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

SERVICE LIST

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601-3218

City of Kankakee Clerk
Anjanita Dumas
385 E. Oak Street
Kankakee, IL 60901
Fax: (815) 933-0482

Attorney Christopher Bohlen
Barmann, Kramer, and Bohlen, P.C.
200 East Court St., Suite 502
Kankakee, IL 60901
Fax: (815) 939-0994

Donald J. Moran
Pederson & Houpt
161 N. Clark St., Suite 3100
Chicago, IL 50501-3242
Fax: (312) 261-1149

Kenneth A. Leshen
One Dearborn Square, Suite 550
Kankakee, IL 60901
Fax: (815) 933-3397

Byron Sandberg
P.O. Box 220
Donovan, IL 60931
Fax c/o Sandberg 815-486-7327

Richard S. Porter
Hinshaw & Culbertson
P.O. Box 1389
Rockford, IL 61105-8488
Fax: (815) 963-9989

Mr. Brad Halloran
100 West Randolph, 11th Floor
Chicago, IL 60601
Fax: (312) 814-3669

PLEASE TAKE NOTICE that on November 27, 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:

Respondent's Brief to the Pollution Control Board

GEORGE MUELLER, 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 and via U.S. mail from Chicago, Illinois, prior to 5:00 p.m. on November 27, 2002, with proper postage pre-paid.

JOSEPH A. VOLINI

"OFFICIAL SEAL"
BETH GRAUNKE
Notary Public, State of Illinois
My Commission Expires 02/12/06

SUBSCRIBED AND SWORN TO before me this 27th day of NOVEMBER, 2002.

NOTARY PUBLIC

GEORGE MUELLER, P.C.
Attorney at Law
501 State Street
Ottawa, IL 61350
Phone: (815) 433-4705

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)**

APPLICANTS' BRIEF

TABLE OF CONTENTS

Title	Page
INTRODUCTION	1
STANDARD OF REVIEW	2
I. THE CITY OF KANKAKEE HAD JURISDICTION PURSUANT TO THE NOTICE REQUIREMENTS OF SECTION 39.2(b) OF THE ACT	4
A. Receipt of Registered Mail Notice by Someone Other Than the Addressee Was Proper	5
B. The Applicant Determined the Identities And Addresses Of All Owners Of Record From the Authentic Tax Records of Kankakee County	6
C. All Notices Were Received In A Timely Manner	7
D. All Property Owners Entitled To Service Were Served	7
II. THE PROCEEDINGS WERE FUNDAMENTALLY FAIR	10
A. There Were No Improper Pre-filing Contacts Between the Applicant And the City	11
B. The Failure Of the City to Provide Copies Of the Application To the State's Attorney and County Board Was An Oversight By the City Clerk With No Resulting Prejudice To Any Person	17
C. The City Of Kankakee Did Not Deny Information, Documents, Or the Right To Participate, To Any Person	19
D. No Person Was Prejudiced Because Of Limited Seating Capacity In the Hearing Room On the First Night Of The Proceedings	21

Title	Page
III. THE DECISION OF THE CITY COUNCIL WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.....	26
A. The Proposed Facility Is Located, Designed, And Proposed To Be Operated So As To Protect the Public Health, Safety, And Welfare.....	26
B. The Plan Of Operations For the Facility Is Designed To Minimize the Danger To the Surrounding Area From Fire, Spills Or Other Operational Accidents.....	34
C. The Applicant's Proposal Is Consistent With the County Solid Waste Management Plan.....	35
IV. THE COUNTY DOES NOT HAVE THE RIGHT TO PRECLUDE THE CITY FROM EXERCISING ITS PROPER PLANNING AND SITING JURISDICTION.....	38
A. Any Action By Kankakee County To Limit the Powers Of the City Of Kankakee Within Its Corporate Boundaries Is Unconstitutional.....	40
B. The Solid Waste Planning And Recycling Act ("SWPRA") Expressly Preserves Siting Authority To Units Of Local Government.....	41
C. The City Of Kankakee's Solid Waste Plan Prevails Over the County Plan.....	42
D. The Amendments To the Kankakee County Solid Waste Management Plan Relied Upon by the Objectors Were Not Adopted Pursuant To the Requirements Of the SWRPA.....	43
V. CONCLUSION.....	44

INTRODUCTION

On March 13, 2002, the Respondents, Town & Country Utilities, Inc. and Kankakee Regional Landfill L.L.C. (hereinafter "Town & Country") filed an Application with the City of Kankakee for local siting approval of a new regional pollution control facility. The Application consisted of five volumes totaling approximately 2,500 pages. The Application proposed a new municipal solid waste landfill of approximately 400 acres with a waste footprint of 236 acres and an estimated capacity of 30 years (TR 261). A nearby small landfill owned and operated by Waste Management is scheduled to close in 2004. (C3265).

Prior to the public hearing on the Request For Siting Approval, appearances were received from sixteen Objectors including Waste Management Of Illinois, Inc., Kankakee County, and a citizens' group (CRIME) by their spokesperson, Doris Jean O'Connor (C2028-2058).

The siting hearing commenced on June 17, 2002 and continued for eleven days and nights until concluding on June 28, 2002. Public comments were received through July 29, 2002. During the public hearing, Town & Country called six expert witnesses who testified regarding various aspects of the Application. Kankakee County called Steven VanHook, a geologist. Waste Management Of Illinois called no witnesses. The citizens' group called Stuart Cravens, a geologist. A number of citizen Objectors also offered their own testimony.

On August 19, 2002, the City Council of Kankakee adopted Findings of Fact and Conclusions of Law and approved the Application of Town & Country with a number of conditions by a 13 to 0 vote with one abstention. (C3261-3292).

Three of the Objectors, Kankakee County, Waste Management Of Illinois, and Byron Sandberg filed timely Petitions for review by the Board. Those Petitions were consolidated and these proceedings ensued. Although Sandberg has confined his objection on review to the City Council's finding on Criterion 2 (Public health, safety and welfare), Town & Country understands the issues collectively raised

by Petitioners to be that the hearings were not fundamentally fair, and that the decision of the City Council was against the manifest weight of the evidence on Criteria 2, 5 and 8. (415 ILCS 5/39.2(a)).

With regard to the Application's consistency with the County Solid Waste Management Plan, Petitioners, particularly Kankakee County, have argued that since the intent of that Plan, as hastily amended twice before the City's siting hearing, was to pave the way for Waste Management Of Illinois to seek an expansion of its existing facility from the County while simultaneously precluding the City from exercising its siting jurisdiction, the City was legally incapable of approving any request for siting approval. While Town and Country disagrees, the issue does arguably present a mixed question of fact and law. The legal portion of this issue needs to be resolved within the context of our Supreme Court's holding in another case involving a contentious battle between units of local government:

> "As evidenced in the instant case, no matter where a landfill is sited, neighboring units of local government, not participating in the landfill's development, will typically employ their considerable legal arsenals to prevent indefinitely the development of such facilities. Thus, where the appropriate unit of local government approves the siting of a pollution control facility pursuant to Section 39(c), and that facility is contained solely within that unit's own geographic boundaries, we hold that extraterritorial third-party challenges to the siting decisions to the courts of this State are incompatible with the purposes of the Act." City of Elgin v. County of Cook , Village of Bartlett v. Solid Waste Agency of Northern Cook County, 169 Ill.2d 53, 70, 660 N.E.2d 875 (1996).

STANDARD OF REVIEW

Section 40.1 of the Act requires the Board to review the proceedings before the local decision maker to assure fundamental fairness. In E & E Hauling, the Appellate Court found that, although citizens before a local decision maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The Court held that standards of adjudicative due process must be applied. (E & E Hauling, 451 N.E.2d at 564; see also Fairview Area Citizens Task Force (FACT) v. Pollution Control Board, 144 Ill.Dec. 659, 555 N.E.2d

1178 (3rd Dist. 1990)). Due process requires that parties have an opportunity to cross-examine witnesses, but that requirement is not without limits. Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. Waste Management of Illinois, Inc. vs. Pollution Control Board, 175 Ill.App.3d 1023, 530 N.E.2d 682, 693 (2nd Dist. 1988). The manner in which the hearing is conducted, the opportunity to be heard, the existence of ex parte contacts, the prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc., (PCB 900163, December 20, 1990).

The above standard for review has been frequently repeated in the decisions of this Board. However, recent decisions of the Illinois Appellate Courts suggest that the fundamental fairness standard be viewed in the context of the siting authority's role as both a quasi-legislative and quasi-adjudicative body, and that by reason thereof the standard should be restricted rather than expanded. For example, the Third District Appellate Court has stated in Land & Lakes Co. v. Pollution Control Board, 309 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000):

> "A nonapplicant who participates in a local pollution control facility siting hearing has no property interest at stake entitling him to the protection afforded by the constitutional guarantee of due process. South Energy Corp v. Pollution Control Board, 275 Ill.App.3d 84, 211 Ill.Dec. 401, 655 N.E.2d 304 (1995). However, under Section 40.1 of the Act (415 ILCS 5/40.1 (West 1998)), such a party has a statutory right to "fundamental fairness" in the proceedings before the local siting authority. Southwest Energy Corp, 275 Ill.App.3d 84, 211 Ill.Dec. 401, 655 N.E.2d 304. A local siting authority's role in the siting approval process is both quasi-legislative and quasi-adjudicative. See Southwest Energy Corp, 275 Ill.App.3d 84, 211 Ill.Dec.401, 655 N.E.2d 304. In recognition of this dual role, courts have interpreted the right to fundamental fairness as incorporating minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence. Daly v. Pollution Control Board, 264 Ill.App.3d 968, 202 Ill.Dec. 417, 637 N.E.2d 1153 (1994)."

It is obvious from the foregoing, therefore, that fundamental fairness is a standard derived from and interpreted in context. As such, fundamental fairness violations should not be found based on isolated

incidents, inadvertent problems, or harmless errors so long as the "minimal" requirements are satisfied.

While the determination of fundamental fairness is made on a de novo basis, the Board acts as an appellate type body regarding the nine substantive criteria, confining its review to the record made before the local siting authority.

When examining local decision on the nine criteria under Section 39.2 of the Act, the Board must determine whether the local decision is against the manifest weight of the evidence. McLean County Disposal, Inc. v. County of McLean, 207 Ill.App.3d 477, 482, 566 N.E.2d 26, 29 (4th Dist. 1991); Fairview Area Citizens Task Force v. PCB, 198 Ill.App.3d 541, 550, 555 N.E. 2d 1178, 1184 (3rd Dist. 1990). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. CDT Landfill, PCB 98-60, slip op. At 4; Harris v. Day, 115 Ill.App.3d 762, 769, 451 N.E.2d 262, 265 (4th Dist. 1983). It is not the duty of the Board to reweigh the evidence, to judge the credibility of the witnesses, or to substitute its opinion for that of the local decision maker.

I. THE CITY OF KANKAKEE HAD JURISDICTION PURSUANT TO THE NOTICE REQUIREMENTS OF SECTION 39.2(b) OF THE ACT.

Petitioners argue that the City Council lacked jurisdiction to conduct a siting hearing because the Applicant failed to meet the pre-filing notice requirements of Section 39.2 of the Act. They raise a number of different notice issues, including: failure to give notice to all required landowners, notice not being received by landowners or their authorized agents, and that notices were not timely.

The only evidence of notice in the local siting hearing record is the Affidavit with attachments of Tom Volini, President of Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. offered and admitted as Applicant's Exhibit #2. Neither Petitioners herein nor any other Objectors offered evidence or raised any notice or jurisdictional issues during the siting hearing process.

However, Petitioner, Kankakee County, made a detailed and layered argument alleging lack of jurisdiction due to notice defects in its Proposed Findings to the Kankakee City Council. Since the Board ordered that the fundamental fairness hearing, which commenced on November 4, 2002, would also consider jurisdiction, the Hearing Officer, over objection from the Petitioners, received at that hearing additional evidence regarding notice from both Tom Volini and Patricia VonPerbandt, who was involved in preparation of the pre-filing notices and personally served some of them.

The County makes all of its notice objections in summary form in its Petition For Review by this Board, and, since the parties herein are required to file simultaneous briefs, Town & Country will respond to the more detailed arguments set forth in the County's Proposed Findings of Fact submitted at the local siting hearing.

A. Receipt of Registered Mail Notice by Someone Other Than The Addressee Was Proper.

The County initially argues that, "The return receipts of numerous parcels were signed by individuals other than the owners of the property, and the authority to accept service of process on behalf of the owners was not established by the Applicant." (C2690). Town & Country acknowledges that the return receipts (green cards) on some registered mail were signed by individuals other than the addressee. of the mail. The County in support of its proposition that when the signor of registered mail is not the addressee, there must be definitive evidence that the signor is the agent for service of process, cites the Board's decision in IEPA vs. RCS, Inc. and Michael Duvall, AC96-12 (Dec. 7, 1995). First of all, that case is an administrative citation case where the Agency was operating under a different service standard. Secondly, even with the more stringent service standard in administrative citation proceedings, the Board pointed out that had the registered mail been sent to Duvall's home rather than his place of work, there would have been no problem with someone else signing for the receipt. Curiously, the County supports the proposition that signature of a return receipt by a non-addressee voids service by citing the Board's decision in DiMaggio vs Solid Waste Agency of Northern Cook County, PCB 89-138 (January

11, 1990). In fact, the Board in DiMaggio reached the opposite conclusion when it held:

> "The Board has previously addressed this issue. In City of Columbia et al. vs. County of St. Clair and Browning Ferris Industries of Illinois, Inc., 69 PCB 1 (PCB 85-223, 85-177, 85-220 Consolidate, April 3, 1986), affirmed, 162 Ill.App.3d 801, 516 N.E.2d 804 (5th Dist. 1987), the Board specifically found that service was not defective when someone other than the addressee signed for and accepted the notice. The Board feels that this case is dispositive of Petitioners' argument. The notices were timely mailed, 26 days in advance of filing the request, and the City's jurisdiction is not affected by who acknowledged receipt of the notice." (DiMaggio at page 7).

In the instant case, the Affidavit of Tom Volini regarding notice indicates that pre-filing notices were mailed by him 23 days prior to the filing of the siting Application. (Applicant's Exhibit #2, paragraph 6).

B. The Applicant Determined the Identities and Addresses Of All Owners Of Record From the Authentic Tax Records Of Kankakee County.

The County also argues that, "There is no jurisdiction because the Applicant failed to present evidence that the authentic County tax records were used to determine the identities and addresses of the owners," and attaches in support of the argument the Affidavit of the Treasurer of Kankakee County. (C2694, C2715). The County's argument is directed at the statement in Tom Volini's Affidavit that, "To determine which Kankakee County records are the 'authentic tax records of the County', I spoke with employees in the Office of the Kankakee County Recorder and the Kankakee County Supervisor of Assessments. During these conversations, I was told that the most accurate and up-to-date records of ownership were maintained in the Office of the Kankakee County Supervisor of Assessments." (Applicant's Exhibit #2, paragraph 4). The Affidavit of the County Treasurer does not state or even imply that he maintains the only authentic tax records of Kankakee County. Maintaining a tax record is apparently a somewhat complex task, and it appears, one that is frequently shared among various County offices. This situation was described and discussed in Bishop vs. Pollution Control Board, 235 Ill.App.3rd 925, 601 N.E.2d 310 (5th Dist. 1992), where the Court held that the County Clerk's Office, the Assessor's

Office, and the Treasurer's Office, by each playing a role in the property tax cycle, all maintained "authentic tax records" within the statutory meaning of that term. In fact, Patricia VonPerbandt offered uncontradicted testimony at the fundamental fairness hearing that her inquiry revealed that the Kankakee County Treasurer and Kankakee County Supervisor of Assessments share a common computer database which contains the County's most up-to-date authentic tax records. (Bd. TR 11-6 293).

C. All Notices Were Received In a Timely Manner

The County also argued that Applicant failed to timely serve the Illinois Central Railroad because registered mail sent to the Railroad's Registered Agent for service of process at 208 N. LaSalle Street, Chicago, IL was not signed for until March 6, 2002. The County conveniently neglects the fact that two (2) notices were sent to the Railroad at two (2) alternative addresses including the Railroad's business office at 17641 S. Ashland Avenue, Homewood, IL, and that registered mail sent to the Illinois Central Railroad at this address was signed for on February 20, 2002, that date being 21 days prior to the date on which the Siting Application was filed.

D. All Property Owners Entitled To Service Were Served

The County lastly alleges that the Applicant failed to serve all of the owners of Parcel 13-16-23-400-001. Tom Volini's uncontradicted Affidavit of Service actually had this parcel listed twice with different owners and addresses for each listing. The first listing shows the owners as Gary L. Bradshaw, James R. Bradshaw, J.D. Bradshaw, Ted A. Bradshaw, Denise Fogle, and Judith A. Skates all located at 22802 Prophet Road, Rock Falls, IL 61071. The second listing of the same parcel shows the owner as only Judith A. Skates, 203 S. Locust, Onarga, IL 60955. The uncontradicted Affidavit of Tom Volini indicates that registered mail was sent to all of these owners on February 18, 2002. (Applicant's Exhibit #2, paragraph 6). Paragraph 7 of the same Affidavit lists the owners who did not accept delivery of their

registered mail, but omits from that listing the group of owners at the Rock Falls address. Tom Volini explained this apparent contradiction in his testimony during the fundamental fairness hearing when he said that he deemed the registered mail service on Judith Skates at the Onarga address which was timely accepted on February 20, 2002 to satisfy the service requirement for that parcel. (Bd. TR. 11-6 377). Patricia vonPerbandt further testified that she attempted personal service on all of the individuals listed at the Rock Falls address and encountered an individual there who identified herself as the daughter of Judith Skates, and who indicated that none of the listed individuals lived at the Rock Falls address, some of those individuals lived out of state, some of those individuals were dead, and that all matters relating to that parcel were being handled by Judith Skates who lived in Onarga, at the address where she was served, (Applicant's Exhibit #2), (Bd.TR. 11-6 285-288).

It appears that Town & Country has created an issue where none previously existed by attempting to do too much. There was conflicting information in the authentic tax records of Kankakee County regarding the ownership of Parcel 13-16-23-400-001. In retrospect, Town & Country should have just listed the parcel as owned by Judith Skates as that listing was also supported by the authentic tax records. However, in an effort to cover all bases, Town & Country listed and served both alternate owners. Patricia VonPerbandt, in her testimony at the fundamental fairness hearing, explained the conflicting ownership information regarding this parcel when she introduced three documents secured from the Kankakee County Assessor's and Treasurer's Office: the Assessor's property owners' card showing the group in Rock Falls (including Judith Skates) as owners, the Treasurer's tax bill which was sent to Judith Skates in Onarga, and a name and address change form for the parcel received by the Assessor's Office. (Board Hearing, Applicant's Exhibits 1, 2, 3). This form lists the owners as "Skates, Judith and Bradshaw" and the address in Onarga and is signed by Judith Bradshaw Skates.

Initially, Town & Country notes that it is somewhat disingenuous for the County to allege that Applicant failed to serve the owners of this parcel when the Treasurer's record shows that the tax bill was

sent to Judith Skates in Onarga, and the County otherwise argues that the Treasurer's records are the true "authentic tax records" of the County. Regardless, a common sense evaluation of the Exhibits introduced at the Board hearing regarding this parcel indicates that the owner for service of notice purposes is Judith Skates in Onarga, and she was timely served with registered mail. Moreover, service of registered mail on only one of a number of heirs when that one person appears to be the designee for receipt of mail has been approved by both the Board and the Appellate Court with the holding that, "It is true that only one heir received notice, but only that heir was listed by name and address in the tax records to receive that tax statement on behalf of all the heirs." Wabash and Lawrence Counties Tax Payers and Water Drinkers' Association vs. Pollution Control Board, 198 Ill.App.3rd 388, 555 N.E.2d 1081 (5th Dist. 1990). The Skates/Bradshaw situation here is identical. Personal service was attempted on all of the listed owners, including Judith Skates in Rock Falls, but none of them lived at that address. The person at that address referred the process server to Judith Skates. Judith Skates was listed on the Treasurer's record as the person who got the tax bill at her address in Onarga Illinois. Judith Skates was timely served in Onarga.

Although the previous argument demonstrates that the Applicant successfully met the pre-filing notice requirements under any legal standard which has heretofore existed, the Board is asked to consider a recent Illinois Supreme Court decision which completely revises and significantly simplifies the previous notice requirement. Siting applicants and opponents both have previously been operating under the interpretation of the notice requirement in Ogle County Board vs. Pollution Control Board, 272 Ill.App.3rd 184, 649 N.E.2d 545 (2nd Dist. 1995) which held that actual timely receipt of pre-filing notice is required. The Appellate Court in the Ogle County decision seemingly overruled a previous line of PCB decisions construing the notice requirement as requiring initiation of service sufficiently far in advance to reasonably expect receipt of notice by the addressee 14 days in advance of the filing of an application. The Ogle County Court relied on the Supreme Court's previous decision in Avdich v. Kleinert, 69 Ill.2d 1, 370 N.E.2d 504 (1977).

The Ogle County Court's reliance in Avdich was misplaced, and the decision in Ogle County has been effectively overruled by People ex rel. Devine vs. $30,700 United States Currency, 199 IL2d 142, 766 N.E.2d 1084 (2002). The Devine case was a forfeiture proceeding where the required notice provision is as follows: "If the owners or interest holders name and current address are known, then (notice or service shall be given) by either personal service or mailing a copy of the notice by certified mail, return receipt requested, to that address." (725 -ILCS 150/4(a)(1)). In Devine, our Supreme Court held that certified mail notice was complete upon mailing despite the "return receipt requested" requirement in the notice provision. In explaining its holding, the Court engaged in a lengthy discussion wherein it distinguished the meaning of the "return receipt requested" requirement from the notice requirement in Avdich which was "a returned receipt from the addressee." (199 Ill.2d 152, 153, 766 N.E.2d 1090, 1091). The Court concluded that the "return receipt requested" language did not require actual receipt by the addressee.

In the instant case, it is undisputed that Town & Country sent notices by registered mail, return receipt requested, nine days before the deadline for service of notice to all property listed on the authentic tax records of Kankakee County including all of the alternate owners of Parcel 13-16-23-400-001.

Lastly, the County argues, in its Proposed Findings to the City Council, that the pre-filing notices, themselves, were defective because they were mailed with other documents including a Property Value Guarantee Program and cites in support the unsworn public comment of A. Carol Taylor. (C2695). This is rebutted by the sworn testimony of Patricia VonPerbandt that she personally placed the notices in the envelopes with no other documents and sealed the envelopes before delivering them to Tom Volini for mailing. (Bd.TR. 11-6 284).

II. THE PROCEEDINGS WERE FUNDAMENTALLY FAIR

Petitioners allege that the hearings were fundamentally unfair because of four defects in the proceedings. First, they allege that pre-filing contacts between the Applicant and City of Kankakee representatives, particularly the Applicant's presentation at a City Council meeting some three weeks

before the Application was filed, fatally and irrevocably biased the City Council in favor of the Application. Secondly, they allege that the City's failure to follow its own Siting Hearing Ordinance by not tendering copies of the Siting Application to County representatives was fundamentally unfair. Thirdly, Petitioners argue that the City's procedures in requiring Freedom Of Information Act forms to be filled out were confusing and oppressive, and that the hearing registration requirements were confusing and contradictory. Lastly, they allege that failure to accommodate everyone in an unexpected overflow crowd on the first night of the hearing violated the requirement of a public hearing and was fundamentally unfair.

A. There Were No Improper Pre-filing Contacts Between the Applicant And the City.

During the fundamental fairness hearing before the Board, Petitioners elicited extensive testimony from both the Mayor of Kankakee and the City Attorney that Town & Country had frequent pre-filing contacts with the City. The testimony was objected to whenever elicited, said objections were sustained by the Board's Hearing Officer, and the testimony is part of the record only in the form of Petitioner Kankakee County's offer of proof. Generally, this testimony consisted of admissions that the City had annexed the property on which the proposed site is located with a view toward possible siting proceedings, the City had received input from Town & Country among others in drafting its own Solid Waste Management Plan and Regional Pollution Control Facility Siting Ordinance, and the City had engaged in extensive negotiations with Town & Country regarding the terms of a host agreement. Petitioners point to no actual prejudice resulting from any of these ordinary pre-filing business contacts between the City and Town & Country.

According to Petitioners, the most egregious pre-filing contact between the City and Town & Country occurred on February 19, 2002 when a number of Town & Country representatives appeared at and gave an informal presentation to the City Council at one of its regular meetings. The minutes of that meeting contain a complete transcript of what was said (C3139-C3178). The Petitioners, particularly

Kankakee County, argue that the appearance of Town & Country and some of its representatives to speak to the City Council at its regular meeting on February 19, 2002, before the Application For Siting Approval was filed, constitutes a prejudicial ex parte contact, and, to a lesser degree, that it improperly biased the City Council members in favor of the Applicant. Objectors essentially argue that Town & Country was able to improperly bolster its own credibility and discredit potential objectors in a captive forum. While a cynic might argue that this is the very purpose of pre-siting lobbying in all of its forms, including approved and widely used (including by Waste Management) pre-filing reviews, the Objectors' references to the record of the February 19th meeting are taken out of context and mis-characterize what actually occurred. Since the entire City Council meeting was transcribed and this transcript is part of the record, the Board is urged to review the entire transcript in order to verify that Town & Country's presentation consisted principally of an explanation to the City Council of the siting procedure. Throughout this presentation, the City Council members were reminded that they had to make their ultimate siting decision based on the evidence as it related to the statutory siting criteria. In fact, each of the speakers for Town & Country on February 19th at various times correctly reminded the City Council of its obligation to make its decision based on the evidence. Tom Volini, one of the principals of Town & Country, stated:

> "You are called upon to be judge and jury. Judge and jury in a process that formally commences tomorrow when there is notices received by 60 units of government and the property owners and legislators to commence this process formally of landfill site location approval under the Environmental Protection Act. When that process starts, we want you to have your own copy of the relevant pages of the statute. We want you to know the proofs you are called upon to make sure that we make. Or if you are to vote no. That's what the statutes say and the cases say. So, if, if Envirogen can't convince you and Devin Moose can't convince you of the quality of his calculations, the integrity of his design, and the compliance of that design with the Environmental Act, you get to vote no. ... We expect your questions. We expect your scrutiny. We expect to be held to the highest standard. We're on trial. The trial started a long time ago. We're on trial with you. You're on trial. Everyone expects you to make the proper informed decision under the Environmental Protection Act. The criteria that Devon will talk about in his presentation. The fact that you sit as judge and jury. The fact that after tonight we can't talk to you." (City Council Minutes, C3146)

George Mueller, Attorney for Town & Country, told the City Council:

> "You, as City Council members, are the jury. And the Pollution Control Board in looking at these cases when they have been appealed in the past, has said that local decision makers, whether they be County Board members or City Council members, adopt a quasi-judicial role. Which means that, in effect, you put on the mantel of jury and you have to now make decisions, not based upon your elected status but rather based upon the evidence that you hear at a hearing. There are two things that the Pollution Control Board, the Courts, and the IEPA are concerned about at these hearings. Number one, that the evidence which will be presented supports the 10 criteria which an applicant must satisfy in order to get an affirmative vote. We need to get 10 out of 10. Nine out of 10 and we lose. The second thing they look at is that the process is fundamentally fair. What that has been construed to mean by the Courts in this State is that the decisions are made on the evidence. They are not made on things that are said in hallways, they are not made based on newspaper editorials, they are not made based on what people tell you on the street. Decisions are made on the evidence." (City Council Meeting Minutes, C3147)

Devin Moose, Town & Country's Chief Engineer, stated among other things, "We need to make the decision based on the manifest weight of the evidence... We need to demonstrate. We need to demonstrate that there is a need for the facility... and it's that kind of approach, not just accepting our work, but putting in the data and the proof so that you can check the validity of our conclusions yourself... And, what I would urge you to do is remember two things. One, you make the decision on the evidence." (City Council Minutes, C3149, C3150, C3152).

Jaymie Simmon, on behalf of Town & Country, stated, "The reason that we are telling you this is just simply to add some more weight to the idea that this is an important, important decision and it will require of you some mental rigors in understanding the science and hearing the evidence in making your decision based upon it." (City Council Minutes, C3153).

Lastly, in answering the question about the status and rights of potential objectors, Attorney Mueller stated, "They can have an attorney. They can cross-examine our witnesses. They can put on their own witnesses. And frankly, we welcome that because it is a truth seeking process that the hearing is supposed to be, and if somebody can put up evidence that disputes ours it is going to make the decision

more clear to the City Council." (City Council Minutes, C3166).

The Petitioners' arguments that an informal, informative and accurate presentation by Town & Country to the City Council before filing the siting Application was tantamount to a hearing, prejudiced the City Council in favor of the Applicant, and was an improper ex parte contact are unsupported by the facts and the law. First of all, there is not a scintilla of evidence in the record that any City Council member based his or her decision on anything other than the evidence presented at the siting hearing.

Moreover, both the Board and the Appellate Courts have specifically found that an applicant's pre-filing presentations to a city council are not fundamentally unfair. In Southwest Energy vs. Illinois Pollution Control Board, 655 N.E.2d 304 (4th Dist. 1995), the Court found no problem with the pre-filing luncheon where the applicant and the city council members attended, but the general public was not allowed. No one knows what was said at the private luncheon in Southwest Energy, but the Courts approved of this luncheon nonetheless. Here, Town & Country made its presentation at an open and public City Council meeting where every word was transcribed.

A similar factual situation was considered by the Board in Beardstown Area Citizens For A Better Environment vs. City of Beardstown and Southwest Energy Corporation, (PCB 94-98), where the Board was asked to consider the propriety of a pre-filing luncheon between the City Council of Beardstown and the Applicant followed by a reception at City Hall where known opponents were not invited. In that case, the Mayor was also designated as the Hearing Officer, as was initially the situation here. The Petitioners at Beardstown alleged, "that the behavior of the Mayor and several City Council members demonstrates that they prejudged the facts and the law and so should have been disqualified." (PCB 94-98 at 9). The Board, however, rejected these arguments finding that there are no ex parte restrictions prior to the filing of an application for siting approval. The Board also rejected the fundamental fairness claims of bias arising out of the alleged favoritism of the Mayor and certain City Council members toward the Applicant.

In Residents Against A Polluted Environment vs. County of LaSalle and Landcomp Corporation,

(PCB 96-243), the Board went even further than it had in the Beardstown case and created a bright line test whereby evidence of pre-filing contacts between an applicant and a decision maker would not even be considered for purposes of evaluating the fundamental fairness of the proceedings. The Board affirmed this ruling in the second Landcomp case, (Residents Against A Polluted Environment vs. County of LaSalle and Landcomp Corporation, PCB 97-139), where, in discussing its decision to not even receive evidence regarding pre-filing contacts between the applicant and decision makers, the Board stated, "We held that because evidence of these contacts is not relevant to the siting criteria and is not indicative of impermissible pre-decisional bias of the siting authority, we find that the County Hearing Officer's failure to allow testimony concerning the allegations did not render the proceedings fundamentally unfair. Similarly, the contacts between the Applicant and the County Board prior to the filing of the Application are irrelevant to the question of whether the siting proceedings, themselves, were conducted in a fundamentally fair manner." (PCB 97-139 at 7). This decision was affirmed by the Appellate Court (Residents Against A Polluted Environment vs. Illinois Pollution Control Board, 687 N.E.2d 552 (3rd Dist. 1997)).

Petitioners argue that bias and prejudgment are to be inferred as the result of the Applicant appearing before the City Council on February 19, 2002. The record, however, is totally devoid of any evidence of actual bias or prejudgment. The record is also totally devoid of any evidence that any City Council member based his or her decision on anything other than the evidence presented at the siting hearing. No City Council members were called to testify at the fundamental fairness hearing, and those City representatives who did testify on the subject opined that they were certain that the City Council disregarded what they heard on February 19th and the Council based its decision exclusively on the evidence at the siting hearing.

Contrary to Petitioners' assertion regarding the inference of bias, there is a well established principle that elected officials are presumed to act objectively, and there must be at least a minimal

showing of actual bias to overcome that presumption. Residents Against A Polluted Environment vs. Illinois Pollution Control Board, 293 Ill.App.3d 219, 687 N.E.2d 552 (3rd Dist. 1997).

Petitioners have argued that the cumulative effect of pre-filing contacts should be deemed to constitute bias and prejudgment on the part of the City Council. They point to the involvement of the City and the Applicants in the initial annexation proceedings, the parties negotiating a Host Agreement, and the fact that economic benefit will be derived by the City. All of these arguments have been previously raised and dismissed in other siting cases. A city's participation in and even support of the annexation process as a precursor to an applicant filing for siting approval on the annexed land is not evidence that the decision makers are biased or have prejudged the application. Concerned Adjoining Owners vs. Pollution Control Board, 288 Ill.App.3d 565, 680 N.E.2d 810 (5th Dist. 1997). A portion of the Court's decision is instructive in this case:

> "The facts of the instant case do not reveal that the Council had made any prejudgments about the criteria for siting approval. On the contrary, the records shows that the Council asked relevant questions of all of the witnesses about each of the criteria. The questions did not demonstrate any bias for or against siting approval. The objectors did not present any evidence to show how the Council was biased, other than the generic argument that it must have been biased because it had already taken on the preliminary actions necessary to get to the siting hearing stage. We do not find this argument sufficient to overcome the presumption that the Council acted fairly and objectively where the record does not indicate any prejudgment of the statutory criteria for making the siting decision." (Concerned Adjoining Owners at 288 Ill.App.3rd 573, 574).

Likewise, the fact that economic benefit is likely to result to the City from successful siting is irrelevant on the issue of bias or prejudgment. Appellate Courts have even gone on to say that municipalities may actually consider such economic benefit in their siting decisions so long as they find that the other statutory criteria have been met. Fairview Area Citizens Task Force vs. Illinois Pollution Control Board, 198 Ill.App.3rd 541, 555 N.E.2d 1178 (3rd Dist. 1990).

Christopher Bohlen, the Kankakee City Corporation Counsel who later became the Hearing Officer, summed it up best when he explained at the Board fundamental fairness hearing why he did not

object to anything said by the Town & Country representatives at the February 19th City Council Meeting:

> "Again, as I indicated, this was part of the give and take process. I didn't... It made no difference to me what they said as long as there was something not patently illegal or even latently illegal at what they said, and I heard nothing other than what I consider the normal give and take. They were trying to say what they were going to prove. I had heard a number of times what Waste Management was going to do to them in the process of this hearing, and what the County was going to do with them and so did the Aldermen. I was not concerned by the statements or any of the people who talked that night said ... made. Those did not give me rise to believe there was anything improper going on." (BD. TR. 11-4-02 293, 294).

B. The Failure Of the City To Provide Copies of the Application To the State's Attorney and County Board Was an Oversight By the City Clerk With No Resulting Prejudice To any Person.

On the first night of the siting hearing, Kankakee County, by Motion, pointed out that the City of Kankakee Siting Ordinance (No. 65) provides at Section 4-D-1 that upon receipt of a proper and complete application and payment of the applicable filing fee deposit, the City Clerk shall date stamp all copies and immediately deliver one copy to the Chairman of the County Board and one copy to the Kankakee County Solid Waste Director. (TR. 29) The City acknowledged that it failed to follow its own Siting Hearing Ordinance in this regard, and offered no explanation other than mere oversight, with the City Clerk testifying that she was unaware of the requirement until it was brought to her attention after the siting hearing. (Bd.TR 11-6 251-257). The City Clerk's failure to give copies of the Application to the County is nothing more than an oversight. (Bd. TR. 11-6 218)..

Kankakee County never argued, either at the original siting hearing or at the Board fundamental fairness hearing, that it was prejudiced by not immediately receiving two copies of the Siting Application. The record is clear from the transcript of the siting proceedings that County legal representatives cross-examined Town & Country's witnesses vigorously and extensively, that the cross-examination was based on detailed knowledge of the contents of the Siting Application, and that the County even presented its own geologist who had reviewed the portions of the Application pertaining to his area of expertise in

detail. (TR. 1210) At the Board fundamental fairness hearing, the City presented documentation showing that the County's expert consultant, Chris Berger, had obtained a copy of the Siting Application almost two months prior to commencement of the public hearing. (Bd. Hearing City Exhibit 1). Waste Management Of Illinois had secured their copy of the Application even earlier. (Bd. Hearing City Exhibit 2). The County objected at the fundamental fairness hearing to questions asking the County Board Chairman whether the County was prejudiced by not being given copies of the Application. (Bd. TR. 11-6 132, 133).

The sole question on this issue then is whether the City's failure to follow a provision of its own Siting Hearing Ordinance, without even a hint of actual prejudice, is fundamentally unfair. The City's oversight is certainly understandable given the fact that this was its first Section 39.2 siting hearing. (Bd. TR 11-4 312). Petitioners will undoubtedly rely in support of their argument on the Board's decision in American Bottom Conservancy vs. Village of Fairmount and Waste Management Of Illinois, Inc. (PCB 00-200, October 19, 2000). That decision is distinguishable from the instant facts in that in ABC, a citizen objector was deprived of the Application until two weeks prior to commencement of the public hearing. The Board correctly found that this did prejudice her as she was less able to prepare for the siting hearing. The issue in ABC was not directly failure to give a copy of an application to another party or an objector, but rather placing impediments on the disclosure of and the availability of the application for copying and public inspection. In that case, the Applicant, Waste Management, attempted to cure the error by giving the objector a copy of the Application two weeks prior to the start of the siting hearing, but by that point it was too late and the damage had been done.

There is no law stating that a city council must follow all of the requirements of its own siting ordinance in order for the siting proceedings to be conducted in a fair manner. Petitioners confuse the requirements of Section 39.2 of the Act with the requirements of the local siting hearing ordinance. A local siting hearing ordinance is not even required. The result might be otherwise if a city's failure to

follow its own siting hearing ordinance is evidence of some systematic attempt to bolster the applicant or prejudice an objector. This is simply not the case here as the testimony of the City Clerk that she simply didn't know about the requirement is believable and unrebutted.

The Board, of course, has the right, when fundamental fairness requires supplemental proceedings before the local governing body, to remand the cause to that body for additional proceedings, Land & Lakes Company vs. Pollution Control Board, 245 Ill.App.3d 631, 616 N.E.2d 349 (3rd Dist. 1993), but no legitimate purpose would be served by such an action here since the ability of Kankakee County to prepare for and participate fully in the siting hearing is not disputed.

C. The City Of Kankakee Did Not Deny Information, Documents, Or the Right To Participate, To any Person.

The City Council amended its Siting Hearing Ordinance during April, 2002, while the Application for local siting approval was pending. (C3179-C3191). The Amended Siting Hearing Ordinance required five-day advance registration for those who wanted to participate in the local siting hearing. Due to the ban on ex parte communications while the Application was pending, the City failed to communicate to Town & Country the fact of this Amendment. (Bd. Tr 11-6 319, 320) Accordingly, Town & Country caused to be published a Pre-Hearing Notice based on the old version of the Ordinance which required participants in the siting hearing to register no later than the first day of the hearings. (App. Exhibit 9, TR 9).

Petitioners argue that this discrepancy somehow rendered the proceedings fundamentally unfair. However, they point to no person who was denied full participation as a result of this discrepancy. At the Board fundamental fairness hearing there was testimony from citizens such as Doris O'Connor, the spokesperson for CRIME, that they were confused by the conflict between the published Notice and the City's Ordinance (Bd.TR 11-4 348-350), but it appears that these people resolved their confusion and uncertainty by adhering to the stricter five day registration standard. (Bd.TR 11-4 348-350). When the

issue was raised by motion of Kankakee County on the first night of the local siting hearing, the Hearing Officer indicated that he would waive the five day registration requirement and allow registrations through the first night of the hearing by anyone who wished to participate. (TR 12). He even sent an assistant corporation counsel for the City of Kankakee into the hallway outside the hearing where the unexpected overflow crowd was located to inquire whether any of them wished to register as participants. (Bd. TR 11-6 313, 386). In fact, an assistant to the individual videotaping the proceedings for the public, who was apparently confused about what was required to register as a participant, was allowed by the Hearing Officer to be included as a full participant with right of cross-examination on the third night of the hearing despite the fact that her initial written communication to the City had only indicated a desire to speak. (Bd. TR 11-6 105, 337).

Generally, Petitioners argue that the proceedings were rendered fundamentally unfair by reason of the fact that some members of the public got vague or confusing answers from the City Clerk's Office on questions regarding how to participate. Moreover, they suggest that it was improper for the City Clerk to require everyone who wanted copies of documents or records to fill out a Freedom Of Information Act Request Form. Petitioners do not allege that anyone was prevented from participating, nor do they offer evidence that anyone was denied access to requested records or information.

The City Clerk testified at the Board fundamental fairness hearing indicating it had always been her practice to require anyone who requested copies of any City records to fill out a Freedom Of Information Act form (Bd. TR 11-6 226, 267). This practice pre-dated Town & Country's filing and was uniformly applied to everyone, including Town & Country representatives who sought information. (Bd. TR 11-6 225,261) Moreover, the form required to be filled out was a simple form where a few blanks such as name, date, and information requested had to be filled in. (Bd. TR 11-6 267, City Exhibit 4).

As to allegedly confusing information regarding the rules of participation given out by the City Clerk's Office, it is clear that no one was prevented from full participation. Moreover, it is not the job of

the City Clerk to give legal advice, to construe City Ordinances, or to educate people in the Section 39.2 hearing process. The unfortunate inconsistency between the five day registration requirement in the Amended City Ordinance and the hearing registration requirement in the Applicant's published hearing Notice was fortunately resolved in favor of greater and fuller public participation by the Hearing Officer electing to apply the more liberal requirement. It is more than a little ironic that this fundamental fairness issue grows directly out of the fact that the City was not communicating with Town & Country while the Application was pending, strong circumstantial evidence of how serious the parties were about avoiding ex parte contacts.

It is well established that the local siting authority may develop its own siting procedures, if those procedures are consistent with the Act and supplement, rather than supplant those requirements. (Waste Management of Illinois v. PCB, 175 Ill.App.3rd 1023, 530 N.E. 2d 682, 2nd Dist. 1988). Therefore, to the extent that the Kankakee City Council did not faithfully follow the Siting Ordinance it had enacted, even though such Siting Ordinance was not required, no fundamental fairness violation occurs in the absence of prejudice or, alternatively, in the absence of proof that the decision-maker was systematically attempting to impair a party's participation. There is no evidence of wrongful intent on the part of the City of Kankakee in this record. There is nothing inherently wrong with the City Clerk's procedures for access to records; they pre-dated the filing of this Application, and they were applied uniformly to everyone. The City Clerk's failure to give copies of the Application to the County is nothing more than an oversight. (Bd. TR 11-6 218)

D. No Person Was Prejudiced Because Of Limited Seating Capacity In the Hearing Room On the First Night Of the Proceedings.

It is undisputed that the City Council Chambers where the siting hearings were held could not accommodate all of the members of the public who wished to attend on the first night of the hearing. This

had already been the subject of a Motion For Summary Judgment filed by Kankakee County and denied by the Board. Extensive evidence on this issue was elicited at the Board fundamental fairness hearing.

Town & Country's position is that the City Council was faced with a difficult situation on the first night of the hearings, and that the City acted more than reasonably to cure the problem and to assure that everyone was allowed the right to participate. A careful review of the testimony of the witnesses at the fundamental fairness hearing establishes this conclusion.

Leonard Martin, a County Board member, did not get in on the first night of the hearings. He admitted that he was only going as "a spectator" and did not wish to participate. It should be pointed out that to the extent that Kankakee County had four legal representatives in the hearing room on the first night, Mr. Martin's interests were more than capably represented.

Darrell Bruck, Jr. testified that he arrived at 8:05 p.m. and was ultimately able to get into the hearing room at approximately 10:00 p.m. (Bd.TR. 11-4 103). He also conceded that there was no problem with public access to the hearings after 10:00 p.m. on the first night of the eleven day hearing. (Bd.TR. 11-4 114). Bruck never registered as a participant, but was able to give a public comment on June 27th. (Bd. TR 11-4 110,113). He also knew that the City made a transcript of the first night's proceedings available to everyone, but chose not to read the same. (Bd. TR 11-4 114).

Pam Grosso also did not register as a participant. (Bd. TR 11-4 139). She was aware of her right to subsequently give public comment, but chose not to do so, electing instead to submit a written statement which became part of the record. (Bd. TR 11-4 138).

Barbara Miller, who complained about the over-crowding did, in fact, get in the hearing room on the first night. (Bd. TR 11-4 146). Similarly, Betty Elliott, an elderly lady, also got into the hearing room on the first night, but apparently left on her own and never got back in. (Bd. TR 11-4 154, 160, 161, 164, 165). She also made a public comment on June 27th. (Bd. TR 11-4 166). Mrs. Elliott's testimony illustrates part of the problem on June 17th, the first night. She apparently did not understand that the siting

hearing was in the nature of a trial where lengthy evidence would be taken, and the opportunity of the public to speak or otherwise comment would be deferred until later in the hearings. It is clear from her testimony at the Board Hearing that she thought she would get a chance to express her views on the first night of the hearing, and was disappointed that this didn't occur. However, she ultimately did express her views at the appropriate time.

Keith Runyon's testimony demonstrates that no one who expressed a desire to participate was excluded. At the fundamental fairness hearing, Mr. Runyon complained about the crowding on the first night and the fact that a significant number of people did not get into the hearing room. Runyon was an officer of a citizen's group, OUTRAGE, and he indicated that even though he arrived late, space was made for him in the hearing room once he indicated that he had registered to participate. (Bd. TR 11-4 177, 180, 181). Similarly, Doris O'Connnor, the spokesperson for another citizen's group, CRIME, also was admitted to the hearing because she had preregistered. (Bd. TR 11-4 368, 370). She was also aware of the Hearing Officer's decision to waive the pre-hearing registration requirement by allowing anyone who wished to register during the first night's hearings (Bd. TR. 11-4 370).

Pat O'Dell is the only witness presented by the County at the fundamental fairness hearing who even arguably wanted to participate on the first night and was excluded. Her situation, however, was significantly more equivocal than the County would assert. O'Dell testified that she believed she had registered, but her registration consisted of a letter previously turned into the City Clerk indicating that she wanted to "speak." (Bd. TR. 11-6 80). On June 19th, the third night of the hearings, the Hearing Officer explained on the record how he had construed Mrs. O'Dell letter when he stated, "Because there was no indication of these appearances when they were filed that any of these persons desired to cross-examine or present testimony, I construed these as persons who wanted to make statements." (TR. 357). Moreover, it is not at all clear that Mrs. O'Dell was actually excluded from the hearings. She had arranged to have the hearings videotaped and brought a friend with her who was admitted for that purpose. (Bd. TR 11-6 91,

92). In connection with setting up the videotaping, she was in and out of the hearing room at least three times before the hearings started. (Bd. TR. 11-6 78, 79). While she was not in the room after the hearings began, it appears that she may have excluded herself. (Bd. TR. 11-6 95, 96). Instead of remaining in the council chambers after the hearings commenced, she busied herself by circulating petitions regarding the proposal with her signature first on the petition of those opposed even though she did not claim to be an objector. (Bd. TR. 11-6 100). Upon further inquiry to the Hearing Officer on the third night of the hearings, her status was changed to that of registered participant, and she thereafter fully participated in cross-examination of witnesses. (Bd. TR. 11-6 105).

By having arranged for the videotaping on the first night, Mrs. O'Dell was in a perfect position to catch up on what she had missed while she was circulating petitions, but she indicated that she chose never to watch the videotape. (Bd. TR. 11-6 93). Moreover, there is a curious conflict between Mrs. O'Dell's written public comment at the siting hearing and her testimony at the Board fundamental fairness hearing. Although she testified at the fundamental fairness hearing that as many as 150 people were excluded on the first night of the hearings, she admitted that in her public comment protesting the events of the first night she had that number as 60 people being excluded. (Bd. TR. 11-6 98).

It is clear from the record that the overcrowding problem only occurred on the first night, and only, according to the County's own witnesses, for the first two or two and a half hours of the lengthy hearing session. The City Council Chambers accommodated 125 people. (Pat Power Affidavit). At least fifty, and perhaps more, people did not get into the hearing room initially. Some citizens complained at the fundamental fairness hearing that they were not given an opportunity to stand at the back of the room, but Mayor Green testified that because of the extra chairs placed into the Council Chambers, there was no room to stand in the back. (Bd. TR. 11-6 216). Petitioners suggest that the City should have foreseen the problem and scheduled the hearings in a larger venue. Both the Hearing Officer and Mayor Green testified at the fundamental fairness hearing that the existence of larger venues within the City was not at

all clear, and that these may not have been available. (Bd. TR. 11-6 209, 210). Hearing Officer Bohlen testified that he rejected schools and outdoor venues as inappropriate because of the lack of air-conditioning and the Summer heat. (Bd. TR. 11-4 334, 335). The City Council Chambers were obviously the customary venue for normal City Council business.

Having no alternative venue on June 17th, the City had to find a way to make the best out of a bad situation. This was accomplished in two ways. Initially, the Hearing Officer attempted to distinguish between spectators and those who wished to participate. Initially, he sent a police officer into the hall outside the Chambers to make sure that no one who had preregistered was unable to enter. (TR. 12). He also sent an Assistant City Attorney, Pat Power, into the hallway to inquire whether anyone there wished to register to participate. (Pat Power Affidavit, Bd. TR. 11-6 313, 386). While it is not clear that everyone heard the City representatives in the hallway, Pat O'Dell at least acknowledged that she did. (Bd. TR. 11-6 96). Accordingly, no one who truly wanted to participate on June 17th was deprived of that right. In addition, two nights later, the City made available to everyone a transcript of the June 17th proceedings, and the Hearing Officer announced that fact. (TR. 357).

Of additional significance is the fact that the bulk of Professor Shoenberger's testimony on June 17th (he was the only witness that night) consisted of legal analysis. The County subsequently moved to strike the testimony and pursuant to the Hearing Officer's ruling, the City Council did not consider any of Professor Shoenberger's legal analysis or conclusions. (C3284). With that ruling precious little remained of Professor Shoenberger's testimony, and that portion which did remain was duplicated in Devin Moose's testimony some days later.

At the fundamental fairness hearing, the County elicited testimony from all of their witnesses that uniform and armed police officers were used to control the crowd. Presumably this testimony was elicited to support the inference that the presence of police officers somehow intimidated the public or created some type of chilling effect on the right of expression. However, none of the County's witnesses

testified that the police acted improperly or that they did anything other than perform their duties.

The only Board decision on seating capacity as it relates to fundamental fairness is City of Columbia v. County of St. Clair, PCB 85-177, PCB 85-220, PCB 85-223 (April 3, 1986). In City of Columbia, the County was confronted with an overflow crowd, and the Board found that, "The Board appreciates the County's logistical dilemma in finding a new room for a hearing when faced with overflow crowds and does not find it unreasonable that hearing was commenced." (City of Columbia Decision at page 14).

The totality of the record reveals a lengthy, contentious and difficult siting hearing. The Application was opposed not only by many members of the public as well as Kankakee County but also Waste Management of Illinois, Inc. The fact that Town & Country rested on day three, and the remaining eight days were taken up with cross-examination of Town & Country's witnesses and presentation of the Objectors' cases provides the most compelling evidence that everyone who desired to do so had a full opportunity to participate. In their totality, the proceedings were fundamentally fair.

III. THE DECISION OF THE CITY COUNCIL WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

A. The Proposed Facility Is Located, Designed, and Proposed To Be Operated So As To Protect the Public Health, Safety, And Welfare.

The only argument advanced by any of the Petitioners with regard to this Criterion is that Town & Country has failed to properly characterize the Silurain Dolomite and, consequently, that locating the facility in close proximity to the Dolomite Aquifer is not protective of the public health, safety, and welfare. This argument displays a profound misunderstanding of the overwhelming evidence that the specific geologic characteristics of the site are well understood, and that the design contains unique engineering features which not only account for, but actually take advantage of the geologic conditions.

Devin Moose, a professional engineer, testified that he was the Director of the St. Charles, Illinois,

office of Envirogen, Inc., a national firm which focuses exclusively on environmental engineering, and he has designed or participated in the design of approximately thirty landfills. (TR 254-257).

Mr. Moose described the facility as located on the South side of the City of Kankakee with a facility boundary of 400 acres, a waste footprint of 236 acres, and an estimated projected site life of thirty years. (TR 261). He testified that he was familiar with all applicable State and Federal Location Standards, and that the facility satisfied all of these. (TR. 263-267, Application 10075-10083).

Envirogen conducted a hydro-geologic evaluation of the site consisting of evaluation of published literature on the regional geologic setting, evaluation of an initial series of soil borings done by the engineering firm of Weaver, Boos and Gordon, Ltd., an additional series of soil borings performed under the direction of Envirogen, bringing the total borings to nineteen, as well as lab and field permeability testing of the geologic materials encountered. (TR. 265-272). The site specific geologic conditions consisted of a fairly thin layer of unconsolidated materials, relatively impermeable Yorkville Till on top of weathered and fractured Dolomite which in turn is underlain by massive competent Dolomite Bedrock. (TR. 267-269). At the site, the weathered uppermost portion of the Dolomite is approximately five feet thick and constitutes the Uppermost Aquifer. (TR. 268-269). Field permeability testing at the site included slug tests and five Packer Tests in the Deep Boring which penetrated approximately fifty feet of the Dolomite Bedrock. All of the Packer Tests had no take indicating a low permeability material. (TR 272). Laboratory testing of a Dolomite sample confirmed its low permeability. (TR. 272). On cross-examination, Mr. Moose confirmed that the results of four additional laboratory permeability tests on the Dolomite had been received since the Application was published, and these confirmed very low permeability of the massive Dolomite. (TR. 1002, Applicant's Exhibit 21).

Mr. Moose's summary regarding site specific geologic conditions was, "Well, I thought the geology was relatively straight forward. It consisted of three or four layers over Bedrock, it was fairly predictable, fairly easy to monitor, and it was easy to identify the Uppermost Aquifer, the cracked or weathered Bedrock

Zone is an easily monitored unit." (TR. 273).

Mr. Moose then described the design of the proposed landfill. He proposed to excavate below all of the unconsolidated materials, and to also excavate all of the weathered Dolomite. The landfill liner will actually be built on approximately four and one-half feet of structural fill recompacted to the same standards as the clay liner. (TR. 274-276). Mr. Moose described how the pizometers in the Uppermost Aquifer showed water levels significantly higher than the bottom of the landfill thereby indicating that the facility would have an inward hydraulic gradient. (TR. 277, 278). He explained how an inward gradient prevents water from leaking out of a landfill, noting that in the event of liner failure, ground water would leak into the landfill. (TR. 278).

Mr. Moose then described the composite liner system proposed for the landfill consisting of three feet of recompacted clay on top of the engineered structural fill, a high-density polyethylene liner, and a leachate collection system. (TR. 280). On the side of the landfill, the recompacted clay will be twelve feet thick rather than the State minimum requirement of three feet. (TR. 282).

Mr. Moose also explained the results of the groundwater impact evaluation using the Model Pollute, which is readily accepted and widely used by the IEPA. The Model showed no measurable impact on the groundwater for the life of the facility (30 years) plus an additional 100 years. (TR. 293). On later examination by City Council members, Mr. Moose pointed out that the groundwater impact model continued to show no measurable impact on groundwater even after 1,700 years. (TR. 1194).

The Siting Application describes, and Mr. Moose testified about, numerous other aspects of the proposed landfill design including gas management, construction sequencing, daily and intermediate cover, groundwater monitoring, leachate management, storm water management, final cover, and post-closure care. To the extent that these design features and operational components are typical of a modern Subtitle D Landfill, and because they are not directly relevant to the issues raised by Petitioners herein, they will not be further elaborated.

Petitioners responded with indignant cross-examination of Mr. Moose's conclusions regarding the Uppermost Aquifer based upon their belief that the Dolomite represented a major Regional Bedrock Aquifer System. Moose never took issue with the regional characterization by the Objectors pointing out only that his site specific characterization for the specific location where the facility is proposed to be located is more accurate. Even Stuart Cravens, the opposition witness whose views were most diametrically opposed to those of Mr. Moose, admitted that the productivity of the Shallow Dolomite Aquifer is very inconsistent and impossible to predict. (TR. 1718). None of the Objectors' witnesses challenged the validity of the Packer Tests verifying the integrity of the Massive Dolomite. Cravens could not question these results, nor did Sandra Sixberry, a college geology professor, whose testimony was not qualified as expert testimony because she lacked a professional geology license. (TR 1282, 1298).

Devin Moose was extensively cross-examined about what other studies corroborated his conclusion that only the weathered uppermost portion of the Dolomite constituted an aquifer, and that the lower Dolomite was massive and acted as an aquitard. In response to questioning by counsel for Waste Management, Moose referred specifically to a study performed by Waste Management in connection with a permit application at their nearby landfill, where the Uppermost Aquifer was described as being approximately ten feet in thickness, and the lower Dolomite was described as massive. (TR. 1004, 1005). Moose actually produced portions of Waste Management's old permit application verifying their concurrence with his conclusions. (Applicant Exhibit 21). Moose quoted from a portion of Waste Management's report:

> "Based on hydraulic conductivity measurements of the weathered Bedrock, RQD values from borings into the weathered Bedrock, visual observation of Bedrock core samples, permeability was found to decrease with depth. For modeling, the maximum depth of significant Bedrock weathering was no more than ten feet. At this depth, the Dolomite becomes increasingly competent and acts as a confining layer to vertical groundwater flow." (TR. 1004, 1005).

Various Objectors called witnesses in an attempt to rebut the conclusions of Devin Moose.

Kankakee County called their consultant, Steven VanHook, a geologist with Patrick Engineering, the engineering firm at which Moose was previously employed, which firm sued Mr. Moose when he left to join Envirogen. (TR. 1234). VanHook admitted that he was hired by the County to critique Town & Country's Application, and that he did not agree with Envirogen's description of the Dolomite. (TR. 1211, 1212). He opined that because of the proposed landfill's proximity to the Uppermost Aquifer, "There definitely are some concerns with suitability", but that, "Envirogen did a good job of engineering around some of these deficiencies." (TR. 1212). He felt that the design would have to be very carefully followed, and that there was little margin for error, and although he admitted he was not an engineer qualified to comment on design features he could "see the liner system is significantly beyond the minimum required for the EPA." (TR. 1214-1216). He acknowledge that if the site were properly constructed and the gas system operates properly, the designed liner would be sufficient to protect the sand in the Henry Formation. (TR. 1229). He did, however, not review the Construction Quality Assurance Plan in Town & Country's Application. (TR. 1226).

VanHook based his conclusion that Moose had mis-characterized the thickness of the Aquifer on the fact that many of the reported drinking water wells in the vicinity of the site drew their water from deep in the Dolomite. These wells were actually reported in Town & Country's Siting Application, and Mr. Moose had explained in detail during his cross-examination why it was difficult to draw scientific conclusions from wells whose construction details had not been scientifically recorded. Moose had pointed out that water in a well can be drawn from any area below the seal and absent reported information on where the well is sealed, it can be drawing water from anywhere in its entire depth. (TR. 1078-1024). VanHook acknowledged that commercial well-drillers were not geologists, that they often mistook geologic classifications, and that water well drillers' logs were inherently unreliable if they contained contradictory or incomplete information. (TR. 1239, 1240). He ultimately admitted that without knowing where wells are sealed, saying what formation the water comes from is speculation. (TR. 1142).

VanHook acknowledged that the best way to learn the true nature of the Dolomite in the area of the site is through visual inspection. (TR. 1243). This is consistent with Moose's testimony that after excavation of the weathered Dolomite and before placement of the structural fill, the engineers would inspect the surface of the competent Dolomite and grout any visible fractures as needed. (TR. 1102, 1103).

Moose had indicated to the City Council that because there was not much clay underneath the site, he intended to take it all out and construct a highly engineered landfill that relied on an inward gradient to protect the environment. (TR. 1156, 1157). VanHook acknowledged that the hydro-geologic characteristics of the site created an inward gradient. (TR. 1237). He agreed that the inward gradient would protect the environment from leachate releases. (TR. 1138). In summary, VanHook, who started out as a critic, appreciated the additional engineering at the site, and acknowledged the environmental protection afforded by the inward gradient, the key feature of the site. His only difference with the opinions offered by Mr. Moose relates to the thickness of the Uppermost Aquifer, and that difference results from flawed conclusions developed by his reliance upon the inherently flawed water well drillers' logs, which did not contain the essential seal information.

Likewise, Sandra Sixberry, who also expressed concern about the site's proximity to the Aquifer, was fourth in cross-examination to acknowledge the inward gradient as an effective barrier to advective flow. (TR. 1294). She acknowledged the value of modeling, but admitted that she had not reviewed the Applicant's model inputs although she acknowledged that she had been privately provided with the diffusion coefficient information used in the model by one of Mr. Moose's assistants. (TR. 1293).

The last and most interesting of the opposition witnesses to testify about hydro-geology was Stuart Cravens, a former employee of the Illinois State Water Survey. He initially testified that he had been a "senior hydro-geologist" at the Illinois State Water Survey who carried the title of "Senior Professional Scientist." (TR. 1311). During his time at the Water Survey, he had coauthored a study entitled Regional

Assessment of the Groundwater Resources of Eastern Kankakee and Northern Iroquois Counties (Benoit Exhibit 29, TR. 1319-1321). On cross-examination, Cravens admitted that he had not been a senior hydro-geologist at the Water Survey, but had actually been a "Professional Scientist." (TR. 1615, 1616). A short biography of Cravens in one of his other publications revealed, however, that his title at the Water Survey was "Assistant Hydrologist." (Applicant's Exhibit 23).

Cravens readily admitted that he was not an engineer and not qualified to design landfill liners, and that he could not speak as to whether the Applicant's liner was a barrier to the environment. (TR. 1641, 1643). He had never developed a groundwater monitoring program. This was his first experience with a Subtitle D Landfill. He had never done a Section 39.2 Hearing Review, he had never done a permit review for a municipal solid waste landfill, and he had never drafted any part of a siting application. (TR. 1624, 1661, 1674).

Cravens felt that based upon its proximity to the Dolomite Aquifer as verified by regional studies, no site specific investigation should ever have been done at the site. (TR. 1648). He acknowledged the statement in his Executive Summary that no design can adequately protect the public health, safety, and welfare at the Applicant's site, but stated that this was not correct. (TR. 1647). He subsequently changed his mind and stated that, in fact, no design at this site could protect the public health, safety and welfare, but then again changed his mind stating that some designs might work. (TR. 1653, 1654).

Cravens corroborated Moose's conclusion that intact primary Dolomite has very low permeability. (TR. 1725). He also acknowledged that the Applicant's data showed an inward gradient at the site. (TR. 1827). However, he disagreed with the assumptions in the groundwater impact modeling even though he could not name the model used, or identify the parameters that he would change, ultimately admitting that he was not a modeler. (TR. 1831-1835). Cravens could not take issue with the Applicant's conclusion that the Model would have passed IEPA Standards with a three foot clay side-liner rather than the twelve foot side-liner which was actually proposed. (TR. 1831-1835).

Like VanHook, Cravens based his disagreement with Moose on the depth of water wells in the area. He too, admitted that absent a well being sealed, water can come from any area of the length of the well. (TR. 1698). In his own regional study, however, he did not look at or utilize seal information. (TR. 1698). Cravens had reviewed data from the 307 local water wells in the vicinity of the site to support his conclusion that the Dolomite is a thick regional aquifer in the area of the site. However, different portions of his conclusions use different subsets of data specifically selected by him, and ultimately he admitted that none of these over 300 wells had published seal information. (TR. 1761, 1762).

Cravens' own regional study, which did not directly include the subject site, seem to indicate that as one approached this site from the East, the Dolomite became increasingly less permeable. In the observation well in Cravens' study closest to the Applicant's site, there was no response whatsoever to the aquifer drawdown test. (TR. 1819). This suggested in the area of the site the thick, lower, competent Dolomite, indeed, was not functioning as an aquifer, but rather as an aquitard. Moreover, of the sixteen observation wells in Cravens' 400 square mile study area, the two wells closest to the Applicant's site were finished at depths in excess of 600 feet, indicating that they may not even have been Dolomite wells. (TR. 1789, 1790). Another of Cravens' "Dolomite" observation wells had no recorded depth information at all. (TR. 1796).

The Objectors at the siting hearing and the Petitioners here misconstrue both the nature and the amount of proof required to establish that a site is so located and designed as to protect the public health, safety, and welfare. Town & Country's representatives readily admitted that not enough site investigation was done to satisfy permitting requirements, but this is not a permitting proceeding. If the standard were the same as in permitting, there would be no reason for the local decision-maker to even rule on the issue. Objectors say that not enough deep soil borings were done. This, too, misses the point as there is no minimum or magic number of borings. Devin Moose testified that the borings were sufficient for him to understand the site and to develop a design which took into account the unique characteristics of the site.

The design far exceeds minimum IEPA specifications. The fact that the Objectors don't want to believe Mr. Moose is of no consequence since they are not the decision-makers. They also are not in a position to impose their standard of what constitutes sufficient proof on the decision-makers.

All three Objectors' witnesses on this issue ended up admitting that the depth of surrounding water wells is, absent seal information, not a reliable indicator of the depth of the Uppermost Aquifer. Other than that, VanHook admitted the design would work, Sixberry acknowledged the effectiveness of an inward gradient, and Cravens repeatedly changed his mind and his testimony on everything from his past job title to whether any design could protect the public health, safety, and welfare.

The testimony of Stuart Cravens emphasizes an important point, namely, that it is the exclusive province of the trial of fact to determine what weight is to be given to conflicting testimony. A review of the City Council's Findings of Fact indicates not only that they considered all of the evidence, but also that they properly weighed the evidence and arrived at the correct decision. Those findings, in fact, contain thirty-one specific paragraphs of findings wherein the conflicting evidence relating to the thickness of the Aquifer was acknowledged and given its proper weight. (C3267-3271). The City Council's finding was not against the manifest weight of the evidence.

B. The Plan Of Operations For the Facility Is Designed To Minimize the Danger To the Surrounding Area From Fire, Spills Or Other Operational Accidents.

Devin Moose, the Applicant's Chief Engineer testified on this Criterion. (TR. 254-257). He indicated that Envirogen, under his direction, prepared an operational plan for the proposed facility which is set forth in detail in the Application. (TR. 301). He also indicated that the Application contains plans with regard to spill prevention, accident response, fire response, and the like, and that the details of those plans are set forth fully in the Appendices to the Application. He opined that the facility is designed so as to minimize the impact of fires as well as other accidents. (TR. 306).

The summary of the Health And Safety Plan is found in Volume I of the Application, which

summary sets forth the major feature of that Plan including but not limited to safety training and emergency response procedures. (10397-10406). The detailed Plan is set forth in Appendix S of the Siting Application.

Mr. Moose was only asked one question on cross-examination regarding this Criterion, namely whether he had ever contacted the Fire Department in Kankakee to verify their ability to provide emergency assistance as described in the Plan. Moose conceded that he had not contacted them. (TR. 516). No evidence was introduced indicating that any responding agency was incapable to respond to any accident that might occur. In its unanimous approval of the siting Application, the City Council imposed the additional condition, "That the Applicant prior to commencing of operations, shall work with the City of Kankakee Fire Department to insure that the Operational Plan is consistent with the emergency response of the City of Kankakee Fire Department and to insure that the City of Kankakee Fire Department shall be informed at all times regarding any potential hazardous conditions which may exist and which would increase the likely of any accidental fire, spill, or other operational accident." (C3279).

Based on the foregoing, Petitioners have argued that the City Council decision with respect to Criterion v is against the manifest weight of the evidence. This argument is specious. First of all, Devin Moose's failure to confirm the Kankakee City Fire Department's availability goes to the weight to be given to his testimony, a decision that must be made by the City Council. Moreover, to the extent that no contrary evidence was introduced, the City Council is clearly entitled to accept his qualified and expert opinion. Lastly, the fact that the City Council imposed a special condition of approval specifically responsive to the issue indicates that the decision maker has addressed the matter in a manner consistent with the evidence.

C. The Applicant's Proposal Is Consistent With the County Solid Waste Management Plan.

Allen Shoenberger, a law professor at Loyola University of Chicago (TR. 48), offered Town &

Country's initial testimony on Siting Criterion viii, whether the facility is consistent with Kankakee County's Solid Waste Management Plan. Professor Shoenberger recounted his extensive appellate experience, the fact that he had been Hearing Officer for the Pollution Control Board, has presided over Section 39.2 local siting hearings, and in those capacities made proposed findings of fact and law to various tribunals regarding the Section 39.2 Siting Criteria (TR. 51).

The Kankakee County Solid Waste Plan was originally adopted in 1993, readopted in 1995, and updated in the year 2000 (TR. 52). At that time, the Plan precluded waste from outside of Kankakee County being disposed of in the existing facility within the County (TR 53).

On October 9, 2001, the County's Plan was amended to remove the preclusion on receiving out-of-county waste in the County Landfill. That Amendment also contained the following language with regard to the existing waste management landfill:

> "An expansion of the landfill, if approved, will satisfy the County's waste disposal needs for an additional 20 years. No new disposal facilities will be necessary, or desired, in Kankakee County for purposes of implementing the Plan. Kankakee County will not support and will contest the development of any other landfill in the County, unless the expansion of the existing landfill is not approved." (Siting Hearing, Kankakee County Exhibit 2).

This is the version of the County's Plan addressed in the Siting Application. The Siting Application points out that the proposal is consistent with the County Solid Waste Management Plan in that it represents a privately owned landfill, the preferred alternative in the County Plan, and in that as of the date of the Town & Country Application, the Waste Management Landfill expansion "is not approved." (Application 10462-10464).

On March 12, 2002, the day before Town & Country's Application was filed, Kankakee County amended its Solid Waste Management Plan once again (TR. 62). This Amendment slightly changed some of the previous language regarding the contemplated expansion of the existing Waste Management Landfill and also added three new requirements, namely that any proposal contain an Environmental Contingency Escrow Fund, a Domestic Well Water Protection Program, and a Real Property Protection

Plan. (TR. 63, 64). Specifically, the Amendment of March 12, 2002 required that:

> "An expansion of the existing landfill, if approved, would then satisfy the County's waste disposal needs for at least an additional 20 years, and in accord with the Kankakee County Solid Waste Management Plan (as amended), as well as relevant portions of the Local Solid Waste Disposal Act and the Solid Waste Planning And Recycling Act, no new facilities would be necessary." (Siting Hearing, Kankakee County Exhibit 2).

Dr. Shoenberger opined that since the Waste Management expansion "is not approved" and since the Town & Country Application would satisfy the County's waste disposal needs for 20 years and since the Town & Country Application contained an Environmental Contingency Escrow Fund, a Domestic Well Water Protection Program, and a Real Property Protection Plan, the proposal was consistent with Kankakee County's Solid Waste Management Plan (TR. 65, 69).

On cross-examination by the County's attorney, Devin Moose of Envirogen, Inc., a professional engineer and the chief author of the Town & Country siting Application, testified over objection by Town & Country's attorney that he had assisted in the development of dozens and dozens of County Solid Waste Management Plans, and that he considered himself and his firm to be experts in the area of County Solid Waste Management Plans (TR 519, 520). On subsequent questioning by one of the City Council members, Mr. Moose, without objection from any of the participants, gave a detailed description of why he concluded that the Town & Country Application was consistent with the Kankakee County Solid Waste Management Plan. (TR. 1202-1207). He explained that even though the County Solid Waste Plan, as amended, clearly contemplated Waste Management filing an application for expansion of their existing facility, the plain meaning of the words in that Amended Plan, because Waste Management's expansion was "not approved," allowed the Town & Country Application to be consistent. He also pointed out that the Town & Country Application met or exceeded all of the technical requirements in the County's March 12, 2002 Amendment, which he detailed in his testimony. (Id.).

Kankakee County now argues that the City's unanimous finding that the Town & Country

Application is consistent with the County's Solid Waste Management Plan is against the manifest weight of the evidence. This argument presupposes that the Kankakee City Council had to honor the presumed intent of the County's Plan rather than give effect to the plain meaning of the words therein. There is no question in this record that the County wanted an expansion of the Waste Management facility and that their Plan Amendments, including a second one the very day prior to the Town & Country filing, were intended to preclude the City from successfully exercising its siting jurisdiction. However, the wording of the Amendments left room for the City to make a finding of Plan consistency so long as a Waste Management application for its landfill expansion was "not approved." The Findings of Fact adopted by the City Council contain an extensive discussion of this issue, proving conclusively that the City Council did consider all of the evidence. The Council considered in detail all of the requirements of the County's Plan and unanimously found that Town & Country's Application was consistent. (C3283-3286). Regardless of whether the Board may or may not have a different interpretation or give a different meaning to the words in the County's Solid Waste Plan, there is substantial evidence to support the City Council's finding, and therefore that finding is not against the manifest weight of the evidence.

IV. THE COUNTY DOES NOT HAVE THE RIGHT TO PRECLUDE THE CITY FROM EXERCISING ITS PROPER PLANNING AND SITING JURISDICTION.

The Petitioners' arguments regarding Criterion viii reveal the classic example of one unit of local government improperly attempting to foreclose the efforts of another in the lawful exercise of its power. Here, Kankakee County improperly attempted to use two hastily adopted amendments to its Solid Waste Management Plan in an attempt to strip the City of Kankakee of the siting jurisdiction granted to it by the legislature (415 ILCS 5/39.2(a)), and to prevent it from exercising its constitutional powers within it s corporate boundaries.

None of the Objectors presented any evidence that Town & Country's Application was not

consistent with the County Solid Waste Management Plan, save for the Board Chairman's affidavit describing the Plan's provisions. None of them offered any alternative interpretation to sworn testimony of the plain language of the Amended Plan. Although the County moved to strike Devin Moose's testimony that the proposal was consistent with the Plan, it was the County's attorney, in cross-examination, who qualified Moose as an expert on the subject, and the County failed to object when Moose offered his conclusions.

The Petitioners' argument that the proposed facility fails to satisfy Criterion viii (415 ILCS 5/39.2(a)(viii), is based upon the premise that the facility is inconsistent with the amendments to the Kankakee County Solid Waste Plan ("KCSWP") adopted on October 9, 2001 and March 12, 2002, which amendments were specifically intended to deny the City of Kankakee the right to site any facility within its corporate limits unless the Waste Management landfill was not expanded by County Board action.

Before the 1970 Illinois Constitution, municipalities and counties only had that authority to act expressly given them by the General Assembly. Without an express statutory power to act, a unit of local government could not act. If the statutes were silent on a topic that was the subject of a possible municipal or county ordinance, that topic was generally foreclosed. This theory of almost total state legislative control of local government is commonly known as "Dillon's Rule." See City of Clinton v. Cedar Rapids and Missouri River Railroad, 24 Iowa 455 (1868). Under Dillon's Rule, which still applies to non-home rule units, governmental powers will be narrowly construed by the Courts. See Ives v. City of Chicago, 30 Ill.2d 582, 198 N.E.2d 518 (1964).

As a home rule unit, the City of Kankakee has substantial constitutional authority to enact ordinances and take other actions which pertain to its government and affairs such as solid waste planning and siting. The Illinois Supreme Court explained the dramatic constitutional authority of the home rule unit, as follows:

> The concept of home rule adopted under the provisions of the 1970 Constitution was designed to drastically alter the relationship

> which previously existed between local and State government. Formerly, the actions of local governmental units were limited to those powers which were expressly authorized, implied or essential in carrying out the legislature's grant of authority. *Under the home rule provisions of the 1970 Constitution, however, the power of the General Assembly to limit the actions of home rule units was circumscribed and home rule units have been constitutionally delegated greater autonomy in the determination of their government and affairs.* To accomplish this independence, the Constitution conferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein. Kanellos vs. Cook County, 53 Ill.2d 161, 290 N.E.2d, 240, 243 (1972) *(emphasis added).*

A. Any Action By Kankakee County To Limit the Powers of The City Of Kankakee Within Its Corporate Boundaries Is Unconstitutional.

415 ILCS 5/39.2(a) grants to the City of Kankakee the sole responsibility to approve or deny a request for siting approval of a pollution control facility located within its corporate boundaries. As a home rule unit, the City of Kankakee "... may exercise any power and perform any function pertaining to its government and affairs..." (ILL. CONST. Art. VII, Section 6(a)), and may also "...exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically declare the State's exercise to be exclusive. (ILL. CONST. Art. VII, Section 6(i)).

Clearly, pursuant to both the Illinois Constitution and the delegation by the General Assembly of the responsibility for siting approval, the City of Kankakee may not be prevented, or in any way obstructed, in the exercise of this power within its corporate boundaries, by Kankakee County. An attempt by Kankakee County, through the guise of amendments to its Solid Waste Management Plan, to prohibit the City of Kankakee from approving the siting of a pollution control facility within its corporate boundaries is directly contrary to the Illinois Constitution and the authority of 415 ILCS 5/39.2(a).

A solid waste management plan may not limit the powers of a unit of local government conferred by the Illinois Constitution or delegated by the General Assembly. To the extent that it attempts to do so,

the plan is ineffective. Simply put, the SWPRA cannot be used by a county to reserve to itself the sole power to site a pollution control facility based on whether the county, on some future date, might itself accept the expansion of another site.

To the extent that Criterion viii could be construed to allow Kankakee County to limit the City of Kankakee of exercising its delegated or constitutional powers, 415 ILCS 5/39.2(a)(viii) is unconstitutional.

B. The Solid Waste Planning And Recycling Act ("SWPRA") Expressly Preserves Siting Authority To Units Of Local Government.

In recognition of the independence of one unit of local government from interference in the exercise of its powers by another unit of local government, the SWPRA, itself, expressly preserves the siting authority of 415 ILCS 5/39.2(a) for pollution control facilities to the governing body of the municipality where the proposed facility is located:

> This amendatory Act of 1992 shall not be construed to impact the authority of units of local government in the siting of solid waste disposal facilities. 415 ILCS 15/2(a)(5).

Accordingly, any county solid waste plan that purports to in any way limit the powers of the governing body of a municipality to approve or deny a siting request for a proposed facility located within the municipality's boundaries is not consistent with the planning requirements of the SWPRA, as required by 415 ILCS 5/39.2(a)(viii). Consequently, such a solid waste plan does not trigger the requirement that an applicant satisfy Criterion viii, because the County plan itself fails to satisfy the requirement to be "consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act. (Id.). To the contrary, the County would, for purposes of a siting hearing, be considered not to have a solid waste plan because of this conflict with the planning statutes on which all such county plans must be based to be competent under 415 ILCS 5/39.2(a)(viii).

In this case, the Kankakee County Plan relied upon by the Objectors does attempt to limit the powers of the City of Kankakee and violates both 415 ILCS 10 and 415 ILCS 15. Because of the failure

of the plan to comply with the SWPRA, Kankakee County has no solid waste plan consistent with the planning requirements of the SWPRA, making Criterion viii inapplicable.

C. The City Of Kankakee's Solid Waste Plan Prevails Over the County Plan.

The amendments to the Kankakee Solid Waste Plan also directly conflict with the provisions of 415 ILCS 10. Section 1.1 of the Local Solid Waste Disposal Act, (415 ILCS 10/1.1) recognizes a municipality's authority to site a pollution control facility:

> It is the purpose of this Act and the policy of this State to protect the public health and welfare and the quality of the environment *by providing local governments with the ability to properly dispose of solid waste within their jurisdictions* by preparing and implementing, either individually or jointly, solid waste management plans for the disposal of solid waste and, to the extent technically and economically feasible, to efficiently use products or byproducts generated during the disposal process. *(emphasis added).*

Section 2(2) of the Local Solid Waste Disposal Act defines a "unit of local government" to specifically include a municipality, and section 2(4) specifically defines "jurisdiction" in the case of a municipality to be "the territory within the corporate limits of the municipality." (415 ILCS 10/2(2) and 10/2(4)). The Local Solid Waste Disposal Act defines the jurisdiction of a county to exclude "the corporate limits of any municipality which has adopted or is implementing a plan under this Act..." 415 ILCS 10/2. Accordingly, Kankakee County's planning jurisdiction could not reach within the boundaries of the City of Kankakee after the City adopted its own solid waste plan. This would be the case under 415 ILCS 10 even if the City of Kankakee was not a home rule unit.

When, however, the City of Kankakee adopted its Solid Waste Management Plan pursuant to the Local Solid Waste Disposal Act, any provision of the County's Plan in conflict with the City's Plan became invalid with respect to the City, based on both the provisions of the Local Solid Waste Disposal Act and the Illinois Constitution. ILL. CONST. Art. VII, Section 6(c).

D. The Amendments To the Kankakee County Solid Waste Management Plan Relied Upon By the Objectors Were Not Adopted Pursuant To the Requirements of the SWPRA.

415 ILCS 15/5 clearly sets forth the procedural steps necessary to adopting a solid waste management plan and for subsequently updating and amending that plan.

Here, Kankakee County first adopted its Solid Waste Management Plan on October 12, 1993, which Plan was readopted on August 18, 1995. As required by 415 ILCS 15/5(e), the County adopted its first five-year update on July 31, 2000.

Then, spurred on by the actions of the City of Kankakee to address the solid waste needs of its own citizens, Kankakee County on October 9, 2001, and again on March 12, 2002, purported to amend its Plan. The sole thrust of the County's Amendments were to attempt to block any unit of local government from siting a solid waste landfill in Kankakee County.

In adopting these amendments, however, the County was so desperate that it failed to comply with any of the procedural requirements of 415 ILCS 15/5(a), (b), (c) or (d). Since these amendments were not properly adopted, they do not become a part of the County Plan, and are simply irrelevant in this case.

Why would Kankakee County take the action it did regarding these amendments when it had to realize that it was violating the procedures specified in 415 ILCS 15/5/(a)-(d)?

For one simple reason - revenue. Kankakee County wanted to be the only government unit to collect the $1.27 per ton Solid Waste Management Fee allowed under 415 ILCS 5/22 15(j)(l) and other host fees. The County would have no revenue from a solid waste landfill located in a municipality which elected to impose the maximum Solid Waste Management Fee allowed by statute. Fearing its loss of revenue, the County attempted to improperly use the SWPRA to exert total control over siting approval for pollution control facilities in Kankakee County. Unfortunately for the County, its actions violated both the Illinois Constitution and statutes as presented above. The City of Kankakee's approval of the siting of

Town & Country's landfill facility, supported by the weight of the evidence, should be affirmed accordingly.

V. CONCLUSION

For the foregoing reasons, Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. respectfully pray that this Board affirm the decision of the Kankakee City Council granting siting approval.

Respectfully Submitted,
Town & Country, Utilities, Inc. and
Kankakee Regional Landfill, L.L.C.
Respondents,

BY: George Mueller By JW
Their Attorney

GEORGE MUELLER, P.C.
Attorney at Law
501 State Street
Ottawa, IL 61350
Phone: (815) 433-4705