

ILLINOIS POLLUTION CONTROL BOARD  
October 1, 2009

FOX MORaine, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 07-146
	)	(Pollution Control Facility
UNITED CITY OF YORKVILLE, CITY	)	Siting Appeal)
COUNCIL,	)	
	)	
Respondent,	)	
	)	
KENDALL COUNTY,	)	
	)	
Intervenor.	)	

RICHARD S. PORTER OF HINSHAW & CULBERTSON, LLP AND GEORGE MUELLER OF MUELLER ANDERSON PC APPEARED ON BEHALF OF PETITIONER;

JIM MCCLUSKEY OF MOMKUS MCCLUSKEY LLC, APPEARED ON BEHALF OF THE INTERVENOR;

LEO P. DOMBROWSKI AND ANTHONY G. HOPP OF WILDMAN, HARROLD, ALLEN & DIXON APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

**SUMMARY OF THE OPINION**

Fox Moraine, LLC (Fox Moraine) petitioned the Board seeking review of a 2007 decision of United City of Yorkville City Council (Yorkville) denying siting of a pollution control facility requested by Fox Moraine in Yorkville, Kendall County. Yorkville’s decision denies siting finding that the application did not meet the statutory criteria i, ii, iii, v, vi, and viii, of Section 39.2(a) of the Environmental Protection Act (Act) (415 ILCS 5/39.2(a) (2008)) and that the prior operating history of the operator was considered against Fox Moraine<sup>1</sup> when considering criteria ii and v (*see* 415 ILCS 5/39.2(a)(ii) and (v) (2008)). Fox Moraine challenges the decision by arguing that the proceedings were fundamentally unfair and the findings on criteria were against the manifest weight of the evidence.

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<sup>1</sup> Yorkville and Fox Moraine refer to the operator qualification consideration as the “tenth criterion” and Yorkville’s resolution denying siting refers to criterion ix as not being met. However, in Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2008)), the language that allows a decisionmaker to consider operating experience is an unnumbered, unlettered paragraph following criterion ix.

Kendall County has intervened in the proceeding and Friends of Greater Yorkville (FOGY) and the Village of Plainfield (Plainfield) filed *amicus curiae* briefs. Each filed a brief in support of Yorkville's decision that Fox Moraine failed to establish that the facility would meet the criteria of Section 39.2 of the Act (415 ILCS 5/39.2 (2008)).

The record developed in this proceeding before Yorkville is over 18,000 pages. Before the Board, hearing was held on three separate days and the parties filed substantial briefs. A careful review of the record and the arguments leads the Board to conclude that the Yorkville proceedings were fundamentally fair. The Board also concludes that the record supports Yorkville's findings on the six challenged criteria and Yorkville's decision on the operating history of the applicant. Therefore the Board affirms Yorkville's decision denying siting of a pollution control facility

The Board begins the opinion by setting forth the relevant procedural and legal backgrounds. The Board will next summarize the facts beginning with facts related to the challenge of fundamental unfairness (*see* pages 6-15) and then the facts relevant to the criteria (*see* pages 16-34). Before proceeding to the merits, the Board will address an argument on the issue of credibility of Ms. Rose Ann Spears (*see* page 34). The Board will then present the arguments on fundamental fairness by Fox Moraine (*see* pages 35-44), Yorkville (*see* pages 44-52), FOGY (*see* pages 52-53), and then Fox Moraine's reply (*see* pages 53-59). The Board will frame the issues on fundamental fairness (*see* pages 59) followed by the Board's discussion and findings on fundamental fairness (*see* pages 59-64).

The Board will then summarize the briefs of Plainfield and Kendall County (*see* pages 64). The Board will present the arguments on the challenged criteria beginning with arguments made generally on the criteria (*see* pages 64-68). Next the Board will address arguments and findings on criteria i (*see* pages 68-70), iii (*see* pages 70-74), vi (*see* pages 74-76), and viii (*see* pages 76-78), individually. The Board will discuss criteria ii, v, and operator history together (*see* pages 78-82).

### **PROCEDURAL BACKGROUND**

On June 27, 2007, Fox Moraine timely filed a petition asking the Board to review a May 24, 2007 decision by Yorkville that denied siting approval for petitioner's proposed pollution control facility in Yorkville, Kendall County. On July 12, 2007, the Board accepted the petition for hearing. On August 30, 2007, Yorkville filed the record (C).

On July 25, 2007, Kendall County filed a motion to intervene in this proceeding, which the Board granted on August 23, 2007. On November 16, 2007, FOGY filed a motion to intervene in this proceeding. On November 20, 2007, Fox Moraine filed an objection to FOGY's motion to intervene. Also on November 2, 2007, Plainfield filed a motion seeking leave to file an *amicus curiae* brief. On December 7, 2007, the Board denied FOGY's motion to intervene; however the Board allowed FOGY to file an *amicus curiae* brief. On December 7, 2007, the Board granted Plainfield's request to file an *amicus curiae* brief.

On September 23, 2008, Fox Moraine filed a “First Amended Petition for Review” and on September 26, 2008, a “Second Amended Petition for Review”. On November 20, 2008, the Board accepted the amended petitions.

On April 21, 22, and 23, 2009, hearing was held before Board Hearing Officer Bradley Halloran (4/21Tr., 4/22Tr., 4/23Tr.). After the close of hearings, on April 24, 2009, Fox Moraine filed a motion for a finding that Valerie Burd was not a credible witness. After allowing for responses, on May 21, 2009, Hearing Officer Halloran declined to make a finding that Ms. Burd was not credible.

On June 12, 2009, Fox Moraine filed a brief (FMBr.) and a supplement (FMBr2) along with a motion for leave to file a brief of over 50 pages in length. On July 17, 2009, Yorkville filed a brief (YBr.) along with a motion for leave to file a brief over 50 pages. Also on July 17, 2009, Plainfield (VBr.) and Kendall County filed briefs (KCBr.). On July 20, 2009, FOGY filed the *amicus curiae* brief (FOGYBr.) On July 31, 2009, Fox Moraine filed a reply brief (Reply).

The Board grants the motion to file the supplement to the brief and the motions to file briefs in excess of the Board’s page limit.

### **LEGAL BACKGROUND**

The following section delineates the specific statutory provisions at issue in this proceeding and then discusses the legal standards to be applied by the Board when deciding the issues.

#### **Statutory Provisions**

Section 3.330(a) of the Act defines a pollution control facility as “any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator.” 415 ILCS 5/3.330(a) (2008). Section 3.330(b) defines a new pollution control facility to include “the area of expansion beyond the boundary of a currently permitted pollution control facility. 415 ILCS 5/330(b) (2008).

Section 39.2(a) of the Act requires that an applicant seeking approval for siting a pollution control facility must provide evidence demonstrating that the nine criteria listed in subsections (i) through (ix) are met. 415 ILCS 5/39.2(a) (2008). The specific criteria at issue in this proceeding are criteria (i), (ii), (iii), (v), (vi), (viii), (ix) and the provision regarding operator experience, which provide:

- (i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;
- (ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

- (iii) 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;

\* \* \*

- (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents;
- (vi) the traffic patterns to and from the facility are so designed to minimize the impacts on existing traffic flow;

\* \* \*

- (viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan; for purposes of this criterion (viii), the "solid waste management plan" means the plan that is in effect as of the date the application for siting approval is filed;
- (ix) if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met.

The county board or the governing body of the municipality may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section. 415 ILCS 5/39.2(a)(i), (ii), (iii), (v), (vi), (viii), (ix) (2008).

Section 40.1(a) of the Act provides:

If the county board . . . refuses to grant or grants with conditions approval under section 39.2 of this Act, the applicant may, within 35 days after the date on which the local siting authority disapproved . . . siting, petition for a hearing before the Board to contest the decision of the county board or the governing body of the municipality \*\*\* In making its orders and determinations under this Section the Board shall include in its consideration the written decision and reasons for the decision of the county board or the governing body of the municipality, the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. 415 ILCS 5/40.1(a) (2008).

Siting approval is to be granted only if a proposed facility meets all nine of the criteria set forth in Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2008)). See Town & Country Utilities, Inc. v. PCB, 225 Ill. 2d 103, 117, 866 N.E.2d 227, 235 (2007); see also Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 576, 680 N.E.2d 810, 818 (5th Dist. 1997); Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 194 (3rd Dist. 2000).

### **Fundamental Fairness**

The Board must review the proceedings before the local siting authority to determine if the proceedings were fundamentally fair. The courts have given the Board some guidance on this issue. In E & E Hauling v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983) *aff'd*, 107 Ill. 2d 33, 481 N.E.2d 664 (1985), the court indicated that fundamental fairness refers to the principles of adjudicative due process and a conflict of interest itself could be a disqualifying factor in a local siting proceeding if the bias violates standards of adjudicative due process. E & E Hauling, 116 Ill. App. 3d at 596, 451 N.E.2d at 564. Further, in E & E Hauling, the appellate court found that although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. See also Industrial Fuels & Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (1st Dist. 1992); Tate v. Macon County Board, 188 Ill. App. 3d 994, 544 N.E.2d 1176 (4th Dist. 1989). Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. Waste Management of Illinois Inc. v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (2nd Dist. 1988).

The courts have indicated that the public hearing before the local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App. 3d 631, 616 N.E.2d 349, 356 (3rd Dist. 1993). The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc., PCB 90-163 (Dec. 20, 1990). The courts have also indicated that fundamental fairness must include the opportunity to be heard and impartial rulings on evidence. Daly v. PCB, 264 Ill. App. 3d 968, 637 N.E.2d 1153, 1155 (1st Dist. 1994).

### **Legal Standards for Board Review of Criteria**

In reviewing the decision of a local government disapproving siting based on the nine statutory criteria, the Board must apply the "manifest weight of the evidence" standard of review. Land and Lakes Co. v. PCB, 319 Ill. App. 3d at 48, 743 N.E. 2d at 197; Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987); City of Rockford v. PCB, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2nd Dist. 1984). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262 (4th Dist. 1983). The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses.

Merely because the Board could reach a different conclusion is not sufficient to warrant reversal. City of Rockford, 125 Ill. App. 3d 384, 465 N.E.2d 996; Waste Management of Illinois, Inc. v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3rd Dist. 1984); Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel Partnership v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

The Board will not disturb a local siting authority's decision regarding the applicant's compliance with the statutory siting criteria unless the decision is contrary to the manifest weight of the evidence. See Concerned Adjoining Owners, 288 Ill. App. 3d at 576; 680 N.E.2d at 818; see also Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. "That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable." Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818, quoting Turlek v. PCB, 274 Ill. App. 3d 244, 249, 653 N.E.2d 1288, 1292 (1st Dist. 1995). The Board may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority. See Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3rd Dist. 1990); Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 81-82, 543 N.E.2d 505, 507 (2nd Dist. 1989); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989). "[T]he manifest weight of the evidence standard is to be applied to each and every criteria on review." See Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818.

The local siting authority weighs the evidence, assesses witness credibility, and resolves conflicts in the evidence. See Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; see also Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Fairview, 198 Ill. App. 3d at 550, 555 N.E.2d at 1184; Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. Where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. See Waste Management, 187 Ill. App. 3d at 82, 543 N.E.2d at 507. "[M]erely because the [local siting authority] could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the [local siting authority's] finding." File v. D & L Landfill, Inc., 219 Ill. App. 3d 897, 905-906, 579 N.E.2d 1228, 1235 (5th Dist. 1991).

## **FACTS**

The Board begins the recitation of facts by summarizing the activities which took place prior to the filing of the application which are relevant to the claims that the proceedings were fundamentally unfair. The Board will next elaborate on the facts which occurred after the filing of the application which also relate to charges that the proceedings were fundamentally unfair. The Board will then summarize the facts in evidence on each of the criteria and the operating history of the operator.

### **Pre-application Activities**

Fox Moraine's landfill activities began in the Spring of 2006 with the Yorkville city attorney, John Wyeth, authoring confidential memos for the city council concerning the annexation of property to Yorkville to facilitate jurisdiction over landfill siting. 4/21Tr. at 198.

In late August 2006, representatives of Fox Moraine, Charles Murphy and James Burnham, held a series of meetings with city council members to advise them of Fox Moraine's intentions. 4/22Tr. at 177-178, 206.

On September 25, 2006, Yorkville's City Planning Commission (Commission) met to discuss the annexation of property owned by Donald Hamman; the property that the Fox Moraine landfill was ultimately proposed to be sited upon. C00056-273; FM Exh. 1. The meeting occurred over two months before the filing of the landfill siting application. C000889-5953. At that meeting numerous members of the public spoke in opposition to the annexation including Arden Plocher. C00097-98, 170; FM Exh. 1 at 109. Todd Milliron also spoke in opposition of the annexation numerous times. C00079-81, 98, 106, 134, 138-39, 166, 193-194; FM Exh. 1 at 18, 37, 45, 73, 77, 105, and 132. During the meeting, applause for anti-landfill, anti-annexation statements occurred 32 times. *See generally i.e.* C00080, 95, 96, 97, 104; FM Exh. 1 at 19, 34, 35, 36, 37, 43.

On September 26, 2006, the Yorkville city council met to consider annexation of the property and the meeting was again attended by many opponents. C00274-568; FM Exh. 2. Yorkville was also considering vacating a road, approving a host agreement and amending the landfill siting ordinance. *Id.* Mr. Milliron again spoke several times to the applause of the audience. *See generally i.e.* C00314-18; FM Exh. 2 at 22-26. This meeting also had several outbreaks of applause for anti-landfill, anti-annexation sentiments. *See generally i.e.* C00308, 314, 317-20, 326, 352, 387; FM Exh. 2 at 16, 22, 25-28, 34, 60, 95. Another opponent who spoke against the annexation was Ron Parrish, an officer in FOGY. *See generally i.e.* C00374-381; 4/21Tr. at 161.

On September 26, 2006, Kendall County's special environmental counsel, Michael Blazer spoke. C00456-475. Mr. Blazer presented the opinion of the Kendall County State's Attorney that the Kendall County Solid Waste Management Plan prohibited siting of a landfill in Yorkville. C00460-471; FM Exh. 2 at 168-179. Mr. Blazer also opined that the host agreement between Yorkville and Fox Moraine was inferior to the host agreement between Kendall County and a competing landfill operator. C00467-470. Mr. Blazer informed Yorkville that Kendall County would oppose any attempt to develop the landfill near Yorkville and told the city council to vote no on annexation to stop the siting. C00469-71; FM Exh. 2 at 177-179.

Mr. Wally Werderich spoke against annexation at the hearings and characterized the tone of the public comments regarding annexation as being opposed. 4/21Tr. at 302-303. Mr. Werderich indicated that Mr. Gilson vehemently made the point that annexation was intended to facilitate a landfill siting and the best way to stop siting was to oppose annexation. *Id.*

During the course of the two days of hearing on annexation, Ms. Valerie Burd appears to have changed her position from support of annexation and the landfill to opposition. 4/22Tr. at 158-159.

After the vote to annex the property on September 26, 2006, a series of meetings of both the Commission and the city council were held to discuss the host agreement, vacating Sleepy Hollow Road and re-annexation of the property due to technical issues. *See* C00794-870, 876-

888; FM Exh. 3-8. Meetings that took place between October 10, 2006 and November 30, 2006 included several verbal attacks on the mayor and aldermen of Yorkville for the approval of the annexation. *Id.* Ms. Spears and Ms. Burd were vocal opponents to annexation and the vacating of Sleepy Hollow Road. *Id.* At the January 23, 2007 meeting of the city council, Ms. Burd passed out “substantiating information on why the annexation agreement could be seen as being breached” and supporting Ms. Spears’ position that Yorkville should be able to renegotiate. C06282-06283.

Charles Murphy, the project manager for Fox Moraine, testified that he has been involved in five or six landfills in Illinois. 4/22Tr. at 171, 173. He testified that in this case he was involved in the annexation hearings as well as subsequent meetings, and the annexation meetings were unusual because interruptions by opponents were intended to connect action on annexation with the landfill project. 4/22Tr. at 178-179. Mr. Murphy indicated that the host agreement continued to be brought up at subsequent meetings. *Id.* Mr. Murphy observed that members of the public were aggressive and taunting of and cackling at the elected officials was occurring. 4/22Tr. at 181. Mr. Murphy observed opponents of the annexation cheering Ms. Spears and Ms. Burd. 4/22Tr. at 183-185. Mr. Murphy believed in his experience this was one of the worst hearings he attended. 4/22Tr. at 187.

### **Actions After Filing of Application**

On December 1, 2006, Fox Moraine filed an application seeking siting approval for a landfill to be sited in Yorkville, Kendall County. C00891-5953. Attorney Larry Clark was appointed hearing officer to preside over the hearings held by Yorkville on the siting application. C08092. Hearings were held on 24 days beginning March 7, 2007 (C08090) and ending on April 20, 2007 (C15628). Derek Price was the special counsel for Yorkville at the hearings. C08095.

### **Testimony Concerning Alleged Bias of Council Members**

**Rose Ann Spears.** Ms. Spears has served 13 years as aldermen and was re-elected two years ago, but did not run her campaign on an anti-landfill platform. 4/21Tr. at 42, 124. Although Ms. Spears did not recall the specific September 26, 2006 council meeting to consider “the annexation of the Fox Moraine property, the execution of a host agreement, the execution of an annexation agreement, and the adoption of an amended pollution control facility siting ordinance,” she did state that she voted against the annexation resolution. 4/21Tr. at 43-44. However, she denied knowing that “the annexation was to start the process that would end in the landfill if everything went right for Fox Moraine[.]” 4/21Tr. at 142. After checking her voting records, Ms. Spears disagreed with her deposition statements that she was opposed to new development involving “Route 47 until the road was widened and improved.” 4/21Tr. at 78.

Concerning public comments regarding the landfill proposal, Ms. Spears could not recall whether she had received one or a thousand emails on the landfill proposal, but that it was “quite a span.” 4/21Tr. at 79. She also received four letters about the proposal that were addressed to the mayor and all council members. 4/21Tr. at 79-80. Ms. Spears stated she received some letters personally, but again could not recall how many. 4/21Tr. at 80. Similarly, she did not remember how many personal communications from community members she had received.



However, she testified that when a person approached her to discuss the proposal, she would tell them that she was not allowed to discuss the topic with them because she was acting as a judge. 4/21Tr. at 132.

During the local siting hearings, Ms. Spears had more concerns with the “demeanor and conduct” of the attorneys involved in the siting than the landfill opponents. 4/21Tr. at 81. She testified that she heard Jim Bock telling another member, (who she believed may have been Paul James), about receiving a phone call at 2:00 or 4:00 in the morning threatening him. 4/21Tr. at 82-83. Mr. Hamman also approached Ms. Spears during the hearings and, off the record, asked her if he could take her to a landfill he was involved with in Will County. 4/21Tr. at 125-26. He indicated that the homes “were[valued at ]half a million dollars up to \$1 million homes surrounding the area, and [Ms. Spears] told him [she] could not do that, it would be illegal, and he kind of shrugged his shoulders and laughed and said, ‘I promise we won’t be talking about the landfill.’” 4/21Tr. at 126.

In the last week of August, Ms. Spears received a memorandum from John Wyeth, a Yorkville city attorney. Mr. Wyeth’s memorandum asked to meet with the council by ward to discuss a development; the memo also “did mention a landfill.” 4/21Tr. at 127-28. Also at the meeting were Charlie Murphy, a developer, and Jim Burns, both of whom represented Fox Moraine, and Mr. Joseph Besco. 4/21Tr. at 128. During the meeting, “Mr. Murphy presented a very pretty sketch of a landscaped area with a road in front of it. There was nothing in there about a landfill or a hole or whatever, and he was presenting us that and just saying what a wonderful thing that this could be for Yorkville.” 4/21Tr. at 129. Each of the next three days after the meeting, Mr. Murphy left a phone message for Ms. Spears on her answering machine telling her to call him if she had any questions. 4/21Tr. at 129-30. Ms. Spears stated that she did not approve of this meeting and did not think the meeting was ethically “above board” since she had not ever and has never since met with a developer on any issue regarding the city; “so [the meeting] was a red flag to me.” 4/21Tr. at 143.

While at the council meeting on October 24, 2006, Ms. Spears stated that she had concerns about the host agreement because Yorkville had approved Fox Moraine’s host agreement near the same time as the Kendall County had approved the host agreement with Waste Management and Kendall Land and Cattle Company. 4/21Tr. at 84-86. She was aware that there were two possible lawsuits; the first was “because [council] did not follow the state statute procedures and [the second was for] vacating Sleep Hollow Road.” 4/21Tr. at 90. Given these options, she stated, “if we have a choice of two lawsuits, why don’t we take what the best alternative is? Vote no. Protect our city.” 4/21Tr. at 91. Ms. Spears also stated at a meeting on January 23, 2007, that Fox Moraine “performed a breach of contract with this annexation agreement.” 4/21Tr. at 93.

Later, on April 3, 2007, Ms. Spears refused to sign a resolution “stating essentially that the city council members would vote fairly[.]” 4/21Tr. at 93-94. She refused because “some [Council] members were grandstanding, and [she] didn’t want to be a part of that. [She] took this very seriously. It wasn’t a joke to [her].” 4/21Tr. at 94. Ms. Spears denied saying to the *Beacon News*, as was printed on April 15, 2007, that, “[i]f [the landfill] had nothing surrounding it for acres, and if it was proven to be safe as far as leakage, and if it would have no impact on traffic,

that would be a perfect scenario.” 4/21Tr. at 100. Despite her assertion that she had been misquoted, she admitted not having called the author of the article, Heather Gillers, to complain, stating that “nothing is ever done” to correct such misquotes. 4/21Tr. at 101.

In the May 23, 2007 meeting, Ms. Spears noted that she was shocked at the motion to disqualify her, but that she did vote to deny her disqualification after being assured by Mr. Michael Roth, the city attorney, that she was allowed to vote on the matter. 4/21Tr. at 104. In her testimony, Ms. Spears clarified a statement she made during that meeting; one of the reasons she believed that Fox Moraine had moved to disqualify her is because they knew of her track record for researching. 4/21Tr. at 105. She noted that in using the term “researching, she was referring to taking good notes and researching them.” *Id.* During the same meeting, when Ms. Burd thanked her for researching her presentation, Ms. Spears did not correct her because she “didn’t think it would come to that.” 4/21Tr. at 124. Ms. Spears also asserted that her statement at the meeting that Fox Moraine “failed to meet criterion 1 due to EPA records, indicated there is adequate land availability for at least nine to fifteen years” was based on a PowerPoint presentation given to the council. 4/21Tr. at 121-22. Contrary to the transcript of the May 24, 2007, meeting, Ms. Spears did not recall stating that the opponents of the landfill were getting “pretty dirty,” meaning that they were “unruly and disruptive.” 4/21Tr. at 106.

Ms. Spears admitted that she proposed additional conditions for the landfill, including (1) limiting the service area to Kendall County, (2) requiring two layers of HDPE in the liner of the landfill, and (3) requiring proper tanks made of welded steel built to the AWWAD-100 or API 650 standard. 4/21Tr. at 107-108. She asserted that the second condition was based on evidence presented in a PowerPoint presentation about such double composite liner systems. 4/21Tr. at 108.

Ms. Spears recalled seeing the resolution denying the siting application from Fox Moraine. 4/21Tr. at 110. However, she could not remember whether the reports referred to in the resolution recommended approval of the application with conditions. 4/21Tr. at 113. She admitted that the third condition she proposed on May 24, 2007, concerning the applicable standards for the aboveground storage tanks, was the same condition put into the resolution. 4/21Tr. at 114. She was unsure whether she had discussed the condition with the city’s attorneys before that meeting or whether the resolution was changed to include those proposals, but she did indicate that all of the meetings with city attorneys were open and so there should be minutes of each meeting. 4/21Tr. at 115-116.

**Valerie Burd.** Ms. Burd ran for mayor of Yorkville and was elected in April 2007. 4/21Tr. at 172. She was sworn into office on May 8, 2007, and had served as an aldermen for nine years. *Id.* Ms. Burd’s election campaign committee included Mr. Milliron, Mr. Parrish, Wally Werderich, and Dan Nicholson. 4/21Tr. at 181, 317-18; 4/22Tr. at 17. In addition, Mr. Plocher and Ed Sleezer were a part of the campaign committee. 4/22Tr. at 18. Ms. Burd testified that she did not know that Mr. Milliron and Mr. Parrish opposed the landfill and could not recall hearing them speak out against the landfill. 4/21Tr. at 182-185. Ms. Burd did not know that Mr. Parrish was a member of FOGY. *Id.* Ms. Burd did not know that Wally Werderich was a founding member of FOGY, but was aware that he was a member. 4/21Tr. at 185.

Ms. Burd testified that she believed Derek Price, the attorney hired to represent Yorkville during the siting process, was biased in favor of Fox Moraine. 4/21Tr. at 192. Ms. Burd inquired of Mr. Price at a November 30, 2006 meeting if Yorkville could help pay for an attorney to represent the citizen's group. FMExh. 8 at 27. Ms. Burd testified that she had never made any comment in public against the siting application during her campaign and she did not run as an anti-landfill candidate. 4/21Tr. at 173-174.

**Wally Werderich.** Mr. Werderich was elected to the city council on April 17, 2007. 4/21Tr. at 300. Mr. Werderich was a founding member of FOGY, which was organized at the end of 2006 or beginning of 2007. 4/21Tr. at 300-01. The other co-founders include George Gilson, Ron Parrish, and Tom Gilmore. *Id.* Mr. Werderich performed legal services for the group and resigned at the end of 2006. 4/21Tr. at 302. Mr. Milliron is a friend and contributed in-kind contributions to Mr. Werderich's campaign. 4/21Tr. at 311. Mr. Werderich in newspaper articles prior to his election expressed his concerns about the handling of the siting and used email lists and internet messaging boards to garner support for a question and answer session with Yorkville. 4/21Tr. at 313. Mr. Werderich decided to run for aldermen because of the handling of the landfill siting. 4/21Tr. at 316.

In statements made at a November 30, 2006 meeting, Mr. Werderich noted that the siting hearing process was not adversarial and presents only one side of the story. FMExh. 8 at 169-170.

**Arden Plocher.** Mr. Plocher was elected to the city council on April 17, 2007. 4/22Tr. at 12. Mr. Plocher received campaign contributions from Mr. Milliron and Mr. Parish. 4/22Tr. at 18.

**Robyn Sutcliff.** Ms. Sutcliff was elected to the city council on April 17, 2007. 4/21Tr. at 258. Prior to her election, Ms. Sutcliff attended city council meetings and published a web page known as the "Third Ward Advisor" that summarized and commented on the meetings. 4/21Tr. at 259. On her website, Ms. Sutcliff indicated that if elected she would vote against the landfill. FM Exh. 21. Ms. Sutcliff's comments included phrases such as the audience "proudly displayed no landfill signs" and "50 concerned citizens gathered . . . armed with signs and concern for the future of their community." 4/21Tr. at 262-263. Ms. Sutcliff could not recall ever commenting, posting or writing a positive comment about the landfill. 4/21Tr. at 271. Ms. Spears informed Ms. Sutcliff that while campaigning Ms. Sutcliff should not discuss the landfill and Ms. Sutcliff stopped. 4/21Tr. at 278.

**Ron Parrish.** Mr. Parrish, a private citizen, testified that he was one of the original members of FOGY and donated a raffle prize to FOGY. 4/21Tr. at 154-155. Mr. Parrish donated money to Mr. Werderich's campaign and had heard Mr. Werderich speak out against annexation. 4/21Tr. at 156-157. Mr. Parrish also donated to Mr. Plocher and Ms. Burd and placed a sign for Ms. Burd. 4/21Tr. at 157-158. Mr. Parrish testified that Mr. Devin Moose threatened him at informational meetings, prior to the beginning of the siting hearing. 4/21Tr. at 162-166.

**Devin Moose.** Mr. Moose, Fox Moraine's engineer, denied that he had ever threatened Mr. Parrish. 4/22Tr. at 127.

**Donald J. Hamman.** Mr. Hamman is the ultimate person in charge of Fox Moraine, LLC, and has a fifty-one percent interest in the company. 4/23Tr. at 5, 8. He relies on the advice of his staff to make major decisions. *Id.* at 7. Mr. Hamman was aware that there was an aldermanic election in Yorkville that would take place around the same time as the landfill siting hearings (4/23Tr. at 14), and admitted that he could have filled the application either before or after December 1, 2006, which was the date he filled the application. 4/23Tr. at 12-14. He also was aware of the possibility that Yorkville citizens would protest the landfill. 4/23Tr. at 14-15.

On Sunday, April 15, 2007, Mr. Hamman read the Kendall County edition of the *Aurora Beacon News* and noted a particular article where many candidates in the aldermanic election were quoted concerning their positions on the landfill. 4/23Tr. at 15. Specifically, Mr. Hamman thought that the article showed that Joe Plocher, Robyn Sutcliffe, Wally Werderich, Jason Leslie, and Marty Munns were biased against the landfill before having voted on it. 4/23Tr. at 16-18.

### **Yorkville Public Hearing on Siting**

The public hearings on the siting application commenced on March 7, 2007, and continued until April 20, 2007. C08089, 15628. No hearings were held between April 5, 2007 and April 19, 2007. C15001, 15526. Fox Moraine completed presentation of the application and witnesses in support on March 24, 2007. C12901. There were a total of 24 sessions of hearings.

Joseph Besco, Jr., an alderman for eight years, testified that he received threatening phone calls during the public hearing process. 4/22Tr. at 153, 159. Mr. Besco reported the calls to the police. 4/22Tr. at 159-160. Mr. Besco indicated that Mr. Munns received the same phone call. 4/22Tr. at 161. Mr. Besco also recalls that Ms. Burke changed her position on the landfill after seeing the opposition, and that Ms. Burd recommended the attorney who represented Yorkville in the siting process. 4/22Tr. at 159.

Mr. Besco remembered Mr. Milliron and Mr. Parrish frequently attending council meetings and speaking regularly and forcefully against the landfill; he understood that both were landfill opponents. 4/22Tr. at 162. Mr. Milliron was "forceful, aggressive, and very vocal" and engaged in name calling. 4/22Tr. at 162-163. Mr. Milliron was removed from a meeting for his behavior. *Id.* This conduct was curtailed by Yorkville's hearing officer during the public hearings. 4/22Tr. at 164.

Mr. Murphy testified that the siting hearings were attend by 50 to 250 people, including individuals who travel from jurisdiction to jurisdiction to oppose landfills. 4/22Tr. at 199. Mr. Moose, Fox Moraine's engineer, testified that the hearings were prolonged by opponents. 4/22Tr. at 105-110.

### **Press Statements**

A newspaper article appeared in the *Beacon News* which included quotes from the officials seeking election. Ms. Spears denied making the statements in the newspaper. 4/21Tr. at 100-101. Ms. Burd admitted to making a statement concerning landfills in Illinois. 4/21Tr. at 200. Ms. Sutcliff could not recall making the statement. 4/21Tr. at 294. Mr. Werderich felt his quote was taken out of context. 4/21Tr. at 319. Mr. Plocher also felt he had been misquoted. 4/22Tr. at 24.

### **Involvement of City Attorney**

The law firm of Wildman, Harrold, Allen & Dixon LLP (Wildman) submitted an invoice to Yorkville titled "Local Siting Engagement Interim Statement for Professional Services Rendered through May 31, 2007". FM Exh. 16. The first entry is dated April 21, 2007, and the description of "begin review of siting petition and exhibits to same". *Id.* There are eight additional entries prior to May 8, 2007, including an entry for five hours on April 30, 2007, which is described as preparation for and conducting a meeting with the mayor. *Id.*

On May 8, 2007, the new city council for Yorkville was sworn in which included the new mayor Ms. Burd, new aldermen Mr. Werderich, Mr. Plocher, Ms. Sutcliff and Ms. Spears. FM Exh. 17 at 1. Ms. Burd indicated that she would like to appoint Mike Roth from the Wildman law firm to the interim city attorney and this would be for the short-term. FM Exh. 17 at 2. In response to questions, Mr. Roth indicated that the proposal was for a fixed number of hours of 50 hours a month for a fixed fee. *Id.* Ms. Burd testified that the Wildman firm "handled the landfill appeal process and all of that" separate from the fixed fee that Mr. Roth performed under. 4/21Tr. at 216-221.

Ms. Burd spoke with representatives of the Wildman law firm prior to being sworn in as mayor, but testified that she did not retain the attorneys prior to May 8, 2007, when she was sworn in as mayor. 4/21Tr. at 200. Ms. Burd stated that she did what all mayors do during transition time, speak with different legal firms before appointing a city attorney. 4/21Tr. at 200-201. Ms. Burd testified that she did not hire the firm to do any work until after May 8, 2007, but when speaking with law firms, she discussed the scope of work to include annexation issues and development issues noting that Yorkville was in the middle of a landfill siting proceeding. 4/21Tr. at 204. Ms. Burd noted that Mr. Price represented the staff; the corporate authorities were represented by Mr. John Wyeth, and Mr. Wyeth's term ended when the new mayor was sworn. 4/21Tr. at 205. Ms. Burd stated that she had not directed the Wildman law firm to segregate landfill-related charges during the period, but testified that prior to May 9, 2007, the firm performed no work on legal matters for the city other than the landfill work. 4/21Tr. at 205-208. Ms. Burd reiterated that the Wildman firm was not solicited or authorized by her to perform any work prior to May 9, 2007. 4/21Tr. at 209.

## **Yorkville Deliberations**

On May 23, 2007, Yorkville began deliberations on the landfill siting application. C18534-591. Those deliberations continued on May 24, 2007, when the council voted seven to one to deny siting. C18592-185639. Neither Mr. Clark nor Mr. Price was present for the deliberations. C18537-18538; 4/21Tr. at 228. On May 23, 2007, the council members received the reports filed by Mr. Clark, Mr. Price, the Wildman law firm, and final materials from Fox Moraine. C18538-18541. Yorkville did consider postponing discussion on the application to allow for additional time to review the materials received on May 23, 2007, but that motion did not pass. C18541.

On May 23, 2007, Yorkville also voted to deny two motions. The first was a motion filed by Kendall County to dismiss for lack of jurisdiction. C18538-18539. The second was a motion to disqualify Ms. Burd and Ms. Spears. C18539.

During deliberations on May 23, 2007, each of the aldermen was allowed 20 minutes to state their positions regarding the landfill siting. C18542. Ms. Sutcliff began and indicated her belief that the landfill was incompatible with the surrounding area as the landfill will “present an insurmountable obstacle to development” in the surrounding area. C18543. Ms. Sutcliff was also concerned that downtown Yorkville was not considered in the study of traffic. *Id.*

Ms. Spears spoke next and indicated that she felt that the applicant did not meet the first criterion because “EPA records” indicate adequate landfill capacity for at least nine to 15 years. C18544. Ms. Spears continued to delineate her reasons for believing the criteria had not been met, including recommending the detailed technical standards for leachate tanks (*id.*), concerns about vinyl chloride levels (C18547), and concerns that the landfill did not contain a double composite liner system with leak detection (C18546). *See also* C18544-18549.

Mr. Plocher indicated he had concerns about traffic and he states that “the applicant said that the landfill leaked” and that presented cross contamination issues to him. C18549. Mr. Plocher also stated that he would never jeopardize his friends and family and referred to his brother with cerebral palsy. C18549-18550.

Mr. Leslie followed Mr. Plocher and indicated three criteria he believed had not been met. C18550. Mr. Leslie expressed concerns on the impact of the landfill on property values, traffic patterns, and the Kendall County Solid Waste Management Plan. *Id.*

Mr. Munns noted the conflicting opinions of the attorneys and indicated he would read the material before making his decision. C18550-18551. Mr. Munns did not publicly state whether or not the siting criteria would be met, but voted to deny siting. *Id.*, C18631.

Mr. Werderich indicated that the applicant failed to establish need for the facility given the disposal capacity still available for the area’s waste. C18551-18552. Mr. Werderich also expressed concerns about placement of groundwater monitoring wells and the compatibility with the surrounding area. C18552-18553. Mr. Werderich referred to specific parts of the testimony

when discussing his concerns. C18553-18554. Mr. Werderich also had concerns regarding traffic flow and the Kendall County Solid Waste Management Plan. C18555-18556. Mr. Werderich urged the council to consider the application on its face not based upon any conditions that may be added. C18557-18578.

Mr. Besco thanked Mr. Werderich for going through the report prepared by Mr. Roth's firm and had questions regarding Mr. Clark's recommendations. C18558. Ms. Burd then commented that the council was deliberating and several aldermen had not made decisions while other aldermen "appear to have already made a determination based on their own research and information they have gotten." C18560.

On May 24, 2007, deliberations were continued and alderman Gary Golinski began by stating he had reviewed all the submitted evidence and his decisions were based solely on that evidence. C18597-18598. Mr. Golinski stated that he had never shown predetermined bias for or against the applicant. C18598. Mr. Golinski stated that he does not believe the evidence supports a need for the facility. C18599. Mr. Golinski was also concerned about groundwater monitoring wells and prior operator history. C18601-18602. Mr. Golinski found the evidence on compatibility to be lacking credibility and had concerns about the traffic. C18602-18606.

On May 24, 2007, Yorkville was presented with two different resolutions to consider: one resolution would deny landfill siting and the second resolution would approve landfill siting with conditions. C18612. In the denial resolution, conditions were included if the decision of Yorkville were to be overturned by the Pollution Control Board. C18613. Several additional conditions were suggested, including some conditions which might not be permissible by law. C18613-18624. The resolution which passed allowed Yorkville's attorneys to add only those conditions which were legally acceptable. C18628-18630. The written resolutions required revision based on the comments made by the council members on May 24, 2007, and Mr. Roth indicated the revisions would be made and the resolution returned for the mayor's signature the next day. C18623. Resolution 2007-36 dated May 24, 2007, formally denied landfill siting to Fox Moraine. C18640-18643.

### **Facts on the Criteria**

The Board summarizes the facts on each of the contested criteria beginning with criterion i, and proceeding in order ending with a summary of the facts on the operator's experience.

#### **Facts on Criterion i (Need)**

**Phillip Kowalski.** Mr. Kowalski testified for Fox Moraine in support of criterion i, that the facility is necessary to accommodate the waste needs of the area the facility is intended to serve. C09380; C09444-9459. Mr. Kowalski has a bachelor's degree in physics and an MBA in finance from the University of Chicago and has been employed as a solid waste consultant for approximately 19 years. C09382. Mr. Kowalski's specific area of focus is needs assessment studies. *Id.* Mr. Kowalski studied demographic projections, various county solid waste management plans and need assessment studies, the current solid waste disposal capacity data and the amount of waste presently deposited in landfills based on data from the Illinois

Environmental Protection Agency (IEPA) and state agencies in Indiana, Michigan and Wisconsin. C09383-84. Mr. Kowalski indicated that this type of information represents much more current up-to-date information on how much waste is being disposed of and how much capacity is available. C09384-9385.

The proposed service area includes the counties of DeKalb, Kane, Cook, DuPage, Will, Grundy, LaSalle and Kendall. The proposed landfill is centrally located within the service area. C09449, 09385. The facility will have a disposal capacity of approximately 23.5 million tons and an average daily throughput of 3,500 tons per day, with a projected life of 24 years. C09386. Mr. Kowalski considered a period of time from 2006 through 2031 in assessing the need for the facility. *Id.*

Mr. Kowalski found that in the past ten years the amount of waste in the landfill service area has been growing by about two percent annually with one percent attributable to population growth and one percent attributable to growth in per capita waste generation. C09387-8. Mr. Kowalski projects that during the period of 2006 through 2031, the service area will dispose of 325 million tons of waste rising from about 11.5 tons in 2006 to about 13.6 tons in 2031. C09388. Mr. Kowalski explained that the proposed facility will meet the needs of the service area for about two years. *Id.*

Mr. Kowalski pointed out that at one point there were as many as 28 landfills operating meeting the needs of the service area; but as of January 2006, only ten facilities remained. C09388-9389. Mr. Kowalski stated that Kendall County has relied on three landfills historically; only one is still operating, and that landfill has limited capacity. C09389. Mr. Kowalski testified that two other facilities are open in the service area however those facilities have restricted areas for accepting waste. *Id.* Mr. Kowalski testified that given the limited capacity the service area will experience a shortfall of disposal capacity of approximately 296 million tons during the period of 2006 to 2031. C09391-9392.

Mr. Kowalski testified that development of a landfill takes approximately nine years from concept to actual operation in Illinois. C09397. Mr. Kowalski testified that there are a number of economic considerations for the Fox Moraine landfill including the central location of the site. *Id.* Mr. Kowalski noted that when the nearby landfills that Kendall County has relied on historically for disposal are closed the waste will need to be transported 40 to 60 miles away. C09398. With many companies adding waste-fuel surcharges to bills costs to customers are increased. C09399. Mr. Kowalski stated that comparing the transportation distances of the proposed landfill versus the average transportation distance to the other regional landfills, the siting of Fox Moraine could save 800,000 gallons in fuel per year and approximately \$6.5 million in transportation costs. *Id.* Mr. Kowalski opined that based on his studies, the facility was necessary to meet the waste needs of the service area. C09401-9402.

**Darryl Hyink.** Mr. Hyink is a retired school teacher who also worked in administration at the school. C14322. Mr. Hyink has experience evaluating new construction, writing proposals for new construction and working in the private sector. *Id.* Mr. Hyink looked at the application because he lives in close proximity to the proposed site. C14322-14323. Mr. Hyink performed research concerning two criteria, including criterion i, looking at several documents



including newspaper articles and *Non-Hazardous Solid Waste Management and Landfill Capacity Reports* for Illinois in the years 1997 through 2005. C14324-14325. Mr. Hyink opined that there was a “glut” of landfill space in the nation, with enough space to handle the nation’s needs for 26 years. C14325-14326. Mr. Hyink expressed the opinion that Kendall County does not have the responsibility to handle the waste from Chicago, in an area that is planned for residential use. C14326-14331.

Mr. Hyink examined the Non-Hazardous Solid Waste Management and Landfill Capacity Reports in Illinois 1997 and offered the opinion that waste capacity in the State had actually increased by 13.36% from 1997 to 2005. C14333. Mr. Hyink suggests using the Spoon River Landfill 187 miles away and perhaps transporting by rail. C14338-14341.

**Mr. Price’s Report.** Mr. Price found that the record supported a finding that the facility was necessary to meet the needs of the service area. C18741. Mr. Price noted that the record was “replete with information about alternative technologies” however Mr. Price found those technologies are not yet viable. *Id.* Mr. Price also noted that the record contained information about downstate disposal facilities that are already permitted, but the rebuttal evidence concerning costs and burdens of transporting waste, “we conclude,” established need for the facility. *Id.* Mr. Price recommended two conditions: one relating to price and one allowing acceptance of waste from transfer stations which are located only in the service area. *Id.*

**Mr. Clark’s Report.** Mr. Clark finds that there are currently no proven technologies for treating waste beyond landfilling and the needs analysis appropriately did not consider these alternative methods. C18753. Mr. Clark finds the issue of whether other landfills such as Spoon River could provide sufficient disposal capacity to be speculative. *Id.* Mr. Clark opines that the necessary updates for hauling waste by rail has not come to fruition and even if Spoon River were available to the service area, the capacity would add only an additional two years. *Id.*

### **Facts on Criterion ii (Designed to protect public health, safety and welfare)**

**Daniel Drommerhausen.** Mr. Drommerhausen testified on behalf of Fox Moraine concerning criterion ii, the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. C09873; C09977-10016. Mr. Drommerhausen testified more specifically concerning the hydrology of the site. *Id.* Mr. Drommerhausen is a senior hydrogeologist with Shaw Environmental and a professional geologist in Illinois, Indiana, and Georgia. C09873. Mr. Drommerhausen has a bachelor’s degree in geology from Augustana College and a master’s degree in hydrogeology from the University of Georgia with a focus on groundwater. *Id.* Mr. Drommerhausen has 11 years of experience in the solid waste industry and has worked on over 20 landfill projects where he interpreted the geology and hydrogeology of the site. C09874. He has 14 years of experience in groundwater modeling, mostly dealing with landfills and developing dimensional groundwater modeling. *Id.*

Mr. Drommerhausen’s job entails determining the geology and hydrogeology of the site and working with the engineers on the type of design that is appropriate for the location. C09874. Mr. Drommerhausen opined that “this site is about as good as it gets. This is the best

site I've worked on hydrogeologically when developing a landfill." *Id.* Mr. Drommerhausen determined the relevant objectives and conducted investigations to characterize the geology and hydrogeology of the site to aid in design and identify potential migration pathways. C09874-9875. Mr. Drommerhausen identified potential migration pathways to design the groundwater monitoring network and performed a groundwater impact evaluation. C09875-9876. Mr. Drommerhausen examined all well logs within one mile of the proposed site. *Id.*

Mr. Drommerhausen's investigations found that the proposed site has a great deal of clay-type and fine-type material below the site and then further below some sand and gravel and bedrock. C09877. Mr. Drommerhausen testified that between the aquifer below the proposed site and the aquifer that provides Yorkville's water supply is 300 to 500 feet of confining retarding material. C09878. Also, of the 74 existing wells within one mile of the site, 12 wells are downgradient. *Id.* Mr. Drommerhausen testified that the design of the landfill has about 80 feet of clay beneath the liner. The resulting projected vertical movement rate of two inches per year results in taking over 480 years for groundwater to move from the base of the proposed landfill to the bottom of the clay unit. C09879, 9888.

Mr. Drommerhausen's drilling program consisted of 48 boring locations, with 46 continuous boring locations and two continuous sampled angle borings being advanced to detect fractures. C09879-9880. The borings were evenly spaced from north to south and east to west. *Id.* Mr. Drommerhausen used the information gathered from these boring to put together a hydrogeologic report. C09879. The boring locations were in all areas of geological interest and were used to collect groundwater elevation data and hydraulic conductivity. C09882-9885.

Mr. Drommerhausen's study determined that the site contains Peoria silt (a windblown sediment) beneath which is a Lemont formation (glacial till), then discontinuous silt, sand, and gravel deposits, then some areas of the Tiskilwa formation (glacial till) and then Roxana silt which is an ancient soil. C09885-9886. Following the Roxana silt is older drift made up of clay, silt, sand, and gravel and then bedrock. C09886. Mr. Drommerhausen noted the presence of the Sandwich fault approximately a half mile to the north, northeast of the site. C09888-9889. Mr. Drommerhausen noted that there has been no displacement on the Sandwich fault in over 286 million years. C09890. Mr. Drommerhausen provided the Illinois State Geological Survey his report and the Illinois State Geological Survey indicated agreement with the characterizations of the site geography. C09891.

Mr. Drommerhausen next evaluated the impact on groundwater using a groundwater model approved by the IEPA. C09893. Even assuming no liner on the proposed landfill, the site passed the modeling. *Id.* Mr. Drommerhausen sent the hydrogeologic and geologic information to Dr. Kerry Rowe, an expert on liner design. C09895. Dr. Rowe opined that the site seem well suited for landfill development. *Id.* Mr. Drommerhausen determined that the site is located hydrogeologically so as to protect the public health, safety and welfare. C09896.

**Devin Moose.** Mr. Moose testified on behalf of Fox Moraine concerning criterion ii. C10633; 10871-10941. Mr. Moose is a civil engineer and has worked on hundreds of solid waste management projects. C10633. Mr. Moose is a director for Shaw Environmental and is a registered professional engineer in nine states. C10871. Mr. Moose managed the compilation of

the application in this case and prepared information for criteria ii, iv, v, vii, and ix. C10633-106. Mr. Moose participated in the selection of this site and the site was chosen because of the favorable geology. C10653-10654. Mr. Moose noted the site is not in a seismic impact area and the nearest active fault is 200 miles away. C10653-10654; 10656.

Mr. Moose indicated that an archeological evaluation was performed on the site and found there are no significant historical, archeological, or architectural resources with the projected site. C10656. The Illinois State Historic Museum has “signed off” on the site and the facility will not impact nor make any threat to endangered species. *Id.* The facility is not governed under any statewide water quality management plan and meets all required setbacks for water wells. C10656-10657. The nearest downgradient water well is about 1680 feet away and there is a water well protection plan for people within two miles of the site. C10657. The proposed landfill also meets all required setbacks from roads and highways and the required setbacks from schools, dwellings, retirement homes, and hospitals. C10657. The nearest residential dwelling is about 1,500 feet from the site. *Id.* Mr. Moose notes that the application provides a Property Value Protection Plan for all residences located within one mile of the proposed facility. *Id.*

Mr. Moose next discussed the design of the facility, noting that there is an average of 78 feet of *in situ* clay beneath the proposed landfill site. C10663. Mr. Moose opined that because the clay has an extremely low permeability, a liner system isn’t even technically necessary because the natural clay protects the aquifer. *Id.* However, Mr. Moose testified that the application does require excavation of three feet of the *in situ* clay and recompacting the clay in place to ensure no cracks or fissures are present. C10663. The application calls for the clay to be compacted to produce a permeability value of one times ten to the minus seven centimeters per second or less. C10664. On top of the clay, the design calls for a “60-mil, high density polyethylene liner”. C10664-10665.

A leachate collection system of 12 inches of granular material will lie directly above the liner system. C10664. Mr. Moose stated that the design calls for the use of four individual liner systems in the critical areas around the leachate collection sumps and perimeter of the landfill facility. C10668-10670. In response to previous questions, Mr. Moose indicated that the minimum thickness of clay beneath the critical areas is 67 feet and the maximum thickness is 95 feet; there would be an average of 75 feet of clay beneath the critical areas. C10670.

Mr. Moose’s design would place the liner system beneath the critical areas, the sumps, and where the leachate pipes run (V notches), to consist of two layers of polyethylene, with a geo-synthetic clay liner (GCL) material sandwiched between the two layers, and a minimum of three feet of recompacted low permeability clay underneath. C10671. The GCL material will consist of bentonite, which, when hydrated, is equivalent to three feet of compacted clay. *Id.* If the GCL liner were to become perforated, the material in the liner would flow in and around the puncture and would therefore seal itself. C10672-10674. The application requires one hundred percent of every inch of every seam of the high density polyethylene liner to be tested. C10680. Although the life of the liner is expected to be a thousand or more years, the application nevertheless is designed to assume a seepage rate through the liner system as an ultra conservative measure. C10782-10783.

Mr. Moose explained that the application requires the use of fusion welding to fuse all portions of both the polyethelene cover and liner. C11497-11498. Fusion welding results in intermolecular linkage within the polyethelene material, and each of the welded areas is stronger than the material itself. C11499.

Because of the design grades in the liner system, leachate will only accumulate on one percent of the surface of the liner system. C10887. From the accumulation points in the landfill, leachate will be removed by the use of a system of leachate collection pipes to quickly convey leachate down to the sumps. C10669; C10672. Mr. Moose explained that the pipes would be surrounded by a washed gravel envelope, with the envelope to be surrounded or encased in a layer of filter fabric which would provide additional protection in the event that there was ever a failure associated with the pipe. C10672-10673. Leachate would then be removed via a leachate collection riser system using an air-driven pump. C10683-10684. The pumps called for in this system are specifically designed for this type of environment, and are level-actuated, so that when one foot of leachate accumulates, the pumps will begin pumping the leachate. C10684; C11496. The design requires leachate holding tanks equipped with an alarm system that will sound when a tank is 80% full and the system incorporates both visual and audio alarms. C11538. If a tank reaches 85% of capacity, the pump will shut off and the alarm system will stay on so that the tank cannot overflow. C11538-11539.

The design for the final cover plans to protect against water entering the landfill and increasing the potential for leachate by use of a geocomposite net, above which there would be three feet of protective soil, and a vegetative layer. C10686-10687. The final cover will have an average slope of 4 to 1, with a minimum of five percent to work in combination with the synthetic cover and the drainage net, to cause 99% of all precipitation that falls on the facility to run off. C10687. The landfill mimics the area's topography so as to make the landfill as aesthetically pleasing as possible. C10814-10815.

To address gas removal the landfill is designed to use suction which creates negative pressure within the landfill. C10691. The design for the gas collection system calls for 208 wells, connected by piping to a central point, where the gas will be treated. C10691. Mr. Moose explained that in the early stages of the landfill development there might not be sufficient quantity or quality of gas to warrant a gas-to-energy system; therefore, in the early stages, gas will be burned using flares. C10691-10692. Incineration of gas would take place in an enclosed flare, thereby eliminating the potential for odor problems. C10692. Once the landfill generates a sufficient amount of gas, a waste-to-energy or gas-to-energy facility will be constructed for generating electricity. C10692-10693. Mr. Moose testified that the application calls for continuous monitoring around the facility for gas and leachate. C10694. In addition, there is a system to monitor landfill gas within the waste footprint and around the perimeter to ensure that no gas is migrating through the vadose zone. C10695. Mr. Moose testified that the application requires monitoring the ambient air near the ground surface, since landfill gas is heavier than air. *Id.* Air in onsite buildings will also be continuously monitored to ensure no methane has migrated into any of the buildings. *Id.* The area around the perimeter of the facility will be monitored using 25 gas monitoring probes, thereby ensuring no gas is migrating into the surrounding ground. C10698.

Mr. Moose described the facility's groundwater monitoring system noting that the system calls for 36 groundwater monitoring wells, to be located all the way around the perimeter of the landfill, fifty feet from the edge of the waste. C10698; C11271. The uppermost aquifer will be monitored completely around the landfill. C10699. There will also be monitoring of the saturated zones of the Henry formation. *Id.*

Because groundwater flows to the South and Southeast of the landfill, wells are spaced closer together in that area, with the spacing having been determined by use of a computer program. C10700. Mr. Moose explained that ultimately the IEPA will determine the final spacing of groundwater monitoring wells, but the groundwater monitoring system as designed will be over 99.5% efficient. C10701; C11531. Groundwater sampling and testing will be done by an outside independent consultant. C11493.

Mr. Moose explained that the application includes a comprehensive construction quality assurance program that will oversee every aspect of construction to ensure that construction is in strict compliance with the design plan. C10704. Every aspect of construction will be inspected by an independent third-party and certified by a professional engineer registered in the State. *Id.* Construction oversight includes oversight of the recompacted low permeability clay liner system, and the testing of every inch of the seams of the high density polyethelene, as well as the high-density polyethelene material. C10704-10705. The quality assurance program requires that every man-made component of the system will be tested. C10705. Mr. Moose also testified that the project is so designed as to avoid any flooding downstream as a result of construction activities. C10707.

The design includes a stormwater system designed for a 100-year, 24-hour storm, with naturalized detention basins with emergent wetland shelves. C10708-10709. Prairie grasses on the banks of the basins are included to dampen or minimize the effect of erosion around the perimeter, and to serve as filtration or nutrient uptake, so that the plants themselves help clean the water. C10710. The design includes wet-bottom basins designed so that water is in them at all times, thereby causing water entering the basin to be slowed down. C10709-10710. Mr. Moose also explained that the longer water stays in such basins, the more sediment settles out. *Id.*

The application provides for the use of bio swales, and various wetland and prairie vegetation to minimize erosion, and for the rerouting of an existing farm ditch which transects a small portion of the site. C10710; C10712. The landfill design also incorporates waterfalls to provide aeration and improve the water quality prior to discharge. C10713.

With respect to operational controls, Mr. Moose testified that the proposed site will take municipal solid waste, and will take no hazardous or radioactive waste. C10717. Employees will be trained to identify acceptable and unacceptable materials, with unacceptable materials to be segregated and either recycled or disposed of properly. C10720. The gatehouse will have a radiation detection device, and vehicles will be videotaped as they enter. C10721. In addition, at the active face of the landfill, operators, spotters, landfill compactors, and all other employees will be trained to look for unacceptable waste. C10722. The application requires random

inspections, both at the landfill and at transfer stations that will use the facility, to determine whether unacceptable waste is present. C10722. Haulers who bring unacceptable materials to the landfill will be penalized, and chronic offenders will be barred from using the facility. C11515-11516.

Mr. Moose explained the application includes measures designed to control dust and mud, including requirements that onsite areas used by trucks will be paved, and that there be an adequate distance between the entrance and the scale house to queue incoming vehicles. C10726. During periods of wet weather, landfilling would take place only in areas kept under intermediate cover. C10726-10727. This minimizes the distance a truck must travel from the paved road to the point of disposal. C10727. Once weather improves, disposal will resume at the normal active face in the landfill. *Id.* Mr. Moose testified that the best mud-control measure is use of good, all-weather access roads from the facility entrance gate to and from the active face area, so that most mud will have fallen off a vehicle before the vehicle even reaches the wheel wash area. C11421. Dust is to be controlled by use of a water truck, and a street sweeper is to be used anywhere mud is created. C10728; C11485-11486.

The application provides for use of 10 to 15 foot high operational screening berms around the perimeter to shield daily operations from the view of passersby and these berms also help suppress noise and control litter. C10729. The litter control measures include a requirement that waste be covered in a timely manner, and a process which ensures trucks are cleaned out before they leave the active face of the landfill. *Id.* Operations are to be altered during windy conditions and Mr. Moose explained that there would be primary, secondary and tertiary portable fencing, with 20 foot high primary fencing to be located next to the active face. C10730. These fences are to be moved every day, or may be moved multiple times per day, as needed. *Id.*

The site will be patrolled for litter pickup, and there are strict tarping procedures with meaningful penalties meant to increase incentives for compliance. C10732. Odor control includes covering waste as soon as possible throughout the course of the day, and also use of the gas monitoring systems and flaring systems. C10735-10736. A professional exterminator will regularly visit the site to inspect for vermin and rats, and will use appropriate measures to control them. C11598-11599. Noise is to be controlled in part by use of setbacks, as well as operational screening berms. C10736. Mr. Moose confirmed that the facility will comply with Yorkville's noise ordinance. C10744.

Security will be present at the facility from the time it closes at night until the following morning to ensure that any trucks onsite are pre-approved and are part of the customer list, and that no one else gains access to the facility. C10774-10775. The proposed facility incorporates a convenience center to allow homeowners to dispose of waste in a series of roll-offs near the scale house, and a recycling drop-off area where the public may dispose of recyclable materials. C10801; C11543. Records concerning quality control and quality assurance are to be maintained onsite, along with records regarding operation, construction and self-audits. C10806.

**William Schmanski.** Mr. Schmanski is a civil engineer testified on behalf of FOGY C14099-14100. Mr. Schmanski testified that the application does not meet Criterion ii with respect to stormwater management. C14102-14103. Mr. Schmanski testified that the allowable

release rate set by Yorkville’s stormwater management ordinance is 0.15 cubic feet per second (cfs) per acre and this was given in the application as the level the landfill was designed to meet. C14105-14106. Mr. Schmanski testified that his review of the design is that the landfill will not meet the 0.15 cfs for all drainage ways. C14108.

Mr. Schmanski has never previously been involved in stormwater management design for a landfill, and he has never done a stormwater management review in connection with a landfill siting application. C14111-14112. He admitted that the three drainage sections all drain to the Fox River, and that in the aggregate, they meet the 0.15 cfs standard under the ordinance. C14114. Mr. Schmanski was aware that the IEPA’s stormwater management regulations for landfills are different than local regulations for other land uses, because the goal in stormwater management of landfill includes minimizing infiltration into the landfill. C14112-14113.

**Mr. Hyink.** Mr. Hyink offered testified on criterion ii and noted that more problems could occur if the pollution leaks and enters the aquifers. C14351-14352. Mr. Hyink believes that additional geologic investigation is needed and until that is done the best information is not available. C14352.

**Stan Ludwikowski.**<sup>2</sup> Mr. Ludwikowski offered a public comment at the siting hearing. C10952. Mr. Ludwikowski has a bachelor’s degree from the Illinois Institute of Technology and is a professional engineer. *Id.* Mr. Ludwikowski noted that the plans for the first five years call for wells that will be upgradient and no wells will be on the south end for 24 years. C10952-10960.

**Mr. Price’s Report.** Mr. Price found Mr. Drommerhausen and Mr. Moose credible and found that with conditions, the planned facility will meet criterion ii. C18741. Mr. Price then recommended 39 conditions including very specific technical requirements. C18741-18746.

**Mr. Clark’s Report.** Mr. Clark notes that the “sheer number of conditions causes one to carefully consider them to determine if Fox Moraine’s applications is deficient to the point that it should be denied.” C18755. Mr. Clark also noted that “I do not find that any one of them [the conditions] are 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.” C18755-18756. Mr. Clark observed that all the conditions came from the testimony during the course of the public hearing. C18756. Mr. Clark found that with the addition of the conditions, Fox Moraine’s application met criterion ii. *Id.*

### **Facts on Criterion iii (Minimize Incompatibility and Impact on Property Values)**

**Chris Lannert.** Mr. Lannert testified on behalf of Fox Moraine concerning criterion iii, which states that the facility is located so as to minimize incompatibility with the character of the

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<sup>2</sup> The Board has reviewed all of the public comments presented during the siting hearings. Space does not allow the Board to summarize all of those public comments. However, because Yorkville cites Mr. Ludwikowski’s public comment in the argument, so the Board will briefly summarize his comment.

surrounding area and to minimize the effect on the value of the surrounding property. C08139, C08281-8304. Mr. Lannert is president of the Lannert Group and has a degree from Michigan State University majoring in landscape architecture and regional and urban planning. C08139. Mr. Lannert has worked on a number of solid waste siting and transfer stations throughout the Midwest. C08140.

Mr. Lannert prepared the section of the application on criterion iii and in preparation he personally viewed the area on multiple occasions, using aerial photographs, touring on foot and by car, to confirm actual land uses in the area. C08144; C08150-8151. After viewing the area, Mr. Lannert prepared a landscape plan, created 3-D images, and worked with a model maker to prepare a 3-D model of the landform. C08145-8146. His planning work for the facility incorporated a variety of design elements to minimize incompatibility with the surrounding area. C08531.

Mr. Lannert noted that the holdings of Mr. Hamman, who owns 2,000 acres in the area, represent 51% of the land area situated within a one-mile circumference of the site. C08147. Mr. Hamman's land extends out in three directions from the proposed site. C08541. Mr. Lannert determined that Mr. Hamman's substantial holdings in the area could skew the results if a one mile radius was used as the study area; therefore, Mr. Lannert utilized a two mile radius in his analysis. C08147; C08186-8188; C08472. That two mile radius includes 13,083 acres, which is 84% agricultural, 7% open space, 6% residential, and 2% Commonwealth Edison right of way area. C08149-8150.

Mr. Lannert testified that the landfill is designed to minimize the incompatibility with the surrounding area. C08168. Fox Moraine took into consideration the site's frontage on highway 71, the contiguity to the Commonwealth Edison corridor, and the proximity to the proposed Prairie Parkway. C08533. The natural undulations of the area were also considered in relation to the final landform, so that the landform will be minimally intrusive. C08159-8160. Vegetation planted will also match the seasonal colors of the area. C08529. The application plans for berms that are ten to 12 feet high and feature vegetation that will add an additional ten to 12 feet as natural screening. C08162-8163. This berming will also block noise from the operations. C08517-8518.

**Frank Harrison.** Mr. Harrison also testified on behalf of Fox Moraine concerning criterion iii, specifically with respect to property values. C08571, C08648-8668. Mr. Harrison is a real estate appraiser and land use consultant and has been in the business for 36 years. *Id.* Mr. Harrison holds the MAI and SRA designations from the Appraisal Institute and has been teaching throughout the United States for 29 years. C08571-8572.

In performing his real estate impact study, Mr. Harrison states that the analyst "creates a familiarity with the location of the property and the type of property that is being . . . analyzed, as well as the area in which the property is located." C08575. Mr. Harrison explained that a series of comparisons are done searching for similar types of properties and similar types of locations. *Id.* Mr. Harrison drove through the area (C08576), looked at recent land sales



(C08578), and performed a historical case study by looking at other landfills throughout Northern Illinois (*Id.*). Mr. Harrison examined more closely the case studies, looking to the public records and actual data from the studies to form his own perspective. C08578-8579. Mr. Harrison performed an in-depth study of two landfills, Countryside in Lake County and Settler's Hill in Kane County. C08580. Mr. Harrison also reviewed the Residential Property Protection Plan (Plan) included in the application for siting. C08582.

Mr. Harrison found that the Countryside landfill bears a number of similarities to the proposed site and he was able to use several sales to do some comparative analysis. C08591. Mr. Harrison noted that the area around the Countryside landfill is growing towards the landfill and the Prairie Crossing development is in close proximity to the Countryside landfill. C08597. Mr. Harrison opined that the Countryside landfill did not prevent municipal growth. C08599. Mr. Harrison offered the same opinion concerning Settler's Hill landfill. C08688.

Mr. Harrison testified that the Plan ensures that property owners will not see the value of their property diminish because of development of the landfill. C08694. Mr. Harrison testified that the one mile radius in the application is larger than most, which tend to be set in feet or a quarter of a mile. C08695. Mr. Harrison also noted that the application has the Plan become effective upon of filing the application while most are effective upon the permitting of the site. C08695-8696.

Mr. Harrison testified that the type of development that typically occurs around an interstate exchange, such as the one planned for the Prairie Parkway, is not high-end single-family residential. C08700. Typically commercial, industrial and business park properties develop in that type of area. C08701. Mr. Harrison stated that in his opinion the facility is located so as to minimize the effect on the value of the surrounding property. C08718.

**Edward Sleezer.** Mr. Sleezer testified on behalf of FOGY on criterion iii, specifically regarding the Residential Property Protection Plan. C13481; 13484. Mr. Sleezer is a licensed real estate broker and a farmer. *Id.* Mr. Sleezer has a bachelor's degree from the University of Illinois in agriculture. C13483. He is self-employed at Sleezer Real Estate. C13481-13482. Mr. Sleezer has been a licensed real estate broker for eight years with five years as a sales person in real estate and for ten years, Mr. Sleezer was Fox Township Assessor. C13482.

Mr. Sleezer opined that the Plan fails to minimize impacts because the Plan applies in a very limited manner to a fraction of the properties in the surrounding area. C13487. Mr. Sleezer states that the Plan does not cover agricultural property, business property, or business losses. C13489. Also, the Plan does not protect subsequent buyers who wish to resell. C13490. The Plan does not protect residences located after the application was filed and the property must be enrolled within one year. C13491. Mr. Sleezer points out that the property must be on the market continuously for one year before the Plan kicks in and that time frame is very long. C13492-13493. The Plan allows for Fox Moraine to hire an appraiser to appraise the property and Mr. Sleezer believes the appraiser should be independent. C13493-13494. Mr. Sleezer also believes that funding for the Plan should be in an escrow account or somehow guaranteed. C13495.

Mr. Sleezer acknowledged that he attempted to sell his property to Mr. Hamman and that his property is not covered by the Plan. C13514-13522. Mr. Sleezer testified that he had brokered less than five transactions a year in the previous two years and some of those were his own transactions. C13516-13518. Mr. Sleezer had never reviewed a Residential Property Protection Plan before the one included in the siting application. C13526.

**R. Bud Wormley.** Mr. Wormley also testified on behalf of FOGY on criterion iii. C13564. Mr. Wormley is a real estate and insurance broker, who owns the business called Wormley Real Estate in Oswego. *Id.* Mr. Wormley has testified in his professional capacity three or four times in condemnation and pipeline issues. *Id.* Mr. Wormley has a bachelor's degree from the University of Illinois in agricultural economics. *Id.* Mr. Wormley owns property a little over a mile from the proposed site. C13585.

Mr. Wormley personally investigated and performed an analysis concerning the potential impact of the landfill on property values. C13566-13567. Mr. Wormley opined that Fox Moraine failed to minimize the impact on property values. C13575. Mr. Wormley specifically takes issue with Mr. Harrison's sales data that indicated the surrounding area was dominated by "1031" exchanges<sup>3</sup>. *Id.* Mr. Wormley indicates that the growth that has occurred in the area is residential. *Id.* Mr. Wormley further testified that developers had annexed land next to the proposed site for residential use without knowing the landfill was proposed. *Id.* Mr. Wormley testified that "1031" sales are likely to diminish exponentially as a result of loss of land value due to the depreciation because of the proposed landfill as "1031" sales are looking for land that will appreciate. C13575-13576.

Mr. Wormley expressed concerns that Fox Moraine did not consider the full impact of loss including the long-term tax assessment, deterrent to growth in the area and loss of employment opportunities. C13576-13582. Mr. Wormley talked to property owners in the area about these concerns as a part of his investigation. *Id.*

**Ted Schneller.** Mr. Schneller was the third witness presented by FOGY on criterion iii, and he is a real estate appraiser, holding the general certification. C13642-13643. Mr. Schneller has taken several courses and attended the College of DuPage. *Id.* Mr. Schneller has worked for government entities including the Illinois Department of Transportation (IDOT), the DuPage County Highway Department and the Kane County Department of Transportation, Division of Land Acquisition as an approved fee appraiser. C13644-13645.

Mr. Schneller performed a highest and best use analysis which determines the use that will yield the property the greatest net return in dollars. C13646. Mr. Schneller expressed several concerns about the proposed landfill and the impact the landfill will have on the uses around the facility. C13646-13657.

**Douglas Adams.** Mr. Adams was the fourth witness by FOGY on criterion iii and he is a licensed real estate appraiser in Illinois. C13885. He has master's degree from University of Chicago in finance and business school and he has been an appraiser for 30 years. C13886. Mr.

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<sup>3</sup> These are a type of real estate transaction with tax implications.

Adams performed a paired sales study, which is a study where you take two properties that are identical as possible expect for the variable you are trying to measure. C13888. Mr. Adams compared a landfill in rural Dewitt County, the Clinton landfill and in the Chicago area Hillside landfill. C13894. Mr. Adams chose these two landfills because one was raw farmland and the other a developed area. *Id.* Mr. Adams found that the landfill in Clinton had no noticeable impact on the land values. C13904. Mr. Adams found that in his analysis, the properties closer to the Hillside landfill sold for less. C13911. Mr. Adams believes that the landfill would be more appropriately sited where the land was farmland and would remain farmland. C13920.

**Joseph Abel.** Mr. Abel testified on behalf of FOGY and is a planning, zoning, and economic development consultant and has been for approximately 45 years. C14562. Mr. Abel holds a bachelor's degree in city and regional planning from the University of Illinois. C14563. Mr. Abel testified regarding the landfill's compatibility with the surrounding area. C14570-14572. As a land use planner, he said, "eighty percent of [his] work" deals with compatibility or incompatibility and he opined that "the proposed landfill facility is not located so as to minimize incompatibility with the character of the surrounding area." C14572-14573. Mr. Abel reviewed Yorkville's comprehensive development plan in performing his review. C14574-14578. Mr. Abel does not believe that the landfill will stimulate economic or residential development in the area. C14579. Instead, Mr. Abel, expressed concern that the proposed landfill is in the development corridor. C14691.

Mr. Abel disagreed with Mr. Lannert's methodology, as there is "nothing magic" about a one- or a two-mile radius around a particular facility. C14583. Mr. Abel does not perform his analysis in the same way. *Id.* Rather, he determines compatibility by doing a very detailed land use investigation and then determines what other uses are in the vicinity of the land use. *Id.* Mr. Abel looks at the land use and decides how the uses "get to where they want to go." *Id.* Mr. Abel stated that his approach determines the area of influence in terms of compatibility. *Id.* Mr. Abel's methodology involves driving through the area surrounding the proposed landfill and examining maps. C14598.

Mr. Abel also disagreed with the conclusions Mr. Lannert drew regarding the character of the surrounding area. From a planning standpoint, Mr. Abel would not characterize the area north of Walker Road, between Route 47 and the Fox River, as an agricultural area. C14598. In Mr. Able's opinion, areas are characterized as agricultural where there is square mile upon square mile of agricultural land, with perhaps no more than one house per square mile. C14599. Mr. Abel found that "there is the creeping of residential development" even south of Walker road, "the southern limit of the subject property." C14599. Mr. Abel, therefore, characterized the "entire area . . . as a low-density residential development, [that] still has some agricultural or farmsteads waiting to be developed." C14573. Mr. Abel stated that the properties are waiting to be developed, but they are not truly agricultural properties. C14600. Mr. Abel concluded that the landfill as proposed was not compatible with its surroundings. C14608.

**Mr. Price's Report.** Mr. Price notes that the statute assumes the proposed landfill is not compatible with the surrounding area so the first part of Mr. Harrison's and Mr. Lannert's testimony that there will be no negative impact is not credible. C18746-18747. This is also true with Mr. Abel's testimony shifting the analysis to whether the siting will be compatible with an

area. *Id.* Mr. Price also “discounts” Mr. Harrison’s analysis of other reports where he did not perform the underlying analysis. C18747. Mr. Price offers nine conditions and indicates that the criterion could be met with those conditions. *Id.*

**Mr. Clark’s Report.** Mr. Clark indicated his belief that the criterion had been met subject to the addition of the conditions recommended in Mr. Price’s report. C18758.

**Facts on Criterion v (Designed to Minimize Danger of Accidents, Fires and Spills)**

**Mr. Moose.** Mr. Moose also testified concerning measures incorporated in the application to prevent accidental spills, as well as leak detection methods including visual observation. C11350-11351. In addition, Mr. Moose testified that trucks receiving pumped leachate will be at a higher elevation so that the hose either drains into the truck or drains back into the landfill; thus, when a hose is disconnected, gravity will cause leachate to drain from one receptacle to the other, thereby severely limiting the quantity of any possible spill. *Id.* Mr. Moose also testified concerning visual and audio alarms designed to immediately alert personnel if a spill developed (C11538-11539), and testified that security personnel will be present onsite when the facility is closed. C10774-10775. Additional testimony by Mr. Moose regarding operational controls to avoid fire, spills, or other operational accidents is discussed in detail above in the facts concerning criterion ii. Mr. Moose testified that based on his experience, the application, and the materials he referred to during his testimony, his professional opinion is that the plan of operations for the proposed facility is designed to minimize the danger to the surrounding area from fires, spills, and other operational accidents. C10746.

**Ron Edwards.** Mr. Edwards testified as a representative of Fox Valley Landfill Services, which would be the operator of the proposed facility. C10173-10174. Mr. Edwards has over 23 years of experience in the management of solid waste and is currently the vice-president of Peoria Disposal Company (PDC), an owner/member of Fox Valley Landfill Services. C10174-10175. Mr. Edwards has served as vice president of landfill operations for five landfills in Illinois. C10173-10174. Mr. Edwards testified concerning the oversight that would minimize the risk of accidents through vigilant monitoring and proactive inspections to detect potential problems before they ripen into accidents. He explained that PDC would provide Fox Valley Landfill Services with personnel who would be fully trained in the management of solid waste, and who would perform routine daily and weekly inspections. PDC’s environmental compliance department also would routinely audit personnel and operations. C10188. PDC’s compliance coordinator typically visits each facility every week, the health and safety coordinator visits each month, the compliance manager visits every three months, and Mr. Edwards, as vice-president of landfill operations for PDC, visits each facility every six months. C10212.

Mr. Edwards testified that the operator will have the necessary heavy equipment and trained and experienced personnel onsite who can respond quickly to contain any fire that might occur. C10488-10490. Employees at PDC facilities receive annual training, as well as monthly “tool box” meetings that are conducted by the health and safety coordinator. C10518. In addition, monthly training sessions would be conducted by the environmental coordinator at the landfill. *Id.*

**Mr. Price's Report.** Mr. Price found Mr. Moose's testimony credible and indicated that with the conditions imposed under criterion ii and v, criterion v is met. C18748.

**Mr. Clark's Report.** Mr. Clark believed that criterion v should be approved subject to the conditions set forth under criterion ii. C18758.

**Facts on Criterion vi (Minimize Impact on Traffic)**

**Michael Werthman.** Mr. Werthman, a traffic and transportation engineer with 17 years of experience testified for Fox Moraine. C09038-9039. Mr. Werthman's testimony concerns criterion vi, whether the traffic patterns to and from the facility are so designed as to minimize the impacts on existing traffic flow. He has worked on approximately 750 different projects, including residential, commercial, and retail, and involving distribution, manufacturing, and industrial facilities. *Id.* Mr. Werthman is a registered professional engineer in Illinois, Pennsylvania and Wisconsin. C09041. He holds a bachelor's degree in civil engineering from Michigan State University, as well as a master's degree from Northwestern University. *Id.* He has specific experience with solid waste projects; having worked on 30-35 such projects, and has testified in connection with 19 solid waste related projects. C09042.

Mr. Werthman works throughout the greater Chicago area, on behalf of both private entities and units of local government. C0941-09043. He testified that due to Yorkville's rapid growth rate and the limitations associated with having only one bridge across the Fox River, traffic has become a primary concern for Yorkville, with or without a landfill. C09044-9045. In the case of this project, he conducted a three-phase traffic impact study using the accepted methodology within the industry and with transportation planning officials. C09046. Mr. Werthman explained that traffic delays are typically expressed on an "A to F" scale, with "A" representing the least amount of typical delay, and "F" representing the greatest delays. C09049-9050. Under existing conditions, the intersections that would be most impacted by the proposed landfill facility are currently operating at "B" and "C" levels. C09081. Even with the additional landfill-generated traffic, Mr. Werthman testified that they would continue to still operate at the same levels. C09081.

Mr. Werthman's first phase of the traffic study looked at existing conditions by doing field studies. C09051-9052. Mr. Werthman next held discussions with various transportation officials including IDOT, the Kendall County Highway Department, the City of Yorkville, and other public agencies. C09051. Mr. Werthman then collected and reviewed transportation-related data, including existing traffic volumes, approved and proposed developments, planned and proposed roadway improvements, and existing accident data. C09051-9052.

Peak period and daily traffic counts were conducted at critical intersections near the proposed site. C09052. And finally, Mr. Werthman and his group conducted a gap study along Route 71 at the location of the site access drive. *Id.* Route 71 is a northeast to southwest arterial roadway a two-lane, undivided cross-section, and is considered a Class 2 truck route. *Id.* At Route 71's intersection with Route 47, there are separate left turn lanes. *Id.* Routes 47 and 126 are also Class 2 truck routes, with two-lane undivided cross-sections. C09053. All three of these

roadways are under the jurisdiction of IDOT and all are designated arterial truck routes that connect important areas. C09054-9055. All of the routes carry both passenger and commercial truck traffic. *Id.*

Mr. Werthman explained that IDOT has already received funding to build the first section of the Prairie Parkway between Illinois 71 over the Fox River to Route 34, and construction is scheduled to begin in 2009. C09064-9065. In addition, he testified that IDOT proposes to widen Illinois 47 to a five-lane cross-section with additional intersection improvements between Kennedy Road and Illinois. 71. C09066. Mr. Werthman also explained that the contract has been awarded for significant improvements to the intersection of Illinois 71 and Illinois 126, and that construction was scheduled to begin in the spring of 2007. C09066-9067.

The landfill traffic plan envisions use of the arterial roadways of Illinois Routes 71, 126, and 47. C09069-9070; C09085. In assessing the potential impact the landfill may have on traffic in the area, Mr. Werthman determined that the increase in traffic will be limited, as much of the same volume of traffic that would travel to and from the landfill is already traveling to and from the landscape waste application facility that currently operates on the proposed site location. C09073-9074.

Mr. Werthman also explained that if, instead of a landfill, single family homes were built on the proposed site location, even if only one home were built per acre, the volume of traffic that would be generated would be in excess of 3,300 trips per day, rather than the 494 trips per day predicted for the landfill. C09075-9076. In the alternative, if the property was developed as a warehouse facility, there would be an estimated 57 trips per acre, per day, rather than the 494 trips per day per acre, estimated for the proposed landfill facility. C09077. An office development could be expected to generate 110 trips per acre per day. C09077. Moreover, traffic for a landfill would not be concentrated at a particular time of day, but would instead be expected to occur throughout the day. C09077-9080.

Mr. Werthman concluded that the proposed design of the access drive would be more than adequate to ensure that traffic demands can be accommodated efficiently. C09085. In Mr. Werthman's opinion, based on his study of the proposed plan and the nature of existing traffic flow, is that the traffic patterns to and from the facility were so designed as to minimize the impact on the existing traffic flows. C09085. Mr. Werthman did not rely upon the planned roadway improvements for the area. C09086.

**Brent Coulter.** Mr. Coulter testified on behalf of Kendall County, and has a bachelor's degree in civil engineering from Vanderbilt University and a master's degree in urban planning from the University of Iowa. C12984-12985; 12991. Mr. Coulter is a certified professional traffic engineer (C12986). He first came to the area in 1978 and since 2002 has had his own business, Coulter Transportation Consulting. C12987-12988. Mr. Coulter has had recent experience in the Route 47 corridor and done signal plans and intersection design studies on Routes 30 and 34 in Oswego. C12989.

Mr. Coulter reviewed the siting application in the context of criterion vi (C12991-12992) and opined that the impact of the landfill site on exiting traffic is not minimized. C12992. Mr.

Coulter first reviewed the traffic analysis prepared by Mr. Werthman. C12993. Mr. Coulter noted the proposed truck traffic indicated in Mr. Werthman's study and, in his opinion such truck traffic was more appropriately served by regional expressways. C12995-12996. Mr. Coulter noted that there is roughly 18 to 20 miles of two lane road between the proposed site and the expressways. C12998.

Mr. Coulter agrees that Routes 126 and 47 are Class II truck routes but states that this does not mean that there are not places where transportation by truck might be difficult or conflict with the area. C12999. Mr. Coulter opines that there is a difference between legal requirements versus a representation that Class II means that there are no defects on the roadway which could compromise the operation of heavy trucks. *Id.*

Mr. Coulter also opined that the proposed truck traffic will worsen the impact of traffic on Routes 47, 71 and 126. C13004. Specifically, Mr. Coulter testified that an intersection that is already rated "F" is not a good location for additional heavy truck traffic. C13016. Mr. Coulter stated that Mr. Werthman should have examined additional areas to be included based on local or site-specific areas and he should have looked at the potential impact on residential areas. C13012-13013.

**Stephan Corcoran.** Mr. Corcoran testified on behalf of the Village of Plainfield on criterion vi. C13805-13806; 13807. Mr. Corcoran is a traffic engineer and vice-president of Land Strategies. *Id.* Mr. Corcoran has been practicing for approximately 22 years as a traffic engineer doing traffic impact studies. C13806. Mr. Corcoran's testimony concerned the impact from the traffic at the proposed site as the traffic will impact Plainfield. C13810.

Mr. Corcoran reviewed the application and the traffic studies as well as studies already performed for Plainfield regarding both the downtown and surrounding areas. C13810. Mr. Corcoran testified that Plainfield currently faces a substantial transportation problem and Plainfield is trying to decrease thru truck traffic in the downtown and through some of Plainfield's subdivisions. C13817-13879.

Mr. Corcoran noted that Will, DuPage, and Cook Counties will generate 90% of the waste tonnage throughout the service area and the main route will be interstate 55 to Route 126. C13824. Mr. Corcoran believes that the application underestimates the number of trucks that will pass through Plainfield to the proposed site. *Id.* Mr. Corcoran opines that criteria vi is not met because the landfill will generate a significant amount of truck traffic through Plainfield downtown area as well as increasing delays at intersections in Plainfield. C13832.

**Mr. Price's Report.** Mr. Price found Mr. Werthman credible and found that the expert presented by Kendall County used assumptions not recognized as valid for this type of development. C18748. Mr. Price further found that additional conditions are necessary to further minimize the impact on traffic and recommends four conditions. C18748-18749.

**Mr. Clark's Report.** Mr. Clark concluded that Fox Moraine had done what could be done to minimize the impact on traffic given the current roadway system. C18760. Mr. Clark stated that he also believed that as future roadway improvements are constructed further

minimization of impacts may be possible. *Id.* Mr. Clark recommended two additional conditions for the approval of criterion vi.

### **Facts on Criterion viii (Consistency with the Solid Waste Management Plan)**

**Walter S. Willis.** Mr. Willis testified for Fox Moraine on criterion viii, whether the facility is consistent with the Solid Waste Management Plan (SWMP) adopted by Kendall County. C11715. Mr. Willis has 20 years experience doing solid waste planning in Illinois and throughout the country. C11716. Mr. Willis developed 38 plans for 38 counties in Illinois. C11734. Mr. Willis began his career working for the IEPA in the Solid Waste Management Section, and worked on the first available solid waste disposal capacity report. C11744. Mr. Willis originated the database for the landfill sites in Illinois. *Id.* He was involved when the Solid Waste Planning and Recycling Act (415 ILCS 15/1 *et seq.* (2008)) was first being considered. *Id.*

Mr. Willis testified that the SWMP adopted in 1995 was adopted after several meetings and outreach with communities. C11728. The 2000 update had several meetings though fewer than the 1995 plan. C11729. Mr. Willis testified that in 2005 only one public hearing was held and the adoption of the 2006 resolutions was accomplished with very little input. C11730. On May 4, 2006 Kendall County adopted a resolution to the SWMP and Mr. Willis opined that the resolution was adopted contrary to the principles set forth by Kendall County in 1995. C11737; C12147.

Mr. Willis testified to the sequence of events regarding the SWMP beginning in July of 2000, when the first Five Year Update was completed. C11748-11749. In February 2005, the Ten Year Update to was completed. C11749. Mr. Willis opined that the SWMP consists of the 1995 Plan and the 2000 and 2005 updates. The earlier SWMP has not been superseded by later amending documents. C11750. Rather, the Five Year Update, Ten Year Update, and all later amendments supplemented the existing SWMP substance; they did not repeal previously-adopted portions of the SWMP. C11763-11764. The 2005 Plan Update expressly provides for intergovernmental cooperation between Kendall County and the municipalities in addressing solid waste issues. C11986.

Mr. Willis went on to opine that the SWMP clearly contemplates municipal siting of landfills, as the SWMP states: “if the County is not the appropriate siting authority, a Host Community Agreement must be made with the siting authority.” C11756; C12003. As Mr. Willis noted, the Kendall County has never removed this language from the SWMP. C11757. Mr. Willis believes that the SWMP therefore requires that if an applicant sites a landfill in an incorporated area of Kendall County, the applicant must have a Host Agreement with the municipality wherein the proposed landfill is sited. C11758.

On September 26, 2006, Fox Moraine and Yorkville entered into a Host Agreement. C11759. Accordingly, Willis noted that such a Host Agreement is entirely consistent with the requirement of the SWMP. *Id.* On May 4, 2006, Kendall County adopted a resolution that provides that landfills may only be located in unincorporated areas of the county. C11741; C12147. Mr. Willis opined that if the resolution bans local municipalities from acting as siting



authorities, the resolution is contrary to the legislature's expressed intention to allow both counties and local governments to act as siting authorities. C11849. Furthermore, Mr. 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. C11755-11756; C11762-11763. Willis opined that the application was therefore consistent with the "plain and ordinary language of the plan," (C11755).

**John Church.** Mr. Church testified on behalf of Kendall County concerning criterion viii. C12903-04. Mr. Church testified in his capacity as the Kendall County Board Chairman. C12904. Mr. Church testified that after the adoption of the resolution, which provides that any landfill may only be located in unincorporated areas of the county, the SWMP text was revised to reflect the amendment. C12906-07; C12147. Mr. Church opined that in light of the resolution adopted on May 4, 2006, the Fox Moraine application was not consistent with the SWMP. C12912.

**Mr. Price's Report.** Mr. Price reported that this is a "straight forward judgment call for you" and left the decision to Yorkville. C18749.

**Mr. Clark's Report.** Mr. Clark agreed that the issue of whether criterion viii was met was a legal question and depended on interpretation of the word "located" as used in the SWMP. C18762. Mr. Clark recommended a finding that Fox Moraine met the burden on criterion viii, although noting that this decision was "headed" for the Board and the appellate court. *Id.*

### **Facts Concerning Operator Experience**

**Mr. Edwards.** Mr. Edwards 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. C10176-10180. PDC operates six solid waste landfills, and affiliates include a number of collection and transportation companies, as well as PDC Laboratories, Inc., in Peoria. C10179-10180; C10191. PDC Laboratories, Inc provides local drinking water and waste water testing services to many municipalities in the State of Illinois. *Id.* Another PDC affiliate (PDC Technical Services) also services numerous municipal clients. C10180.

Fox Valley Landfill Services is a newly formed company that has contracted to serve as the operator of the proposed facility. C10190. Upon issuance of a permit by the State, Fox Valley Landfill Services would be responsible for compliance matters at the facility. C10323-10325. As a new entity, Fox Valley Landfill Services has no record to examine; PDC's record for environmental compliance reveals that during the 90 year history of waste management, PDC has received only minor violation notices. C10193-10200. During that time, there have been only six violations that resulted in penalties, and one Supplemental Environmental Project that was agreed to without stipulation of a violation. C10200. Since 1990, PDC has had 350 inspections of PDC facilities without a violation. C10457.

**Mr. Price's Report.** Mr. Price reported the Mr. Edwards' testimony was less persuasive concerning the plan of operations and the obligations of the operators. C18741. Mr. Price noted

that Mr. Edwards' testimony highlighted the paradox that the more experienced an operator, the more of a history of regulation and enforcement there will be to judge an operator on. *Id.*

**Mr. Clark's Report.** Mr. Clark noted that Fox Valley Landfill Services has no history and the corporate relatives of Fox Valley Landfill Services were examined in depth. C18745. Mr. Clark noted that none of the companies have exemplary history but there are few violations in the last 10 years. *Id.*

### **MS. SPEARS' CREDIBILITY**

As a preliminary matter the Board must address the arguments by Fox that Ms. Spear's testimony was not credible.

#### **Arguments of the Parties on Ms. Spears Credibility**

Fox Moraine acknowledges that a motion was not filed with the hearing officer challenging Ms. Spears' credibility; however, Fox Moraine argues that the conflict between Ms. Spears' previous statement and her testimony at the Board's hearing clearly require such a finding. FMBR. at 48. Fox Moraine argues that Ms. Spears was a vocal opponent during the meetings concerning annexation, the host agreement, and vacation of Sleepy Hollow Road. *Id.* Fox Moraine contends that Ms. Spears' statements "are so unbelievable that her recent protestation of fairness should clearly be disregarded." *Id.* Fox Moraine argues that Ms. Spears acknowledged voting "no" on all the statutory criteria and asserts that this would include criteria not even at issue. FMBR. at 48-49.

Fox Moraine maintains that Ms. Spears was evasive about the *ex parte* communications she received in that she could not remember how many she received. FMBR. at 49, citing 4/21Tr. at 79-80. Fox Moraine claims that Ms. Spears "memory improved dramatically and remarkably when asked" about pre-filing contact with the Fox Moraine's representatives. *Id.*, citing 4/21Tr. at 129-30. Fox Moraine also argues that Ms. Spears claims to not have looked outside the record, but that several of the points made in her comments lack support in the record so her denial is not credible. FMBR. at 49. Fox Moraine also finds impossible Ms. Spears claims to have seen the final version of Resolution 2007-36 on the night of May 24, 2007. *Id.*

#### **Board Finding on Ms. Spears' Credibility**

The Board notes that Yorkville does not specifically respond to Fox Moraine's argument that Ms. Spears was not credible. However, Yorkville's arguments in other portions of the brief establish Yorkville's position that Ms. Spears was credible. The Board finds that Ms. Spears is credible.

The Board has carefully reviewed the record and Ms. Spears' statements may at times appear contradictory. However, the Board does not find this unusual in a proceeding which has had substantial discovery, including depositions, and spanning several years. Therefore, the Board evaluates Ms. Spears' testimony, in the context of the rest of the evidence when making findings of fact.

## **ARGUMENTS ON FUNDAMENTAL FAIRNESS**

The Board will begin with a summary of Fox Moraine's arguments followed by a summary of Yorkville's arguments. The Board will then summarize FOGY's arguments and Fox Moraine's Reply.

### **Fox Moraine's Arguments**

Fox Moraine argues that in making a decision on siting, the local authority is called upon to act in a quasi-judicial role and must make decisions based solely on the evidence in the record. FMBr. at 5, citing City of Rockford v. Winnebago County Board, PCB 87-92 (Nov. 19, 1987); Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist. 1997); and Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682. Fox Moraine asserts that of equal importance is the principle that collusion between an applicant or presumably an opponent and the actual decisionmaker resulting in pre-judgment of the facts is fundamentally unfair. FMBr. at 5, citing Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 743 N.E.2d 188.

### **Deliberative Process**

Fox Moraine notes that the Board has never reversed a local siting denial based on a finding that the decision was against the manifest weight of the evidence; however the Appellate Court has reversed. FMBr. at 7-8, citing Industrial Fuels Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (1st Dist. 1992). Fox Moraine further notes that the Board has not reversed a denial on a finding that the proceedings were fundamentally unfair in almost 22 years. FMBr. at 8, citing City of Rockford v. Winnebago County Board, PCB 87-92 (Nov. 19, 1987). Fox Moraine argues that in Rockford, the Board found that the decisionmaker made little real distinction between the quasi-judicial functions of siting and legislative functions. *Id.* Fox Moraine states that the Board noted that the decisionmaker had a lack of familiarity with the statutory criteria and the siting committee recommendations. *Id.*

Fox Moraine argues that since the Board's decision in Rockford, the deliberative process privilege as that privilege is applied in Board decisions has expanded considerably. FMBr. at 8. Fox Moraine opines that questions regarding a decisionmaker's familiarity with the statutory criteria or contents of the recommendations would be disallowed as invading the deliberative process. *Id.* Fox Moraine asserts that this is a highly problematic trend because a determination as to whether or not a decisionmaker relied on information outside the record cannot be made if the questions cannot be asked. *Id.* Fox Moraine argues that the deliberative process shield has become a "shield behind which decisionmakers hide to avoid disclosure of the fact that their decision was not based on evidence presented." *Id.*

Fox Moraine asserts that the deliberative process privilege does not exist in Illinois where bad faith and government misconduct pervade. FMBr. at 8, citing People, ex rel. Birkett v. City of Chicago, 184 Ill. 2d 521, 705 N.E.2d 48 (1999). Fox Moraine concedes that the Chicago case is distinguishable on the facts; however, Fox Moraine maintains that the principle applies in this

case. FMBR. at 8. Fox Moraine urges the Board to revisit previous holdings on the deliberative process in this case, because this case is “suffused with bad faith”. FMBR. at 9.

Fox Moraine notes that the Board has recently allowed the deliberative process privilege to remain in place and cites to Rochelle Waste Disposal v City of Rochelle, PCB 03-218 (Apr. 15, 2004) and Peoria Disposal Co. v. Peoria County Board, PCB 06-184 (June 21, 2007). FMBR. at 9. Fox Moraine argues that what distinguishes those cases from this one is that in Rochelle and Peoria Disposal the decisionmakers, though misguided appeared to be acting with good intentions and good faith. *Id.* Furthermore, Fox Moraine notes that where good faith has been in evidence, the Appellate Court had declined to hold local decisionmakers to the same standard as judicial bodies. *Id.*, citing Southwest Energy v. PCB, 275 Ill. App. 3d 84, 655 N.E.2d 304 (4th Dist. 1995). Fox Moraine claims that what sets this case apart is the evidence here does not demonstrate good faith, but rather the worst intentions. FMBR. at 9.

### **Pre-application Activities**

Fox Moraine states that pollution control facility siting proposals, particularly for landfills, generate vocal opposition and that is particularly true where the proposed site is a green field. FMBR. at 9-10. Fox Moraine alleges that the internet has compounded the problem by allowing members of the general public to become “self styled anti-landfill experts” and has allowed for better organization of opposition. FMBR. at 10.

Fox Moraine asserts that the intentions and subsequent actions of Fox Moraine were not a surprise to the city council, given that Fox Moraine had met with council members and the memorandum prepared by Mr. Wyeth, city attorney at that time. FMBR. at 10. Fox Moraine maintains that during the council meetings held between September 25, 2006 and January 23, 2007, Ms. Burd and Ms. Spears became the “champions of the objectors’ cause”. *Id.* Fox Moraine further maintains that during this same time period, the “incessant and intimidating clamor of the objectors began to wear down the will of” the aldermen to act fairly. *Id.*

Fox Moraine points out that the transcript of the annexation hearing on September 25, 2006 is nearly 200 pages and comprises almost entirely comments in opposition to annexation and the anticipated landfill. FMBR. at 11. Fox Moraine states that Mr. Plocher, subsequently “a member of Burd’s anti-landfill slate,” spoke in opposition to a landfill. *Id.* Fox Moraine brings to the Board’s attention that Mr. Milliron spoke seven times during the hearing and Mr. Milliron was “the most strident landfill opponent.” *Id.* Fox Moraine also indicates that the hearing was interrupted for applause to anti-landfill statements 32 times. *Id.*

Fox Moraine claims that the September 26, 2006 meeting was more of the same. FMBR. at 12. The meeting was interrupted 18 times for applause for statements expressing anti-landfill sentiment and Mr. Milliron was a “frequent speaker”. *Id.* Fox Moraine points to Mr. Blazer’s statements and argues that Mr. Blazer “opined at length” that siting a landfill in Yorkville was prohibited by the Kendall County Solid Waste Plan. *Id.* Fox Moraine characterizes Mr. Blazer’s statements as indicating that the Yorkville host agreement with Fox Moraine was inferior to the Kendall County host agreement with a Fox Moraine competitor. *Id.* Fox Moraine notes that Mr.

Blazer indicated that Kendall County would oppose siting of a landfill in Yorkville and urged the council to stop the process. *Id.*

Fox Moraine asserts that because of the statements made and reaction of the audiences at the September 25 and 26, 2006 meetings, “the cards were on the table” and the fact that Yorkville would need to vacate a road and Kendall County would oppose the landfill were clear. FMBr. at 11-13. Fox Moraine maintains that “a seemingly endless series of meetings” were held after the annexation to debate the merits of the host agreement and the vacating of Sleepy Hollow Road. FMBr. at 14. Fox Moraine asserts that the meetings became a “streaming, real-time forum” of landfill opponents to attack Fox Moraine. *Id.*

Fox Moraine refers to six specific meetings occurring between October 10, 2006 and November 30, 2006 and asserts that the public comments offered at those meetings “constituted a relentless and continuing *ad hominem* attack” on Yorkville for annexing the property. FMBr. at 14-15. Fox Moraine claims that during these meetings Ms. Burd and Ms. Spears emerged “as the darlings of the opposition speakers and crowd” and Ms. Burd and Ms. Spears “embraced” the idea that the host agreement was unfavorable to Yorkville. *Id.* Fox Moraine argues that Ms. Burd and Ms. Spears claimed that the annexation agreement was void because the requirement to vacate Sleepy Hollow Road required a super majority which resulted in talk of litigation. *Id.* Fox Moraine asserts that Ms. Spears had other memory lapses, but remembered clearly that Yorkville felt at risk for being sued for failing to properly vacate Sleepy Hollow Road. *Id.*

Fox Moraine argues that one of the most outspoken landfill opponents was Ron Parrish, an officer in FOGY. FMBr. at 17. Fox Moraine asserts that the opposition speakers were loud, strident and disruptive, one of the worst crowds ever witnessed by Mr. Moose. *Id.* Fox Moraine argues that Mr. Moose observed the effect on the aldermen. FMBr. at 18. Fox Moraine’s project manager, Mr. Murphy recalled the meetings as being constantly interrupted by anti-landfill “diatribes” and that the audience members were “taunting and cackling” at some of the elected officials. *Id.* Fox Moraine notes that Mr. Besco testified to regular and forceful attacks leveled by Mr. Milliron and Mr. Parrish. *Id.*

Fox Moraine asserts that the reactions of various council members is “telling” as Ms. Spears had no problem with opponents. FMBr. at 18, citing 4/21Tr. at 106. Fox Moraine notes that Mr. Werderich who was a co-founder of FOGY, testified that the public never acted inappropriately at council meetings. FMBr. at 18, citing 4/21Tr. at 301, 303, 309. Fox Moraine further notes that Ms. Burd did concede the Mr. Milliron was threatened with eviction, but indicated that the conduct did not embarrass her. FMBr. at 18, citing 4/21Tr. at 187-88.

Fox Moraine argues that boisterous and disruptive behavior is bad enough, but in this case the opposition went further. FMBr. at 19. Fox Moraine claims that the opposition took the form of threats and personal intimidation. *Id.* Fox Moraine asserts that aldermen were subjected to name calling at public hearings and that police reports were filed. *Id.* Fox Moraine claims that ultimately only Fox Moraine remained restrained during the process and this was to Fox Moraine’s detriment. *Id.*

### **Alleged Bias of Council Members**

Fox Moraine notes that Ms. Spears voted “no” to annexation, the annexation agreement and the host agreement. FMBBr. at 13. Fox Moraine further notes that Ms. Spears voted present on the amendment of the ordinance relating to pollution control facility siting. *Id.* Fox Moraine points to statements made by Ms. Spears at an October 24, 2006 meeting indicating that she had concerns about the host agreement and the annexation agreement. FMBBr. at 16.

Fox Moraine notes that Ms. Burd also voted “no” to annexation, the annexation agreement and the host agreement. FMBBr. at 13. Fox Moraine argues that Ms. Burd’s claims not to have connected the annexation with the landfill siting process are contradicted by the record and Mr. Besco. FMBBr. at 14, citing 4/22Tr. at 154. Fox Moraine points to Mr. Besco’s testimony recalling that Ms. Burd called him about annexation so that Yorkville could receive the tipping fees. *Id.* Mr. Besco further testified that on the night of the annexation hearing, Ms. Burd changed her mind. *Id.*

Fox Moraine asserts that despite the current Yorkville city administrator’s view that the landfill siting was a primary issue in the 2007 campaign<sup>4</sup>, Ms. Burd indicated that she was not an anti-landfill candidate for mayor. FMBBr. at 20, citing 4/21Tr. at 174. According to Fox Moraine, Mr. Munns initially corroborated Ms. Burd, but then agreed that her association with anti-landfill groups was public knowledge. FMBBr. at 20, citing 4/22Tr. at 78. Fox Moraine claims that the most compelling evidence is Ms. Burd’s personal and political associations with landfill opponents including members of her campaign committee, Mr. Milliron, Mr. Parrish and Mr. Werderich. FMBBr. at 20, citing 4/21Tr. at 181. In addition, Fox Moraine claims that Mr. Plocher and Mr. Sleezer were also members of Ms. Burd’s campaign committee and Mr. Sleezer testified as an expert for FOGY. FMBBr. at 20, citing 4/22Tr. at 18, C13480.

Fox Moraine asserts that Ms. Burd’s campaign committee is at the “heart of the organized effort” to defeat the siting application. FMBBr. at 20. Fox Moraine argues that Mr. Parrish gave frequent statements in opposition to the landfill and donated thousands of dollars to Ms. Burd’s campaign in cash and in kind. FMBBr. at 20-21. According to Fox Moraine, Mr. Werderich also spoke out in opposition to annexation and organized opposition, including co-founding FOGY. FMBBr. at 21. Furthermore, Fox Moraine claims that Mr. Werderich decided to run for aldermen because he felt that the council was not listening to constituents regarding opposition to the landfill and Mr. Werderich passed out literature informing would-be voters that he was among the first to oppose annexation. *Id.*

Fox Moraine asserts that both Mr. Werderich and Mr. Plocher’s campaigns were funded by Mr. Milliron and Mr. Parish who were both vocal opponents and Mr. Milliron was a founding

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<sup>4</sup> In the Board’s proceeding United City of Yorkville v. IEPA and Hamman Farms PCB 08-95, the city administrator filed a verification which indicated that the landfill siting was “the primary issue in the last city election and change in administration.” The Board’s hearing officer allowed the filing as an offer of proof and the Board will take notice of the filing in another of the Board’s dockets.

member of FOGY. FMBR. at 21. Fox Moraine argues that some of Mr. Milliron's statements were "beyond the pale" and that he "relentlessly attacked" the mayor at the meetings. *Id.* According to Fox Moraine, Mr. Milliron also was responsible for reading into the record at the March 26, 2007 siting hearing a previously confidential memorandum from Mr. Wyeth to the council concerning annexation. FMBR. at 22, citing C13316.

Fox Moraine argues that the record is indisputable that the most steadfast, vocal members of the landfill opposition joined in Ms. Burd's campaign committee and Ms. Burd's responses to questions during the hearing "defy comprehension". FMBR. at 22. Fox Moraine points to Ms. Burd's testimony that she did not know Mr. Milliron and Mr. Parrish were landfill opponents and that she did not know Mr. Werderich was a founding member of FOGY. *Id.*

Fox Moraine argues that Ms. Sutcliff prejudged the application and points to Ms. Sutcliff's website in support of the argument. FMBR. at 23. Fox Moraine argues that the materials prepared for and published on the website reveal her clear bias and pre-judgment as well as a political agenda. *Id.* Fox Moraine maintains that the statements of Ms. Sutcliff go far beyond a mere expression of opinion and are inflammatory with a clear promise to vote against siting. FMBR. at 25.

### **Yorkville Public Hearing on Siting**

Fox Moraine asserts that many of the candidates and aldermen had already formed opinions before the public hearings. Ms. Burd and Mr. Werderich "did all they could to undermine the statutory public hearing before" the hearing began. FMBR. at 25. In support of this argument, Fox Moraine points to Ms. Burd's request that Yorkville pay for legal representation for citizen's groups and Mr. Werderich's statement that the hearing presented only one side. *Id.* Fox Moraine maintains that that objectors' behavior at the public hearing was disruptive with the record indicating on the first day laughter by the crowd during the opening statement by Fox Moraine. *Id.*

Fox Moraine claims that the hearings were intentionally "dragged out and prolonged" by opponents to ensure that a final vote on the siting application could not occur before the seating of the new aldermen. FMBR. at 26. Fox Moraine concluded presenting evidence on the application on March 24, 2007, and hearings continued for four more weeks. *Id.* Fox Moraine claims that Yorkville's siting ordinance was violated when the hearings were suspended from April 4 through April 19, as the ordinance allowed no more than a five-day recess. *Id.*, citing C00748. Fox Moraine argues that the delay was occasioned by the opponents and Yorkville and as a result of the delay there was a public comment period which ended one week before the statutory decision deadline. FMBR. at 26-27.

### **Involvement of City Attorney**

Fox Moraine asserts that Ms. Burd turned to the Wildman law firm to assist in defeating the Fox Moraine siting proposal. FMBR. at 28-29. Fox Moraine notes that Ms. Burd contacted Wildman before officially taking office, though she insists that she did not authorize charges and lacked authority to engage the firm. FMBR. at 29. Fox Moraine maintains that the invoice

indicates that for the period of April 27, 2007 to May 29, 2007, more than 50 hours were logged by the Wildman law firm. FMBR. at 30. Fox Moraine notes that Yorkville city council had hired the firm to perform work totaling 50 hours a month at a fixed rate. *Id.* Furthermore, the invoice indicates that legal services are charged beginning eleven days before Ms. Burd was sworn in as mayor. *Id.* In addition to the hours worked, Fox Moraine argues that three attorneys not appointed as city attorney billed for almost 100 hours. *Id.* Fox Moraine opines that the “inescapable inference” is that the amount and scope of work was far beyond that authorized by the city council and represented by Ms. Burd. *Id.*

Fox Moraine continues the argument concerning the attorneys at the Wildman law firm not retained as city attorney noting that the invoice reflects several dozen hours performed by those attorneys. FMBR. at 30. Fox Moraine opines that “it seems incomprehensible” that the Wildman firm would proceed with a project committing dozens of hours before being retained by a client. FMBR. at 30-31. Fox Moraine argues that none of the work reflected on Fox Moraine Exhibit 16 represents the kind of work or tasks associated with a city attorney but rather is directed solely toward the landfill proposal. FMBR. at 31. Fox Moraine asserts that more importantly the tasks reflected on the invoice are directed toward the denial of the application. *Id.*

Fox Moraine delineates several items listed on the Wildman invoice arguing that these examples reflect the Ms. Burd’s administration’s “strategy” for defeating the landfill. FMBR. at 31-32. Fox Moraine asserts that the listed examples occurred prior to Ms. Burd being sworn in as mayor and the appointment of Mr. Roth as city attorney. Fox Moraine offers that given Ms. Burd’s denial of giving the Wildman firm any direction or scope of work, Ms. Burd’s failed recollection of a meeting with the firm on April 30, 2007, is not a surprise. FMBR. at 32. Fox Moraine asserts that the description on the invoice of that meeting “clearly implies” that the firm received direction from Yorkville more than a week before Mr. Roth was hired. *Id.* Fox Moraine notes that for the next several weeks the Wildman firm worked on reviewing evidence and preparing a report, at the same time that two other reports were being prepared for Yorkville pursuant to city ordinance. *Id.* The reports required by the ordinance were from the hearing officer Larry Clark and Mr. Price. FMBR. at 33.

Fox Moraine finds curious how much time Wildman spent reviewing Mr. Clark and Mr. Price’s reports. FMBR. at 33. Fox Moraine asserts that based on the evidence in the record, Ms. Burd “could clearly anticipate” that Mr. Clark and Mr. Price would recommend siting approval and such recommendations would “have to be undermined to defeat” siting. *Id.* Fox Moraine claims that Ms. Burd “realized she would need a massive, impressive-sounding report” to offset the strong recommendation of Mr. Clark and Mr. Price. *Id.* Fox Moraine maintains that the conclusion is obvious that the Wildman firm was under clear direction to construct a case for denial of siting. FMBR. at 33-34.

### **Yorkville Deliberations**

Fox Moraine argues that the deliberations on May 23 and 24, 2007 were the “Valerie Burd’s show” and the nonappearance by Mr. Clark and Mr. Price upset some of the aldermen. FMBR. at 34. Fox Moraine concedes that Ms. Burd testified that she could not remember if Mr.



Clark and Mr. Price had been invited to the deliberations; “[i]t is, however, naïve to believe [Ms.] Burd did not take steps to ensure that Clark and Price would not be present to assist.” *Id.* Fox Moraine opines that with Mr. Clark and Mr. Price unavailable, there was no one to point out that FOGY’s expert evidence was unqualified conjecture. *Id.* Fox Moraine claims that the Yorkville deliberations are fraught with error in several areas. *Id.*

**Council had insufficient time to review the evidence.** Fox Moraine notes that the city council received the reports from Mr. Clark and Mr. Price as well as Fox Moraine’s final comments the on May 23, 2007, the night of deliberations. FMBr. at 35. Fox Moraine also notes that Yorkville began deliberating two days after the close of the comment period. *Id.* Fox Moraine claims that deliberations were required because of the fast approaching decision deadline due to numerous delays “occasioned by the opposition and the city, which were used to drag out the proceedings” to ensure that the vote on siting occurred after the April 17, 2007 election. *Id.* Fox Moraine asserts that Mr. Munns complained about the absence of the hearing officer, whose experience would have been an asset. *Id.* In addition to Mr. Munns, Fox Moraine notes that Mr. Besco, Mr. Leslie, Mr. Golinski, and Ms. Spears expressed concerns about the inability to read all the material. *Id.*

Fox Moraine argues that though the decisionmaker cannot consider matters outside the record, the inability to consider the evidence in the record renders the proceeding fundamentally unfair. FMBr. at 36. Fox Moraine asserts that in this case a majority of the council indicated more time to read the material was necessary in order to be able to consider all the evidence and failure to grant that time renders the proceeding fundamentally unfair. *Id.*

**Reliance on the “Roth Report”.** Fox Moraine asserts that the invoice from the Wildman firm establishes that Ms. Burd directed the Wildman attorneys to prepare a report and a set of recommendations to counter the reports from the hearing officer and Yorkville staff. FMBr. at 36. Fox Moraine notes that the invoice indicates on May 23, 2007 a final version of legal memorandum analyzing evidence and findings and recommendations was prepared; this report was the subject of pre-hearing motions and was known as the Roth Report. *Id.* The hearing officer ruled that the Roth Report was not subject to disclosure due to attorney-client privilege. *Id.*

Fox Moraine argues that the existence of the Roth Report was confirmed by the aldermen on May 23, 2007 and was considered by the aldermen in making their decision. FMBr. at 36. Fox Moraine argues that the statement of Mr. Munns, who indicated that the Roth Report conflicted with the reports by Mr. Clark and Mr. Price, is critical. FMBr. at 37. Fox Moraine opines that the Roth Report was elevated by Yorkville from legal advice to substantive evidence and was given the same weight as the reports prepared by Mr. Clark and Mr. Price. *Id.* Fox Moraine concedes that the Board has long held that decisionmakers may rely on reports and proposed findings of fact prepared by consultants; however, those reports have always been made available to the public. *Id.* In this case, Fox Moraine maintains that the Roth Report was researched and drafted as a substantive review and critiques of the evidence and that the aldermen relied on the Roth Report in the same manner as the reports prepared by Mr. Clark and Mr. Price. *Id.* The contents of the Roth Report were not included in the record, so “no one will

ever know” if the report misstated facts, made references to matters outside the record, or included prejudicial or unfair material. *Id.*

Fox Moraine asserts that Yorkville’s claim that the Roth Report is protected by the attorney client privilege is true only in the most superficial sense. FMBBr. at 38. Fox Moraine claims that the Roth Report is functionally no different than the reports prepared by Mr. Clark and Mr. Price, which were not protected by the privilege. *Id.* Fox Moraine argues that the Roth Report should have been disclosed and Yorkville’s reliance on the report renders the proceedings fundamentally unfair. *Id.*

**Reliance on Information not in the Record.** Fox Moraine asserts that a decision based on information not received into evidence is a classic example of a proceeding that is fundamentally unfair. FMBBr. at 38. Fox Moraine points to a statement of Ms. Burd indicating that some aldermen had made their decision based on “their own research and information they have gotten” to support Fox Moraine’s position. *Id.* Fox Moraine asserts that this statement indicates that independent research was a “hallmark” of the decisionmaking process. *Id.* Fox Moraine maintains that Ms. Spears made multiple references to information and material not a part of the record. FMBBr. at 38-39. Specifically, Fox Moraine claims that the record does not include “EPA records” that indicate adequate landfill capacity for nine to 15 years. FMBBr. at 39. Fox Moraine also takes issue with Ms. Spears’ proposal of a specific technical standard for leachate storage tanks and Ms. Spears’ comments about a vinyl chloride level. *Id.* Fox Moraine lastly notes that the evidence in the record is directly contrary to Ms. Spears’ suggestions about the safety of the landfill design without a double composite liner system with a leak detection component. *Id.*

Fox Moraine asserts that Mr. Werderich also relied on information outside the record. FMBBr. at 40. Fox Moraine claims that Mr. Werderich alleged that there had been citizen complaints regarding Don Hamman’s composting operations. *Id.* Fox Moraine claims that the record contains no evidence of complaints. *Id.* Fox Moraine also takes issue with Mr. Werderich’s comment to take the siting application “on its face”. *Id.* Fox Moraine argues as Mr. Werderich is an attorney this statement was an attempt to prejudice other members of the council. *Id.* Fox Moraine maintains that Mr. Werderich’s admonition along with comments made by Mr. Munns and Mr. Munns’ vote to disapprove siting “is disturbing and throws the entire decision making process into question.” FMBBr. at 40-41.

Fox Moraine argues that Mr. Plocher also relied on evidence not in the record to make his decision. FMBBr. at 41. Fox Moraine opines that Mr. Plocher’s statements regarding his brother and the statement about the landfill leaking were not supported by the record. *Id.*

**Resolutions.** Fox Moraine notes that Mr. Roth had prepared two different resolutions, one of which was a denial with conditions. FMBBr. at 41-42. Fox Moraine further notes that the Board has frequently held that conditions attached to a denial are a nullity. However in this case, Fox Moraine believes the conditions are relevant. FMBBr. at 42. Fox Moraine believes that the conditions help to demonstrate the tainted nature of the decisionmaking process and that Yorkville understood that the manifest weight of the evidence showed approval was appropriate. *Id.* Fox Moraine argues that the imposition of conditions on the denial left Yorkville with no

rationale to support the denial. *Id.* The suggested conditions included conditions not allowed by law and resulted in a motion to allow the attorney to draft a resolution including only those which were legal. *Id.* The final resolution included some but not all the conditions proposed by the aldermen. FMBR. at 43.

Fox Moraine argues that the final resolution was not before Yorkville at the time the council voted on the resolution. FMBR. at 43. Fox Moraine maintains that the invoice from the Wildman firm substantiates that the resolution was prepared after the council meeting. *Id.* The invoice indicates that work was performed as late as May 29, 2007, the decision deadline. *Id.* Fox Moraine argues that the resolution was improperly back dated and this is further proof of Ms. Burd's deception and bad faith. FMBR. at 43-44.

Fox Moraine concedes that the mayor is not necessarily a decisionmaker, but that the Board has considered the actions of a mayor in ruling on fundamental fairness. FMBR. at 44, citing Concerned Citizens for a Better Environment v. City of Havana and Southwest Energy Corp., PCB 94-44 (May 19, 1994). The Board found the proceedings fundamentally unfair noting that the actions of the mayor showed bias. *Id.* Fox Moraine argues that the Board has recognized the important role the mayor plays in the siting process. FMBR. at 44.

Fox Moraine argues that Resolution 2007-36, as that resolution was signed and presented to Fox Moraine, was never before the council for a vote. FMBR. at 44. Fox Moraine claims that the resolution represents the final decision of the Wildman law firm rather than the council and the council improperly delegated authority to Mr. Roth to develop conditions. *Id.* Fox Moraine argues that this delegation renders the proceeding fundamentally unfair. *Id.*

Fox Moraine next argues that the four draft resolutions were presented at hearing before the Board and no one has identified which of the draft resolutions was before the council for a vote; although one of the four is Resolution 2007-36. FMBR. at 44-45. Because of this, Fox Moraine argues that ultimately determining what Yorkville decided is difficult and clearly Yorkville did not determine the contents of Resolution 2007-36. FMBR. at 45. Fox Moraine asserts that this violates Section 39.2(e) of the Act (415 ILCS 5/39.2(e) (2008)) and the application should be deemed approved by operation of law. *Id.*

Fox Moraine maintains that there was never a consensus on which siting criteria were not met. FMBR. at 45. Fox Moraine notes that Resolution 2007-36 indicates that criteria (i), (ii), (iii), (v), (vi), (viii), (ix), and (x) were not met with the reference to criterion (x) being shorthand for previous operating experience. *Id.* However, Fox Moraine argues that a review of the transcript reveals no consensus on the criteria. *Id.* Fox Moraine maintains that not all the aldermen spoke on each criterion and even those who did were at times equivocal and even contradictory. *Id.*

Fox Moraine also argues that the criterion ix regulated recharge, was not applicable in this case and if Yorkville maintains that Resolution 2007-36 represents the will of the council, then the vote demonstrates bias. FMBR. at 46.

Fox Moraine asserts that Resolution 2007-36 violates Section 39.2(e) of the Act (415 ILCS 5/39.2(e) (2008)) because there is no reasoning for the decision. FMBr. at 46. Fox Moraine argues that the record provides no reason for denial and Yorkville settled for a cursory conclusion that the criteria were not met. FMBr. at 46-47.

### Yorkville's Arguments

Yorkville asserts that in reviewing a local siting decision the Board is to consider “the fundamental fairness of the **procedures** used” by the local decisionmaker. YBr. at 15, emphasis in the original. In a local siting proceeding, Yorkville notes that fundamental fairness incorporates only minimal standards of procedural due process, like the right to be heard, the right to cross-examine witnesses, and the right to impartial rulings on evidence. YBr. at 15, citing Peoria Disposal Co. v. PCB, 385 Ill. App. 3d 781, 797, 896 N.E.2d 460, 475 (3rd Dist. 2008); Land & Lakes Co. v. PCB, 319 Ill. App. 3d at 48, 743 N.E.2d at 193; E & E Hauling, 107 Ill. 2d at 42, 481 N.E.2d at 667-68; Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695.

Yorkville argues that courts have recognized that the local decisionmaker’s role in the process is both quasi-legislative and quasi-adjudicative and the courts have recognized that the local decisionmaker is not held to the same standard of impartiality as a judge. YBr. at 15-16, citing Land & Lakes, 319 Ill. App. 3d at 47, 50, 743 N.E.2d at 193, 195. Yorkville points out that the legislature amended the Act to provide that a local decisionmaker who expresses publicly an opinion on an issue related to siting is not precluded from voting on the application. YBr. at 16; 415 ILCS 5/39.2(d) (2008). Yorkville claims this confirms that even though the siting process more closely resembles an adjudicatory proceeding than a legislative one, the local decisionmaker is not held to the same standards as a judicial body. YBr. at 16, citing Southwest Energy Corp. 275 Ill. App. 3d at 91, 655 N.E.2d at 309.

Yorkville maintains that Fox Moraine would have the Board consider more than just the procedures used by Yorkville in evaluating the application. YBr. at 16. Yorkville argues that Fox Moraine would have the Board consider the possible effect of “every alleged comment made by the public, even before the application was filed, that Fox Moraine considers to be hostile, strident, or rude.” *Id.* Yorkville opines that for the Board to consider such things “would have the Board adopt a role that is not authorized by the siting statute and that is beyond the review the Board has traditionally applied.” *Id.*

Yorkville argues that over 20 public hearings were held and the mayor and council members, including those running for office attended almost all of the hearings. YBr. at 3. Yorkville states that the hearing generated approximately 125 hours of testimony and that the record totals almost 20,000 pages. YBr. at 2. Yorkville asserts that complicating the process was the decision by Fox Moraine to file the siting application during a time when an election would be held. *Id.* Yorkville maintains that Fox Moraine seeks to “profit” from filing the application at this time by claiming “this confluence of events resulted in ‘pre-judgment and collusion, in which an organized and bold opposition group, working in consort with a highly ambitious politician, hijacked the decision-making process.’” YBr. at 2-3.

### Alleged Bias of Council Members

**Waiver.** Yorkville argues that by not raising issues of bias as to Mr. Leslie, Mr. Munns, Mr. Plocher, Mr. Werderich, and Ms. Sutcliff, Fox Moraine has waived the argument. YBr. at 4. Yorkville notes that seven aldermen voted against siting with only Mr. Besco voting for siting and Ms. Burd, as mayor, not voting. YBr. at 4. Yorkville contends that Fox Moraine claims that the mayor and six of eight aldermen were biased against Fox Moraine. *Id.* Yorkville notes that Fox Moraine does not argue that the bias was discovered too late to object to the aldermen voting on the siting application. YBr. at 5. Yorkville asserts that the evidence is undisputed that Fox Moraine believed several council members were biased throughout the landfill hearings and in fact Mr. Hamman testified that six weeks before the vote he believed Mr. Leslie, Mr. Munns, Mr. Plocher, Mr. Werderich and Ms. Sutcliff were biased. YBr. at 5, citing 4/23Tr. at 15, 18. Further, Yorkville notes that Mr. Hamman shared his view with Mr. Murphy and Mr. Burnham, who agreed with him. YBr. at 5, citing 4/22Tr. at 168, 218-219, 234-235; 4/23Tr. at 16-17.

Yorkville concedes that Fox Moraine filed a motion to disqualify Ms. Burd and Ms. Spears, and Yorkville notes Fox Moraine indicated the failure to bring the motion could result in waiver of the issue. YBr. at 5, citing C08104-5. Yorkville asserts that Fox Moraine made no other objections to any other council member until raising the issue before the Board. YBr. at 5-6. Yorkville argues that the law on waiver of unfairness and bias allegations in landfill siting proceedings is well settled that if a party believes the decisionmaker is biased, the party must raise the issue promptly at hearing. YBr. at 6. Yorkville notes that the Illinois Supreme Court held that allowing a party to sit on a belief of bias without promptly raising the issue would be improper. *Id.*, citing E & E Hauling, 107 Ill. 2d at 38-39, 481 N.E.2d at 666-67, *see also* Peoria Disposal, 385 Ill. App. 3d at 798, 896 N.E.2d at 474 (3rd Dist. 2008); Waste Management, 175 Ill. App. 3d at 1039-40, 530 N.E.2d at 695; A.R.F. Landfill, Inc. v. PCB, 174 Ill. App. 3d 82, 88-89, 528 N.E.2d 390, 394 (2nd Dist. 1988); Land and Lakes Co. v. Village of Romeoville, PCB 92-25 (June 4, 1992), *rev'd on other grounds*, 245 Ill. App. 3d 631, 616 N.E.2d 349 (3rd Dist. 1993). YBr. at 6-7.

Yorkville argues that Peoria Disposal is particularly applicable as in that case the applicant learned the day the county board voted on the application that two members were also members of the Sierra Club, a group opposing siting. YBr. at 7. Yorkville points out that on appeal the applicant argued that the Board's decision that the proceeding was fundamentally fair should be reversed as the county board members should have been disqualified. *Id.* Yorkville notes that the appellate court disagreed, finding that even though the alleged bias was not discovered until the day of the vote, the applicant could have objected before the vote was taken and the appellate court agreed that the applicant waived the right to raise bias. *Id.*, citing Peoria Disposal, 385 Ill. App. 3d at 799, 896 N.E.2d at 476.

Yorkville argues that Waste Management is also instructive in that the applicant claimed eight members of the county board were biased and should have been disqualified. YBr. at 7. However, Yorkville notes that the motion to disqualify at the local siting proceedings alleged only four were biased and the court held that by not alleging bias or prejudice as to the remaining four members, the applicant waived the claims and the issue could not be raised on appeal. YBr. at 7-8, citing Waste Management, 175 Ill. App. 3d 1039-40, 530 N.E.2d at 695.

Yorkville claims that Fox Moraine believed that Mr. Leslie, Mr. Munns, Mr. Plocher, Mr. Werderich and Ms. Sutcliff were biased well before a vote was taken by Yorkville. YBr. at 8. Furthermore, Yorkville notes that Fox Moraine was aware of the potential that the issue could be waived and Yorkville argues that Fox Moraine was right. *Id.* Yorkville asserts that Fox Moraine has waived claims of bias and prejudice and the Board should not consider the claims. *Id.*

Yorkville acknowledges that a motion to disqualify Ms. Burd and Ms. Spears was filed by Fox Moraine, which the hearing officer made no recommendation on as no evidence had been adduced. YBr. at 8, citing C08317-19. Yorkville argues that a litigant must support contentions that are made and failure to do so waives the argument. YBr. at 8, citing Waste Management of Illinois v. PCB, 160 Ill. App. 3d 434,443, 513 N.E.2d 592, 598 (2nd Dist. 1987); Wolfe v. Menard, Inc., 364 Ill. App. 3d 338, 348, 846 N.E.2d 605, 613 (2nd Dist. 2006); People v. Rockey, 322 Ill. App. 3d 832, 839, 752 N.E.2d 576, 583 (2nd Dist. 2001). Yorkville asserts that the requirement of factual and legal support is particularly critical with a claim of bias or prejudice because if any claim were enough to disqualify all litigants would claim bias when a ruling is made against them. YBr. at 9.

Yorkville maintains that Fox Moraine's motion seeking to disqualify Ms. Burd and Ms. Spears did no more than raise conclusory allegations of bias without factual support and thus the motion was insufficient. YBr. at 9. Yorkville urges the Board not to consider Fox Moraine's claims that Ms. Burd and Ms. Spears were biased against Fox Moraine. *Id.*

**Ms. Burd.** Yorkville asserts that Fox Moraine's theory that Ms. Burd was responsible for a "plot" of prejudgment and collusion is just a theory and because there is no factual support, the theory fails. YBr. at 17. Yorkville claims that Fox Moraine speculations include an attempt to link a filing in a different case before the Board to the "plot"; however Yorkville maintains that the statements made in the other case are not related to this case. *Id.* Yorkville opines that Fox Moraine appears to be arguing the doctrine of judicial estoppel and that doctrine is not applicable. YBr. at 18-19. Yorkville argues that the statements made by Yorkville's city administrator and the statements made by Ms. Burd are not inconsistent. *Id.*

Yorkville asserts that the record is clear that Ms. Burd was not an anti-landfill candidate and that Ms. Burd did not discuss the proposed landfill at any of her appearances. YBr. at 19. Furthermore, Yorkville contends that Ms. Burd refused to discuss the landfill siting with Yorkville voters even though the refusal made some voters angry. *Id.*, citing 4/21Tr. at 182-187, 188-189. Yorkville also claims that Ms. Burd's statements to the *Beacon News* also disprove Fox Moraine's theory as Ms. Burd did not answer the question but rather avoided the question. YBr. at 20.

Yorkville claims that Fox Moraine misstates the record concerning several statements of Ms. Burd. YBr. at 20-21. For example, Yorkville argues that Ms. Burd testified that Mr. Milliron had been threatened with eviction from a proceeding one time after she became mayor. YBr. at 20. Another example is that Ms. Burd knew that Mr. Werderich was involved with FOGY, but simply did not know that he had helped found the organization. YBr. at 21. Finally

Yorkville notes that the Board's hearing officer found Ms. Burd to be a credible witness. YBr. at 20.

**Ms. Spears.** Yorkville asserts that Ms. Spears' statement that she did not definitely know that when voting on annexation Fox Moraine would be filing a siting application is credible, as the record demonstrates that Fox Moraine did not definitely know an application would be filed. YBr. at 21. Yorkville points out that Fox Moraine's annexation attorney told the council on September 26, 2006, that Fox Moraine was not sure of a particular use and that the Hamman operation would continue for now. YBR. at 21-22, citing FM Exh. 2 at 156-157. Yorkville contends then that how can Fox Moraine assert that the "cards were on the table" after the annexation vote. YBr. at 22.

As to Ms. Spears' statements in the *Beacon News*, Yorkville argues that Ms. Spears stated she had been misquoted. YBr. at 22-23. Yorkville disagrees that Ms. Spears was a "vocal opponent" of siting in that like other candidates, Ms. Spears was "diligent" in not talking about the landfill. YBr. at 23. Yorkville notes that the council members were given a card, indicating that the council members could not discuss the landfill siting application and explaining the landfill siting process. *Id.*, citing 4/21Tr. at 132-133, 136, 130; 4/22Tr. at 89; 4/23Tr. at 37.

Yorkville contends that the remainder of Fox Moraine's claims regarding Ms. Spears is that by voting against annexation, host agreement, and road vacation, Ms. Spears was biased. YBr. at 23. Yorkville asserts that Fox Moraine "sees unfairness" if an elected official examines an issue on the merits and then votes as the official deems appropriate. YBR. at 24.

Yorkville further claims that there was an incidence of fundamental unfairness. YBr. at 24. Yorkville contends that Mr. Hamman offered to take Ms. Spears to a landfill in Will County and this was an obvious attempt to influence Ms. Spears. *Id.*

**Mr. Werderich.** Yorkville concedes that Mr. Werderich attended council meetings and decided to run for city council because he did not approve of the council's handling of the annexation process. YBr. at 24. Yorkville also concedes that Mr. Werderich was a member of FOGY; however, he resigned when he decided to run for city council. *Id.* Yorkville claims that Fox Moraine's arguments that Mr. Werderich prejudged the application are based on comments made two months before the application was filed and six months before he was elected to the council. *Id.*

Yorkville argues that local decisionmakers are presumed to be objective and capable of impartially judging a landfill application and to overcome that presumption a decisionmaker must have taken a public position or expressed strong views. YBr. at 25, citing A.R.F. Landfill, 174 Ill. App. 3d at 89, 528 N.E.2d at 394. Yorkville claims that other than a comment to the *Beacon News*, Mr. Werderich's comments concerned annexation and ceased when he decided to run for office. YBr. at 25. Yorkville argues that if strong statements by an elected official do not overcome the presumption, then statements made by a town resident certainly do not overcome the presumption. *Id.* Yorkville notes that Mr. Werderich testified that his comments to the *Beacon News* were taken out of context. YBr. at 25, citing 4/21Tr. at 318-319.

**Ms. Sutcliff.** Yorkville notes that Ms. Sutcliff decided to run for office because she believed that the city council was trying to rush approval of the annexation. Ms. Sutcliff was a political newcomer, and established a web site. YBr. at 25. Yorkville asserts that the web site merely summarized what other people were saying at public meetings and Fox Moraine does not claim the statements are by Ms. Sutcliff. YBr. at 26. Yorkville contends that Fox Moraine is attempting to find bias where no evidence of bias exists. *Id.*

Yorkville claims that Ms. Sutcliff was informed that she should not discuss the landfill siting and she removed anything from her website that referenced either annexation or the proposed landfill. YBr. at 26. Yorkville notes that Ms. Sutcliff informed residents, when campaigning, that she could not talk about the landfill. *Id.*, citing 4/21Tr. at 274-276.

Yorkville argues that the statements made by Ms. Sutcliff were concerning annexation, not the landfill. YBr. at 26. According to Yorkville, this includes statements that she would have voted no on annexation, but Ms. Sutcliff never gave an indication on how she would vote on the siting application. *Id.* Yorkville argues that Fox Moraine misrepresents the record as there was not a “link” to FOGY’s web site, merely the address. YBr. at 27.

**Mr. Plocher.** Yorkville argues that like Mr. Werderich, Fox Moraine sees bias in statements made by Mr. Plocher at annexation hearings which took place two months before the landfill siting application was filed. YBr. at 27. Yorkville reiterates that local decisionmakers are presumed to be objective and Mr. Plocher’s statements are innocuous and do not overcome the presumption. YBr. at 27-28. As with others, Mr. Plocher believed he had been misquoted by the *Beacon News*. YBr. at 28. Yorkville contends that Mr. Plocher’s statements about his brother also do not indicate bias or prejudice and Yorkville notes that in Peoria Disposal, the court found that consideration of personal experience did not show prejudice. *Id.*, citing Peoria Disposal, 385 Ill. App. 3d at 799, 896 N.E.2d at 476.

### **Election Campaign**

Yorkville argues that Fox Moraine “makes much” of the allegations of boisterous landfill opponents appearing at hearings, the clamor of opponents that influenced the council members, and the mayor’s practice to let anyone talk at any time. YBr. at 10. Yorkville claims that public participation is a clear purpose of the local hearing requirements and throughout Fox Moraine’s brief, Fox Moraine “disparages and disregards the public’s right to be heard.” YBr. at 10. Yorkville asserts that a landfill siting proceeding is always controversial and Fox Moraine generated significant additional interest by filing the application four and a half months before a municipal election. YBr. at 10-11. Yorkville maintains that Fox Moraine knew the election was occurring and that the mayor and four council seats would be up for election during the campaigns. YBr. at 11, citing 4/23Tr. at 11-12.

Yorkville takes issue with Fox Moraine’s statement at the close of siting hearings that Fox Moraine had taken the high road. YBr. at 11. Yorkville asserts that Mr. Parrish was threatened by Mr. Moose and did not attend the siting hearings; although Mr. Parrish was an outspoken opponent to annexation. YBr. at 11-12, citing 4/21Tr. at 161, 163-164, 166-167. Yorkville notes that Mr. Parrish became so appalled by Mr. Moose’s tactics that he stopped



attending the hearings. YBr. at 12, citing 4/21 at 170. Yorkville opines that if Fox Moraine intended to silence an opponent, Fox Moraine succeeded. YBr. at 12.

Yorkville asserts that Fox Moraine attempted to intimidate the public by threats of physical harm. YBr. at 12. Yorkville maintains that Fox Moraine's contempt for Yorkville residents who opposed siting is "evident in [Mr.] Moose's condescending depiction" of the opponents. *Id.* Yorkville claims that Fox Moraine is seeking to profit from the atmosphere Fox Moraine created by filing the application on December 1, 2006. *Id.* Yorkville argues that nonetheless, Fox Moraine received a fair hearing. *Id.*

### **Public Hearing on Siting**

**Length of Hearings.** Yorkville takes issue with Fox Moraine's claim that opponents and Yorkville were responsible for the public hearings extending such that the public comment period ended one week before the decision deadline. YBr. at 13. Yorkville notes the Fox Moraine "calculatedly filed" the application on December 1, 2006, so that the hearings would take place during an election campaign. *Id.* Yorkville asserts that Fox Moraine also fails to explain how the siting process could have been completed before the seating of the new council on May 8, 2007, and Fox Moraine fails to explain how the length of the process caused Fox Moraine prejudice. *Id.*

Yorkville argues that statutorily, Fox Moraine knew that the earliest the hearing could commence was March 1, 2007 and the hearing began on March 7, 2007. YBr. at 13. Yorkville claims that Fox Moraine "monopolized" the first 13 plus days of hearing with presentations from eight witnesses. YBr. at 13-14. Yorkville further argues that by statute a 30 day public comment period after the close of hearing is required, so out of the 180 days Yorkville is allowed to make a decision, 120 days are not available for hearing. YBr. at 14. Yorkville asserts that because of the lengthy presentations by Fox Moraine, Yorkville should be commended for completing the statutorily required proceedings in 180 days. *Id.* Yorkville further asserts that only Fox Moraine would profit from a decision not being made in 180 days as the application would be deemed accepted. *Id.*

**Fox Moraine Full and Complete Opportunity.** Yorkville maintains that Fox Moraine had a full and complete opportunity to present evidence in support of the application. YBr. at 28. Yorkville argues that the examples of problems at the annexation and landfill hearings amount to nothing more than a few, occasional shouts from the public and those outbursts happen at all kinds of city council meetings. *Id.* Yorkville contends that Fox Moraine misjudged or was simply unaware of the size of the public opposition as FOGY consisted of only five members and Mr. Milliron was not a member. YBr. at 28-29.

Yorkville argues that Fox Moraine "wildly exaggerates the tone of the landfill hearings" and that several Yorkville residents commented that the hearings were orderly, controlled, and well run. YBr. at 29, *see e.g.* 4/21Tr. at 144-145. Yorkville argues that no one other than Fox Moraine's "paid witnesses" testified that the siting hearings were disorderly, unruly, or hostile. YBr. at 30.

Yorkville maintains that whether the public opposition would qualify as “strong” is not relevant. YBr. at 30. Yorkville asserts that the case law is clear that the existence of strong public opposition does not render landfill siting proceedings fundamentally unfair as long as the applicant is provided with a full opportunity to present the support for the application. *Id.*, citing Peoria Disposal, 385 Ill. App. 3d at 798, 896 N.E.2d at 476; Waste Management 175 Ill. App. 3d at 1043, 530 N.E.2d at 697-98.

Yorkville argues that the 20 plus days of hearings, 125 hours of hearing testimony and 20,000 page record demonstrate that Fox Moraine was afforded an ample opportunity to present evidence in support of the application. YBr. at 30. Furthermore, Yorkville contends that Fox Moraine’s employees agreed that Fox Moraine had sufficient opportunity to present evidence regarding the application. *Id.* Yorkville maintains that this alone shows the proceedings were fundamentally fair. *Id.*

### **Yorkville Deliberations**

**Mayor Presiding Over Council Meeting.** Yorkville asserts that there was nothing improper in Ms. Burd, as mayor, presiding over the city council meeting. YBr. at 14. Yorkville argues that the landfill siting hearings had ended and Mr. Price’s work was complete with the submission of his report on May 18, 2007. *Id.*, citing C17191. Yorkville maintains that Mr. Clark’s report had also been filed and no provisions were made for him to attend the council meeting. YBr. at 15. Furthermore, Yorkville claims that Fox Moraine did not identify any provisions which required Mr. Clark’s presence. *Id.*

**Decision Based on the Record.** Yorkville takes issue with Fox Moraine’s claim that “several” council members relied on information outside the record and then only names two of the council members. YBr. at 32. Yorkville argues that Fox Moraine relies on Ms. Burd making a statement about council members doing research and that must necessarily mean research outside the record. *Id.* However, Yorkville contends there is no support in the record that the research was any more than researching the substantial record before the council on siting. *Id.* Yorkville contends that, contrary to Fox Moraine’s claims that Ms. Spears statement about capacity is not supported by the record, Fox Moraine’s own application indicates that landfill capacity will be exhausted in 2016 or 2017 (C01000) which is 10 or 11 years from when the application was filed. *Id.* Furthermore, according to Yorkville, the application references IEPA Landfill Capacity Reports. *Id.*, citing C01013-1014. Yorkville also points to testimony that underutilized landfill capacity is available to meet the disposal needs of the region. YBr. at 33, citing C14321, 14324, 14344.

Yorkville argues that the record also supports Ms. Spears’ statements regarding technical standards for leachate storage tanks and a double liner leak detection system. YBr. at 33, citing C15919-15920, 16819, 16824-16825, 18456, 19555-19557. And contrary to Fox Moraine’s claims that the record does not discuss safe levels for vinyl chloride, Yorkville contends that there are numerous references in the record to vinyl chloride being detected at unsafe levels near landfills. *Id.*, citing C10972, 10976-10978, 11049, 15781, 15785, 15787, 19542-19545. Finally, Yorkville argues that Ms. Spears did not misunderstand the requirements of criterion vi. YBr. at 34.

As to Mr. Werderich, Yorkville argues that Fox Moraine is again incorrect as the record contains numerous complaints regarding odor and litter, registered with different government agencies, concerning Mr. Hamman's operations. YBr. at 34, citing C07822-7849, 13305-13306, 14461-14462, 14496-14497, 15100-15102, 15107, 16408, 16441-16484, 16517-16540, 16658-16663, 16669, 16886. In addition, Mr. Moose testified as to an odor issue and the record contains evidence of a settlement agreement after operational violations were alleged against the operation. YBr. at 35, citing C10772-10773, 11394, 18557, 1634-16340, 16523-16526, 16658-16663.

**Sufficient Time to Review the Record.** Yorkville contends that Fox Moraine “dumped” a 1,319 page post-hearing submittal into the record on the last day of the public comment period “in an effort to postpone the proceedings and push the vote beyond the 180-day deadline.” YBr. at 35. Yorkville asserts that Fox Moraine could have submitted some if not all of the information sooner and now Fox Moraine complains of “a problem” Fox Moraine “deliberately created” by waiting until the last day to file the comment. YBr. at 36. Yorkville contends that in any event, the members of the siting authority need not have reviewed every page of the record as long as the record was available to them. *Id.*, citing Waste Management of Illinois v. PCB, 123 Ill. App. 3d 1075, 1080-81, 463 N.E.2d 969, 974 (2nd Dist. 1984).

**Written Decision was Proper.** Yorkville asserts that the decision of the local authority must be in writing and need only indicate which of the criteria have or have not been met. YBr. at 37, citing E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 616, 451 N.E.2d 555, 577-78 (2nd Dist. 1983), *affd on other grounds*, 107 Ill. 2d 33, 481 N.E.2d 664. Yorkville argues that the local authority need not vote on individual criteria, as the Board reviews the local decision on all of the criteria. YBr. at 37, citing City of Rockford v. Winnebago County Board, PCB 88-107 (Nov. 17, 1988). Furthermore, Yorkville argues that the decision need not include specific findings of fact or law on each criterion nor must the city council deliberate on each criterion as long as the members have had the opportunity to review the record before voting. YBr. at 37-38, citing Clutts v. Beasley, 185 Ill. App. 3d 543, 544, 541 N.E.2d 844, 845-46 (5th Dist. 1989); Slates v. Illinois Landfills, Inc., PCB 93-106, slip op. at 17-18 (Sept. 23, 1993); *see also* Waste Management, 123 Ill. App. 3d at 1080-81, 463 N.E.2d at 974. Yorkville contends that a siting authority may meet the requirements of Section 39.2(e) of the Act (415 ILCS 5/39.2(e) (2008) in several different ways including adopting an unofficial transcript of deliberations as the written decision. YBr. at 38, citing Peoria Disposal, 385 Ill. App. 3d at 796, 896 N.E.2d at 474.

Yorkville asserts that the record was available to the city council before the vote and the City's written resolution indicates that Fox Moraine failed to meet seven of the ten criteria. YBr. at 38. Yorkville notes that Fox Moraine cites to no cases to support Fox Moraine's argument that a finding of fact or statement of reason for denial was not provided as numerous courts have rejected similar arguments. *Id.*, citing E & E Hauling, Inc., 116 Ill. App. 3d at 616, 451 N.E.2d at 577-78; Clutts, 185 Ill. App. 3d at 544, 541 N.E.2d at 845-46; Slates, PCB 93-106, slip op. at 17-18 (Sept. 23, 1993); City of Rockford, PCB No. 88-107, slip op. at 6 (Nov. 17, 1988).

Yorkville contends that Resolution 2007-36 clearly indicates that Fox Moraine's application did not meet criteria (i), (ii), (iii), (v), (vi), (viii), and the tenth [previous operating

experience]. YBr. at 39, citing C18640-18643. The resolution attaches the transcripts of the deliberations as well as the reports prepared by Mr. Clark and Mr. Price. *Id.* Yorkville maintains that the written decision conforms to Section 39.2(e) of the Act (415 ILCS 5/39.2(e) (2008) and Fox Moraine has no legal or factual basis to argue otherwise. YBr. at 39.

Yorkville asserts that the city council need not have the final form of the resolution before them when voting. YBr. at 39. Yorkville maintains that the city council could vote and then prepare a written memorial of the decision. *Id.*, citing Slates, PCB 93-106, slip op. at 3, 17 and Peoria Disposal Co. v. Peoria County Board, PCB 06-184 (June 21, 2007). Furthermore, Yorkville contends that the multiple resolutions did not lead to fundamental unfairness as this procedure nearly mirrors the facts of Slates. YBr. at 40.

**Roth Report.** Yorkville asserts that no fundamental unfairness resulted from the hiring of, or work done by, the Wildman law firm. YBr. at 40-41. Yorkville first contends that Fox Moraine has no standing to challenge the city council's hiring of a city attorney. YBr. at 41. Secondly, Yorkville maintains that the invoice prepared by the Wildman firm does not show prejudgment but rather shows that the city attorneys undertook a thorough review of the landfill siting criteria and fundamental fairness issues. *Id.* Yorkville claims that the draft resolutions included two resolutions to approve siting and this too demonstrates that there was no prejudgment. YBr. at 42. Yorkville claims that Ms. Burd explained at hearing that the Wildman firm was hired for work on the landfill siting and that there were two separate engagements. YBr. at 41 f.n. 19.

### **Friends of Greater Yorkville Amicus Curiae Arguments**

FOGY submitted an *amicus curiae* brief to the Board in support of Yorkville's decision to reject the landfill siting application. FOGY asserts that the Board does not have the power to review the actions of Yorkville for anything other than procedural sufficiency. FOGYBr. at 1. FOGY maintains that if the Board were to examine the substance of the comments made and actions taken by the citizens of Yorkville in opposition to the landfill, the Board would be considering substantive due process, which is beyond the scope of the statute. FOGYBr. at 1-2. Therefore, FOGY urges that the Board should base its review on the procedures of the hearings and find that the decision to reject the siting application was not against the manifest weight of the evidence. FOGYBr. at 12.

FOGY continues that Section 40.1(a) of the Act, 415 ILCS 5/40.1(a), instructs the Board to consider "the fundamental fairness of the **procedures** used by . . . the governing body of the municipality in making its decision." FOGYBr. at 1 quoting Act, emphasis in brief. FOGY argues that the plain language of that section restricts the Board to considering procedures only and not the substance of the hearing. FOGYBr. at 2. FOGY supports this assertion by citing to Residents Against a Polluted Environment v. PCB, 293 Ill. App. 3d 219, 222-23, 687 N.E.2d 552, 554-555 (3rd Dist. 1997), where Board refused to allow opponents of a landfill to present evidence that the applicant was involved in helping La Salle County amend the Solid Waste Management Plan before the applicant applied for landfill siting. FOGYBr. at 4, citing Residents Against, 293 Ill. App. 3d at 222-23, 687 N.E.2d at 554-555. FOGY argues that First Amendment issues are "far more unwieldy and complex than the amendment of the solid waste

management plan in Residents . . . [and so] this Board should not attempt to review citizens' public comments made at the annexation hearings." *Id.*

FOGY asserts that the public comments themselves are substantive and cannot be evaluated; however, the procedures used in obtaining the comments can be. FOGYBr. at 5. FOGY relies on Waste Management, 123 Ill. App. 3d at 1081, 463 N.E.2d at 974, to argue that when public officials recognize and act on strong public opposition, they do not inherently make the siting process fundamentally unfair. *Id.* FOGY asserts that the converse is also true: since Section 39.2 of the Act requires that public hearings be held and written comments be accepted, the expression of citizens' opinions to public officials also does not make the process unfair. FOGYBr. at 5. FOGY contends that this statutory right to public comment cannot deprive Fox Moraine of procedural due process. FOGYBr. at 6. FOGY further contends that same right also "distinguishes the siting application process from a more traditional judicial or adjudicatory proceeding," *id.*, further supporting the idea that Yorkville had to consider its public comments on the landfill. FOGY maintains that considering statutorily-allowed comments does not render the process fundamentally unfair. FOGYBr. at 7.

FOGY opines that the public hearings also give citizens a place to exercise their First Amendment rights. FOGYBr. at 8. FOGY asserts that citizens should be allowed both to elect the representatives that they choose and to voice their opinions to those representatives on issues at hand. FOGYBr. at 9. FOGY urges the Board to affirm citizens' rights to express those opinions or the Board will encourage other landfill owners to schedule siting applications at the same time as local elections so that they can ask the Board to overturn the decision because of the negative influence of the election. *Id.* FOGY argues that Fox Moraine also had the chance to exercise its First Amendment rights and that Fox Moraine chose to submit its siting application close to the election, when citizens were more likely to discuss the application publicly does not violate the procedures. FOGYBr. at 10. FOGY reiterates the argument that the Board cannot consider the political action of citizens in the Board's consideration of the fairness of the procedures. *Id.* citing Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 45-47 (1st Cir. 1992). FOGY maintains that attempting to do so would "seriously embroil the Board in unpromising and unwarranted efforts to tailor the democratic process." FOGYBr. at 11. Finally, FOGY urged the Board to decide the issue on non-constitutional grounds by finding for Yorkville by agreeing with the criteria that Yorkville cited for rejection of the proposed landfill. FOGYBr. at 12.

### **Fox Moraine's Reply**

#### **Waiver**

Fox Moraine maintains that the right to challenge council members on the basis of bias and prejudgment was not waived. Reply at 3. Fox Moraine notes that prior to the siting hearings beginning, Fox Moraine filed a motion to disqualify Ms. Burd and Ms. Spears based largely on "overtly hostile comments" made by Ms. Burd and Ms. Spears at prehearing meetings of the city council dealing with ancillary issues such as annexation. *Id.* Fox Moraine asserts that at the time the siting hearings began, Fox Moraine was unaware that Ms. Burd had organized a movement to defeat the application, centered around her mayoral campaign. *Id.* Fox Moraine

claims that Fox Moraine was unaware of the interconnections between Ms. Burd, Mr. Werderich and Ms. Sutcliff, the campaign committee and FOGY. *Id.* Fox Moraine maintains that this information and the nature of Ms. Sutcliff's web site were not known until discovery was undertaken in this proceeding before the Board. *Id.*

Fox Moraine maintains that Yorkville's argument is flawed because Yorkville misstates the law in that a mere belief that a decisionmaker is biased is not sufficient; Fox Moraine argues that actual knowledge is required. Reply at 4. Fox Moraine asserts the standard is clearly enunciated in E & E Hauling where the Illinois Supreme Court indicated that an allegation of disqualifying bias must be asserted promptly after "knowledge" of the alleged disqualification. Reply at 4, citing E & E Hauling, 107 Ill. 2d at 38-39, 481 N.E.2d at 666 (emphasis in original). Fox Moraine contends that both A.R.F Landfill (174 Ill. App. 3d 82, 528 N.E.2d 390) and Waste Management, 175 Ill. App. 3d 1023, 530 N.E.2d 682, also require actual knowledge of disqualifying bias as opposed to mere supposition for waiver to occur. Reply at 4.

Fox Moraine notes that at the time of the siting hearings, Mr. Werderich, Mr. Plocher and Ms. Sutcliff had not even been elected to the city council. Reply at 5. Fox Moraine concedes that after they were elected, Fox Moraine had concerns and suspicions about the impartiality of Mr. Werderich, Mr. Plocher and Ms. Sutcliff. *Id.* Fox Moraine contends however, that absent knowledge such as that Mr. Werderich was a founding member of FOGY, Fox Moraine's suspicions did not rise to actual knowledge of disqualifying bias. *Id.* Fox Moraine asserts that this is particularly true as the depth of Ms. Burd's opposition was not clear until discovery was undertaken in the Board's proceeding. *Id.* Fox Moraine claims that during discovery, Fox Moraine learned: 1) that the Wildman law firm was contacted before Ms. Burd was sworn in as mayor, and 2) the composition of Ms. Burd's campaign committee, that included an individual who testified as an expert for FOGY. *Id.* Fox Moraine agrees that had Fox Moraine known these things prior to the vote on the application, Yorkville's argument of waiver might be valid; however the information came to light after the vote on the applications and after the appeal was filed. *Id.*

Fox Moraine argues that all the cases cited by Yorkville, except Peoria Disposal were decided prior to the 1993 amendments to the Act which added the following provision that:

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. 415 ILCS 5/39.2(e) (2008).

According to Fox Moraine, Mr. Hamman testified that he believed that a number of the candidates were prejudiced based on the article in the *Beacon News*, but the statutory language allows decisionmakers to make such statements. Reply at 5-6. Fox Moraine asserts that the statements made in the *Beacon News* are not by themselves conclusive evidence of bias or prejudice; rather Fox Moraine relies on those statements as additional evidence of bias or prejudice. Reply at 6.

Fox Moraine argues that Peoria Disposal is distinguishable from this case in that the applicant had actual knowledge of the disqualifying bias and an actual opportunity to object. Reply at 6. Fox Moraine reasserts that Fox Moraine did not have actual knowledge and further, Fox Moraine contends that there was no opportunity to object to Mr. Werderich, Mr. Plocher and Ms. Sutcliff. *Id.* Fox Moraine notes that the three aldermen were not seated until the close of public hearings and their first official participation was in the deliberations on May 23 and 24, 2007. *Id.* Fox Moraine claims that even if there had been actual knowledge of bias or prejudgment, no procedural opportunity or mechanism for objecting was available on May 23 and 24, 2007. Reply at 6-7. Fox Moraine points out that the city attorney stated that no further evidence or input from the applicant or the public would be allowed and the proceeding was under council rules. Reply at 7, citing C18537, 18540. Fox Moraine notes that the court in Peoria Disposal, after finding the argument had been waived elected to consider the argument on the merits. Reply at 7. The court found that bias had not been established. *Id.*

Fox Moraine takes issue with Yorkville's claim that the motion to disqualify Ms. Burd and Ms. Spears lacked factual and legal support. Reply at 8. Fox Moraine asserts that even a cursory review of the motion to disqualify establishes that the motion contains allegations with citation to appropriate precedent. *Id.* Fox Moraine argues that the motion is also factually specific, referencing communications.

### **Alleged Bias of Council Members**

Fox Moraine responds to the arguments of both Yorkville and FOGY regarding the language of the Act which allows the Board to determine that the "procedures" were fundamentally fair. Reply at 13. Fox Moraine opines that this argument would seem to indicate that if an ordinance is on the face fundamentally fair, the Board cannot inquire into whether the ordinance was actually followed. *Id.* According to Fox Moraine, FOGY expands this argument and asserts that the Board cannot limit the public's exercise of free speech in these matters. Reply at 14. Fox Moraine argues that the difficulty arises from the fact that the public does have the right to express opinions, but the decisionmakers are expected to base their decisions on the evidence. *Id.* Fox Moraine maintains that the public's exercise of free speech does not render the proceeding fundamentally unfair, rather the decisionmakers "succumbing to the public clamor and giving up their role of adjudicator" that renders the proceedings fundamentally unfair. *Id.*

Fox Moraine argues that FOGY's reliance on Residents Against a Polluted Environment, 293 Ill. App. 3d 219, 687 N.E.2d 552, and Southwest Energy, 275 Ill. App. 3d 84, 655 N.E.2d 304, is misplaced. Reply at 14. In Land & Lakes, 319 Ill. App. 3d 41, 743 N.E.2d 188, the court did consider whether pre-filing contacts could render the proceeding fundamentally unfair, thus overruling Residents Against a Polluted Environment, 293 Ill. App. 3d 219, 687 N.E.2d 552. *Id.* Fox Moraine further states that the reference to Southwest Energy, 275 Ill. App. 3d 84, 655 N.E.2d 304, allowing the decisionmaker to disregard the evidence and deny siting based on constituents' desires is clearly dicta and not supported by any other case law. *Id.*

Fox Moraine argues that the more appropriate way to view "procedures" as used in Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2008)) is to consider what actually occurred and

the entire decisionmaking process. Reply at 14. Fox Moraine claims that in Land & Lakes (319 Ill. App. 3d 41, 743 N.E.2d 188), the focus of the inquiry was whether the proceedings were fair and in that context the procedures used were “fatally flawed and horribly unfair”. *Id.* Fox Moraine contends that FOGY’s discussion of procedural fairness and substantive fairness is a distinction without a difference. *Id.*

Fox Moraine maintains that the Yorkville brief offers a “cursory examination of tiny snippets of evidence” for each council member to demonstrate that the council member acted appropriately. Reply at 15. With Ms. Burd, Fox Moraine asserts that Yorkville attempts to rehabilitate her though Fox Moraine impeached her testimony. *Id.* Fox Moraine notes that Yorkville begins by referencing the statements made by the city administrator in another case and noting that the statements do not trigger judicial estoppel. *Id.* Fox Moraine maintains that judicial estoppel was not argued by Fox Moraine, but that the statements are a party admission against interest that appear to directly contradict Ms. Burd’s insistence that she did not run as an anti-landfill candidate. *Id.*

Fox Moraine also takes issue with Yorkville’s claim that the Board’s hearing officer found Ms. Burd’s testimony credible. Reply at 15. Fox Moraine argues that the hearing officer found no overt physical signs of lying but made no finding on the plausibility of Ms. Burd’s statements. *Id.* One statement Fox Moraine finds particularly implausible is Ms. Burd’s testimony that she would not allow FOGY members on her committee, yet Ron Parrish, a founding member of FOGY was on the campaign committee. Reply at 16.

Fox Moraine argues that Yorkville’s defense of Ms. Spears regarding her lack of knowledge about the potential landfill application at the annexation hearing is contradicted by the fact that six months prior to annexation, the city attorney provided a confidential memorandum to the council members explaining the annexation strategy and purpose. Reply at 16. Furthermore, Ms. Spears recalls meeting with Fox Moraine’s representatives, which included a discussion of the landfill plan. *Id.* Fox Moraine asserts that a thorough review of Ms. Spears’ testimony indicates that Ms. Spears “really had no memory of much of anything, which is strangely at odds with her remarkable ability to remember minute details from thousands of pages of unsworn anti-landfill material submitted by landfill opponents.” *Id.*

Fox Moraine concedes the point that Mr. Werderich resigned as a member of FOGY when he announced his candidacy for aldermen; however, Fox Moraine asserts that this does not explain his *pro bono* work to incorporate FOGY, as well as his campaign literature and membership on Ms. Burd’s campaign committee with Mr. Milliron. Reply at 16-17. Fox Moraine asserts that Mr. Werderich’s statement that he ran for aldermen because he did not like the handling of the annexation “has, throughout the proceedings” been shorthand for opposition to the landfill. Reply at 17.

Fox Moraine contends that Yorkville’s theory that Ms. Sutcliff’s web site was simply relaying information is “utter nonsense” as the “reporting” was clearly editorial reporting. Reply at 17. Fox Moraine asserts that by placing the material on the web site she acquired ownership and urges the Board to examine the quotations from her web site. *Id.* Fox Moraine contends that the fact that Ms. Sutcliff was promising to vote against annexation long after annexation



occurred demonstrates that annexation and the landfill proposal had become intertwined and interchangeable. *Id.*

### **Timing of Application**

Fox Moraine argues that the timing of the filing of the application is irrelevant to considerations of fundamental fairness and Yorkville's argument that Fox Moraine's filing of the application during an election cycle invited or created many of the problems is not valid. Reply at 9-10. Fox Moraine maintains that the application was filed as soon as the application was completed and ready to file and Fox Moraine's right to an impartial decision was not abridged by the fact that an election campaign was occurring during the hearings. Reply at 10. Fox Moraine also argues that the right to an impartial decision was not abridged by "loud public opposition". *Id.*

Fox Moraine maintains that public participation is a critical element of the process and some public expression is emotional rather than based on facts; however, in this case, Fox Moraine argues that the opposition went beyond emotional and became disruptive and intimidating. Reply at 10. Fox Moraine argues that the point is not that there is public opposition, but rather the impact on the decisionmakers and potential impact on their votes. *Id.*

Fox Moraine challenges the argument by Yorkville that Fox Moraine's representatives allegedly intimidated some anti-landfill protestors, noting that Mr. Moose emphatically denied threatening Mr. Parrish. Reply at 11-12. In addition, Fox Moraine argues that a cursory review of the transcripts from the landfill siting hearing demonstrates that, contrary to Yorkville's claim, Fox Moraine's witnesses did not monopolize the hearings. Reply at 12. Fox Moraine cites to the transcripts to demonstrate that direct examination was often very short with cross-examination taking much more time. *Id.*

### **Opportunity to Present Evidence on the Application**

Fox Moraine notes that Yorkville argues the "undisputed point" that Fox Moraine had a full and complete opportunity to present evidence on the application. Reply at 18. However, Fox Moraine contends that this opportunity is meaningless if the decisionmakers made up their minds how to vote in advance, disregarded the evidence, or voted based on matters outside the record. *Id.* Fox Moraine argues that Mr. Clark, with thirty years of landfill experience wrote a report based on the evidence recommending approval of the siting application. *Id.* Fox Moraine contends that the fact that seven council members voted no, suggests that the council members either "didn't listen to the evidence, didn't care about the evidence, or didn't consider the evidence in reaching their decision." *Id.* Fox Moraine asserts that a full and complete opportunity to present evidence was thus a pointless endeavor. *Id.*

Fox Moraine challenges Yorkville's portrayal of the siting hearings, arguing that Yorkville relies on unsworn statements of objectors, FOGY members, and friends and relatives of the unruly. Reply at 18. Fox Moraine asserts that Yorkville misunderstands the argument being made by Fox Moraine. *Id.* Fox Moraine is arguing that the behavior was "quietly encouraged" by Ms. Burd and Ms. Spears and created an atmosphere of hostility and

intimidation that all of the aldermen had to deal with. *Id.* Fox Moraine offers Mr. Munns as an example of this, arguing that his statements indicate agreement with Mr. Clark and Mr. Price's recommendations, but ultimately he voted against siting. *Id.*

### **Materials Outside the Record**

Fox Moraine asserts that Yorkville attempts to rebut Fox Moraine's argument that the council relied on information outside the record "through mincing words and pointing to minutia". Reply at 19. Fox Moraine asserts that Ms. Spears statement that there is no known safe level for vinyl chloride is not supported by the record as the references to vinyl chloride in the record are irrelevant and the IEPA recognizes a safe drinking water standard of two parts per billion. Reply at 19, citing 35 Ill. Adm. Code 611.311.

As to the issue of criterion vi, Fox Moraine urges the Board to look at Ms. Spears testimony as the testimony makes clear that Ms. Spears felt all along that any impact on traffic flows was bad and sufficient to defeat criterion vi. Reply at 19.

Fox Moraine argues that Yorkville resorts to semantics in attempting to show that Mr. Werderich's statements are in the record. Reply at 19. Fox Moraine argues that Mr. Werderich's statement about complaints to various agencies is not the same as citizens' comments in the siting hearing. *Id.* Fox Moraine argues that in any event these complaints are not proper evidence in a landfill siting proceeding and Mr. Werderich's comments were an attempt to prejudice other council members. Reply at 20.

### **Written Decision**

Fox Moraine does not challenge the sufficiency of the written decision, though Fox Moraine argues the decision is wrong. Reply at 20. Rather, Fox Moraine argues that the decision issued is not the decision of Yorkville. *Id.* Fox Moraine notes that Yorkville concedes in the brief, that the final resolution was not before the council and Yorkville argues this is routine. *Id.* Fox Moraine argues that the "formality" of putting the spoken words and votes from deliberations into writing is "far different" than what happened in this case. Reply at 20-21. Fox Moraine contends that in this case Ms. Burd "delegated to her team of attorneys the discretionary task of actually deciding themselves what the substantive content of the final resolution should be." Reply at 21 (emphasis in original).

Fox Moraine argues that Peoria Disposal does not support Yorkville's position as there is no issue that the written decision represented the substantive action of the decisionmaker. Reply at 21. Fox Moraine contends that in this instance, the final resolution contained a number of matters that were never voted on and clearly reflected substantive work done on the resolution. *Id.*

Fox Moraine argues that Resolution 2007-36 makes a finding that Fox Moraine did not meet criterion ix. Reply at 22. Fox Moraine contends that this finding demonstrates that the bias against Fox Moraine was so strong that a finding was made on criterion ix that is not even applicable to Fox Moraine. *Id.*

### **Roth Report**

Fox Moraine argues that the Wildman firm was never hired to perform the tasks reflected in the invoice filed in this record. Reply at 21. Furthermore, Fox Moraine asserts that Ms. Burd specifically disavowed hiring the Wildman firm prior to her being sworn in as mayor. *Id.* Fox Moraine argues that no evidence has been provided to demonstrate that the Wildman firm was hired by Yorkville to do any more than the fifty hours a month of ordinary municipal work. Reply at 21-22.

### **ISSUES ON FUNDAMENTAL FAIRNESS**

The multiple arguments of the parties on the issue of fundamental fairness can be grouped in three main issues. The first issue involves the argument regarding the deliberative process. The second issue concerns bias and prejudice, and whether the pre-application process, elections, newspaper and websites, behavior and speech of the public, and behavior and speech of the council members, rendered the proceedings fundamentally unfair. The third issue involves the actual decision on siting and includes whether the length of the public hearings and resulting limited time to consider comments, the so-called “Roth Report” and other information outside the record, and the resolutions and vote rendered the proceedings fundamentally unfair. In addition, the *amicus* brief by FOGY raises a preliminary issue by seeming to assert that the Board cannot review statements made by the public in determining whether or not the proceedings were fundamentally unfair.

### **DISCUSSION ON FUNDAMENTAL UNFAIRNESS**

The Board will first address the preliminary argument in the *amicus* brief by FOGY that seems to argue that the Board cannot review the statements made by the public. The Board disagrees and has substantial case law which supports the Board. The Board often reviews statements made by the public, to ensure that statements are not made *ex parte*. See e.g. Waste Management of Illinois v. Kankakee County Board, PCB 04-186 (Jan. 24, 2008); Peoria Disposal PCB 06-184. The Board has repeatedly stated that:

The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudice of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc., PCB 90-163 (Dec. 20, 1990). Waste Management PCB 04-186, slip op at 24.

Thus, the Board will review the speech and activities of the public as well as the elected officials to determine whether the proceedings were fundamentally fair.

### **Deliberative Process**

The Board next revisits the issue of the deliberative process privilege as the issue was raised by Fox Moraine. Fox Moraine has asked the Board to reconsider the Board’s long held

position protecting the deliberative process of decisionmakers because of alleged bad faith in this case. The Board has previously held that the integrity of the decision making process requires that the mental processes of the decisionmakers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made. Rochelle Waste Disposal L.L.C. v. City Council of the City of Rochelle, Illinois, PCB 03-218 (Apr. 15, 2004); Waste Management, PCB 04-186. Public officials, however, should be considered to act without bias. E & E Hauling, 107 Ill. 2d at 42, 481 N.E.2d at 688. The presumption of the impartiality of the actions of a public official will be overcome only where it is shown by clear and convincing evidence that the official has an unalterably closed mind in critical matters. See A.R.F. Landfill, Inc. v. Lake County, PCB 87-51 (Oct. 1, 1987). Fox Moraine argues that in this case the decisionmaking process was fraught with bad faith and closed minds. However, the Board finds that the evidence is insufficient to demonstrate bad faith or unalterably closed minds. As will be discussed below in more detail, some of the decisionmakers may have expressed an opinion on annexation, but the record contains no such statements about the landfill siting application. In addition, the actions of the council members running for election do not rise to the level of bad faith. The Board will not depart from the past decisions protecting the deliberative process privilege.

### **Bias and Prejudgment**

#### **Waiver**

Fox Moraine argues that the bias of council members, Mr. Werderich, Mr. Plocher and Ms. Sutcliff contributed to the fundamental unfairness of the Yorkville landfill siting process. Yorkville argues that Fox Moraine waived the right to challenge Mr. Werderich, Mr. Plocher and Ms. Sutcliff by failing to challenge them before Yorkville. Fox Moraine maintains that until the discovery process during the appeal, Fox Moraine did not have actual knowledge of the disqualifying bias. Fox Moraine also argues that there was no opportunity to challenge the new council members before the vote.

The law is well-settled that issues of bias or prejudice on the part of the local siting authority are generally considered forfeited unless they are raised promptly in the original siting proceeding “because it would be improper to allow the complainant to knowingly withhold such a claim and to raise the claim after obtaining an unfavorable ruling.” E & E Hauling, 107 Ill. 2d at 38-39, 481 N.E.2d at 666. Fox Moraine concedes that if Fox Moraine had knowledge of the disqualifying bias, then Fox Moraine would have waived the objection.

The Board finds that Fox Moraine did have “knowledge” of alleged bias as to Mr. Werderich and Mr. Plocher and therefore has waived the right to bring the objection. Fox Moraine attempts to differentiate between “knowledge” and “belief” and argues that they believed there was bias but did not know. This argument fails with Mr. Werderich and Mr. Plocher, given that much of Fox Moraine’s argument concerning their alleged bias is based on membership in FOGY and their activities at council meetings on annexation. Also, the Board is unconvinced that an objection to the new council members could not have been made at the May 23, 2007 council meeting. Although no mechanism for objection was formally available, no attempt was made by Fox Moraine. Therefore, the Board finds that Fox Moraine has waived

objection to Mr. Werderich and Mr. Plocher. The Board will however consider some of the arguments made concerning the alleged bias of these council members as those arguments relate to the remaining issues of fundamental fairness.

As to Ms. Sutcliff, the Board finds that Fox Moraine did not waive their objection. The Board is convinced that Fox Moraine only discovered alleged bias of Ms. Sutcliff during the discovery process of the appeal.

### **Bias and Prejudgment of Council Members**

Fox Moraine has presented argument that many factors lead to and establish the bias and prejudgment of Yorkville on the issue of siting. Fox Moraine points to annexation and road vacation hearings, decisions to run for office, campaign committees, newspaper articles, web sites, and intimidation by the public and council members. As discussed above, the allegations of bias against Mr. Werderich and Mr. Plocher are waived, but the allegations of Ms. Sutcliff's potential bias is not. In addition, Yorkville denied a motion to disqualify Ms. Spears and Ms. Burd and the Board will consider that decision.

The Board and the courts have repeatedly held that the members of a local siting authority are presumed to have made their decision in a fair and objective manner. *See E & E Hauling*, 107 Ill. 2d at 42, 481 N.E.2d at 667-68; *Waste Management*, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695; *Peoria Disposal* 385 Ill. App. 3d at 797; 896 N.E.2d at 475. That presumption is not overcome merely because a member of the authority has previously taken a public position or expressed strong views on a related issue. *See* 415 ILCS 5/39.2(d) (2008); *Waste Management*, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695; *Peoria Disposal* 385 Ill. App. 3d at 798; 896 N.E.2d at 475. Rather, to show bias or prejudice in a siting proceeding, the challenger must show that a disinterested observer might conclude that the local siting authority, or the members, had prejudged the facts or law of the case. *Waste Management*, 175 Ill. App. 3d at 1040, 530 N.E.2d at 696; *Peoria Disposal* 385 Ill. App. 3d at 798; 896 N.E.2d at 475.

The Board has examined the record carefully and reviewed the transcripts of the council meeting both from the annexation hearings and the siting decision. The Board has closely reviewed the transcripts from the siting hearings. The Board cannot find support for Fox Moraine's arguments. Did Ms. Sutcliff, Ms. Spears and Ms. Burd oppose annexation, yes. Did Ms. Burd have landfill opponents on her campaign committee, yes. However, the record contains no evidence of statements opposing the landfill being made by the council members voting on the application. At hearing before the Board, Fox Moraine was unable to even establish that campaign signs were located in proximity to anti-landfill signs.

Fox Moraine has attempted to argue that the annexation and landfill siting decision are one and the same. However, they are not. Fox Moraine admits that confidential memorandums circulated concerning the connection between annexation and siting. Fox Moraine also admits to holding meetings with council members before filing the application for siting. Annexation may have been conducive to a potential landfill siting application, but at the annexation hearings themselves, Fox Moraine's attorneys stated Fox Moraine had not decided what to do with the property. Thus, the Board will not equate the two different legal proceedings and "strong views

on a related issue” does not establish bias in this siting proceeding. The Board finds support in this conclusion in E & E Hauling wherein the Illinois Supreme Court found that the local decisionmaker had not prejudged the application even though prior ordinances supporting expansion of the landfill had been passed. E & E Hauling, 107 Ill. 2d at 43, 481 N.E.2d at 668.

As to Fox Moraine’s arguments about the election campaign committees, candidate web sites, and decisions to run for office, the Board finds that the activities were citizens exercising their various rights during the election process. Ms. Sutcliff did have a web site and she adamantly maintained she was merely reporting the proceedings. Upon learning that she should not discuss the landfill as she might be a decisionmaker, Ms. Sutcliff removed the materials. Dissatisfaction with the performance of elected officials is a common reason to run for office and Mr. Werderich, Mr. Plocher, and Ms. Sutcliff were well within their rights to run. Likewise, the formation of and participation on Ms. Burd’s campaign committee are exactly the types of activities associated with elections. The Board finds these activities do not establish bias.

Fox Moraine also deplores the behavior of opponents at the public hearings on annexation and siting. Specifically, Fox Moraine notes that a number of times opponents applauded anti-annexation sentiment and the “attacks” on Yorkville for annexing the property. *See* FMBR. at 14-15. Although, the activities of the opponents at the landfill siting hearings may have been offensive to some, there is no indication in the record that Fox Moraine’s ability to present evidence concerning the siting application was inhibited. Allegations of threats were made by both sides, but the record contains no indication that these threats impacted the decision. *See* Waste Management, PCB 04-186. Furthermore, the Board notes that Yorkville’s hearing officer, Mr. Clark did exercise control and on at least one occasion chastised the audience. *See* C08116-8119. Thus, the Board finds that the behavior of the public did not create a bias.

Therefore, based on a careful review of the arguments and the record in this case, the Board finds that the record does not support a finding that bias or prejudice rendered the proceedings fundamentally unfair.

### **Deliberations**

Fox Moraine argues that the submission of a substantial amount of information to the council members on May 23, 2007, rendered the proceeding fundamentally unfair. Yorkville asserts that over 1,000 pages of that material was Fox Moraine’s final comment and some of the information could have been provided sooner. Section 39.2 of the Act (415 ILCS 5/39.2 (2008)) sets forth strict timeframes for action to be taken by both the local decisionmaker and the Board, with only the applicant able to waive those strict timeframes. *see* 35 Ill. Adm. Code 107.504; 35 Ill. Adm. Code 101.308. The case law is also clear that as long as the record is made available to the decisionmaker for review prior to making a decision, the proceeding is fundamentally fair. Waste Management, 123 Ill. App. 3d at 1081, 463 N.E.2d at 974, citing E & E Hauling, 116 Ill. App. 3d at 604, 451 N.E.2d at 569.

In this instance, Fox Moraine is arguing that the record was available but the decisionmaker was unable to review the record. The Board is unpersuaded by this argument. A

vote was taken by the council to continue the meeting and that vote was defeated. *See* C18541. At least one council member affirmatively stated that he reviewed all the evidence before the vote on May 24, 2007. *See* C18597-98. Furthermore, although the council members had the notebooks before them, Mr. Price's report was actually submitted May 18, 2007, five days before the May 23, 2007 meeting. *See* C18740. Mr. Price and Mr. Clark's filings together were only 23 pages. *See* C18740-18763. Thus, the bulk of the material supplied on May 23, 2007 was the over 1,000 pages of material submitted by Fox Moraine. Therefore, the Board finds that the late submission of materials did not render the proceedings fundamentally unfair.

Hand in hand with the arguments about late submission of the materials, are Fox Moraine's arguments that the public hearings were lengthened by the behavior of the opponents. The Board finds that the length of the public hearings, which were completed in sufficient time to allow for the statutory public comment period also did not render the proceedings fundamentally unfair.

### **Materials Outside the Record**

The Board will now turn to the "Roth Report" and the activities of the Wildman law firm. The Board has carefully reviewed the invoice provided and the testimony of Ms. Burd. Likewise, the Board notes statements from the May 23, 2007 Yorkville meeting which offer insight into the content of the Roth Report (*see* C18558). The Board finds nothing which convinces the Board to overrule the Board's hearing officer's decision that the materials in the Roth Report are protected by the attorney-client privilege. Fox Moraine relies heavily on the fact that Yorkville has no specific record that the Wildman firm was hired to perform work on the landfill siting, other than the testimony of Ms. Burd. However, the invoice is stamped paid and thus Yorkville paid Wildman for these services. Therefore, the Board finds that the Roth Report is protected by the attorney-client privilege and did not result in the proceeding being fundamentally unfair.

Fox Moraine argues that Ms. Spears and Mr. Werderich performed "research" outside the record and relied on that information in determining that the landfill siting application should be denied. The Board disagrees and Yorkville has provided citations to the record which could form the basis for the statements. Therefore, the Board finds that Ms. Spears and Mr. Werderich did not rely on or pass on information that is not within or supported by the record.

### **Resolutions**

Fox Moraine argues that Yorkville illegally delegated the authority to make a final decision to the city attorney. Yorkville argues that the city attorney merely prepared a written document to reflect Yorkville's decision. As recently as Peoria Disposal the Board has faced a challenge to the decisionmakers' final action. In Peoria Disposal, the Board found that a vote and the transcript of the vote were sufficient. Peoria Disposal, PCB 06-184, slip op. at 13, *aff'd* Peoria Disposal, 385 Ill. App. 3d 781, 896 N.E.2d 460. The Board and the courts have also held that "so long as the decision is in writing, and a record has been made showing the basis for the decision, neither a detailed statement finding specific facts, nor a detailed explanation of the relationship between the facts, the criteria, and the conclusions is necessary, and the decision can

be framed in the language of the criteria set out in the statute.” Clutts v. Beasley, 185 Ill. App. 3d 543; 541 N.E.2d 844. Thus, the decisionmaker has wide latitude in memorializing the decision made.

In this case, the city attorney prepared several potential resolutions and the council members considered them. *See* C18612. During the meeting on May 24, 2007, several council members suggested additional conditions to be added to the denial. The council gave leave to the city attorney to finalize a resolution consistent with the discussion and the law. The resolution submitted and dated May 24, 2007 is Resolution 2007-36. Criterion ix is listed prior to a parenthetical about previous operating experience. *See* C18641.

The Board finds that Yorkville did not impermissibly delegate the decisionmaking to the city attorney. The resolution signed by the mayor reflects Yorkville’s deliberations of May 24, 2007, and reflects the will of the council as voted on that night. The Board views the reference to criterion ix as a scrivener’s error, as the record is clear that Yorkville was referring to the operating history of the operator. Therefore, the Board finds that the existence of multiple draft resolutions did not render the proceeding fundamentally unfair; nor should Fox Moraine’s siting be granted by operation of law.

### **VILLAGE OF PLAINFIELD AMICUS CURIE BRIEF**

Plainfield strongly supports the decision of Yorkville and joins and adopts the brief filed by Yorkville. VBr. at 1.

### **KENDALL COUNTY BRIEF**

Kendall County adopts and incorporates Yorkville’s brief on the issue of traffic and consistency with the county’s solid waste management plant. KCBBr. at 1. Kendall County also incorporates a stipulation between Kendall County and Fox Moraine. *Id.*

### **DISCUSSION ON CRITERIA**

The Board will address the arguments made generally on the criteria. Next the Board will address arguments and findings on criteria i, iii, vi, and viii, individually. The Board will discuss criteria ii, v, and operator history together because the facts and arguments are connected.

### **General Arguments**

#### **Fox Moraine’s Arguments**

Fox Moraine argues that this case is controlled by Industrial Fuels, 227 Ill. App. 3d 533, 592 N.E.2d 148 because there was “simply no competent evidence presented by the objectors on any criterion.” FMBBr. at 101. Fox Moraine argues that *prima facie* proof for each of the statutory criteria was presented and Yorkville’s findings that Fox Moraine did not meet the



statutory criteria are not supported by the record. FMBr. at 50. Fox Moraine opines that Yorkville's decision is against the manifest weight of the evidence and should be reversed. *Id.* As further proof of the lack of record, Fox Moraine asserts that Yorkville actually found that two criteria were not met, which don't even apply in this case. FMBr. at 51.

Fox Moraine asserts that the Board is not free to disregard an applicant's expert evidence. FMBr. at 103. Further the Board cannot disregard the lack of credible opposition evidence. *Id.* Fox Moraine opines that the Board must base the decision on competent evidence and not merely speculation or unreliable or incompetent evidence. *Id.* Fox Moraine claims that once the applicant makes a *prima facie* case the burden shifts to the opponents. *Id.* Fox Moraine reminds the Board that public comments are not entitled to the same weight as expert testimony. FMBr. at 103.

Fox Moraine claims that in making a manifest weight determination, the Board must decide if there is any technically sound basis for concluding that a criterion has not been met. FMBr. at 51. Fox Moraine argues that in Town & Country, 225 Ill. 2d 103, 866 N.E.2d 227, the Illinois Supreme Court pointed out that the legislature intended a unified statewide approach to pollution control facility approval "where the primary responsibility lies with the technically qualified PCB [Board]." FMBr. at 51. Fox Moraine also argues that in Town & Country, units of local government have concurrent jurisdiction and render an interim decision, which can be challenged in an appeal to the Board wherein the Board's technically qualified members make factual and legal determinations on the evidence. FMBr. at 51, citing Town & Country, 225 Ill. 2d at 117, 866 N.E.2d at 235.

Fox Moraine maintains that the "mandate of our Supreme Court" in Town & Country, "suggests that the Board take a more proactive and aggressive role in landfill siting decision process." FMBr. at 105. Fox Moraine argues that the Illinois Supreme Court has made clear that the local decision is merely an interim decision and that ultimately the Board determines when an applicant has met the siting criteria. *Id.* Fox Moraine notes that the Illinois Supreme Court acknowledged that the Board has the knowledge and expertise to determine whether the local interim decision requires correction or reversal. *Id.*

### **Yorkville's Arguments**

Yorkville argues that prior to 1981, Yorkville would have had no opportunity or input on whether a landfill could be sited in Yorkville as that authority formerly rested with the IEPA. YBr. at 43. The legislature added Section 39.2 of the Act (415 ILCS 5/39.2 (2008)) to allow for local input and the intent was to transfer to municipalities and counties the authority that rested with IEPA. YBr. 43, citing CDT Landfill Corp. v. City of Joliet, PCB 98-60 (Mar. 5, 1998). Yorkville asserts that to grant siting approval the local decisionmaker must find that all statutory criteria have been met and if the applicant fails to meet even one of the criteria, the application fails. YBr. at 43, citing Town & Country 225 Ill. 2d at 109, 866 N.E.2d at 231; Waste Management, 160 Ill. App. 3d at 443, 513 N.E.2d at 597.

Yorkville asserts that the Board will not overturn the local authority's decision unless the decision is against the manifest weight of the evidence. YBr. at 43-44, citing Land and Lakes

Co., 319 Ill. App. 3d at 52, 743 N.E.2d at 197; Peoria Disposal, PCB 06-184. Yorkville maintains that a decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain or indisputable or if no rational trier of fact could have agreed with the local siting decision. YBr. at 44, citing *Id.* and Worthern v. Roxana, 253 Ill. App. 3d 378, 384, 623 N.E.2d 1058, 1063 (5th Dist. 1993).

Yorkville maintains that the manifest weight of the evidence standard is consistent with the legislative intent and merely because the local government could have drawn different inferences the Board cannot reverse. YBr. at 44, citing Land & Lakes v. Romeoville, PCB 92-25 (June 4, 1992). Yorkville argues that where there is conflicting evidence the Board may not reverse simply because the local decisionmaker credited one group of witnesses over another. *Id.*, see Wabash & Lawrence Counties Taxpayers & Waterdrinkers Ass'n v. PCB, 198 Ill. App. 3d 388, 392, 555 N.E.2d 1081, 1085 (5th Dist. 1990); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989).

Yorkville takes issue with the Fox Moraine argument that Town & Country mandates that the Board somehow modify the manifest weight of the evidence standard. YBr. at 44. Yorkville claims that this argument is contrary to the well-established line of precedent and a misreading of Town & Country. YBr. at 44-45. Yorkville maintains that the Illinois Supreme Court did not alter the standard of review the Board should apply to the local decision, but rather decided that the appellate court must review the Board's decision. YBr. at 45. Yorkville maintains that the Illinois Supreme Court specifically rejected the same argument advanced here by Fox Moraine indicating that the Board applies the manifest weight of the evidence standard to the local decision. *Id.*, citing Town & Country, 225 Ill. 2d at 106, 120, 117, 866 N.E.2d at 229, 237.

Yorkville maintains that Yorkville weighed the evidence, resolved conflicts in testimony and assessed witness credibility. YBr. at 45. Yorkville determined the Fox Moraine failed to establish that the application met criteria i, ii, iii, v, vi, viii, and the operator experience. *Id.* Yorkville argues that the Board should affirm the decision of Yorkville. *Id.*

Yorkville asserts that Fox Moraine's reliance on the findings of Mr. Price and Mr. Clark are largely irrelevant as Yorkville is charged under the Act to make the determination that the statutory criteria have or have not been met. YBr. at 80. Yorkville contends that a local government's consultant or staff report is not binding on the decisionmaker. *Id.*, citing Rochelle, PCB 03-218. Yorkville maintains that the reports actually support the findings of Yorkville and prove that the decision was not against the manifest weight of the evidence. *Id.*

Yorkville maintains that Fox Moraine cannot dispute that the applicant must establish that a proposed landfill meet the statutory criteria. YBr. at 81. Furthermore, Yorkville argues that the local siting authority is not obligated to correct deficiencies. YBr. at 82.

### **Fox Moraine's Reply**

Fox Moraine claims that in assessing whether a decision is against the manifest weight of the evidence, the Board must determine whether there is any sound technical basis for

concluding that a criterion is not met. Reply at 22. Fox Moraine argues that the Illinois Supreme Court in Town & Country explained that the Board must conduct a technical review of the record developed to decide whether the record supports the local siting decision. *Id.* Fox Moraine argues that a decision is against the manifest weight of the evidence if an opposite conclusion is apparent or the decisionmaker's findings appear to be arbitrary, unreasonable or not based on evidence. *Id.*, citing Webb v. Mount Sinai Hospital, 347 Ill. App. 3d 817, 807 N.E.2d 1026 (1st. Dist. 2004). Fox Moraine argues that the mere existence of some evidence that conflicts with the applicant's proof is not sufficient to support a denial of siting. Reply at 23, citing A.R.F. Landfill, PCB 87-51.

Fox Moraine argues that in this instance the applicant presented thorough, competent and exhaustive technical and scientific evidence that offered *prima facie* proof that the statutory criteria had been met. Reply at 23. Fox Moraine argues that Yorkville's decision is against the manifest weight of the evidence and the Board should reverse the siting decision. Reply at 23-24.

### **Board's Findings Regarding General Arguments**

The Board is not persuaded by Fox Moraine that the Illinois Supreme Court decision in Town & Country, 225 Ill. 2d 103, 866 N.E.2d 227, is an invitation to the Board to take a more "proactive and aggressive" (FMBR. at 105) role in landfill siting cases. The decision in Town & Country made clear that the Board's decision is reviewed by the appellate court in a siting appeal; however, the Illinois Supreme Court did not disturb the existing case precedent on siting appeals. The Board's position is shared by the appellate court in Peoria Disposal, where the applicant argued that Town & Country changed the standard by which the Board reviews the local siting decision. The appellate court rejected that argument. Peoria Disposal, 385 Ill. App. 3d at 800, 896 N.E.2d at 477. The precedent is well-settled that the Board reviews the local siting decision to determine if that decision is against the manifest weight of the evidence. Land and Lakes, 319 Ill. App. 3d at 48, 743 N.E. 2d at 194; Waste Management, 160 Ill. App. 3d 434, 513 N.E.2d 592; Rockford, 125 Ill. App. 3d 384, 465 N.E.2d 996.

The Board reviews the record using the Board's technical expertise to determine whether the decision of the local siting authority is against the manifest weight of the evidence. Town & Country, 225 Ill. 2d at 122-123, 866 N.E.2d at 238-239. The Board does not reweigh the evidence. Fairview, 198 Ill. App. 3d 541, 555 N.E.2d 1178. A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197.

As to Yorkville's challenging of Fox Moraine's reliance on the opinions of Mr. Price and Mr. Clark, Yorkville is correct that the decisionmaker is not bound by the opinions of the expert hired by that decisionmaker. The Board has consistently found that a local government's consultant report or staff recommendation is not binding on the decisionmaker. Rochelle, PCB 03-218; CDT Landfill, PCB 98-60; Hediger, PCB 90-163; McLean County Disposal Company v. County of McLean, PCB 89-108 (Nov. 15, 1989). Therefore, the Board finds that Mr. Price's and Mr. Clark's reports, though relevant to the decision of Yorkville, were not binding on Yorkville.

### **Criterion i (Need)**

#### **Fox Moraine's Arguments**

Fox Moraine asserts that need is established where the proposed facility is reasonably required by the waste needs of the service area as defined by the applicant. FMBR. at 51, citing File v. D&L Landfill, 219 Ill. App. 3d 897, 597 N.E.2d 1228 (5th Dist. 1991). Fox Moraine maintains that opposition to the service area size, or to accepting waste from outside the county, are not proper reasons to deny siting based on criterion i. FMBR. at 51-52, citing Metropolitan Waste Systems v. PCB, 201 Ill. App. 3d 51, 558 N.E.2d 785 (3rd Dist. 1990). Fox Moraine delineates the testimony provided in support of the criterion, noting that the eight-county service area once had 28 landfills but only ten are still operating. FMBR. at 52. Fox Moraine argues that based on the insufficient remaining disposal capacity for the service area and the time involved in siting and developing a landfill, Fox Moraine established a need for the facility. FMBR. at 53.

Fox Moraine argues that the only evidence provided by objectors on criterion i was provided by a “retired industrial arts teacher” who based his research on internet and newspaper articles. FMBR. at 101. Fox Moraine asserts that no scientific evaluation was performed by the witness whose opinion seemed to be that waste should be shipped by rail downstate. FMBR. at 102. Fox Moraine asserts that Mr. Hyink’s “‘testimony’ is typical” of what Yorkville “‘apparently accepted’” as evidence. FMBR. at 54. Fox Moraine claims that Mr. Hyink’s testimony had no relation to the designated service area.

#### **Yorkville's Arguments**

Yorkville argues that the applicant must prove by a preponderance of the evidence that the facility is needed to meet the waste needs of the service area defined by the applicant. YBr. at 45, citing Waste Management, 123 Ill. App. 3d at 1084, 463 N.E.2d at 976. Yorkville asserts that the applicant need not show absolute necessity, but instead that the landfill is needed to serve the area considering waste production and waste disposal capacity. YBr. at 46, citing Land & Lakes, PCB 92-25; Waste Management, 123 Ill. App. 3d at 1084, 463 N.E.2d at 976. Yorkville maintains that in considering this criterion, the decisionmaker may consider flaws in the applicant’s expert’s analysis including inconsistent and unsupported conclusions. *Id.*, citing Peoria Disposal, 385 Ill. App. 3d at 800-01, 896 N.E.2d at 477-78; Waste Management, 123 Ill. App. 3d at 1085-87, 463 N.E.2d at 977-78.

Yorkville argues that the evidence provided by Fox Moraine included that the landfills in Illinois, Indiana, Wisconsin, and Michigan would meet the needs of the larger region for eight to nine more years and another 1.1 years can be added when including the additional capacity of three other landfills. YBr. at 47-48. Yorkville notes that Mr. Kowalski conceded that the proposed facility would constitute a small fraction of the total yearly disposal capacity available to the service area. YBr. at 48. Yorkville asserts from Mr. Kowalski’s testimony alone that Yorkville could have determined the proposed landfill was unnecessary. *Id.*

Yorkville asserts that Fox Moraine merely established that the proposed facility would be convenient to certain counties in the service area. YBr. at 48. Yorkville asserts that 80% of the waste from the service area is already exported from the service area and the landfills examined by Mr. Kowalski have over 10 years of remaining capacity. *Id.* Yorkville maintains that this evidence alone supports the decision of Yorkville. *Id.*, citing Waste Management, 123 Ill. App. 3d at 1084, 463 N.E.2d at 976; Waste Management of Illinois v. Lake County Board, PCB 82-119 (Dec. 30, 1982). Yorkville adds that Kendall County produces only 0.7% of the waste generated in the service area, another factor that weighs against need. *Id.*

Yorkville argues that Fox Moraine's analysis is inconsistent in that Fox Moraine projects the life of the proposed facility to be 23 years, with all the remaining landfills to close in eight to nine years. YBr. at 48-49. Yorkville claims that by Fox Moraine's own estimates if there were no other landfills accepting waste, the proposed landfill would be open less than two years. YBr. at 49. Thus, Yorkville maintains that Fox Moraine must be estimating additional landfill space will be available in the service area. *Id.*

Yorkville argues that even more evidence was presented that the landfill was not needed, pointing to the testimony of Mr. Hyink. YBr. at 49. Yorkville contends that Fox Moraine attempts to divert the Board, by challenging the fact that Mr. Hyink is not an expert. *Id.* However, Yorkville argues that Mr. Hyink's non-expert status does not discredit otherwise persuasive evidence. *Id.*, citing Waste Management, 123 Ill. App. 3d at 1086, 463 N.E.2d at 977. Yorkville argues that Mr. Hyink's testimony is persuasive combined with the capacity estimates of Fox Moraine. *Id.*

### **Fox Moraine's Reply**

Fox Moraine argues that the use of "necessary" in the statute does not require the applicant to show that the proposed facility is necessary in absolute terms, but only that the proposed facility is "expedient" or "reasonably convenient" for the area's waste needs. Reply at 24, citing E&E Hauling, 116 Ill. App. 3d at 609, 451 N.E.2d at 573. Fox Moraine argues that opposition to the service area size or accepting out of county waste are not sufficient reasons to deny siting based on criterion i. *Id.*, citing Metropolitan Waste Systems, 201 Ill. App. 3d 51, 558 N.E.2d 785.

Fox Moraine maintains that Yorkville attempts to support the decision that criterion i was not met by arguing that if all the waste in the eight county area were placed in the proposed landfill, the landfill would be full in two years. Reply at 24. Fox Moraine is unclear on how Yorkville finds that this shows no reasonable need for the landfill. *Id.* Equally unclear to Fox Moraine is Yorkville's argument concerning the amount of waste Kendall County generates as opposition to accepting out-of-county waste is irrelevant. *Id.*

Fox Moraine argues that the absence of a present extreme crisis does not mean that criterion i has not been met; an applicant need only demonstrate that the proposed facility is reasonably required to meet the waste needs of the service area. Reply at 24-25. Fox Moraine contends that the fact that there may be ten years of capacity does not negate the need for a

facility given that siting and permitting of landfills can take an average of nine years. Reply at 25

Fox Moraine argues that Yorkville ignores the evidence regarding the remaining number of landfills and that the landfills historically relied upon by Kendall County are diminishing. Reply at 25. Fox Moraine argues that Yorkville also ignores the distance to other landfills once the nearest landfills are closed given that the proposed landfill will be centrally located. *Id.*

Fox Moraine argues that Yorkville's misrepresentation of the evidence is glaring and unmistakable. Reply at 25. Fox Moraine contends that the evidence clearly demonstrates that Yorkville and Kendall County are experiencing rapid growth and landfill capacity is shrinking, thus refuting that there is no evidence of need. Reply at 25-26.

Fox Moraine notes that the conditions set forth by Mr. Clark and Mr. Price are a "stark illustration of the falsity of Yorkville's oft-reported theory" that Mr. Price found the application did not meet criterion i. Reply at 26.

### **Board's Findings**

As stated above, the Board does not reweigh the evidence, but instead uses the Board's technical expertise to determine whether the record supports the local siting authority's decision. The Board will reverse the local siting authority's decision on a criterion if that decision is against the manifest weight of the evidence. Criterion i requires the applicant to demonstrate that the landfill is necessary to meet the waste needs of the service area as defined by the applicant. The applicant need not show absolute necessity, but mere convenience is also not sufficient to meet the criterion.

In this case, evidence in the record demonstrates that landfill capacity is available. *See* C09391-9399. The record demonstrates that landfill disposal, after closure of landfills closer to Kendall County, will be more costly and require shipment. But alternative capacity has been demonstrated. Mere convenience is not sufficient to establish need. The Board notes that the courts have found that need also does not depend only on the life expectancy of the existing landfills, but the existence of facilities outside the county may also be considered. Waste Management, 175 Ill. App. 3d at 1033, 530 N.E.2d at 691. Therefore, the Board finds that the record supports Yorkville's decision on criterion i, and the Board affirms Yorkville's decision that criterion i was not met.

### **Criterion iii (Minimize Incompatibility and Impact on Property Values)**

#### **Fox Moraine's Arguments**

Fox Moraine argues that the objectors' experts misunderstood the criterion, lacked relevant expertise, or were motivated by personal interest. FMBR. at 102. Fox Moraine maintains that the opposition groups presented witnesses who lacked relevant experience, failed to conduct legitimate, verifiable investigations and analyses, and largely misunderstood the standards under the criterion. FMBR. at 72.

Fox Moraine recaps the testimony of Mr. Lannert and Mr. Harrison, noting that both opine that the facility is designed to minimize the impact on the surrounding area and property values. FMBr. at 68-71.

Fox Moraine claims that Mr. Sleezer, who evaluated the Residential Property Value Protection Plan (Plan), is a “self-described real estate broker and farmer . . . as well as an undisclosed member of” Ms. Burd’s campaign committee,. FMBr. at 72. Fox Moraine notes that Mr. Sleezer has brokered less than ten real estate deals in the preceding two years and some of those were personal dealings. *Id.* Fox Moraine argues that Mr. Sleezer had never previously looked at a Plan and his opinion was based largely on hearsay. *Id.* Fox Moraine also attacks Mr. Sleezer claiming he has a pecuniary interest because the Plan does not protect Mr. Sleezer’s own property in the vicinity of the landfill. *Id.*

Fox Moraine also takes issue with Mr. Wormley’s testimony claiming a personal interest because he owns property in the area. FMBr. at 72-73. Fox Moraine notes that Mr. Wormley is not a certified appraiser, but offered the opinion that there would be depreciation of the surrounding property if the landfill was sited. *Id.* Fox Moraine points to alleged inconsistencies in Mr. Wormley’s testimony and asserts that Mr. Wormley could offer no suggestions for minimization of the impact. FMBr. at 73.

Fox Moraine argues the Mr. Schneller was also self-motivated and self-interested because he lives near the facility. FMBr. at 74. Fox Moraine takes issue with the analysis performed by Mr. Schneller using “highest and best use” comparisons. *Id.* Fox Moraine notes that Mr. Schneller was unaware of developments occurring around existing landfills. *Id.*

Fox Moraine takes issue with the late submission of Mr. Adams report and the use of Hillside landfill for comparison given the substantial difference between the proposed landfill and Hillside. FMBr. at 75-76. Fox Moraine points to several weaknesses in the testimony of Mr. Adams. FMBr. at 75-78.

As to Mr. Abel, Fox Moraine noted that Mr. Abel’s testimony relied on Yorkville’s Comprehensive Land Use Plan Update. FMBr. at 78. However, Fox Moraine points out that Mr. Abel conceded that the landfill was outside the boundaries of the Comprehensive Land Use Plan Update. *Id.* Fox Moraine asserts that “notably” Mr. Abel never assisted an applicant in filing an application for siting approval. FMBr. at 79

### **Yorkville’s Arguments**

Yorkville asserts that the Act requires the landfill applicant to minimize the incompatibility with the surrounding area and minimize the effect on property values. YBr. at 55, citing 415 ILCS 5/39.2(a)(iii) (2008). Yorkville asserts that the applicant must demonstrate compliance with both portions of the criterion. *Id.*, citing Waste Hauling, Inc. v. Macon County, PCB 91-223 (May 7, 1992). Yorkville argues that as to the first portion, the applicant must demonstrate that the applicant has done or will do what is reasonably feasible to reduce the landfill’s incompatibility. *Id.*, citing Waste Management, 123 Ill. App. 3d at 1090, 463 N.E.2d at

980. Yorkville asserts that where the applicant fails to address the entire surrounding area and inadequacies in the applicant's minimization efforts are shown, the applicant has not met the burden. *Id.*

Yorkville argues that the decisionmaker may consider height and visibility and the application's failure to consider viewpoints from multiple vantage-points or environmental and visual impact. YBr. at 56 (citations omitted). Yorkville asserts that the decisionmaker may also consider whether the proposed landfill is shielded from view on all sides. *Id.*

Yorkville argues that as to the second portion of criterion iii that the decisionmaker may consider not only expert testimony regarding valuation, but also public statement regarding any difficulty of selling of property or the decline of nearby business. YBr. at 56, citing Waste Management, 123 Ill. App. 3d at 1090-92, 463 N.E.2d at 980-81. Yorkville contends that the decisionmaker may also consider whether property values and residential sales near existing landfills have decreased even when 80% of the land nearby the landfill is agricultural. *Id.*, citing Rochelle, PCB 03-218.

Yorkville argues that the decision of Yorkville is not against the manifest weight of the evidence given the conflicting testimony and especially given the conditions recommended by Mr. Price. YBr. at 57. Further, Yorkville notes that Mr. Price found parts of Mr. Harrison's testimony not credible. *Id.*

Yorkville takes issue with many statements made by Mr. Lannert noting that Mr. Lannert did not count residents or residential units in the area surrounding the landfill while acknowledging the explosive growth of the area. YBr. at 57. Yorkville contends that Mr. Lannert conceded that Fox Moraine needed to consider future growth and that growth tended to residential. *Id.* Yorkville notes that Mr. Lannert opined that the development would occur with or without the landfill. *Id.*

Yorkville asserts that as designed only three sides of the completed landfill will be landscaped and Mr. Lannert was unable to testify as to whether or not active cells would be shielded from view. YBr. at 58. Yorkville maintains that Mr. Lannert's testimony was that the landform would be visible and almost 80 feet higher than the next tallest point. *Id.*

Yorkville argues that the Fox Moraine thus failed to provide for proper landscaping and screening and the landfill would become the highest point in the area. YBr. at 58. Furthermore, Yorkville argues, the design did not recognize that the recreational needs could change over the life of the facility or provide a way for Yorkville or the community to have input on appearance closer to the closure date. *Id.*

Yorkville points to the testimony of Mr. Abel, noting his disagreement with Mr. Lannert's methodology and classification of the area. YBr. at 58-60. Yorkville contends that Mr. Abel's opinion is that the landfill design did not minimize the impact on the surrounding area. YBr. at 60.



Yorkville similarly takes issue with Mr. Harrison's historical case studies and failure to perform analysis on the data, rather than merely spot checking the data. YBr. at 60-61. Yorkville asserts that Mr. Harrison's conclusions regarding Settler's Hill industrial growth are in complete indifference to Yorkville's residential growth. YBr. at 61.

Yorkville also takes issue with Mr. Harrison's testimony on the Plan. YBr. at 61. Yorkville contends that Mr. Harrison did not study property values to note the impact of the application on property values and he suggested that development in the area would have to be compatible with industrial uses. YBr. at 61-62.

Yorkville notes that FOGY presented the testimony of four witnesses concerning the second portion of criterion iii. YBr. at 62-65. Mr. Adams also looked at land sales around two landfills and determined that in one instance the landfill had no noticeable impact, but at the other landfill there was an impact. YBr. at 62-63. Yorkville also noted that Mr. Sleezer and Mr. Wormley also expressed concerns about the impact of the proposed landfill on property values especially given the Plan's failure to cover nonresidential areas and potential loss of "1031" sales. YBr. at 63-65. Yorkville also points to Mr. Schneller's concerns that the design does not minimize the impact on surrounding property values. YBr. at 65

Yorkville maintains that given the hearing testimony and the recommendations by Mr. Price and Mr. Clark, the evidence supports Yorkville's finding that Fox Moraine failed to satisfy criterion iii. YBr. at 66. Yorkville cites several additional areas where Mr. Lannert and Mr. Harrison's testimony fell short. YBr. at 66-68.

### **Fox Moraine's Reply**

Fox Moraine reiterates the argument that the fact that Mr. Price recommended special conditions does not equate with a finding that criterion iii cannot be met. Reply at 34. Fox Moraine renews the argument that the opposition's witnesses were lacking in appropriate experience, failed to conduct legitimate, verifiable investigation, and largely misunderstood the criterion. Reply at 35. Fox Moraine references Mr. Price's report for support that the testimony and evidence for the opposition is pointless. Reply at 35. Fox Moraine attacks the opinions of witnesses such as Mr. Abel, Mr. Adams, and Mr. Sleezer. Reply at 36-38. Fox Moraine takes issue with Yorkville's characterization of Mr. Harrison's testimony arguing that Yorkville resorts to gross misrepresentations concerning the testimony. Reply at 41-42.

### **Board's Findings**

Yorkville was presented with substantial evidence regarding criterion iii. The Board notes that the hearing body, in this case Yorkville, weighs the evidence, resolves conflicts in testimony, and assesses the credibility of the witnesses. Merely because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford, 125 Ill. App. 3d 384, 465 N.E.2d 996; Waste Management, 122 Ill. App. 3d 639, 461 N.E.2d 542; Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel, 135 Ill. App. 3d 343, 481 N.E.2d 1032.

Fox Moraine argues that the witnesses presented by the opposition have a personal interest in the outcome and are not qualified to offer opinions. The Board understands that individuals who live in the area of a landfill may strongly oppose the siting and certainly Section 39.2 of the Act (415 ILCS 5/39.2 (2008)) contemplates participation by such individuals. However, the Board disagrees with Fox Moraine that the individuals were not qualified to offer opinions. Although not experienced in landfill siting, each of the individuals was involved and had been involved in real estate transactions in the area. Also those who live and work locally often have a unique perspective.

The Board finds that the record supports Yorkville's decision that the design of the landfill did not minimize the impact on surrounding properties or the impact on property values. The Board does not reweigh the evidence or reassess the credibility of witnesses and in this instance the record contains evidence which Yorkville could have relied upon for denial of siting. The Board therefore affirms Yorkville's decision that the applicant did not meet criterion iii.

### **Criterion vi (Minimize Impact on Traffic)**

#### **Fox Moraine's Arguments**

Fox Moraine argues that the experts presented by the opposition "uniformly misunderstood that the plain language of the criterion assumes that there will be some associated increase in traffic." FMBR. at 102. Fox Moraine asserts that the evidence presented by the opponents focused solely on the notion that the landfill would generate increased traffic in and around Yorkville. FMBR. at 83. Fox Moraine claims that the opponents' witnesses failed to address whether the design minimized the impact on traffic. *Id.* Fox Moraine opines that the basis for the opponents' testimony was that any increase in traffic would be unacceptable. FMBR. at 83-84.

Fox Moraine recaps the testimony of Mr. Werthman noting his opinion that the facility was designed to minimize the impact on traffic. FMBR. at 84-87. By contrast, Fox Moraine argues that Mr. Coulter's testimony focused not on minimization of impact from traffic but on the location of the facility. FMBR. at 87. Fox Moraine asserts that Mr. Corcoran's testimony did not focus on minimization. FMBR. at 87-89.

Fox Moraine argues that the evidence provided by Fox Moraine was based on an in-depth analysis using scientific data and proposed improvements as well as traffic patterns. FMBR. at 89. Opponents offered evidence that the landfill should be built somewhere else and that a town 16 to 17 miles away wanted to ensure that trucks associated with the landfill did not pass through. *Id.*

#### **Yorkville's Arguments**

Yorkville notes that while Mr. Werthman testified that the application met criterion vi, two other experts, Mr. Coulter and Mr. Corcoran, disagreed. YBr. at 70. Yorkville delineates several facts from the testimony of Mr. Coulter and Mr. Corcoran and argues that as the trier of

fact, Yorkville was able to hear and assess the testimony the various witnesses. YBr. at 70-72. Yorkville contends that Yorkville could determine whether one witness was more credible than others and the council members were free to use their own knowledge and familiarity with traffic conditions. YBr. at 72, citing Fairview, 198 Ill. App. 3d at 550, 555 N.E.2d at 1184 and Hediger, PCB 90-136. Yorkville claims that the council members could use this knowledge to determine that criterion vi was not met. *Id.*

Yorkville reiterates that the Board may not reweigh the evidence or reassess the witnesses' credibility. YBr. at 72, citing Wabash, 198 Ill. App. 3d at 392, 555 N.E.2d at 1085; Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. Yorkville asserts that where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits some witnesses and not others. *Id.*, citing Waste Management, 187 Ill. App. 3d at 82, 543 N.E.2d at 507. Yorkville contends that there was significant testimony showing that Fox Moraine failed to establish that the proposed landfill's design would minimize the impact on traffic flow and patterns. Because Yorkville was in the best position to weigh the evidence and testimony, the Board should affirm Yorkville's decision that criterion vi was not met. YBr. at 72.

### **Fox Moraine's Reply**

Fox Moraine argues that the opponents focus on the "notion that a landfill would generally increase traffic in and around Yorkville and surrounding communities." Reply at 45. Fox Moraine reiterates that the opponents seem to argue that any increase in traffic is unacceptable. *Id.* Fox Moraine relies on the findings of Mr. Price and Mr. Clark to support the position that criterion vi was met and to challenge the arguments of Yorkville. Reply at 46. Fox Moraine argues that Yorkville's reliance on Mr. Coulter and Mr. Corcoran is misplaced as Mr. Coulter focused on location of the landfill and Mr. Corcoran focused on the impact on Plainfield. Reply at 47-48.

### **Board's Findings**

As with criterion iii, Yorkville was presented with substantial evidence regarding criterion vi. And as noted above, Yorkville weighs the evidence, resolves conflicts in testimony, and assesses the credibility of the witnesses. Merely because the Board could reach a different conclusion, does not warrant reversal. City of Rockford, 125 Ill. App. 3d 384, 465 N.E.2d 996; Waste Management, 122 Ill. App. 3d 639, 461 N.E.2d 542; Steinberg, 139 Ill. App. 3d 503, 487 N.E.2d 1064; Willowbrook Motel, 135 Ill. App. 3d 343, 481 N.E.2d 1032.

Yorkville relied on the testimony of Mr. Coulter and Mr. Corcoran to decide that criterion vi was not met. Fox Moraine agreed that Mr. Coulter and Mr. Corcoran may be experts, but argued that they misunderstood the criterion and testified on location of the facilities and the impact on the Village of Plainfield. Fox Moraine asserts that the criterion contemplates that there will be traffic impacts, and the applicant must demonstrate that those impacts are minimized.

The Board finds that the record contains evidence which supports Yorkville's decision that criterion vi was not met. The evidence to support Yorkville's decision on criterion vi was primarily supplied by the testimony of Mr. Coulter and Mr. Corcoran. The Board does not agree that the criterion was misunderstood by the experts and notes that Mr. Coulter did review the applicant's study and took issue with portions of that study. Mr. Coulter specifically testified that adding additional trucks to routes which are already designated "F" is not a good location and offered the opinion that the truck traffic for the proposed landfill will worsen the impact on traffic, and that Mr. Werthman should have examined potential impact on residential areas. *See* C13004; 13016; 13012-13013. The Board does not reweigh the evidence. Therefore, the Board affirms the decision of Yorkville that criterion vi was not met.

### **Criterion viii (Consistency with County Solid Waste Management Plan)**

#### **Fox Moraine's Arguments**

Fox Moraine argues that Kendall County insists that the application is not consistent with the SWMP because of the resolution passed on May 4, 2006. FMBR. at 90. Fox Moraine points out that Kendall County's position is that any landfill sited within the boundaries of a municipality is inconsistent with the SWMP. *Id.* Fox Moraine argues that the evidence at hearing establishes: 1) that the Kendall County Board never adopted the May 2006 amendment to the SWMP; 2) the application is consistent with the formally adopted SWMP; 3) even if valid the May amendment did not revoke or repeal prior plan updates; and 4) regardless of the "after the fact expressions regarding the meaning of the May 2006 amendment" the application is consistent. FMBR. at 91.

Fox Moraine asserts that the evidence established that when the proposed site was initially located the SWMP provides for annexation of unincorporated property into a municipality as was done in this case. FMBR. at 91. Fox Moraine argues that the SWMP required a host agreement, which was also developed in this case. *Id.* In support of this argument, Fox Moraine notes that Mr. Willis testified as to the adoption of the SWMP and subsequent amendments. FMBR. at 91-92. Mr. Willis further opined on the content of the SWMP. *Id.*

Fox Moraine argues that in September 2006, Fox Moraine entered into a host agreement with Yorkville and the land was annexed into Yorkville. Fox Moraine asserts that this is consistent with the SWMP. FMBR. at 94. Fox Moraine argues that using an accepted definition of "located" the landfill was located when the planning process began and therefore is consistent even with the May 2006 amendment. FMBR. at 94.

Fox Moraine argues that Kendall County's resolution deprives municipalities of the right to act as siting authorities and as such is contrary to the law. FMBR.2 at 1. Fox Moraine asserts that the resolution is contrary to the Solid Waste Management Planning and Recycling (415 ILCS 15/1 *et seq.* (2008)) in that the resolution contemplates unilateral action by Kendall County. FMBR.2 at 2. Furthermore, Fox Moraine asserts that Kendall County's position is inconsistent with City of Elgin v. County of Cook, 169 Ill. 2d 53, 660 N.E.2d 875 (1995),

wherein the court condemned the attempts of municipalities to interfere with the siting authority of their neighbors. FMBR.2 at 3.

### **Yorkville's Arguments**

Yorkville argues that the express language of the Act indicates that the purpose of the siting process is to determine that the proposed facility complies with the county's plan. YBr. at 72-73, citing Residents Against, 293 Ill. App. 3d 219, 22, 687 N.E.2d 552, 555. Yorkville argues that Fox Moraine correctly noted in the application that Kendall County has a SWMP and that plan was amended on May 4, 2006. YBr. at 73. Yorkville points out that the amendment occurred well in advance of the siting application being filed. *Id.* Yorkville contends that the land on which Fox Moraine proposes to build a landfill is property annexed by Yorkville and is thus not in an unincorporated area of Kendall County. *Id.* Because the landfill was proposed to be located in a municipality, Yorkville properly found that Fox Moraine had not met criterion viii. *Id.*

Yorkville asserts that contrary to the admission in the application, Fox Moraine "belatedly and desperately maintains" that the May 2006 amendment was not a proper amendment to the SWMP. YBr. at 73. Yorkville contends that Mr. Willis' testimony relating to the passage of the amendment is "entirely speculative, unfounded, and outside the witnesses knowledge." *Id.* Furthermore, Yorkville argues that the testimony is inconsistent with the facts in the record. *Id.* Yorkville maintains that the Kendall County meeting minutes (C13764), the signed resolution adopting the amendment (12143) and the amended Kendall County SWMP (C12069) all show the resolution was passed and the SWMP amended to reflect the resolution. YBr. at 73-74. Yorkville points to the testimony of Mr. Church who testified that the SWMP had been amended in support of the argument. YBr. at 74.

Yorkville argues that the resolution is clear and unambiguous and the Board need not resort to construction aids to interpret the resolution. YBr. at 75. Yorkville argues that Fox Moraine's argument that because the proposed landfill was being discussed, the proposed landfill was located prior to the May 2006 amendment, is a tortured reading that Kendall County could not have intended. YBr. at 75. Yorkville argues that under a straight forward interpretation, Fox Moraine's proposed landfill was located in Yorkville, which is an incorporated area of Kendall County and therefore, Yorkville properly found that criterion viii was not met.

### **Fox Moraine's Reply**

Fox Moraine reiterates the arguments and summary of Mr. Willis' testimony and that the SWMP was ambiguous and that the application is consistent with the SWMP. Reply at 49-56.

### **Board's Findings**

Initially, the Board notes that Fox Moraine argues that the May 2006, resolution to the SWMP usurps the right of a municipality to local siting under Section 39.2 of the Act (415 ILCS 5/39.2 (2008)) and is therefore contrary to the Act and the Solid Waste Management Planning and Recycling Act (415 ILCS 15/1 *et seq.* (2008)). The Board is granted the authority to review

local decisions on siting by Section 40.1 of the Act (415 ILCS 5/40.1 (2008)) and that authority limits the Board's review to the decision made under Section 39.2 of the Act (415 ILCS 5/39.2 (2008)). Therefore, the Board only looks at the record to determine consistency with the solid waste management plan and if the local decision was against the manifest weight of the evidence. The Board does not review the contents of the solid waste management plan for consistency with the law. Land & Lakes PCB 99-69, slip op. at 23.

The Board finds that the record supports Yorkville's decision on criterion viii. The resolution adopted by Kendall County to the SWMP clearly prohibits siting of landfills in incorporated areas of Kendall County. Fox Moraine argues at length that the terms of the resolution are ambiguous and that the resolution might not have been properly adopted. The record contains testimony from Mr. Church, chairman of the Kendall County Board as well as the SWMP and the resolution. This evidence supports Yorkville's reading of the resolution. Therefore the Board affirms Yorkville's decision that criterion viii was not met by the applicant.

### **Criteria ii (Design), v (Leak and Spill Protection), and Operator History**

#### **Fox Moraine's Arguments**

Fox Moraine recaps the testimony offered by Mr. Drommerhausen, Mr. Moose, and Mr. Edwards. FMBR. at 55-67; 82-83; 99-100. Fox Moraine maintains that based on their years of experience these experts found that the application met the criteria. *Id.*

Fox Moraine argues that only two witnesses testified under oath in opposition to these two criteria and one of those is unqualified due to lack of experience. FMBR. at 102. More specifically, Fox Moraine argues that Mr. Schmanski's testimony is lacking as he has never been involved in stormwater management design for a landfill. FMBR. at 66. Fox Moraine also discounts Mr. Hyink's testimony as being based on internet research. *Id.*

#### **Yorkville's Arguments**

Yorkville argues that a determination on this criterion ii is purely a matter of assessing the credibility of expert witnesses. YBr. 50, citing Fairview, 198 Ill. App. 3d at 552, 555 N.E.2d at 1185; File, 219 Ill. App. 3d at 907, 597 N.E.2d at 1236. Yorkville argues that Fox Moraine "boasts" that Fox Moraine's experts identified the site as the "best they had ever seen"; however, Yorkville asserts the evidence casts doubt on that superlative. YBr. at 50. Yorkville contends that Mr. Price cited the need for 39 conditions before criterion ii could be met and listed a sampling of those conditions. YBr. at 50-51.

Yorkville noted that the application planned for no groundwater monitoring wells on the southern border for 24 years after waste was first accepted and Mr. Ludwikowski commented this was unacceptable. YBr. at 51. Mr. Ludwikowski also recommended beginning cell construction at the downgradient point and proceeding upgradient. *Id.* Yorkville contends that Mr. Moose agreed with these comments. YBr. at 51-52.

Yorkville also notes that the application proposed to reroute an unnamed tributary of Hollenback Creek and both the Army Corp of Engineers and the Illinois Department of Natural Resources expressed concerns. YBr. at 52, citing C11287-90; C15372-15374; C11288-11289; C15373. Yorkville also relies on Mr. Schmanski's testimony regarding drainage and stormwater issues. YBr. at 52.

Yorkville challenges the credibility of Mr. Moose noting inconsistencies in his testimony and findings in Town & Country. YBr. at 53-54.

Regarding criterion v, Yorkville asserts that Mr. Price found that the applicant had not met the criterion without imposition of conditions. YBr. at 69. Yorkville argues that Fox Moraine proposes using temporary storage for leachate and may use clay berms for containment. *Id.* Yorkville argues that Fox Moraine should have committed to using concrete secondary containment enclosures and a different type of leachate storage tank. *Id.*, citing C15920; C19552.

Yorkville argues that, as stated above, the Board may not reverse merely because the local government could draw different inferences and conclusions from conflicting testimony. YBr. at 69. Further Yorkville reminds the Board that the Board may not reweigh evidence or reassess witnesses. Yorkville asserts that there was more than sufficient information for Yorkville to find that criterion v had not been met and the Board should affirm Yorkville's decision.

On the issue of operating experience, Yorkville notes that the siting ordinance required Fox Moraine to provide information on the proposed operator. YBr. at 77. Yorkville argues that Fox Moraine failed to meet this criterion in several ways. *Id.* Yorkville argues that first Fox Moraine misrepresented the operating history of the proposed operator, Fox Valley Landfill Services. *Id.* Yorkville contends that in the application Fox Moraine "boasted" that Fox Valley Landfill Services was an experienced landfill operator with an outstanding environmental compliance record, when in reality Fox Valley Landfill Services has no operating history. YBr. at 77-78. In addition Yorkville maintains that Fox Moraine refused to disclose the names of Fox Valley Landfill Services managers, members, and ownership and Fox Moraine failed to attach a certificate of good standing. YBr. at 78. Yorkville concedes that Fox Moraine identified PDC as having a 20% ownership stake in Fox Valley Landfill Services. *Id.*

Yorkville argues that in Low Transfer, Inc. v. County Board of McHenry County, PCB 03-221 (Oct. 2, 2003), the applicants for a waste transfer station argued that McHenry County inappropriately considered the inexperience of the operator when examining criteria ii and v. YBr. at 78. Yorkville opines that the Board disagreed and found the lack of experience was germane to the decision of the local siting authority. *Id.*

Yorkville argues that Fox Moraine also violated the siting ordinance by not providing information regarding past violations. YBr. at 79-80. Yorkville argues that Yorkville properly relied on the lack of experience and Fox Moraine's failure to provide critical information in finding against Fox Moraine on the issue of operator experience. YBr. at 80.

### **Fox Moraine's Reply**

Fox Moraine argues that the evidence presented by Fox Moraine on criterion ii is “especially powerful” and was presented by highly respected, educated, and experienced experts in their fields. Reply at 27. Fox Moraine asserts that Yorkville ignores this evidence almost entirely in the brief and focuses on the number of conditions recommended by Mr. Price as evidence that the criterion was not met. *Id.* Fox Moraine agrees that the decisionmaker is not required to search for conditions that will enable an applicant to meet the criteria; however, adding conditions to an approval is appropriate. *Id.*

Fox Moraine contends that Yorkville is “grasping at straws” in pointing to evidence in the record to try and support Yorkville’s decision on criterion ii. Reply at 28-30. Fox Moraine argues that Yorkville also attempts to dismiss Mr. Moose by challenging his credibility. Reply at 30. Fox Moraine opines that Yorkville’s attempt to impugn the credibility of a highly respected landfill expert “concedes” Yorkville’s “fear of the testimony” presented by Mr. Moose. Reply at 32. Furthermore, Fox Moraine argues that Yorkville completely ignores the testimony by Mr. Drommerhausen. *Id.*

Fox Moraine maintains that having ignored all the expert testimony and all of the scientific evidence, Yorkville is left only with “anti-landfill ‘evidence’ presented by persons possessing absolutely no relevant credentials” who relied on internet research or common sense in forming opinions. Reply at 33.

Fox Moraine asserts that Yorkville “falsely states” that Mr. Price found that Fox Moraine had not met criterion v. Reply at 44. Fox Moraine again argues that Mr. Price’s recommendation of conditions established that the applicant met the burden under criterion v. *Id.* Fox Moraine contends that the arguments regarding the leachate containment system are based on a public comment made by a lay person. Reply at 44-45. Fox Moraine maintains that the leachate system in the application was designed by a landfill design engineer and for Yorkville to declare the application deficient based on the opinion of a laymen is “preposterous”. Reply at 45.

As to the issue of operator experience, Fox Moraine maintains that information was not withheld when filing the application and the operating history of Fox Valley Landfill Services was not misrepresented. Reply at 57. Fox Moraine argues that Fox Valley Landfill Services is a new entity and as such has no history to examine. *Id.* Fox Moraine asserts that the evidence establishes that Fox Valley Landfill Services will draw upon the expertise of PDC in the operation of the landfill and PDC has a strong history of compliance in operating landfills. Reply at 58.

### **Board's Findings on Criteria ii and v**

**Operating History Considered.** As an initial note, Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2008)) allows:



The county board or the governing body of the municipality may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section.

The Board notes that this is not an additional criterion, but rather allows for consideration of an operator's experience in examining criteria ii and v, which relate to the design of the landfill including that the landfill is designed to minimize the danger of accidents, fires and spills. The Board will therefore examine the record and the arguments made concerning operator history in the context of criteria ii and v.

**Criteria ii and v.** As with prior criteria, Yorkville was presented with substantial evidence regarding criteria ii and v. And as noted above, Yorkville weighs the evidence, resolves conflicts in testimony, and assesses the credibility of the witnesses and merely because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford, 125 Ill. App. 3d 384, 465 N.E.2d 996; Waste Management, 122 Ill. App. 3d 639, 461 N.E.2d 542; Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel, 135 Ill. App. 3d 343, 481 N.E.2d 1032. Yorkville in fact argues that with criterion ii, the decision is purely a matter of assessing the credibility of expert witnesses. On the other hand, Fox Moraine argues that there is no credible evidence in the record that disputes the qualified experts presented by Fox Moraine and that Yorkville is grasping at straws.

The Board disagrees with Fox Moraine. The record contains evidence that supports Yorkville's decision. This evidence includes answers by Fox Moraine's experts during cross-examination. The Board notes that Yorkville, in the brief, lists a number of deficiencies in Fox Moraine's application, including the design deficiencies highlighted by the conditions in the Price Report, and issues pertaining to the relocation of the unnamed tributary to Hollenback Creek. *See e.g.* C10650; 10762; 11287. Furthermore, questions were raised concerning not only the operator but actual operations of the facility.

**Design Deficiencies.** The Price Report conditions cited by Yorkville as evidence to support the denial of siting indicate deficiencies pertaining to liner design and integrity of liner, design of final cover system and landfill slope stability analysis. YBr. at 50-51 and C18742. The Price Report conditions 2.1 through 2.3 address additional liner testing requirements, leak location survey and a stress analysis study to ensure acceptable liner design and integrity. C11360-66. The Price Report condition 2.4 deals with prevention of clogging of soil cover above the drainage layer in the final cover system. C11377-78. The Price Report conditions 2.8 through 2.11 add several requirements concerning the landfill slope stability analysis. C11371-74. While the deficiencies individually may appear to be minor in terms of the overall design, the Board finds that when the deficiencies are considered together they support Yorkville's decision regarding the adequacy of Fox Moraine's landfill design to protect public health, safety and welfare.

**Relocation of Unnamed Tributary to Hollenback Creek.** The record contains evidence that Fox Moraine's design included the relocation of an unnamed tributary to Hollenback Creek.

Fox Moraine has withdrawn the permit that would allow rerouting the tributary of Hollenback after the Army Corps of Engineers stated that “practicable alternatives may exist for the development of this facility that would have less adverse impact on the aquatic ecosystems, such as reconfiguration of the landfill to avoid or minimize stream and wetlands impacts . . .” C15372-374; C11287-90. In response to questions about the tributary relocation and the Army Corp of Engineers’ statements, Mr. Moose indicated that an alternative analysis “was done” but Fox Moraine has not yet responded to the Army Corps of Engineers. C11290-11291. Mr. Moose indicated that Fox Moraine was focusing on siting and then would address the issues with the Army Corps of Engineers if the landfill is sited. C11291. The Board finds that this evidence also supports Yorkville’s decision that the landfill design did not protect the public health, safety and welfare.

**Operator History.** At hearing, Mr. Edward testified as to the operating history of Fox Valley Landfill Services, which would be the operator of the proposed facility. Mr. Price in his report found Mr. Edwards was less persuasive concerning the plan of operations and the obligations of the operations. C18741. Mr. Price noted that Mr. Edwards’ testimony highlighted the paradox that with more experience there is more history of regulation and enforcement to judge an operator. *Id.* Mr. Clark noted that Fox Valley Landfill Services has no operating history.

Yorkville argues that the lack of operating history can be considered when reviewing criteria ii and v. YBr. at 78, citing Lowe Transfer, PCB 03-221, slip op. at 27-28. The Board agrees with Yorkville that the lack of operating history can be weighed when considering criteria ii and v. Further, the Board finds that the evidence regarding violations by PDC can also be considered. Thus, the Board finds evidence in the record on the operating history of the operator which Yorkville could have relied upon in finding that criteria ii and v were not met when considered in relation to the history of the proposed operator of the landfill.

**Conclusion on Criteria ii and v.** A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Harris, 115 Ill. App. 3d 762, 451 N.E.2d 262. The local decisionmaker is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. The Board finds that the record contains support for Yorkville’s decision on criterion ii and v. The opposite conclusion is not clearly evident, plain, or indisputable. Therefore, the Board affirms Yorkville’s finding that Fox Moraine’s application failed to meet criteria ii and v.

## **CONCLUSION**

The Board has reviewed the arguments, testimony, and record in this landfill siting appeal. The record is substantial and represents several weeks of public hearings before the Board and Yorkville. A careful review of that record demonstrates that the proceedings before Yorkville were fundamentally fair. More specifically, the Board is not persuaded that the council members demonstrated a prejudgment or bias on the landfill application. The Board also finds that the record establishes that the council members had sufficient time to deliberate, made their decision based on the record, and properly voted to deny siting.

The Board has examined the record before Yorkville and finds that the record supports Yorkville's findings that the landfill applicant failed to demonstrate a need for the facility (415 ILCS 5/39.2(a)(i) (2008)). Further the Board finds that the record supports a finding that the applicant failed to demonstrate that the facility was so designed as to minimize the impact on the surrounding properties and property values (415 ILCS 5/39.2(a)(iii) (2008)). The Board also finds that Yorkville's decision concerning the design of the facility and protection against spills and leaks, considering the operator's past history, (415 ILCS 5/39.2(a)(ii) and (v) (2008)) is not against the manifest weight of the evidence. The Board finds support in the record for Yorkville's finding that the design of the facility did not minimize impact on traffic (415 ILCS 5/39.2(a)(vi) (2008)) and thus that decision is also not against the manifest weight of the evidence. The Board finds that Yorkville's interpretation of the solid waste management plan of Kendall County is supported by the record and Yorkville's decision that the application is not consistent with the solid waste management plan (415 ILCS 5/39.2(a)(viii) (2008)) is not against the manifest weight of the evidence.

The Board also finds that Ms. Spears was credible and that the Board could consider her testimony and any perceived inconsistencies in evaluating the evidence before the Board. The Board found that Fox Moraine has waived the right to challenge Mr. Werderich and Mr. Plocher. However to the extent that the arguments made concerning bias of other council members related to Mr. Werderich and Mr. Plocher, the Board did examine those arguments.

This opinion constitutes the Board's findings of fact and conclusions of law.

### **ORDER**

The Board affirms the decision of United City of Yorkville, City Council denying Fox Moraine LLC's request for siting of a pollution control facility pursuant to Section 39.2 of the Environmental Protection Act.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 1, 2009, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board