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,	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.	PCB 03-35 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

RESPONSE OF THE COUNTY OF KANKAKEE AND STATE'S ATTORNEY EDWARD D. SMITH TO POST-HEARING BRIEFS OF APPLICANT AND CITY OF KANKAKEE

NOW COME Defendants, COUNTY OF KANKAKEE and STATE'S ATTORNEY EDWARD D. SMITH, and in response to the Post-Hearing Briefs of Applicant and City of Kankakee, state as follows:

I. INTRODUCTION

The Applicant admits that "there is no question in the record that the County wanted an expansion of the Waste Management facility" rather than additional non-contiguous landfills being cited within the County. (Applicant's Brief, 38). Therefore, the Applicant has admitted that the application is inconsistent with the intent of the Solid Waste Management Plan as amended. The Applicant is correct that the Kankakee County Board passed by overwhelming majority the October 9, 2001 and March 12, 2002 amendments to the Solid Waste Management Plan. These amendments removed any question that it was the County's Plan to answer the need for additional landfilling capacity in the County that is expected to arise around 2005, while avoiding a proliferation of non-contiguous landfills in the County, by planning that the present Kankakee County landfill be expanded, rather than an entire new landfill being erected. The owner of the present landfill has expeditiously sought that expansion and Section 39.2 hearings have now taken place on the expansion application. The Town and Country application is obviously inconsistent with the County Plan and, therefore, the City Council finding as to Criterion viii should be reversed.

As to the fundamental fairness issues, the briefs of the Applicant and the City fail to mention the fact that individuals, who had standing to appear at the City hearings, such as Mr. Darrell Bruck, were erroneously informed by the City Clerk that they could not appear as a party

in the landfill siting proceedings after June 12, 2002. These same individuals were then barred from entering the room on June 17, 2002 by the City Police to hear the announcement that the actual deadline for signing up to appear as a party was that evening and even if the public could have heard the announcement they could not get past the police and into the hearing room to sign up. The City and the Applicant have also failed to address the fact that numerous appearances were filed with the City Clerk by June 12, 2002, such as those filed by Ms. Patricia O'Dell, but these people were not recognized as parties. Therefore, the Applicant and the City have completely failed to address the fact that members of the public were refused the opportunity to appear as parties in this siting hearing. This brief will address these issues and respond to many of the assertions made in the Applicant's and City's briefs.

II. MOTION TO STRIKE BRIEF OF CITY OF KANKAKEE

On November 27, 2002, the undersigned counsel received by telefax a copy of the Applicant's brief which was received by hard copy in the Hinshaw & Culbertson Rockford Office on December 2, 2002. However, the brief of the City of Kankakee was not received by the undersigned counsel until December 2, 2002. Proof of service for the City of Kankakee brief indicates that it was deposited in regular mail by 5:00 p.m. on November 27, 2002 though it was hand delivered to the Illinois Pollution Control Board. (IPCB). (See Respondent City of Kankakee's brief, Proof of Service). The Hearing Officer made it abundantly clear that the mail box rule did not apply and that each party had to receive the briefs by November 27, 2002 in light of the abbreviated time for filing a response brief which was due just eight (8) days after the initial brief was to be filed, so that the parties could receive the pleadings before the Thanksgiving holiday weekend. The City of Kankakee did not file a Motion for Leave to File its brief late and, therefore, the brief should be stricken.

III. IN ITS INTRODUCTION THE APPLICANT IMPROPERLY SUGGESTS THE COUNTY OF KANKAKEE DOES NOT HAVE STANDING TO APPEAL THE CITY OF KANKAKEE DECISION.

With very little explanation, the Applicant quotes language in its introduction from the case of *The 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), which held that "extraterritorial third-party challenges to the siting decisions to the courts of this State are incompatible with the purposes of this Act." (See Applicant's Brief, 2). The *City of Elgin* case is wholly inapposite to the case at bar as the County of Kankakee is certainly not an "extraterritorial third-party" challenger to the City of Kankakee proceedings. The very landfill at issue will be placed within Kankakee County.

The IPCB (IPCB) landfill siting hearing rules explicitly provide that "any person who has participated in the public hearing conducted by a unit of local government and is so located as to be affected by the proposed facility may file a petition for review of the decision to grant siting." 35 Ill.Adm.Code §107.200(b) (2002). Obviously, the County of Kankakee is affected by the proposed facility and the County not only participated as defined by the IPCB[1], but was a registered party to the Section 39.2 hearing. Furthermore, anyone who filed a petition for review is a party to the proceeding. 35 Ill.Adm.Code 107.202(a)(1)(2002). Finally, the IPCB rules provide that "where the interest of the public would be served, the Board or Hearing Officer may allow the intervention by...the State's attorney of the County in which the facility would be located." 35 Ill.Adm.Code 107.202(b)(2002). Therefore, even if the County had not been a

[1] The IPCB distinguishes between mere participation and acting as a party. 107.404. A participant may offer comment at a specifically determined time, but may not cross-examine witnesses for either party. Whereas a party will have all rights of examination and cross-examination relevant in any judicial proceeding. 35 Ill.Adm.Code 107.404.

participant or a party in the underlying case, and even if the County had not filed a petition for review, which it did, it could still intervene in the instant proceedings.

The Applicant's quotation and citation to the *Elgin v. County of Cook* case is completely irrelevant to the case at bar and was apparently done merely to confuse and suggest to the IPCB that it is inappropriate for a County to oppose the decision of a city within the county to approve a siting application. In no way does the *Elgin* case contain such a ruling. On the contrary, in *Elgin* the landfill was sought to be sited in unincorporated lands of Cook County (which 39.2(h) explicitly exempts from the statute), and the objectors were incorporated cities near the proposed landfill. In this case, the County is not an "extraterritorial" objector and instead the landfill is proposed to be erected within the County's territory of which the County has the primary responsibility for planning for solid waste disposal.

IV. THE STANDARD OF REVIEW FOR CONSISTENCY WITH THE SOLID WASTE MANAGEMENT PLAN IS *DE NOVO.*

In this Introduction the Applicant concedes that "with regard to the application's consistency to the County's Solid Waste Management Plan...the issue does arguably present a mixed question of fact and law." (Applicant's Brief, p 2). However, immediately after the introduction in the Standard of Review section, the Applicant argues that the manifest weight of the evidence standard applies to all nine criteria. (Applicant's Brief, p 4). Indeed, the Applicant then goes on to argue that the IPCB may not employ its own interpretation of the Solid Waste Management Plan and that the City's interpretation is not against the manifest weight of the evidence. (Applicant's Brief, p 38). The Applicant is wrong.

As explained in the Petitioner's Brief, if the Applicant is correct that the determination of whether the application is consistent with the Solid Waste Management Plan is a mixed question of law and fact then the "clearly erroneous" standard should be applied which is a middle ground

between the deferential manifest weight of the evidence standard and the *de novo* standard. (See Respondent's Brief, p 61, (citing *Land and Lakes v. Illinois Pollution Control Board*, 319 Ill.App.3d 41, 48; 743 N.E.2d 188, 193 (3rd Dist. 2000)). However, as explained in Respondent's Brief, there is no factual issue as to what language is contained in the Solid Waste Management Plan as the Applicant does not dispute that amendments were made to the Plan in October of 2001 and March of 2002. Furthermore, the decision of the City Council explicitly acknowledges that the County's Solid Waste Management Plan was amended on October 9, 2001 and March 12, 2002. (C3283-3284). The City Council's findings also acknowledge that Dr. Schoenberger's testimony regarding the alleged illegality of the Kankakee County Solid Waste Management Plan as amended was stricken and not considered by the City Council. (C3284).

Therefore, the only issue that is to be decided by the IPCB is whether the application is consistent with the Kankakee County Waste Management Plan as amended. This is a pure legal question of statutory interpretation of the Plan. When an issue is a pure question of law it is subjected to *de novo* review. *Land and Lakes*, 319 Ill.App.3d at 48 (citing *Branson v. Department of Revenue,* 168 Ill.2d 247, 659 N.E.2d 961 (1995)). Therefore, the standard of review as to the issue of Criterion viii in this case should be *de novo*.

V. THE RECORD IS CLEAR THAT THE CITY OF KANKAKEE DID NOT HAVE JURISDICTION TO HEAR THE SITING APPLICATION.

The Applicant acknowledges that "the only evidence of notice in the local siting hearing record is the affidavit with attachments of Tom Volini, President of Town and Country Utilities, Inc. and Kankakee Regional Landfill, LLC offered and admitted as Applicant's Exhibit 2." (Applicant's Brief, p 4). Though the Applicant makes this concession it also makes the erroneous statement that the County never "offered evidence or raised any notice or

jurisdictional issues during the siting hearing process." First, it is undeniable that it is the burden of the Applicant to establish jurisdiction. (*Ogle County Board v. Pollution Control* Board, 272 Ill.app.3d 184, 649 N.E.2d 545 (2d Dist. 1985); *ESG Watts v. Sangamon County* Board, PCB 98-2 (June 17, 1999). Second, the record clearly indicates that the County fully briefed the issue in the Proposed Finding of Facts and Conclusions of Law which was the first opportunity to make any argument or propose findings.

Paradoxically, the Applicant admits that Kankakee County made a detailed argument alleging lack of jurisdiction in its Proposed Findings of Fact to the Kankakee City Counsel. (Applicant's Brief, 5). Obviously, its assertion that the issue was never brought up during the siting hearing process is irreconcilable with the record and by its admission that a detailed argument was raised in the proposed findings of fact and conclusions of law

A. The Applicant has Admitted that Every Owner of Parcel 13-16-23-400-001 was not Served Notice as Required by Section 39.2(d).[2]

The Applicant admits that Mr. Tom Volini identified the owners of Parcel 13-16-23-400-001 as Gary L. Bradshaw, James R. Bradshaw, J.D. Bradshaw, Ted A. Bradshaw, Denice Fogel and Ms. Judith Skates at 22802 Prophet Road, Rock Falls, Illinois. However, the only return receipt for this property was one addressed to a Judith A. Skates at 203 South Locust, Onarga, Illinois. (Applicant's Brief, p 7-8). The only explanation that the Applicant offers for failing to serve each owner is their citation to *Wabash and Lawrence Counties Taxpapers and Water Drinkers Association v. Pollution Control Board*, 198 Ill.App.3d 388, 555 N.E.2d 1081, (5th

[2] The County's initial brief contains a detailed argument that the Applicant should not have been allowed to attempt to correct its failure to establish jurisdiction at the City of Kankakee proceedings during the Pollution Control Board hearing and that the Hearing Officer's allowance of additional evidence on jurisdiction was erroneous. The Applicant's brief contains no argument concerning that Hearing Officer's ruling and, therefore, the County will make no further comment on that issue and stand by the arguments raised in its initial brief.

Dist. 1990). However, if the *Wabash* case is followed this matter should be disposed in favor of Kankakee County and not the Applicant.

The *Wabash* case explicitly held that "[i]t is true that only one heir received notice, but only that heir was listed by name and address in the tax records to receive the tax statement on behalf of all of the heirs. As [the Applicant] notified the owner of the property appearing from the authentic tax records, the PCB properly found the notice complied with Section 39.2(b) of the Act even though all of the heirs did not receive personal notice." *Wabash*, 555 N.E.2d 1081, 1084 (5th Dist. 1990). Therefore, following the very precedent cited by the Applicant, it is clear that jurisdiction did not vest in the City of Kankakee. In this case, the Applicant's own affidavit establishes that six individuals were identified by the authentic tax records as owners of the property at issue. (Applicant's Ex. 2, para 5). *Wabash* establishes that each owner identified within the authentic tax records must be served with Section 39.2(b) notices. The Applicant failed to provide any evidence that each owner of this parcel received notice, and therefore, the City had jurisdiction and its decision should be reversed.

The Applicant makes a last ditch desperate argument to avoid the clear failure to establish that each landowner received the 39.2(b) notices by arguing that *Ogle County Board v. Pollution Control Board,* 272 Ill.App.184, 649 N.E.2d 545 (2d Dist. 1995) and the litany of cases that have followed it have been "effectively overruled" by *People ex rel Devine v. $30,700 United States Currency,* 199 Ill.2d 142, 766 N.E.2d 1084 (2002). Nonetheless, even a cursory reading of the *Devine* case establishes that it did not overrule *Ogle County* or its progeny and instead was limited to the remedial statute at issue in that case. At issue in *Devine* was whether individuals who had been accused of being involved in drug trafficking received notice concerning the forfeiture of seized currency under the Drug Asset Forfeiture Procedure Act. The Illinois

Supreme Court explicitly noted that Act is designed to serve a remedial purpose, and therefore, is to be "liberally construed to achieve that purpose." *Id.* at 1089, 1091. The Court also noted that the Act would be interpreted in light of the federal forfeiture provisions of 21 U.S.C. 881. *Id.* at 1089. The Court noted that in order to determine when mail notice was perfected under the Act the Court was bound by long standing principles of statutory construction. *Id.* at 1091. One of these principles concluded that the Court "must also consider that the Act is remedial in nature; therefore, the act warrants liberal construction to achieve the overall purpose of the statute." *Id.*

The Court went on to discuss that requiring actual receipt of the notice would create an obstacle to the enforcement of the Drug Asset Forfeiture Procedure Act because individuals that were entitled to the notice were the very individuals whose assets were sought to be seized and had no interest in accepting service. *Id.* at 1091-92. In other words, the government was the entity that would receive the benefit of the forfeiture to the detriment of the person receiving notice. In this case, the notice that is to be issued is for the benefit of the recipient landowners to have a full and complete opportunity to review, examine, and challenge the application, and is not to benefit the sender Applicant. In this case, unlike *Devine*, the individual receiving notice is the individual that is sought to be protected by Section 39.2(b).

Section 39.2(b) is not a remedial statute and, therefore, is not entitled to the liberal construction that was afforded to the service requirements of the statute at issue in the *Devine* case. *Devine* does not even mention the *Ogle County* decision, nor any landfill siting cases. *Ogle County,* which does address Section 39.2, explicitly found that "Section 39.2(b) of the Act reflects the intent of the legislature to require actual receipt of the notice, as evidenced by the signing of the return receipt." *Ogle County,* 649 N.E.2d at 554.

The *Devine* case also noted that the statute at issue in that case was not conditioned upon the investigation of the entity sending the notice, rather the person who was supposed to receive the notice was obligated to notify the seizing agency of his or her change of address. *Devine*, 766 N.E.2d at 1092. The Court held that in regard to the Drug Asset Forfeiture Procedure Act requiring the notice to be actually received would render the requirement that the individual notify the State of a change in address superfluous and, therefore, the Court employed the liberal interpretation in regard to service requirements of the Statute. *Id.* In this case, the notice is conditioned upon the investigation done by the Applicant to determine the address and identity of the owners of the property by the authentic tax records. It is not the burden of the owners to keep the Applicant informed of their addresses. Therefore, imploying a strict reading Section 39.2(b) as requiring actual notice, as was done in the *Ogle County* case, and has been done in a litany of IPCB cases, does not render any portion of Section 39.2(b) superfluous. (See e.g. *ESG Watts*, PCB 98-2 June 17, 1999; *Environmentally Concerned Citizens v. Saline County Board,* PCB 98-98 (May 7, 1998)).

Finally, in reviewing Section 39.2(b) as a whole, it is clear that the intent of the legislature was to require receipt of actual notice to assure landowners the opportunity to review and object to a siting application. Whereas, the Drug Asset Forfeiture Procedure Act reviewed in *toto* establishes that the purpose was only to require the government to send the notice to the address of which it was aware or to any address provided by the individual entitled to notice. In other words, the State was only required to show its good faith effort before enforcing its remedy against the drug traffickers. But in regard to a landfill siting hearing, a landowner has committed no wrongdoing subjecting itself to a remedy, and therefore, the burden should clearly be upon the Applicant to establish that the notice has actually been served on an individual. In this case,

it is indisputable that at least five of the six owners of the above-referenced parcel never received notice of the intent to file the application (even the one owner for which a return receipt is contained is actually not signed by the owner herself), therefore, the long held rule that there must be evidence that the notice was received should be followed and the City of Kankakee decision reversed.

B. There is No Evidence in the Record that "ICC Railroad" is the Same Entity as the "Illinois Central Railroad Co."

The Applicant argues that service upon the "Illinois Central Railroad Co." was effective despite the fact that the return receipt is dated March 6, 2002, which is not at least 14 days before the filing of the application. (Applicant's Brief, p 7). The Applicant argues that the return receipt for "ICC Railroad" which was sent to 17641 South Ashland Avenue, Homewood, Illinois and signed on February 20, 2002 was effective service upon "Illinois Central Railroad Co."

However, there is no evidence in the record that Illinois Central Railroad Co., c/o CTS Corp., is the same legal entity as "ICC Railroad". The Applicant has admitted that the only evidence regarding the owners that were entitled to notice is contained in Tom Volini's affidavit and the exhibits thereto. One of these exhibits is a returned receipt from Illinois Central Railroad Co., c/o CTS Corp., which is signed and dated March 6, 2002. We can only assume that Illinois Central Railroad Co., c/o CTS Corp., was an entity that was entitled to notice. The record is completely devoid of any evidence or testimony that "ICC Railroad" is the same legal entity as Illinois Central Railroad Co. Therefore, the evidence on its face establishes that the Illinois Central Railroad Co. did not receive notice 14 days before the application was filed.

C. The Return Receipts of Several Parcels were Signed by Individuals who Refused to Indicate that they were the Agent of the Landowner, and Therefore, Service was Improper.

The Applicant has "acknowledge[d] that the return receipts (green cards) on some registered mail were signed by individuals other than the addressee of the mail." (Applicant's Brief, p 5). The Applicant attempts to distinguish *IEPA v. RCS, Inc. and Michael Duvall,* AC 96-12 (Dec. 7, 1995), by arguing that case does not apply because it involved an administration citation proceeding which according to the Respondent entailed a "more stringent service standard". This is either an intentional or negligent misstatement of the *Duvall* case by the Applicant.

The *Duvall* case itself established that there was no more of a stringent standard for service of process in an administrative citation hearing than a PCB Enforcement Action and rather both actions could be accomplished by certified or registered mail return receipt requested, which is the exact same service standard at issue on this case. *IEPA v. RCS, Inc. and Michael Duvall,* AC 96-12, p 4. *Duvall* went on to conclude that service of an individual by certified mail to an employer, which was then signed and received by someone at his employer's office, was improper because the record was devoid of any evidence that the individual who signed the receipt was the authorized agent of the addressee for service of process. *Id.* at 4-5.

The *Duvall* decision has been affirmed in regard to a general PCB enforcement action. *Trepanier v. Board of Trustees of the University of Chicago*, PCB 97-40 (Nov. 21, 1996). In *Trepanier* the Court held that a complaint filed in the IPCB could "either be served personally…or shall be served by registered or certified mail…". *Id.* at 3. *Trepanier* noted that a public corporation (such as the University of Chicago) could be served through its president, clerk or other officer pursuant to 735 ILCS 5/2-211. *Id.* In *Trepanier* service was attempted to be obtained by sending the complaint to the secretary of the president of the University and the

IPCB found that such service was improper because the secretary who signed the receipt was not the legally authorized agent for service of process. Therefore, the *Trepanier* case establishes that the requirement that the individual be the authorized agent as announced in *Duvall* is not only for administrative citation actions, but for any action where registered mail is recognized as an appropriate method of service.

It is simply impossible to reconcile *Duvall* and *Trepanier* with *DiMaggio v. Northern Cook County*, 89-138 (Jan. 11, 1990) and *City of Columbia v. City of St. Claire and Browning-Ferris Industries of Illinois*, PCB 85-223, 85-177 and 85-20, (April 3, 1996). The *DiMaggio* case merely cites the *City of Columbia* as the IPCB precedent, but a review of *City of Columbia* indicates that no analysis was done concerning the propriety of an individual signing the return receipt when there is no evidence that individual is an authorized agent for service of process.

At a minimum the *Duvall* and *Trepanier* cases establish: (1) that registered mail service is improper when the receipt is signed by a third party at the intended recipient's place of employment; and (2) that a business may not be served except through a legally recognized agent for the purpose of service of process, which would be a president, clerk or other officer of the business. In this case, there are several business identified in Mr. Volini's affidavit including parcel 13-16-24-300-019 wherein the business owner is identified as "Skeen Farms". Likewise, 13-16-24-400-001 the business owner is identified as "Skeen Farms". 13-16-25-100-002 the owner is identified as "AT&T Property Tax". Also Parcels 13-16-25-500-001, 002, and 003 the owner is identified as "ICC Railroad". The return receipt for "Skeen Farms" is signed by one "C. Skeen" and the agent box is not checked. The record is completely devoid of any evidence that C. Skeen was the president, officer or legally recognized authorized agent of Skeen Farms.

Likewise, the receipt for ICC Railroad is signed by a Bob Malenti who is identified as agent, but as the *RCS/Duvall* case establishes a return receipt which merely indicates agent is insufficient. The *AT&T Property Tax* parcel is signed by an E. Meyers, and there is no indication of agency and again the record is devoid of any evidence that he was a legally recognized agent for the service of process. Therefore, at a minimum these business properties did not receive proper service.

Even if the IPCB decides to continue to follow *DiMaggio* and *City of Columbia* (despite the lack of analysis in those cases and the inability to reconcile them with *Duvall* and *Trepanier),* those cases do not answer the question of first impression that is raised by the Respondents in this action as to those properties where the individual signing the return receipt refused to mark the "agent" box. Neither *DiMaggio,* nor *City of Columbia,* addressed the specific issue of whether service is proper when the return receipt has a box to be checked if the signee is the agent and such box is not checked. It is the position of the Petitioners that the failure to check this box is unrebutted evidence that the signee was not the agent of the landowner for the purpose of accepting service of process. The Applicant has sited no case that when there is such unrebutted evidence of the lack of agency that jurisdiction could be deemed established. Therefore, the City of Kankakee decision should be vacated.

D. Neither the Applicant Nor the City has Addressed the Fact that No Notice was Sent Before the February 19, 2002 City Council Hearing.

One of the primary bases for the petition for review filed by the County and State's Attorney Smith was that "the City Council did not have jurisdiction to consider this matter because the Applicant first made its request for site location approval to the City Council on February 19, 2002, without sending the notices required by Section 39.2 of the Act." (See Petition for Review, par 8(g)). During the IPCB hearings the issue was addressed and the City

and the Applicant stipulated that no Section 39.2 notices were sent before the February 19, 2002 meeting. (11/6 Tr. 188, 190). Despite the Applicant and the City's awareness that it is the position of the County that Section 39.2 notices had to be sent before the February 19, 2002 meeting, the Applicant has not responded to this argument.

Once again, a review of those minutes establishes that it was a hearing concerning the substance and content of the application by the Applicant's expert witnesses at which time the County Board was allowed to question those witnesses concerning their compliance with Section 39.2 criteria. The Applicant presented its case to the City Council that the proposed site met the 39.2 criteria. Obviously, that was the exact intent of a Section 39.2 hearing. The landowners surrounding the landfill as well as the known objectors had the right to be present to examine those same witnesses at the time that the City Council heard this unsworn testimony. Since no notices were sent before the February 19, 2002 hearing, the City of Kankakee did not have jurisdiction to decide the case and, therefore its decision should be reversed.

VI. THE PROCEEDINGS WERE FUNDAMENTALLY UNFAIR.

A. The Public was Denied the Opportunity to Participate in the City Hearing.

Surprisingly, both the Applicant and the City indicate that there was no evidence in the record that any person was denied the opportunity to participate in the Section 39.2 proceedings. (See Applicant's Brief, p 19; City of Kankakee Brief, p 3). Both the Applicant and the City completely ignore Mr. Darryl William Bruck, and other persons like him, that were given misinformation, either intentionally or negligently, by the City Clerk that they could not appear as a party in the Section 39.2 proceeding after June 12, 2002. (See Petitioner's Brief, pp 8-10). Mr. Bruck explicitly testified that he went to the City Clerk at some point after June 12, 2002 and before the hearing commenced on June 17, 2002 and was told it was "too late" to register as an objector. (11/4 Tr. 100-117; C1549-1550). Mr. Bruck informed the City Clerk that the notice

published in the newspaper indicated he could sign up any time up to and including the first night of the hearing, but was told that that notice was irrelevant and it was too late. (11/4 Tr. 117; C1549-1550).

Mr. Bruck then attempted to go the first night of the hearing, but could not get into the hearing room due to the over crowding and the police barring him from entering the room. (11/4 Tr. 109). While in the hallway he never heard any announcement that he could sign up to register that evening. (11/4 Tr. 109). Every member of the public that testified at the IPCB hearing said that they never heard any announcement made in the hallway on June 17, 2002 that they could sign up and register at any time that evening. (11/4 Tr. 77-78, 105, 110-111, 133, 195, 366-167; 11/6 Tr. 55).[3] Neither the city nor the Applicant called any member of the public to testify that they heard such an announcement. The 50 to 125 people standing in the hallway could not hear nor see what was occurring in the hearing room. *Id.* Therefore, Mr. Bruck, and any other person that went to the City Clerk's office after June 12, 2002, were denied the opportunity to participate in this allegedly public hearing because they were erroneously told it was too late to enter their appearances and then they were barred from entering the hearing room on the first night to appear.

Furthermore, neither the City nor the Applicant have addressed the fact that the City Clerk, Ms. Anjanita Dumas, specifically informed people that came to her office prior to June 12, 2002 that they had to draft a letter stating they wish "to speak" at the hearing in order to register as a party. (11/6 Tr. 37). Indeed such forms were filled out by Pat O'Dell, Brian Simms,

[3] The Applicant misstates the record by indicating that Ms. Patricia O'Dell acknowledged that Mr. Pat Power made an announcement in the hallway that people could register to participate. (Applicant's Brief, 25). The Applicant cites 11/6 Tr. 96 for this proposition. However review of that testimony provides that in her written statement she acknowledged that she heard names called in the hallway, but at no time indicates that she heard an announcement that people could sign up to register. On the contrary, Ms. O'Dell explicitly testified that there were no announcements made in the hallway as to instructions on the rules of procedure or admonitions or advice as to rights. (11/6 Tr. 55-56).

Olivia Waggoner, John Surprenant, Thomas Bunosky, Ruth Romar, Ronald Thompson, David McAloon, and Richard Howell. (C2223-2231). The Hearing Officer admitted that there were numerous forms submitted to the City Clerk prior to June 12, 2002 that indicated certain individuals wanted to speak and that he did not recognize these individuals as participants or parties. (11/4 Tr. 330-333). He admitted that the names of these individuals are contained in pages 2223-2234 of the City of Kankakee Record. (11/4 Tr. 332, C2223-2234)).

What the Hearing Officer failed to realize is that the public notice only required persons who wished to be parties at the public hearings to submit written notification of said intent to the City Clerk before the first day of the public hearing or register with the hearing officer on the first day of the hearings. The notice provided that any person so appearing would then have the right to present testimony and witnesses, be represented by counsel, and cross-examine witnesses. There was no requirement in the public notice that an individual merely wanting to provide public comment needed to file a form with the City Clerk. (See Applicant's Ex. 6). Furthermore, the City of Kankakee Ordinance 2-24 provided that only persons who wanted to present witnesses and cross-examine witnesses needed to file a written appearance at least five days before the public hearing was scheduled to commence. That rule explicitly provided that "this rule does not apply to a person or entity who desires only to present an oral or written position to the City Council." (C3237). Therefore, the City was completely aware that if someone filed a written form with the City Clerk by June 12, 2002, the only purpose for doing so was to identify that person as wanting to present witnesses and cross-examine witnesses. The only reason that these forms have the word "speak" in them, is because the City Clerk herself told people that such language needed to put in the form to enter a valid appearance.

Once these forms were filed with the City Clerk the City Attorney/Hearing Officer ignored them because they did not use the word "participate" even though no ordinance nor notice ever indicated that people needed to use this "magic word". Through sheer tenacity Ms. O'Dell was finally able to correct the problem in her circumstance and was allowed to act as a party after the third or fourth day of the hearing. Of course, by this time Dr. Shoenberger (who was the only witness identified and called by the Applicant testified as to Criterion viii) was no longer available and therefore Ms. O'Dell never had the opportunity to personally hear his testimony nor cross-examine that witness. The other individuals who filed appearance forms with the City Clerk prior to June 12, 2002 perhaps also tried to attend the hearing on June 17, 2002 but were unsuccessful in entering the hearing room due to the overcrowding and the armed guards blocking the doorways. Therefore, the names of these people were not read in the hallway with the recognized parties and these people were never invited into the hearing room.

Obviously, the procedures that were employed in this case were not only confusing but obtrusive and resulted in two specific individuals, Mr. Darryl Bruck and Ms. Patricia O'Dell not being able to fully participate as parties. (Mr. Bruck was never successful in being recognized as an objector and therefore was never afforded the opportunity to present witnesses or cross–examine the applicants witnesses). It is very fortunate that the County was able to discover these two individuals as it is likely that other people found themselves in the same circumstances but were not discovered by the County. The fact that the Applicant and the City have ignored this testimony in the record is undoubtedly because they recognize that there is no defense to this clear violation of the Section 39.2(d) requirement that the City hold a public hearing. Therefore, the decision of the City Council should be vacated.

B. The Public Was Denied the Opportunity to Attend the First Night of the Hearing.

The Applicant and the City have not disputed the fact that between 50 and 125 people were denied access to the hearing on the first night. As a matter of fact, the Applicant has even acknowledged that "at least 50, and perhaps more, people did not get into the hearing room initially." (Applicant's Brief, 24).[4] The only argument posed by the Applicant concerning the failure to accommodate the vast numbers of people that could not hear nor see the testimony on the first night is a reference to the *City of Columbia* case that the Board "appreciated the logistical dilemma" of finding a new hearing room when faced with overflow crowds.

As explained in the County's brief, the *City of Columbia* case actually supports the finding of fundamental unfairness because the lack of seating capacity was one of the factors that when combined with other factors (which coincidentally happened in this case as well) resulted in a fundamentally unfair proceeding. In other words, the *City of Columbia* case did not hold that the lack of adequate seating was not a fundamental fairness consideration, and on the contrary it held that it was one of the factors that must be considered.

Furthermore, in the *City of Columbia* case the *City* was surprised by the overflow crowds, but here there was ample evidence that the City of Kankakee was aware that the chamber room would be of insufficient size. Specifically, Doris O'Connor informed the City Clerk and Hearing Officer Bohlen of her concerns about seating capacity days before the hearing commenced. The annexation proceedings were overcrowded, the Applicant's "expert witness" Jamie Simmon

[4] The Applicant's Brief indicates that the City Council chambers had chairs to accommodate 125 people. There was no evidence submitted to this fact at the IPCB hearings. The Applicant sites the "Pat Power Affidavit" but does not indicate where or when this affidavit was allegedly admitted into the record. The County of Kankakee does not recall that a Pat Power Affidavit was admitted as an exhibit by the Applicant at the City of Kankakee hearing or the IPCB hearing. The County of Kankakee recalls that an affidavit by Pat Power was tendered to it in response to discovery, however, the County of Kankakee has no recollection that the affidavit was ever offered or admitted into the proceeding by the Applicant or the City. The IPCB has indicated that no public comment was filed concerning the IPCB hearing. Therefore, upon information and belief the affidavit is not a part of this record and should not be relied upon or considered by the IPCB.

informed the City Council on February 19, 2002 that the hearings would be crowded, and indeed the City acknowledged that it was expecting large crowds by putting additional seats into the hearing room. There was also insufficient explanation as to why people who found space at the back of the room to stand were expelled from the room by City police when in past City Council meetings people were allowed to stand. The Applicant and the City have provided absolutely no authority that would suggest barring 50 to 125 people from the hearing room on the first night of the hearing, (which was the only night that the Applicant's witness on plan consistency testified) is fundamentally fair to the public. The only argument that the Applicant and the City make is that on the second night they attempted to rectify the situation by providing speakers in the hallway. However, it did not correct the inability of people to hear Dr. Schoenberger's testimony the first night, nor did it correct the fact that people could not hear the Hearing Officer's announcement that they could sign up at any time the first evening to participate. Therefore the record is clear that the proceedings were fundamentally unfair and the City Council decision should be vacated.

C. The Third District Court has Held that Pre-Filing Contacts are Admissible to Show Pre-Adjudication of the Merits or Improper Communications with the Decision Maker.

As the Petitioners anticipated, the Applicant's counsel has argued that there is a "bright line" test as to which communications are admissible and relevant to determining whether or not there was a pre-adjudication of the merits or improper communications between the Applicant and the decision makers. (Respondent's Brief, p 15). It is the Applicant's position that under *Residents Against a Polluted Environment Against a Polluted Environment v. Illinois Pollution Control Board*, 293 Ill.App.3d 219, 687 N.E.2d 552 (3rd Dist. 1997) any 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 were conducted in a fundamentally fair manner. (See

Respondent's Brief, p 15). It is amazing that the Applicant's counsel, has made such an argument as he was the very counsel for the objector in the *Residents* case and should know that the Third District refused to create any such "bright line" test. The *Residents* Court never ruled that pre-filing contacts were inadmissible and irrelevant. On the contrary, the Court only ruled that considering how the decision maker amended its Solid Waste Management Plan was beyond the scope of review of a Section 39.2 proceeding. *Residents*, 687 N.E.2d at 554 – 556. The Third District specifically found that

> the Appellants do not cite, nor do we find, any statutory or judicial authority which would allow evidence to be presented concerning the County's amendment of its Plan. Indeed, the express language of the Act indicates the purpose of the siting process is to determine whether the proposed facility complies with the County's Plan. 415 ILCS 5/39.2(a)(viii)(1994). The Act does not authorize an inquiry in the County's prior amendment of the Plan, rather the adoption and amendment of a Solid Waste Management Plan is governed by the local Solid Waste Disposal Act (415 ILCS 10/1 *et seq*. (1994)) and the Solid Waste Planning and Recycling Act (415 ILCS 15/1 *et seq* (West 1994)). Neither of these Acts authorizes the Board in siting approval appeals to review the procedures by the County in adopting its Solid Waste Management Plan.
>
> *Residents*, 687 N.E.2d at 555.

In the *Residents* case Attorney George Mueller, attempted to argue that the County improperly amended its Solid Waste Management Plan and the Third District merely held that "the amendment of the Plan was a prior legislative function of the County board." *Id.* In this case, the City Council held a "pre-hearing" of the merits of the application on February 19, 2002. This meeting served absolutely no legislative function and was not part of the amendment of the City's Solid Waste Management Plan. The only purpose for the meeting was to give the Applicant an unfettered opportunity to present its case to the City Council without any objectors or lawyers being present. The other undeniable purpose of the meeting was to inform the City Council that the Section 39.2 proceeding itself was untrustworthy because objectors would submit witnesses that would be hired gun environmentalists that would not tell the entire truth.

The *Residents* case is in no way relevant to the determination of whether it is appropriate for a local siting authority to hold a "pre-hearing" immediately before the notices of intent to file the application are sent out. It is blatantly obvious that the Applicant and its counsel either misinterpreted the ruling against Mr. Mueller's client in *Residents* or intentionally wanted to test the limits of that ruling by conducting a hearing in front of the City Council concerning the merits of the application before the application was formally filed.

The *Residents* case was clear that the Court was not ruling that any and all pre-filing contacts are irrelevant and inadmissible, when it ruled that the objector's argument that they were improperly prevented from presenting evidence of "other" pre-application contacts was not possible to be ruled upon because the objector did not make an offer of proof in that case. *Id.* at 556-557. The Court cited to the IPCB record wherein the Hearing Officer informed the objector's counsel that if he wished he was free to make an offer of proof as to the specific pre-filing *ex-parte* contacts. *Id.* The Third District refused to send the cause back for a third set of public hearings because the objector's counsel failed to make such an offer of proof. It held "at least a minimal showing of bias, if not a formal offer of proof, must therefore be made to warrant a remand." *Id.* at 557. In otherwords, the Third District recognized that it must review the pre-filing contacts themselves to determine if they are relevant to an allegation of pre-adjudication. Indeed, the Third District has confirmed that it will review pre-filing communication and if those communications are directly with the decision makers and likely to lead to bias, they are highly relevant and grounds for reversal of a siting approval. *Land and Lakes Company v. IPCB,* 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000). In this case, there has been more than a "minimal showing of bias". Instead, there is explicit evidence that there were numerous pre-

filing contacts with the City and the Applicant, the Hearing Officer and the Applicant, and culminating with a direct pre-hearing of the application to the decision makers, the City Council.

The Applicant argues on numerous occasions that no City Council member testified that he was biased by the February 19, 2002 meeting. However, the Respondent's counsel fails to mention that under Illinois law is improper to inquire into the deliberative process of a decision maker at a Section 39.2 hearing. *Village of LaGrange, City of Countryside, Christine Radogno, Laureen Dunne Silver, Michael Turlek, and Donald Younker v. McCook Cogeneration Station, L.L.C. and the Board of Trustees of the Village of McCook,* PCB 96-41 (December 7, 1995); *DiMaggio v. Solid Waste Agency of Northern Illinois*, PCB 89-138 at 5 (January 11, 1990). Therefore, one must prove improper communications and pre-adjudication of the merits by objective evidence such as the minutes to the February 19, 2002 meeting, the March 12, 2002 correspondence from Mr. Mueller to Hearing Officer Bohlen wherein it is acknowledged that Mr. Mueller drafted the rules and procedures for the hearing, and the Mayor and several alderman (the decision makers) interviewed witnesses for a vacant City Council position wherein those potential applicants were asked whether they favor siting a landfill within the City. When this evidence of pre-adjudication is considered along with the other unfair practices that occurred in this case, it is clear that the combined result of these practices was a fundamentally unfair proceeding. *American Bottom Conservancy v. Village of Fairmont and Waste Management of Illinois,* PCB 00-200 (October 19, 2000).

D. Kankakee County was Prejudiced by the City's Failure to Provide the Required Copies of the Application to the County.

The Applicant concedes that the City of Kankakee violated its own siting ordinance by failing to immediately provide copies of the application to Kankakee County. (The City does not even address the issue in its brief). The only argument that the Applicant makes is that the

County's outside expert consultant, Mr. Chris Burger, eventually obtained a copy of the siting application. (Applicant's Brief p 18). The Applicant states that Mr. Burger received it almost two months before the siting hearing commenced. In reality, he acquired it approximately six weeks before the hearing commenced which was still over two months after the Solid Waste Director and the Chairman of the County Board were supposed to receive copies of the application.

First, in regard to the allegation of prejudice the *ABC* case establishes that a failure to timely provide the application is prejudice as a matter of law because an objector does not have as much time to review the application as it was entitled. *American Bottom Conservancy v. Village of Fairmont*, PCB 00-200, p 16 (October 19, 2000). Second, the issue is not whether an expert hired by the county acquired a copy of the application, but rather whether Mr. Karl Kruse, the County Board Chairman, and Mr. Efraim Gil, the County's Solid Waste Director, received the copies that were supposed to be provided to them by the City Council. They never received a copy from the City Council.

The Applicant even concedes that the Board is free to remand this cause for the failure of the City Council to follow its ordinance and provide copies of the application. (Applicant's Brief, p 19). On this issue alone, the Applicant argues that no purpose would be served by a remand. The Applicant is simply wrong. First, after remand Kankakee County would no longer be prejudiced by the failure to timely provide the application because it will have had the application for over the four months that it was entitled to review and test the application before the commencement of the 39.2 hearing. Second, a remand could resolve many of the fundamental fairness problems that resulted from the misinformation supplied by the City Clerk and the barring of people from entering the chamber room on the first night, which resulted in

members of the public not being able to participate or attend the Section 39.2 hearings. Regardless, the decision of the City Council should simply be reversed, rather than remanded, because the City Council has been irrevocably tainted by the improper pre-hearing of the application on February 19, 2002 and because the lack of compliance with Criterion viii is dispositive of this case as the County's Solid Waste Management Plan clearly plans only for the expansion of the existing landfill.

VII. IT IS UNDENIABLE THAT THE APPLICATION IS INCONSISTENT WITH THE COUNTY SOLID WASTE MANAGEMENT PLAN.

A. The Plain Language of the Plan Precludes the Erection of a New Landfill Unless and Until the Expansion of the Existing Landfill is Disapproved.

The Applicant has admitted that "there is no question in this record that the County wanted expansion of the Waste Management facility" and attempted to accomplish this by their Plan amendments. (Applicant's Brief, 38). This concession, in and of itself, establishes that the decision of the City Council should be overturned.

It is elementary that the primary objective in construing a statute is to give effect to the intention of the legislature. *In Re C.W.,* 766 N.E.2d 1105, 199 Ill.2d 198 (Ill.2002); *M.A.K. v. Rush Presbyterian-St. Luke's Medical Center*, 764 N.E. 1, 198 Ill.2d 249 (Ill. 2001). The cardinal principle of statutory construction, to which all other cannons and rules are subordinate, is to ascertain and give effect to the intention of the legislature. *People v. Savory*, 197 Ill.2d 203, 756 N.E.2d 804, 810 (Ill. 2001); *Coal v. State Department of Public Health*, 329 Ill.App.3d 261, 767 N.E.2d 909 (3d Dist. 2002). A statute must be considered in its entirety keeping in mind the subject it addresses and the legislature's apparent objective in enacting it. *People v. Davis,* 766 N.E.2d 641, 199 Ill.2d 130 (Ill.2002). The statute must not be read so as to render any part of it inoperative, superfluous or insignificant and one must not depart from the statute's plain language by reading into it exceptions, limitations or conditions the legislature did not express.

People v. Ellis, 765 N.E.2d 991, 199 Ill.2d 28 (Ill. 2002). When interpreting a statute a court must give affect to the entire statutory scheme rather than looking at words and phrases in isolation from other relevant portions of the statute. *Carroll v. Paddock*, 764 N.E.2d 1118, 199 Ill.2d 16 (Ill. 2002). As the Applicant concedes, when one reviews the Plan as amended there is no question that it was the County Board Plan that the existing landfill be expanded to meet the County's needs rather than additional non-contiguous landfills being erected in the County.

In this case, the City Council took the two words "if approved" and read them in isolation resulting in a strained reading that ignored the obvious intent of the legislature of Kankakee County. As mentioned earlier, the *Residents* case clearly held that how a Solid Waste Management Plan is amended is not appropriately reviewed at a Section 39.2 hearing nor an appeal thereafter. Therefore, the only question is whether or not the application is consistent with the County's Solid Waste Management Plan as amended which involves a pure question of legal interpretation of the Plan.

Dr. Schoenberger's entire testimony was grounded on his assertion that the Plan amendments were illegal or unconstitutional and that entire testimony was stricken. The Applicant sites only pages 65 and 69 of the record as containing Schoenberger's testimony, but a review of his testimony clearly showed that it was not the basis of Dr. Schoenberger's opinion that the expansion of the Waste Management facility had to acquire final approval before other facilities would be inconsistent with the Plan; rather the basis for his opinion of consistency was his opinion that the amendments were illegal or unconstitutional. (As to the testimony of Devin Moose, the City Council decision in no way relied upon Mr. Moose's testimony, undoubtedly because Mr. Moose was not a disclosed witness on the issue of compliance with the Solid Waste Management Plan. Furthermore, his testimony again was not based upon any expertise as an

engineer, but rather his interpretation of the language of the Solid Waste Management Plan which is a pure legal question to be left to the City Council as the adjudicative body and the IPCB in its review of that decision. In other words, Mr. Moose's testimony was not based upon his expertise and rather was simply an improper lay opinion).

The only substantive evidence that was admitted at the hearing, other than the plain language of the Plan as amended, was the sworn affidavit testimony of Kankakee County Board Chairman, Karl Kruse. (See Petitioner's Brief pp 67-79). Mr. Kruse confirmed that it was the intent of the Kankakee County Board when it passed the Solid Waste Management Plan as amended to limit the impacts upon the County to the expansion of the existing landfill to meet any future waste disposal needs, rather than erecting one or more entirely new landfills.

The decision of the City of Kankakee completely rested upon the isolation of the two words "if approved" contained in the March 12, 2002 amendment for its finding of consistency. (C3285). The City Council has completely ignored the fact that the October 9, 2001 and March 12, 2002 amendments did not in any way provide that the erection of a new non-contiguous landfill would be consistent with the County's Plan as long as it received siting approval before the existing landfill's application for expansion was heard. Indeed, there is no reference within the Plan that it was the intention of the County that its solid waste planning would be decided by a race to siting approval.

On the contrary, the October 9, 2001 resolution to the County Solid Waste Management Plan provided the "present landfill and its owner have served the County and residents well for 27 years, its capacity will be exhausted at present rates within approximately 3-1/2 years." (Kankakee County Ex 1, p 1; attached to Petitioner's Brief as Appendix E). The resolution further noted that "the expansion of the present landfill will meet the needs of the residents of

this County for waste disposal generated within the County for many years" and "the expansion of the current landfill would serve all of the residents of the County at a reasonable cost". *Id.* The resolution also provided "a second landfill would have negative impacts on County residents near the facility". Furthermore, the resolution provided "the Kankakee County Board affirms it is in the best interest to all residents of Kankakee County that one landfill be maintained in its current location." Therefore, the County amended the language of the Solid Waste Management Plan to make it absolutely clear that it was the Kankakee County's Plan for solid waste management that the existing landfill be expanded rather than new landfills being erected within the County and that the County would oppose any attempt to erect a new landfill.

The March 12, 2002 resolution and amendment also provided that "a second, non-contiguous landfill would have impacts upon County residents located near any such proposed new facility." (C2678; County of Kankakee Ex. 2, p 1).[5] The Plan as presently amended now provides:

> Kankakee County has a single landfill owned and operated by Waste Management of Illinois, Inc. This landfill has provided sufficient capacity to dispose of waste generated in Kankakee County and its owners advised the County that it plans to apply for local siting approval to expand the facility to provide additional disposal capacity for the County. Operation of the landfill has been conducted pursuant to the landfill agreement signed by the County and Waste Management in 1974, and subsequently amended from time to time. In the event siting approval for expansion is obtained, the landfill would provide a minimum of 20 years of long term disposal capacity through expansion of the existing landfill.
>
> An expansion of the existing landfill, if approved, would then satisfy the County's waste disposal needs for at least an additional 20 years. In an accord with the Kankakee County Solid Waste Plan (as amended), as well as relevant provisions of the local Solid Waste Disposal Act and the local Solid Waste Planning and Recycling Act, no new facilities would be necessary.

[5] It has come to the attention of the County that there is a photocopying error in regard to Appendix D of the Petitioner's Brief, such that page two of the ordinance was omitted. The entire ordinance was admitted into the record as County Ex. 2 as well as attached to the Affidavit of Karl Kruse and by the Applicant at C2678-2681. Nonetheless a new Appendix D is attached hereto for the convenience of the Board.

(County Exhibit 2; C2679).

If the City's interpretation of the Plan is used then all of the language other than the words "if approved" would be rendered superfluous and meaningless. The Plan explicitly contemplated that the expansion of Waste Management's facility had not yet been approved, but it was nonetheless the Plan of the County that the existing landfill should be expanded and no other facilities would be necessary nor desired because of the combined impacts of multiple landfills in the County. The language could not be clearer that it is the County's Plan to limit the impacts from landfilling in Kankakee County to the existing landfill as expanded. The hearings on the proposed expansion are taking place and such expansion has not been disapproved. The City Council should not have ignored the plain language and regardless it is clear that the City Council's decision that the application was consistent with the Plan was erroneous.

Even if the Court employees the manifest weight of the evidence standard, it is absolutely clear that the manifest weight of the evidence was that it was the Plan of the County that only the existing landfill be expanded rather than new landfills erected. Therefore, the application is obviously inconsistent with Criterion viii and the City of Kankakee decision should be reversed.

B. The County of Kankakee is not Precluding the City's Right to Conduct a Siting Hearing Under Section 39.2.

The Applicant argues that 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". (Applicant's Brief, 38). As explained in the *Residents* case, it is beyond the purview of this proceeding for the IPCB to review whether the adoption of the County's Solid Waste Management Plan was appropriate. Rather, the only question is whether or not the application is consistent with the Plan. Regardless, at no time has the County of Kankakee infringed upon the right of the City of

Kankakee to hold a siting hearing under Section 39.2. Had the Applicant properly served the Section 39.2(b) notices (which it failed to do) then the City of Kankakee would clearly have jurisdiction because the property at issue was annexed into the City. At no time has Kankakee County argued otherwise.

C. The Applicant's "Home-Rule" and Constitutional Arguments are Untimely, Improper and Erroneous.

In its post-hearing brief, the Applicant attempts for the first time to raise an argument relating to the validity of the Kankakee County Solid Waste Management Plan as amended, disguising its argument as a constitutional challenge to the Plan. (Respondent's Brief at Section IV). Prior to the filing of its closing brief herein, the Applicant did not in any way challenge the Kankakee County Plan nor the method by which it was drafted or adopted in any admitted testimony. Rather, the City has at all times acted as though it fully accepted the validity of the Plan itself, although the City has arrived at strained interpretations of the Plan.

This eleventh hour effort to fabricate new arguments significantly prejudices Petitioner inasmuch as little or no time has been afforded to respond to the new arguments. Given the late hour at which Respondent raises its previously unstated arguments, to the extent that Respondent's Post Hearing Brief addresses its home rule status, Constitutional implications, or attacks on the validity of the County's Solid Waste Management Plan, Petitioners move to strike Section IV of petitioner's post-hearing brief as untimely and outside the scope of this review. *GERE Properties, Inc. v. Jackson County Board and Southern Illinois Regional Landfill, Inc.*, PCB 02-201 (September 5, 2002) (GERE's belated attempt to include a challenge to Criteria VIII was stricken from its post-hearing brief because the late attempt to challenge the criteria prejudiced the respondents in that case, who were not able to address the issue through the pendency of the case); *Land & Lakes v. Randolph County Board*, PCB 99-69 (September 21,

2000), affirmed 319 Ill.App.3d 41, 48; 743 N.E.2d 188, 193 (3rd Dist. 2000) (the IPCB may not undertake a review of the validity of a solid waste management plan in a Section 39.2 appeal taken under 415 ILCS 5/40.1); *TOTAL v. City of Salem*, PCB 96-79 (March 7, 1996) (IPCB cannot reweigh evidence or enter new evidence regarding the validity of the Plan.)

Although the Respondent's arguments in Section IV of its Post Hearing Brief should be stricken by the Board as untimely, and beyond the scope of review of the IPCB, they are also incorrect both as to their factual allegations and to the legal arguments. The Illinois Constitution, Article VII, does state that a home-rule governmental body may "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.***" Illinois Constitution, Article VII, Section 6(i) (emphasis added). However, in this case, the general assembly has clearly indicated its desire to subject local governmental units to the solid waste management goals of counties, insomuch as the legislature enacted 415 ILCS 5/39.2(a)(viii), which states that "if [a] facility is to be located in a county where the county board has adopted a solid waste management plan . . . the facility [must be] consistent with that plan." *Id.* Therefore, it is clear that indeed the Illinois state legislature has indicated a preference for County planning, reflecting its desire to deal with solid waste primarily at the county level. This is confirmed by the local Solid Waste Disposal Act which provides that the County is primarily responsible for solid waste planning. 415 ILCS 15/2(a)(2)(2002).

Of course petitioner is unable to cite any statutory or judicial authority for its proposition that Criterion viii is to be ignored when the City is the siting authority, inasmuch as no such authority exists. In fact, the only way to discuss respondent's home rule argument is to resort to comparable cases in other areas. For example, in *The County of Cook v. Village of Rosemont*,

the Village attempted by enacting its own competing ordinance to revoke a county ordinance imposing an amusement tax on county residents, by disallowing *Village* employees from collecting the tax. *County of Cook v. Village of Rosemont*, 303 Ill.App.3d 403, 405 (5th Dist. 1999). In overturning the Village ordinance, the 5th Circuit announced that inasmuch as the City ordinance was specifically contradictory to the County ordinance, the City exceeded its grant of home-rule power. *Id.* at 409. The court held that to the extent that the local ordinance had implications reaching outside the City, the ordinance was invalid. *Id.*

In this case, the County's Plan is limited to its own borders. However, the City's Plan attempts to revoke the County Plan. It is therefore clear that Respondent's unsupported assertion that that the County plan is preempted by the City plan is simply legally incorrect. See Pet. Br. at IV(C). As is made clear from the *County of Cook* case, home-rule authority does not provide a local governmental body the authority to thwart broader previously enacted county planning, nor does a conflict between two statutes result in a preemption of the broader county statute by the city statute. *Id.*

Further, in line with Respondent's general attempt to create an argument where none otherwise exists, its extremely selective quotation of the Solid Waste Planning and Recycling Act, 415 ILCS 15/1, et seq., completely misrepresents the nature of that statute. Although the Act is not generally designed to "impact the authority of units of local government in the siting of solid waste disposal facilities", the Act also specifically states that counties should have the primary responsibility to plan for the management of municipal waste within their boundaries. 415 ILCS 15/2(a)(2)(2001). Therefore, although the statute leaves open the ability of a local unit of government to site a solid waste disposal facility, it also clearly states that the primary burden for regional solid waste disposal planning lands on the county, identifying the legislature's desire

to deal with solid waste disposal in a regionally responsible manner. Regardless, if the City or the Applicant takes issue with the County Plan it must seek review of that Plan under Administrative Review Law and cannot attack the validity of the Plan in a Section 39.2 hearing or review. *Residents,* 687 N.E.2d at 554-556.

D. Criterion ii and v Were Not Met.

For the reasons announced in the Petitioner's brief it is obvious that Criterion ii and v have not been met. Though the Applicant argues that there was substantial testimony regarding Criterion ii it has not refuted the fact that the application and the Applicant's witnesses mischaracterized the aquifer that the landfill is proposed to be built into as an "aquatard" (retardant to water), and therefore, Criterion ii has not been met. Furthermore, the Applicant has conceded that its only plan to respond to fire, spill or operational accidents was for the City of Kankakee Fire Department to respond to such occurrences. However, the Applicant failed to coordinate with the fire department to determine if it was capable of performing this function for the Applicant. Therefore, it is absolutely clear that there was no basis for the City Council's determination that Criterion v was met.

VIII. CONCLUSION

It is clear from the record that the City Council did not have jurisdiction to render a decision in this matter as there is insufficient evidence that the required Section 39.2 notices were issued and therefore the decision of the City Council should be reversed. Furthermore, because the application is patently inconsistent with the County's Solid Waste Management Plan, the decision of the City Council as to Criterion viii was erroneous and should be reversed. Likewise, the improper pre-hearing of the application on February 19, 2002 has irreparably tainted the process which can only be adequately remedied by a complete reversal with prejudice

of the City Council decision. In the alternative, the proceedings should be remanded to the City of Kankakee with directions to hold a fundamentally fair proceeding.

Dated: December 4, 2002

Respectfully submitted,
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