

**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 29, 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 Response to Fox Moraine's Motion to Compel Disclosure of Roth Memorandum**, 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

**Electronic Filing - Received, Clerk's Office, September 29, 2008**  
**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 Helsten  
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 J. Knippen, II  
Walsh, Knippen, Knight & Pollock  
2150 Manchester Road  
Suite 200  
Wheaton, IL 60187  
jim@wkkplaw.com  
heather@wkkplaw.com

James B. Harvey  
McKeown, Fitzgerald, Zollner,  
Buck, Hutchison & Ruttle  
24255 Glenwood Avenue  
Joliet, IL 60435  
jim@mckeownlawfirm.com

**BEFORE THE  
ILLINOIS POLLUTION CONTROL BOARD**

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

**YORKVILLE'S RESPONSE TO FOX MORaine'S  
MOTION TO COMPEL DISCLOSURE OF ROTH MEMORANDUM**

Before it rendered its decision on Fox Moraine's landfill application, Yorkville's City Council asked its appointed city attorney, Michael Roth, for legal advice. Roth responded to the request in a memorandum, which is clearly protected by the attorney-client privilege. At this late hour, days before the hearing, and without citing any authority in support of its position (because there is none), Fox Moraine has moved to compel production of Roth's memorandum. Because the memorandum is privileged, Fox Moraine's motion should be denied.

**I. BACKGROUND**

Yorkville ordinance No. 2006-117 sets forth requirements for reviewing landfill applications and provides a structure for the Council to review such applications. (C736-754, attached as Exhibit A.) Pursuant to the ordinance, the City Administrator, with the Special Counsel to the City, must coordinate the Council's review of an application. (C744.) To conduct the hearings, the ordinance requires that "[t]he Mayor shall appoint a Hearing Officer," who may "make decisions concerning the admission of evidence and the manner in which the hearing is conducted." The Hearing Officer must be a licensed attorney and must, at the conclusion of the hearings, "submit draft written findings (of law or fact) to the City Council and file a copy of

**Electronic Filing - Received, Clerk's Office, September 29, 2008**

such findings with the City Clerk." (C747-49.) The City Administrator and the Special Counsel may submit reports to the Council as well, but if they choose to do so, the reports must be provided through the public hearing process. (C744.)

Pursuant to this ordinance and 415 ILCS 5/39.2, Yorkville held public hearings for over a month in March and April 2007. The appointed Hearing Officer, Larry Clark, presided over the hearings, and Yorkville Special Counsel, Derke Price, assisted the City Administrator through the process. In May, a new Mayor and several new Council members were sworn in. Shortly thereafter, Michael Roth was appointed as the new City Attorney, while Price and Clark kept their respective positions as Hearing Officer and Special Counsel.

The City Council asked Roth for legal advice, and he produced a memorandum in response to that request. Entirely separately, both Clark and Price submitted reports to the Council.

Even though Fox Moraine has known of the Roth Memorandum for over a year, only now does it seek to compel its production. Fox Moraine acknowledged in its Response to Yorkville's Motion to Compel that it had received a copy of an invoice relating to Roth's legal work for Yorkville in August 2007. That invoice references a "legal memo."<sup>1</sup> For tactical reasons, Fox Moraine has waited until the very last minute to seek production of the Roth Memo. For this reason alone, Fox Moraine's motion should be denied.

---

<sup>1</sup> Because Yorkville inadvertently disclosed the privileged invoice to Fox Moraine, Yorkville intends to appeal the order denying its Motion to Compel the return of the invoice. Yorkville has also filed a motion in limine arguing that the invoice is privileged and also irrelevant to these proceedings. By referring to the invoice in this response, Yorkville in no way intends to waive its objections to the production of the invoice or its objections to the Hearing Officer's order related to it. The point here is that Fox Moraine has had the invoice for over a year, and the invoice discloses the existence of the Roth Memo.

**II. FOX MORAINES MOTION SHOULD BE DENIED BECAUSE THE ROTH MEMORANDUM IS A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION.**

Fox Moraine asks the Hearing Officer to compel disclosure of a privileged attorney-client communication from the City's attorney, Michael Roth, to the Council. Without citing any legal authority to support its argument, because there is none, Fox Moraine instead labels Roth's legal memorandum a "report" and "a supplemental filing," which it then attempts to group with the reports authored by the City's Special Counsel and the Hearing Officer, which were filed as part of the public record. Fox Moraine blithely assumes, then, that because those reports, which are part of the record, are not privileged, the legal memorandum Roth authored likewise must not be privileged. That assumption is misplaced both factually and legally.

First, Petitioner's assumption does not comport with the facts. Unlike Roth, both Clark and Price were assigned, by ordinance, a role in the application hearing proceedings. Clark, the Hearing Officer, was required to submit a written report of his findings to the Council prior to its deliberations. He did so, and his report became part of the record. Price, too, as the City's Special Counsel, was required to submit any report he produced through the public hearing process. Because he prepared a report, that report also became part of the public record. Thus, both Price and Clark prepared reports that were intended to, and did, become part of the public record.

The City Attorney, on the other hand, is not assigned any role in the landfill proceeding by the ordinance and had no obligation to write or file any report as part of the proceeding. Roth's Memorandum therefore was not a third landfill "report" under the ordinance or otherwise. It is solely a lawyer's confidential response to his client's request for legal advice—a privileged attorney-client communication.

**Electronic Filing - Received, Clerk's Office, September 29, 2008**

Fox Moraine's assumption also contravenes Illinois laws regarding privilege. In Illinois, an attorney-client privilege arises when one seeks legal advice from a professional legal advisor in his capacity as such; the communications relating to that purpose made in confidence by the client are permanently protected from disclosure by him or the legal advisor. *E.g., People v. Murry*, 305 Ill. App. 3d 311, 316 (2<sup>nd</sup> Dist. 1999). And not only are the client's communications to the lawyer privileged, but the lawyer's response to the request for legal advice, too, is protected. *Midwesco-Paschen Joint Venture for the Viking Projects v. IMO Indus., Inc.*, 265 Ill. App. 3d 654, 660-62 (1<sup>st</sup> Dist. 1994); *In re Marriage of Granger*, 197 Ill. App. 3d 363, 374 (5<sup>th</sup> Dist. 1990); *see also* Ill. S. Ct. R. 201(b)(2) (describing privileged matters as including "communications between a party or his agent and the attorney for the party"); *CNR Invs., Inc. v. Jefferson Trust & Sav. Bank*, 115 Ill. App. 3d 1071, 1075 (3<sup>rd</sup> Dist. 1983) (noting that "attorney-client privilege is restricted to confidential legal advice from a lawyer").

Finally, Fox Moraine also claims, again without citing any support, that, "Fox Moraine, as a matter of fundamental fairness is entitled to know all of the materials considered by the city council in making its decision." (Motion to Compel, ¶ 6.) Fox Moraine is wrong. The Appellate Court and the Board have consistently held that fundamental fairness requires only that the record be available to the decisionmaking body, and the landfill applicant is not entitled to know what the decisionmakers considered or even if they reviewed the record. *See, e.g., City of Rockford v. County of Winnebago*, 186 Ill. App. 3d 303, 313 (2<sup>nd</sup> Dist. 1989) ("the only statutory requirement concerning the decision of the county board is that its decision be in writing and specify the reason for the decision. . . . Whether the board members availed themselves of the opportunity to review the record is not an issue relevant to this case, as there is no such requirement that they do so."); *Waste Mgmt. v. Pollution Control Bd.*, 175 Ill. App. 3d

1023, 1044 (2<sup>nd</sup> Dist. 1988) (where applicant contended that the county board did not have adequate time or opportunity to consider the record before its vote, Appellate Court held "fundamental fairness in this context does not require the full county board to debate the hearing committee's recommendation so long as the record is made available for review by the entire county board. . . . [and] there is no requirement that the [county board] conduct any debate as long as they have had an opportunity to review the record prior to voting."); *Rockford v. Winnebago County Bd.*, PCB No. 88-107, 1988 Ill. ENV LEXIS 128, at \*10-11 (Nov. 17, 1988) (forbidding applicant from questioning board members about how much preparation they did for deliberation, because it is "not permissible for this Board to inquire into how the administrative decisionmaker dealt with the record in deriving his or her final determination—so long as there was a fair and adequate opportunity for Rockford to present testimony and evidence into that record."), *aff'd County of Winnebago*, 186 Ill. App. 3d 303 (2<sup>nd</sup> Dist. 1989); *Slates v. Ill. Landfills, Inc.*, PCB No. 93-106, 1998 Ill. ENV LEXIS 956, at \*40 (Sept. 23, 1993) ("[T]here is no requirement that the local decisionmaker conduct any debate as long as they have had an opportunity to review the record prior to voting.").

Because Roth's memorandum was a confidential response to a request by his client, the City Council, for legal advice, it is protected from disclosure, and Fox Moraine's Motion to Compel its production should be denied.

## **II. CONCLUSION**

Petitioner disingenuously characterizes a memorandum from Michael Roth, the City's attorney, to the City itself as a "report" of the hearings regarding Fox Moraine's landfill application. Roth's memorandum was not, however, a "report" of the proceedings, but was a written and confidential response to the City's request for legal advice. Roth wrote the memorandum not as a participant in the landfill application proceedings, but as a legal advisor to





**EXHIBIT A**

STATE OF ILLINOIS     )  
  ) ss  
COUNTY OF KENDALL    )

**ORDINANCE No. 2006-117**

**ORDINANCE AMENDING AND RESTATING**

**CITY CODE TITLE 8 -- BUILDING,**

**CHAPTER 14 -- POLLUTION CONTROL FACILITY SITING**

Whereas the United City of Yorkville has taken up, discussed and considered amending and restating the City Code, Title 8, Chapter 14, Pollution Control Facility Siting, and









Whereas the Mayor and City Council have discussed that it may be prudent to amend and restate Title 8-- Building, Chapter 14 -- Pollution Control Facility Siting, in its entirety thereby restating Chapter 14 as depicted on the attached Exhibit "A".

NOW THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE UNITED CITY OF YORKVILLE, upon Motion duly made, seconded and approved by a majority of those so voting, that Title 8 -- Building, Chapter 14 -- Pollution Control Facility Siting, of the City Code of the United City of Yorkville is hereby amended by deleting the current text of all of Chapter 14, and substituting in place of the former Chapter 14, a new Chapter 14, as depicted on the attached Exhibit "A".

All ordinances or parts of ordinances conflicting with any of the provisions of this Chapter shall be and the same are hereby repealed.

If any section, subsection, sentence, clause, phrase or portion of this Chapter is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

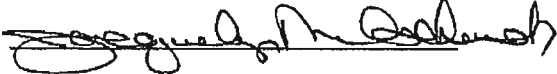
This Chapter shall be in effect from and after its passage, approval and publication in pamphlet form as provided by law.

JAMES BOCK		JOSEPH BESCO	
VALERIE BURD		PAUL JAMES	
DEAN WOLFER		MARTY MUNNS	
ROSE SPEARS		JASON LESLIE	

Approved by me, as Mayor of the United City of Yorkville, Kendall County, Illinois, this 26 Day of Sept, A.D. 2006.

  
MAYOR

Passed by the City Council of the United City of Yorkville, Kendall County, Illinois this 26 day of Sept, A.D. 2006.

ATTEST:   
CITY CLERK

Prepared by:

John Justin Wyeth  
City Attorney  
United City of Yorkville  
800 Game Farm Road  
Yorkville, IL 60560

**EXHIBIT "A"**

CHAPTER 14

POLLUTION CONTROL FACILITY SITING ORDINANCE

**Section 1. DEFINITIONS**

Whenever the following terms are used in this Chapter, they shall have the meanings respectively ascribed to them hereafter provided:

ACT: "The Environmental Protection Act," 415 ILCS 5/1 *et seq.*

APPLICANT: Any person, partnership, firm, association, corporation, Municipal corporation or unit of local government, company or organization of any kind that files a request for siting approval of a pollution control facility pursuant to the Act and this Ordinance.

CITY: The United City of Yorkville, County of Kendall, State of Illinois.

CITY CLERK: The United City of Yorkville City Clerk.

CITY COUNCIL: The United City of Yorkville City Council.

FACILITY: A pollution control facility as defined in the Act.

PETITION: The application filed by the Applicant requesting siting approval for a facility.

In addition, all other words used in this Chapter and defined in the Act shall have the same definitions and meanings as set forth in the Act.

**Section 2. NOTICE OF REQUEST FOR SITING APPROVAL**

A. No later than 14 days before the date on which the City Clerk receives a request for siting approval, the Applicant shall cause written notice of such request to be served either in person or by registered in mail, return receipt requested, on owners of all property within the subject area that is not solely owned by the Applicant and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of Kendall County; provided that the number of feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided further that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.

B. Such written notice shall also be served upon members of the Illinois General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation.

C. Such notice shall state the name and address of the Applicant, the location of the proposed Facility, the nature and size of the Facility, the nature of the activity proposed, the probable life of the proposed activity, the date when the request for site approval will be submitted, and a description of the right of persons to comment on such request as hereafter provided (which may be satisfied by enclosing a copy of this Ordinance).

**Section 3. APPLICATION FOR SITING APPROVAL**

A. An original Application and a minimum of 30 complete copies of the Application, including all plans, exhibits, reports, maps and other submittals, shall be delivered to the office of the City Clerk. Upon receipt of any such Application, the City Clerk shall date stamp, retain and preserve the original Application as the start of the public record on this matter. The Clerk shall also date stamp the copies of the Application and immediately deliver 1 copy of the Application to the Mayor and each City Council Member. The Clerk shall deliver 2 copies to the City Administrator's office. The Clerk shall deliver 1 copy to the Finance Director, 1 copy to the Director of Public Works, 1 copy to the City Engineer, 1 copy to the Zoning Officer, 1 Copy to the Chief of Police; 1 copy to the City Planner; 1 copy to the Economic Development Committee Chairman; 1 copy to the Chairman of the Plan Commission. The Clerk shall deliver 12 copies to the City Attorney's office. The Clerk shall also forward a copy of the Application to the Public Library for the Library to maintain as a non-circulating reference copy available to the Public.

The date on the stamp of the City Clerk shall be considered the official filing date for all purposes relating to the time of filing. Receipt and acceptance of a Petition by the City Clerk is pro forma, and does not constitute an acknowledgment that the applicant has complied with the Act or this Article. Should the Petition be presented to the City Clerk without the correct number of copies, in the incorrect form, or without the sections and fee described in this subsection, the Petition shall be rejected by the City Clerk.

B. A copy of the Application shall be made available at City Hall for public inspection in the office of the City Clerk or such other location as may be convenient to the operation of the City government. Another copy of the Application shall be made available for purposes of fulfilling copy requests submitted to the City. The Clerk may employ an outside copy service for this purpose and said service may be furnished a copy of the Application for purposes of reproduction. Members of the public shall be allowed to obtain a copy of the Application or any part thereof upon payment of the actual costs of reproduction. All copying requests shall be fulfilled by the City Clerk within a reasonable time and in conformance with the Freedom of Information Act.

C. Applications shall include the following:

1. A written petition on standard 8 ½" x 11" paper setting forth or including the following:

- a. The identification of the applicant, owner of the subject property and the proposed operator of the Facility. If the subject property is

- owned in a trust, then also identify the beneficiary(ies) of the trust(s). Also indicate for each whether the Applicant, the landowner and the operator is an individual, partnership, limited liability company, corporation or unit of government. In the case of an individual, list his or her address. In the case of a partnership, submit the names of all partners. In the case of a limited liability company, submit the names and addresses of all members and managers and attach a certificate of good standing for the LLC from the Secretary of State's office. In the case of a corporation, submit the names and addresses of all officers and directors, and the names and addresses of all shareholders owning 10% or more of the capital stock of the corporation; together with certified copies of the articles of incorporation in the State of Illinois or, if not incorporated in the State of Illinois, its license to do business in the State of Illinois.
- b. The legal description of the proposed site of the Facility and a street address or some other reasonable description of where the Facility is to be located.
  - c. A description of the proposed Facility, its operation and the anticipated longevity thereof.
  - d. The area to be served by the proposed Facility and a statement of the needs in such area for such a Facility.
  - e. The expected types, amounts and methods of treatment or storage of all wastes proposed for the site and the origins of these wastes.
  - f. The monitoring plans, including background analyses for ground water, surface water and air.
  - g. The plans for closure of the site and continued monitoring thereafter.
  - h. Reasons supporting approval of the request;
  - i. Proof of notice pursuant to Section 39.2(b) of the Act; and
  - j. A prayer for siting approval.
2. The request for a permit made to the Illinois Environmental Protection Agency, if any such request has been made.
3. A site plan showing details of the proposed Facility including, but not limited to:
- a. Engineering cross-sections;
  - b. All existing wells within 1,000 feet of the subject property;
  - c. All monitoring systems, including, but not limited to, ground water, surface water, and air;
  - d. Fences, buildings and other structures;
  - e. Roads, entrances and driveways;
  - f. Core sample locations on the subject property; and
  - g. Location and purpose of any other drill-holes on the subject property.
  - h. Any information to demonstrate that the proposed facility is so designed, located and proposed to be operated in such a manner that the public health, safety and welfare will be protected, in addition to that which has been provided already pursuant to this article.
  - i. Whether any existing uses will be continued.

4. A detailed topographic survey of the subject property and the surrounding area--within 1,000 feet of the property line—indicating: topographical variations in 2 foot intervals; existing land uses; existing zoning; and, if applicable, the boundary of any floodway or flood plain.
  
5. A statement of the plan of operation for the proposed Facility including, but not limited to, the following:
  - a. Method of landfilling, incineration, composting, resource recovery or other process;
  - b. Hours of operation;
  - c. Personnel and their training;
  - d. Litter, vector, dust and odor control;
  - e. Surface drainage and erosion control;
  - f. Fire control; and
  - g. Corrective actions for spills and other operational accidents.
  
6. A report of projected traffic impact regarding the proposed site, including but not limited to, the anticipated number of vehicles and their size, weight and direction of movement. This report should include gap study data and level of service analysis for all intersections likely to be impacted by the projected traffic.
  
7. All site-specific studies, maps, reports, permits or exhibits which the applicant desires the City to consider at the public hearing, including all documents submitted to the Illinois Environmental Protection Agency pertaining to the proposed Facility. Background reference material generally relied upon in the preparation of the application need not be reproduced and included within the application in its entirety.
  
8. A written commitment (by Host Agreement or otherwise) to obtain certificates of insurance from companies having a Best rating of A VI or better that shall, at such time as the facility is permitted, cover accidents such as fires, explosions, nonsudden accidental occurrences and pollution impairment.
  
9. If the site is a proposed hazardous waste facility, a copy of the Resource Conservation and Recovery Act Contingency Plan.
  
10. A statement describing the past operating experience of the Applicant and, if different, the Operator (and, for both, any subsidiary, member, manager, parent corporation or subsidiary of the parent corporation) in the field of solid or hazardous waste management.
  
11. A statement citing the past record of actual or alleged violations of the applicant (and any subsidiary, member, manager, parent corporation or subsidiary of the parent corporation) with environmental laws and regulations governing solid or hazardous

management operations or activities. Said statement shall include, but not be limited to, a citation of the applicable statute or ordinance violated or alleged to be violated and a brief written summary of the activities or operations giving rise to the actual or alleged violations and the ultimate outcome of the matter, including whether any fines or penalties were imposed.

12. A description of the following (if applicable):
  - a. Leachate collection system.
    1. Type, location and construction of the subsurface collection system;
    2. Written narrative describing methods and processes of the collection, management and treatment of the leachate;
    3. Program for monitoring effectiveness of the collection, management and treatment of the leachate; and
    4. Discharge points of effluent
  - b. Final cover system, including proposed soil and/or geomembrane specifications if applicable.
  - c. Facility construction quality assurance and quality control program;
  - d. Personnel requirements including number of full- and part-time employees, which personnel positions and in what numbers are considered minimally necessary for facility operation, and the training and supervision of employees. In addition, identify whether the proposed facility intends on utilizing any contract or temporary employees and, if so, the positions those employees would fill, the training requirements and supervision of such employees, and whether such employees would be considered minimally necessary for the facility operation.
  
13. The Application Fee for a request for siting approval is required and shall be administered as follows:
  - a. The Applicant shall deposit the sum of \$100,000.00 in the form of a certified or cashier's check, to cover the costs associated with the siting process, including (but not limited to) court reporter costs, transcript costs, City legal and consultant costs, and other expenses incurred by the City in conducting the review of the request for siting approval, the subsequent public hearing and the siting approval decision; provided, however, that any portion of the application fee that remains unexpended at the conclusion of the siting approval decision shall be returned to the applicant. An accounting of expenses attributed to the hearing process shall be provided monthly.
  - b. In the event that, at any time prior to the conclusion of the siting approval process, the City has expended such sums as to reduce the balance of the application fee to a figure less than \$25,000.00, the Applicant will be notified in writing. The Applicant would then have 14 days to deposit with the City Clerk an additional \$50,000.00 in the form of a certified or cashier's check, unless the City Administrator determines, in his/her sole discretion, that additional funds in excess of \$50,000.00 are necessary



based upon the status of the siting process, in which case the Applicant shall deposit that amount. In no event shall any demand for additional fees exceed \$100,000.00 per each additional funding request. Any portion of the fees, including any additional fees, that remain unexpended at the conclusion of the siting approval decision shall be returned to the Applicant.

14. A table of contents shall be provided that readily identifies all sections and subparts of the application, including all accompanying appendices, exhibits, tables, and illustrations. The pages, appendices, exhibits, tables, and illustrations shall be denoted in logical sequence.

15. The Applicant shall also provide a copy of the entire Application in electronic ".pdf" format on CD-ROM such that the Application may be uploaded to the City website and that read-only copies of the Application may be provided on CD-ROM format to members of the public that request same.

D. An Application may not be filed that is substantially the same as an application that was disapproved within the preceding two years pursuant to a finding under any of the criteria of subsection 9B of this Ordinance.

E. Although date stamped at the time of delivery, the Application shall be subject to further review to assure compliance with the requirements of this Ordinance concerning the content of the Application. Accordingly, every Application may be rejected within the first 21 days following its delivery if it is determined by the office of the City Administrator that the Application has omitted any of the materials required by this Section of the Ordinance. This review is for purposes of completeness only and not an evaluation of the information under the criteria of the Act. The City Administrator shall, therefore, deliver to the Applicant within 21 days of the date of delivery a statement advising the Applicant of one of the following:

1. The content of the Application is complete and therefore the delivery date stamped upon the Application shall constitute the Date of Filing; or

2. The Application is incomplete in the following specific ways and therefore the Application has not been accepted for filing. The City Administrator shall specify the deficiencies in the Application.

Following confirmation of the completeness of the Application, the City Clerk shall cause the publication of a black border notice stating that said Application and supporting evidence have been filed and are available in the City Clerk's office for public inspection. The City Clerk shall cause such notice to be published no later than 30 days from the Date of Filing.

F. In order to give members of the public an opportunity to make informed written comment and to give members of the public and the City an opportunity to prepare adequately and fairly for the public hearing hereinafter described, the Applicant must

fully comply with all requirements of this Section of the Ordinance and failure to submit the required information as of the Date of Filing shall, absent good cause shown in the judgment of the Hearing Officer, render such information inadmissible at the public hearing.

G. At any time prior to the completion by the Applicant of the presentation of the Applicant's factual evidence and opportunity for cross-examination by the City Council and any participants, the Applicant may file not more than one amended application containing substantive amendments or revisions upon payment of additional fees in the sum of \$25,000.00--unless the City Administrator determines, in his/her sole discretion, that funds in excess of the \$25,000.00 are required due to the nature of the changes of the amended application, in which case that greater amount shall be the sum due. Upon the filing of an Amended Application, the time limitations for final action by the City Council shall be extended for an additional period of 90 days.

H. Other amendments may be made if, in the opinion of the Hearing Officer, any such proposed amendment is nonsubstantive and the Hearing Officer otherwise allows such amendments.

**Section 4. REVIEW OF APPLICATION**

A. The City Administrator, together with the assistance of Special Counsel to the City, shall be responsible for coordinating the review of the Application by the City Staff and its consultants and to render such reports, advice or recommendations to the Mayor and City Council as the City Administrator shall deem prudent to assisting the Mayor and City Council in making their decision. The City Administrator is authorized to call meetings and set deadlines for the submittal of reports and recommendations in preparation for submission through the public hearing process. The City Administrator, Special Counsel, the City Staff and the City's consultants shall not discuss the Application or the review thereof with, nor submit reports or recommendations to, the Mayor, City Council or the City Attorney except in accordance with the public hearing process set forth below.

B. Should the City Administrator desire to enter any reports, testimony or other evidence into the record of the public hearing, such shall be entered in accordance with the procedures set forth in this Ordinance and such shall also be available for copying by the public upon the payment of the actual costs of reproduction.

**Section 5. PARTICIPATION AND INFORMATION FROM OTHER PARTIES.**

(a) The Applicant is a Participant.

(b) The City is a Participant. For purposes of the Act, the City and its employees and staff, and any experts, consultants, investigators or attorneys hired by the City to review, investigate, present at hearing, or otherwise work for the City concerning the Petition, all

constitute one Participant. To the extent the City employees and staff wish to participate in the public hearings outside their roles or employment with the City, they must submit a Notice of Participation, as do other members of the public.

(c) Any person other than described in (a) and (b), above, must file a written "Notice of Participation" on a form supplied by the City Clerk notifying the City Clerk and counsel for the Applicant of that person's or entity's intent to participate.

1. Every Notice of Participation must be filed with the City Clerk before the adjournment of the first day of public hearing. In the case of counsel of record for any Participant, said counsel shall, on or before the 80<sup>th</sup> day from the Date of Filing, serve a letter upon the City Clerk and upon counsel for the Applicant entering his or her appearance for the Participant.

2. Every Notice of Participation shall provide the following information: the name, address daytime phone number and, if available, facsimile number of the Participant or counsel; whether the Participant will be participating on his/her own behalf or as a representative/spokesperson of another person or entity (and if on behalf of another person or entity, identify the name of that person or entity); whether the person (or the entity or association he/she represents) will be represented by an attorney during the public hearings; and whether the person intends on providing oral testimony or comment during the public hearing. All members of the public who desire to present sworn testimony, unsworn comment, or submit written questions to the Hearing Officer must file a Notice of Participation.

3. No person may become a Participant after the first day of the hearing except for good cause shown. The Hearing Officer shall liberally interpret this limitation if the additional participation shall not delay the process or unfairly prejudice a prior Participant. No late Participant shall be entitled to re-call a witness who has previously testified.

(d) Participant rights. Participants have the right to present sworn testimony and witnesses. Participants represented by counsel have the right to cross-examine or question witnesses who provide sworn testimony. Participants who are not represented by counsel may provide witnesses, evidence and sworn testimony subject to cross-examination by others; provide unsworn testimony or comment during the public hearing (subject to the Hearing Officer's judgment and consistent with fundamental fairness); or, as is the case for members of the public generally, submit written questions to the Hearing Officer who, in his/her sole discretion, shall decide whether such questions shall be posed and the manner of posing such questions. Participants who are not represented by counsel shall not cross-examine witnesses directly.

(e) Any attorneys acting as counsel and representing a Participant must be licensed and in good standing to practice law in the State of Illinois, or if licensed and in good standing to practice law in another State which is part of the United States, shall be

allowed to serve as a counsel for a Participant upon motion made to and granted by the Hearing Officer.

(f) All witnesses (other than those called purely for purposes of rebuttal) and the subject matter on which they will testify shall be disclosed, and all reports, studies, exhibits or other evidence, or copies thereof, that any person, other than the Applicant, desires to submit as evidence for the record at the public hearing must be filed with the City Clerk and with counsel for the Applicant no later than 80 days after the Date of Filing of the Application. In the event that the 80<sup>th</sup> day after the Date of Filing falls on a Saturday, Sunday or legal holiday, the next business day shall be considered the date by which all such information must be filed. Copies of all such information shall also be available for copying by the public upon the payment of the actual costs of reproduction. Evidence or witnesses not so disclosed by the required date shall be admissible at the hearing only where the Hearing Officer shall find that the admission of such evidence is necessary to provide fundamental fairness to the parties.

**Section 6. PUBLIC HEARING**

A. The Public Hearing shall be held no sooner than 90 days from the Date of Filing and shall not commence any later than 120 days from the Date of Filing. The Public Hearing shall be at such times and places as is convenient for the public generally but convenience of the public shall be subservient to the requirement that the City render a decision prior to the 180<sup>th</sup> day from the Date of Filing, and accounting for the 30 day period for written comment following the close of the public hearing, and accounting for sufficient time for the corporate authorities to deliberate and render a decision. The City Administrator shall determine and publish the date(s), time(s) and location(s) for the Public Hearing as soon as is practical but in no event later 30 days after the Date of Filing.

B. Once determined by the City Administrator, the City Administrator shall notify the Applicant of the date, time and location of the Public Hearing and shall request that the Applicant cause notice of the Public Hearing to be made as follows:

1. Publish 2 legal notices in a newspaper of general circulation published in Kendall County. The first such notice shall be published no sooner than 50 days from the Date of Filing and no later than 60 days from the Date of Filing; the second such notice shall be published no sooner than 65 days from the Date of Filing nor later than 75 days from the Date of Filing. Said notices shall consist of the following:

- A. The name and address of the Applicant;
- B. The owners of the site and, if ownership is in a land trust, the names of the Beneficiaries of said trust;
- C. The legal description of the site;
- D. The street address of the Property and, if there is no street address for the

Property, a description of the site with reference to location, ownership or occupancy or in some other manner that will reasonably identify the property to the residents of the neighborhood;

- E. The nature and size of the proposed development;
  - F. The nature of the activity proposed;
  - G. The probable life of the proposed activity;
  - H. The Date of Filing and the time and date of the public hearing;
  - I. The location of the public hearing;
  - J. A copy of this Ordinance and a statement that witness lists and copies of reports and other evidence are to be filed with the City Clerk and counsel for the Applicant no later than the 80<sup>th</sup> day from the Date of Filing.
2. Certified mail to all members of the Illinois General Assembly from the district in which the proposed site is located.
  3. Certified mail to the Illinois Environmental Protection Agency.
  4. Certified mail to the County of Kendall and all municipalities or townships within 1 and ½ miles of the proposed facility.
  5. Public hearing notice in a newspaper of general circulation published as a display at least once during the week preceding the public hearing. Such notice shall consist of all items described in subsection B1 above except for items 1c and 1j.

C. Hearing Procedures:

1. The Mayor shall appoint a Hearing Officer to preside over the public hearing and the Hearing Officer shall make any decisions concerning the admission of evidence and the manner in which the hearing is conducted, subject to this Ordinance. The Hearing Officer shall make all decisions and rulings in accordance with fundamental fairness. The Hearing Officer may exclude irrelevant, immaterial, incompetent or unduly repetitious testimony or other evidence. Rulings of the Hearing Officer shall be appealable to the City Council but may be reversed only upon a vote of 3/4ths of the corporate authorities present. All testimony and all public meetings concerning the Petition shall be in the presence of a certified court reporter who shall report all proceedings regarding consideration of the Petition. The Hearing Officer shall have the following powers or duties:

- a. Administer oaths and affirmations;
- b. Conduct a public meeting, prior to the start of the public hearings, to explain the public hearing procedure and site location review process.
- c. Arrange for the presence of a certified court reporter to attend and transcribe the conduct of all public hearings for the public record.

d. Regulate the course of the hearing, including, but not limited to, controlling the order of proceedings, consistent with this Ordinance, and to grant recesses for good cause shown. For example, good cause may be found when issues, facts, data or other pieces of evidence arise in the course of the hearing that were not reasonably foreseeable to the party requesting the recess. No recess may extend past 5 days except due to the availability of a suitable forum for the hearing.

e. Require a witness or person presenting unsworn public comment to state his/her position either for, against, or undecided with respect to the proposed facility.

f. Examine a witness and direct a witness to testify.

g. Establish reasonable limits on the duration of public hearing consistent with the Act and this Ordinance, including but not limited to the reasonable limitation of sworn testimony, unsworn oral comment, direct and cross-examination of any witnesses, and the limitation of repetitive or cumulative testimony and questioning.

h. Rule upon objections and evidentiary questions, with the understanding that such rulings must be consistent with fundamental fairness, but need not be in strict compliance with the Illinois Supreme Court, Illinois Code of Civil Procedure, or any local rules of evidence governing a civil judicial trial in the State of Illinois.

i. Allow the introduction of late-filed evidence, be it written or testimonial, on behalf of any Participant, provided good cause is shown for the late-filing, the evidence is offered in and is relevant to the rebuttal portion of the Applicant's or Participant's case, and evidence was filed with the City Clerk at least one day before the public hearing at which it is offered, and fundamental fairness to all parties will be preserved.

j. The Hearing Officer shall be an attorney, licensed to practice in Illinois. The Hearing Officer shall confer with the City Council concerning the Petition, between the Date of Filing of the Petition and the Council's decision on the Petition. Given the Hearing Officer's role of communicating with the City Council, the Hearing Officer may not confer with the Participants (members of the public, Applicant and City included) concerning the Petition, unless such conference takes place during the public hearing, is through correspondence which is filed with the City Clerk (and, thus, available for everyone to view), or concerns location, time or other similar scheduling aspects of the public meeting or public hearing, or the notices for same. The only additional exception from this restriction is that the Hearing Officer may confer with the City Clerk about the upkeep or status of the public record, make a request to review or copy the public record, or confer with the City Clerk regarding the scheduling or location

of the public meeting or hearing, or arrangements for the notices of the public meeting and hearing.

k. At the conclusion of the public hearing and after consideration of all timely-filed written comments, the Hearing Officer shall submit draft written findings (of law or fact) to the City Council and file a copy of such findings with the City Clerk.

l. The Hearing Officer does not have the right or the power to vote, as a City Council Member votes, on the Petition.

2. Conduct of the public hearing shall be substantially as follows:

a. Call to order with determination of a quorum;

b. Introduction of the City Council Members who are present;

c. Introduction of the Hearing Officer;

d. Recognition of the Applicant and identification of the Petition;

e. Recognition of fees, notices, and date of filing of the Petition;

f. Recognition of the City staff and attorney present;

g. Recognition of all other Participants who have filed the Notice of Participation;

h. Recognition of all reports, exhibits, maps or documents of record as filed pursuant to subsection (e), above;

i. Applicant, Participants represented by Counsel, and Special Counsel for the City may then make an opening statement.

j. The City Council shall then hear testimony from the Applicant and/or any witnesses the Applicant may wish to call. Upon the close of the Applicant's testimony, Participants represented by counsel may present sworn testimony, including any witnesses and evidence they wish to present. Upon the close of all such testimony, the City may present sworn testimony, including witnesses and evidence it may wish to present. The Hearing Officer, in the exercise of his or her discretion, may then permit rebuttal testimony and sur-rebuttal testimony.

k. All witnesses shall testify under oath and be subject to reasonable questioning as follows: direct examination by counsel; cross-examination by counsel for other Participants or the City, the City Council and/or the Hearing

Officer (including the use of written questions submitted by members of the Public to the Hearing Officer); redirect examination; re-cross examination.

1. Following the testimony outlined in subparagraph (j) above, any Participant not represented by counsel that wishes to provide sworn testimony subject to cross-examination by others may proceed.
  - m. Following the testimony, if any, outlined in subparagraph (l) above, any Participant that has not otherwise presented testimony may provide unsworn testimony or comment, subject to the Hearing Officer's judgment and consistent with fundamental fairness.
  - n. Closing statements, if any, by counsel for the Applicant, Participants represented by counsel, and counsel for the City.
  - o. Rebuttal statement, if any, by the applicant, subject to limitations as imposed by the Hearing Officer.
  - p. Hearing declared closed.
3. Public comment: written and oral:
  - a. Any person has the right to file written comment concerning the appropriateness of the proposed facility, or its compliance with the requirements of Section 39.2 of the Act, with the City Clerk, at any time after the filing of a Petition and within the time limitation provided in subsection (d), below.
  - b. The City Clerk, on behalf of the City Council, shall receive written comment from any person concerning the appropriateness of the proposed site. Upon receipt of any such written comment the City Clerk shall date stamp same, shall serve copies of the same on counsel for the Applicant and counsel for the City; and shall file written comment and the postmarked envelope in which comment is received.
  - c. Copies of such written comments shall be made available for public inspection in the offices of the City Clerk, and members of the public shall be allowed to obtain a copy of any written comment upon payment of actual cost of reproduction.
  - d. Any written comment received by the City Clerk or postmarked not later than thirty (30) days after the date of the last public hearing shall be made part of the record at the public hearing as hereinafter described and the City Council shall consider any such timely written comments in making its final determination concerning said Petition. In the event that the thirtieth day falls on a Sunday or a Federal holiday, the next day on which mail is delivered shall be considered the thirtieth day for purposes of this subsection.



e. Any person has the right to provide oral, unsworn comment during the course of the public hearing, upon reasonable notice to the Hearing Officer that the person desires to provide such comment. This type of comment, since it is not provided under oath, is not subject to cross-examination.

4. Ex-Parte Communication Prohibited:

In recognition of the quasi-judicial role of the Mayor and each Member of the City Council, and the City Attorney, ex-parte communications with persons other than the Mayor, Council Members or the City Attorney concerning the Application are prohibited between the Date of Filing and the date of the final decision of the City Council (or the 180<sup>th</sup> day after the Date of Filing). Although the Mayor and Members of the City Council are encouraged not to attend meetings at which the Mayor or Member knows the Application may be discussed, it is inevitable that due to their regular legislative duties over the course of time during the consideration of the Application they may be in attendance at such meetings (e.g. attendance at a municipality's council of governments meeting, attendance at a local chamber of commerce meeting). As such, the Mayor or Member is required to obtain and file a transcript of any meeting, where such meeting has been transcribed or recorded, or otherwise disclose such meeting in the public records (such as disclosing it on the record during the transcribed public hearings or during the written comment period provided for in this Article). The transcript shall not, however, be utilized by the City in reaching its decision.

**Section 7. RECORDS KEPT**

A. The City Clerk shall be responsible for keeping the records of said hearing. The records shall consist of the following:

1. The Application and all amendments thereto;
2. Proofs of the required notices;
3. Notices of Participation;
4. Written comments filed by the public (either received by the City Clerk's office or postmarked between the Date of Filing and 30 after the close of the hearing);
5. All reports, studies, exhibits, documents or statements received in evidence at the public hearing;
6. The transcript of the public hearing;
7. Any motions filed during the public hearing;

8. All transcripts, when available, or disclosures of meetings, other than the public hearings held pursuant to this Article, at which the Mayor or a City Council Member was in attendance and the Application was discussed.
  9. The Hearing Officer's proposed findings of fact and recommendations to the City Council (including any conditions of approval).
  10. The resolution containing the final decision of the City Council.
- B. The City Clerk shall be responsible for certifying all copies of the record of the public hearing.

**Section 8. SITING APPROVAL DECISION**

- A. On or before the 180<sup>th</sup> day following the Date of Filing, or on or before the 270<sup>th</sup> day following the Date of Filing if the Applicant filed an amendment to the Application in compliance with the timing requirements of the Act, the City Council shall, by written resolution, upon the vote of a majority of its members, decide whether to:
1. Grant the Petition, without any conditions; or
  2. Grant the Petition, but with conditions on such approval, provided such conditions are reasonable and necessary to accomplish the purposes of Section 39.2 of the Act and are not inconsistent with the regulations promulgated by the Illinois Pollution Control Board; or
  3. Deny the Petition.
- B. In making its recommendation on the request for siting approval, the City Council shall base its decision on the following criteria:
1. The facility is necessary to accommodate the waste needs of the area it is intended to serve;
  2. The facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
  3. The facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;
  4. The facility is located outside the boundary of the 100-year flood plain;
  5. The plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents;

6. The traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;

7. If the facility will be treating, storing or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and evacuation procedures to be used in case of an accidental release;

8. If the facility will be located within a regulated recharge area, any and all applicable requirements specified by the Illinois Pollution Control Board for such area have been met; and

9. If a solid waste management plan was previously adopted for Kendall County prior to the filing of the petition, the facility is consistent with that plan.

C. The City Council shall consider as evidence the previous operating experience and past record of violations and penalties of the Applicant or proposed Operator (and any subsidiary, parent corporation, subsidiary of the parent corporation, or manager or member of the Company) in the field of solid waste management when considering criteria 2 and 5 of the Act and subsection B above.

D. No determination by the City Council of a siting approval request may be reconsidered.

E. A local siting approval granted under this Chapter shall expire at the end of 2 calendar years from the date upon which it was granted, unless the local siting approval granted under this Chapter is for a sanitary landfill operation, in which case the approval shall expire at the end of three (3) calendar years from the date upon which it was granted, and unless within that period the applicant has made application to the Illinois Environmental Protection Agency for a permit to develop the site. In the event that the local siting decision has been appealed, such expiration period shall be deemed to begin on the date upon which the appeal process is concluded.

F. Siting approval obtained pursuant to this Chapter is transferable and may be transferred to a subsequent owner or operator with the written approval of the City Council. In the event that siting approval has been transferred to a subsequent owner or operator, that subsequent owner or operator assumes and takes subject to any and all conditions imposed upon the prior owner or operator by the City Council pursuant to this Section as well as any modifications to these conditions as documented in connection with the City Council's written approval of the transfer of the siting approval. Further, in the event that siting approval obtained pursuant to this Chapter has been transferred to a subsequent owner or operator, that subsequent owner or operator assumes all rights and obligations and takes the facility subject to any and all terms and conditions of any existing host agreement between the prior owner or operator and the City.

**Section 9. ADMINISTRATION OF FEES AND COSTS**

**Electronic Filing - Received, Clerk's Office, September 29, 2008**

- A. Upon termination of any proceedings under this Chapter, a final accounting and summary of all authorized expenditures and reimbursements shall be presented to the City Council.
- B. Any portion of an application fee not required for reimbursement to the City for costs and expenses incurred by the City under this Chapter shall be returned to the applicant. Should there be costs and/or expenses in excess of the amount paid by the applicant in the application fee, the applicant shall bear any and all additional costs.
- C. In order to properly administer the application fee received with respect to this Chapter, the Finance Director is hereby authorized and directed to receive and hold such application fees for administration subject to the review and approval of the City Council.
- D. In order to expedite payment of all bills incurred as a result of administering this Chapter, all bills and questions concerning billing should be directed to the Finance Director.

**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 Response to Fox Moraine's Motion to Compel Disclosure of Roth Memorandum** 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 29, 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.