BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC, Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL, Respondent.	)	PCB No. PCB 07-146

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on July 31, 2009, the undersigned electronically filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, **Petitioner's Response to Yorkville's Post Hearing Brief,** a copy of which is attached hereto..

Dated: July 31, 2009

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/ Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

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	)	
Respondents.	)	

PETITIONER FOX MORAINE'S RESPONSE TO YORKVILLE'S POST-HEARING BRIEF

NOW COMES the Petitioner, FOX MORAINE, L.L.C., by and through its attorneys, Charles F. Helsten and George Mueller, and for its Response to Yorkville's Post-Hearing Brief, states as follows:

INTRODUCTION

The City of Yorkville was under a duty to adhere to the principles of fundamental fairness when dealing with Fox Moraine's efforts to site a landfill on property under the City's jurisdiction. Yorkville's claim that fundamental fairness requirements do not apply because Fox Moraine's Application was filed three months before an election enjoys no support in the law, inasmuch as there is no "election exception" from the requirements of fundamental fairness. Moreover, the City's claim that Yorkville waived its right to object to the decisionmaker's bias and prejudgment by not raising objections when it had not yet obtained actual proof of bias is similarly unsupported, and indeed, unsupportable.

Yorkville's brief relies on distortions and misrepresentations, including the bizarre claim that the City Attorney doesn't know how to read roman numerals, which are invoked in a desperate attempt to defend the indefensible: a decision to deny siting approval that is against the manifest weight of the evidence. Yorkville's continuous characterization of Fox Moraine's

arguments as hysterical, wild and grasping at straws, is a tawdry attempt to substitute sound for substance.

Because the City denied Fox Moraine its right to fundamental fairness in considering Fox Moraine's Application for siting approval, and because the City Council's decision to deny siting approval was against the manifest weight of the evidence, the decision was in violation of Illinois law and should accordingly be reversed by the Board.

I. THE SITING PRECEEDINGS WERE NOT FUNDAMENTALLY FAIR

A. Fox Moraine did not waive its right to object to bias and pre-judgment.

Fox Moraine has argued in great detail how Mayor Burd, as well as Aldermen Spears, Werderich, Plocher and Sutcliff, had disqualifying bias and prejudged the siting application against Fox Moraine. Only two of these individuals, Burd and Spears, were incumbent office holders at the time the siting hearings commenced. Fox Moraine filed a detailed motion with legal citations to disqualify them on the first day of the siting hearing. That motion was largely based on overtly hostile comments which Burd and Spears made at pre-hearing City Council meetings dealing with ancillary issues related to Fox Moraine, such as annexation of the subject property, and vacating Sleepy Hollow Road. At the time the landfill siting hearings began, Fox Moraine was unaware that Valerie Burd had already organized a movement to defeat the application, centered in her mayoral campaign committee, and Fox Moraine was also unaware of the deep-rooted interconnections between the new Aldermanic candidates (Werderich, Plocher and Sutcliff) and the campaign committee, as well as FOGY. The depth and extent of this organized effort were only uncovered during discovery in this case, as was the internet web page of Robyn Sutcliff, on which she solicited votes by repeatedly promising to vote against the siting application if elected.

Yorkville, now for the third time, raises the argument that Fox Moraine waived its claims of bias and prejudgment against Aldermen Werderich, Plocher and Sutcliff. Initially, Yorkville raised the claim in an effort to prevent discovery on the issue. Subsequently, the claim was raised in a Motion in Limine in a further attempt to prevent evidence on the issue from being elicited at the April, 2009 fundamental fairness hearing. Obviously, Fox Moraine's argument has struck a nerve.

Yorkville's argument is flawed at the outset, because it misstates the law. That misstatement of law, which Yorkville describes as "well settled," purports to be that, "If, during the hearings on a siting application, a party believes a decision maker is biased, the party must raise the issue promptly during the hearings." (emphasis added). Belief has nothing to do with it, and there are no cases that support Yorkville's position. Yorkville's reason for mis-stating the law presumably derives from the testimony by several Fox Moraine witnesses that they believed, as the proceedings went on, that various city council members might be prejudiced against them. However, the witnesses' subjective beliefs are irrelevant until they rise to the level of actual knowledge.

The cases cited by Yorkville do not support its conclusion. The standard is clearly enunciated in *E&E Hauling, Inc. v. Pollution Control Board,* 107 Ill.2d 33, 481 N.E.2d 694 (1985), wherein the Court stated, "A claim of disqualifying bias or partiality on the part of a member of the judiciary or an administrative agency must be asserted promptly after knowledge of the alleged disqualification." *Id.* (emphasis added). Similarly, two other cases cited by Yorkville, *ARF Landfill, Inc., v. Pollution Control Board,* 174 Ill. App.3d 82, 528 N.E.2d 390 (Ill.App.Ct. 1988), and *Waste Management of Illinois, Inc., v. Pollution Control Board,* 175 Ill. App.3d 1023 (Ill.App.Ct. 1988), also require actual knowledge of disqualifying bias, as opposed to mere supposition that there is prejudice, for waiver to occur.

At the time of the siting hearings, Werderich, Plocher and Sutcliff had not even been elected. After they were elected, Fox Moraine had concerns and suspicions about their impartiality. However, in the absence of actual knowledge of things such as Wally Werderich's having been a founding officer of FOGY, and his gratuitous, pro bono performance of the legal work necessary to incorporate that organization, Fox Moraine's suspicion did not rise to the level of actual knowledge of disqualifying bias. This is particularly true because at the time of the decision, Fox Moraine had no inkling of the depth of Burd's opposition to the application. The depth of that opposition only surfaced during discovery in this case, when Fox Moraine learned that, for example, Mayor Burd illegally retained another law firm before she was even sworn in as Mayor, to counter the anticipated approval recommendations from the independent Hearing Officer and Special Environmental Counsel for the City. Fox Moraine did not know the composition of Mayor Burd's campaign committee until discovery, including the revelation that it included the most irresponsibly strident opponent of the landfill (Todd Miliron). Fox Moraine did not know, until discovery, that Burd's campaign committee also included an expert witness who testified on behalf of FOGY at the actual siting hearing. This is the type of evidence that gives rise to disqualifying bias, and had Fox Moraine known of Werderich, Plocher and Sutcliff's significant connections to Burd during the proceedings, Yorkville's waiver argument might have some traction. However, the information never came to light until this appeal allowed Fox Moraine to conduct discovery.

All of the cases cited by Yorkville in support of its argument, save one, were decided prior to the January 1, 1993 Amendment to 415 ILCS 5/39.2, which added the language, "The fact that a member of the County Board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue." (PA 87-1152). Donald

Hamman, the majority owner of Fox Moraine, testified that based upon the statements of the candidates in an April 15, 2007 Beacon News article, he believed that a number of those candidates were prejudiced against Fox Moraine. However, when the legislature has chosen to specifically protect the ability of decision makers to make such statements, the failure to make a Motion to Disqualify based on the statements can not construed as a waiver of the bias issue. Put another way, the statements of the candidates as reported on April 15, 2007, are, by themselves, not conclusive evidence of bias or prejudgment. Fox Moraine instead now relies on those statements as additional evidence of bias and prejudgment, because the statements do not stand alone. Instead, they are part of a large body of evidence of the bias of the Mayor and Aldermen Spears, Werderich, Plocher and Sutcliff.

The only contemporary precedent cited by Yorkville is *Peoria Disposal Co. v. PCB,* 385 Ill. App.3d 781, 896 N.E.2d 460 (Ill.App.Ct. 2008). That decision is inapplicable, and is distinguishable on three grounds. First, in *Peoria Disposal* the Court found that the applicant had actual knowledge of the disqualifying bias (the decision makers' membership in the Sierra Club). As explained hereinabove, in this case Fox Moraine had no such knowledge. Second, the Court in *Peoria Disposal* concluded that after obtaining actual knowledge of disqualifying bias, the applicant had an actual opportunity to object. No such opportunity existed for Fox Moraine at the May 23, 2007 and May 24, 2007 City Council meetings. The three individuals to whom Fox Moraine failed to object, Werderich, Plocher and Sutcliff, were not even seated until after the close of the public hearing. Their first official participation in this process was their participation in the City Council deliberations, which commenced on May 23, 2007. At that point, the public hearing was long since concluded, and even the thirty day post-hearing public comment period had closed. Accordingly, even if Fox Moraine had actual knowledge of the disqualifying bias of these individuals, there was no procedural opportunity or mechanism for objecting on May 23,

2007. This was made abundantly clear when the City Attorney announced, at the outset of the May 23, 2007 meeting, "The hearing officer then closed the public hearings on April 20th of 2007...We are now in a stage of this proceeding where the City Council shall consider and deliberate over the application. No further evidence or input from the applicant or the public is to be taken." (C18537). Mayor Burd echoed the point by stating, "It's no longer a public hearing. We are under city council rules." (C18540). To emphasize her point she added, "The hearing officer is no longer in charge. That's why he is not needed tonight, it's back under the Mayor, and the Mayor is the one who is back and running the meeting." (C18541).

Not surprisingly, a review of the transcript of the proceedings of the City Council on May 23, 2007 and May 24, 2007 reveals that no input was taken from any party or member of the public. Therefore, even if Fox Moraine had known of the Burd campaign committee, the Sutcliff web page, Werderich's position in FOGY or any of the other hard evidence of disqualifying bias (as opposed to mere statements uttered by decision makers), there was no procedural opportunity to object after the close of the public hearing.

Lastly, the Court in *Peoria Disposal*, after finding that the conflict of interest argument had been waived, elected to exercise its authority to consider it on the merits anyway, and found that bias had not been established. This is consistent with the holding over twenty years ago in *E&E Hauling, Inc.*, where the Court expressly observed the exceptions to the waiver rule, and affirmed an Appellate Court decision which described the waiver rule as "not inflexible." (116 Ill. App.3d 586, 451 N.E.2d 555 (Ill.Appt.Ct. 1983).

In summary, when all of the factors are considered together, it is clear not only that there was no waiver by Fox Moraine here, but also that the concept of waiver was not applicable under these facts. Fox Moraine was aware of established case law which required actual knowledge of a disqualifying conflict or bias before waiver could occur. Fox Moraine was also aware of the

amended Section 39.2(d), which stated that a decision-maker's prior public expressions on a siting issue are not per se disqualifying. Fox Moraine was confronted with three new Aldermen, who it believed, based solely upon their prior public statements, to be biased, and who were sworn into office after the close of the public hearing. and after the close of Fox Moraine's ability to comment. Its dilemma was compounded by the City's explicit and emphatic announcement at the outset of the May 23, 2007 deliberation meeting that no further input from the Applicant or any other participant would be allowed. If nothing else, this statement should estop the City from raising the waiver argument. Ultimately controlling, however, regardless of this Board's interpretation of the case law, is the fact that there is no evidence that Fox Moraine's belief that there was bias as of May 23, 2007 was based on anything other than the prior public expressions of opinion by the three new Aldermen. The unknown interconnections between them, between them and Valerie Burd, and between them and FOGY, had not yet come to light.

Yorkville now also argues that even though Fox Moraine objected promptly to the participation of Burd and Spears, who were sitting Aldermen at the commencement of the public hearing, that objection was insufficient because it lacked factual detail and legal support. Although Yorkville cites a number of cases, no legal precedent supports its conclusion. The only case cited by Yorkville that deals with Section 39.2 siting proceedings is *Waste Mgmt. of Illinois, Inc. v. PCB,* 160 Ill. App.3d 434, 513 N.E.2d 592 (Ill.App.Ct. 1987), wherein the Appellate Court held that an applicant's failure to support a novel theory of bias with legal precedent constituted waiver of the argument.

Even a cursory review of Fox Moraine's Motion to Disqualify Burd and Spears filed on March 7, 2007 reveals that it contains allegations of bias and prejudgment, and that it includes citations to appropriate precedent in that regard (*e.g. Concerned Adjoining Owners, Fairview Area Citizens Task Force, D&L Landfill, Inc. and Land & Lakes Co.*, citations omitted).

Moreover, the motion is factually specific, referencing communications between Alderman Spears and an attorney for Kendall County, statements made by Alderman Burd at the City Council meeting of February 13, 2007, and the campaign platform of Alderman Burd and statements to the press. Aldermen Spears and Burd were thereby put on notice of the nature of the allegations of bias and prejudgment being leveled against those two individuals. Had Alderman Burd been kind enough to invite a representative of Fox Moraine to one of her mayoral campaign committee meetings, the additional information developed in discovery in this case could have been included in the original motion also. However, it is in the nature of conspirators and those engaged in bias and prejudgment to be secretive, and to deny the same when confronted with hard evidence. Hence, Mayor Burd continues to deny to the very end that she knew that her personal friend and campaign committee member, Todd Miliron, was opposed to the Fox Moraine landfill.

B. The timing of Fox Moraine's filing of its siting application is irrelevant to fundamental fairness considerations.

In a mildly creative but misguided argument, Yorkville alleges that Fox Moraine invited or created fundamental fairness problems by the timing of its filing of the Siting Application. Yorkville suggests that Fox Moraine should have known there would be public opposition to the Application, and that the landfill would become a campaign issue. Yorkville expands the argument by suggesting Fox Moraine was even more sinister, essentially resorting to its crystal ball to calculate a filing date that would maximize the likelihood of fundamental fairness problems so that it could have its Application denied by the City Council, and then raise fundamental fairness issues on appeal. This, according to Yorkville's theory, was the calculated plan conceived by a business that had invested an enormous amount of money to prepare an Application to obtain siting approval. What Fox Moraine really wanted all along, Yorkville's theory proposes, is an appeal to the Pollution Control Board.

In addition to proposing a theory that is truly ludicrous, there is obviously no legal support for Yorkville's argument, and there is no "election campaign exception" to the requirement that siting proceedings be fundamentally fair. Yorkville's brief continually reiterates that Fox Moraine is only entitled to minimal fundamental fairness, but it is axiomatic that even that minimal standard includes entitlement to an impartial decision based on the evidence.

The siting application was filed as soon as it was completed and ready to be filed. When asked why the application was not filed sooner, Donald Hamman answered, "Well, it was recommended that we do it then because we were waiting for additional engineering. We wanted to have the safest and the best landfill study done and that's - -the time went on and that's why it approached December 1." (PCB 4-23-09 P. 12).

Fox Moraine's right to an impartial decision based on the evidence was not abridged by the fact that an election campaign occurred during the siting hearings. Similarly, Fox Moraine's right to an impartial decision based on the evidence was not abridged by the fact that there was loud public opposition. Yorkville suggests that Fox Moraine's brief shows it is somehow opposed to public participation, and to the expression of public opinions in siting matters. Nothing could be further from the truth. Public participation is a critical element of the process, and the fact that some public expression is emotional, rather than based on the facts, is inherent in the process. In this case, however, public opposition went beyond mere expression of opinion, and became disruptive and intimidating, even before the siting hearings began. The point is thoroughly documented in Fox Moraine's opening Brief. Yorkville's argument to the contrary notwithstanding, the point is not that this public opposition, no matter how inappropriate or disruptive it might have been, rendered the hearings fundamentally unfair, but rather that its impact on certain of the decision makers, and ultimately its impact on their votes on the Application, rendered the hearings fundamentally unfair.

In this case, there was a symbiotic relationship between Aldermen Burd and Spears and the landfill opponents. Alderman Besco testified about Alderman Burd's 180 degree change in position on landfill-related issues such as annexation after she saw the large turnout of landfill opponents at the City Council meeting to consider the initial property annexation. As meticulously documented in Fox Moraine's opening Brief, Burd and Spears began, thereafter, to court the landfill opponents, encouraging them at council meetings, and in return, the opposition rewarded Burd and Spears with frequent applause, cheers, and praise. The hidden aspect of this symbiotic relationship, the intertwined network that developed between Burd and FOGY through Burd's campaign committee, was obviously unknown to Fox Moraine. However, Burd's and Spears' performances for the opposition were sufficient to convince Fox Moraine that their public statements went beyond the kind of protected expressions of opinion contemplated in the amended Section 39.2(d).

Yorkville entirely misses the point when it argues that the strident, disruptive public opposition described in Fox Moraine's opening Brief is relevant only to the extent that it contributed to, or helps explain, the bias of certain decision makers. Yorkville's assertion that Fox Moraine deliberately "manufactured" the fundamental fairness violation by the timing of its filing suggests that a decision maker's requirement to remain free from bias is excused during election campaigns.

Mudslinging aside, Yorkville now alleges that Fox Moraine should not complain of intimidating tactics by the opposition, because Fox Moraine's representatives allegedly intimidated the anti-landfill protesters. For support, Yorkville references the testimony of Ron Parish, a founding officer of FOGY, major contributor to Valerie Burd's election campaign, and a member of her election committee, who claims he was threatened by Devin Moose, Fox Moraine's chief engineer and designer. Yorkville's Brief shamelessly treats these allegations by

Mr. Parish as if they were undisputed facts, despite the fact that Devin Moose emphatically denied Parish's unsupported allegation. (PCB 04-22-09 P. 127). Devin Moose is a professional engineer, a diplomat in the American Academy of Environmental Engineers, and arguably the most experienced pollution control facility siting engineer, both for government and private industry, in Illinois. (PCB 4-22-09 pp 99-102). An individual with such credentials is hardly likely to jeopardize his reputation or career by threatening an uninformed, but presumably well-meaning, citizen.

While Yorkville's argument regarding Parish is one-sided and misleading, its next argument is an outright misrepresentation. In response to Fox Moraine's argument that the opponents intentionally dragged out the public hearing in order to ensure that their anti-landfill candidates would be elected and seated by the time of the final decision, Yorkville argues, without any reference to the record, that Fox Moraine's lengthy witness presentations monopolized the hearings, and that Fox Moraine was responsible for the undue length of the hearings. (Yorkville Brief, P. 13). Even a cursory review of the record belies this assertion.

The first witness presented by Fox Moraine, Chris Lannert, testified on direct only briefly, with the transcript of his direct testimony constituting 32 pages (C08137-C08169). However, the opponents' cross-examination of Mr. Lannert constitutes 109 pages (C08169-C08217; C08391-C08452). Similarly, the transcript of the direct testimony of Fox Moraine's second witness, Frank Harrison is 73 pages. (C08568-C08604; C08682-C08719). However, Mr. Harrison's cross-examination transcript is 268 pages! (C08719-C08894; C08935-C09028). The third witness for Fox Moraine, Michael Werthman, testified briefly on direct, the transcript of his direct testimony being only 49 pages. (C09038-C09087). However, the transcript for Mr. Werthman's cross-examination is 203 pages! (C09089-C09201; C09289-C09380). A similar pattern exists for the remaining Fox Moraine witnesses. Therefore, the assertion of Yorkville

that Fox Moraine monopolized thirteen of the twenty-three hearing days is beyond merely "untrue." Instead, the record reveals that Fox Moraine's witnesses had to sit through seemingly endless and repetitive cross-examination that often took four or more times as long as their direct testimony.

If, in focusing on the timing of Fox Moraine's filing of its siting application, Yorkville is suggesting that the overlap between an election campaign and the pendency of a landfill siting application is more likely to cause opportunistic politicians to forsake their responsibility to render an impartial decision on the evidence in favor of advancing their political careers, its point may, sadly, be true. However, Yorkville's assertion that Fox Moraine intentionally selected its filing date for that purpose is not only utterly illogical, it is completely unsupported in the record. Moreover, the suggestion that Fox Moraine deserved to be denied a fundamentally fair hearing on its Application because of the date on which it filed that Application is completely unsupported by law.

C. Multiple City Council members were biased against Fox Moraine, prejudged the Application and/or made decisions based on matters outside the record.

Yorkville again, at the outset of its argument, reminds the Board that Fox Moraine is only entitled to minimal elements of due process, but Yorkville at least concedes that an impartial decision based on the evidence is one of those essential elements. Yorkville then focuses on one word from Section 40.1(a) of the Environmental Protection Act, "procedures," suggesting that the Board can only look at whether the procedures used were fundamentally fair, further suggesting that an evaluation of how those procedures were implemented is beyond the scope of the Board's responsibility. This appears to represent an attempt to argue that if a local siting ordinance is, on its face, fundamentally fair, then an inquiry into whether that ordinance was actually followed is beyond the scope of this Board.

This argument is expanded in the Amicus Brief filed by FOGY. FOGY points out that the Board cannot limit the public's exercise of free speech rights in these matters. The difficulty arises in the fact that the public has the right to express opinions on the one hand, but on the other, the decision makers are expected to base their decision on the evidence. It is therefore not the public's exercise of free speech rights (regardless of how irresponsible or unruly that exercise might be) which can cause a hearing to be fundamentally unfair, but rather the decision makers' succumbing to the public clamor and giving up their role as adjudicators. In this case the public opposition is relevant because it initially drove Burd's decision to use the landfill issue to catapult herself into the mayor's chair.

FOGY's reliance on *Residents Against a Polluted Environment* for the proposition that the Board should confine itself just to what happened at the siting hearing is misplaced. That portion of *Residents* was effectively overruled in *Land & Lakes Co. v. PCB*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000), where the Court did consider whether pre-filing contacts rendered the proceedings fundamentally unfair.

FOGY's last point, that *Southwest Energy* authorizes local decision makers to disregard the evidence and, based upon the perceived wishes of their constituents, deny a siting application on "legislative" considerations, is not supported by any other case. The reference in *Southwest Energy* is clearly dicta and contrary to well established law.

The more appropriate way to view the "procedures" as used in Section 40.1(a) of the Act is to consider what actually occurred, and the entire decision-making process. *Land & Lakes*, for example, focuses its inquiry on whether the "proceedings" were fair. In that context the procedures used were fatally flawed and horribly unfair. FOGY's discussion of procedural fairness and substantive fairness is then a distinction without a difference.

Yorkville's Brief offers only a cursory examination of tiny snippets of evidence as to each of the suspect council members, attempting thereby to demonstrate that the particular council member acted appropriately. The first member examined in Yorkville's Brief is Mayor Burd. Yorkville's Brief is not so much a discussion of what Valerie Burd said (as most of what she said is essentially indefensible), as it is an attempt to rehabilitate her in the wake of the impeachment of her testimony shown by Fox Moraine. Yorkville begins with a discussion of the City Administrator's sworn affidavit in related PCB Case 08-95 where he verified that the landfill issue was "the primary issue in the city election and change in administration." (Yorkville Brief, p. 18). Yorkville argues that Mr. McLaughlin's statements did not trigger judicial estoppel, an argument Fox Moraine didn't even raise in it's opening Brief. McLaughlin's statements do, however, meet all the criteria for a judicial admission. At a minimum his sworn statements are a party admission against interest, in that they appear to directly contradict Burd's insistence that she did not run as an anti-landfill candidate, and her inference that the landfill was not an issue in the 2007 municipal election.

Yorkville's Brief also falsely claims that the Hearing Officer ultimately found Burd's testimony credible. The Hearing Officer made no such finding, although he did note, not surprisingly, that Burd exhibited no overt physical signs of lying while she was testifying. Before the Board chooses to credit Burd's testimony because she did not tremble and sweat profusely during her testimony, the Board should also consider the Hearing Officer's cautionary statement that, "I make no finding as to the ultimate plausibility of any of Ms. Burd's statements." Fortunately, the Hearing Officer provided the Board with a roadmap to examine whether Burd's statements were plausible. It is hoped that the Board will carefully consider the Hearing Officer's Order, as well as Fox Moraine's Post-Hearing brief, which both point to examples of Burd's incredible statements.

One of Mayor Burd's many implausible statements is her testimony that she would not allow FOGY members to be on her campaign committee, which is extremely difficult to reconcile with the presence of founding FOGY officer, Ron Parish, on the committee.

Yorkville's defense of Alderman Spears is, to be charitable, weak. The City argues that Spears professed lack of knowledge regarding the purpose for Fox Moraine's efforts to have its property annexed into the City should be deemed plausible, because Fox Moraine's annexation attorney failed to publicly announce the landfill plan during the annexation meeting. This argument completely ignores the fact that the City Attorney had, six months earlier, distributed confidential memos to the Aldermen explaining the annexation strategy and its ultimate purpose (which were released to the press by Burd late in the election campaign). Yorkville's argument also ignores the fact that Alderman Spears clearly recalled her meeting with Charlie Murphy and Jim Burnham of Fox Moraine a few weeks earlier, wherein the two representatives explained Fox Moraine's landfill plan, and even showed the Aldermen a conceptual model.

Yorkville's other point regarding Alderman Spears notes that she did, in fact, remember voting "no" on the annexation. That statement is curious, inasmuch as she didn't really remember the meeting (which was attended by hundreds of loud, angry anti-landfill activists), and also didn't remember voting on the host agreement which was part of the annexation. A thorough review of Alderman Spears' testimony indicates that she testified that she really had no memory of much of anything, which is strangely at odds with her remarkable ability to remember minute details from the thousands of pages of unsworn anti-landfill material submitted by landfill opponents.

Yorkville's defense of Alderman Werderich is that he quit FOGY and quit publicly talking once he announced his candidacy for Alderman. While a valid point, it does not explain Werderich's pro bono work to incorporate FOGY, as well as his campaign literature and secret

membership on Burd's campaign committee, along with his friends Todd Miliron and Ron Parish.

Yorkville offers up an interesting statement in defense of Alderman Werderich, noting that he decided to run for Alderman because, "Like many other Yorkville residents, he did not approve of the council's handling of the annexation process." That statement has, throughout the proceedings, and from the beginning of the annexation process, been shorthand for opposition to the landfill. As documented in Fox Moraine's opening Brief, numerous landfill opponents made unequivocal statements to the City Council as early as the first annexation meeting, that the way to conclusively stop the landfill was to vote "no" on the annexation. Kendall County was, at the time, romancing a competitor, Waste Management of Illinois, Inc., and if Yorkville would not annex Fox Moraine's property into the city, Fox Moraine had nowhere to go. In short, expressing disapproval of the Council's handling of the annexation process was essentially code for condemning the Council's failure to stop the landfill in its tracks.

Yorkville's defense of Alderman Sutcliff offers the theory that her web page was simply relaying information, not stating her personal opinion. That is utter nonsense. If the content of the web page was "reporting," it was clearly editorial reporting, and if the material she published was written by others, by placing it on her own website she certainly acquired ownership of its content. The Board is urged to reread the quotations from Sutcliff's website, found at page 24 of Fox Moraine's opening Brief. The Board must conclude that there is no explanation other than bias and prejudgment for statements such as, "I am asking you to take action. If you want to stop the landfill you can do several simple things to make a difference. Vote for new leadership by voting for Robyn Sutcliff on April 17, 2007! I will vote against the annexation of landfill property." (emphasis added). In response, Yorkville continues to urge the fiction that the question of annexation had nothing to do with the landfill proposal. The fact that Sutcliff, long

after the annexation had become final, was promising to oppose the annexation of landfill property demonstrates that the concepts of annexation and the landfill proposal had become intertwined and interchangeable. What is clear and unmistakable is Sutcliff's express promise to voters that she would work to stop the landfill.

Yorkville spends several pages arguing the undisputed point that Fox Moraine had a full and complete opportunity to present evidence in support of its application. That opportunity is somewhat meaningless if the decision makers made up their minds how to vote in advance, disregarded the evidence, or voted on the basis of matters outside the evidence. Admittedly, the Hearing Officer did not impede Fox Moraine's ability to put on a case. The same Hearing Officer, with thirty years of landfill experience, also wrote a report based on that evidence recommending approval of the application. The fact that seven city council members voted no suggests that they either didn't listen to the evidence, didn't care about the evidence, or didn't consider the evidence in reaching their decision, making Fox Moraine's full and complete opportunity to present evidence essentially a pointless endeavor.

Yorkville emphasizes that the hearing was less unruly than Fox Moraine portrays it in its opening Brief. Of course, Yorkville relies for support on the unsworn statements of objectors, FOGY members and friends and relatives of the unruly. Regardless, the point is irrelevant, as Yorkville apparently didn't understand Fox Moraine's argument that the unruly and disruptive conduct of landfill opponents was on the one hand quietly encouraged by Aldermen Burd and Spears, and, on the other hand, created an atmosphere of hostility and intimidation that all of the other Aldermen to deal with. Poor Alderman Munns is perhaps the best example of this, in that all of his comments during the council deliberations on May 23, 2007 indicated that he agreed with the recommendations of the Hearing Officer and the Special Counsel for approval,

personally supported approval with conditions, and yet voted no. Even after his "no" vote he still continued to agree with the recommendation for approval with conditions.

Yorkville, through mincing words and pointing to minutia, attempts to rebut Fox Moraine's point that several Aldermen considered matters outside the record. An example is Yorkville's response to Fox Moraine's having pointed out that Alderman Spears stated there is "no known safe level of vinyl chloride," which is not supported anywhere in the record. The other references to vinyl chloride in the record are irrelevant. Yorkville's Brief and Spears are both wrong about there being no safe level, as the IEPA recognizes two parts per billion in it's drinking water standard. 35 Ill.Adm.Code 611.311. This misrepresentation is characteristic of the kinds of misstatements of the record and false assertions that appear throughout Yorkville's brief.

Yorkville also attempts to defend Spears' reasoning concerning the finding that Criterion (vi) (traffic) was not met. The Board is urged to look at this portion of Alderman Spears' testimony (PCB, 4-21-09 pp. 66-73). The unmistakable conclusion is that Spears felt all along that any impact on existing traffic flows was bad, and was sufficient in and of itself to defeat Criterion (vi), and she tried to couch her statements to that effect in her testimony before the Board in the context of the evidence presented.

Yorkville again resorts to tricks with semantics in attempting to show that Werderich's decision was based on the evidence. His statements about citizen complaints to various agencies regarding odors from Donald Hamman's use of landscape waste in his farming operation are not the same as the complaints of citizens in public comment during the siting hearing regarding odors. Basing a decision on "citizen complaints" without knowing the nature of the complaint, the author of the complaint, and whether the complaint was valid or proven is irresponsible, and asking others to base their decisions on it is even more irresponsible. Worse yet, the City

Council should not have considered anything with regard to Mr. Hamman's use of landscape waste at his farm, as the only evidentiary consideration beyond the nine statutory criteria is for the record of violations and convictions of an operator or owner in the area of solid waste management. Solid waste is defined as "waste" in the Act, and this is different from the separate definition of landscape waste or compost.

Werderich's remarks were nothing but a calculated attempt to prejudice other City Council members against Mr. Hamman and Fox Moraine. Curiously Yorkville's Brief does not event attempt to respond to the most serious indictment of Werderich's conduct on May 23, 2007, when he incorrectly advised other City Council members that if a criterion could not be satisfied without conditions, they had to vote no. Because he is an attorney, Werderich's comment would presumably have been credited by the other City Council members. The failure of Valerie Burd's cadre of non-appointed attorneys to correct Mr. Werderich also speaks volumes about what was happening on May 23, 2007.

Yorkville's argument regarding the written decision is, to say the least, curious. Fox Moraine does not question whether the reasons set forth in the written decision were legally insufficient. Those reasons are wrong, and are not supported by the evidence, but they are arguably otherwise sufficient, at least in form, to satisfy the minimum requirement for a written decision specifying reasons. Rather, Fox Moraine's primary argument is that the written decision that was issued was not the decision of the City Council. Although various Yorkville witnesses stated at various times that the final resolution presented to Fox Moraine was, in fact, in front of the Council on the night of the vote, the record is clearly to the contrary, and even Yorkville's responsive brief finally admits the point. Yorkville now justifies this by stating that it is routine for the final resolutions to be prepared by attorneys after the conclusion of meetings. However, the formality of putting the actual spoken words and actual votes of a deliberative

body into writing is far different than what happened in this case, where Valerie Burd delegated to her team of attorneys the discretionary task of actually deciding for themselves what the substantive content of the final resolution should be.

Yorkville now cites *Peoria Disposal Company* for the proposition that even a transcript can constitute the required written decision. However, in *Peoria Disposal Company* there is no issue as to whether the written decision represented the substantive action of the County Board or its attorneys. Here, the final resolution clearly reflected the substantive work, and, worse yet, the controlling hand of the City Attorneys, and contained a number of matters that were never voted on by the Council. Therefore, the resolution is not the written decision of the Council, it was the written decision of Attorney Michael Roth and his colleagues. The council still has not produced its written decision specifying its reasons for the claimed denial.

Finally, Yorkville argues that Fox Moraine lacks standing to allege that the Wildman firm was illegally retained. Actually Fox Moraine's allegation is that the Wildman firm was never retained for the purpose reflected in their June invoice for over $96,000.00. Yorkville is silent as to the fact that Mayor Burd explicitly disavowed having engaged the Wildman firm, or having given them any direction about anything prior to May 8, when she was sworn in. Accordingly, there is an irreconcilable conflict between her testimony and the invoice.

Yorkville now argues that regardless of how the relationship between the City and the Wildman firm began, Mayor Burd testified that they were specifically retained to review the record and present recommendations on the Siting Application, and that this was separate from the fifty hours of municipal law work authorized by the City Council on May 8, 2007. The problem with the City's reliance on Mayor Burd's testimony is that, once again, there is not a shred of support anywhere, any place, for her assertion. No correspondence, no minutes, no resolution or any other document have been produced which evidences that the Wildman firm

was ever hired to do anything more than the fifty hours a month of ordinary municipal law work authorized in the Council's motion and vote of May 8, 2007. Once again, Mayor Burd is not credible.

Yorkville repeatedly argues in its brief that the City denied Fox Moraine on seven of the ten siting criteria, and that this denial was justified by the evidence. This misstatement is apparently intended to try and conceal the fact that the Council's bias against Fox Moraine was so strong that it found Fox Moraine even failed to satisfy siting Criterion (ix), regulated recharge, a criterion not even applicable to the Fox Moraine application. A copy of Resolution 2007-36, showing in paragraph three that there was a finding on Criterion (ix), is attached to the Petition for Review. The fact that Yorkville would even now misrepresent the contents of the final resolution itself speaks volumes about its willingness to twist the truth.[1]

II. The City Council's Decision Was Against the Manifest Weight of the Evidence

A. The Board's technical expertise must be utilized in its review of the record.

In assessing whether a decision is against the manifest weight of the evidence, the Board must determine whether there is any technically sound basis for concluding that a particular criterion was not met. As explained by the Supreme Court in *Town & Country Utilities, Inc. v. PCB*, 225 Ill.2d 103, 866 N.E.2d 227 (2007), the Board must conduct a technical review of the record developed during the local siting hearing "to determine whether the record supported the local authority's conclusions." (*Id.* at 123). The Court observed in *Town & Country* that the primary responsibility for the statewide approach to pollution control facility approval lies with the technically qualified and versed PCB. Although the Court noted that units of local

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[1] Fox Moraine notes that, contrary to Yorkville's statements, there are nine statutory criteria and not ten. A decision maker may consider the record of convictions or violations of an owner or operator in the field of solid waste management but is not required to do so, and said consideration relates to criteria ii and v.

government have "concurrent jurisdiction" in siting (225 Ill.2d at 108), their conclusion represents only an "interim decision" which is subject to review by the PCB pursuant to Section 40.1 of the Act. (*Id.* at 116). Under Section 40.1, the members of the PCB are charged with utilizing their expertise to review the record developed below and "make factual and legal determinations on evidence." (*Id.* at 120).

A decision is against the manifest weight of the evidence if an opposite conclusion is apparent or the decision-maker's findings "appear to be unreasonable, arbitrary, or not based upon the evidence." *Webb v. Mount Sinai Hosp.*, 347 Ill.App.3d 817, 807 NE.2d 1026 (Ill.App.Ct. 2004). Moreover, the mere existence of some evidence that conflicts with the Applicant's proof is not sufficient to support a denial of siting. *See A.R.F. Landfill v. Lake County*, PCB 87-051, slip op. at 21-24 (Oct. 1, 1987).

Here, the Applicant presented competent, thorough, and exhaustive technical and scientific evidence that offered *prima facie* proof of each of the statutory criteria, as discussed below. Because the City Council's "finding" that the Applicant failed to meet criteria (i),(ii), (iii), (v), (vi), (viii), and (ix),[2] as well as "the Tenth Criterion" was unsupported by competent or substantial evidence, and was, in fact, contrary to the competent and relevant evidence presented at the hearing, the Board should reverse the City's decision denying siting approval as against the

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2 Yorkville's brief asserts that the City Council's resolution incorrectly listed the criteria that were not met, and that when the resolution stated that criterion "(ix)" was not meant, it intended to refer to the so-called tenth criterion. (*See* Yorkville's Post Hearing Brief at 45, 77 at n. 25). Apparently, Yorkville is telling the Board that its attorneys thought that roman numeral "ix" meant the number 10. Yorkville attempts to bolster this assertion by claiming that the resolution stated that the Council found that "seven, not eight, of the ten criteria" were not met. (*Id.* at 77, n. 25). Notably, however, the resolution includes no language indicating how many criteria were found not to have been met. Rather, the resolution simply lists the criteria that were not met, including "ix." Fox Moraine observes, however, that Yorkville admits in its brief that "No one disputed that Fox Moraine had met Criterion (ix)." Fox Moraine requests that the Board take judicial notice of this admission that Criterion (ix) was, in fact, met. *See Id.*

manifest weight of the evidence. *See Industr. Fuels & Resources/Illinois, Inc. v. PCB*, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist. 1992) (reversing siting denial because there was no evidence to substantiate risk or contradict applicant's *prima facie* showing).

B. The evidence showed the proposed landfill was necessary to accommodate the needs of the service area, therefore the City Council's finding concerning Criterion (i) was against the manifest weight of the evidence.

With respect to the "need" requirement of Criterion (i), "[t]he use of 'necessary' in the statute does not require applicants to show that a proposed facility is necessary in absolute terms, but only that the proposed facility is 'expedient' or 'reasonably convenient' vis-a-vis the area's waste needs. *E&E Hauling v. PCB*, 116 Ill.App.3d 586, 609, 451 N.E.2d 555, 573, 71 Ill.Dec. 587, 605 (1983). Opposition to the service area size, or to accepting out-of-county waste, are not proper reasons to deny Criterion (i). *See Metropolitan Waste Systems v. PCB*, 201 Ill.App.3d 51, 558 N.E.2d 785 (2nd Dist. 1990).

Yorkville tries to show Criterion (i) was not met by pointing out that if all of the waste from the entire, eight-county service area were all placed into the proposed landfill, it would be full within two years. (Yorkville Br. at 47). It is unclear how Yorkville finds that this would show there is no reasonable need for the proposed landfill. Yorkville then points to evidence that Kendall County produces "only .7% of the waste generated by the proposed service area." (Yorkville Br. at 48). Once again, the amount of waste currently generated in Kendall County compared with the waste generated in surrounding counties is hardly probative of the need for the proposed facility, and opposition to accepting out-of-county waste is irrelevant. *See Metropolitan Waste*, 201 Ill.App.3d 51.

According to Yorkville, the previously identified arguments, coupled with the fact that "landfills in the region...have approximately 10 years life remaining," together purportedly weigh "against necessity." (*Id.*). Notably, however, the absence of a present, extreme crisis does

not mean that Criterion (i) has not been met. Rather, the Applicant need only demonstrate the proposed facility is reasonably required by the waste needs of the service area. *File v. D&L Landfill*, 219 Ill.App.3d 897, 597 N.E.2d 1228 (5th Dist. 1991). Moreover, the idea that there might be up to ten (10) years of capacity left in existing landfills within the greater region hardly negates the element of need, when one considers that it takes an average of nine years to go from concept to the actual operation of a landfill in Illinois. (C09401-02).

Yorkville's argument that the Applicant failed to show a need for the landfill also ignores the fact that although the proposed eight-county service area had 28 operating landfills in the past, by January 2006, only ten were still operating. (C09388-389). It further ignores the evidence that of the three facilities historically relied upon by Kendall County, two have closed, with the one remaining landfill having very limited capacity left. (C09398-9399). Yorkville ignores the evidence that even as the number of landfills in the area has diminished, Kendall County has been experiencing rapid growth, as has the City of Yorkville. (C09387). Once the landfills upon which Kendall County has historically relied are closed, the nearest landfill will be 37 miles away, and the next closest landfill will be 60 miles away. (C09398).

Yorkville ignores the evidence that the proposed facility would be centrally located, being about 40 miles from the "waste centroid" of the service area, and about 8 miles from the centroid within Kendall County. (C09397-98). Yorkville acknowledges the relevance of the cost savings reaped by avoiding the need to transport waste large distances, but goes on to claim this is "the only portion of Fox Moraine's presentation that arguably supports the need for a landfill." (Yorkville Br. at 49).

Yorkville's misrepresentation of the evidence is here, as elsewhere in the brief, glaring and unmistakable. The evidence clearly demonstrated that Yorkville and Kendall County are experiencing rapid growth at a time when the availability of landfill capacity in the area is

dramatically shrinking, thus refuting the notion that there is no evidence of need, other than the millions of dollars in cost savings, which is apparently of no moment to Yorkville, despite the City's widely-reported financial troubles.

Yorkville relies upon the evidence of objector Darryl Hyink, a retired industrial arts teacher, to overcome the overwhelming weight of Fox Moraine's Criterion (i) evidence. According to Yorkville, Mr. Hyink's thoughts, which derived from his review of articles on the internet and in newspapers such as the New York Times, should be deemed sufficient to demonstrate there is a "glut of landfill space" in Illinois, and offer "persuasive" evidence that new landfills are unnecessary in the state. (C14325; Yorkville Br. at 49).

Unlike Yorkville, both the Hearing Officer and Special Counsel Derke Price concluded that with the City Staff's proposed conditions, Criterion (i) was met. As the Hearing Officer, Mr. Larry Clark, observed, the evidence supported a finding that there is urgency with respect to need, and the Applicant thus met its burden as to Criterion (i). (C18522-23). Special Counsel, Derke Price, similarly concluded that Fox Moraine's expert, Mr. Kowalski, presented credible evidence that Criterion (i) was met. (C17192). Neither Price nor Clark credited, or even mentioned, Mr. Hyink's testimony. It is also worth noting that the conditions imposed by Price require that the Applicant provide special pricing to the City (Condition 1.1) and that waste to be collected from transfer stations is limited to those facilities situated within the service area, or waste that is directly collected within the service area (Condition 1.2). These conditions are a stark illustration of the falsity of Yorkville's oft-reported theory that Price found the Application did not meet the statutory siting criteria unless the proposed conditions were imposed. By way of example, it goes without saying that special, preferential pricing for the City is not necessary to demonstrate the reasonable necessity of the facility, i.e. Criterion (i).

The Board's technical expertise allows it to distinguish between the relative competence and reliability of the evidence presented by both sides with respect to Criterion (i). When that competing evidence is examined, it is abundantly clear that the Applicant satisfied its burden of establishing that the proposed landfill was necessary to accommodate the needs of the service area, and was not overcome merely by the objector's broad brush, unsubstantiated claims that there is a glut of landfill space in northern Illinois. Accordingly, the City Council's decision regarding Criterion (i), finding that there was no need in the service area, was against the manifest weight of the evidence.

C. The evidence showed that the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected, therefore the City Council's finding concerning Criterion (ii) was against the manifest weight of the evidence.

As thoroughly discussed in Fox Moraine's Post-Hearing brief, the evidence presented by the Applicant on Criterion (ii) was especially powerful, and was presented by highly respected, highly educated and experienced experts in geology, hydrogeology, and landfill design. Ignoring this evidence almost entirely in its brief, Yorkville focuses its criticism of the Criterion (ii) evidence primarily on the number of conditions proposed by Attorney Price, suggesting that because Attorney Price came up with 39 recommended conditions, Criterion (ii) was not met. (Yorkville Br. at 50). Although a decision-maker is not required to search for conditions that would enable an Applicant to meet the statutory criteria, it is perfectly permissible for the decision-maker to employ the use of criteria as it sees fit, and the fact that Attorney Price was able to come up with 39 conditions is hardly evidence that the Application failed to satisfy the criteria. If that were true, then every siting approval which is granted "with conditions" would render the underlying application defective under the statute. This is clearly not the case. Moreover, the Hearing Officer observed that the 39 conditions suggested by Price appeared to "come from the particular engineering perspective of the City Staff's engineer." (C18525). He

further noted that he "[did] not find any of them [to be] particularly significant individually, but rather are added so that there will be no question at a later date of what the design, construction and operations shall be." (C18526) (emphasis added). In other words, in the opinion of the Hearing Officer, who had over 30 years experience with landfill siting, the conditions were intended to clarify and memorialize details that might otherwise be unclear.

The balance of Yorkville's arguments consist largely of "grasping at straws." Yorkville points to the unsworn testimony of objector Stan Ludikowski, a lay witness with a lapsed engineering license, who admitted he had no expertise in geology or hydrogeology, but nevertheless opined on the sequencing of construction and placement of groundwater monitoring wells, offering his personal criticisms of the plan prepared by professional engineer and expert hydrogeologist Devin Moose, who testified for the Applicant. (C10952-54; C11254-57). Moose, recognizing the relatively inconsequential nature of Ludikowski's objection, politely agreed on behalf of the Applicant to make the proposed change so that the hearing could move on to more important matters. (*Id.*) It is difficult to imagine how Yorkville can view Ludikowski's ideas, which the Applicant agreed to incorporate into its plan, as somehow representing a failure by the Applicant to meet Critierion (ii). Notably, the Hearing Officer did not deem Ludikowski's testimony significant enough to even merit a passing mention in his recap of the evidence. Similarly, Attorney Price never mentioned Ludikowski.

Yorkville further points to the testimony of objector William Schmanski, who opined on the subject of stormwater management, and criticized the Applicant for an alleged failure to comply with the EPA stormwater standard, despite Schmanski's admission that he had never been involved in stormwater management design for a landfill, and never participated in stormwater management review in connection with a landfill. (C14111-12). Nevertheless, he expressed his personal opinion that the Application didn't comply with the EPA standard as he

interpreted it, which was followed by an admission that he had no authority to back up his criticism or his interpretation. (C14114-17). Yorkville's brief simply recites the bare gist of Schmanski's testimony without ever mentioning that his opinion enjoys no authoritative support. Neither the Hearing Officer nor Attorney Price gave any indication whatsoever that Schmanski's testimony demonstrated a failure as to Criterion (ii). Moreover, it is worth noting that IEPA enforces the stormwater management requirements according to its own understanding of them, notwithstanding Mr. Schmanski's opinions on what the standards should be.

Yorkville also points to a public comment submitted by former Mayor Prochaska after the hearings were over, in which Prochaska opined that the truck parking area should have been designed differently, and suggested installation of a system to pump accumulated liquid from the parking area into the leachate storage system. (Yorkville Br. at 53). Notably, however, there is no evidence in the record concerning the advisability of Prochaska's proposed changes. As a result, the post-hearing musings of a former politician with no known engineering credentials on how he feels the truck parking area should have been engineered, or how he would engineer the handling of runoff from the parking area, do not constitute evidence that Criterion (ii) was not met.

Yorkville also points to a permit application to the Army Corps of Engineers ("ACE") which was previously submitted by the Applicant, and then withdrawn, asserting that the withdrawal of that application somehow demonstrated a failure to meet Criterion (ii). (Yorkville Br. 52). Inasmuch as it would be pointless to make revisions to the ACE permit application unless siting was approved, the Applicant reasonably elected not to make the revisions unless or until siting approval was granted, and simply withdrew the permit application. Yorkville's argument that this represents a failure under Criterion (ii) disregards the business reality that incurring costs for an activity that might be moot is a waste of resources. Yorkville further

ignores the fact that the ACE exercises its own independent authority to determine whether Fox Moraine meets the proper standards for stream or wetland impacts, and therefore whether to issue a permit. At this juncture, it would have "put the cart before the horse" to have the Applicant's engineers undertake the analysis and make revisions to obtain a permit that will be moot if siting is not approved. Thus, Yorkville's argument is of no moment with respect to Criterion (ii).

Yorkville attempts to sidestep much of the most powerful Criterion (ii) evidence in the record by simply summarily announcing that expert Devin Moose's credibility was "severely impaired." (Yorkville Br. at 53). Notably, Mr. Moose was deemed credible by both the Hearing Officer and Attorney Price. Yorkville, however, claims Mr. Moose's credibility was impugned because of a supposed encounter between Mr. Moose and outspoken, anti-landfill activist Ron Parish, after which Parish said that he stopped attending the hearings because he felt "threatened" by statements allegedly spoken by Mr. Moose. (Yorkville Br. 55 at n. 23). Yorkville's claim that Mr. Moose's evidence is not credible and should not be considered by the Board because an outspoken landfill opponent says he felt "threatened" by something Mr. Moose allegedly said to him borders on the absurd.

Yorkville also tries to avoid the evidence by claiming that Mr. Moose's answer to a question in the proceedings below, in which he was asked to describe work on a landfill in Kankakee five years earlier, differed in some way from a statement of dicta that appears in the background facts section of a decision by the Supreme Court regarding the Kankakee site (*Town & Country*, 225 Ill.2d 103 (2007)). Again, this is truly another classic example of "grasping at straws" (in fact, microscopic ones in this case). Yorkville states that when Mr. Moose was asked at the hearing whether he "relied on" a 1966 study in his design of the Kankakee site, he responded in the negative, stating that he "relied on [his] own experience." (Yorkville Br. at 54).

In citing the Supreme Court dicta to supply a supposedly contradictory statement, Yorkville quotes the Court as having mentioned in passing that Mr. Moose's design was "also based on a 1966 geologic study..." (Yorkville Br. at 54). Like all competent professional engineers, Moose reviewed all potentially relevant materials available when he was designing the Kankakee site, and, in so doing, he "also" reviewed the 1966 study. But like all professional engineers, Moose relied on his own professional knowledge, experience, and technical expertise in designing the Kankakee facility. Stating that the 1966 study was among the materials he reviewed is not the same as stating that his design "relied on" the 1966 study. Yorkville's assertion that this dicta in a Supreme Court opinion somehow impugns Mr. Moose's credibility is ludicrous.

Moreover, Yorkville also points to another statement of dicta in the Supreme Court decision that "one of the borings extended 50 feet into the bedrock," apparently contrasting it with Moose's negative response when asked whether he had performed "only one boring to bedrock" in Kankakee. However, Yorkville deliberately and in a deceptively calculating manner deletes, using elipses, the rest of the Court's description of the borings, including the Court's statement that an additional five borings extended into weathered bedrock. 225 Ill.2d at 111 (emphasis added).

Yorkville's final attempt to impugn the credibility of Mr. Moose involves the allegation that he "denied ever having worked at the Mallard Lake Landfill...even though his resume lists Mallard Lake among his "Selected Project Experience." (Yorkville Br. 54). Had Yorkville bothered (or wanted) to read Mr. Moose's resume carefully, it would have noted that the section under which Mallard Lake appears on the resume includes a listing of sites regarding which Mr. Moose has performed due diligence work. (C5905). In point of fact, with respect to Mallard Lake, Mr. Moose performed due diligence for a unit of government in connection with its decision on whether to send waste to Mallard Lake, therefore his statement that he did not work

on the Mallard Lake facility was completely accurate. (C11391). The fact that the attorney did not bother to follow up by asking Mr. Moose to explain why Mallard Lake is listed on his resume, reflects on the ineptness of the attorney, not the credibility of Mr. Moose, who was under no obligation to volunteer additional information regarding tangential questions, or questions not asked, in order to assist the attorney. Yorkville's feeble attempts to impugn the credibility of a highly respected landfill expert concede (and actually tell) its fear of the testimony he presented, which was exhaustive in its detail, and was credited by both the City's Special Counsel, Derke Price, and the Hearing Officer.

Moreover, Yorkville also completely ignores the testimony of Dan Drummerhausen, a hydrologist with 11 years of solid waste experience and 14 years of groundwater modeling experience (most involving landfills) (C09873-74), who designed, supervised, and implemented the geologic and hydrogeologic characterization of the proposed site. (C09872). Yorkville conveniently ignores the fact that this respected expert concluded that from a hydrogeological standpoint, the proposed site was the best landfill site he had ever worked on. (C09874; C10158-59). It also ignores the evidence that a substantial amount of in situ clay material is present at the site, and further ignores the presence of end moraine which further decreases the site's already extremely low potential for contamination of the shallow aquifer. (C09876-78). Yorkville further ignores the testimony that when a groundwater impact evaluation of the type approved by the IEPA was performed, the facility easily passed the groundwater model even without a liner system, showing no measurable impact on groundwater (C09893). It ignores the fact that one of the world's top experts on liner design and contaminant transport, Dr. Kerry Rowe, found that the site appeared "well-suited for a landfill development" and that the site's hydrogeology had been "conservatively interpreted for the purposes of performing calculations to assess potential contaminant impact." (C09895).

Having deliberately ignored all of the expert testimony and all of the scientific evidence, Yorkville was left only with the anti-landfill "evidence" presented by persons possessing absolutely no relevant credentials, who relied only upon their own internet research or "common sense" ideas about landfills and their design, i.e. Ludikowski, Schmanski, and Prochaska, discussed above, in opposing landfills as "unsafe" in general.

In stark contrast, the Hearing Officer observed that Drommerhausen's testimony showed that the clay beneath the site "exceeds all IEPA requirements for liner soils in regard to acceptable permeability" (C18524), and credited Drommerhausen's testimony that "this site is the best site from a geological/hydrogeological [basis] that he has ever worked on." (C18524). The City's Special Counsel and Staff credited the testimony of both Moose and Drommerhausen, observing that they had testified credibly that the natural character of the site coupled with the Applicant's design (with conditions) "will meet the requirement to protect the public health, safety and welfare." (C17192).

Finally, it should be noted that as with Criterion (i), Price's proposed conditions make clear that Price did not find the Application failed to meet the criterion without them, as for example, Condition 2.16, which requires that the Applicant shall pay the cost of locating, recruiting, training, and employing a City employee for the landfill, and the cost of providing that City employee with a desk, phone, and internet capabilities. (C17191). Presumably, no one would argue that absent this condition, the Application fails to satisfy Criterion (ii). Similarly, the requirement of Condition 2.25 that all required records be converted to a word-searchable electronic format cannot reasonably be deemed as one without which the Application fails to meet Criterion (ii).

Because the Applicant's evidence regarding Criterion (ii) was both credible and technically comprehensive, and was countered solely by the conjecture of unqualified persons

who presented no scientific evidence in opposition to a Criterion (ii) finding, the City Council's finding that the Applicant failed to meet Criterion (ii) was against the manifest weight of the evidence.

D. The evidence showed that the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property, therefore the City Council's finding on Criterion (iii) was against the manifest weight of the evidence.

As Yorkville observes, an Applicant must do "what is reasonably feasible to minimize incompatibility." *Waste Mgmt. v. PCB*, 123 Ill.App.3d 1075, 1090, 463 N.E.2d at 980 (Ill.App.Ct. 1984).

Yorkville's argument in support of the City Council's finding that Criterion (iii) was not met was based on alleged "conflicting testimony of the witnesses" and "Price's recommendations for conditions," as well as Price's finding that some of the Applicant's witness testimony was not credible. (Yorkville Br. at 57). As noted above, the fact that the Special Counsel for the City was able to come up with recommended conditions does not equate with a finding that the Applicant failed to establish Criterion (iii). Moreover, even though Price discredited part of the testimony of the Applicant's witnesses, he recommended the Council find that Critierion (iii) was, in fact, met, as did the Hearing Officer, who discredited the testimony of every one of the objectors' witnesses, most of which he found to be self-serving at best. (C18528).

As discussed in the Applicant's Post-Hearing brief, there was ample, detailed evidence in support of Criterion (iii). Yorkville's complaints with Criterion (iii) included the fact that after closure, the property would likely be fit for walking, sledding, or other similar activities, rather than "more active uses." (Yorkville Brief at 58). This is hardly a refutation of the standards for Criterion (iii). Yorkville further asserts that the Applicant "failed to provide for the proper landscaping and screening," in sharp contrast with the findings of the Hearing Officer, who

found that the landfill's undulating top and distance from residential uses, coupled with the Property Value Protection Plan, showed that the Applicant had indeed appropriately minimized impact. (C18527). The Hearing Officer further observed that the evidence showed that almost 85% of the land within two miles of the proposed facility was agricultural, and most residential uses within the study area are greater than a mile from the site. (18526). Special Counsel Price also noted that some degree of negative impact is legislatively presumed, and that the statute merely requires that the Applicant minimize impact. He found that the Application does, in fact, minimize impact through use of landscaping, design, and buffering, including the placement of the facility within a larger parcel of surrounding property owned by one of the Applicant's principals (C17198). Accordingly, Special Counsel Price found that Criterion (iii) was met, and recommended a handful of minimal conditions. (C17198).

The evidence presented by landfill opposition groups concerning Criterion (iii) came from witnesses who lacked appropriate relevant experience, failed to conduct legitimate, verifiable investigations and analysis, and largely misunderstood the standards under Criterion (iii). The failure of opponents to present any credible evidence on Criterion (iii) is amply evident in the reports prepared by the Hearing Officer, who has thirty-plus years of experience in landfill siting, and Special Counsel Price, who also, unlike the objectors, possesses an understanding of what an analysis of Criterion (iii) entails.

The Hearing Officer did not waste any space in his report discussing the pointless testimony of Joseph Abel, who is relied upon extensively by Yorkville in its brief. In addition, as Special Counsel Price observed, Abel's testimony accomplished nothing other than to point out that, as the statute already acknowledges, landfills tend to be generally incompatible, and Abel made no mention whatsoever of the degree to which the Applicant did or did not minimize incompatibility, thus, offering no useful evidence regarding Criterion (iii). (Yorkville Br. 58-60;

C17198). In a telling exchange between Abel and Price at the hearing, Price asked Abel whether, because the site was located inside land with which Abel had already testified it was not incompatible, this did not constitute a minimization of incompatibility? Abel denied that it did, and went on to announce, summarily, "you can't minimize it and, therefore, it shouldn't go in." ((C14672-75; C14679).

Yorkville also relies substantially on the testimony of Doug Adams, who testified for the landfill opponents.[3] Special Counsel Price made no reference whatsoever to Adams' testimony, apparently finding it not worth mentioning, and the Hearing Officer only referred to the fact that he found Adams' credibility was "suspect in a number of different aspects" and that he could "give very little weight to his testimony." (C18528). In addition to Adams' obvious credibility problems, as expressly noted by the Hearing Officer (and as impliedly noted by Special Counsel Price, who did not even waste a line of text on Adams), the testimony offered by Adams revealed his failure to review the appropriate materials, in addition to his basic, fundamental misunderstanding of Criterion (iii).

For example, Adams admitted this was his first impact study or analysis, and represented his first landfill study. (C13977-78). He acknowledged he did no statistical analysis to verify his findings, and that he selected two landfills for his study to determine impact on property values in large part because he was already familiar with both of them. (C13978; 13980). He then

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[3] As discussed in Fox Moraine's Post Hearing Brief, Adams' report was never provided to the Applicant until after the Applicant had already rested its case, and was revealed only one day before the witness testified, and indeed, three and a half weeks into the hearing. (C13888-89; C13891). The Applicant accordingly objected to the testimony as unfair because of the untimely tendering of the report (which denied the Applicant an opportunity to review it and assess the validity of its contents). (C13888-89; C13891). The Hearing Officer agreed with the Applicant that if this hearing had progressed in the manner most siting hearings do, it would already have concluded, but he nevertheless denied the objection and allowed Adams to testify concerning his report (C13891). The Applicant accordingly urges the Board to find that Hearing Officer's ruling to admit the testimony was erroneous.

admitted he is unfamiliar with Land Resource Management Plans, and never looked at the Kendall County Land Resource Management Plan. (C13994; C13996). He acknowledged he had no idea what percentage of the land in Fox Township, where the site is located, is agricultural. (C13997). Nevertheless, he testified that the only way to minimize the incompatibility of the proposed facility (i.e. to meet Criterion (iii)) would be to make it smaller or to locate it "in a more rural setting than where it is." (C13912-13; C13920; C14025). Notably, he had no opinion as to how much smaller the landfill should be. (C14030). He acknowledged that of the two landfills he selected for "comparators," the Hillside landfill is not a modern era landfill built under current standards, and that it has a long history of compliance problems, including uncontrolled releases of leachate and landfill gas, and is notorious for its strong odor. (C14008; 13905). When Adams testified about the price differentials he found between houses that were closer to the Hillside landfill and those farther away from it, he was questioned by a skeptical Hearing Officer, who immediately noted serious flaws in Adams' conclusions. The Hearing Officer observed that the higher priced home sales included more personal property, including appliances, than the lower priced homes, and Adams admitted this was true. (C14040-41) The Hearing Officer further pointed out that the higher prices were obtained in spring and summer, and the lower prices were obtained in the winter, which is in keeping with typical sale trends. (C14042-43). The Hearing Officer also pointed out that the lower priced properties were in the less desirable Hillside School District, whereas the higher priced properties were in School District 87; again, the witness admitted this was true. (C14043-44).

Significantly, with respect to the other landfill Adams used as a "comparator" (located near Clinton, Illinois), Adams found there was no correlation between a home's proximity to the landfill and sale prices. (C14027-28; C13904). He opined that the Clinton landfill represents a "predevelopment" example of what is proposed for the Fox Moraine site, and observed that the

owner/operator of the Clinton Landfill is the same as the proposed operator in this case. (C13900; C13897). Thus, his testimony showed that a landfill similar to the one proposed here had no noticeable effect on price.

Yorkville also points to the testimony of Sleezer, a self-described real estate broker and farmer, and former township assessor, as well as an undisclosed member of Alderman Burd's mayoral campaign committee. (C13481-84; C 13487; 13, PCB 4-22-09 p. 18). Sleezer has never been a licensed appraiser, and had never seen a Property Value Protection Plan before he undertook to analyze the Applicant's Plan. (C13517-18; C13525-27).

He acknowledged that his conclusion that the proposed facility would have a negative impact on surrounding property was based solely upon hearsay. (C13529-31). In addition, Sleezer also acknowledged he had a personal, pecuniary interest in the Protection Plan, complaining that it would not cover his own property, which is located north of the proposed facility. (C13514-15). According to Sleezer's analysis, the Applicant's Protection Plan was insufficient because it would not apply to vacant or agricultural land, business property, or commercial property (i.e., his own property would be excluded). (C13489-90). As the Hearing Officer observed, Sleezer's testimony was largely self-serving, and offered little to the process. (C18528). Yorkville's Post-Hearing brief recites Sleezer's opinions about what he thought such a plan should cover, without mentioning that Sleezer had absolutely no basis for even evaluating the plan, never having seen one before. Moreover, Sleezer's personal wish-list of things he would like to see included, most notably his own vacant land, is hardly probative on the subject of Criterion (iii). Like the other non-notables among the landfill opponents' witnesses, Sleezer was not deemed to even merit a mention in Special Counsel Price's report.

Yorkville also points to Bud Wormley, an insurance and real estate broker who, although not an appraiser, offered his own self-serving opinion of surrounding property values, and

projected future growth. (C13564, 13566-67; C13569-71). Like Sleezer, Wormley had a personal, pecuniary interest in the outcome of the siting hearing, inasmuch as he owns property about a mile from the proposed site. (C13585). Wormley proffered his opinions concerning the depreciation of land he would expect to see if the landfill was constructed, but offered no data whatsoever in support of his opinion, describing it as a "subjective issue." (C13593-96; C13619) (emphasis added).

While Yorkville claims Wormley "personally investigated the impact" of a proposed landfill, his testimony revealed that his "investigation" consisted solely of talking to certain property owners in the area, although he could only remember the names of two of the people he spoke to. (C13596-97). Wormley's conclusion that the Applicant failed to meet Criterion (iii) was based on the site's location, specifically, its location within what he believed was "a plan, committed, and invested growth corridor." (C13583; C13611-12). Notably, he also testified that any land use other than agriculture would have a negative impact on land values in the area. (C13618). He further offered, gratuitously, his own anti-landfill opinion that all landfills leak eventually, and that it is just a matter of when. (C13622).

With respect to his claim of land depreciation, he admitted he conducted no investigation or analysis to determine what the percentage or rate of this alleged depreciation was, and knew of no information or sales data that would support his conclusion. (C13602-03).

Although Yorkville states in its brief that Wormley opined on a likely diminishing of 1031 exchanges due to the landfill, when he was asked at the hearing to explain his testimony that Section 1031 real estate exchanges had affected reported real estate values, he acknowledged he did not know how many Section 1031 exchanges there had been within five miles of the proposed site in the prior year, and further admitted he did not look at such data, and did not even know whether such data was in fact even available. (C13591-93).

Finally, Yorkville points to Mr. Schneller, another self-interested, self-proclaimed "expert" who lives near the proposed facility. (C13703). Schneller opined that the facility would pose an environmental risk (C13652), would be a danger to the shallow aquifer from which residents draw their water, and would cause traffic problems (C13656-59), but then later admitted he had no expertise in any of these areas, and that his opinion was not based on scientific data or evidence. (C13683; C13685-89; C13700-01). Schneller opined that the Application did not comply with Criterion (iii) based upon his "highest and best use analysis," and that the only way to "minimize" the landfill's incompatibility was to move it somewhere else. (C13646; C13683). He further opined that the "vast majority of residential developers would not seek to develop properties for residential purposes next to a landfill." (C13693). However, he later admitted he was not familiar with the Fox Run subdivision near Settlers Hill, where the average home price was over $750,000, and that he did not know there were million dollar homes within ready view of the Wheatland Prairie Landfill. (C13693-94). Schneller acknowledged he did not review any of this kind of information in performing his so-called analysis, and admitted he did not do any match compared analysis, explaining that he did not know of "many other landfills that are in a location like this." (C13695).

Schneller further conceded that excluding the opinions of local developers and the personal opinions of people with whom he had conversed, there was no empirical data to support his so-called "analysis." (C13699). His opinion was, he admitted, based on the general "stigma" associated with a landfill, and he claimed (again without support) that the proposed facility would create a stigma on the entire city of Yorkville. (C13687-13690; C13709-01). As with other witnesses, this testimony offers no useful evidence on the subject of whether the Applicant has done what is reasonable to minimize the impact of the proposed facility on property values.

In contrast with the landfill opponents' Criterion (iii) witnesses, whose knowledge and experience concerning landfill impact analysis ranged between slim and none, the witnesses for the Applicant had extensive experience in Criterion (iii) planning and/or impact analysis. Mr. Chris Lannert had, at the time of the hearing, provided testimony regarding approximately 29 solid waste landfill proposals and approximately 17 transfer station sites.(C08144). Mr. Frank Harrison, who also testified for the Applicant, is an appraiser and land use consultant who has worked in the field for 36 years, holds the MAI and SRA designations from the Appraisal Institute, has taught appraisal for 29 years, has written a book on the valuation of complex properties, is the past chairman of the Illinois Real Estate Appraisal Board, and helped create the criteria and standards that govern the licensure, certification, and accreditation of real estate appraisers in Illinois. (C08571-74).

In attacking the testimony of Mr. Harrison, Yorkville resorts to the same kinds of gross misrepresentations it made concerning the testimony of Mr. Devin Moose. For example, Yorkville "quotes" Harrison as having testified that "much of the growth and development around Settler's Hill landfill is industrial in nature." (Yorkville's Br. 61). According to Yorkville, the reference by Harrison to the presence of industrial development near the Settler's Hill landfill "was in complete indifference to Yorkville's residential growth." (Yorkville's Br. 61). Interestingly enough, Yorkville avoids mention of Harrison's testimony about the upscale Fox Run subdivision, and nearby golf course, that have been developed very near the Settler's Hill landfill. (C8691-92).

Oddly enough, although both the Hearing Officer and Special Counsel Price recommended that the Council find Criterion (iii) had been met, Yorkville nevertheless announces in its brief that "[g]iven the hearing testimony and Price's and the Hearing Officer's recommendations, it was well within the manifest weight of the evidence for the City Council to

determine that Fox Moraine had not met its burden on the first part of this criterion." (Yorkville Br. 66). According to Yorkville, evidence that there has been some residential growth in the area around the proposed landfill means that the City Council was justified in finding that "the landfill is inconsistent with the character of the surrounding land." (Yorkville Br. at 66). Once again, Yorkville's assertion entirely misses the point of a Criterion (iii) analysis concerning incompatibility: has the Applicant done what is reasonably feasible to minimize incompatibility? *Waste Mgmt. v. PCB*, 123 Ill.App.3d 1075, 1090, 463 N.E.2d at 980 (Ill.App.Ct. 1984). Here, the evidence showed that it did, in fact, do what was reasonably feasible to minimize incompatibility. Yorkville's notion that the Applicant simply needs to relocate the landfill to "someplace else" that is "more rural" than this predominantly agricultural area is not a reasonably feasible way to minimize incompatibility, and therefore cannot constitute a basis for finding that Criterion (iii) was not met.

With respect to minimizing the landfill's effect on property values, even accepting as true Yorkville's claim, which the Applicant disputes, that "Harrison examined only the impact on development surrounding landfills at those landfills' 'midlife' rather than the beginning" this would not, as is argued, allow the City Council to find the Applicant failed to minimize the proposed landfill's effect on property values. (See Yorkville Br. 67). Even the opponents' own witness, Adams, testified that he had found that at another landfill developed in a rural area, the so-called "Clinton landfill," he could find no correlation between proximity to the landfill and sale prices. (C14027-28; C13904). Here, not content to rely on the data suggesting no impact on home prices, as was confirmed by the opponents' own witness, the Applicant has put in place a Property Value Protection Plan whose terms are more generous than most, extending out a full mile from the landfill, and beginning with the date on which the Application was first filed.

Finally, Yorkville claims that the City Council's decision was not against the manifest weight of the evidence because "multiple FOGY witnesses testified that Fox Moraine had not minimized the impact on the value of surrounding properties," however as noted above, none of the FOGY witnesses had the expertise required to render the opinions they offered, and proffered opinions based largely on hearsay and speculation, which were motivated in large part by their own pecuniary interest. Notably, none were found credible by the Hearing Officer or Special Counsel Price. Although, as Yorkville points out, Price also found Harrison and Lannert's testimony that the landfill would not affect property values was not credible, he did not impugn their credibility generally, but simply declined to credit those particular conclusions, unlike the global lack of credibility found by the Hearing Officer with respect to the objector witnesses.

Moreover, without crediting any testimony whatsoever by the objector witnesses, Price did credit the testimony of Harrison and Lannert with respect to the buffering of the property, and the property protection plan, leading to his decision to recommend that the City Council find that Criterion (iii) was met, with a small handful of proposed conditions, including, for example, a requirement that the Applicant provide the City with copies of all records relating to appraisals and payments under the protection plan, and a superfluous requirement that the Applicant "comply with all City ordinances in the design and construction of the office building." (C17198).

For all the reasons cited above, and as further discussed in more detail in the Applicant's initial Post Hearing Brief, the City Council's decision was against the manifest weight of the evidence.

E. The evidence showed that the plan of operations was designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents, therefore the City Council's finding on Criterion (v) was against the manifest weight of the evidence.

Yorkville falsely states that Special Counsel Price "found that Fox Moraine had not met this Criterion." (Yorkville Br. at 69). Once again, Yorkville blatantly misrepresents the record to this Board. The complete text of Special Counsel Price's finding on Criterion (v) is as follows:

> The testimony of Mr. Moose on matters related to this criterion was credible. As modified by the various conditions set forth above in Criterion 2 and below for Criterion 6 (concerning roadway improvements and routing), the plan of operations for the facility would be designed to minimize the danger to the surrounding area from fire, spills or other operational accidents.

(C17199).

Clearly, Price's report does not include a finding that Fox Moraine "did not meet this Criterion." As Price noted in his report, a siting authority may "impose such conditions of approval as may be reasonable and necessary to accomplish the purposes of Section 39.2 and as are not inconsistent with regulations imposed by the Pollution Control Board." (C17191). Notably, some of the conditions require the Applicant to deposit large sums of money with the City (*see, e.g.*, Conditions 3.6, 6.1), provide the City with preferred pricing for waste disposal (Condition 1.1), and pay for the recruitment, training, and salary of a City employee, as well as furniture, internet access, and a telephone (Condition 2.16). Price's use of such conditions proves conclusively that his report did not find that the Applicant filed to meet its burden on the statutory criteria without the conditions, and that the conditions are necessary to meet the 39.2 criteria. (C17199). The Hearing Officer, likewise, found that the Applicant met its burden as to Criterion (v). (C18528). Moreover, Price accepted, without any qualification whatsoever, the credibility of Devin Moose, the Applicant's witness concerning Criterion (v). (C17199). The Hearing Officer treated Criteria (ii) and (v) together, and credited the testimony of Fox Moraine's witnesses Drommerhausen and Moose.

Counsel for Yorkville asserts, at page 69 of Yorkville's brief, that the Applicant's failure to meet Criterion (v) arose in part from its failure to propose the leachate containment system

suggested by one Alan Green during post-hearing public comment, although Mr. Green acknowledged that his comments were made solely as a laymen, with absolutely no experience with landfill design. (C15918).

Although Yorkville opines that the PCB may not reverse merely because it might have drawn different conclusions, the Board is possessed of technical expertise and knowledge, as acknowledged by the Supreme Court in *Town & Country*, that allows it to review the evidence in the record and determine whether the siting authority's conclusion is against the manifest weight of that evidence. As noted above, the Board is charged with discerning between credible evidence that arises from experience and expertise, and that evidence which has no legitimate, credible basis. Thus, the argument by Yorkville's counsel that the leachate containment system proposed in the Application, which was designed by a highly experienced landfill design engineer, is deficient because it differs from one proposed by a self-proclaimed laymen with no landfill experience, is nothing short of preposterous.

The record makes very clear that the Applicant met its burden with respect to Criterion (v), and that the City Council's finding to the contrary is against the manifest weight of the evidence.

F. The evidence showed that the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows, therefore the City Council's finding on Criterion (vi) is against the manifest weight of the evidence.

The evidence presented by opponents focused solely on the notion that a landfill would generally increase traffic in and around Yorkville and surrounding communities. Thus, they failed to address the factors important in assessing this criterion (i.e., whether the designated patterns to and from the proposed facility were formulated in a way that will minimize the facility's impact on existing traffic). The gravamen of the opposition testimony was that any

increase in traffic, even if that increase is less than that which would arise from alternative uses for the property, would be unacceptable.

Both Special Counsel Price and the Hearing Officer acknowledged that Criterion (vi) contemplates there will be a traffic impact, and that the statute does not require no impact. (C17199; C18529-30). Specifically, Price found that the evidence presented by the Applicant (through Werthman) was credible, whereas that presented by objectors (Coulter and Corcoran) was not based on valid or acceptable methods "for this or any other development," and was in fact illogical, inasmuch as it assumed harm when roadways were utilized for their expressly intended purposes as truck routes. (C17199). The Hearing Officer concurred that the Applicant met Criterion (vi), although he proposed that in the future, if and when certain proposed roadways are constructed, the traffic plan should be altered so that traffic will not pass through downtown Yorkville or Plainfield. (C18530).

Yorkville's brief asserts that the Applicant failed to meet Criterion (vi) because Yorkville's experts had uttered the kinds of conclusions rejected by both the Hearing Officer and Special Counsel Price as illogical, such as their finding that use of existing truck routes for truck travel would be injurious (Yorkville Br. 70), that use of Route 47 (a truck route) would make it hard for the City of Yorkville to promote residential development and a pedestrian-friendly area along that truck route (*id.*), that the landfill would increase truck travel along truck routes IL 47, 71, and 126 (Yorkville Br. 71), as well as complaints about the supposedly flawed methodology employed by the Applicant's expert, Michael Werthman, a registered professional engineer with 17 years of traffic and transportation experience, who has worked on approximately 750 different projects, including residential, commercial, and retail, and involving distribution, manufacturing, and industrial facilities, and has extensive experience with solid waste projects.(C09038-39; 09041-42).

The conclusions that the City relied upon in finding Criterion (vi) was not met were, according to its brief, those rendered by Brent Coulter and Steve Corcoran. Coulter's testimony did not focus on whether the Applicant's traffic design would minimize adverse traffic impact, as set forth in the actual statutory criterion, but, instead, focused on the physical location of the landfill itself. (C13124-25). Although Coulter focused on his belief as to the purported negative planning implications associated with the proposed landfill's location, he acknowledged that he has no experience or expertise as a planner, and is not a member of the American Institute of Certified Planners or the American Planning Association. (C13157-59; C13121-22). Coulter admitted that although he initially claimed the proposed routes would not meet minimum state truck standards, he never actually evaluated the routes proposed to be used by trucks going to and from the facility, to identify the supposed portions of the routes that would allegedly not meet minimum state truck standards. (C13079). He further agreed he had no data to support his conclusion that truck traffic from the landfill would pose an enhanced or increased danger to anyone along any portion of the access routes. (C13109-10). Coulter agreed that if the subject property were developed into a regional distribution center, a manufacturing facility, or even a large residential subdivision, it would create greater traffic problems than if developed as a landfill. (C13088).

Corcoran, who was retained by the Village of Plainfield to comment on Criterion (vi), focused almost exclusively on the impact of the proposed landfill on Plainfield, a village located 16 or 17 miles from the proposed site. (C13807, C13810, C13817). He acknowledged that the farthest distance impacts associated with a landfill are recognized was two miles away, whereas his study regarding the impact on an area 16 to 17 miles from the proposed site. (C13866-67). Corcoran acknowledged that his assessment of Criterion (vi) did not look at the potential impacts of alternate routes or traffic patterns. (C13837-38). He admitted that he agreed with Werthman's

conclusion that the transport routes proposed by the Applicant would have minimal impact on downtown Yorkville, and acknowledged that in terms of developed land use, landfills are one of the lowest per acre traffic-generating land uses. (C13856; C13819-40).

Fox Moraine's evidence consisted of an in-depth, scientific study of the existing roads and proposed improvements, and showed that traffic patterns to or from the facility were designed to minimize the impact on existing traffic flows (the standard under Criterion (vi)), whereas the opponents' witnesses simply opined that the landfill should be built someplace else, and in the case of Corcoran, demonstrated only that a village located 16 to 17 miles away wanted to ensure that trucks associated with the landfill would not travel on designated state truck routes running through it.

Both the Hearing Officer and Special Counsel concluded that Criterion (vi) was met, but that minimal conditions should be imposed. Those conditions consisted of a requirement that the Applicant deposit the sum of $100,000.00 with the City toward the cost of the anticipated roadway relocation and construction (Condition 6.1), that all perimeter roads be covered in asphalt (Condition 6.2), that in the future, when a bridge is built on Eldemain Road, trucks should use that bridge (Condition 6.3), and that the City should be given the right to use the scale at the landfill to determine if trucks are overweight (Condition 6.4). As noted above, the kinds of conditions proposed by Price make very clear that the conditions were not imposed because the Application failed to meet the statutory criterion without them.

The Hearing Officer expressly remarked on the number of ways in which the Applicant's witnesses showed minimization of impact, including numerous safety improvements to Route 71, as well as design features that minimize the possibility for mud to be tracked onto the roadway, and the plan to allow semi-trailers to enter the facility outside normally operating hours for storage so as to minimize truck traffic on the roadway during peak traffic hours. (C18529-

30). He concluded that the Applicant had done all it could to minimize traffic under the current system, although as mentioned above, he proposed that additional conditions to come into play in the future, if roadway improvements are made. (C18530).

Although Yorkville correctly observes that the Board is not free to reverse merely because the local siting authority credits some witnesses and not others, the Board is expected to exercise its technical expertise in reviewing the evidence, and can not accept facially illogical conclusions by so-called experts who utilize clearly flawed methodology, and apply the wrong standard when assessing an Application for the statutory criteria. Because the evidence here very clearly showed that the Applicant demonstrated that the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows, the City Council's decision to the contrary is against the manifest weight of the evidence.

G. The City Council's finding on Criterion (viii) is against the manifest weight of the evidence.

As discussed at great length in the Applicant's Post-Hearing Brief, the evidence showed that the County's Solid Waste Plan is facially ambiguous. The ambiguity was recognized by the Hearing Officer, who observed that such ambiguity should be construed against the drafter. (C18532). Special Counsel Price observed that based on the evidence, it was doubtful whether the County Board ever formally adopted the May 2006 Amendment to the County Solid Waste Plan, which the County alleges would, if valid, allegedly prohibit the proposed location (because the County sought to appropriate to itself the sole right to site a landfill within its confines, denying all municipalities the right to site a landfill).

Despite Yorkville's protestations in its brief that the Applicant's interpretation of the County Plan is "strained" or "tortured," the evidence presented by the Applicant came from a highly experienced expert, Mr. Walter S. Willis, who has twenty years of experience doing solid waste planning, both in Illinois and throughout the country, who has been a Project Manager

responsible for developing Solid Waste Management Plans in 38 of Illinois' 102 counties. (C11745; C11716). Mr. Willis was highly qualified to interpret and opine about the language of the Plan, and to assess its validity in the context of Section 39.2, having begun his career working for the Illinois EPA in the Solid Waste Management Section, and having worked on the first available solid waste disposal capacity report. (C11744). In fact, Mr. Willis originated the database for the Senate Bill 172 sites, and was involved when the Solid Waste Planning and Recycling Act was first being considered. (C11744).

He testified on behalf of the Applicant concerning the ambiguity of the County's plan, its inconsistency with the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, and the County's failure to properly adopt its amended plan.

In summary, Mr. Willis testified that in May of 1995, the County Board adopted its Phase II Solid Waste Management Plan, at which time the County held extensive public hearings, and received extensive input and involvement from its Environmental Task Force. (C11748). Five years later, in July of 2000, the first Five Year Update was completed. (C11748-49). In February of 2005, the Ten Year Update was completed. (C11749). Mr. Willis explained that the County Plan therefore consists of the 1995 Plan and the 2000 and 2005 updates, and that the earlier Plan has not been superseded by later amending documents. (C11750). Rather, the Five Year Update, Ten Year Update, and all later amendments supplemented the existing plan substance; they did not repeal previously-adopted portions of the Plan. (C11763-64).

He testified that the County's 2005 Plan Update expressly provides for intergovernmental cooperation between the County and municipalities in addressing solid waste issues (C11986), and clearly contemplates municipal siting of landfills, inasmuch as it states: "If the County is not the appropriate siting authority, a Host Community Agreement must be made with the siting authority." (C11756; C12003) (emphasis added). The County has never removed this language

from the Plan. (C11757) (emphasis added). The Plan therefore requires that if an Applicant sites a landfill in an incorporated area of the County, it must have a Host Agreement with the municipality wherein it is sited. (C11758). Here, Willis testified, the Applicant did just that on September 26, 2006, inasmuch as the Applicant and the City entered into a Host Agreement which provides that: "Fox Moraine LLC will offer its use of this facility as the host for those residential recycling, reclamation and/or reuse activities as defined by Section 3.380 of the Act which may from time to time be planned and conducted by the City." (C11758-59) Accordingly, Willis noted that such a Host Agreement is entirely consistent with the requirement of the County Plan. (C11759).

Willis further explained that the County Plan provides that a Host Agreement may, as was done here, be used as an incentive to compensate the host community and other affected communities for potential environmental, infrastructure, economic, aesthetic and other impacts within their jurisdiction. (C11760-61).

He explained that in March 2006, when Kendall County was negotiating with Fox Moraine concerning the potential siting of the landfill (at a site that was located in unincorporated Kendall County at the time), the County Board passed a resolution stating that it was appropriate to consider development of a solid waste disposal facility within the County, demonstrating by its conduct that the County had concluded the subject property was a feasible site for a landfill. (C11749; C12971-72). That subject property was, however, subsequently annexed into Yorkville, as is permitted under the County Plan. (C11743).

In September 2006, the Applicant entered into a Host Agreement with the City of Yorkville, as envisioned and required by the County Plan, and in December 2006, the Applicant filed its Application for siting approval. (C11749; C11763). Thus, the evidence shows that the subject property on which a landfill facility was proposed to be sited was located in

unincorporated Kendall County at the time it was identified as such a site, and it was subsequently annexed into the City, and became the subject of a Host Agreement between the Applicant and the City. The evidence therefore showed that the proposed facility is consistent with the County Plan.

On May 4, 2006, the County Board passed Resolution No. 06-11, which the County has interpreted to deny all municipalities the right to act as local siting authorities. Mr. Willis testified that if the Resolution actually had that effect, it would be in direct and unmistakeable conflict with the planning principles employed by the County since at least 1995. (C11737). He went on to note that although the County interprets the May 4th Resolution as effectively stripping municipalities of their right to act as local siting authorities, the legislature clearly and expressly authorized both counties and municipalities to act as local siting authorities for solid waste facilities. (C11849)

While the County argues that the May 4, 2006 resolution was intended to prevent Kendall County's municipalities from exercising their statutory siting jurisdiction, Mr. Willis testified that the language of the resolution was not even effective at accomplishing that. Using an accepted dictionary definition of the word "located," Willis concluded that the proposed landfill was in an unincorporated area of the county at the time it was located and identified as a potential landfill site. (C11755-56; C11762-63). Willis opined that the application was therefore consistent with the "plain and ordinary language of the plan." (C11755) It is a well-settled rule of statutory construction that one cannot look to intent in derogation of plain and ordinary language.

As our Supreme Court has explained, where a term is not defined within a statute, it must be assumed that the legislature intended the term to have its ordinary and popularly understood meaning. *Landis v. Marc Realty, L.L.C.*, 2009 WL 1416074, *3 (Ill. May 21, 2009). In such situations, "[i]t is appropriate to employ a dictionary to ascertain the meaning of an otherwise

undefined word or phrase." *Id.* Moreover, where there are alternative dictionary definitions of a word in a statute, each of which can make sense within the statute, the statute is deemed ambiguous. *Id.* at 5. In construing a statute (which the high court expressly observed to include municipal ordinances in *Landis*), an ambiguous term is to be given its broadest, not its narrowest, meaning. *Id.*

Here, Willis appropriately utilized a dictionary to determine the meaning of the undefined term "locate," and assigned that term its broadest and most ordinary meaning, not its narrowest meaning, whereupon the Application is seen to be consistent with the County Plan. It. is also well established (as observed by the Hearing Officer in his Findings and Recommendations) that ambiguities in language are to be resolved against the drafter. (C18532).

Since the comments of a county attorney do not constitute evidence, Mr. Willis' conclusion regarding Fox Moraine's consistency with the plain and ordinary language of the Plan, including the May 4, 2006 Resolution, was unrebutted by any other witness. The testimony of Willis further showed that the May 2006 Update to the County Plan was never approved by the County Board. (C11770-72). This testimony was never rebutted by the landfill opponents.

Kendall County Board Chairman, John Church, testified that the County's Plan has always been updated at five year intervals, in accordance with State law, and that until the spring of 2006, the County had never amended its Plan other than on the five-year schedule. (C12967-68). Church admitted that in March 2006, the County was approached by Fox Moraine about siting the proposed facility, at a time when the subject property was located in unincorporated Kendall County, and that the County then passed an ordinance so that it could consider siting a landfill there. (C12971-72).

Church testified that at the March 2006 meeting concerning discussions about the potential siting of the Fox Moraine landfill, the City asked whether it could be part of the siting

process if an application was filed, and the County's legal representative stated that the siting authority would be whichever entity governed the property where it was located. (C12976-77). Church acknowledged that after the March 2006 meeting, the County and City "left the meeting in very general terms talking about the issue that we both knew was coming up, a potential landfill application...As we left the meeting, it is my recollection that as we laid those options out, if the City wanted to come back to us to work with us...they would contact us. They also, of course, had their options of working with the applicant directly." (C12981-82).

Church confirmed that a Host Agreement for a non-hazardous solid waste facility allows the siting authority to garner revenue from a landfill, that the County had entered into such a Host Agreement with Waste Management, a competitor to Fox Moraine, and that the County was also involved in the process of negotiating a second such agreement with another waste disposal company. (C12924-25). Church acknowledged that if the County could prevent the City of Yorkville from siting a landfill, the County could, in turn, effectively ensure that it, alone, could collect revenue for a landfill. (C12925-26).

With respect to the contents of the 2006 Amendment, Church himself, as a representative of the County Board, testified that the full and complete text of the 2006 Amendment represents the controlling law regarding landfill siting in Kendall County, and that the previously existing language of the Plan (which provides, for example, that if a landfill is to be sited in a municipality, the applicant should enter into a host agreement with that municipality) was never deleted from the 2006 Amendment. (C12929-31) (emphasis added).

Church testified that the May 2006 Resolution provides that "nothing herein shall be deemed by potential applicants, Kendall County, this Board or other agencies or the public to indicate that this...Board has adopted any position on the location of a non-hazardous waste landfill in Kendall County."(C12922-23). Notably, Church never refuted Willis's testimony that

the May 2006 Amendment that purports to amend the County Plan was never formally adopted by the Board. Thus, Willis' testimony is the only record evidence on this subject.

Although Yorkville has its own interpretation of the ambiguous County Plan, evidence at the hearing established that both the County Plan and the purported May 2006 Amendment to the Plan expressly provide that siting may be within a municipality: "If the County is not the appropriate siting authority, a Host Community Agreement must be made with the siting authority." (C11756). Moreover, the Plan does not prohibit the annexation of property, as occurred here, and, in fact, allows annexation. (C11743; C11823). Moreover, the testimony by Mr. Willis that the May 2006 Amendment was never formally adopted by the County Board was never refuted by the County, although the Board's Chairman, Mr. Church, testified at the siting hearing, and had every opportunity to refute it. There is, therefore, no evidence in the record to show that the May 2006 Amendment was ever actually made a part of the Plan.

Perhaps most importantly, the 2006 Amendment is internally inconsistent, inasmuch as it expressly authorizes a municipality to enter into a Host Agreement when a landfill is located within an incorporated area of the County, and simultaneously announces (under the interpretation propounded by the County) that no landfill may be located in an incorporated area of the County. Because the 2006 Amendment is ambiguous, it should be construed against the drafter, in this case the County.

Finally, if, in fact, as urged by the County, the County Plan strips all municipalities of the right to act as local siting authorities, then criterion (viii) does not even apply in these proceedings because the County's Plan is not "consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act." 415 ILCS 5/39.2(a).

The Hearing Officer and Special Counsel both observed that Criterion (viii) presents a legal question. As such, the Board need not defer to the City Council's legal analysis. The Hearing Officer observed that the County Board could have avoided the ambiguity of its resolution by better drafting, and noted that courts generally interpret ambiguity against the drafter. (C18532).

Special Counsel Price opined that Willis's testimony set forth a *prima facie* interpretation of the Plan and also arguments for consistency with the Plan as written. (C17200). He further observed that the Record contains evidence and testimony to indicate that the County may not have adopted the revisions to its Solid Waste Management Plan in accordance with statutory requirements, which was never countered by opponents. (C17200) (emphasis added). Price went on to find that the Record "offers no support for the County's closing argument at the hearing: While the County may not agree with the petitioner's argument, the County did not come forward with facts or evidence to support the allegations made in its attorney's closing argument concerning Mr. Willis." (C17200). Ultimately, Special Counsel Price encouraged the members of the City Council to undertake their own legal analysis of whether the Application was consistent with the Plan's requirements. (C17200).

For the reasons set forth above, opponents failed to present evidence that the Applicant did not meet any applicable requirements of Criterion (viii), and therefore the City Council's finding on Criterion (viii) is against the manifest weight of the evidence.

H. The City Council's error regarding Criterion (ix) is conceded by Yorkville. Yorkville claims that its attorneys didn't understand roman numerals, and thought that "ix" meant 10. (Yorkville Br. 45, 77).

Since Yorkville has admitted, indeed conceded, that Criterion (ix) was met, this point need not be addressed.

I. The City Council's finding as to the so-called "Tenth Criterion" is against the manifest weight of the evidence.

Yorkville erroneously claims that the Applicant "withheld key information regarding the operating experience of the proposed landfill's owner and operator" and "misrepresented the operating history of Fox Valley Landfill Services." (Yorkville Br. 77). Inasmuch as the evidence established that the proposed operator, Fox Valley Landfill Services, was a newly-formed entity which was created to operate the proposed landfill, Yorkville's allegation is yet another blatant falsehood. (*See* C10190). Testimony established that upon issuance of a permit by the State, FVLS would be responsible for compliance matters at the facility. (C10323-25). As a new entity, FVLS had no record to examine, and thus there could be no misrepresentation of its record, which was acknowledged not to exist.

The evidence established, however, that FVLS owner/member PDC has a solid record of environmental compliance. Mr. Ron Edwards, who testified for the Applicant concerning "Criterion 10," is a certified landfill operator in Illinois with more than 23 years of experience in the management of solid waste, and as noted above, is a manager at Fox Valley Landfill Services ("FVLS"). Edwards is also the vice-president of Peoria Disposal Company ("PDC"), which is an owner/member of FVLS, and Edwards has served as vice president of landfill operations for five landfills in Illinois. (C10174-75). He is a past chairman of the National Solid Waste Management Association, Illinois Chapter, Landfill Technical Committee to assist the IEPA and the Illinois Pollution Control Board in the development of solid waste landfill regulations for Illinois. (C10175-76).

Mr. Edwards, again, manager at FVLS, testified that PDC, an owner/member of Fox Valley Landfill Services, has a broad range of experience in the field of waste management operations, and has been in the waste disposal and management business for 90 years. (C10176-180). PDC operates six solid waste landfills, and its affiliates include a number of collection and transportation companies, as well as PDC Laboratories, Inc., in Peoria, which provides local

drinking water and waste water testing services to many municipalities in the State of Illinois. (C10179-80; C10191). Another PDC affiliate (PDC Technical Services) also services numerous municipal clients. (C10180).

PDC's record for environmental compliance reveals that during its 90 year history of waste management, it has received only minor violation notices, and that during that time, there have been only six violations that resulted in penalties, and one Supplemental Environmental Project that was agreed to without a stipulation of a violation. (C10193-C10200). The evidence showed that since 1990, PDC has had 350 inspections of its facilities without a violation. (C10457).

Accordingly, the evidence showed that the entity that would be operating the landfill facility, FVLS, is a new company with no existing operating record of its own, but which will draw upon the expertise of one of its owners, PDC, which has demonstrated a strong history of compliance in operating landfills, particularly during the last two decades. There was, therefore, no relevant and reliable evidence presented at the hearing that would justify denial based on "Criterion 10." Yorkville's claim that the City could deny siting based on "Criterion 10" because it didn't know the identities of the investors in Fox Moraine is disingenuous at best, since the evidence clearly established who the operator would be, FVLS, and that those who would be responsible for FVLS's operating activities had a strong record of environmental compliance.

Both the Hearing Officer and Special Counsel addressed the "Criterion 10" question of operating history in their discussions of Criterion (ii). The Hearing Officer observed that although Fox Moraine and the proposed operator, FVLS, have no operating histories, the operating history of the related LLC's were discussed in depth. (C18524). Although he concluded that none had exemplary histories, he observed that there had been few violations in the last ten years. (C18524).

Special Counsel Price opined that Edwards' testimony "highlighted the paradox that the more experienced the operator is, the more of a history of regulation and enforcement there will be to judge that operator upon." (C17192). He recommended that the City find "Criterion 10" was met, and included a number of conditions designed to ensure there would be appropriate oversight by qualified individuals, at Fox Moraine's expense. (C17192-97). Clearly, conditions designed to ensure adequate oversight are not necessary to establish that the operator does not have a past history that makes it unsuitable, as provided for under the so-called "Criterion 10."

In summary, there is simply no competent evidence in the record to support denial based on any criterion.

J. Yorkville cannot rely upon unsworn public comment to refute scientific evidence subjected to cross-examination.

Under 35 Il1.Adm.Code §101 .628(b), public comment must be received and considered, but the rule cautions that, "Written statements submitted without the availability of cross-examination, will be treated as public comment in accordance with sub-section (c) of this section and will be afforded less weight than evidence subject to cross-examination." The principle that public comments are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination, and should accordingly receive a lesser weight, has been consistently endorsed by this Board. *See, e.g., City of Geneva v. Waste Mgmt. of Illinois,* PCB 94-058, 1994 WL 394691, *12 (July 21, 1994); *Donald McCarrell and Ann McCarrell v. Air Distribution Assoc., Inc* ., PCB 98-55, 2003 WL 1386319, *3 (March 6, 2003); *Landfill 33, Ltd . v . Effingham County Board and Sutter Sanitation Services, Stock & Co.*, PCB 03-043 & 03-052, 2003 WL 913440, *8 (Feb. 20, 2003).

In determining whether a decision is against the manifest weight of the evidence, the Board is not authorized to disregard an applicant's expert evidence or the absence of any credible opposition evidence in making its decision, and may not base its decision on speculation, or on

unreliable or incompetent evidence. Rather, to rule against the Applicant on any of the substantive siting criteria, the Board must find competent rebuttal or impeachment evidence in the record. *Indus. Fuels & Res. Illinois, Inc. v. PCB*, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist. 1992)(emphasis added). Once an applicant makes a *prima facie* case on a criterion, the burden of proof shifts to the opponents to rebut the applicant's case. Claims by opponents that simply disagree with the Applicant's conclusions are insufficient and, in fact, prejudicial if not supported by competent evidence. *People v. Nuccio*, 43 Ill.2d 375, 253 N.E.2d 353 (1969).

Here, the evidence was overwhelming that the Applicant met all the siting criteria, but was denied siting approval anyway. The Board can, and should, correct the local siting authority's erroneous decision, which was clearly against the manifest weight of the evidence.

CONCLUSION

As is often the case, the residents of Yorkville, along with a handful of itinerant anti-landfill activists, began an anti-landfill crusade almost as soon as word got out that a landfill might be in the City's future. Seeing an opportunity to further their own political ambitions, local politicians began to court the anti-landfill crowd in hopes of securing votes and power in the Spring 2007 election, and unbeknownst to Fox Moraine, the campaign of Mayoral Candidate Valerie Burd received contributions and support from anti-landfill activists. Other candidates for the office of alderman publicly proclaimed their intent to defeat the landfill, and were elected on that basis. The Council thereby became stacked with members who had promised to vote "no" on Fox Moraine's Application, and as the City would later state in a verified pleading filed in Circuit Court in another case, the landfill at issue here was "the biggest issue[] in Yorkville in the past 20 years" and was "the primary issue in the City election and change in administration." (FM Ex. pp. 29, 30, PCB 4-22-09 pp. 51, 52).

Opponents, through their unruly and disruptive behavior, transformed the siting hearings into an ugly circus. Aldermen were intimidated, and subjected to anonymous telephone threats. Crowds repeatedly interrupted the presentment of Fox Moraine's case with taunts and jeers. Lost in this melee was the evidence.

That evidence showed that the site for which Fox Moraine sought approval was described by the highly talented and experienced landfill engineers who worked on the project as perhaps the best they'd ever seen, from a geologic and hydrogeologic standpoint. It showed that the design proposed for the facility was state-of-the-art, relying on the latest technology; that a Property Value Protection Plan that exceeded the protections offered by most such plans would be offered; along with nearby roadway improvements. A series of highly experienced, talented experts in every relevant field addressed each and every one of the statutory siting criteria in exhausting detail. Landfill opponents, in contrast, presented witness after witness who lacked both the relevant experience and knowledge to offer their opinions, and largely misunderstood the statutory criteria.

When the time came for the Council to deliberate and vote, they were left without the guidance of either the highly experienced Hearing Officer who had shepherded the process, or the Special Environmental Counsel who had participated in the hearings for the City, both of whom had prepared detailed reports that recommended the Council approve siting, albeit with conditions. Aldermen expressed confusion and dismay that they had no expert guidance, and that they had received the lengthy advisory reports from both the Hearing Officer and the Special Counsel, along with an advisory report prepared by the attorney hired by Mayor Burd, just before the meeting began, leaving no time for review. They were told by the Mayor that they didn't need any guidance, that they should rely on their own independent research, and that they

should reach a decision without worrying about whether they'd had time to review the recommendations of the Hearing Officer or Special Counsel.

Ultimately, the Council voted to deny siting, without addressing each statutory criterion, and authorized the City's attorney to draft a resolution that would make the kind of findings that would allow their decision to withstand an appeal. The City Attorney later came up with a resolution, although it was never presented to the Council for review and approval.

The Council's vote to deny siting was clearly against the manifest weight of the evidence, which established that all of the statutory criteria were met. In addition, the process to which Fox Moraine was subjected was fundamentally unfair, inasmuch as Fox Moraine was deprived of the opportunity to have its Application decided by an impartial decisionmaker based upon the evidence.

WHEREFORE, Petitioner Fox Moraine requests that the Board apply its technical expertise to review the evidence in the record, and enter an order finding that the City Council's decision was against the manifest weight of the evidence and/or that the proceedings in this case were fundamentally unfair.

Dated:	July 31, 2009		Respectfully submitted, Fox Moraine, LLC /s/ Charles F. Helsten One of its Attorneys

Charles F. Helsten Hinshaw & Culbertson LLP 100 Park Avenue P.O. Box 1389 Rockford, IL 61105-1389 815-490-4900	George Mueller Mueller Anderson, P.C. 609 Etna Road Ottawa, Illinois 61350 815-431-1500

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on July 31, 2009, she served a copy of the foregoing upon:

Via E-Mail – hallorab@ipcb.state.il.usl Bradley P. Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center 1000 W. Randolph St., Ste. 11-500 Chicago, IL 60601	Via E-Mail – dombrowski@wildman.com Leo P. Dombrowski Wildman, Harrold, Allen & Dixon 225 West Wacker Dr. Suite 3000 Chicago, IL 60606-1229
Via E-Mail – jharkness@momlaw.com James S. Harkness Momkus McCluskey, LLC 1001 Warrenville Road, Suite 500 Lisle, IL 60532	Via E-Mail – eweis@co.kendall.il.us Eric C. Weiss Kendall County State's Attorney Kendall County Courthouse 807 John Street Yorkville, IL 60560

Via E-mail.

/s/ Nicola Nelson

HINSHAW & CULBERTSON LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4900