

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC)	
)	
Petitioner,)	
)	
v.)	PCB No. 07-146
)	(Pollution Control Facility Siting
)	Appeal)
UNITED CITY OF YORKVILLE, CITY)	
COUNCIL)	
)	
Respondent.)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on September 24, 2008, Leo P. Dombrowski, one of the attorneys for Respondent, United City of Yorkville, filed via electronic filing the attached **United City of Yorkville's Motion in Limine #1, Motion in Limine #2, Motion in Limine #3 and Motion in Limine #4** with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE

By: /s/ Leo P. Dombrowski
One of their Attorneys

Anthony G. Hopp
Thomas I. Matyas
Leo P. Dombrowski
WILDMAN, HARROLD, ALLEN & DIXON LLP
225 West Wacker Drive, 30th Floor
Chicago, Illinois 60606
Phone: (312) 201-2000
Fax: (312) 201-2555
hopp@wildman.com
matyas@wildman.com
dombrowski@wildman.com

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COUNCIL)	
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YORKVILLE MOTION IN LIMINE #2

Pursuant to the Hearing Officer's Order of September 22, 2008 and 35 Ill. Admin. Code § 101.610, Respondent, the United City of Yorkville, City Council ("Yorkville"), by and through its attorneys, moves the Hearing Officer in limine to exclude from the hearing on this matter the following information: any and all arguments statements, questions, testimony, or evidence of any kind from Petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly, the decision making processes of the Members of the Yorkville City Council, including the reasons why they voted the way they did regarding the Fox Moraine landfill application (the "Application"). In support of its Motion, Yorkville states as follows:

1. Yorkville believes that Fox Moraine will seek to question at hearing the Council Members regarding the reasons why they voted the way they did on the Application and the underlying bases for those reasons. At depositions, Fox Moraine has asked certain questions regarding the Council Members' decision-making processes and Yorkville believes that Fox Moraine intends to raise at hearing the following and similar issues:

- Did Council Members agree or disagree with the findings and recommendations contained in the reports submitted by Landfill Hearing Officer Larry Clark and to City Staff by Derke Price.
- How Council Members interpreted the statutory criteria and what kind of evidence Fox Moraine was required to present to prevail on a particular criterion.

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- Did Council Members, for example, interpret the traffic criterion to require no impact on traffic.
- Whether Council Members thought the evidence was sufficient to prove or disprove a particular criterion.
- The opinions Council Members had regarding the experts who testified at the landfill hearing.

2. “The Board has consistently held that decisionmakers are entitled to protection of their internal thought processes in their adjudicative roles.” *Waste Management of Illinois v. County Bd. of Kankakee County*, PCB No. 04-186, 2008 Ill. Env. LEXIS 14 at ** 67-8 (Jan. 24, 2008). In that case, Waste Management sought to question Kankakee County Board members regarding the reasons why members voted the way they did on a landfill application, including the reasons why some voted to approve a 2002 application but denied a subsequent application for the same site submitted in 2003. Affirming the Hearing Officer’s pre-hearing decision precluding Waste Management from questioning the County Board members on the reasons for their votes, and relying on long-standing precedent, the Board held that:

The Board has previously held that the integrity of the decision making process requires that the mental processes of the decisionmakers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made. Public officials, however, should be considered to act without bias. The presumption of the impartiality of the actions of a public official will be overcome only where it is shown by clear and convincing evidence that the official has an unalterably closed mind in critical matters.

Id. (citations omitted).

3. The decision to grant or deny siting approval is an adjudicative-like function. *Southwest Energy Corp. v. Pollution Control Bd.*, 275 Ill. App. 3d 84, 90-91 (4th Dist. 1995) (“a local siting proceeding more closely resembles an adjudicatory proceeding than a legislative one”); *Land and Lakes Co. v. Pollution Control Bd.*, 245 Ill. App. 3d 631, 638 (3rd Dist. 1993). Authorized by statute to render a decision on a siting application, city council members

essentially sit as judges do in a court of law. Like judges, their mental processes should be protected to uphold the sanctity of the landfill siting process. "Such an examination of a judge would be destructive of judicial responsibility. . . . Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." *DiMaggio v. Solid Waste Agency of Northern Cook County*, PCB 89-138, 1989 Ill. Env. LEXIS 86 at * 13 (Oct. 27, 1989) (citations omitted); *see also Rochelle Waste Disposal v. City of Rochelle*, PCB 03-218, 2004 Ill. Env. LEXIS 231 at ** 42-43 (April 15, 2004) ("the integrity of the decision making process requires that the mental processes of decision-makers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made.")

4. Fox Moraine has no evidence, much less clear and convincing evidence, to overcome the presumption of impartiality in this matter. It should not be allowed to question Yorkville Council Members on why they voted the way they did, what they thought of the evidence, how they interpreted the statutory criteria, or on any other matter that would invade their decision making processes.

5. Questioning regarding a Council Member's deliberative mental processes should be barred for an additional reason: Section 40.1(a) prohibits the Board from considering "new or additional evidence in support of or in opposition to any finding, order, determination or decision of the appropriate county board or governing body of the municipality." 415 ILCS 5/40.1(a). Because it is so prohibited by the Act, the Board may not, for example, "reweigh the evidence or make new credibility determinations." *McLean County Disposal v. County of McLean*, 207 Ill. App. 3d 477, 480 (4th Dist. 1991). Asking a Council Member why she voted the way she did would be seeking new evidence regarding the "determination or decision" of the Yorkville City

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Council. Consequently, even if a landfill applicant were allowed at hearing to ask governmental decision-makers why they voted as they did, the Board could not consider any such evidence because it is barred by statute from doing so.

WHEREFORE, Respondent, UNITED CITY OF YORKVILLE, CITY COUNCIL requests that the Hearing Officer enter an order barring any and all arguments statements, questions, testimony, or evidence of any kind regarding the Council Members' decision making processes as discussed in this motion.

UNITED CITY OF YORKVILLE, CITY COUNCIL

By: /s/ Leo P. Dombrowski
One of Its Attorneys

Dated: September 24, 2008

Anthony G. Hopp
Thomas I. Matyas
Leo P. Dombrowski
WILDMAN, HARROLD, ALLEN & DIXON LLP
225 West Wacker Drive, 30th Floor
Chicago, Illinois 60606
Phone: (312) 201-2000
Fax: (312) 201-2555
hopp@wildman.com
matyas@wildman.com
dombrowski@wildman.com

CERTIFICATE OF SERVICE

I, Susan Hardt, a non-attorney, certify that I caused a copy of the foregoing **Notice of Filing and United City of Yorkville's Motion in Limine #1, Motion in Limine #2, Motion in Limine #3 and Motion in Limine #4** to be served upon the Hearing Officer and all Counsel of Record listed on the attached Service list by sending it via Electronic Mail on September 24, 2008.

/s/ Susan Hardt

- [x] Under penalties as provided 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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SERVICE LIST

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
hallorab@ipcb.state.il.us

George Mueller
Mueller Anderson, P.C.
609 Etna Road
Ottawa, Illinois 61350
george@muelleranderson.com

Charles Helston
Hinshaw & Culbertson, LLP
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389
chelsten@hinshawlaw.com

Michael S. Blazer
Jeep & Blazer, LLC
24 N. Hillside Avenue, Suite A
Hillside, IL 60162
mblazer@enviroatty.com

Eric C. Weiss
Kendall County State's Attorney
Kendall County Courthouse
807 John Street
Yorkville, Illinois 60560
eweis@co.kendall.il.us

James. H. Kippen, II
Walsh, Knippen, Knight & Pollack, Chartered
601 W. Liberty Dr.
Wheaton, IL 60187-4940
jim@wkkplaw.com

James. B. Harvey
McKeown, Fitzgerald, Zollner,
Buck, Hutchison, & Ruttle
2455 Glenwood Avenue
Joliet, Illinois 60435
jim@mckeownlawfirm.com

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Anthony G. Hopp
Thomas I. Matyas
Leo P. Dombrowski
WILDMAN, HARROLD, ALLEN & DIXON LLP
225 West Wacker Drive, 30th Floor
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Phone: (312) 201-2000
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YORKVILLE MOTION IN LIMINE #3

Pursuant to the Hearing Officer's Order of September 22, 2008 and 35 Ill. Admin. Code § 101.610, Respondent, the United City of Yorkville, City Council ("Yorkville"), by and through its attorneys, moves the Hearing Officer in limine to exclude from the hearing on this matter the following information: any and all arguments statements, questions, testimony, or evidence of any kind from Petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly, any statements, whether oral or written, made by Yorkville City Council Members during their election campaigns leading up to the April 17, 2007 elections regarding the proposed Fox Moraine landfill (the "Landfill"). In support of its Motion, Yorkville states as follows:

1. Yorkville believes that Fox Moraine will seek to question at hearing the Mayor and Council Members regarding statements they may have made regarding the Landfill during their election campaigns. For example, Fox Moraine has questioned the Mayor and Council Members at depositions regarding statements that appeared in the April 15, 2007 BeaconNews. In that article, the reporter noted that City Council candidates had generally "withheld airing their views" on the Landfill. Some candidates were then asked: "Would a safe, state-compliant landfill be a positive, negative, or neutral addition to Yorkville?" Mayor Burd was quoted as

saying: "Is there such a thing as a safe, state-compliant landfill? . . . I don't know if that's an oxymoron." Council Member Spears was quoted as saying: "If it had nothing surrounding it for acres, and if it was proven to be safe as far as leakage, and if it would have no impact on traffic, that would be a perfect scenario." Other Members were also quoted. (A copy of the April 15, 2007 article is attached as Exhibit A.)

2. Yorkville believes that Fox Moraine will attempt to question the Council Members regarding these statements and argue that the statements show the Members were biased. However, as a matter of law, any statement made by the Council Members during their election campaigns regarding their positions on the Landfill are inadmissible, as such statements made in the context of a campaign for public office are not relevant to the issues involved in this appeal.

3. First, any public statements made by Council Members during their election campaigns regarding the Landfill were in keeping with the landfill siting provisions of the Illinois Environmental Protection Act (the "Act"). In fact, Section 39.2(d) of the Act expressly allows such statements: "The fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue." 415 ILCS 5/39.2(d) (emphasis added). Section 39.2(d) clearly provides that the Council Members were free to make public statements concerning landfills in general and the Fox Moraine Landfill in particular. Because Section 39.2(d) specifically allows candidates to express their opinions related to landfill site review proceedings, any such statements made by the Council Members are not relevant and should not be admitted into evidence at the hearing or considered by the Board.

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4. Second, the Hearing Officer and the Board should refuse to admit or consider the above-referenced statements because the Council Members had an absolute right to make them. See U.S. Const., Amend. I; *see also* 5 U.S.C. § 7323(c) (expressly allowing even employees of the federal government to express opinions on political subjects). Under the First Amendment, the Council Members had a right, as candidates for public office, to express their opinions on all pertinent political subjects. When they were asked about the Landfill, they had every right, and arguably even a responsibility, to respond to those questions.¹ Consequently, the Hearing Officer and Board should find that the Council Members, as candidates for political office, had a right to express their political views without fear of formal interrogation.

5. Third, the statements made by the Council Members cannot be used to establish that the proceeding was fundamentally unfair because the fact that Council Members made statements regarding the Landfill during their election campaigns does not overcome the presumption that, as administrative officials, they were objective in judging the siting application. *See, e.g., Waste Management of Illinois v. Pollution Control Bd.*, 175 Ill. App. 3d 1023, 1040 (2nd Dist. 1988) (“There is a presumption that administrative officials are objective and capable of fairly judging a particular controversy. Moreover, the fact that an administrative official has taken a public position or expressed strong views on an issue before the administrative agency does not overcome the presumption.”)²

¹ By filing this motion, Yorkville does not concede that the Council Members were properly or accurately quoted in the April 15, 2007 article or in any other article that appeared in the press.

² This motion is similar to one filed by the Kankakee County Board in *Waste Management v. County Board of Kankakee County*, PCB 04-186. There, making similar arguments as Yorkville does here, the County Board moved *in limine* to bar any testimony regarding statements made by a Board member during her election campaign in which she said in a questionnaire and in campaign materials that she was “opposed to proposed landfills being sited in Kankakee County.” (County Board’s Motion in Limine, filed April 4, 2005, at pp. 1-2.) The Hearing Officer granted the motion, allowing Waste Management to elicit such statements in an offer of proof at the hearing. The County Board was represented by Charles Helsten and Richard Porter, who represent Fox Moraine in this appeal.

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WHEREFORE, Respondent, UNITED CITY OF YORKVILLE, CITY COUNCIL requests that the Hearing Officer enter an order barring any and all arguments statements, questions, testimony, or evidence of any kind regarding statements made by the City Council Members regarding the Landfill during their election campaigns as discussed in this motion.

UNITED CITY OF YORKVILLE, CITY COUNCIL

By: /s/ Leo P. Dombrowski
One of their Attorneys

Dated: September 24, 2008

Anthony G. Hopp
Thomas I. Matyas
Leo P. Dombrowski
WILDMAN, HARROLD, ALLEN & DIXON LLP
225 West Wacker Drive, 30th Floor
Chicago, Illinois 60606
Phone: (312) 201-2000
Fax: (312) 201-2555
hopp@wildman.com
matyas@wildman.com
dombrowski@wildman.com

EXHIBIT A

The Sunday Beacon News



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THE LANDFILL

Yorkville candidates weigh in on

Yorkville's mayor and the aldermen elected Tuesday will decide next month whether a plan to site a landfill in the city meets state standards.

Heeding lawyers' cautions, most City Council candidates have withheld airing their views on the proposal — until now. At right, each candidate's response to this election's hottest question: Would a safe, state-compliant landfill be a positive, negative or neutral addition to Yorkville?



Art Prochaska
View: The two-term mayor will not comment on the relative merits of a Yorkville landfill.
Background: Prochaska, who is running for re-election, spearheaded bringing the landfill site within city limits.



Valerie Burd
View: "Is there such a thing as a safe, state-compliant landfill? ... I don't know if that's an oxymoron."
Background: The nine-year alderman, who is running for mayor, voted against annexing the landfill site.



Paul James
View: There are "pros and cons" to the landfill proposal.
Background: The seven-year Ward 1 alderman voted to annex the site and is backing Prochaska.



Carlo Colosimo
View: "A state-compliant landfill, if we are required to site it, would have both positive and negative effects."
Background: Ward 1 candidate supported annexing the site and made no endorsements in the mayoral race.



Walter Wardenich
View: "I don't think that (a landfill) is a good thing for Yorkville."
Background: The Ward 1 candidate is backing Burd and once belonged to a group opposed to the landfill.



Jeffery McElroy
View: A landfill would be a "negative" and the Yorkville proposal raises specific concerns.
Background: The Ward 2 candidate supported annexing the site and made no endorsements in the mayoral race.



Arden 'Jon' Pletcher
View: "I don't think there is any such thing as a safe, state-compliant landfill."
Background: The Ward 2 candidate is backing Burd and once worked with citizens to fight the landfill.

Sunday, April 15, 2007

TODAY'S WEATHER BY:
JULIANA DIAZ
BARDWELL SCHOOL
AURORA



HIGH 53, LOW 30 CLOUDY

SUNDAY, APRIL 15, 2007

\$1.50

LOWDOWN

touchy trash issue

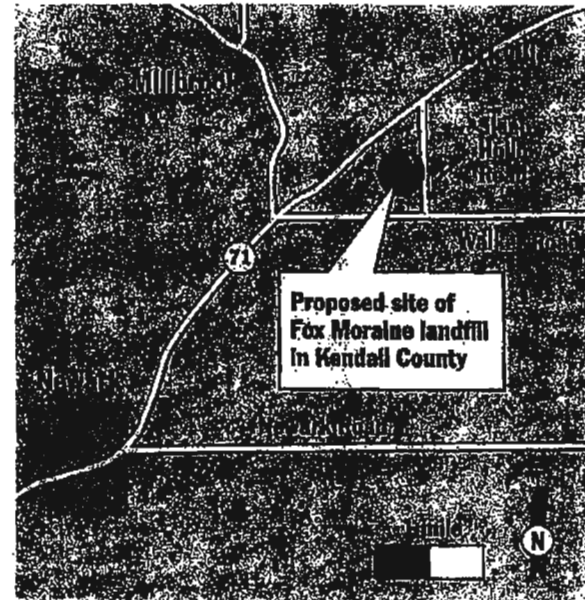


ILLUSTRATION BY JEFF FROSCH/STAFF ARTIST



William Skledowski
View: "I don't think (a landfill) should have even been brought up."
Background: The Ward 2 candidate made no comment on the annexation and no endorsements.



James Bock
View: Bock did not return calls for comment.
Background: The Ward 3 alderman voted to annex the site.



Robyn Sutellfi
View: "It would be a negative addition to the city. I have no question about that."
Background: The Ward 3 candidate opposed annexing the site and is backing Burd.



Rose Ann Spears
View: "If it had nothing surrounding it for acres, and if it was proven to be safe as far as leakage, and if it would have no impact on traffic, that would be a perfect scenario."
Background: Nine-year alderman voted against annexing site and is backing Burd.



Tony Berry
View: A safe, state-compliant landfill would be a "neutral" addition to the city.
Background: The Ward 4 candidate supported annexing the site. He has made no endorsements for mayor.

LANDFILL ANNEXATION

Were the Yorkville City Council's moves defensive or offensive?

News, A8

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SERVICE LIST

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
hallorab@ipcb.state.il.us

George Mueller
Mueller Anderson, P.C.
609 Etna Road
Ottawa, Illinois 61350
george@muelleranderson.com

Charles Helston
Hinshaw & Culbertson, LLP
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389
chelsten@hinshawlaw.com

Michael S. Blazer
Jeep & Blazer, LLC
24 N. Hillside Avenue, Suite A
Hillside, IL 60162
mblazer@enviroatty.com

Eric C. Weiss
Kendall County State's Attorney
Kendall County Courthouse
807 John Street
Yorkville, Illinois 60560
eweis@co.kendall.il.us

James. H. Kippen, II
Walsh, Knippen, Knight & Pollack, Chartered
601 W. Liberty Dr.
Wheaton, IL 60187-4940
jim@wkkplaw.com

James. B. Harvey
McKeown, Fitzgerald, Zollner,
Buck, Hutchison, & Ruttle
2455 Glenwood Avenue
Joliet, Illinois 60435
jim@mckeownlawfirm.com

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Fax: (312) 201-2555
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YORKVILLE MOTION IN LIMINE #4

Pursuant to the Hearing Officer's Order of September 22, 2008 and 35 Ill. Admin. Code § 101.610, Respondent, the United City of Yorkville, City Council ("Yorkville"), by and through its attorneys, moves the Hearing Officer in limine to exclude from the hearing on this matter the following information: any and all arguments statements, questions, testimony, or evidence of any kind from Petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly, the invoice of Wildman Harrold that was inadvertently produced in this appeal. In support of its Motion, Yorkville states as follows:

1. The document at issue, an invoice of the law firm of Wildman Harrold for legal services rendered to Yorkville, is not relevant to any issue in this appeal. Yorkville incorporates by references the arguments made in support of its Motion to Compel Return of Document Inadvertently Disclosed, which was filed with the Board on or around November 8, 2007.

2. Additionally, "relevant evidence" is defined as something that has "any tendency to make the existence of any fact that is of consequence to the determination of

the action more or less probable than it would be without the evidence.” *Wojcik v. City of Chicago*, 299 Ill. App. 3d 964, 971 (1st Dist. 1998) (emphasis added).

WHEREFORE, Respondent, UNITED CITY OF YORKVILLE, CITY COUNCIL requests that the Hearing Officer enter an order barring any use of or reference to the invoice of Wildman Harrold as discussed in this motion.

UNITED CITY OF YORKVILLE, CITY COUNCIL

By: /s/ Leo P. Dombrowski
One of Its Attorneys

Dated: September 24, 2008

Anthony G. Hopp
Thomas I. Matyas
Leo P. Dombrowski
WILDMAN, HARROLD, ALLEN & DIXON LLP
225 West Wacker Drive, 30th Floor
Chicago, Illinois 60606
Phone: (312) 201-2000
Fax: (312) 201-2555
hopp@wildman.com
matyas@wildman.com
dombrowski@wildman.com

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Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
hallorab@ipcb.state.il.us

George Mueller
Mueller Anderson, P.C.
609 Etna Road
Ottawa, Illinois 61350
george@muelleranderson.com

Charles Helston
Hinshaw & Culbertson, LLP
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389
chelsten@hinshawlaw.com

Michael S. Blazer
Jeep & Blazer, LLC
24 N. Hillside Avenue, Suite A
Hillside, IL 60162
mblazer@enviroatty.com

Eric C. Weiss
Kendall County State's Attorney
Kendall County Courthouse
807 John Street
Yorkville, Illinois 60560
eweis@co.kendall.il.us

James. H. Kippen, II
Walsh, Knippen, Knight & Pollack, Chartered
601 W. Liberty Dr.
Wheaton, IL 60187-4940
jim@wkkplaw.com

James. B. Harvey
McKeown, Fitzgerald, Zollner,
Buck, Hutchison, & Ruttle
2455 Glenwood Avenue
Joliet, Illinois 60435
jim@mckeownlawfirm.com