BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner,	)	
	)	PCB No. 14-99
v.	)	(Pollution Control Facility
	)	Siting Appeal)
VILLAGE OF ROUND LAKE PARK, ROUND LAKE PARK VILLAGE BOARD and GROOT INDUSTRIES, INC.,	)	
	)	
Respondents.	)	

GROOT INDUSTRIES, INC.'S POST-HEARING BRIEF

NOW COMES the Respondent, Groot Industries, Inc. ("Groot"), by and through its attorneys, HINSHAW & CULBERTSON, and submits this Post-Hearing Brief:

I. INTRODUCTION

This proceeding involves an appeal by Timber Creek Homes, Inc. ("Petitioner") of a decision by the Round Lake Park Village Board ("Village Board") to grant Groot's application for siting approval (the "Siting Application") for a transfer station to be located in the Village of Round Lake Park ("Village"). The Village Board's decision followed a thorough hearing during which the Petitioner was permitted to cross examine witnesses and present its own evidence. Petitioner has not alleged any deficiency in the hearing procedures or process, but nonetheless claims that the siting approval somehow violated principles of fundamental fairness. Petitioner also attempts to re-visit the evidence in support of its claim that the Village Board's siting approval is not supported by the manifest weight of the evidence.

Petitioner bears the burden of proof in this appeal and, under Illinois law, that standard of proof is high. Petitioner has wholly failed to meet its burden here. Instead, the record shows that the Village Board's decision is supported by the manifest weight of the evidence and that the procedures employed by the Village Board comported in all respects with principles of fundamental fairness. Based on the following, Groot respectfully requests that the Illinois

Pollution Control Board ("PCB") uphold the Village Board's decision and deny Petitioner's Petition for Review.

II. STANDARD OF REVIEW

The procedures and criteria for siting a pollution control facility are set forth in 415 ILCS 5/39.2. On appeal by a third party petitioner of a grant of siting approval, "[t]he burden of proof shall be on the petitioner." 415 ILCS 5/40.1(b); *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶ 57 (2011). In reviewing the siting authority's decision, the PCB must consider the Village Board's written decision and reasons therefor, the siting hearing transcript, and the fundamental fairness of the siting proceeding. 415 ILCS 5/40.1(a); *Fox Moraine*, 2011 IL App (2d) 100017, at ¶ 57.

A. Section 39.2 Criteria – Manifest Weight of the Evidence

The standard of review on appeal of a siting authority's decision regarding the statutory criteria is well established. A siting authority's decision will be overturned only if it is against the manifest weight of the evidence. *Fox Moraine, LLC*, 2011 IL App (2d) 100017, ¶ 88; *Tate v. IPCB*, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176 (4th Dist. 1989). "A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence." *Tate*, 188 Ill. App. 3d at 1022. "The question in this appeal is not whether a ruling in favor of the [petitioner] is a more reasonable conclusion based on the evidence presented. Rather, the only question is whether it is clearly evident from the record that the [siting authority should have denied the siting application]." *Peoria Disposal Co. v. PCB*, 385 Ill. App. 3d 781, 801, 896 N.E.2d 460 (2008).

It is also clear that it is the siting authority's province "to determine the credibility of witnesses, to resolve conflicts in the evidence, and to weigh the evidence presented." *Land & Lakes Co. v. IPCB*, 319 Ill. App. 3d 41, 53, 743 NE2d 188 (3d Dist. 2000). The PCB does not reweigh the evidence, and the fact that there is some evidence that would support a different

conclusion does not mean that the PCB will substitute its judgment for the siting authority's. *Id.* Indeed, the PCB "is not required to . . . reverse the [Village Board's] decision merely because the Board could conclude the opposite." *Fox Moraine*, 2011 IL App (2d) 100017, ¶ 15.

B. Fundamental Fairness – Clear and Convincing Evidence

The standard of review for a claim of fundamental fairness is equally well settled. A third-party petitioner does not have a property interest at stake on appeal of a siting proceeding such that it is entitled to constitutional guarantees of due process. *Land & Lakes*, 319 Ill. App. 3d at 47. Instead, a petitioner is entitled to "minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence." *Id.* at 48. The PCB must generally confine its review to the record developed by the local siting authority, and may only hear new evidence outside this record if it is relevant to fundamental fairness. *Id.* Further, the Petitioner must show that it preserved its claim regarding fundamental fairness by raising it during the siting proceeding. *Id.* "[I]ssues of bias or prejudice on the part of the siting authority are generally considered forfeited unless they are raised promptly in the original siting proceeding, because it would be improper to allow the petitioner to knowingly withhold such a claim and to raise it after obtaining an unfavorable ruling." *Fox Moraine*, 2011 IL App (2d) 100017, ¶¶ 60, 74-75.

Members of a siting authority enjoy a presumption "that they have made their decision in a fair and objective manner." *Id.* ¶ 59 (citing *Peoria Disposal Co.*, 385 Ill. App. 3d at 796). This presumption may only be overcome if the petitioner presents "clear and convincing evidence" of a violation of principles of fundamental fairness. *Id.* This evidence must be specific and show actual bias or pre-judgment. *Stop the Mega-Dump v. County Bd. of DeKalb County*, 2012 IL App (2d) 110579, ¶ 56 (2012).

"Mere expressions of public sentiment are not sufficient for a showing of prejudice." *Fox Moraine*, 2011 IL App (2d) 100017, ¶ 61. A petitioner must instead show that "a disinterested

observer might conclude that [the siting authority] had in some measure adjudged the facts as well as the law of the case in advance of hearing it." *E&E Hauling, Inc. v. PCB*, 116 Ill. App. 3d 586, 598, 451 N.E.2d 555 (1983). In *Stop the Mega-Dump*, the PCB stated that the standard of proof for a claim of fundamental fairness is high, and the decision makers' sworn testimony that they "voted solely on the basis of the evidence" is more than enough to sustain the presumption that they acted in good faith. *Stop the Mega-Dump*, 2012 IL App (2d) 110579, ¶59. In *Fox Moraine*, in assessing the fundamental fairness of the proceeding, the PCB concluded that the evidence offered by the petitioner was "insufficient to find that the council's decision-making process was fraught with bad faith and closed minds." *Fox Moraine*, 2011 IL App (2d) 100017, ¶ 8.

It is instructive to note that very few cases have actually overturned a siting authority's decision on the basis of fundamental fairness. *E&E Hauling* is one of the only cases in which the PCB and reviewing courts actually found that the proceedings did not comport with fundamental fairness, and even then, the court upheld the siting approval because the adjudicative facts – those relevant to the siting criteria – in the record showed that the applicant had met the statutory criteria. *E&E Hauling*, 116 Ill. App. 3d at 617. The facts of *E&E Hauling* that were sufficient to show a violation of fundamental fairness were egregious: the county board siting authority was comprised of the same individuals who made up the forest preserve district that was in fact a co-applicant for siting approval. *Id.* The county board had also previously passed an ordinance approving the facility at issue on largely the same grounds as the Section 39.2 criteria, effectively deciding the merits of the siting application prior to the hearing. *Id.* at 590-91. In contrast, in *Fox Moraine*, several members of the siting authority were elected in the midst of the siting proceedings and ran campaigns in which they expressly and publicly stated opposition to the landfill. 2011 IL App (2d) 100017, ¶¶ 17-55. Nevertheless, the PCB and

Appellate Court found that there was insufficient evidence of prejudgment or bias and upheld the siting authority's decision. *Id.* ¶ 83. These cases make it clear that the burden for proving a violation of fundamental fairness is high and cannot be satisfied based on speculative "evidence" or "mere expressions of public sentiment" regarding a pollution control facility.

III. DISCUSSION

A. Petitioner's Claim Regarding Fundamental Fairness Should Be Denied

1. Petitioner did not preserve its claim

It is well established that issues of bias or lack of fundamental fairness must be "raised promptly in the original siting proceeding," or they are forfeited. *Fox Moraine*, 2011 IL App (2d) 10017, ¶ 60. This is "because it would be improper to allow the petitioner to knowingly withhold such a claim and to raise it after obtaining an unfavorable ruling." *Id.* TCH has not introduced any facts into the record that show that it made any specific claim regarding its allegations of fundamental fairness in the original siting proceeding in a timely or operative fashion, nor did it actually do so.

Groot moved to dismiss the Petition because, *inter alia*, Petitioner did not preserve its claims regarding fundamental fairness in the underlying siting proceeding. While the PCB denied Respondents' motion, the PCB also stated that "in order to prevail before the Board, TCH must establish that any claim of bias or prejudice was raised at hearing." PCB Order, PCB No. 14-99, at 13 (Mar. 20, 2014). The PCB held that Respondents' argument that the Petitioner waived its fundamental fairness claims could be raised again after additional evidence is included in the record. *Id.* Petitioner has not introduced any additional facts whatsoever into the record showing that it preserved its fundamental fairness claims, nor even argued that it did so. In fact, Petitioner did not properly preserve its claims in the underlying hearing; therefore, as a matter of law the PCB should disregard Petitioner's arguments regarding fundamental fairness, as those claims were waived.

The Petition states summarily, regarding fundamental fairness, that:

> 7. The local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair in at least two respects. First, members of the Village Board prejudged the Application and were biased in favor of Groot. Second, the Hearing Officer, appointed to oversee the hearing process and render proposed findings and conclusions, usurped the authority of the Village Board by making determinations that were beyond the scope of this authority and that were solely the province of the Village Board. The Village Board in turn failed in its statutory duty to make those determinations.

Pet. Rev. ¶ 7.

Based on vague allegations in the Petition for Review, Petitioner's claim regarding fundamental fairness appears to be twofold: First, that certain members of the Village Board were biased and prejudged the application in favor of Groot, and second, that the hearing officer usurped his authority by making determinations outside the scope of his authority, while the Village Board failed to make required determinations. Petition at ¶ 7. However, at no time during the siting hearing did TCH allege bias of the Village Board, nor did it make any allegation of lack of fundamental fairness in the conduct of the hearing officer. The Petitioner has not introduced a single fact into evidence that shows that Petitioner preserved either of these bases of its fundamental fairness claim.

Petitioner stated in its response to Groot's Request to Admit that it made no motion regarding fundamental fairness, because "such a motion [was not] possible." Pet'r's Resp. Request Admit 11, at 2-3. In fact, the procedures employed in the siting hearing offered ample opportunity for Petitioner to object to Groot's siting application and make a motion, either formally or informally, regarding fundamental fairness. *See, e.g.*, Pet'r's Resp. Request to Admit 6, 8, at 2 (admitting that all parties were able to participate and that Petitioner never objected regarding its opportunity to participate). However, even if Petitioner were correct that it had no opportunity to make a formal motion regarding fundamental fairness, it still must have preserved

its claim. In *Fox Moraine*, the court noted that even if the appellant lacked a "formal 'mechanism for objection,'" it "could have submitted a written motion . . . during the public commentary period or at the deliberations meeting. *Since it made no attempt, . . . the arguments were forfeited.*" *Fox Moraine*, 2011 IL App (2d) 100017, ¶¶ 74-75. (Emphasis added). Similarly, here, Petitioner's arguments regarding fundamental fairness were waived because they were not "raise[d] . . . promptly during the original siting proceeding." *Id.* ¶ 74.

Neither the documents in the siting record nor those introduced by Petitioner on appeal show that Petitioner properly raised its claims regarding fundamental fairness *during the siting hearing*. A general statement by Petitioner's counsel that "there has been a predetermining of this application" and that "the rules of fundamental fairness have been violated" is not sufficient to have preserved Petitioner's fundamental fairness claim. (C03234). In *E&E Hauling*, the Appellate Court noted that similarly brief and generalized comments by citizens in that proceeding were "insufficient to raise the issues of . . . bias and prejudice raised before the PCB." 116 Ill. App. 3d at 592-93.[1] The comments made need to have been specific to Petitioner's *actual* allegations regarding fundamental fairness, not a broad and general reference to "bias" or "predetermination." *See, e.g.*, *Peoria Disposal Co. v. PCB*, 385 Ill. App. 3d at 791 (holding that, although the petitioner was arguing bias and *ex parte* contacts as the basis for its fundamental fairness claim, the petitioner had forfeited the claim of bias by failing to raise it in the original hearing; the court therefore limited its fundamental fairness inquiry only to the issue of *ex parte* contacts).

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[1] *E&E Hauling* was decided shortly after Section 39.2 of the Environmental Protection Act was passed, and authority to make siting decisions was delegated to County Boards. Because of the unique procedural posture of that case, in which the County Board essentially became a statutory decision maker midway through the siting process, the court did address the merits of the fundamental fairness argument despite the petitioner's failure to preserve its claim. The court stated that this was a unique situation, because the challenge to the composition of the decision making body could only have been made for the first time on administrative review. Those extenuating circumstances do not exist in the present proceeding, and Petitioner's failure to preserve its fundamental claims must result in waiver of those claims.

Petitioner made no mention of its claims regarding the hearing officer's alleged usurpation of the Village Board's role, nor did it mention the alleged predetermination based on approvals related to other facilities or the transfer station host agreement. The presumption of fairness and high evidentiary bar to overcome such presumption, coupled with the requirement that an objector raise issues of fundamental fairness in the original proceeding, evince a public policy of reluctance to disturb a siting authority's decision. This public policy lends further support to the principle that a petitioner must, *during the hearing*, specifically raise the issues it claims give rise to its claim of fundamental fairness.

It is obvious from these cases that an opponent does not preserve its fundamental fairness claims by making some vague and general assertion during a proceeding. Instead, Petitioner's objection must have been reasonably specific so as to put the parties on notice regarding its allegations. Petitioner made no such specific objection or allegation during the hearing and have not presented any evidence identifying a specific objection or allegation at the local siting hearing. Therefore, Petitioner has not shown that it preserved the issue of fundamental fairness in the underlying siting proceeding, and Petitioner's claims regarding the fundamental fairness of the siting hearings should be denied as waived.

2. Petitioner has not shown a lack of fundamental fairness.

i. Petitioner has not established that the Village Board predetermined the Siting Application.

Even if the PCB determines that Petitioner's few vague comments were sufficient to preserve its fundamental fairness arguments, Petitioner has not met its burden to show that the proceedings before the Village Board were fundamentally unfair. Petitioners "were afforded an opportunity to be heard, to cross examine adverse witnesses, and to submit comments during the statutory period." *Land & Lakes*, at __. In order to show a lack of fundamental fairness, Petitioner must show, *by clear and convincing evidence*, that the Village Board's "decision-

making process was fraught with bad faith and closed minds." *Fox Moraine*, ¶ 8. Petitioner has failed to meet its burden, and as in *Land and Lakes*, here "the proceedings before the [Village] Board were fundamentally fair." *Id.*

Petitioner notably does not argue that the procedures employed at the siting hearing were fundamentally unfair. The siting hearings spanned 7 days and generated almost 1400 pages of testimony. (C02496-C03874). Petitioner's counsel presented witnesses on behalf of Petitioner and was permitted to cross examine all witnesses. *Id.* Petitioner also submitted briefing and proposed findings after the siting hearing concluded. (C04135-C04201, C04113-C04124). In fact, the principal for Petitioner testified that he was unaware of any witnesses of TCH not being permitted to testify or any Groot witnesses that Petitioner was not permitted to cross examine. Cohn Dep. at 44-45.

Instead, Petitioner argues generally that the Village Board was biased and prejudged Groot's application, based on documents and statements prior to the filing of the applicaiton. Pet'r Br. at 3-11. Petitioner presents no evidence of actual bias or predetermination, however. For its arguments related to alleged predetermination, Petitioner relies primarily on a series of meeting minutes, some of which contain some mention of the transfer station, but many of which are not related to the transfer station at all. *See, e.g.*, Pet'r Br. at 4-6.[2] Petitioner argues that these documents show that the Village Board had decided to grant Groot's siting application years before it was actually filed. *See* Pet'r Br. at 7-8. The documents cited by Petitioner at most show that *Groot* began to contemplate a transfer station in 2008. For example, Petitioner makes much of the fact that Groot purchased the transfer station property without conditions and also

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[2] Petitioner attempts to weave together prior actions by the Village Board related to other Groot facilities to bolster its unsubstantiated conspiracy theory. The hearing officer in the present appeal hearing correctly determined that information related to these facilities is not relevant to this transfer station siting appeal. Hearing Officer Order, PCB No. 14-99, at 5 (Mar. 20, 2014). This finding of irrelevance was affirmed by the PCB. Order of the Board, PCB No. 14-99 (Apr. 3, 2014).

purchased property around the proposed facility. Pet'r Br. at 4-5 Rather than evincing clear and convincing evidence of a nefarious intent by the Village Board, these documents simply show that Groot exercised forethought and good business judgment by planning for a protracted process whereby the final outcome *might* be siting approval for a transfer station. Brandsma Dep. at 60:19-24 ("The grand plan was something we referred to internally as the [eco] campus, which included, *we hoped at some point in the future*, a transfer station . . . ."). These facts demonstrate absolutely nothing about any alleged predetermination or bias by the Village Board of the transfer station siting application. Groot's business decisions have no bearing on whether the *siting authority* complied with the requirements of fundamental fairness. Petitioner's citation of these irrelevant facts demonstrates instead that Petitioner has no actual, specific evidence of bias or predetermination.

Indeed, the PCB has noted that "[c]ontacts between the applicant and the siting authority prior to the filing of a siting application do not constitute impermissible *ex parte* contacts. It follows to reason that contacts between the applicant and the siting authority before the application is filed are *irrelevant* to the question of whether the siting proceedings themselves were conducted in a fundamentally unfair manner." *Sandberg v. City of Kankakee*, PCB No. 04-33, 2004 WL 604915, at 13-14 (Mar. 18, 2004), *rev'd on other grounds* (emphasis added). Therefore, the meeting minutes cited by Petitioner, all of which occurred prior to filing the siting application, have no relevance to whether the siting procedures for *this* transfer station were fundamentally fair.

Because Petitioner has no actual evidence of bias or predetermination, Petitioner next turns to mischaracterizations and bald misrepresentations of various hearing and deposition testimony to support its claims. For example, Petitioner claims, without citation, that one of the Village Trustees, Ms. Kenyon, identified Ms. McCue as a Village Board member with a

preconceived notion regarding the transfer station. Pet'r Br. at 2. Instead, what Kenyon actually said was that she "saw no evidence whatsoever that anybody on that board that voted made a pre-adjudication of how they were going to vote." Kenyon Dep. at 88. When asked by Petitioner's counsel whether McCue, in 2008 at the time of early discussions regarding a potential transfer station, "was already set to vote in favor of a transfer station," Ms. Kenyon replied, "I don't know." Kenyon Dep. at 239-241. Kenyon testified that she had no reason to believe that McCue did not keep an open mind on the siting application. Kenyon Dep. at 81. Kenyon further testified that she never heard any board member declare how he or she would vote prior to the actual vote. Kenyon Dep. at 87.

Ms. McCue herself testified that the entire Village Board was instructed by their attorney to keep an open mind regarding the siting application and that she "most definitely" kept an open mind herself. McCue Dep. at 114-115. She stated that she based her decision on the record. *Id.* at 115. Ms McCue testified that she "attended every one of the hearings," and that she did not "walk into that hearing with any preconceived notion as to how [she] would ultimately vote." *Id.* Ms. McCue further testified that no Village Board member ever said anything to her that would suggest that they failed to keep an open mind. *Id.*

Donna Wagner, another Trustee, similarly testified that the Village Board attorney "instructed us that we were not to discuss [the transfer station] in any way, shape, or form. *We had to be an unbiased board*, we had to be a sequestered jury. *We had to wait for the hearings before we made up our minds* or discussed anything." Wagner Dep. at 49-50 (emphases added). And when asked if that was, in fact, what she did, Ms. Wagner unequivocally replied, "Yes." *Id.* Ms. Wagner also testified that she limited her decision to evidence in the record, and "took [her] job very seriously regarding remaining unbiased and not making up her mind until she heard all the evidence. *Id.* at 51-52.

Linda Lucassen, who was the mayor at the time of the siting decision, testified as follows:

> BY MR. BLAZER
>
> Q: How far in advance of the December 10 meeting had you decided to vote in favor of the Groot transfer station?
>
> * * * *
>
> A: I didn't make any decision. I had no idea I'd be called to vote.[3]
>
> Q: Your testimony is that you didn't discuss the vote with any other member of the Board before December 10, 2013?
>
> A: No, I did not.
>
> * * * *
>
> BY MR PORTER
>
> Q: Did you wait until receiving all of the evidence before you made a decision in this case?
>
> A: Yes.

Lucassen Dep. at 49, 52.

Petitioner's allegations of predermination are based on rampant speculation, rather than actual fact. When asked about the perceived fundamental unfairness concerning the application process, Petitioner's principal, Larry Cohn, stated:

> I had heard before the hearing that some people who knew other people said that the thing was a done deal long before the hearing, that the trustees had already decided.

Cohn Dep. at 77. And when asked what evidence of pre-adjudication Mr. Cohn had seen, he responded:

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[3] The mayor, by ordinance, does not vote unless there is a tie. Ms. Lucassen's testimony that she "had no idea [she] would be called to vote" further shows that neither she nor any other Village Board member had predetermined how they would vote on the siting application.

> Q: All right. Other than the meeting minutes and Mr. Sechen's questioning of witnesses, nothing else; correct?
>
> A: Just the rumors that some people may have heard from reliable sources, but I can't verify those personally because I didn't hear them directly.
>
> Q: Well, and you don't know what reliable sources they heard it from; right?
>
> A: No, I'd be speculating it was from a trustee or someone who knew a trustee or something of that nature, but I can't give you any specifics.

Id.

This speculation based on rumors is far from the type of specific evidence regarding actual bias that is required here. The evidence relied on by Petitioner in support of its argument that the Village Board predetermined Groot's application does not come close to meeting the high evidentiary standard Petitioner must meet to overcome the presumption that the Village Board acted properly and in good faith. As in *Stop the Mega-Dump*, here "[a]ny inferences that potentially could be drawn about possible bias or predisposition from various comments made at various times by [Village] Board members are more than negated by their sworn testimony." 2012 IL App (2d) 110579, ¶ 59.

Petitioner's entire "evidence" related to negotiation of the host agreement between Groot and the Village similarly does not rise to the level required to show a violation of fundamental fairness. Petitioner argues that a single quote, made in the context of host agreement negotiations, ("take a chance on them not having a transfer station,") somehow establishes that the Village Mayor was ensuring Groot would have a transfer station. This quote, taken from the context of negotiations of the host agreement between Groot and the Village, does not meet Petitioner's burden to show predetermination by *clear and convincing evidence*. In fact, the statute explicitly contemplates negotiation of a host agreement prior to a siting decision:

> If, prior to making a final local siting decision, a . . . governing body of a municipality has negotiated and entered into a host agreement with the local siting applicant, the terms and conditions of the host agreement, whether written or oral, shall be disclosed and made a part of the hearing record for that local siting proceeding."

415 ILCS 5/39.2(e). Here, the host agreement was properly entered into the record. (C04624-C04659) Further, the host agreement itself explicitly states that it does not obligate the Village to grant citing approval. (C04626) ("[U]nder no circumstance shall the Village be under any obligation to grant site location approval of the transfer station unless and until, through the pollution control facility site location review process, it finds that the transfer meets or exceed all criteria set forth in 415 ILCS 5/39.2.") Kenyon specifically testified that she understood that she had no obligation to approve the Siting Application because of the host agreement. In fact, Kenyon actually voted to approve the host agreement and then voted against the siting application. Kenyon Dep. at 80-81.

The PCB and Appellate Court have both found that negotiation of a host agreement prior to a siting hearing does not violate fundamental fairness. *See, e.g.*, *Stop the Mega-Dump*, 2012 IL App (2d) 110579, ¶¶ 56-64; *City of Kankakee*, 2004 WL 604915, at 12. The quotes and documents cited by Petitioner merely show communications that are standard for the negotiation of such an agreement. Petitioner may not like this system, but following a standard process used by many applicants for a pollution control facility simply does not overcome the presumption that the Village Board acted properly.

The next "evidence" Petitioner points to is the Village's adoption of a solid waste plan and a siting ordinance. What Petitioner fails to mention is that the Village later repealed its solid waste plan and instead used the existing county solid waste plan. (C02491-C02494) Further, even if the Village had relied on its own solid waste plan, that plan does not establish that the

Village Board was biased or had predetermined that it would approve the transfer station.[4] As in *County of Kankakee v. PCB*, Petitioner's claims regarding the Village's solid waste plan are not even appropriately addressed in this appeal. 396 Ill. App. 3d 1000, 1024 (2010) ("In these administrative proceedings, there is no statutory authority to adjudicate claims about the legitimacy of [solid waste] plan adoption or amendment. We cannot expand our review beyond the scope of our statutory authority.").

Finally, Petitioner seemingly relies on a series of misrepresentations of hearing testimony and documents not admitted into evidence[5] to advance a vague theory that the Village and Groot were somehow co-applicants for the transfer station. It is obvious, however, from the entire record that *Groot* was the applicant for siting approval, and that the Village was not and never has been a co-applicant. Petitioner makes the incredible claim that the Village's counsel admitted that the Village had already determined that it was prudent to cite the transfer station and that the Village and Groot were "proceeding jointly." Pet'r Br. at 8-9. The actual hearing transcript reveals exactly the opposite, however. The Village's counsel, Mr. Sechen, was questioning Petitioner's witness, Mr. Thorsen, about the timing of siting a landfill. Mr. Thorsen stated, "Look, these are all businesses. The Village needs to make business decisions. The hauler needs to make those business decisions. And the landfills do. And that's a very big

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[4] Petitioner attempts to make much of the fact that Groot's counsel provided comments on the (repealed) solid waste plan and the siting ordinance. This "evidence" does not even come close to the showing required to establish bias by the Village Board. Indeed, an identical allegation regarding an applicant's input into a siting ordinance was made in *Sandberg v. City of Kankakee*, 2004 WL 604915, at 14, and the PCB was unpersuaded that this interaction violated fundamental fairness. It is also significant to note that the communications referenced by Petitioner were between Groot's counsel and the Village and Village Board's counsel. At no time does Petitioner allege that these communications occurred between Groot representatives and an actual decisionmaker. They are irrelevant to the fundamental fairness inquiry. *Fairview Area Citizens' Taskforce v. PCB*, 198 Ill. App. 3d 541, 548.

[5] Exhibit 33 was not admitted by the hearing officer, for reasons thoroughly detailed in prior rulings of the hearing officer. *See, e.g.*, Hearing Officer Order, PCB No. 14-99 (Mar. 20, 2014). Petitioner nonetheless relies on it as an "offer of proof." It is difficult to see how this evidence, which did not even meet the standards for admissibility in this proceeding, could rise to the level of clear and convincing evidence sufficient to overcome the presumption in favor of the Village Board.

dynamic, and people can choose to make those decisions at one point in time." (C03216). The following exchange then occurred:

> Q. Okay. Not the same question, Mr. Thorsen, do you take issue with the Village of Round Lake Park and its hauler finding it necessary, *if they do*, to site a transfer station for whatever business reasons they may have?
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> * * * *
>
> MR. CLARK: I'm going to object as well. I didn't know that the Village was an applicant in this case.
>
> MR. SECHEN: Village isn't. Village is making the decisions.
>
> * * * *
>
> MR. BLAZER: If Mr. Sechen is now saying that the Village and Groot have already decided to site this transfer station, then he had raised a dramatically different issue in this case.
>
> MR. SECHEN: *That's not what I said.*
>
> THE HEARING OFFICER: Let me response, especially, because I heard – *I did not hear that they had decided. I heard "if they decide*," that was the statement, that was the question I'm ruling on. And if they decide that it's necessary, the question is, if they decide its necessary, do you disagree with them?
>
> * * * *
>
> Q: So *if it were determined by a village that it were necessary to site a transfer station*, any village within this community or this county, for cost reasons, would you take issue with that?
>
> MR. BLAZER: Mr. Hearing Officer, I know my brother Mr. Clark to the right here suggested that I let Mr. Sechen hang himself, but I can't really do that. Either Mr. Sechen is suggesting the Village has already made that decision or he's asking a completely irrelevant question, now multiple times. Either way, it's objected to. If it's the first, like I said, we have a very different issue in this case. If it's the latter, it's completely irrelevant.
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> * * * *
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> THE HEARING OFFICER: Mr. Blazer is making the statement or the implication for lack of a better word, and I'm sure there's a better one, that the Village has already made the dcecision to site –

> MR. SECHEN: Oh, that's ridiculous.
>
> THE HEARING OFFICER: Well, that's [what] I want you to respond to first.
>
> MR. SECHEN: *Neither have they nor have I suggested that they have.*

(C03221-C03224 (emphases added)).

Petitioner's suggestion that Mr. Sechen "acknowledged that VRLP and Groot had found it necessary to site a transfer station for their own business reasons is flatly contradicted by the actual transcript from the hearing. The fact that Petitioner has resorted to such tortured interpretations of the hearing testimony, not supported by the plain language therein, is telling. Petitioner obviously has no evidence of bias or predetermination, and has therefore apparently found it necessary to fabricate such evidence.

Petitioner's reliance on *E&E Hauling, Inc.* in support of its argument is entirely misplaced. In *E&E Hauling*, the siting authority actually *was* a co-applicant for siting approval. Further, it is notable that even in that case, in which both the PCB and the Appellate Court found that the siting procedures violated fundamental fairness, the Appellate Court nonetheless upheld the siting authority's grant of siting approval based on the adjudicative facts in the record that supported a finding that the criteria had been satisfied.

Further, Petitioner's attempts to undermine the credibility of Dale Kleszynski, an expert for the Village on the subject of impact to property values, are convoluted at best, and do not come close to the standard required for showing that the proceeding violated fundamental fairness. For example, Petitioner notes with great emphasis that Kleszynski was asked to render an opinion *by his client* and that his report was "specific to the needs of his client," as though these were somehow shocking developments rather than the usual course for the retention of experts. Pet'r Br. at 9-11. Mr. Kleszynski's testimony is clear that he was referring to the scope

of work from his client and that his *opinion* was based on his professional judgment and was not dictated by the needs of any party. Mr. Kleszynski testified as follows:

> Q: And the Village's needs in the context of your report were expressed to you, correct?
>
> A: No. The Village's needs were not directed to me. What this underlying assumption and limiting condition [in the expert report] says is that the information contained in the report is specific to the needs of the client as it – well, and it's intended to imply that it's tied to the scope of work that was – that was – and the valuation question that I was asked to answer or asked to address.
>
> Q: And the needs of your client are reflected in your report, correct?
>
> A: The needs of the client are reflected in my report to the extent that it references the data utilized and the methodologies applied.
>
> Q: So your conclusions were not part of the needs of the client?
>
> A: My conclusions were not part of the needs of the client.

(C3742.074-C3742.075). Petitioner's claims that Mr. Kleszynski's conclusions were biased are again unsupported by the actual transcript from the hearing.

Further, even if Petitioner were correct that Mr. Kleszynski was somehow biased in favor of Groot, this would not have rendered the proceedings fundamentally unfair. Mr. Kleszynski was not a decision-maker, nor, for that matter, was Mr. Sechen. *See Fairview Area*, 198 Ill. App. 3d at 546-48 (holding that the alleged bias of a municipality's expert, Mr. Michels, was irrelevant to the question of fundamental fairness because "Michels did not have a vote)". *Waste Mgmt. of Ill., Inc. v. PCB*, 175 Ill. App. 3d 1023, 1039, 530 NE2d 682 (1988) (noting that the participation of state's attorneys on behalf of interested parties did not violate fundamental fairness, as the attorneys did not participate in the ultimate decision making process). Petitioner's conspiracy theories, which are wholly unsupported by the evidence, *even if solely for purposes of argument,*

were taken as true would not rise to the level of showing that the minds of the *Village Board* pre-disposed on the siting of the transfer station.

ii. The Village Board complied with its statutory obligations in granting the Siting Application.

Petitioner next argues that the Village Board somehow failed in its obligation to assess the credibility of witnesses and abdicated that duty to the hearing officer. Pet'r Br. at 11-12. Petitioner presumably bases this argument on the fact that the Village Board adopted the hearing officer's proposed findings. This argument is equally baseless, and clearly without any evidentiary support whatsoever.

Following deliberations, the Village Board adopted Resolution No. 13-09, approving the Siting Application. (C04579-C04584) That Resolution explicitly noted that the Findings and Recommendations of the Hearing Officer were just that –"*recommended* findings of fact and conclusions of law of the hearing officer as to whether the Applicant met the Criteria." (C04579) The Resolution then states that the Village Board met "to deliberate, and to review and consider the testimony of all witnesses and the evidence admitted into the record at the public hearing . . . in light of each of the Criteria." (C04579) Finally, the Resolution states that "after careful review and consideration, the [Village Board] desire[s] to adopt the Hearing Officer's Findings as the basis of their decision as to whether the Applicant met the Criteria." (C04580)

The statute and case law are perfectly clear that a siting authority may adopt findings proposed by another party. *See Land & Lakes*, 319 Ill App. 3d at 50. Indeed, a siting authority may adopt findings proffered by a clearly biased party, such as the applicant or an opponent, without violating principles of fundamental fairness. *Id.* In the present case, the hearing officer was an *unbiased* party; indeed, the Petitioner does not even allege bias on the part of the hearing officer. Therefore, Petitioner's unsubstantiated assertion that the Village Board somehow abdicated its duty to determine the credibility of witnesses because it adopted the hearing

officer's findings – which clearly *do* make credibility determinations – is simply without merit and completely contrary to clearly established precedent.

B. The Village Board's Decision Was Not Against the Manifest Weight

The Village Board's decision was clearly not against the manifest weight of the evidence. In its post-hearing brief, Petitioner has essentially re-hashed its closing brief in the siting hearing in an apparent attempt to have the PCB re-weigh the evidence. Petitioner has also misrepresented the testimony of Groot's experts on numerous occasions. Rather than detaining the PCB by correcting each of Petitioner's misrepresentations regarding the evidence, this Brief instead shows that the Village Board's decision was supported by substantial evidence and is therefore not against the manifest weight of the evidence.

As noted above, re-weighing the evidence is not the province of the PCB. In the siting hearing, "[e]xperts testified for petitioners, for [Groot], and for the [Village]. The credibility to be accorded the testimony of these witnesses is a matter to be determined by the hearing tribunal," not the PCB. *Tate*, 188 Ill. App. 3d at 1026. Instead, as in many siting cases, the Village Board was presented with some competing opinions and evidence,[6] weighed this evidence, and determined that Groot had met the siting criteria. The opposite conclusion is not clearly evident from the record; therefore, the Village Board's decision must be upheld.

1. Criterion 1

The Village Board's determination that Groot met criterion I – that the facility is necessary to accommodate the waste needs of the intended service area – is supported by the manifest weight of the evidence.

The "need" for a facility as that term is defined in criterion i, is established when the evidence shows that the facility is *reasonably required* by the waste needs of the service area.

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[6] Petitioner only presented conflicting evidence with respect to criteria 1, 2, 3, 6, and 8. On the remaining criteria, Petitioner either did not contest them at all, or only attempted to cast doubt on Groot's experts' opinions.

File v. DNL Landfill, 219 Ill. App. 3d 897 (5th Dist. 1991) (emphasis added). The needs analysis has been interpreted to require a showing that the facility is expedient, or reasonably convenient. *Clutts v. Beasely,* 185 Ill. App. 3d 543 (5th Dist. 1989); *Tate*, 188 Ill. App. 3d at 1023. "Neither the Act nor case law suggests that need be determined by application of an arbitrary standard of life expectancy of existing disposal capacities The better approach is to provide for consideration of other relevant factors such as future development of other disposal sites, projected changes in amounts of refuse generation within the service area, and expansion of current facilities. *Tate*, 188 Ill. App. 3d at 1023.

Christina Seibert testified on behalf of Groot regarding criterion i. Ms. Siebert's qualifications to testify in this area are undisputed by Petitioner. Instead, Petitioner simply attempts to split hairs and mischaracterize Ms. Siebert's testimony to state that "need" equates with *immediate* need. Pet'r's Br. at 14. However, Ms. Siebert's definition of need (which is not consistent with Petitioner's characterization thereof) is not the relevant inquiry here. The record is clear that the facility is reasonably required by the waste needs of the service area. The Village Board's determination that there is a need for the facility is therefore not against the manifest weight of the evidence.

Ms. Siebert testified that Criterion I has been met because the facility is necessary to accommodate the waste needs of the intended service area. (TR 9/24/13C). The law is clear that Applicants are entitled to designate their own service area. The proposed designated service area for the transfer station, to which no one has objected, consists of Lake County. (TR 9/24/13C at 15).

Ms. Siebert performed a needs analysis by evaluating trends in managing waste in the service area and in the Chicago metropolitan area, and comparing available transfer and disposal capacity with projected waste generation. (TR 9/24/13C at 13). Ms. Seibert reviewed various

projections and data concerning the trends in the waste disposal system, the landfill and transfer station capacity generally serving Lake County, and the waste requiring disposal for the service area. (TR 9/24/13C at 13-15).

Ms. Seibert explained that under the Solid Waste Planning and Recycling Act, 415 ILCS 15/1 et seq., the County has historically sought and acquired twenty (20) years of guaranteed disposal capacity for the waste generated within its borders. (TR 9/24/13C at 19). Historically, Lake County has sent waste to Advanced Disposal's Zion Landfill, Waste Management's Countryside Landfill in Grayslake and Waste Management's Pheasant Run Landfill just outside of Kenosha, Wisconsin. (TR 9/24/13C at 19-22). Ms. Seibert explained that the Countryside Landfill will have less than five (5) years capacity remaining when the Lake Transfer Station begins operating. (TR 9/24/13C at 20). The ADS Zion Landfill's capacity commitment to Lake County will expire in 2017, and that facility is projected to close within 12 years of the Lake Transfer Station opening. (TR 9/24/13C at 20). Finally, the Pheasant Run Recycling and Disposal Facility will not provide any significant disposal capacity for Illinois because Wisconsin has dramatically increased its tipping fees, making that facility economically infeasible for waste disposal. (TR 9/24/13C at 36-37).

Ms. Seibert projected that Lake County is expected to experience population growth, which will result in an increase in the quantity of waste that must be managed. (TR 9/24/13C at 26-27). It is undeniable that the Lake County landfills will not provide the needed twenty (20) years capacity and that new landfills are generally being developed further and further away from the County thereby necessitating the use of transfer stations. (TR 9/24/13C at 42).

Ms. Seibert testified that the Lake County Solid Waste Management Plan cited a need to develop new facilities, including transfer stations, and that those facilities need to be developed prior to the closing of existing facilities. (TR 9/24/13C at 23). Ms. Seibert noted that there are

no transfer stations currently operating in Lake County, thereby resulting in a transfer capacity deficit far in excess of the proposed capacity of the Groot Lake Transfer Station. (TR 9/24/13C at 34). Based on Ms. Siebert's testimony, it is clear that the service area is in need of between 3,550 and 4,191 tons per day of disposal capacity to meet the twenty (20) year disposal capacity needs. All of the landfill capacity servicing Lake County will be exhausted in approximately twelve (12) years of the Lake Transfer Station beginning its operation and could be much sooner than that. (TR 9/24/13C at 20).

Finally, Ms. Seibert testified that each of the regional landfills in the area have taken nine (9) years or more to permit and that the planning for the Lake Transfer Station began in 2008, which results in a development time frame of seven (7) years. (TR 9/24/13C at 22, 25).

The only witness who testified concerning criterion i on behalf of objectors was John W. Thorsen, who was called by Timber Creek Homes. (TR 9/25/13B). Mr. Thorsen admitted that he did not perform a needs analysis himself. (TR 9/25/13B at 91). Mr. Thorsen further admitted that he had only personally been involved in one needs analysis in his entire career, and that was over twenty (20) years ago for a landfill (for which siting was initially rejected). (TR 9/25/13B at 43-44). He had no experience whatsoever in performing a needs analysis for transfer stations. (TR 9/25/13B at 46). Mr. Thorsen admitted that he in fact used and relied upon, and thus had no criticisms of, the data and analyses provided by Ms. Seibert and Shaw Environmental. (TR 9/25/13B at 49-51, 53). Mr. Thorsen also conceded that there was insufficient waste capacity to meet the twenty (20) year needs of the service area. (TR 9/25/13B at 55-57, 59).

Thorsen's only criticism was that in his opinion at the present time the landfills could meet the daily tonnage requirements in Lake County. (TR 9/25/13B at 80). However, he acknowledged that meeting existing daily tonnage requirements is not the standard in Illinois for assessing need. Both the Illinois Local Solid Waste Disposal Act, 415 ILCS 10/1 et seq. and the

Solid Waste Planning and Recycling Act, 415 ILCS 15/1 et seq. specifically require that the planning for waste disposal capacity be for a term of at least twenty (20) years. Mr. Thorsen also admitted that the Countryside Landfill would be at capacity within five (5) to eight (8) years and that the Zion facility only had a six (6) year commitment to Lake County. (TR 9/25/13B at 67-68). He further admitted that Lake County landfills will be at capacity within twelve (12) years, and could reach capacity much sooner than that. (TR 9/25/13B at 55, 81).

Mr. Thorsen agreed that in Illinois it takes an average of nine (9) or more years to site a landfill (which was even shorter than the 10 years it took to site the extension of the landfill for which he performed a needs assessment). (TR 9/25/13B at 59). He also admitted it can take many years to site transfer stations and that the Lake Transfer Station will take at least seven (7) years from planning to commencement of operation. (TR 9/25/13B at 66). In an ironic about-face, Petitioner now claims in its Post-Hearing Brief that this figure is overestimated and that the Groot Transfer Station has only been in planning since 2012. Pet'r's Br. at 22-23. However, it is clear from Petitioner's own strident exhibits that Groot had begun planning for a transfer station – in some location and with no assurance of siting approval – since at least 2008. And as noted above, Petitioner's own expert conceded this timing. Thus, while Petitioner claims such a facility needs only two to three years' lead time, this contention is patently absurd and clearly contradicted by the record and by Petitioner's own witness.

Notably, Mr. Thorsen did not dispute the need for the transfer station, but instead merely objected to the "timing" of filing of the application. However, he personally could not offer a date as to when he believed an application should be filed. (TR 9/25/13B at 80-82). He stated that such a determination was not in his "wheelhouse". (TR 9/25/13B at 82). Given that Mr. Thorsen admitted that it was beyond his expertise (i.e., not in his "wheelhouse") to offer an opinion as to when an application should be filed, his entire testimony that the "timing" of the

application is too soon, is wholly incredible. By admitting that he is unqualified to offer an opinion as to the "timing" of filing an application, he has admitted he is unqualified to determine when there is a need for a new facility.

Because it can take many years to site and develop transfer stations and landfills in Illinois, and there is the potential for landfills in Lake County to close even sooner than the mathematical calculation of remaining life would estimate, it is clear there is a need in Lake County. Further, the testimony of Ms. Seibert on need was credible and substantively unrebutted. Therefore, the Village Board's determination that Groot met criterion I is clearly supported by the manifest weight of the evidence.

2. Criterion 2

As to Criterion ii, regarding public health, safety, and welfare, the Village Board's decision is likewise amply supported by the record. In fact, "there is no evidence in this case that the proposed transfer station will have a deleterious effect on public health, safety, welfare, or the property values of surrounding property. *Tate*, 188 Ill. App. 3d at 1025.

In support of this criterion, Groot called Mr. Devin Moose of Shaw Environmental, who planned and designed the facility. Much of Petitioner's criticism of this criterion appears to be directed at whether Mr. Moose was a credible witness. However, the Village Board has already assessed his credibility and, by adopting the hearing officer's proposed findings, found "that Mr. Moose was a credible witness." *See* Hearing Officer Proposed Findings at 19. Petitioner's contentions regarding Mr. Moose's credibility must be disregarded, as that determination is to be made by the siting authority, rather than on appeal to the PCB.

Mr. Moose testified that the proposed facility is consistent with all of the appropriate and relevant location standards governing residential setbacks, wetlands, archaeological and historic sites, endangered and threatened species, wild or scenic rivers, and the proximity of airports. (TR 9/23/13A at 49). Mr. Moose noted that the nearest residentially zoned property is over

1,500 feet away, and the nearest dwelling is over 1,000 feet west of the proposed facility, thereby meeting all residential setback requirements and complying with Section 22.14 of the Illinois Environmental Protection Act. (TR 9/23/13A at 50). The facility is also buffered from the neighbors by State Highway 120 and open space. (TR 9/23/13A at 68).

Mr. Moose testified that the facility construction was designed to blend into the area and suppress noise from the building. (TR 9/23/13A at 46). Mr. Moose also testified extensively regarding measures proposed to mitigate odor from the facility, which appears from Petitioner's brief to be a primary concern. Pet'r's Br. at 26-27. Mr. Moose testified that the building will use an air exchange program, thereby creating negative pressure within the building and causing air to be exchanged four (4) to six (6) times per hour. (TR 9/23/13A at 49). This design facilitates odor control. (TR 9/23/13A at 49).

In addition, Mr. Moose explained that the facility will implement an Operations Plan which assures that collection vehicles will be fully enclosed and covered and the facility will be routinely patrolled for litter control. (TR 9/23/13A at 65). All waste transfer operations will be conducted within the building and the tipping floor will be cleared of waste on a daily basis. (TR 9/23/13A at 65). Waste materials will be continually transferred through the operating bay on a first-in first-out basis, and any incoming waste with an unusually strong odor will be immediately transferred from the station. (TR 9/23/13A at 65-66). Customers found to habitually deliver waste with unusually strong odors will be denied access and the facility will use a non-toxic odor neutralizer in its misting system. (TR 9/23/13A at 66).

Mr. Moose testified that any loaded transfer vehicles that are stored overnight at the proposed facility will be fully tarped and parked within the transfer station building and removed at the beginning of the next operating day. **[cite]** The facility also will be equipped with high performance rubber doors which will automatically open and close as the collection transfer

vehicles enter and leave the building between the hours of 4:00 and 8:00 a.m. (TR 9/23/13A at 68). Dust will be controlled by paving all access drives, parking area and storage areas and the facility will utilize a street sweeper. (TR 9/23/13A at 68). All public roads and right-of-ways within 1,000 feet of the facility will also be swept. (TR 9/23/13A at 68). Finally, a misting system will be used within the facility to help mitigate dust. (TR 9/23/13A at 68). Ultimately, it was Mr. Moose's opinion that the facility was designed, located and proposed to be operated so that the public health, safety and welfare will be protected.

Mr. Moose's testimony concerning the public health safety and welfare was largely unrebutted. The only witness who provided any testimony at all which purported to be related to Criterion ii was Charles M. McGinley. (TR 9/30/13B and TR 9/30/13C). Groot moved to strike Mr. McGinley's report and testimony because he was offering what amounted to an engineering opinion to the Village Board, though he is not a licensed engineer in Illinois and is instead only licensed in chemical engineering in Minnesota. (TR 9/30/13C at 36). While the Hearing Officer ultimately allowed Mr. McGinley to testify based on the *Thompson* case, he did find that Mr. McGinley's "opinion as it relates to the broad issue of the design location and proposal of the facility is improper; however, his opinions as to odor and odor alone and how that may or may not affect Criterion ii, I do find to be proper and admissible." (9/30/13C at 41). The Hearing Officer noted that the "broad statement that Section ii is not applicable is not really within [McGinley's] area of expertise". (TR 9/30/13C at 41). Finally, the Hearing Officer noted "I do, however, find the lack of registration relevant to the weight of Mr. McGinley's testimony," as is proper under *Thompson*. (TR 9/30/13C at 41).

Mr. McGinley's testimony was properly given little weight, because he admitted that he did not perform any specific study, model or analysis concerning this proposed facility. (TR 9/30/13C at 20-21,33 and TR 9/30/13C at 61-62). Mr. McGinley did not even visit the proposed

facility site or any of the surrounding sites, including Timber Creek Homes. (TR 9/30/13B at 49, 52). Mr. McGinley admitted that he had done no analysis or model which would in any way suggest that this facility would violate any of the Illinois Pollution Control Board regulations on air quality. Mr. McGinley's report primarily emphasized his recommendation that Groot use fast moving rubber doors, which Groot was already proposing to use.

Despite Petitioner's contention to the contrary in its brief, Mr. McGinley testified that he was actually not recommending any specific equipment, such as air scrubbers or bio-filters in the exhaust system, because he had done no study or scientific analysis as to whether such equipment was needed. (TR 9/30/13B at 55-56). Mr. McGinley did not make any effort to determine the prevailing winds at the facility, nor did he determine whether any home, residence or person would actually be subjected to any odors from this proposed transfer station. (TR 9/30/13B at 53). Thus, Mr. McGinley's testimony regarding odors from the facility was completely speculative, based on his experiences at a vastly different municipal incineration facility in Minnesota,[7] and not corroborated by actual evidence related to this facility. (TR 9/30/13B at 81)

Mr. McGinley admitted that he conducted no specific study to determine whether the proposed design, layout and operating procedures of the Lake Transfer Station would create any odor beyond the facility borders. Therefore, his opinions are complete conjecture, and the Village Board properly found that "Mr. Moose's testimony was the more thorough and credible testimony on this issue." Findings and Rec. at 21.

3. Criterion 3

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[7] This facility is referred to as the HERC Facility (Hennepin Energy and Recovery Center); it accepts substantially more waste per day and per year than the proposed transfer station, and furthermore *thousands of tons* of waste remain on the tipping floor at the HERC at all times in order to feed the energy producing incinerator. (TR 9/30/13B at 85). The Groot facility will generally have no more than 40 tons of waste on the tipping floor at any one time and that waste will always be removed by the end of the day.

Criterion iii involves two separate issues. The first issue is whether the facility is located so as to minimize incompatibility with the character of the surrounding area and the second issue is whether the proposed facility is located to minimize the effects on the value of the surrounding property. The statute itself concedes and accepts that there may be some incompatibility and some impact on property values; therefore, the issue is not whether there is *no* impact on the surrounding area. Rather, the question is whether the facility will be located to *minimize* any potential incompatibility and effect on value. *See Fairview Area Citizens Task Force v. IPCB*, 198 Ill. App. 3d 541 (3rd Dist. 1990). This does not require that an Applicant show that there is absolutely no impact on the character of the surrounding area. *Id.* **[cite]**

J. Christopher Lannert, R.L.A., testified concerning minimization of incompatibility with the character of the surrounding area, and Peter J. Poletti, Ph.D., MAI, testified concerning minimization of any impact on property values. (TR 9/24/13A and TR 9/24/13B, respectively).

Mr. Lannert is a registered landscape architect and land use planner who ultimately provided an opinion that the facility is so located as to minimize incompatibility with the character of the surrounding area and satisfies the first part of Criterion iii of Section 39.2(a). (TR 9/24/13A at 47-48).

Mr. Lannert noted that the subject site's boundaries were protected from others by property owned by Groot Industries, and that it was located in an I-1 industrial district within the Village of Round Lake Park. (TR 9/24/13A at 16, 48). The immediate area surrounding the site is defined by industrial uses which would not be altered as a result of the proposed transfer station facility. He testified that the predominant land use in the vicinity of the proposed transfer station would continue to be open space and that within a 1,000 foot radius of the proposed facility 100% of the area would be used for open space and industrial land uses. Within a half mile radius of the proposed facility, 73% of the area would be used for open space and industrial

land uses, and 50% of the area would be for such uses within a mile of the proposed transfer station. (TR 9/24/13A at 48). Mr. Lannert presented numerous photographs of the surrounding off-site uses which clearly depict industrial and undeveloped open space uses. (TR 9/24/13A at 18, 30-32).

Mr. Lannert testified that the Rte. 120 corridor was an appropriate land use buffer along the south property line, and that the proposed transfer station would be fully buffered and a view of it completely blocked by structures to the north, a woodland/forested area to the east, and by berms, plantings, and vegetation along roadways and frontages on the west and south. (TR 9/24/13A at 42, 48-49).

Petitioner's primary argument with Mr. Lannert is his characterization of the "immediate surrounding area. Pet'r's Br. at 33-34. Petitioner unpersuasively made this same argument to the Village Board. The adopted Findings note that "TCH spends pages arguing that the only relevant area includes those properties within one mile from the site and ignores that Mr. Lannert looked at three different radii: (a) 1000 square feet; (b) one-half mile; and (c) one mile." Proposed Findings and Rec. at 24. The Findings note that the most relevant areas are those nearer the proposed transfer station, that in the one-half mile radius, only 27% of the surrounding parcels are residential, and that there are *no* residential parcels within the 1000-square-foot radius of the facility. *Id.*

It is notable that no witness testified in opposition to the fact that the facility was planned and designed in a manner that was reasonably feasible to minimize incompatibility. Mr. Lannert's testimony was substantively unrebutted. The only other witness who testified on the topic was Michael MaRous, called by the objector, Timber Creek Homes. (TR 10/1/13A). MaRous is not an engineer, architect, or urban planner. Mr. MaRous did not dispute any of the factual representations in Mr. Lannert's report and testimony, nor did he contradict any of Mr.

Lannert's conclusions. Rather, Mr. MaRous merely ironically opined, without scientific or empirical support, that Mr. Lannert's work was insufficient to support the conclusion offered.

Despite Mr. MaRous' unsupported criticism of Mr. Lannert's report, Mr. MaRous actually agreed with Mr. Lannert on the design features which are proposed to minimize incompatibility with the character of the surrounding area, including the automatic doors, landscaping, facility orientation, and the buffers surrounding the property, such as the Groot North facility and other adjacent property, a wooded area, a rail line, and Rte. 120. (TR 10/1/13A at 87-92). Mr. MaRous also agreed that the proposed operating procedures, including using a drive through facility where untarping, unloading, loading and tarping are all done indoors, would minimize the incompatibility of the character of the surrounding area. (TR 10/1/13A at 92).

Mr. Lannert's testimony was echoed and agreed to by Mr. Poletti and Mr. Kleszynski.[8] (TR 9/24/13B and TR 10/2/13A, respectively). Dr. Peter J. Poletti, Ph.D., MAI, testified concerning the second portion of Criterion iii and ultimately opined that the facility is proposed to be located so as to minimize the effect of the surrounding property values. (TR 9/24/13B at 59-60). In arriving at his opinions, Dr. Poletti inspected the proposed site and the surrounding area, reviewed the published literature on the subject, reviewed the publicly available property transaction data around the existing transfer station, reviewed the surrounding land use and zoning designations, reviewed the Host Community Agreement and reviewed the siting application itself. (TR 9/24/13B at 38-42). Dr. Poletti also had discussions with consultants working on the project and reviewed the proposed transfer station design. (TR 9/24/13B at 42-

[8] Petitioner makes much of Mr. Kleszynski's testimony, arguing that it was biased in favor of Groot. It is important to note, however, that the Findings and Recommendations "plac[e] little if any reliance on the limited testimony of Mr. Kleszynski." Findings at 29.

44). He analyzed local property transactions near existing transfer stations, and evaluated the effect of other existing transfer stations on surrounding property values. (TR 9/24/13B at 45-46).

Dr. Poletti testified that the design and operating features of the proposed transfer station will minimize the effect on the values of the surrounding properties. (TR 9/24/13B at 59). He explained that the transfer station will be constructed of concrete and steel, and all activities will take place inside the building. (TR 9/24/13B at 41). He noted that the exterior and grounds have been designed to include berms, landscaping, a bio-swale and stormwater basins, all which will serve to minimize the effects on the values of the surrounding property. (TR 9/24/13B at 41). Automatic rubber doors will be used in the morning hours as a precautionary measure to minimize any noise from the facility. (TR 9/24/13B at 42). He noted that significant roadway intersection improvement efforts and operating plans will also be in place to reduce noise, odor and dust including offsite street sweeping and litter control. (TR 9/24/13B at 42-43). He considered the fact that the facility was buffered from surrounding residential areas by distance, intervening industrial and open space land uses, and vegetation. (TR 9/24/13B at 43-44). Further, Dr. Poletti noted that there are no residential property or dwellings located within 1,000 feet of the proposed transfer station facility. (TR 9/24/13B at 44).

Based on an extensive evaluation of similar operating transfer stations in the region, which included a comparison of the sales prices of similar target properties that are proximate to a transfer station to more distant control area properties, Dr. Poletti determined that there was no statistically significant difference between the two averages at any of the three facilities studied. (TR 9/24/13B at 45-48, 53-54, 60). Accordingly, Mr. Poletti opined that the proposal was designed to minimize impacts on surrounding property values. (TR 9/24/13B at 59).

The Village of Round Lake Park staff retained Mr. Dale Kleszynski, MAI, SRA, to review the Poletti report. (TR 10/2/13A). Mr. Kleszynski also personally inspected the site of

the proposed transfer station and the surrounding area as well as the locations of the case studies used by Mr. Poletti. (TR 10/2/13A at 17). He reviewed the data used in the case studies and ultimately came to his own conclusion that the Lake Transfer Station was located to minimize the effect on the value of the surrounding property. (TR 10/2/13A at 31-32). He also ultimately agreed with the Poletti Report's conclusion that the construction and operation of the Groot Industries Lake Transfer Station would *not* have an adverse impact on the value of the surrounding properties. (RLP Exhibit 2, pg. 1). (TR 10/2/13A at 32).[9]

The only testimony offered by any objector was on behalf of Timber Creek Homes by Mr. MaRous. (TR 10/1/13A). Mr. MaRous admitted that he personally did not conduct his own study as to whether Criterion iii had been met, and did not perform his own appraisal to determine whether the proposed transfer station would have an impact on property values. (TR 10/1/13B at 23). Ultimately, Mr. MaRous only testified that in his opinion the Poletti Report was unreliable, primarily because he believed it failed to discuss the hours of operation and the alleged increased traffic expected on local streets and the arterial roadways. (TR 10/1/13A at 76-77). Mr. MaRous's opinion was based on an unsupported assumption that the facility would be operating 24 hours per day, seven (7) days per week, with the doors open 20 hours per day. (TR 10/1/13A at 81-82). However, the Applicant stated that this level of operation was a maximum level that would only occur infrequently. (TR 9/23/13B at 10-11). Furthermore, Mr. MaRous' opinion assumes that this facility will generate significant truck traffic, without any testimony or evidence to support that opinion, and without having conducted any traffic analysis himself. (TR 10/1/13A 103-05). Ultimately, Mr. MaRous was not asked, and did not offer an opinion, as to

[9] Petitioner's attempts to undermine Mr. Kleszynski's credibility based on testimony taken completely out of context should have no impact on this proceeding. Petitioner has completely mischaracterized Mr. Kleszynski's statements regarding his report and opinions, which were obviously independently reached and were not biased. However, as noted elsewhere, even if Mr. Kleszynski were biased in favor of the application – a conclusion for which Petitioner has offered not a scrap of credible evidence – his opinion was not given much weight in the siting proceeding. The Findings state that "Dr. Poletti performed the more thorough analysis and was not impeached in any meaningful manner." Findings at 29.

whether the facility would negatively impact property values in the area. Therefore, as to that portion of criterion iii, Groot's expert witnesses are unrebutted.

Based on the foregoing, the Village Board's decision should be affirmed. **[better conclusion here]**

4. Criterion 6

Michael Werthmann, P.E., P.T.O.E., a registered Professional Engineer and certified Professional Traffics Operation Engineer, testified regarding the impact from the facility on existing traffic. (TR 9/25/13A at 17). He performed a three-phase traffic study, where he first examined the existing physical and operational characteristics of the nearby road system. He then determined the type and volume of traffic to be generated by the facility and the travel routes for that traffic into and exiting the facility, and he, lastly, evaluated the impact of the proposed facilities traffic on the nearby existing roadway system and made recommendations to minimize the same. (TR 9/25/13A at 18-19).

Mr. Werthmann testified that at his recommendation several roadway improvements are proposed, including the widening of IL Rte. 120 to provide a separate left turn lane and separate right turn lane serving Porter Drive. (TR 9/25/13A at 23). Furthermore, Porter Drive is also proposed to be widened to provide separate left turn and right turn lanes serving IL Rte. 120 and enhanced by resurfacing and an increase in the intersection radius. (TR 9/25/13A at 23-24).

Mr. Werthmann explained that peak traffic periods of the transfer station will occur during the late morning or early afternoon outside of the critical commuter peak hours. (TR 9/24/13A at 29-30). Furthermore, there will be operating restrictions on truck traffic to minimize the impact on traffic flows, including directing all transfer station truck traffic to use the IL Rte. 120/Porter Drive intersection when accessing the arterial roadway system and prohibiting transfer station truck traffic from making a left turn from Porter Drive on to IL Rte. 120 between the hours of 7 a.m. and 9 a.m. and 3 p.m. to 5 p.m. (TR 9/24/13A at 32-33). In addition, this

facility is proposed to be proximate to the Groot North facility, which is a storage and maintenance yard for approximately 65 to 70 vehicles. (TR 9/24/13A at 30-31). Those vehicles are already on the area roadways, and, after delivering waste to the proposed transfer station, any Groot collection vehicles will only traverse Porter Drive as they return to the Groot North facility. (TR 9/24/13A at 30-31).

The recommended design features, roadway improvements, and truck restrictions result in a negligible impact on existing roadway system and approximately 1.75% or less of an increase in traffic at any of the studied area intersections. (TR 9/24/13A at 44). Therefore, Mr. Werthmann ultimately opined that the traffic patterns to and from the facility were so designed as to minimize the impact on existing traffic flows to satisfy criterion vi.

The only testimony offered by any objector concerning criterion vi was that of Brent Coulter, P.E., P.T.O.E., on behalf of Petitioner. Mr. Coulter actually admitted that he agreed with much of Mr. Werthmann's report, including his conclusion of no need for a left or right turn lane at the access at Porter Drive and the recommended off-site improvements at Rte. 120 and Porter Drive. (TR 9/26/13A at 13). He also agreed with the operating procedures to be employed. (TR 9/26/13A at 14). Ultimately, Coulter's primary criticism is that there was no discussion in the application of all of the arterial routes that might be used by transfer trailers traveling to their ultimate destinations. (TR 9/26/13A at 15, 36). Mr. Coulter explicitly opined that the transfer station application had "not demonstrated that no adverse traffic impact will be created, or it could be mitigated, in accordance with Criterion vi of Section 39.2 of the Illinois Environmental Protection Act." (TCH Exhibit 5, pgs. 4-5). Notably, "Mr. Coulter never provided any testimony of specific areas where this Facility was not designed to minimize the traffic impact or would cause a problem on the traffic system." Findings at 35.

The law is clear that there is no duty to study all potential impacts to remote arterial roads. *Fox Moraine v. United City of Yorkville,* 960 N.E.2d 1144, 356 Ill.Dec. (2nd Dist. 2011). Further, the criterion does not require that there be *no* impact allowed from the facility or that such impacts must be mitigated entirely. *Id.* at 1181-82 The *Fox Moraine* court explicitly rejected Mr. Coulter's testimony in that case and held that "the Act does not require elimination of all traffic problems." *Id.* at 1181("*Nor is the Applicant required to provide evidence of exact routes*, types of traffic, noise, dust, or projections of volume and hours of traffic, because the Act *does not require a traffic plan* but rather a showing the traffic patterns to and from the facility are designed to minimize impact on existing flows." (emphasis added)) The court noted that the Applicant "did not have to establish that every arterial road would not be affected, just that it designed the *entrance to and from the facility* to minimize the impact on roadways." *Id.* at 1182. Further, as in *E&E Hauling*, there is nothing in the record in this case "to indicate how the traffic patterns for the [project] could have been designed so as to control the impact on existing traffic controls more than as proposed. The statute does not require the [applicant] to show that the facility will have *no* adverse impact on existing traffic flows, but only that the design adopted minimizes this impact." *E&E*, at 616.

In this case, it is indisputable that Mr. Werthmann and the Applicant designed the facility such that there will only be one access drive off of Porter Drive and that it will be near the Groot Industries North facility, thereby minimizing the amount of traffic on the roadway. Furthermore, the proposed operating restrictions and roadway improvements will result in a minimal impact on the nearby intersections and roadway traffic. Petitioner offered no evidence to show how any impact could have been minimized more. Therefore, the Village Board's determination with respect to Criterion vi is clearly supported by the record and should be upheld.

5. Criterion 8

Groot's evidence regarding this criterion was unrebutted. Mr. Moose testified that the facility is consistent with the Lake County Solid Waste Management Plan.[10] That Plan states that Lake County "needs to start seriously considering long term options for managing its waste requiring disposal." (TR 9/25/13A at 124, siting *SWALCO* 2010 Plan, pg. 41). The SWALCO 2010 Plan does identify a desire to "manage as much of the Lake County waste requiring disposal as feasible within the borders of Lake County," and sets forth three options for meeting this goal, including landfilling, transfer stations and alternative technologies. (TR 9/25/13A at 124). One of the primary purposes of the Plan is to ensure that new facilities and programs are in place prior to existing facilities closing. (TR 9/25/13A at 124). The Plan also provides that solid waste transfer stations that are developed in accordance with certain plan recommendations (numbered T-2 through T-6) would be considered consistent with the Plan. Mr. Moose's unrebutted testimony established that the transfer station proposal is consistent with each of the Plan Recommendations concerning transfer stations. (TR 9/25/13A at 126-31).

Petitioner's argument that the transfer station does not comply with the plan because it does not have a host agreement is not supported by the actual language of the plan. Indeed, the section of the Plan quoted by Petitioner applies to landfills, not transfer stations. **[cite]** Petitioner also repeats its arguments that Groot is not using modern odor control measures and is therefore not minimizing emissions or utilizing proven technology. For the reasons set forth in Section __, herein, that argument fails.

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[10] Petitioner argues elsewhere, without explanation, that the Village Board's adoption of its own solid waste plan somehow violated principles of fundamental fairness. However, Petitioner's own post-hearing brief makes it clear that the solid waste plan at issue for the purposes of the siting decision was, in fact, the Lake County Solid Waste Management Plan. Petitioner's claims regarding the Village solid waste plan are completely irrelevant and should be disregarded.

Accordingly, it is clear that the evidence overwhelmingly supports a finding of consistency with the County Plan. Therefore, because the Village Board's decision is not against the manifest weight of the evidence with respect to this criterion, it must be upheld.

IV. CONCLUSION

[insert conclusion]

WHEREFORE, Respondent Groot Industries Inc. respectfully requests that Petitioner's Petition for Review be denied and the Village Board's decision to grant siting approval be upheld.

Dated: July 3, 2014

Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Richard S. Porter
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COUNTY OF WINNEBAGO)

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