BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner	)	
	)	No. PCB 2014-099
v.	)	
	)	(Pollution Control Facility Siting Appeal)
VILLAGE OF ROUND LAKE PARK, ROUND LAKE PARK VILLAGE BOARD and GROOT INDUSTRIES, INC.,	)	
	)	
Respondents	)	

PETITIONER'S POST-HEARING BRIEF

Now comes Petitioner, Timber Creek Homes, Inc. ("TCH"), by its attorneys, Jeep & Blazer, LLC, and hereby submits its Post-Hearing Brief in connection with its appeal of the Round Lake Park Village Board's (the "Village Board") December 12, 2013 approval of the Site Location Application (the "Siting Application") submitted by Groot Industries, Inc. ("Groot") for the siting of Groot's Lake Transfer Station (the "Transfer Station") in the Village of Round Lake Park ("VRLP").

I. INTRODUCTION

VRLP is governed by its present Mayor, Linda Lucassen ("Lucassen"), and a six-member Village Board comprised of Robert Cerretti ("Cerretti"), Candace Kenyon ("Kenyon"), Raeanne McCarty ("McCarty"), Jean McCue ("McCue"), Donna Wagner ("Wagner")[1] and Patricia Williams ("Williams"). McCue, Cerretti and Wagner routinely vote together. In those instances where there is a tie vote, and Lucassen is therefore entitled to vote,[2] she votes with McCue, Cerretti and Wagner, and they constitute a voting bloc (the "Voting Bloc"). (TCH Exhibit 73,

[1] Wagner was first elected to the Village Board in 2013. (TCH Exhibit 73, Wagner Tr. 5-6) She had no prior municipal experience. (TCH Exhibit 73, Wagner Tr. 6) Wagner's sole qualification appears to have been that she was part of a ticket that included Lucassen and Cerretti. (TCH Exhibit 73, Wagner Tr. 10)

[2] 65 ILCS 5/3.1-40-30 provides that a mayor may only vote in the event of a tie among the board members. See also TCH Exhibit 73, Lucassen Tr. 41, 44)

Kenyon Tr. 38-39)[3] Consistent with its practice, the Voting Bloc voted in favor of the Siting Application, resulting in a 4-3 vote in favor of the Transfer Station. (TCH Exhibit 73, Kenyon Tr. 5-6, 39, 92; C04578-04623, 04524)

The Voting Bloc's vote did not come as a surprise to Kenyon, who is the senior trustee on the Village Board. (TCH Exhibit 73, Kenyon Dep. Tr. 38-39) Kenyon identified McCue as a Village Board member with a preconception regarding approval of the Transfer Station. McCue "worked very hard" to bring the Transfer Station to VRLP in order to provide much-needed revenue. (TCH Exhibit 73, Kenyon Tr. 9, 10-11)[4] Kenyon had no reason to believe that McCue would not vote in favor of the Transfer Station. (TCH Exhibit 73, Kenyon Tr. 13-14)

This Brief will first address the fundamental fairness violation resulting from the Voting Bloc's predisposition. Apart from the fundamental fairness violations, albeit doubtless because of their predisposition, the Voting Bloc's decisions with respect to several siting criteria were not merely contrary to the manifest weight of the evidence – the Voting Bloc completely and improperly ignored uncontroverted evidence. Those shortcomings will be the subjects of the latter portions of this Brief.

II. THE VOTING BLOC WAS PREDISPOSED IN FAVOR OF THE SITING APPLICATION

Section 40.1 of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/40.1, and the relevant case law, require that siting proceedings be conducted in accordance with the requirements of fundamental fairness. This Board has repeatedly held, including in prior rulings in this case, that:

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[3] Most of the testimony in this matter was introduced by way of deposition designations. TCH's designations are in its Exhibit 73. References to testimony from those designations will be by that exhibit number, deponent name and transcript pages.

[4] McCue had been VRLP's Mayor for several years, up to May 2013, when Lucassen became Mayor and appointed her to a Village Board Trustee position in. (TCH Exhibit 73, Kenyon Tr. 11-12, McCue Tr. 8-10) McCue assumed the Trustee position "to see through the completion of projects started while I was serving as mayor." (TCH Exhibit 73, McCue Tr. 11)

> Pre-filing contacts may be probative of prejudgment of adjudicative facts, which is an element to be considered in assessing a fundamental fairness allegation. *American Bottom Conservancy (ABC) v. Village of Fairmont City*, PCB 00-200, slip op. at 6 (Oct. 19, 2000). Further, the courts have 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 v. PCB*, 116 Ill. App. 3d 586, 596, 451 N.E.2d 555, 564 (2nd Dist. 1983), *aff'd* 107 Ill. 2d 33, 481 N.E.2d 664 (1985). The manner in which the hearing is conducted, the opportunity to be heard, whether *ex parte* contacts existed, 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, slip op. at 5 (Dec. 20, 1990).

Timber Creek Homes, Inc. v. Village of Round Lake Park, 2014 WL 1350986, PCB 14-99, Slip Op. Cite at 3 (April 3, 2014) See also *Stop the Mega-Dump v. County Board of De Kalb County*, 2012 IL App (2d) 110579, ¶¶11, 37 (2012)

As Kenyon confirmed, and as will be discussed further below, the record of this matter is replete with evidence of the Voting Bloc's, and particularly McCue's, predisposition in favor of Groot. That predisposition in turn led to the Voting Bloc's failure to comply with a siting authority's fundamental obligation to assess and determine the credibility of witnesses.

A. The Decision To Approve The Siting Application Was Made Well Before That Application Was Filed

Lee Brandsma ("Brandsma") is Groot's principal. McCue and Brandsma first met in September 2008 regarding Groot's interest "in putting a Transfer Station in our town". (TCH Exhibit 19, p. 1; TCH Exhibit 73, Brandsma Tr. 14, 17-18) Two weeks later, Groot made its first formal presentation to the Village Board regarding bringing a transfer station to VRLP. Shaw Environmental ("Shaw") was acting on Groot's behalf with respect to the issue of finding a location and then getting a permit for a transfer station in VRLP. Shaw confirmed that Groot had "already found a location". (TCH Exhibit 73, McCue Tr. 31-32, 39, 47; Brandsma Tr. 20, 22; TCH Exhibits 20, 21)

Groot's activities in VRLP are summarized in a public presentation that it made on February 16, 2013:[5]

> • Groot began looking for a transfer station site in the area starting in 2007
> • Two identified properties were in Round Lake Park (Porter and 120)
> - Northwest corner - possible C&D recycling facility
> - Northeast corner - possible municipal solid waste transfer station
> • While evaluating these properties, identified Stock Lumber Yard property (40 S. Porter) as possible regional hauling yard
>
> ***
>
> Moved forward with purchase and plans for the Groot North Hauling Yard Meanwhile, gave a presentation to Village of Round Lake Park Development Committee in September 2008 (attended by SWALCO and the Lake County Board Member for this District) that included conceptual plans for other two properties
> - Presented and discussed Groot's intentions in this industrial subdivision beyond the hauling yard
> - Received interest so moved to purchase property
>
> ***
>
> • Hosted an open house in May 2010 (attended by SWALCO and County representatives) where grand plan for transfer station in the industrial subdivision was presented again

(TCH Exhibit 2, C02083, 02086, 02087)

Brandsma "got the ball rolling with that transfer station". Brandsma confirmed the process that was summarized in the February 2013 presentation, including the "grand plan" for the Transfer Station as part of Groot's intertwined plans for all of its activities in VRLP. Those plans included a truck maintenance and office facility (the "Truck Terminal") and a construction and demolition debris recycling facility (the "C&D Facility"). (TCH Exhibit 73, Brandsma Tr. 5-6, 9-12, 19-20, 32-33, 37-38, 48) Groot began focusing specifically on the Transfer Station effort once it acquired the Truck Terminal property in November 2009 and received the zoning

[5] Most of the hearing exhibits, and the parties' limited stipulation with respect to those exhibits, are identified in the parties' Stipulation, in evidence as Hearing Officer Exhibit A. Several of TCH's exhibits are already part of the siting hearing record, and will be referred to by their exhibit number and siting hearing record page numbers.

approval from the Village Board for that facility. (TCH Exhibit 73, Brandsma Tr. 11-12, 19) Groot purchased the properties for the C&D Facility and the Transfer Station five months later, on April 29, 2010, for $2,750,000. (TCH Exhibit 1, C00833-00847; TCH Exhibits 4, 23, 24; TCH Exhibit 73, Brandsma Tr. 29-30)

Groot's purchase of the Transfer Station property confirms its recognition that, once the Truck Terminal had been approved, it had a clear road ahead for approval of the Transfer Station. On August 11, 2009, Brandsma made another presentation to the Village Board. This presentation related specifically to its plans for the Truck Terminal. Brandsma stated that Groot had entered into a contract to purchase the property that would become the Truck Terminal, but that the purchase was conditioned on obtaining the appropriate zoning approvals from VRLP. (TCH Exhibit 73, Brandsma Tr. 55-56) In contrast, once the Truck Terminal was approved, Groot's $2,750,000 purchase of the Transfer Station property was unconditional. (TCH Exhibit 73, Brandsma Tr. 57-59)[6]

The record reflects numerous other, even more explicit, examples of the clear road to Transfer Station approval that McCue provided to Brandsma, and her commitment to ensure the approval about which Kenyon testified. On December 13, 2011, in connection with negotiations regarding the host agreement for Groot's C&D Facility, McCue stated that:

> Our attorneys and the special counsel, who Groot pays for, have been negotiating. Right at the moment we are at a standstill. They are offering us 75 cents per ton on 75% of the tonnage that comes through the facility. The reason for that is, not 100% of all loads are recyclable. Would like to try and negotiate CPI increases for the transfer station. At this moment they are willing to give us $20,000 up front. Mayor asked board if they wanted to take a tough ground and try and get more money and **take a chance on them not having a transfer station** and not having a scale for the police department, or do we want to **take something which is better**

[6] During the siting hearing, Groot's counsel admitted that, as part of its "deliberate design", Groot purchased the property around the proposed Transfer Station for the express purpose of owning and controlling the area around its planned facility. (C02593, 02596, 09/23/13 Hearing Transcript-1 at 22, 25)

> **than nothing and have them in the town and deal with the next step.** Company is hoping to complete this agreement within the next month or two. [Emphasis added]

(TCH Exhibit 17, C04383)[7] Having made it clear that she did not want to take the chance on "not having a transfer station", McCue's "next step" was ensuring approval of the Transfer Station.

On October 9, 2012 McCue "reported" to the Village Board regarding the host agreement being negotiated between VRLP and Groot regarding the Transfer Station:

> Special Presentation-Mayor McCue informed the board that the village attorney requested to attend tonight's meeting. He wants to present information regarding the negotiation process with Groot for the Host Agreement. Attorney Karlovics explained that the negotiation for the Host Agreement is now down to a remaining issue where Groot wants the cost of living adjustment on the host fee to be capped at 3%. A compromise proposal was a 5% cap with a 5% claw-back. Would have up to five years to re-coup that inflation. Groot will not agree to an open-ended rate of inflation cost of living adjustment. After meeting with Groot's attorney, they stated that in order to get things done in a timely fashion and **make this a reality by next operating season,** they did to get approval of the host agreement. ***
>
> Board discussed what had been explained so far and **they don't want to push too far and end up losing everything**. Polled board and consensus was that Attorney's proposal was fair. Would like to have agreement ready for approval at the October 16th board meeting. [Emphasis added]

(TCH Exhibit 15, C04389; TCH Exhibit 73, Kenyon Tr. 61)

The Village Board approved the host agreement (TCH Exhibit 14) the following week, on October 16, 2012. (TCH Exhibit 73, Kenyon Tr. 62; TCH Exhibit 13) This followed a reiteration of the concern about "losing everything": "Rather than take a chance on losing this Agreement altogether, the Mayor and Trustees did not want Attorney Karlovics to pursue further

[7] TCH Exhibit 17 is a set of Village Board meeting minutes. During McCue's deposition, the Village Board's counsel claimed that these meeting minutes were "not relevant", and directed McCue not to answer any questions regarding that subject. (TCH Exhibit 73, McCue Tr. 62) Yet the Village Board had already admitted that these minutes, together with a number of others, are "Minutes of all Relevant Open Meetings of the Village Board of the Village of Round Lake Park". (C00vii) This was part of Respondents' ongoing effort to evade the evidence of the open door policy that had been established for anything Groot wanted, so long as VRLP received a host fee.

negotiations to attempt to obtain a higher cap and that it would be acceptable." (TCH Exhibit 13, C04394-04395)

The path to guaranteed approval of the Transfer Station continued. In November 2012, VRLP adopted its own local solid waste plan (the "VRLP Plan"). (C00030, C00681; TCH Exhibits 6, 16, C02472-02490, 04400; TCH Exhibit 73, Kenyon Tr. 67-68) VRLP had never had a solid waste plan before. (TCH Exhibit 73, Kenyon Dep. Tr. 65, McCue Tr. 81-82) The VRLP Plan confirms an overriding fact:

> "The Village desires the development of a transfer station within its corporate limits". *** "[T]he Village seeks the development of a transfer station within its corporate limits."

(C02485, 02487)

The VRLP Plan also identified Groot's other business interests that had been approved as part of Groot's "grand plan":

> The Village of Round Lake Park currently contracts with Veolia Environmental Services, a private waste hauling company, to collect waste from households in the northern portion of the Village. ***The contract will expire on January 31, 2013. *** Beginning February 1, 2013, Groot Industries will provide contracted residential collection services within the northern portion of the Village, consistent with the scope of services provided under the current contract.
>
> ***
>
> Groot Industries, Inc. has filed a development application with the Illinois Environmental Protection Agency requesting permit approval to develop a construction and demolition debris processing facility at 200 South Porter Drive within the corporate limits of the Village. This facility, if permitted and constructed, will provide recycling of a minimum of 75 percent of the construction and demolition waste it receives on a daily basis. Permit approval for the facility is anticipated from the IEPA in December, 2012, and construction of the facility is expected to occur in 2013.

(C02483, 02488) The VRLP Plan concludes with the euphemistic "speculation" that, "Groot Industries has indicated to the Village that they may consider a transfer station to be located at

the northeast corner of the intersection of Porter Drive and Belvidere Road (State Route 120), within the corporate limits of the Village". (C02488)

Notably, the "plans" in VRLP's Plan were not created out of whole cloth. Reflecting the close relationship that had developed with Groot, the VRLP Plan was based on "input" from Groot's Transfer Station consultant, Shaw. (C02476) McCue was aware that Shaw was working for Groot on the transfer station at the time the VRLP Plan was adopted. (TCH Exhibit 73, McCue Tr. 91)

Nor is that the sole example of Groot's "input" into the process that led to approval of the Transfer Station. On October 30, 2012, the Village Board discussed the terms and approval of its local pollution control facility siting ordinance (the "Siting Ordinance") that would govern the hearing procedure regarding Groot's impending Siting Application. This was acknowledged to be a "very important ordinance". (TCH Exhibit 26, p. 5-6) It is not common practice for VRLP to allow an applicant input into the ordinance that will govern the process by which an application will be reviewed. Yet Groot's attorney was consulted regarding, and submitted substantial revisions to, the Siting Ordinance. (TCH Exhibit 73, McCue Tr. 76-77, 78)[8]

McCue's efforts on Groot's behalf continued. In December 2012, McCue exchanged a series of communications with a Shaw employee, the main purpose of which was to correct what McCue felt was a "terrible misunderstanding" by VRLP's residents regarding what a transfer station is. (TCH Exhibit 18, C04405-04406; TCH Exhibit 31; TCH Exhibit 73, McCue Tr. 92)

The Voting Bloc's predisposition was also evident during the course of the siting hearing. VRLP's counsel, Glenn Sechen ("Sechen"), indicated that VRLP had already determined that it

[8] TCH Exhibit 29 is an October 25, 2012 email from Groot's counsel to the Village Board's counsel, enclosing a draft of the Siting Ordinance, with extensive revisions. Despite McCue's admission regarding the highly unusual involvement by Groot's attorney in the drafting of the Siting Ordinance, Hearing Officer Halloran, without explanation, did not admit this document into evidence and it was therefore tendered as an offer of proof. (June 2, 2014 Hearing Tr. 64)

was "prudent" to site a transfer station, and was proceeding jointly with Groot for approval of the Transfer Station. (C03214, C03219-03220) Sechen further acknowledged that VRLP and Groot had found it necessary to site a transfer station for their own business reasons. At that point, counsel for the Solid Waste Agency of Lake County ("SWALCO"), another participant in the siting hearing, noted that VRLP had failed to disclose that it was a co-applicant with Groot. (C03220-03221)[9]

VRLP's complicity with Groot was further confirmed by the report and testimony of Dale Kleszynski ("Kleszynski"), who was hired by and testified for VRLP. Kleszynski had been retained at Sechen's request, based on his statement that Kleszynski "is really good and he knows how to testify". (TCH Exhibit 4, C04446; TCH Exhibit 58)

Confirming VRLP's status as an undisclosed co-applicant with Groot, Sechen told Kleszynski that hearing participants opposing the Siting Application were "on the other side of our case". (TCH Exhibit 33) Hearing Officer Halloran, without explanation, sustained VRLP's objection and did not allow Exhibit 33 into evidence. It was therefore accepted as an offer of proof. (June 2, 2014 Hearing Tr. 85)

But then something unusual occurred. VRLP was clearly concerned about the impact of its attorney's admission that it was in fact "on the other side of" the parties opposed to Groot. Therefore, despite the fact that the subject exhibit had not been admitted, counsel for VRLP called Kleszynski to attempt to "explain" what the statement in the document meant, even though it was not his statement and he was not competent to do so. (IPCB Hearing Tr. 161-165) Hearing Officer Halloran sustained TCH's objections on that basis. (IPCB Hearing Tr. 163-164,

[9] VRLP admitted, as it must, that the Village Board serves as its "corporate authority". (February 26, 2014 VRLP Motion to Strike TCH's Discovery Requests at 10.) See 65 ILCS 5/3.1-45-5, 5/3.1-45-15 Nor can it be said that Sechen was acting alone, independent of VRLP's interests and directives. Rule 1.2 of the Illinois Rules of Professional Conduct ("RPC"), provides that, "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."

165) Nevertheless, counsel for TCH pointed out that, by calling a witness and asking questions about the disallowed exhibit, VRLP waived any objection to that exhibit. (IPCB Hearing Tr. 173-175) See *Gillespie v. Chrysler Motors Corp*., 135 Ill.2d 363, 374 (1990); *C.D.L., Inc. v. East Dundee Fire Protection Dist.*, 252 Ill.App.3d 835, 849 (2nd Dist. 1993)

Confirming what "side" VRLP was on, and his directive to ensure that the hearing record supported a pre-determined approval, Kleszynski's report (C02437-C02456) and testimony were in lockstep support of the Siting Application. This was done in direct contravention of the rules applicable to Kleszynski's industry. Kleszynski admitted that the various operative provisions of the Uniform Standards of Professional Appraisal Practice ("USPAP") governed his activities in this case:

> Q. And you're aware that under that Code of Ethics, an appraiser must not advocate the cause or interest of any party or issue, correct?
> A. I am absolutely aware of that part of the Code of Ethics, as well as the Uniform Standards.
> Q. You're also aware then that an appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions, correct?
> A. That is absolutely correct. But that is part of both of the Code of Ethics as well as USPAP.
> Q. A couple of more that I think we're going to agree on. You're also aware that an appraiser must not misrepresent his or her role when providing valuation services that are outside of appraisal practice, correct?
> A. We would agree on that also.
> Q. Here's another one, an appraiser must not communicate assignment results with the intent to mislead or to defraud, correct?
> A. That would also be true.
> Q. And then finally, an appraiser must not use or communicate a report that is known by the appraiser to be misleading or fraudulent, correct?
> A. That is also true.

(C 3742.064-3742.065)

Kleszynski admitted that it was a violation of the USPAP code of ethics for him to advocate any particular position. In order to evade that preclusion, Kleszynski sought to misrepresent the fact that he had been directed by VRLP, as Groot's undisclosed co-applicant

acting through Sechen, to generate an "independent" statement supporting Groot's position. Kleszynski instead claimed that he "volunteered" his opinion. (C 3742.067) Kleszynski failed to take his own prior words into account when he made that assertion. Contrary to his claim of a "volunteered" opinion, Kleszynski's report confirmed that he was asked to render a separate opinion by his client, VRLP, and that his report is "specific to the needs of the client". (C3742.070-3742.074)[10]

The existence of an undisclosed co-applicant was discussed long ago in *E & E Hauling, Inc. v. Pollution Control Board,* 116 Ill.App.3d 586, 603 (2nd Dist. 1983), affirmed 107 Ill.2d 33 (1985), where the court stated:

> We note that the District and E & E became co-applicants for site location approval before the responsibility to decide on their application was transferred by statute to the County Board. We would be presented with a different case had the District entered into an agreement and application after the statutory change—i.e., after District commissioners were aware that they would later, as County Board members, decide on the application. To invoke the rule of necessity under such circumstances would create genuine injustice and would effectively foster, not merely tolerate, biased adjudication. In such a situation the applicants' right to a hearing and the County Board's obligation to decide would be wholly artificial and unworthy of respect. We would not be willing to allow the rule of necessity to facilitate deliberate manipulation of the permit procedure in a way that could empty that procedure of its intended meaning.

B. The Voting Bloc Allowed The Siting Hearing Officer To Usurp Their Authority

It is well-settled that the hearing body has the obligation to assess the credibility of witnesses. See, *e.g.*, *Tate v. Illinois Pollution Control Bd*., 188 Ill.App.3d 994, 1022 (4th Dist. 1989), appeal denied 129 Ill.2d 572 (1990); *Environmentally Concerned Citizens Organization v.*

[10] Sechen never told Kleszynski that the contents of his report were inconsistent with VRLP's needs. (C3742.087) On the contrary, Kleszynski was given an assignment in this case, and Sechen, on behalf of VRLP, communicated that assignment to Kleszynski. (C3742.108)

Landfill, LLC, 1998 WL 244621, PCB 98-98, Slip Op. Cite at 2 (May 7, 1998) Yet the Voting Bloc, having already pre-determined the outcome, made no such determination in this case.

VRLP's Siting Ordinance (TCH Exhibit 8, C02458-02470) authorizes the Hearing Officer to "prepare **proposed** findings of fact and conclusions of law following the adjournment of the Public Hearing [Emphasis added]". (C02465) The Hearing Officer for the siting hearing was Phillip Leutkehans ("Leutkehans"). Leutkehans did not render "proposed" findings regarding witness credibility – he instead made determinations of credibility. (C04355.036-C04355.038, C04355.044, C04355.050-C04355.052, C04355.055, C04355.058-C04355.060, C04355.069-C04355.070) The Voting Bloc then compounded Leutkehans' usurpation of the Village Board's obligation to make credibility determinations by themselves failing to make any such determinations. (C03904, C03905-C03907, C03918-C03920, C03976-C03977)

The Village Board members were clearly aware of their responsibility to make credibility determinations. Their attorney advised them of their obligation in that regard, and how they should indicate their determination for each witness, well before they deliberated and rendered their decision. (C04496, 04497) Regardless of the suggested findings that would be provided by all participants, including the hearing officer, the Village Board members were advised that, "Each of the Board members needs to determine the credibility of the witnesses and what the facts are." (C04497)

The Village Board's attorney repeated that directive during the deliberations regarding the Siting Application. (C03904) Voting Bloc members nevertheless sidestepped their obligation. (C03977)

III. THE VILLAGE BOARD'S FINDINGS REGARDING SITING CRITERIA 1, 2, 3, 6 AND 8 WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE

Siting approval can only be granted if the applicant proves that the proposed facility meets all nine of the criteria set forth in §39.2 of the AcT, 415 ILCS 5/39.2. See *Town & Country Utilities, Inc. v. PCB*, 225 Ill.2d 103, 117 (2007) The record in this matter confirms that the Voting Bloc's approval of Groot's siting application was contrary to the manifest weight of the evidence with respect to Criteria 1, 2, 3, 6 and 8. The Voting Bloc adopted Luetkehans' recommendation. This analysis therefore requires an assessment of Luetkehans' review of the evidence, and of the Voting Bloc's comments during their deliberations on December 10, 2013.

One overriding principle must be considered in the context of this review. As Groot acknowledged during the siting process, "It is well established that a siting authority is not free to disregard the unrebutted testimony on the substantive siting criteria." (C04337) See also *Dill v. Widman*, 413 Ill. 448, 454 (1952); *Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board*, 227 Ill.App.3d 533, 548 (1st Dist. 1992): *CDT Landfill Corporation v. City of Joliet*, PCB 98-60, 1998 WL 112497, Slip Op. Cite at 12-13, 18-19, 21 (IPCB March 5, 1998), affirmed 305 Ill.App.3d 1119 (3rd Dist.), appeal denied 185 Ill.2d 619 (1999)

A. Criterion 1 – The Facility Is Not "Necessary To Accommodate The Waste Needs Of The Area It Is Intended To Serve"

A siting applicant's burden with respect to Criterion 1 was most recently described in *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶110 (2nd Dist. 2011), appeal denied __Ill.2d__, 968 N.E.2d 81 (2012):

> Although an applicant need not show absolute necessity, it **must demonstrate an urgent need** for the new facility as well as the reasonable convenience of establishing it. *Waste Management*, 175 Ill.App.3d at 1031, 125 Ill.Dec. 524, 530 N.E.2d 682. The applicant must show that the landfill is reasonably required by the waste needs of the area, **including consideration of its waste production and disposal capabilities**. *Id*. [Emphasis added]

See also *File v. D & L Landfill, Inc.,* 219 Ill.App.3d 897, 906-907 (5th Dist. 1991) As is evident from the *Fox Moraine* court's citation to its 1988 *Waste Management* decision, this standard is certainly nothing new. Nor is it anything new for Groot's consulting firm, Shaw.

Christine Seibert ("Seibert") was Groot's Criterion 1 witness in this matter. Seibert has often worked with Phil Kowalski ("Kowalski"), another senior planner at Shaw. (C3550) Seibert and Kowalski often work together on projects and review each other's work. Seibert was the principal author of the needs assessment in this case, and Kowalski reviewed her work. (C3551) Consistent with the historic recognition of an applicant's burden under Criterion 1, Kowalski acknowledged in *Fox Moraine* that Criterion 1 requires a showing of urgent need. *Fox Moraine* at ¶109

Seibert in turn equates "urgent" with "immediate" or "imminent", and stated in the Siting Application that, "[T]he service area faces an **immediate transfer capacity deficit**….[Emphasis added]" Seibert also confirmed that by "immediate' she means as of 2015. (C3613-3614, 3615; C00037; C01349) However, Seibert's discussion of "transfer capacity" reflected her effort to avoid the present disposal capacity in Lake County. Lake County currently has two operating landfills – Zion and Countryside – to which waste from Lake County is direct hauled. (C3521) Seibert was asked to identify the portion of the Siting Application that supports the existence of an "immediate landfill capacity deficit as of 2015". She pointed to the discussion at page 1-19 of the Siting Application (C00038). This question and answer followed:

> Q. So it's your position that as of 2015 there will not be sufficient capacity in the two Lake County landfills to accept Lake County waste?
> A. No, I did not say that at all.

(C3615)

Based on the information on page 1-19 of the Siting Application, Seibert could not have testified otherwise. Seibert's report confirmed that, based on the remaining capacity at the two Lake County landfills, there is no "immediate" or "imminent" disposal capacity deficit:

> • Countryside Landfill (Lake County): The Countryside Landfill has a remaining capacity of approximately **9 years** as of January 1, 2013, based on remaining capacity as of December 31, 2012 and average annual waste received from 2008 through 2012. This landfill will have approximately **6 years** of remaining capacity when the proposed Groot Industries Lake Transfer Station begins operating.[11]
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> • ADS Zion Landfill (Lake County): The ADS Zion Landfill has a remaining capacity of approximately **20 years** as of January 1, 2013, based on remaining capacity as of December 31, 2012 (including pending expansion capacity) and average annual waste received from 2008 through 2012. This landfill will have approximately **17 years** of remaining capacity when the proposed Groot Industries Lake Transfer Station begins operating. [Emphasis added][12]

(C00038)

Seibert first tried to avoid the clear evidence of extensive remaining disposal capacity by misrepresenting it. Seibert repeatedly claimed throughout the "need" portion of the Siting Application that, "The two in-county landfills are nearing capacity" and "will not provide long-term disposal capacity". Seibert also claimed that, "The primary reason for using a transfer station is to reduce the cost of transporting waste to disposal facilities." This was related to the assertion that, "The proposed transfer station will be located close to the centroid of waste generation for the service area. (C00020, 00025, 00027, 00039, 00040, 00047) [13]

Recent statements by Shaw completely contradicted Seibert's statements. Shaw prepared the application for the recent expansion of the Zion Landfill. Both Seibert and Kowalski worked on that matter. Indeed, Seibert admitted that she reviewed the Zion Landfill expansion application in the context of preparing her needs assessment for Groot's Transfer Station because she needed to know everything about the disposal capacity that is available for this service area. (C3565-3566) That

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[11] Seibert was wrong about the remaining capacity at the Countryside Landfill. Counsel for SWALCO pointed out that Seibert understated the remaining capacity at Countryside Landfill by two to three years. The capacity certifications for the Countryside Landfill dated as of January 1, 2013 confirm that it had ten years of capacity. (C3654-3656; C01873-01878)

[12] Seibert expects that, after the Countryside Landfill closes, whenever that may be, the waste that went there will be absorbed by the Zion Landfill. (C3618)

[13] The waste centroid is the average point in the service area where waste is being generated. (C3522)

admission confirms her misrepresentation. Seibert and Kowalski confirmed in the Zion Landfill expansion application that the expanded landfill provides several benefits, including

1. "[S]olid waste disposal capacity to the City, Lake County ("County") and other communities in the service area for years to come". (C02105)
2. "A landfill that will compete with other landfills and assure that local communities will have the continued availability of a cost-competitive, safe and convenient disposal option…." (C02107)
3. "[S]ave on fuel consumption and also help communities to contend with waste disposal cost increases stemming from higher fuel costs". (C02108)
4. "[P]rovide needed additional disposal capacity to communities in the service area, in accordance with sound solid waste management planning principles adopted by jurisdictions in Illinois and throughout the U.S." (C02109)
5. "The expanded Veolia ES Zion Landfill will provide a conveniently-located source of disposal capacity to the service area. The proposed Facility will be located approximately 16 miles from the centroid of Lake County and 46 miles from the centroid of the service area." (C02110)
6. "[S]ave on fuel consumption by providing landfill capacity that is located nearer to waste generators within the service area." (C02110)
7. "The expanded landfill will provide additional disposal capacity to the City of Zion and Lake County. This will enable the City and other communities in the County to focus future solid waste efforts on increasing recycling and waste diversion." (C02111)
8. The expanded Facility will be conveniently located to Lake County and the service area. *** [T]he proposed expansion will conserve significant quantities of fuel and

enable communities in the service area to better contend with the rising cost of transporting waste farther distances. (C02112)

Seibert acknowledged that both Lake County landfills are at a convenient distance to transport waste. (C3531) Approximately 80% of Lake County's waste is currently direct hauled to the two landfills. (C3554) Seibert also admitted that direct haul landfills are closer to the waste generation source, and therefore are serviced by the local haul vehicles rather than transfer vehicles. That is because the local haul vehicles are travelling a shorter distance, and can economically serve their area by going to those direct haul landfills. (C3556)

Seibert acknowledged that the presence of facilities that are reasonably available to address the needs of the service area, and convenience of location, are aspects of the needs assessment. (C3633-3634) Seibert explained that the break-even distance, in relation to the waste centroid, means that hauling directly to a landfill only becomes more expensive than a transfer haul if the landfill is more than 18 miles away. (C3574; C00044) For purposes of this Siting Application and this waste centroid, the Zion landfill is only 16 miles away and the Countryside landfill is only 5 miles away. Because both landfills are less than 18 miles from the centroid, they are both accessible to the service area by direct haul. (C3571-3573) In contrast, the Winnebago Landfill, where Groot would take the waste from the Transfer Station, is over 60 miles away. (C3574-3575, 3593-3594)

Seibert then confirmed two additional facts that further undermined her opinion of need in the face of the substantial remaining disposal capacity in Lake County:

1. Landfills like the two in Lake County that are located much closer to the waste centroid of the service area than other more distant landfills provide benefits to the people near them who generate the waste; and
2. Closer landfills also provide an important economic or environmental benefit by preserving the fuel that would otherwise be spent by going to more distant landfills.

(C3634) Seibert admitted that a need for new capacity is demonstrated when the demand or the amount of waste that is requiring disposal exceeds the available capacity. (C3652-3653) She could do little else but admit that fact, since it is the standard identified in *Fox Moraine, supra.* By Groot's own admissions, that is a situation that does not exist in Lake County, and will not for many years to come.

It is clear that Seibert's "analysis" failed to properly take the remaining disposal capacity into account. Beyond that, there have been cases where facilities have been approved in the face of evidence of remaining disposal capacity in the service area. But in every one of those cases, the determining factor was the absence of any contrary evidence or witnesses on the issue of need. See, *e.g.*, *Fox Moraine, supra,* ¶110 ("No reliable evidence was presented refuting the need for the landfill."); *Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board*, 227 Ill.App.3d 533, 544-545 (1st Dist. 1992) ("No contrary evidence was admitted or even offered at the hearing.'); *E&E Hauling v. Pollution Control Board,* 116 Ill.App.3d 586, 609 (2nd Dist. 1983) (Testimony on need was neither rebutted nor impeached.) Apart from the fact that Seibert's testimony was both rebutted and impeached, TCH produced a highly qualified witness who completely undermined Seibert's "analysis".

TCH called John Thorsen ("Thorsen") to testify regarding Criterion 1. Thorsen is a professional engineer registered in four states, including Illinois. He has decades of experience in solid waste issues and also holds a masters degree in regional planning. (C03146-03147) Thorsen also has experience in Lake County with what is now the Countryside Landfill, dating back to the 1980s. (C03147-03149) Thorsen performed the needs analysis for the proposed expansion of the former ARF Landfill, and testified as an expert witness in that matter. Through his over 40-year career, approximately 20 to 25% of Thorsen's work has involved waste issues in Lake County. (C03149-03150, 03151, 03160) Thorsen was also a member of the Lake County Solid Waste Advisory

Committee, a planning group that dealt with County planning for solid waste management. (C03150-03151)

Thorsen independently verified the data for the amount of waste received at the two Lake County landfills for the last three years. (C03153-03154) Thorsen also reviewed the need section of the Zion Landfill expansion application. (C03164) Based on his reviews, Thorsen confirmed that the determination of whether there is a need for the proposed transfer station was a simple matter that did not require a great deal of analysis. He accepted at face value the waste generation and disposal capacity figures for the two Lake County landfills in Groot's Application,[14] and easily confirmed that there is plenty of landfill space in Lake County until 2027. (C03152-03153, 03165-03167)

Thorsen concluded that there is no need, urgent or otherwise, for this Transfer Station in Lake County at this time. This conclusion is based on the confirmation in the Siting Application that the Lake County landfills have capacity through 2027, based on Shaw's own figures reflecting waste generated in the service area, average disposal rates, and remaining capacity. These figures in fact reflect that there is an overage of capacity. (C03154-03155, C03156-03157) Thorsen also concluded that, assuming no new landfill capacity becomes available before 2027, there will be no need for a transfer station until 2025. (C03180-03181, 03196, 03200-03201, 03205-03206, 03216, 03222)

Clearly recognizing the fundamental defect in its analysis of "need", Groot tried to circumvent its own evidence regarding the substantial amount of remaining disposal capacity in Lake County by asserting that need is a function of "planning". Seibert asserted that, "In-county landfills will not provide needed 20 years of capacity for Lake County waste." (C01337, 01344) Seibert sought to connect need for purposes of Criterion 1 with a recommendation in the 2004 version of the Lake County Solid Waste Management Plan ("SWMP") to maintain 20 years of available disposal capacity.

[14] Thorsen did confirm, as did SWALCO's counsel, that, based on the latest capacity information obtained from the IEPA, the Countryside Landfill has 10 years of capacity remaining. (C03193-03184)

(C3525) Because Seibert had to avoid basing her opinion on actual remaining disposal capacity, as required by *Fox Moraine*, her ultimate opinion was instead based on what she described as "the necessary 20 years of capacity to meet the county's needs". (C3548) Seibert claimed that the "urgent need" for the transfer station is based on Lake County's purported desire to have "20 years of capacity available". (C3580)[15]

As noted above, the *Fox Moraine* court confirmed that the focus is on "waste production and disposal capabilities". See also *Waste Management of Illinois, Inc. v. Pollution Control Board*, 234 Ill.App.3d 65, 69-70 (1st Dist. 1992) (Evidence presented by applicant for transfer station "was insufficient to show that the waste transfer station was reasonably required by the waste needs of the area and did not adequately address the waste production and disposal capabilities in the service area.") Seibert defined remaining "capacity" as "the physical space that is available to place waste into". (C3553) This is consistent with the accepted definition of how need is determined. It takes into account actual disposal capacity, not what might be considered under Criterion 8. Moreover, the evidence is unrebutted that Groot misrepresented the facts.

As noted, Groot claimed that Lake County's SWMP expresses a "requirement" for "20 years of disposal capacity". Groot's counsel confirmed his client's position. Groot's effort to establish "need" in the face of overwhelming and uncontroverted evidence of adequate disposal capacity in Lake County through at least 2027 is based exclusively on the county's "planning" in a 20-year time frame – what counsel claimed to be the "the 20-year need of Lake County." (C3757-3758)

[15] Thorsen disregarded Seibert's suggestion that, for "planning purposes", need has to be assessed over a 20-year period – a concept not supported by the case law. Rather, Thorsen conducted his analysis through 2027, at which point there would presumably be no more landfill capacity in Lake County. The point is that there is adequate capacity until 2027. (C03171) Notably, SWALCO's counsel objected to the effort by Groot's counsel to commingle the concept of need in Criterion 1 with the "needs" of the Lake County SWMP for purposes of Criterion 8. (C03190) Ultimately, the Leutkehans agreed, and noted that the Lake County SWMP indicates that transfer stations are consistent with that plan, but that is not relevant to need. (C03191-03192)

Section 39.2 of the Act provides direction on which SWMP is to be considered. Criterion 8 specifically provides that, "[F]or 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** [Emphasis added]". The current SWMP, which was adopted by the Lake County Board on April 13, 2010 (C01879-02074), emphasizes this point: "Any disposal facility proposed to be developed within Lake County must be consistent with the recommendations **in this 2009 Plan Update**. [Emphasis added]" (C01923)

The current SWMP notes that the prior 2004 version included a "recommendation", L6, to, "Acquire additional landfill capacity for Lake County to meet waste disposal needs for a twenty (20) year period." The current SWMP also notes that this recommendation was "Not implemented". (C01916) Groot's notion that "need" is controlled by what the SWMP "plans" is expressly based on the 2004 version of the Lake County SWMP, not the current version. (C00029) Moreover, the recommendation from the 2004 SWMP, albeit not a statement of "need", is not repeated or included in the current SWMP. The only such forward looking statement in the current SWMP is that, "One of the primary purposes of the planning process is to make sure new facilities and/or programs are in place **prior to existing facilities closing**. [Emphasis added]" (C01921) Indeed, completely disposing of the basis for Groot's "planning" assertion, the current SWMP addresses recommendations in the prior 2004 version: "Recommendations and requirements applicable to pollution control facilities that may have existed in the 1989 Plan or the subsequent Plan Updates **are superseded** by this 2009 Plan Update. [Emphasis added]" (C01884) There is absolutely no legal or factual basis for Groot's assertion of "need" based on "planning".

In his recommendation, Leutkehans noted that this was in fact the basis for Groot's assertion of need, but confirmed that the most recent Lake County SWMP no longer includes a 20-year planning requirement. (C04355.040) Nevertheless, in an inexplicable, and unexplained, about face,

Leutkehans then accepted Groot's assertions regarding "the needed twenty (20) years capacity…." and "the twenty (20) year disposal capacity needs." (C04355.041, 042) [16]

No doubt recognizing the fallacy of this conclusion, Groot's focus changed yet again from either "need" or "planning", to "timing". According to Leutkehans, "The evidence also showed that waste transfer facilities can take seven or more years to site from start to finish." (C04355.044) The strained conclusion was that a transfer station is "needed" now because of the long lead time necessary to get one up and running.

Seibert had confirmed in another transfer station proceeding several years ago, based on a study by Kane County, that "two to three years should be allowed for proposals, siting, permitting and construction of the transfer stations prior to the landfill closures." (C3620) Shaw's lead engineer, Devin Moose ("Moose") and Seibert both claimed that it has already taken five years. Moose also claimed that the process can take four to seven years. (C2613, 02662-02663; C3531) Is there evidence in the record to substantiate these assertions, or to contradict them? Moose stated that he was involved in assisting Groot in finding the subject location. Doubtless to remain consistent with his claim that it takes four to seven years to develop a transfer station, Moose asserted that Groot purchased the property "four or five years ago". (C02855) As noted above, however, Groot purchased the subject property on April 29, 2010.

The Siting Application itself confirms that vast amounts of the information that it contains were not generated until the latter part of 2012, not years before. (C00690-00693, C00056-00086, C00189, C00192, C00667, C00686, C00902-00908, 00927-00929, 00948, 00951, 00957, 00959, C00967, 00969, C00983, 00988-00989, 00994-00996, 01002-01003, 01010-01011, C01123-01124, C01131, 01134, C01158, C01212, 01214-01215, 01217) Indeed, the earliest material in the Siting

[16] At least one of the Voting Bloc members, Wagner, likewise used the fallacious 20-year "requirement" as a basis for her vote on Criterion 1. (C03909)

Application, and the only item dated before the April 2010 purchase date, is a April 22, 2010 report from the Illinois Department of Natural Resources in Appendix J. The balance of the material in that Appendix reflects that the project was not submitted for consultation until September 2012. (C00971, 00974-00975, 00977-00978)

Notably, the VRLP Plan, that Shaw helped draft in 2012, confirms that, "It may take 2 to 3 years, or more, to site, permit, construct, and begin to operate the facility." (C02488) The members of the Voting Bloc, led by McCue, ignored this information in VRLP's own solid waste plan, and chose to "accept" Seibert's unsubstantiated, and false, assertion regarding "timing". (C03895, 03897, 03910, 03911-03912)

The fact that there is substantial disposal capacity remaining in Lake County is unrebutted. That capacity exists, by Groot's own admission, through at least 2027, and most likely beyond that given Groot's misstatement of the actual remaining capacity at the Countryside Landfill. There is no need, urgent, immediate, or otherwise, for this Transfer Station at this time, or for years to come.

B. Criterion 2 – The Transfer Station Is Not "So Designed, Located And Proposed To Be Operated That The Public Health, Safety And Welfare Will Be Protected"

The Voting Bloc's failure to make a credibility determining looms largest with respect to Criterion 2. The credibility of the expert witnesses is a significant factor in assessing compliance with Criterion 2. See *Fox Moraine, supra*, 2011 IL App (2d) 100017, ¶102, citing *File v. D & L Landfill, Inc*., 219 Ill.App.3d 897, 907 (1991) In *Fox Moraine*, the credibility issue focused specifically on the testimony of the applicant's principal Criterion 2 witness – Moose. *Id.* Nor was *Fox Moraine* the first time that a denial of siting based on Criterion 2 focused on testimony from Moose. See *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill.2d 103, 111-114, 124-125 (2007)

1. Moose was not a credible witness

Moose is the engineer of record for this project. The Siting Application was prepared under his personal direction and supervision. (C02612, 02644) As in the above prior cases, Moose provided ample evidence in this proceeding that he is not a truthful individual.

There are multiple examples of Moose's deceptive testimony during the hearing, highlighted by two that loom large in the context of several siting criteria. The most prevalent, a deception to which Moose stubbornly clung until almost the end of the siting hearing, relates to the operating plan for the Transfer Station, and specifically to the identity of the landfill to which waste from the Transfer Station will be taken – the Winnebago Landfill.

Very early in his presentation regarding multiple siting criteria, including Criterion 2, Moose claimed that the transfer trailers from this Transfer Station would go to an unspecified landfill 100 to 120 miles away. (C02632) Moose claimed not to know what landfill would be used when the Transfer Station is proposed to begin operating. Moose also claimed that there has been no contractual agreement with anyone to take waste from the Transfer Station in 2015. (C02727-02729)

Moose also claimed that he was not aware of an agreement between Groot and the Winnebago Landfill. Yet he admitted that he participated in the Winnebago Landfill siting proceeding and is familiar with the host agreement between Winnebago County and the operator of that landfill. (C02729-02730)

Moose's statements were first contradicted by a non-Shaw witness, Michael Werthmann ("Werthmann"), Groot's Criterion 6 witness. In his traffic report, Werthmann confirmed that, "The outbound waste is anticipated to be transported from the transfer station to the Winnebago Landfill located in Winnebago County, Illinois." Werthmann's "directional distribution" further confirms that all of the outbound waste from this Transfer Station will go west to the Winnebago

Landfill, and not back into Lake County. (C03116.031-032, 033, 035, 065-067, 068-069; C00204; C01356, 01357) Werthmann confirmed that he was provided the information regarding this part of Groot's operating plan by "the development team". (C03116.067, 068-069)

Moose also testified with respect to Criterion 8. Despite the unequivocal evidence that the waste from the Transfer Station would be transported to the Winnebago Landfill, Moose continued to assert during his Criterion 8 testimony that "we're not going through Winnebago Landfill." (C03123-03124)

Moose's prevarication eventually broke down. After Werthmann had testified, Moose admitted that he told Werthmann to use the Winnebago Landfill as the destination because it "is required in order to create the traffic showing going to the west". Continuing his effort to misrepresent this aspect of the Transfer Station's operating plan, Moose nevertheless claimed that this was just to "put a dot on a map". (C03130-03131) But Werthmann's traffic report does not speak in such "dot on the map" terms. It is, rather, specific and definitive about where the waste is going.

At the very end of his testimony, Moose revealed why he had lied under oath. Contrary to his prior claim that he was unaware of an agreement between Groot and the Winnebago Landfill, Moose confirmed that Groot does in fact have an agreement with the Winnebago Landfill to accept all waste generated through transfer stations owned and/or operated by Groot and disposed of at that landfill. That, Moose finally admitted, was why he instructed Werthmann to use Winnebago Landfill in his traffic analysis. (C03140-03141) [17]

Groot's counsel also eventually conceded that the "present intent" is for the waste to go to the Winnebago Landfill. (C03357.198) Groot's counsel repeated this admission in a motion filed

[17] As will be discussed *infra*, this admission also relates directly to Groot's failure to prove compliance with Criterion 8. That failure explains Moose's persistent effort to misrepresent this aspect of the Transfer Station's operating plan.

during the siting hearing. But continuing the pattern of prevarication, and contrary to Moose's repeated false denials, Groot's counsel falsely asserted that "it was explained several times at the hearing" that "it is the immediate intention to travel to the Winnebago Landfill". (C04134) No such "explanation" appears anywhere in the siting hearing record.

Leutkehans acknowledged that the determination of compliance with Criterion 2 "is purely a matter of assessing the credibility of expert witnesses". (C04355.052) Leutkehans also acknowledged Werthmann's confirmation that all of the waste transfer vehicles from the Transfer Station will go to and come from the Winnebago Landfill. (C04355.064) Remarkably, however, Leutkehans then ignored all the above evidence, and his own acknowledgment, and stated that, "Despite the vociferous and continued arguments of TCH, it is not clear to the Hearing Officer based on the record that any end disposal landfill is certain at this time." (C04355.069)

Apart from the Winnebago Landfill, Moose also misrepresented the nature of the waste that will be accepted by the Transfer Station. Moose stated that approximately 90% of the waste handled by the facility would be municipal solid waste. He also acknowledged that food waste is wetter and "more odiferous", and needs special handling. The issue of odors from the Transfer Station was a significant topic during the siting hearing. In an obvious effort to allay concerns about odors, Moose therefore claimed that the Transfer Station would not accept food waste. (C02828-02829) That assertion is both contrary to the Act and, as Moose ultimately admitted, another fabrication.

Section 3.290 of the Act, 415 IlCS 5/3.290, defines "municipal waste" as, "garbage, general household and commercial waste, industrial lunchroom or office waste, landscape waste, and construction or demolition debris." Indeed, responding to a verbatim recitation of that definition, Moose ultimately admitted that this is exactly the type of waste that the Transfer

Station will accept. (C02859-02860) But in claiming that the Transfer Station will not accept food waste, Moose failed to mention §3.200 of the Act, 415 ILCS 5/3.200, which further defines "garbage" as "**waste resulting from the handling, processing, preparation, cooking, and consumption of food**, and wastes from the handling, processing, storage, and sale of produce." [Emphasis added]

Leutkehans, again inexplicably, completely ignored the clear and unequivocal evidence that Moose repeatedly lied under oath, and "found" "that Mr. Moose was a credible witness and finds no reason to determine that his testimony in this hearing was untrue or deceitful". (C04355.050) The Voting Bloc of course ignored all of this. Consistent with their avoidance of their obligation to make a credibility determination, Moose's repeated falsehoods are not even mentioned in their deliberations.

2. Groot's design and operating procedures ignore accepted principles of transfer station design and operations, and fail to protect the public welfare

Moose's reason for misrepresenting the nature of the waste that the Transfer Station can and will accept became evident as the hearing focused on the issue of odor. That issue became a central one in the context of Groot's effort to prove compliance with Criterion 2. Moose acknowledged that garbage does in fact generate odor. (C02637; C02713)

From the beginning of the siting hearing, Groot's counsel represented that Moose would demonstrate that no shortcuts were taken on this facility, and it "incorporates all the most current state of the art amenities that need to be included to provide these types of protections". (C02587) The unrebutted evidence in fact demonstrates exactly the opposite – that this Transfer Station, based exclusively on what Moose "likes", is contrary to the state of the art. Groot intends to ignore accepted processes and mechanisms that have in fact been the "state of the art"

for years, solely because Moose does not want to implement them. Indeed, Moose's conception of "state of the art" is two decades old. (C02619)

According to Moose, there will not be a filter of any kind on the output air from the Transfer Station. (C02844) The air from inside the transfer station will be discharged outside through the roof with no treatment. (C02864) Moose has nevertheless seen filtration devices used for transfer stations, and has himself designed transfer stations with filters on the output. (C02836, C02845)

TCH called Charles McGinley ("McGinley"), a licensed chemical engineer in the state of Minnesota, and renowned expert in the fields of air quality, air toxics and odor. (C03357.010, 011) McGinley has testified multiple times in multiple states as an expert regarding odors, odor control measures, and management options to deal with odors. (C03357.176) McGinley has 40 years of experience in his field. He works extensively for the waste industry, and has worked for some of the largest waste companies in the world. He has also provided training services relating to odor management development, odor management auditing, odor sampling and investigation. (C03357.017-019) That training applies to both landfills and transfer stations. McGinley has provided training to every major waste company in the United States. He has also provided services to various government environmental agencies. McGinley has also authored or contributed to a number of scholarly reference materials on odor issues in the waste industry. McGinley holds three patents for devices and processes in the fields of odor measurement and analysis. He has also provided training to companies that themselves provide services to the waste industry, including Shaw. McGinley has provided training to over ten Shaw employees,

including employees in Illinois. (C03357.020-023)[18] McGinley has spent 30 years training dozens of transfer station personnel on odor management systems and odor control procedures. (C03357.036-037, 038-039) McGinley teaches people how to design transfer stations and manage odor from waste facilities, including transfer stations. (C03357.043)

Groot's counsel tried, desperately and repeatedly, to prevent McGinley from testifying, even resorting to misrepresenting the law. Counsel cited to *Van Breemen v. Department of Professional Regulation*, 296 Ill.App.3d 363 (2nd Dist. 1998), for the proposition that an engineer who is not licensed in Illinois cannot testify as an expert. Groot's counsel admitted that there is no authority in Illinois to support such a proposition in the context of a siting hearing. (C03357.011-017; C03357.182-184) But he also failed to acknowledge, as pointed out by TCH's counsel, that the proposition for which counsel cited to *Van Bremen* had been rejected by the Illinois Supreme Court in 2006 in *Thompson v. Gordon,* 221 Ill.2d 414, 434 (2006), where the Court held that not having an Illinois license is not a bar to testifying as an expert in Illinois. Leutkehans ultimately rejected counsel's disingenuous effort, and ruled on the basis of *Thompson* that McGinley's testimony with respect to odor was proper and admissible. (C03357.184-187)

The Voting Bloc nevertheless used Groot's misrepresentation of the law as the basis for its vote on Criterion 2. Wagner repeatedly stated that McGinley is "not qualified as an engineer for the state of Illinois". (C03918) Despite an effort by Trustee Williams to explain McGinley's background and experience, Wagner clung stubbornly, and improperly, to her claim that, "[H]e can't testify as an engineer. He is not licensed in the state of Illinois." (C03920) What was it about McGinley that led Groot's counsel to misrepresent the law – and to the Voting Bloc's acceptance of that misrepresentation?

[18] This may explain Moose's preemptive effort to undermine McGinley's testimony. Moose had claimed that the people who work at the Transfer Station can identify odor, and, "You don't have to be an expert in odor." (C02846)

Based on his review of the Siting Application and Moose's testimony, it is McGinley's opinion that the Transfer Station will not prevent air laden with garbage odors from passing into the community, and that would infringe on the public welfare, in contravention of Criterion 2. (C03357.032, 034, 039) Contrary to Moose's false claims, McGinley's opinion is in fact based on the current state of the art in transfer station design.[19]

There are ways to reduce garbage odors, both physically and operationally, which are emitted by a waste transfer station. Those methods are published in U.S. Environmental Protection Agency ("USEPA") guidance documents specifically for urban transfer stations. (C03357.040) The guidance documents are attached to McGinley's report. (C01393-01492)

One of those attachments is a USEPA publication entitled *Waste Transfer Stations: A Manual for Decision Making*, published in 2002 (the "USEPA Manual") (C01424-01488) The USEPA Manual includes a discussion on Urban Transfer Station Design and Operations:

> Urban transfer stations must employ a combination of planning, design, and operating practices to help minimize impacts upon the surrounding community. Listed below are several engineering designs, technologies, and operating practices that an urban transfer station should consider employing to mitigate facility impacts upon the neighboring community.

(C01461) The USEPA Manual then lists a number of design and operational features that should be implemented in order to minimize odors:

> • Install ventilation systems with air filters or scrubbers.
> • Use odor vestibules on truck entrances and exits. Odor vestibules are 2-door systems in which the outer door closes before inner door opens to prevent odors from escaping.

[19] Even the Voting Bloc appears to have accepted McGinley's testimony at some level. Moose had insisted that the Transfer Station entry and exit doors would remain open the vast majority of the time. McGinley testified that the facility doors need to be closed all the time, except for truck passage, in order to minimize the passage of odors beyond the facility's boundary. (C03357.059) The issue with the doors is that they would be open 20 hours a day. The air exchange system, as designed, is inadequate to address odors because it is not sufficient to address the air volume with the doors open. The open doors would result in a wind tunnel effect. (C03357.099-100, 101) Without attribution to McGinley, the approval of the Siting Application includes a condition that, "The Applicant must keep the truck doors to the Facility closed, except to allow trucks to enter and exit the Facility" during specified hours. (C04581)

> • Install plastic curtains on entrances and exits to contain odors when doors are opened to allow vehicles to enter or exit.
> • Use biofilters – which pass malodorous air through organic matter, such as wood chips, mulch, or soil – to capture odor molecules. Bacteria in biofilters consume and neutralize odor molecules.

(C01461) [20]

Groot will only partially implement the odor control measures. Those partial measures will not be adequate to keep odors from traveling beyond the boundary of the Transfer Station. (C03357.042) Without scrubbers, as recommended by the USEPA, the air that is laden with garbage odor will be exhausted from the top of the Transfer Station building and will go into the community untreated. (C03357.055-056, 094-096) Moose will not implement the majority of the controls required by the USEPA Manual, nor will he even do what he claimed would be done for the minimal odor control measures identified in the Siting Application. This is what Moose had to say about the odor mitigation measures recommended by the USEPA, and his view of the "state of the art":

> Q. All right. Then just finally on this issue of the odor controls that everybody's been asking you about. Is the plan to remove all waste at the end of each operating day every day?
> A. Yes, off the tipping floor.
> Q. And is the plan to not allow any waste to remain on site overnight at any point in time?
> A. No.
> Q. All right. Is the plan to install misting systems with deodorants to mask or neutralize odors?
> A. Yes.
> Q. Is the plan to install ventilation systems with air filters or scrubbers?
> A. No.
> Q. Is the plan to use odor vestibules on truck entrances and exits?
> A. No.
> Q. Could you explain what odor vestibules are?

[20] Notably, the USEPA Manual is repeatedly cited as an authoritative reference in the Siting Application – but not by Moose. (C00034, 000039, 00052) Groot's counsel did refer to the USEPA Manual, but only for the purpose of misrepresenting what it said regarding waste regulations in New Hampshire. (C03357.078, 116-119) McGinley was also asked about a facility in Minneapolis. He pointed out that odors are not detectable from that facility because it follows the USEPA guidelines. (C03357.086-087)

> A. It's an air lock where a truck enters -- opens a door -- a door opens, truck enters an air lock, door closes behind it, and another door opens to allow the truck to enter.
> Q. Is the plan to install plastic curtains on entrances and exits to contain orders when doors are opened to allow vehicles to enter or exit?
> A. No.
> Q. Is the plan to use biofilters which pass malodorous air through organic matter such as wood chips, mulch or soil to capture odor molecules?
> A. No.

(C02860-02862)

Groot's counsel, joined by Sechen on behalf VRLP, continued at almost every step to try to prevent McGinley from testifying – even to the extent of repeatedly renewing his legally baseless assertion regarding McGinley's qualification to testify. (C03357.034-036)[21] If anything, all of these efforts, coupled with the fact that McGinley is the pre-eminent expert in his field, having trained not just waste company employees, but even Shaw employees, only served to enhance his credibility. Most notably, McGinley's testimony was completely unrebutted. Neither Groot nor the Village called a single witness to contest McGinley's testimony.

C. Criterion 3 – The Facility Will Not Be "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"

The standard applicable to Criterion 3 is well settled:

> This criterion requires an applicant to demonstrate more than minimal efforts to reduce the [facility's] incompatibility. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. (*Waste Management of Illinois, Inc. v. Illinois Pollution Control Board* (1984), 123 Ill.App.3d 1075, 1090, 79 Ill.Dec. 415, 426, 463 N.E.2d 969, 980.) Furthermore, an applicant should not be able to establish compatibility based upon a preexisting facility. (*Waste Management of Illinois*, 123 Ill.App.3d at 1088, 79 Ill.Dec. at 425, 463 N.E.2d at 979.)

[21] Leutkehans had by this time already ruled that McGinley has the expertise to testify about odor. (C03357.031)

File v. D & L Landfill, Inc., supra, 219 Ill.App.3d at 907 See also *Fox Moraine, supra,* 2011 IL App (2d) 100017, ¶112

1. Lannert did not properly assess the character of the surrounding area

It is readily apparent that, before the issue of minimization of impacts can be addressed, an applicant must first determine the character of the surrounding area that will be impacted. Christopher Lannert ("Lannert"), Groot's witness with respect to the first part of Criterion 3, completely failed in this regard.

Lannert acknowledged that a very significant aspect of determining minimization of impacts on the character of the surrounding area is to determine the context in which the facility is proposed to be located in relation to the other elements around the proposed site. (C02890-02891) It is only upon determining the character of the surrounding area, and evaluating the compatibility of those existing uses with the proposed Transfer Station, that Lannert could proceed to determine how to minimize the incompatibility. (C02914, 02923-02924) Lannert's study therefore included a purported examination of land uses within one mile of the proposed Transfer Station to determine compatibility from both a land use and zoning perspective. (C02983-02984; C01315-01317) This was a linchpin of Lannert's opinion for purposes of determining the character of the surrounding area, and therefore compliance with Criterion 3. (C00094, C02905, 02944, 02950, 02951-02952, 02955-0295603004) Lannert studied over 2200 acres of land within a one-mile radius of the Transfer Station in order to examine surrounding impact. (C02901)

Lannert acknowledged that his methodology, including his determination of the appropriate study area, including specific attention to land use and zoning within a one-mile radius of the proposed site, was of the type commonly utilized to make determinations of land use compatibility. (C02945-02946) Lannert also admitted that the appropriate study area for

determining the character of the surrounding area is not limited to the properties immediately adjacent to the proposed site. (C02947)[22]

To support his opinion, Lannert stated that open space and industrial land uses account for 59% of the area within a one-mile radius of the proposed Transfer Station. Lannert arrived at that figure by focusing on the fact that 55% open space plus 4% industrial within one mile adds up to his 59%. (C02943-02944; C00100; C00094)

Lannert did not, however, address the fact that, after open space, residential uses, at 37%, are the second most predominant uses in the study area – far ahead of industrial uses. (C02957-02958) Lannert's Criterion 3 opinion was instead based on his misstatement that "the immediate area surrounding the site has been defined by industrial uses that have been established over the past years". (C02936-02938)[23] Indeed, Lannert admitted that his sole purpose in linking the 55% open space to the 4% industrial was to be able to say that those are compatible land uses to the proposed Transfer Station. (C02960)

In contrast, Lannert admitted that residential uses have been successfully integrated within the study area. He acknowledged that the residential areas appear "to have been carefully designed with open space parks, trails, buffers and setbacks within those communities. So intermixed within their zoning is a lot of open space as required by the community's specific relations. So that is what I'm trying to get at in terms of that statement." (C02958-02959) Lannert conceded that the substantial areas of residential uses in the study area are "well done residential areas". This included the Timber Creek community, which has been in existence for over 40

[22] Lannert also confirmed that the analysis is not limited to the 1000-foot setback required by section 22.14 of the Act, 415 ILCS 5/22.14. The 1000-foot setback does not define the limit of the analysis for determining the character of the surrounding area, or minimization of impacts on that area. (C02949-02950) That is why Lannert evaluated the area within a one-mile radius of the proposed Transfer Station. (C02947-02948)

[23] Lannert had limited, if any, knowledge regarding what the 4% industrial actually comprises. Other than Groot's Truck Terminal, Lannert did not know what any of the purported industrial uses near the proposed Transfer Station actually are, other than they are classified as "light industrial". (C02978-02979, 02980, 02981-02982, 02983, 02985-02986, 02990, 02991-02992)

years. Lannert also conceded that "residential uses account for 37 percent of the one mile study area and occur within historically established neighborhood areas and recent master plan communities." (C02964)[24]

Nevertheless, Lannert refused to acknowledge simple math. When asked whether, instead of "concluding" that open space and industrial land uses account for 59 percent of the area within a one mile radius of the proposed Transfer Station, he could instead have acknowledged that open space and residential land uses account for 92 percent of the area within a one mile radius, his answer was a bald-faced, "No." (C02965-02966) Lannert fundamentally mischaracterized the character of the surrounding area in order to create a false "basis" for his opinion. Even Peter Poletti ("Poletti"), Groot's appraiser, did not agree with Lannert. Poletti confirmed the real character of the surrounding area. "The Village of Round Lake Park is a multi-faceted **commercial and residential community**. [Emphasis added]" (C00125)

Moreover, Lannert's "characterization" was based on an impermissible foundation. During the hearing, Groot's counsel acknowledged that:

> Trends of development are just that, trends. They are speculative. This line of questioning is speculative. We don't know what is going to happen in the future. We only know the current state of those lands adjacent to the proposed facility, Mr. Hearing Officer. In that regard, I would cite generally *Tate vs. Illinois Pollution Control Board*, 188 Ill. App. 3d, 994, Fourth District case in 1989 that specifically says that, that you have to look at the current state of the land because that's all we know.

(C02939-02939) Yet Lannert based his opinion on exactly that type of impermissible speculation regarding trends of development. Lannert tried to defend his refusal to acknowledge simple math, and that residential uses far outweigh industrial ones, by claiming that "by lumping open space and agricultural uses in with my industrial, I will probably be more correct than incorrect

[24] Lannert also conceded that, "An analysis of the existing zoning and the permitted uses within a one mile study radius of the subject site indicate that the existing uses have been established for many years and continued growth is anticipated as planned." (C00097; C02957)

over the next decade and that is my opinion. [Emphasis added]". (C03006-03007) Lannert's "justification" for misperceiving the actual character of the surrounding area ignores the simple fact that potential future land uses are completely irrelevant to the Criterion 3 analysis.

2. Poletti's opinion was equally flawed

Poletti acknowledged that he worked with Lannert to present a "unified approach" to the two aspects of Criterion 3, and that he relied on Lannert's work in the context of his property value assessment. (C03066-03067, 03092) This reliance included Lannert's "determination" of the character of the surrounding land uses. (C03068, 03073) Poletti and Lannert never discussed the advisability of representing the combined percentages of open space and commercial property, or of open space and residential property. (C03092-03093)

TCH called Michael MaRous ("MaRous") as a witness with respect to Criterion 3. MaRous is a highly qualified real estate appraiser with almost 40 years of experience. He is highly regarded in his field, and has received a number of honors and advanced designations. MaRous has vast experience, including over 1000 projects in Lake County with a combined value of over $1 billion. He has also worked for well over 40 units of government, including a number in Lake County. MaRous has been qualified as an expert witness over 300 times in various settings and forums. (C3371-3376) MaRous has also done numerous market impact studies, including several involving waste facilities. This includes work for owners and operators of waste facilities. (C3376-3377)

Regarding the character of the surrounding area, MaRous confirmed that the Timber Creek community is well established in the area. It is a well-developed residential community with approximately 240 residential units and over 700 residents. Timber Creek has been in existence for over 40 years. It is attractive, has mature landscaping and it is well maintained. (C3377, 3383-3384) In contrast, MaRous described a transfer station as a "very heavy industrial

use". (C3384) It is not common for heavy industrial uses to be co-located with residential uses. They are normally one half mile or more apart from each other. Instead, heavy industrial uses are generally concentrated with other heavy industrial uses. (C3384-3385) A light industrial use generally includes office, light distribution, warehouse and light assembly. Heavy industrial uses, like a waste transfer station, are much more intensive uses, such as heavy manufacturing, cranes, forges, etc. (C3436) A garbage transfer station is a heavy industrial use because of its characteristics. (C3436)[25]

MaRous also confirmed the information regarding prevailing land uses within one mile of the proposed Transfer Station – 92% open space and residential and only 4% industrial. (C3389-3390) MaRous also confirmed, contrary to Lannert's speculation, that Criterion 3 requires minimization of the impacts on the character of the surrounding area as it exists. (C3459-3460)[26]

MaRous concluded that, given the actual character of the surrounding community (which Lannert mischaracterized), minimization of the impact on the character of the surrounding area, including the Timber Creek community which is just over 1000 feet away, was not adequately addressed. (C3386-3387)

With respect to Poletti, MaRous pointed out that the character of the surrounding area must be taken into account in the context of a Criterion 3 value impact analysis. (C3395) As discussed above, however, Poletti relied on Lannert's mischaracterization for that information. MaRous concluded that Poletti had not demonstrated compliance with Criterion 3, particularly as to minimization of impacts on the nearby Timber Creek community. Ultimately, given the

[25] The Groot Truck Terminal is a light industrial use. What differentiates that from the Transfer Station, a heavy industrial use, is the transfer of garbage. (C3464-3465)

[26] Even Kleszynski, who was called by VRLP, admitted, contrary to Lannert's opinion, that "the area within 1 mile of the site has been defined **by open space and residential uses** that have been established over the past years. [Emphasis added]" (C3742.105)

defects in both reports, MaRous concluded that neither Lannert nor Poletti had demonstrated compliance with Criterion 3. (C3405-3406)

MaRous' testimony regarding the character of the surrounding area, including the nature of the uses, was unrebutted. Lannert mischaracterized the character based on improper speculation, and Poletti relied on Lannert. Groot's counsel therefore resorted to yet another set of fabrications in order to try to undermine Marous' credibility. Groot's counsel used fabricated "facts" to try to create the impression that Marous' was not a credible witness. (C3429-3431, 3478-3479, 3704-3705, 3705-3706) As a result of these fabrications by Groot's counsel, Luetkehans granted TCH's Motion to Strike those portions of Marous' cross-examination. (C04355.002-006)

D. Criterion 6 – Groot Did Not Meet Its Burden of Demonstrating That The Traffic Patterns To Or From The Facility Are "So Designed As To Minimize The Impact On Existing Traffic Flows"

Criterion 6 of §39.2 expressly provides that the applicant for siting approval has the burden of proving that "the traffic patterns **to or from the facility** are so designed as to minimize the impact on existing traffic flows. [Emphasis added]" During the siting hearing, Groot's counsel claimed that the scope of Criterion 6 is limited to "traffic patterns at the facility [Emphasis added]." (C03116.065) Indeed, from the very beginning of the siting hearing, Groot's counsel asserted that the Criterion 6 obligation is limited to minimizing "impacts on traffic patterns going in and out of the facility". (C02594) Ultimately, Groot confirmed its effort to re-write Criterion 6 by claiming that "an Applicant need only submit evidence that it designed the entrance to minimize the impact on the roadways. [Emphasis added]" (C04130) Groot's assertions of a limitation on the express language of Criterion 6 are contrary to both the requirements of Criterion 6 and the case law construing those requirements.

It is important to recognize the obvious – Criterion 6 does not limit its scope to "the immediate area into or out of" the facility. The operative language is "traffic patterns to or from" the facility. Nor does Criterion 6, or the cases that have construed it, require an abandonment of accepted traffic engineering principles. Werthmann prepared the Criterion 6 portion of the Siting Application. (C03116.016) Werthmann acknowledged that Criterion 6 requires an analysis of the routes serving the facility, and a demonstration that the impact on those routes has been minimized. (C03116.018)

According to Werthmann, the Criterion 6 traffic analysis is based on a methodology accepted in the transportation industry. (C03116.050-051, 052) It includes an examination of the physical and operating characteristics of the roadway system – that is the "base condition" upon which the balance of the analysis is premised. (C03116.018-019, 051-052)

Werthmann's examination of the existing roadway system involved a field investigation aimed at defining and quantifying that system's physical and operating characteristics. (C03116.019-020) The analysis also included a determination of the facility's characteristics. Werthmann acknowledged that this is important in order to determine "the type and volume of traffic that will be generated and **the routes that they will be using to get to the facility**. [Emphasis added]" That data is analyzed in order to determine "what the impact is on the roadway system". (C03116.028-029)

Werthmann also conducted a capacity analysis to determine the ability of the intersections that will be used by the Transfer Station traffic to accommodate the traffic flow. (C03116.040-042; C01361) Werthmann admitted that 100% of the 24-ton transfer trailers and 35% of the collection vehicles would travel to and from the proposed facility via Illinois Route 120, west of Cedar Lake Road – the transfer trailers to and from the Winnebago Landfill and the collection vehicles from parts unknown. (C03116.031-032, 033, 035, 065-067, 068-069;

C00204; C01356, 01357) Based on the number of truck trips identified by Werthmann (C01358), those percentages reflect a total of 64 to 76 round trips by transfer trailers, and 78 to 94 round trips by collection vehicles. Werthmann acknowledged that the specific routes being used are themselves one of the ways in which impacts to existing traffic flows are sought to be minimized. (C03116.032)

Nevertheless, despite the critical importance of the specific roadways to be used in the context of a Criterion 6 study, Werthmann's analysis to the west of the proposed Transfer Station stopped at the intersection of Cedar Lake Road and Route 120. (C03116.021-022, 035, 055; C00210; C01352, 01358, 01360) Indeed, Werthmann did not know what routes will be used by the transfer trailers to go to and come from the Winnebago Landfill. (C03116.070-072) Nor did Werthmann provide any information of any kind regarding what routes any of the transfer station traffic would use west of Cedar Lake Road.[27]

Werthmann candidly acknowledged the essential requirements of a proper Criterion 6 analysis discussed above – they are the same requirements for a proper traffic analysis for any type of development, and a matter of sound traffic engineering practice. (C03116.050-051, 052) Yet Werthmann never explained why he stopped at Cedar Lake Road. Notably, Werthmann identified a number of potential routes that transfer trailers could utilize to get to and come from the Winnebago Landfill. (C03116.071-072) But he provided no information of any kind, either in the Siting Application or in his testimony, regarding how any of the trucks might get to and come from those routes.

[27] Werthmann acknowledged that the intersection at Cedar Lake Road and Route 120 is a short distance from the proposed Transfer Station. (C03116.111) Nor did Werthmann limit his analysis to the immediate vicinity of the Transfer Station. He merely artificially, and without explanation, stopped where a significant portion of the collection trucks, and all of the transfer trailers, would go to and come from.

More important for the purpose of the type of analysis that Werthmann admitted is required under Criterion 6, Werthmann provided no information regarding the "physical and operating characteristics" of that portion of "the roadway system". This is the principal point made by TCH's traffic expert, Brent Coulter ("Coulter"). Coulter is an experienced and highly qualified traffic engineer. (C03266-03270; C01493-01494)[28] Coulter's conclusion that Groot has not satisfied Criterion 6 is based on the absence of any routing information beyond the immediate vicinity of the proposed Transfer Station.

Coulter agreed with Werthmann that sound traffic engineering involves two principal factors: the traffic component (roadway analysis) and the location specific component (the directional distribution). Coulter concluded that the complete absence of any information beyond the immediate vicinity of the proposed Transfer Station, where so much of the heavy truck traffic would go, and how the impact from that traffic had been considered and minimized, did not meet either sound traffic engineering principles or the requirements of Criterion 6. (C03282-03283, 03285-03286, 03295-03296, 03309, 03329; C01498)

During Coulter's cross-examination, Groot's counsel speculated about potential routes from the transfer station to the Winnebago Landfill – as had Werthmann. (C03315)[29] Any number of combinations of roads and intersections might be utilized, depending on roadway configurations, intersection capacity, and a multiplicity of other facts that Werthmann did not even mention, much less analyze. That is Coulter's ultimate point – absent any information

[28] Groot and its legal team clearly recognized Coulter's expertise and qualifications in the field of traffic engineering, Groot's counsel had sought to retain Coulter to conduct an independent review of Werthmann's traffic analysis in this matter. (C01494-01496) Groot's counsel sought to diminish this acknowledgment of Coulter's expertise by pointing out that Coulter works out of a home office. (C03286) That tactic speaks volumes about the approach Groot and its lawyers took in this matter. Groot's counsel also sought to make headway by asserting that Coulter had not memorized the exact language of Criterion 6 for his testimony, despite Coulter's confirmation that he understood the statutory requirement and had taken its language into account in rendering his opinion. (C03292-03293, 03295)

[29] That speculation left even Leutkehans wondering about where the transfer trailers would go. (C03332-03333)

regarding any roads or intersections beyond the immediate vicinity of the Transfer Station, or the impact on any such routing, or how that impact has been minimized, Groot has not demonstrated that it has complied with Criterion 6. (C03316-03317)

E. Criterion 8 – Groot Failed To Demonstrate That The Transfer Station Is Consistent With The Lake County SWMP

The Lake County SWMP confirms Lake County's intent "to continue to manage as much Lake County waste requiring disposal as feasible **within the borders of Lake County** because this is the most responsible and sustainable approach to waste management. [Emphasis added]" (C01921, TCH Exhibit 27, p. 4-1) It is beyond question, despite Moose's repeated misrepresentations to the contrary, that the operating plan for the proposed Transfer Station provides that all waste would be taken out of Lake County, to the Winnebago Landfill. The Lake County SWMP does allow for this possibility, but requires that:

> SWALCO will consider expanding the list of landfills (located outside of Lake County) deemed to be serving Lake County if the owner of the landfill proposed for inclusion first negotiates a host agreement with SWALCO. The host agreement must provide for a capacity guarantee and payment of a host fee for each ton of Lake County waste taken to the landfill.

(C01929)

When questioned with respect to these express requirements of the SWMP, Moose admitted that none have been met – the Winnebago Landfill has not entered into a host agreement with SWALCO; it has not provided for a capacity guarantee; and it has not agreed to pay a host fee. (C03122-03125) This constitutes a fundamental failure to comply with the requirements of the Lake County SWMP.[30]

[30] This also explains why Moose was so reluctant to admit where the waste from this Transfer Station is going.

The SWMP also identifies certain guidelines that must be implemented by the proponent of a waste transfer station in order to satisfy Criterion 8. These guidelines include "utilize proven technology" and "minimize emissions". (C01931) As set forth in the discussion regarding Groot's failure to meet its burden with respect to Criterion 2, and specifically its failure to implement modern odor control measures, Groot will not "utilize proven technology" or "minimize emissions".

VII. CONCLUSION

Based on all of the foregoing, the combination of the Voting Bloc's predetermination and its failure to make a credibility determination, coupled with the dramatic shortcomings in Groot's evidence with respect to Criteria 1, 2, 3, 6 and 8, mandate a reversal of the Voting Bloc's decision.

Timber Creek Homes, Inc.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of PETITIONER'S POST-HEARING BRIEF to be served on the following, via electronic mail transmission, on this 23rd day of June, 2014:

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