conditioned upon the following being satisfied:

(A) the conditions set forth in the memorandum of Derke Price/Staff to the Mayor and City Council, dated May 18, 2007, attached hereto and incorporated herein as Exhibit "B", which conditions are numbered 1.1 and 1.2; 2.1 through 2.39; 3.1 through 3.9; and 6.1 through 6.4;

(B) the conditions set forth in the Findings and Recommendations of Hearing Officer, Larry M. Clark, attached hereto and incorporated herein as Exhibit "C", which are conditions are directed to Criterion (vi), and which are numbered 1. and 2., found at page 10 of the Findings and Recommendations;

(C) Construction of the Landfill may not commence until the Prairie Parkway has been fully constructed from I-88 on the north to I-80 on the south and is fully operational and open to traffic, provided however that, as constructed, the Prairie Parkway contains an interchange at the intersection of Illinois Route 71 and the Prairie Parkway;

(D) Hours of Landfill operation shall be limited to: (i) from 6:00 a.m. to 4:30 p.m. Monday through Friday; and (ii) from 6:00 a.m. to 12:00 p.m. (noon) on Saturday;

(E) No truck traveling to or from the Landfill may pass through downtown Yorkville;

(F) No truck traveling to or from the Landfill may pass through downtown Plainfield;

(G) Neither Hollenback Creek nor any tributary of Hollenback Creek shall be rerouted or rechannelized;

(H) The Applicant shall test all private water wells within a 10-mile radius of the Landfill on a quarterly basis (every three months) and promptly provide the results to the well owner and user, if different from the well owner;

(I) As part of its post-closure plan, the Applicant shall establish an escrow account sufficient to pay for the costs to landscape and maintain the Landfill for a 25-year period;

(J) The Applicant shall provide an irrigation plan for the Landfill;

(K) The Landfill shall accept no more than 4,000 tons of waste per operating day (this is not an average, but shall be a daily maximum);

(L) The liner system shall be designed to include a geosynthetic clay liner sandwiched between two 60-mil geomembranes for the entire Landfill;

(M) The entire Landfill liners shall be tested to detect factory defects and any damage caused during installation;

(N) All storage tanks, containing leachate or any other substance, shall be aboveground tanks;

(O) All aboveground storage tanks shall meet AWWD-100 or API-650 standards;

(P) All run-off from the wheel wash basin and stormwater falling in the paved area shall be monitored on a daily basis;

(Q) The Landfill shall be restricted to a peak height of 50 feet above the surrounding natural grade;

(R) The Applicant and Landfill operator shall provide all information regarding their respective operating experience and record of actual or alleged violations as required by the Ordinance; and

(S) All Landfill groundwater monitoring wells shall be installed and operational prior to waste placement in any Landfill cell.

BE IT FURTHER RESOLVED that the City Administrator be directed to transmit certified copies of this Resolution and attached Exhibits "A", "B" and "C" to Fox Moraine, LLC, 6110 State Route 71, Oswego, IL 60543, and to the parties on the attached Service List.

Passed by the City Council of the United City of Yorkville, Kendall County, Illinois, the 24th Day of May, A.D. 2007.

Electronic Filing - Received, Clerk's Office, September 24, 2008

Joseph Besco No
Gary Golinski Yes
Jason Leslie Yes
Marty Munns Yes

Joseph Plocher Yes
Rose Spears Yes
Robyn Sutoliff Yes
Wally Werderich Yes

Signed by me as Mayor of the United City of Yorkville, Kendall County, Illinois, this
24th Day of MAY, A.D. 2007.

Valerie Burd
MAYOR

ATTEST: Lisa Pickering
DEPUTY CITY CLERK

1 The City Council should
2 consider, and if it finds that Resolution 06-11
3 prohibits a landfill from being sited within the
4 corporate limits of a municipality in Kendall
5 County, then the City Council may find that the
6 proposed Fox Moraine landfill does not satisfy 05
7 Illinois Compiled -- or 415 Illinois Compiled
8 Statutes 4/39.2A, Subpart 8.

9 And, finally, I would like to
10 address some -- some case law, which is I suppose
11 considered Criterion 9, or it's included under
12 the Illinois statute as well, which is what
13 evidence has been presented to the applicant or
14 any predecessor corporation's previous operating
15 experience and past record of convictions in the
16 field of solid waste management in Lowell
17 Transfer, Incorporated versus County Board of
18 McHenry. The Illinois Pollution Control Board
19 upheld the siting, proper to consider an
20 applicant's lack of experience.

21 I would like to address the
22 applicant and the operator concerning this. The
23 applicant is Fox Moraine, LLC. The members of
24 Fox Moraine, LLC are the Hamman Family, LLC,

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1 resolution of those complaints. Since it's been
2 annexed to the City, it's also my understanding
3 that there have been several complaints made to
4 the City. The applicant also did not provide a
5 statement regarding the environmental compliance
6 record of Kodiak and Groot.

7 Finally let's look at the
8 operator. The operator is Fox Moraine -- or Fox
9 Valley Landfill Services, LLC. Fox Valley is an
10 affiliate of Peoria Disposal Companies,
11 Incorporated, PDC, a 20 percent member of Fox
12 Valley Landfill.

13 In violation of the siting
14 ordinance, the applicant did not disclose who
15 owns the remaining 80 percent of the operator and
16 the environmental compliance record of that
17 particular owner.

18 Ron Edwards of Fox Valley
19 Landfill Services, LLC, and PDC testified for the
20 applicant regarding -- regarding this. He
21 admitted that he did not include several alleged
22 violations in his hearing presentation of the
23 Peoria Development -- of PDC's compliance
24 history. Additionally, the applicant did not

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1 which owns 51 percent, and Kodiak Environmental
2 Services, LLC, which owns 49 percent.

3 The managers of Fox Moraine,
4 LLC, are Donald, Joseph, David, and James Hamman.
5 Groot Industries is the managing member of
6 Kodiak.

7 In violation of the siting
8 ordinance, no statement was provided describing
9 the operating experience of the four Hammans or
10 the Hamann Family, LLC, nor was a statement
11 provided regarding the environmental compliance
12 record of the four Hammans or the Hamman Family,
13 LLC.

14 At a minimum, we know that
15 Donald Hamman entered into a settlement agreement
16 with Kendall County in 1995 resolving odor
17 complaints at his composting operation. The
18 County has filed a complaint seeking a -- the
19 County had filed a complaint seeking an
20 injunction.

21 According to hearing testimony
22 and exhibits, there have been several citizen
23 complaints regarding Hamman's composting
24 operation since 1995. We do not know the

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1 provide this information in its application.

2 I apologize on drawing on, but
3 I wanted to make sure that there was all of this
4 information included in the record, and I
5 appreciate the time.

6 I wanted to address comments
7 made by Attorney Price and the hearing officer
8 concerning the comments that they made in the
9 landfill. I had the opportunity to briefly look
10 those over, and the first thing that I would like
11 to comment on that is that Attorney Price -- and
12 it is later followed by the hearing officer --
13 basically says that the landfill application
14 should be accepted because it will meet the
15 requirements with his conditions -- the
16 conditions that he's included in the -- his
17 decision -- or in his opinion applied.

18 What should be taken into
19 consideration is the fact that the application
20 must be judged on its face, not based upon the
21 conditions which are suggested to be included by
22 either Derke Price or the hearing officer.

23 Accordingly, when reading
24 through that, please take that into

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EX 10

1 consideration.
 2 ALDERMAN MUNNS: Is that it? In
 3 fairness, are we timing it?
 4 MAYOR BURD: I think your 20 minutes
 5 are up.
 6 ALDERMAN WERDERICH: Okay. In
 7 conclusion, I would -- I would like to say that I
 8 think that the application should be denied based
 9 upon Criterion 1, 2, 3, 6, 8, 9, and then also
 10 based upon case law.
 11 MAYOR BURD: Thank you.
 12 (Applause)
 13 MAYOR BURD: We have two Aldermen
 14 left to speak.
 15 ALDERMAN GOLINSKI: I will go very
 16 briefly.
 17 MAYOR BURD: Okay. Alderman
 18 Golinski.
 19 ALDERMAN GOLINSKI: Very briefly. I
 20 didn't prepare a speech tonight because for the
 21 last 30 days I've been waiting to analyze the
 22 input from our special counsel and experts, and
 23 when I read the agenda, it's a deliberation. I
 24 thought it would be more of a discussion of

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1 don't know if we convene tomorrow and we have
 2 time to talk before we vote. I mean, I'll
 3 discuss how I'm going to vote and why I'm going
 4 to vote, but I'm not prepared to do it right now.
 5 MAYOR BURD: From what I understand,
 6 Alderman Golinski, you were supposed to vote on
 7 the nine criteria based on the information that
 8 was presented during the hearing.
 9 ALDERMAN GOLINSKI: Yeah, I
 10 understand that, but like I said, there is a lot
 11 of information that was presented today and I
 12 think it's only right to analyze it.
 13 I understand what Alderman
 14 Werderich said, too, that you want to base your
 15 vote on the face value of the application and the
 16 sworn testimony, but, I mean, we went through
 17 this whole process with all these experts, I
 18 mean, it would be nice to analyze their input
 19 also. That's all.
 20 MAYOR BURD: I don't believe that we
 21 were getting any more input from any experts than
 22 we already have, and you're not supposed to be
 23 asking questions now to get more input from the
 24 experts. You are supposed to base it on the

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Criteria 1 through 9, so I didn't prepare a
 speech and, quite honestly, I didn't really want
 to make a decision on any criteria until I got
 their input, and I just received this today, but
 it looks to me already we have five no votes on
 several criteria already, so I do have a couple
 questions, and that's kind of why I wished that
 Derke Price was here or Larry Clark or someone
 else, because there is still questions in my mind
 that haven't been answered.

What are the consequences to
 the City with a straight no vote? The way I read
 the host agreement, it's basically null and void.

And then from that, what are
 the odds of the Pollution Control Board
 overturning our vote and we get this thing sited
 here without our host agreement? No one has
 talked about any of these consequences. And the
 first thing that I want to see is something like
 the Pontiac landfill here where there is no local
 control over it.

So, I mean, these are questions
 that are still out there, and I don't know if
 anyone here is prepared to address them, but I

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1 record as presented up until the 21st. Go ahead.
 2 ALDERMAN BESCO: Yes, Your Honor.
 3 First of all, receiving the amount of volume that
 4 we did in the last few days, first I want to
 5 thank Wally for going through the attorney -- the
 6 City Attorney Michael Roth's presentation, now I
 7 don't have to read his stuff.
 8 Second of all, still, the
 9 volume that we've received, it's almost
 10 impossible to go through, and that's why I
 11 suggested that we do go ahead and take it over
 12 until tomorrow and give us a chance to go through
 13 it.
 14 There are some things that I do
 15 have questions on, some of Derke's conclusions,
 16 and I would like to ask -- you know, it would be
 17 nice if I could ask him why he chose some of the
 18 things that he did.
 19 I honestly believe that the
 20 same thing goes for Larry Clark's testimony or --
 21 not testimony, his conclusions. I think that we
 22 need, you know, some point of clarification so we
 23 can make a decision, and I look forward to -- I
 24 don't know if -- I suppose we can't contact him

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2 of 10 DOCUMENTS



Warning
As of: Sep 23, 2008

**THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JOSEPH E. BIRKETT,
State's Attorney of Du Page County, et al., Appellees, v. THE CITY OF CHICAGO,
Appellant.**

Docket No. 84452

SUPREME COURT OF ILLINOIS

184 Ill. 2d 521; 705 N.E.2d 48; 1998 Ill. LEXIS 1916; 235 Ill. Dec. 435

December 17, 1998, Opinion Filed

PRIOR HISTORY: [***1] Appellate Court, Second District. DuPage County. CASE NUMBERS: AC2-96-1319. TR95CH0748. TRIAL JUDGE: Hon. Bonnie M. Wheaton.

DISPOSITION: Affirmed.

COUNSEL: For The City of Chicago, APPELLANT: Ms. Benna Ruth Solomon, Chief Assistant Corporation Counsel, Chicago, IL. Mr. Joseph M. Laraia, Attorney at Law, Wheaton, IL. Mr. Anton R. Valukas, Jenner & Block, Chicago, IL.

For Peo ex rel. Birkett, APPELLEE: Mr. Joseph V. Karanganis, Karanganis & White Ltd., Chicago, IL. Mr. Joseph Birkett, State's Attorney, Dupage County, Wheaton, IL.

For American Civil Liberties Union of Illinois, AMICUS CURIAE: Mr. Benjamin Wolf, Attorney at Law, Chicago, IL.

For Illinois Trial Lawyers, AMICUS CURIAE: Mr. Bruce R. Pfaff, Bruce Robert Pfaff & Associates, Ltd., Chicago, IL.

JUDGES: CHIEF JUSTICE FREEMAN delivered the opinion of the court. JUSTICE BILANDIC, dissenting.

OPINION BY: FREEMAN

OPINION

[*522] [**48] CHIEF JUSTICE FREEMAN delivered the opinion of the court:

In this appeal, we are asked to recognize a "deliberative process privilege" to protect certain advice and discussions between government officials concerning formulation of [***2] governmental decisions and policy. For the [**49] reasons that follow, we hold that the adoption of a [*523] privilege as broad-based as that sought in this case is best left to the legislature.

BACKGROUND

Defendant, the City of Chicago (City), brought this appeal from a trial court order holding it in contempt for refusing to produce certain documents sought by plaintiffs, Du Page County, the Du Page County State's Attorney, and the municipalities of Bensenville, Elmhurst and Wood Dale, during the course of underlying litigation. In the underlying suit, plaintiffs requested declaratory and injunctive relief, alleging as follows. Plaintiffs are located in close proximity to O'Hare International Airport, which is owned and operated by the City, and have suffered ongoing severe noise, air pollution and safety concerns resulting from incoming and outgoing flights. Plaintiffs charged that the City had completed extensive construction to O'Hare, without obtaining a certificate of approval from the Illinois Department of Transportation (IDOT) as required under the Illinois Aeronautics Act (Act) (620 ILCS 5/47 (West 1994)). In addition, the City had plans to proceed with even larger new expansion and [***3] alteration projects, all without procuring the required certificate from IDOT. According to plaintiffs, the City was deliberately embarking on a scheme of incre-

EX E

mental construction ventures, with the purpose of greatly expanding airport capacity while circumventing IDOT approval as required under the Act. Thus, the complaint requested that the City's prior construction be declared in violation of the Act and that its current expansion be halted unless it procured the required certificate of approval.

On February 2, 1996, plaintiffs served the City with a request to produce, in relevant part, all documents concerning applications for certificates of approval under the Act; documents relating to construction projects for O'Hare since 1970; all documents concerning plans or [*524] discussions regarding alterations to increase O'Hare's capacity, or concerning past, present, or proposed "airport layout plans" for the airport. The City objected to the request asserting, *inter alia*, that the documents were irrelevant to the present litigation and were immune from discovery under the "deliberative process privilege." Plaintiffs moved to compel production of the documents, arguing that the City [***4] had failed to properly assert the privilege by submitting a privilege log or by identifying the documents supposedly covered by the privilege.

In its response to plaintiffs' motion to compel, the City agreed to produce "all requested documents relating to past and current construction projects at O'Hare," including documents relating to projects approved for the future. However, the City declined to produce documents relating to "discussions," "plans" or "forecasts" concerning future projects as yet unapproved, claiming that such documents were covered under the deliberative process privilege. The City also refused to release the privileged documents under a protective order, arguing that such an order would hinder the ability of City officials to engage in deliberations free of outside intrusions. The City's response to the motion to compel was supported by several exhibits, including the affidavit of Renee C. Benjamin, deputy commissioner for policy and procedure for Chicago's department of aviation (hereinafter department). In the affidavit, Benjamin attested to the confidentiality of the documents alleged to be privileged. The City subsequently filed a supplemental affidavit of [***5] Kitty Freidheim, deputy commissioner for planning for the department.

After a hearing on May 20, 1996, the trial court granted plaintiffs' motion and compelled the immediate production of the requested documents. The court rejected a subsequent motion by the City for clarification [*525] and reconsideration of this ruling, and entered an order stating that the privilege was not valid in Illinois and that the City must produce all documents withheld under the claim of privilege. The court also gave the City leave to submit logs accompanying the allegedly privi-

leged documents, and stated that the court would keep these documents under seal.

Shortly thereafter, the court entered a protective order encompassing all of the allegedly confidential documents and restricting plaintiffs' use and disclosure of these [**50] documents. Nonetheless, the City informed the court that it intended to withhold the documents from plaintiffs until the appellate court could rule on its privilege claim.

On November 4, 1996, after again having ordered that the documents be released to plaintiffs subject to the protective order, the court granted a motion by the City to be held in contempt in order to properly appeal [***6] the rejection of its claim of deliberative process privilege. The court also entered an "access order" granting plaintiffs' counsel *in camera* access to the documents filed under seal. The access order provided that enforcement would be stayed to allow the City time to appeal.

On appeal, the appellate court initially stayed the access order. It then, *inter alia*, affirmed the court's refusal to recognize the deliberative process privilege, finding that creation of the privilege was best left to the legislature. The court further rejected the argument that protection of deliberative documents was in the public interest. 292 Ill. App. 3d 745, 686 N.E.2d 66, 226 Ill. Dec. 717. We granted leave to appeal (134 Ill. 2d R. 315(b)), and now affirm the decision of the appellate court rejecting the deliberative process privilege.¹

1 The Illinois Trial Lawyers Association and the Illinois chapter of the American Civil Liberties Union have filed briefs as *amici curiae* in opposition to the privilege.

[*526] ANALYSIS

Defendant urges that we adopt [***7] a common law deliberative process privilege to exempt from discovery "confidential advice given to those involved in making [decisions and] policy for state and local government." Within this realm, defendant seeks protection of all confidential documents prepared in connection with yet unapproved plans to alter or expand the airport.

Widely recognized in the federal courts, the deliberative process privilege protects certain classes of intra-agency communications offered in the course of governmental decisionmaking. See *Kaiser Aluminum & Chemical Corp. v. United States*, 141 Ct. Cl. 38, 157 F. Supp. 939 (Ct. Cl. 1958); see also *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993). Some courts have defined the privilege to encompass:

"intra-governmental documents reflecting advisory opinions, recommendations

and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 128 U.S. App. D.C. 10, 384 F.2d 979 (D.C. Cir. 1967).²

2 It appears that the term "deliberative process privilege" has come to be recognized by some courts as interchangeable with the terms "executive privilege," or "governmental," "official information" or "intragovernmental opinion" privilege. See, e.g., *Bobkoski v. Board of Education of Cary Consolidated School District 26*, 141 F.R.D. 88, 91 (N.D. Ill. 1992); see also *Hamilton v. Verdow*, 287 Md. 544, 553 n.3, 414 A.2d 914, 920 n.3, citing E. Cleary, McCormick on Evidence §§ 106, 107, at 229-31 (2d ed. 1972). The accuracy of such fluid classification is questionable. For purposes of this opinion, we refer to the asserted privilege as the deliberative process privilege, and pass solely upon that privilege as defined in this case.

[***8] Excluded from the privilege are any factual aspects of predecisional communications, and communications made subsequent to the agency's final decision. *Farley*, [*527] 11 F.3d at 1389, citing *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 152, 44 L. Ed. 2d 29, 48, 95 S. Ct. 1504, 1517 (1975). In addition, the privilege is qualified in that a litigant may obtain access to privileged communications upon a showing of particularized need. See *Sears*, 421 U.S. at 149 n.16, 44 L. Ed. 2d at 46 n.16, 95 S. Ct. at 1516 n.16. The City urges that we create a privilege based upon this definition.

The primary rationale for the privilege is to ensure the frank exchange of advice and opinions in the course of governmental decisionmaking and policymaking. *Zeiss*, 40 F.R.D. at 324; see also *Kaiser*, 157 F. Supp. at 946. Courts adhering to the privilege believe that exposing certain types of predecisional communications to public scrutiny and possible reprisals would produce a "chilling effect" on the candor of government staff, jeopardizing the decisionmaking process. See *Farley*, 11

F.3d at 1389, quoting *United States v. Nixon*, 418 U.S. 683, 705, 41 L. Ed. 2d 1039, 1062, [***9] 94 S. Ct. [**51] 3090, 3106 (1974). Thus, the privilege serves the dual aim of fostering effective and efficient government decisionmaking, and in the process, advancing the public interest.

Nonetheless, privileges are strongly disfavored because they operate to "exclude relevant evidence and thus work against the truthseeking function of legal proceedings." *People v. Sanders*, 99 Ill. 2d 262, 270, 75 Ill. Dec. 682, 457 N.E.2d 1241 (1983); see also *Illinois Educational Labor Relations Board v. Homer Community Consolidated School District No. 208*, 132 Ill. 2d 29, 34, 138 Ill. Dec. 213, 547 N.E.2d 182 (1989), citing *Nixon*, 418 U.S. at 709-10, 41 L. Ed. 2d at 1065, 94 S. Ct. at 3108. Further, it is believed that governmental privileges, if created and applied indiscriminately, will undermine public trust "in the integrity of the government and its commitment to serving the public interest." G. Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 890 (1990); see also *Nixon*, [*528] 418 U.S. at 709, 41 L. Ed. 2d at 1064, 94 S. Ct. at 3108. As such, courts will not create or apply any evidentiary privilege unless it [***10] "promotes sufficiently important interests to outweigh the need for probative evidence." *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182, 189, 107 L. Ed. 2d 571, 582, 110 S. Ct. 577, 582 (1990), quoting *Trammel v. United States*, 445 U.S. 40, 51, 63 L. Ed. 2d 186, 195, 100 S. Ct. 906, 912 (1980); see also *Homer*, 132 Ill. 2d at 34; *People ex rel. Noren v. Dempsey*, 10 Ill. 2d 288, 139 N.E.2d 780 (1957). For these reasons, this court has repeatedly concluded that the extension of an existing privilege or establishment of a new one is a matter best deferred to the legislature. *Homer*, 132 Ill. 2d at 34; *Sanders*, 99 Ill. 2d at 269 (recognizing that great majority of privileges recognized in Illinois are statutory creations).

The City advances two bases of support for our adoption of the deliberative process privilege: namely (1) the recognition of the privilege in the federal courts; and more importantly (2) the existence of an exemption under Illinois' Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 1994)) covering "predecisional" governmental communications. We address the contention regarding the FOIA first.

[***11] The purpose of the FOIA is to ensure the access of the general public to the records of public bodies, subject only to certain explicit exemptions. 5 ILCS 140/3(a) (West 1994); *Homer*, 132 Ill. 2d at 36-37. In particular, section 7(1)(f) provides an exemption for "preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated." 5 ILCS 140/7(1)(f)

(West 1994). The City asserts that this exemption manifests the legislature's intent to create a deliberative process privilege applicable to parties in litigation. We disagree.

The existence of an FOIA exemption for predecisional [*529] materials is evidence of a public policy favoring the confidentiality of such communications. However, it is not dispositive of whether the legislature sought to create an analogous evidentiary privilege. *Homer*, 132 Ill. 2d at 37; *In re Marriage of Daniels*, 240 Ill. App. 3d 314, 326-37, 180 Ill. Dec. 742, 607 N.E.2d 1255 (1992). The FOIA was intended to further the citizens' general desire or need to know about the affairs of government, thus enhancing public discourse and governmental accountability. 5 ILCS 140/1 (West 1994); [***12] *Friedman v. Bache Halsey Stuart Shields, Inc.*, 238 U.S. App. D.C. 190, 738 F.2d 1336, 1344 (D.C. Cir. 1984) (discussing the federal FOIA). However, the concerns underlying this purpose often differ greatly from those of a party in litigation who needs governmental information in order to establish his case. See *Pierson v. United States*, 428 F. Supp. 384, 394 n.24 (D. Del. 1977). For example, while a citizen may procure nonexempt information out of little more than personal curiosity, a litigant must make a threshold showing of the relevancy of such information before obtaining it in discovery. Further, there are safeguards inherent in the discovery process, such as the use of protective orders, which serve to shield the government's interest in maintaining confidentiality. See *Friedman*, [**52] 738 F.2d at 1344. Recognizing these principles, courts considering this question under the federal FOIA have held it unsound to equate FOIA exemptions to similar discovery privileges. *Friedman*, 738 F.2d at 1344; *Association for Women in Science v. Califano*, 185 U.S. App. D.C. 19, 566 F.2d 339, 342 (D.C. Cir. 1977) (existence of FOIA exemption neither creates new privileges nor effects [***13] existing ones). The drafters of the Illinois FOIA also acknowledged a distinction, observing that the FOIA was "more in the *** interest of citizen involvement in public records" and that "litigation, depositions, request for documentation" were all "far beyond the range" of the bill. 83d Ill. Gen. Assem., Senate Proceedings, May 27, 1983, at 130-31 (statements of [*530] Senator Bruce); *Illinois Educational Labor Relations Board v. Homer Community Consolidated School District No. 208*, 160 Ill. App. 3d 730, 736, 112 Ill. Dec. 802, 514 N.E.2d 465 (1987), *aff'd*, 132 Ill. 2d 29, 138 Ill. Dec. 213, 547 N.E.2d 182 (1989) (in enacting the FOIA, legislature was balancing need of public to be informed against need for confidentiality, but was not balancing needs of litigants against such need).

We find these principles especially applicable under the circumstances at bar, where the government is a party

to the litigation and, more importantly, has been charged with malfeasance. In such circumstances, it is unjust to afford the government the benefit of withholding relevant evidence while requiring its opponent to adhere to the established rules of open discovery. In this case, plaintiffs [***14] have raised a colorable claim that the City engaged in a purposeful and covert scheme to circumvent the requirements of a statute. As observed by *amici*, this case, like other state actions, such as an alleged breach of contract or certain tort claims, could well turn more upon a showing of the government's *intent* or *motives* in taking a particular action, rather upon than the fact of the final action itself. See, e.g., *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 179, 137 Ill. Dec. 31, 545 N.E.2d 684 (1989) (ultimate inquiry is whether employer intentionally discriminated against plaintiff). The adoption of a privilege shielding predecisional opinions and recommendations, cast in such broad terms as that espoused by the City here, would undoubtedly operate to hinder the fact-finding process in many of these cases. We do not believe that our General Assembly intended such a result in the creation of FOIA exemption 7(1)(f).

The City also argues that the policies underlying the federal courts' recognition of the privilege militate in favor of its adoption in this court. As with many federal courts adhering to the deliberative process privilege, the City's [***15] affidavits and brief repeatedly parrot the rationale for the executive privilege as initially stated in *Nixon*:

[*531] "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705, 41 L. Ed. 2d at 1062, 94 S. Ct. at 3106.

See also *Sears*, 421 U.S. at 150-51, 44 L. Ed. 2d at 47, 95 S. Ct. at 1516; *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87, 35 L. Ed. 2d 119, 132, 93 S. Ct. 827, 836 (1973). Freidheim's affidavit states that:

"the safety of hundreds of thousands of air travelers at O'Hare each year depends upon the integrity of the Department's planning process, and the ability of its participants to raise questions and concerns about planning alternatives, simulations, or models without fear that the opinions they express during predecisional deliberations will later be disclosed and subject to public scrutiny."

One need only review the cases upon which the City repeatedly relies, however, to see stark distinctions from the case at bar. For example, to the [***16] extent *Sears* and *Mink* provide persuasive authority for the need for a governmental privilege, it is for a narrowly tailored one, protecting communications given directly to high-level government officials, containing advice bearing heavily on the final decision or policy. See *Sears*, 421 U.S. 132, 44 L. Ed. 2d 29, 95 S. Ct. 1504 ("advice and appeals memoranda" prepared for National Labor Relations Board by its general counsel advising whether or not to file unfair labor practice complaints); *Mink*, 410 U.S. 73, 35 L. Ed. 2d 119, 93 [**53] S. Ct. 827 (documents by advisors to President containing recommendations over upcoming underground nuclear test). See also *Kaiser*, 157 F. Supp. at 942 (executive privilege asserted, on grounds of "national interest," over document containing advice to the General Services Administrator concerning the sale of war asset). The *Nixon* case involved the President's claim of privilege over his confidential conversations with "close advisors." The Court recognized the "plain" and "valid need for protection of communications between [*532] high Government officials and those who advise and assist them in *** their manifold duties." *Nixon*, 418 [***17] U.S. at 705, 41 L. Ed. 2d at 1062, 94 S. Ct. at 3106. In addition, it is significant that the executive privilege applied in *Nixon* was rooted not only in national interests, but also in the separation of powers doctrine. See also *Hamilton*, 287 Md. 544, 414 A.2d 914 (analogous privilege found for governor); *University of Pennsylvania*, 493 U.S. at 195, 107 L. Ed. 2d at 585, 110 S. Ct. at 585. The City does not claim any such basis for the privilege asserted in this case.

These cases provide no real support for the adoption of the deliberative process privilege proposed here. Although the privilege may be applied on a qualified basis, its scope is unreasonably broad. The City appears to claim a privilege over all "deliberative" communications regarding any proposed expansion or alteration to the airport or airport layout plan, no matter how trivial or routine. Further, the City does not restrict the privilege based upon the importance or relevance of the particular communication to the decision or decisions, or to the level of the official either compiling or relying upon the communication.

As such, although the City professes to a need to ensure the safety of O'Hare passengers [***18] and the integrity of the decisionmaking process, its claim of the future "chilling" of these communications amounts to nothing more than speculation. Cf., *Farley*, 11 F.3d at 1389, citing *Coastal States Gas Corp. v. Department of Energy*, 199 U.S. App. D.C. 272, 617 F.2d 854, 868

(D.C. Cir. 1980). Assuming, *arguendo*, that certain types of state governmental decisions call for advice or opinions that would be controversial or unpopular, the City provides no real evidence that governmental officials would withhold giving advice they believe is necessary and correct, based merely upon the remote possibility that it could some day be produced in [*533] litigation. Indeed, the City does not claim that the decisionmaking process has been harmed thus far despite the absence of such a privilege in this state. *Babets v. Secretary of the Executive Office of Human Services*, 403 Mass. 230, 238, 526 N.E.2d 1261, 1266 (1988). We conclude that in light of the range of competing policies underlying the deliberative process privilege, its adoption should be left to the General Assembly.

The City also contends that the confidentiality test established by Dean Wigmore (see 8 J. Wigmore, Evidence [***19] § 2285, at 527 (McNaughton rev. ed. 1961)) and most recently applied by this court in *Homer*, 132 Ill. 2d at 35, supports the recognition of a privilege protecting the communications in this case. We disagree. Recognizing that the creation of a new privilege is presumptively a legislative task, *Homer* allows for a court's recognition of an evidentiary privilege, in "rare instances," where each of the following conditions are met: (1) the communications originated in a *confidence* that they will not be disclosed; (2) this element of *confidentiality is essential* to the full and satisfactory maintenance of the relation between the parties; (3) the *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) the *injury* that would inure to the relation by disclosure would be *greater than the benefit* thereby gained for the correct disposal of litigation. *Homer*, 132 Ill. 2d at 35; *In re October 1985 Grand Jury No. 746*, 124 Ill. 2d 466, 475, 125 Ill. Dec. 295, 530 N.E.2d 453 (1988). The burden of establishing the privilege rests with the party claiming exemption under it. *Homer*, 132 Ill. 2d at 35. Furthermore, [***20] the mere assertion that the matter at issue is "confidential" and "privileged" will not suffice. Rather, the proponent of the privilege must set forth with particularity circumstances giving rise to the privilege in each particular case. *Cox v. Yellow Cab Co.*, 61 Ill. 2d 416, 419-20, [**54] 337 N.E.2d 15 (1975); *Krupp v. Chicago Transit Authority*, 8 Ill. 2d 37, 42, 132 N.E.2d 532 [**534] (1956); cf. *Douglas v. Windham Superior Court*, 157 Vt. 34, 43-45, 597 A.2d 774, 780 (1991), citing *King v. Conde*, 121 F.R.D. 180 (E.D.N.Y. 1988).

We dispose of this issue based upon the City's failure to establish the first element of the test. Under this prong, the City contends it had a "general expectation of confidentiality" derived once again from two sources: the long-standing recognition of a deliberative process privilege under federal law, and the existence of FOIA ex-

emption 7(1)(f). The City's argument is misplaced, however, because neither of these sources conclusively establishes the existence of a deliberative process litigation privilege in this state. Of course, it is beyond question that the federal courts' recognition of a privilege does not justify the City's assumption of [***21] that same privilege in this court. Further, as stated above, FOIA exemption 7(1)(f) does not demonstrate a legislative intent to adopt the privilege, as there are great differences between the concerns of the FOIA and those underlying this privilege. Accordingly, the City has failed to demonstrate that the communications at issue originated in confidentiality under *Homer*. Thus, this argument fails.

In light of our decision on this issue, we do not reach the City's argument concerning the alleged error in the trial court's access order.

CONCLUSION

For the foregoing reasons, the judgment of the appellate court rejecting the deliberative process privilege in this case is affirmed.

Affirmed.

DISSENT BY: BILANDIC

DISSENT

JUSTICE BILANDIC, dissenting:

I hasten to add my vigorous dissent to the majority opinion which refuses to recognize a deliberative process privilege.

The Burnham Plan of 1909, sponsored by The Commercial [*535] Club of Chicago, is regarded as the model for regional planning which turns visions into reality. "Make no little plans; they have no magic to stir men's blood and probably themselves will not be realized. Make big plans; aim high in hope and work, remembering [***22] that a noble, logical diagram once recorded will never die, but long after we are gone will be a living thing, asserting itself with ever-growing insistency. Remember that our sons and grandsons are going to do things that would stagger us. Let your watchword be order and your beacon beauty[,]" proclaimed Daniel H. Burnham about this historic event. *Respectfully Quoted*, A Dictionary of Quotations Requested from the Congressional Research Service 256 (S. Platt ed., 1989).

As we embark into the new millennium, The Commercial Club of Chicago released a sequel to the 1909 Burnham Plan for the Metropolitan Chicago area. "The Plan of 1999 focuses principally on an area of 3,749 square miles of real estate covering six counties and supporting about 7.7 million people and 4.1 million jobs. The six counties are Cook, Du Page, Kane, Lake,

McHenry, and Will." *Chicago Metropolis 2020*, The Commercial Club of Chicago, at 1 n.1 (October 30, 1998).

By refusing to recognize a deliberative process privilege, the majority has unwittingly driven a stake through the heart of executive creativity which emerges from the deliberative process. "And today, as in the past, we must ask ourselves what [***23] are the strengths on which we must build, what are the new opportunities that we must exploit, and what are the serious obstacles that we must overcome. Only as we answer these questions and turn those answers into actionable programs will we prove worthy of our heritage and approximate the economic and social goals to which we aspire." *Chicago Metropolis 2020*, The Commercial Club of Chicago, at 5 (October 30, 1998).

[*536] The executive branch, from the Governor of our state to the lowest rank of executive in government, should not be inhibited by the shackles with which the majority seeks to bind them.

The deliberative process privilege protects from discovery predecisional documents that reflect opinions, recommendations and deliberations generated in the course of the decisionmaking process of a governmental agency. [**55] See *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 44 L. Ed. 2d 29, 47, 95 S. Ct. 1504, 1516 (1975); *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993). The privilege has been recognized by the United States Supreme Court, the Seventh Circuit Court of Appeals and other federal and state courts. See *Sears*, 421 U.S. 132, [***24] 44 L. Ed. 2d 29, 95 S. Ct. 1504; *Farley*, 11 F.3d 1385 (7th Cir. 1993); *First Eastern Corp. v. Mainwaring*, 305 U.S. App. D.C. 371, 21 F.3d 465 (D.C. Cir. 1994); *Ostoin v. Waterford Township Police Department*, 189 Mich. App. 334, 471 N.W.2d 666 (1991); *Doe v. Alaska Superior Court, Third Judicial District*, 721 P.2d 617 (Alaska 1986); *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (1980). This court should likewise recognize the deliberative process privilege.

The need to recognize a deliberative process privilege is readily apparent. The realities of governmental decisionmaking create a need for preserving the confidentiality of intragovernmental documents reflecting the mental processes of decisionmakers. Good government requires sound decisionmaking. Sound decisionmaking depends on research, planning, and the consideration of the full array of contrasting views on a particular subject. Those responsible for providing assessments or detailing the potential pitfalls of policy options necessarily depend on an expectation of confidentiality, if their advice is to be candid and uninhibited. In my view, it is of paramount importance that government officials be able [***25] to

engage [*537] in open and candid discussions without a concern for appearances. Such an atmosphere is conducive to good quality governmental decisions and policies, which result from unvarnished advice. Policymakers should not have to fear that every warning or dissent received from staff members could one day become public, and staff members should be free to dissent from recommendations without fear that their dissent will become public. The consequence of not recognizing the deliberative process privilege could be severe. The ability to obtain routine disclosure of predecisional deliberative documents would enable opponents of government action to embarrass government decisionmakers with their own unpolished thoughts.

It is important to emphasize that the privilege is not absolute. Rather, it is a qualified privilege because it can be overcome if the party seeking discovery shows a sufficient need for the privileged documents. In showing a sufficient need, the party must establish that the documents are relevant, and that the party has a particularized need for the documents which outweighs the government's interest in maintaining confidentiality. See *Farley*, 11 F.3d at 1389-90. [***26] The privilege attempts to accommodate the competing interests of a just resolution in legal disputes with the need to protect certain confidential government documents. In light of its qualified nature, the privilege will not interfere with the truthseeking function of legal proceedings since a government entity will not be able to hide relevant and necessary documents.

In addition to the realities of government decision-making, section 7(1)(f) of the Illinois Freedom of Information Act (5 ILCS 140/7(1)(f) (West 1994)), which exempts predecisional governmental materials from disclosure to the public, supports recognition of the deliberative process privilege in the context of litigation. [*538] Although the exemption in section 7(1)(f) involves disclosure to the public in general and not in response to discovery in litigation, it nevertheless evinces a general public policy of protecting predecisional governmental deliberative materials from disclosure.

The context of this case further underscores the need for recognition of the deliberative process privilege. This case centers around a political fight between the plaintiffs, which are municipalities located in close proximity to O'Hare [***27] International Airport, and the City of Chicago, which owns and operates O'Hare, concerning the possible expansion of O'Hare. According to the Chicago Metropolis 2020 report, O'Hare is presently unable to accommodate the ever-growing demand on its facilities, and the loss of operations will have significant adverse economic repercussions for the region. *Chicago Metropolis 2020*, The Commercial Club of Chicago, at 40 (October 30, 1998). The report recommends expand-

ing capacity at [**56] O'Hare to maintain the region's preeminence as a domestic air transportation hub and to build on its potential as an international gateway. *Chicago Metropolis 2020*, The Commercial Club of Chicago, at 89 (October 30, 1998). Likewise, a study commissioned by the Chicagoland Chamber of Commerce warns of a \$ 10 billion annual loss to the region's economy, with \$ 7 to \$ 8 billion being borne by the O'Hare vicinity suburbs, if capacity is not dramatically increased at O'Hare to meet demand. *Chicago Aviation Policy*, Chicagoland Chamber of Commerce, at 2 (November 12, 1998). The heart of the dispute in this case concerns the plaintiffs' opposition to any such expansion at O'Hare. The plaintiffs contend that [***28] the City has plans to proceed with future expansion of O'Hare without obtaining the required certificate of approval from the Illinois Department of Transportation. The plaintiffs seek to use the documents at issue in their attempt to halt any future expansion plans at O'Hare. [*539] This strategy is evident given the nature of the documents.

The types of documents sought by the plaintiffs should be protected from disclosure. The affidavits in the record reveal the planning process from which these documents were generated. According to affidavits submitted by various deputy commissioners of the City's department of aviation, the documents requested by the plaintiffs reflect preliminary and predecisional planning deliberations concerning development options and alternatives at O'Hare. Included in these deliberations are opinions expressed during meetings and recommendations by City personnel and hired consultants. The affidavits further state that the documents contain confidential advice given to municipal policymakers evaluating policy options. Such planning documents go to the heart of the City officials' ability to engage in open and honest discussions relating to future planning. I [***29] believe that these officials should be able to discuss all pertinent policy options without fear that their candid assessments of each option's strengths and weaknesses will be disclosed to the airport's opponents. The affidavits of the deputy commissioners establish the importance of protecting these airport planning deliberations from disclosure in order to maintain the candid evaluation of proposals within that process. I would therefore hold that any documents relating to opinions, discussions, forecasts, recommendations and other predecisional matters concerning O'Hare and arising in the course of government decisionmaking are protected by the deliberative process privilege.

For the foregoing reasons, I would reverse the judgments of the appellate and circuit courts and recognize a deliberative process privilege. I would also remand to the circuit court and direct it to conduct an *in camera* review of the City's documents filed under seal

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to determine [*540] which documents are covered by
this privilege and to determine whether the plaintiffs

have shown a particularized need for any privileged
documents.