ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

COUNTY OF KANKAKEE and EDWARD D. SMITH, STATE'S ATTORNEY OF KANKAKEE COUNTY, **Petitioners,** **vs.** **THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES,INC. and KANKAKEE REGIONAL LANDFILL, L.L.C.** **Respondents.**	**No. PCB 03-31** **(Third-Party Pollution Control Facility Siting Appeal)**
BYRON SANDBERG, **Petitioner,** **vs.** **THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C.,** **Respondents.**	**No. PCB 03-33** **(Third-Party Pollution Control Facility Siting Appeal)**
WASTE MANAGEMENT OF ILLINOIS, INC. **Petitioner,** **vs.** **THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C.,** **Respondents.**	**No. PCB 03-35** **(Third-Party Pollution Control Facility Siting Appeal)** **(Consolidated)**

NOTICE OF FILING

PLEASE TAKE NOTICE that on December 5, 2002, there was caused to be filed with the Illinois Pollution Control Board, an original and nine (9) copies of the following documents, copies of which are attached hereto:

City of Kankakee's Reply Brief to the Pollution Control Board

Kenneth A. Leshen, By: eff
KENNETH A. LESHEN, Attorney at Law

PROOF OF SERVICE

I, Joseph A. Volini, a non-attorney, on oath state that I served a copy of the above listed documents by sending the same to each of the parties listed on the attached Service List via facsimile or personal delivery prior to 5:00 p.m. on December 5, 2002.

JOSEPH A. VOLINI

SUBSCRIBED AND SWORN TO before me this 5th day of December, 2002.

Diana Quintero
NOTARY PUBLIC

"OFFICIAL SEAL"
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Notary Public, State of Illinois
My Commission Expires 11/17/06

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REPLY BRIEF OF THE CITY OF KANKAKEE

Now comes the CITY OF KANKAKEE, by and through its attorney, KENNETH L. LESHEN, Assistant City Attorney, and in response and reply to the briefs and arguments filed herein, states as follows:

I. THE FINDINGS OF FACT AND CONCLUSIONS OF THE CITY COUNCIL OF KANKAKEE IN APPROVING THE SITING APPLICATION IS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND, THEREFORE, THE DECISION SHOULD BE AFFIRMED.

The first and primary issue facing this Board in reviewing the record in this case is to review the findings of fact of the City Council of the City of Kankakee, which findings were adopted as a portion of the resolution approving the siting approval. In reviewing those findings of fact, this Board must determine whether or not it can reverse the decision of the City Council of Kankakee only if it finds that the City Council's decision is contrary to the manifest weight of the evidence. *Concerned Adjoining Owners vs. Pollution Control Board*, 288 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist., 1997). A decision of a local siting authority with respect to an applicant's compliance with the statutory siting criteria will not be disturbed unless the decision is contrary to the manifest weight of the evidence. *Land and Lakes Company vs. Illinois Pollution Control Board*, 319 Ill. App. 3d 41, 743 N.E.2d 188, 252 Ill. Dec. 614 (3rd Dist., 2000). Further, a decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain or indisputable. *Turlik vs. Pollution Control Board*, 274 Ill. App. 3d 244, 653 N.E.2d 1288, 210 Ill. Dec. 826 (1995).

In this case, detailed findings of fact were included in the resolution of the City Council of the City of Kankakee which approved the siting of the solid waste facility in question. Despite their attempts, objectors, Waste Management and the County of Kankakee, have failed to point to or establish any evidence in the record which is substantially contrary to the evidence offered by the applicant in this case.

Further, the evidence offered by the applicant supports each of the statutory criteria which was required to be found by the City Council in approving this siting.

While it is clear that the objectors, Waste Management and Kankakee County, disagree with the findings of the City of Kankakee City Council, they have not shown, nor can they successfully argue, that the decision and findings are against the manifest weight of the evidence. In fact, none of the objectors' witnesses offered testimony contrary to those of the applicant, except on the issue of the geo-hydrology of the site. The City Council found on that issue that the applicant's evidence was credible and was supportive of the criteria and clearly opted to accept that testimony over the testimony of the objectors' witnesses.

Indeed, the findings of the City Council specifically referenced the testimony of the witness offered by Doris Benoit and Mark Warpet. The issues raised by that witness, Stuart Cravens, was considered and referenced in the findings of fact. Those findings found that while Mr. Cravens' testimony regarding the existence or non-existence of aquifers is an issue for which the design must accommodate and which further test borings would determine, Cravens' testimony regarding the design and efficiency of the design was not credible.

It is important to consider that this is not a case where a hearing officer heard the evidence in the absence of the legislative body and then reported to the legislative body his findings. In this case, at least ten of the fourteen members of the City Council were present for all or part of every one of the sessions of the hearings. For most of the sessions, twelve to thirteen members of the City Council were present. Thus, for all of the sessions, more than two-thirds of the City Council were present, heard the testimony, evaluated the testimony and made their own decision. Following the hearings, the City Council unanimously found that the record gave them no alternative but to approve the application for siting.

The City Council was repeatedly instructed that they should make their decision based only on the evidence presented in this record and not on any outside influence, outside testimony, or outside suggestions. In fact, they did so. The findings of fact regarding the various criteria reference the testimony of the various witnesses and discussed the testimony in support of the application. By its findings of fact, the City Council made a finding that the statutory criteria had been satisfied.

No effort has been made, nor has any effort been shown on the part of the objectors to point to evidence which is contrary to the findings of fact. Rather, by broad brush arguments, the appellants attempt to show points of cross examination which they believe tend to support their arguments. Just as the Kankakee aldermen were required to base their decision on the evidence offered at the hearing, so also are the objectors required to rely upon the evidence which was presented.

The facts are that the evidence in the record supports each of the criteria and the findings by the City Council of Kankakee and there is no basis to find that findings and decision made by members of the City of Kankakee City Council were against the manifest weight of the evidence. Indeed, the very substantial record establishes that the decision was based on the evidence presented at the hearings and that any decision other than approval would have been contrary to the evidence presented.

II. THE ERROR OF THE CITY CLERK IN FAILING TO PROVIDE A FREE COPY OF THE APPLICATION FOR SITING TO THE CHAIRMAN OF THE KANKAKEE COUNTY BOARD AND THE SOLID WASTE PLANNER WAS HARMLESS AND CAUSED NO PREJUDICE.

Kankakee County claims that this matter should be reversed and remanded due to the fact that the Kankakee City Clerk failed to provide a free copy of the siting application to the Chairman of the Kankakee County Board and the Kankakee County Solid Waste planner, as required by the City's ordinance. While there is no issue that such a failure occurred, there is also no showing that the County was prejudiced in any way by the failure.

As is established in the testimony of Anjanita Dumas, the City Clerk, she was unaware that she was required to forward a copy to the County. However, she assured that all persons who desired to obtain a copy of the siting application had the opportunity to do so by arranging with local printers to make copies of the application. Further, a copy of the application was available for review by any persons at her office and at the Kankakee Public Library. Thus, there can be no argument that access to the application by anyone was in anyway limited or denied. To the contrary, any party who sought access had access either for free or by payment of the costs of copying. There was no violation as suggested by Kankakee County in their brief. Certainly, there was no denial as was alleged to have occurred in *Waste Management of Illinois vs. Pollution Control Board*, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (2nd Dist., 1988). Although that decision did not decide the issue, the court, in effect, affirmed the Pollution Control Board's finding that the failure to follow the local siting ordinance was harmless error.

Such a holding is applicable here as well. Kankakee County had access to the siting application. Their consultant purchased the document. Kankakee County had the ability to have the same access as any other party. They simply did not have two free copies. However, now the County complains that such was in some way prejudicial.

What is the prejudice? Of course, none was shown. The County fully participated, cross-examined based upon the siting application, and otherwise showed no limitation caused by not receiving the two free copies of the application. Further, the County made no request to continue the hearings, nor did the County make any showing at the time that the issue arose that it had suffered any prejudice by the clerk's error. Indeed, the County's position was then, and is now, that it need not make a showing of any prejudice, but that it need only establish the error. While the claim is a convenient objection, it is not a basis for the reversal of the decision by the City of Kankakee City Council. Here, the County requested and received a copy of the siting application more than two months prior to the hearing. Even though it had to pay for

the copy, the County produced no evidence of prejudice. Without such a showing, this Board should deny the County's objection on this basis.

III. THE UNEXPECTED OVERFLOW CROWD OF THE FIRST NIGHT'S HEARING IS NOT A BASIS TO FIND THAT THE PROCEEDINGS WERE UNFAIR.

Kankakee County has raised the fact that the crowd desiring to attend the first night's hearing was larger than the room was an indicia of unfairness. Based upon this fact, the County argues that this Board should reverse the City's decision approving the application.

The flaw in the County's argument is shown in the record. First, annexation hearings had been held for the annexation of this property. There was sufficient space in the City Council Chambers for all persons who desired to attend to be accommodated, according to the testimony of the Hearing Officer. Further, Kankakee did everything within its power to assure that those persons who actually desired to participate were, in fact, accommodated.

The room where the hearing was held was the normal place for the City Council to meet. Additional chairs were added in the audience portion to accommodate over one hundred observers. In addition to the seating for the observers, seating was provided for the fourteen members of the City Council, the City of Kankakee Planning Board, the Mayor, an engineer advisor, the applicant, the applicant's witnesses and attorney, the fifteen objectors and their attorneys and advisors, and four members of the press. (It should be noted that Kankakee County occupied five seats, including four attorneys and one advisor, while Waste Management representatives occupied four chairs in the room on the first night.) Obviously, this was not a small room, nor was it one without substantial accommodations. However, on the first night of the proceedings, more people arrived than could be seated. Those people were kept from the room itself, although not kept from observation, as the doors to the room were kept open.

The appellants' argument that persons were not allowed to participate is without any basis in the record. When the overflow crowd appeared, the Assistant City Attorney went to the crowd to determine if there were any other people who desired to participate. This was accomplished even though the rules had required objectors to register more than five days prior to the hearing.

In order to allow all persons who desired to participate to participate, the five-day rule was waived. Even two days into the hearing, when Pat O'Dell informed the hearing officer that she had changed her mind and wanted to cross-examine witnesses and appear as an objector she was allowed to do so. The testimony of the hearing officer also indicated that on the night of the hearing, Elizabeth Fleming Weber was allowed to appear and participate. Only one person, Darryl Bruck, claims that he was denied the right to participate, yet he was present at the hearings and never asked the hearing officer to allow him to participate, even though his co-members of Outrage, a citizens group, were all participating.

Clearly, all persons who desired to appear as objectors did so. The County's suggestion that there was confusion about the process to appear as objectors is equally absurd. By requesting only to speak, members of the public were not assumed to be objectors. In fact, all members of the public who requested to speak were allowed to do so and not a single one of those persons indicated that they had been denied the right to participate when they had the chance to speak. (see public comment transcript of 6/27/02)

Thus, the County's argument is baseless. Public hearings which attract more observers than the room can accommodate occur regularly. As Bohlen's testimony verified, even the Kankakee County Board excludes interested citizens from its board meetings due to an overflow. Trials occur when family members of the parties are barred due to crowds in the court room. Such events do not deny the fundamental due process of the proceedings. Rather, they are simply indicative of the limitations of space which occur from time to time.

To accommodate this occurrence, the City did everything within its power to assure that the remainder of the proceedings would accommodate the crowds. However, those crowds did not reappear. In the meantime, the City placed the transcript of the first night's proceedings for public review at the clerk's office and at the library. The City placed additional chairs and speakers in the hallway. The City held the public comment session at the only available location, a school auditorium which was not air conditioned. While the objectors complain, they do not indicate that any alternative was available for the hearing in the City of Kankakee, either that night or any other night.

Because no credible prejudice was shown to anyone who wanted to participate in the hearings, the only negative is that persons who wanted to observe were denied the opportunity to do so. While that is regrettable, it is neither a basis to reverse the proceedings, nor a basis to determine that these hearings denied the objectors any fundamental fairness. In fact, the only objectors who have appealed this proceeding were not only allowed places at the table but were assured, as were all others who desired to participate, accommodations in the front of the council chambers with as much space as they desired.

Finally, there is no basis to claim that the City had advance knowledge of the fact that the crowd would overflow on the first night. To infer that fact and therefore impute bad intentions on the City in its attempts to fairly hold these hearings, is simply contrary to the record and without basis.

There is no basis to claim that the unexpected overflow crowd denied fundamental fairness to the objectors.

CITY OF KANKAKEE

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