BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROXANA LANDFILL, INC. Petitioner, vs. VILLAGE BOARD OF THE VILLAGE OF CASEYVILLE, ILLINOIS; VILLAGE OF CASEVILLE, ILLINOIS; and CASEYVILLE TRANSFER STATION, L.L.C. Respondents.	)	No. PCB 15-65 (Pollution Control Facility Siting Application)
VILLAGE OF FAIRMONT CITY, ILLINOIS, Petitioner, vs. VILLAGE OF CASEYVILLE, ILLINOIS BOARD OF TRUSTEES and CASEYVILLE TRANSFER STATION, LILAC. Respondents.	)	No. PCB 15-69 (Pollution Control Facility Siting Application)

NOTICE OF FILING

TO:

J. Brian Minion Weilmuenster Law Group, P.C. 3201 West Main Street Belleville IL 62226 *(jbm@weilmuensterlaw.com)*	Donald J. Moran Pedersen & Houpt 161 N. Clark Street, Ste 2700 Chicago, Illinois 60601 *(dmoran@pedersenhoupt.com)*	Robert J. Sprague Sprague & Urbana 26 E. Washington Street Belleville, Illinois 62220
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PLEASE TAKE NOTICE that on November 7, 2014, we filed electronically with the Illinois Pollution Control Board, (1) this Notice of Filing and (2), the attached **Petitioner Roxana Landfill, Inc.'s Post-Hearing Brief**, a copy of each is attached and electronically served upon you.

Dated: November 7, 2014

PETITIONER ROXANA LANDFILL, INC.

Clark Hill PLC
150 N. Michigan Ave., Suite 2700
Chicago, Illinois 60601
Phone: 312-985-5912

BY: /s/ Jennifer J. Sackett Pohlenz
One of its attorneys

PROOF OF SERVICE

I, Jennifer J. Sackett Pohlenz an attorney, certify[1] that I served the above referenced documents on the persons identified above by e-mail, at the email addresses listed, before 5:00 p.m. on this 27th day of October 2014.

/s/ Jennifer J. Sackett Pohlenz

[1] Under penalties as provided by law pursuant to Illinois Rev. Stat. Chap. 110-, Sec. 1-109, I do certify that the statements set forth herein are true and correct.

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PETITIONER ROXANA LANDFILL, INC.'S POST-HEARING BRIEF

Now comes Petitioner Roxana Landfill, Inc., by and through one of its attorneys, Jennifer J. Sackett Pohlenz at Clark Hill PLC, and files this Post-Hearing Brief.

A. INTRODUCTION

Respondent Caseyville Transfer Station, L.L.C. ("CTS") succeeded in having the Village Board of the Village of Caseyville ("Village Board") ignore the law and approve the siting of a pollution control facility with no supporting evidence. Upholding the Village Board's decision does nothing less than render Section 39.2 of the Illinois Environmental Protection Act ("Act") meaningless. (415 ILCS 5/39.2).

There is no record from the Village of Caseyville ("Village") evidencing the date CTS's siting application was received by the Village, yet on May 29, 2014, a public hearing was held. The public hearing concluded the same day. At that hearing Roxana filed motions to dismiss based on jurisdictional failures and fundamental unfairness. John Gilbert, acting at that point as

Village attorney[2], and the Mayor stated that the motions would be ruled on with the decision, which did not occur. (05/29/14 Tr. pp.5, 7, 102-103; E-0064, 6006, 0161-0162).

On August 6, 2014, the Village Board met and voted, in a single motion and vote, 4 in favor and 1 opposed to approve CTS's siting application (08/06/14 Tr. pp. 9-14; G0009-0014). The Village Board appeared unaware of the siting statutory criteria when it voted, and awkwardly confused when asked by the Village Board attorney Gras to state reasons to support its vote. (*Id.,* at pp. 8-14; G0008-0014).

B. ARGUMENT

The CTS's siting approval by the Village Board should be **(1)** reversed as it is against the manifest weight of the evidence; **(2)** vacated as there is no evidence that the Village of Caseyville filed the siting application on the date stated in the pre-filing notice under Section 39.2 of the Act; and, **(3)** vacated and remanded based on the fundamental unfairness of the public hearing. In the interest of efficiency, Petitioner Roxana Landfill, Inc. ("Roxana") joins in the Post-Hearing Brief of the Village of Fairmont City and adopts that Brief as if restated herein.[3]

(1) CTS's Siting Approval By The Village Board Is Against The Manifest Weight Of The Evidence

CTS was the only party with a burden of proof at the local public siting hearing. CTS must meet that burden as respects all of the 9 numbered and 1 unnumbered criteria under Section 39.2 of the Act. All of the statutory criteria must be satisfied before a local board may approve a

[2] From the evidence gathered during this expedited appeal it appears that John Gilbert was representing the Village Board and the Village during the pendency of the siting, and regularly conferring with CTS and engaging in analysis with CTS related to the substance of CTS's "case in chief" at the siting hearing.. (*e.g.,* Abernathy Tr. p. 9 (representing the Village Board at the siting hearing); PCB Hearing Tr. p. 129(advising the Village Clerk prior to the siting hearing); PCB Tr. pp. 133-134, 136-139).

[3] The arguments discussed in the Village of Fairmont City's Opening Brief and the Standard of Review, because adopted by Roxana, are not discussed or repeated in this Brief.

local siting application. *Waste Management of Illinois, Inc. v. Pollution Control Board*, 160 Ill. App. 3d 434, 442-43, 513 N.E.2d 592 (1987). CTS failed to meet its burden and the Village Board's decision is against the manifest weight of the evidence.

i. The Village Board's Decision On Criterion 2 Is Against The Manifest Weight Of The Evidence

Criterion 2 of the Act provides: the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. (415 ILCS 5/39.2(a)(ii)). CTS presented no *evidence* on Criterion 2 of the Act. CTS presented only oral comment and a 15-page written report by an unknown author, contained in CTS's siting application. (05/29/14 Tr. pp. 29-38; G-0088-97). In addition, CTS did not even understand Criterion 2 when it presented its comment, confusing it with Criterion 3:

> So the location -- that's what we're looking at -- is the location appropriate in terms of public health, safety and welfare? And then when you look at the surrounding land uses, there really are no incompatible land uses in close proximity to the area.
>
> The Illinois Environmental Protection Agency has identified a radius of 1,000 square feet as being an appropriate setback from residential land uses. Here you see not only that there are no residential, but the surrounding land uses are not a type that would be incompatible with the transfer station. You have Mertzke

(05/29/14 Tr. p. 28; E-0086),

Roxana presented Dustin Riechmann, an Illinois-licensed professional engineer, who testified under oath and submitted himself to cross-examination. Mr. Riechmann testified that Criterion 2 was not met, as CTS's siting application lacked any information concerning an on-

site traffic plan. (05/29/14 Tr. p. 110-111, 133-134; E-0169-0170, 0189-0190). In addition, Mr. Riechmann testified that CTS's siting application lacked the information necessary to review, much less make a decision on Criterion 2. *Id.* For example, CTS's "presentations" (both the siting application and oral comment) **failed to include**: grades; profiles of Bunkum Road or the proposed access ways to the proposed transfer station; stationing of the driveway locations; survey data; site distances; on-site staging, storing and queuing of vehicles and calculations concerning same; parking calculations; and signing and striping plans for on-site traffic flow. *Id.*

Further, the site distances as investigated and determined by Mr. Riechmann, were simply not sufficient to meet the AAHSTO standards and Criterion 2, as site visibility is obstructed in exiting the proposed transfer station location, and transfer trailers exiting the proposed facility would be forced to encroach significantly into the opposite lane of traffic. (05/29/14 Tr. pp. 125-129; E-0184-0188; Roxana Hearing Exhibit 1 p 20, E-0058).

In addition, the Village of Fairmont City submitted the affidavit of Mr. Dallas Alley, the Administrative Assistant to the Director of Building and Zoning for St. Clair County, Illinois, concerning the failure of CTS's siting application to meet the residential setback under Section 22.14 of the Act. Mr. Alley's affidavit states that there are four parcels of property zoned SR-MH (Single Family District - Manufactured Home District) by St. Clair County located within 1000 feet of the proposed transfer station, and two parcels zoned MHP (Manufactured Home Park District) by St. Clair County located within 1000 feet of the proposed transfer station. (Affidavit of Dallas Alley ¶¶8-11). Thus, the only sworn testimony in the record is that the residential setback of Section 22.14 of the Act, a location standard, has not been met.

It has been held that a determination on the second criterion is purely a matter of assessing the credibility of the expert witnesses. *Fox Moraine, LLC v. The United City of Yorkville, City Council, et al.,* 960 N.E.2d 1144, 1177 (2nd Dist 2011), citing *File v. D&L*

Landfill, Inc., 219 Ill. App. 3d 897, 907, 579 N.E.2d 1228, 162 Ill. Dec. 414 (1991). However, in this case, the only expert witnesses Messrs. Riechmann and Alley, were unopposed and not contradicted in their opinions and facts that Criterion 2 was not met by CTS.

Therefore, the Village Board's approval of criterion (ii) is against the manifest weight of the evidence. The evidence clearly showed that:

a. There was no expert report or testimony in support of Criterion 2 presented by CTS;

b. The siting application and oral comment presented by CTS lacked any detail that would be necessary to meet the burden of proof on Criterion 2;

c. There are four residential zoned parcels each of which is located within 1000 feet of the proposed transfer station;

d. The location of the proposed transfer station violates Section 22.14(a) of the Act;

e. There is no site plan for the proposed facility;

f. The proposed facility violates AASHTO site distances for exiting vehicles; and

g. The proposed facility fails to disclose and address significant encroachment of transfer trailers exiting the proposed facility into the opposite lane of traffic on Bunkum Rd.

i. The Village Board's Decision That Criterion 6 Was Met Is Against The Manifest Weight Of The Evidence

Criterion 6 of the Act provides: the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows (415 ILCS 5/39.2(a)(vi)). CTS presented no

evidence on Criterion 6 of the Act. CTS presented only oral comment and a 2-page written report by an unknown author, contained in CTS's siting application. (05/29/14 Tr. pp. 42-43; A-0041.01-0042; E-101-102). CTS failed to produce a traffic study or any documentation developed by and certified or testified to by a civil engineer. Indeed, again, CTS is apparently confused as to what Criterion 6 means, as its public comment at the siting hearing identifies the Criterion as if it were focused on on-site rather than off-site, existing traffic flows:

MR. SIEMSEN: The sixth criterion deals with traffic matters and requires that the traffic patterns to and from the facility are designed to minimize impacts on exiting traffic flow. So again, this criterion deals with the ingress and egress and on-site traffic flow. So here we see the facility, here's Bunkum Road. The way the on-site traffic flow will work is that the incoming trucks will come in. There will be a scale here where the truck will be weighed. Then it

Roxana presented Dustin Riechmann, an Illinois-licensed professional engineer and traffic engineer, who testified under oath and submitted himself to cross-examination. Mr. Riechmann testified that Criterion 2 was not met, as CTS's siting application lacked any information concerning an on-site traffic plan. (05/29/14 Tr. p. 110-111, 133-134; E-0169-0170, 0189-0190; Roxana Group Hearing Exhibit 1; E-0041-0059). In addition, Mr. Riechmann testified that CTS's siting application does not contain sufficient information to determine whether the traffic patterns to or from the proposed facility are so designed to as to minimize the impacts on existing flows. (05/24/14 Tr. 111-133; E-0170-0191) For example, CTS's siting application fails to include: a traffic study; existing traffic counts; build condition of the proposed facility (including location and design of ingress and egress); site conditions; nearby

roadway conditions; crash counts; and other site-based, safety-related information (such as the railroad crossing close to the proposed facility location). *Id.*

Further, Mr. Riechmann testified that there are existing conditions and traffic flows which CTS failed to present any evidence of even an attempt at minimizing. For example, the existing condition of Bunkum Road, the access road to the proposed facility, is very poor; the intersection with Route 111 is highly congested and has insufficient turning radius for transfer trailer vehicles; the proximity of the railroad crossing, just west of the proposed site and situated such that existing cueing issues can block access to the proposed site; a school bus depot located to the east of the proposed site that generates a large amount of traffic based on routing and return of school buses, including associated cars parked on both sides of Bunkum and pedestrians crossing in this area; a Head Start program for 244 children between the ages of 2 and 5 with program drop-off and pick-up times in direct conflict with the peak traffic generation times of the proposed CTS facility; the site egress fails to meet the AAHSTO standards as site visibility is obstructed in exiting the proposed transfer station location; and transfer trailers exiting the proposed facility would be forced to encroach significantly into the opposite lane of traffic. *Id.*

Thus, CTS's 2-page, anonymous authorship narrative contained in the siting application and brief and misleading overview of Criterion 6 in its oral comment at the May 29, 2014, is insufficient to meet its burden to prove Criterion 6 and the Village Board's approval of CTS's siting application is against the manifest weight of the evidence. Further, the only evidence presented at the hearing, the sworn testimony, photos, and drawing of Mr. Riechmann proves, without any contradiction, that Criterion 6 is, in fact, not met by CTS.

Therefore, the Village Board's approval of criterion (vi) is against the manifest weight of the evidence. The evidence clearly showed that:

a. There was no expert report or testimony in support of Criterion 6 presented by CTS;

b. There was no traffic study presented by CTS and the siting application and oral comment presented by CTS lacked any detail that would be necessary to meet the burden of proof on Criterion 6;

c. CTS's siting application failed to include: a traffic study; existing traffic counts; build condition of the proposed facility (including location and design of ingress and egress); site conditions; nearby roadway conditions; crash counts; and other site-based, safety-related information (such as the railroad crossing close to the proposed facility location;

d. The existing condition of Bunkum Road, the access road to the proposed facility, is very poor;

e. The intersection with Route 111 is highly congested and has insufficient turning radius for transfer trailer vehicles;

f. The proximity of the railroad crossing, just west of the proposed site and situated such that existing cueing issues can block access to the proposed site;

g. A school bus depot located to the east of the proposed site that generates a large amount of traffic based on routing and return of school buses, including associated cars parked on both sides of Bunkum and pedestrians crossing in this area;

h. A Head Start program for 244 children between the ages of 2 and 5 with program drop-off and pick-up times in direct conflict with the peak traffic generation times of the proposed CTS facility;

i. The site egress fails to meet the AAHSTO standards as site visibility is obstructed in exiting the proposed transfer station location; and

j. Transfer trailers exiting the proposed facility do not have a proper turning radius and would be forced to encroach significantly into the opposite lane of traffic.

(2) The Village Board Had No Jurisdiction

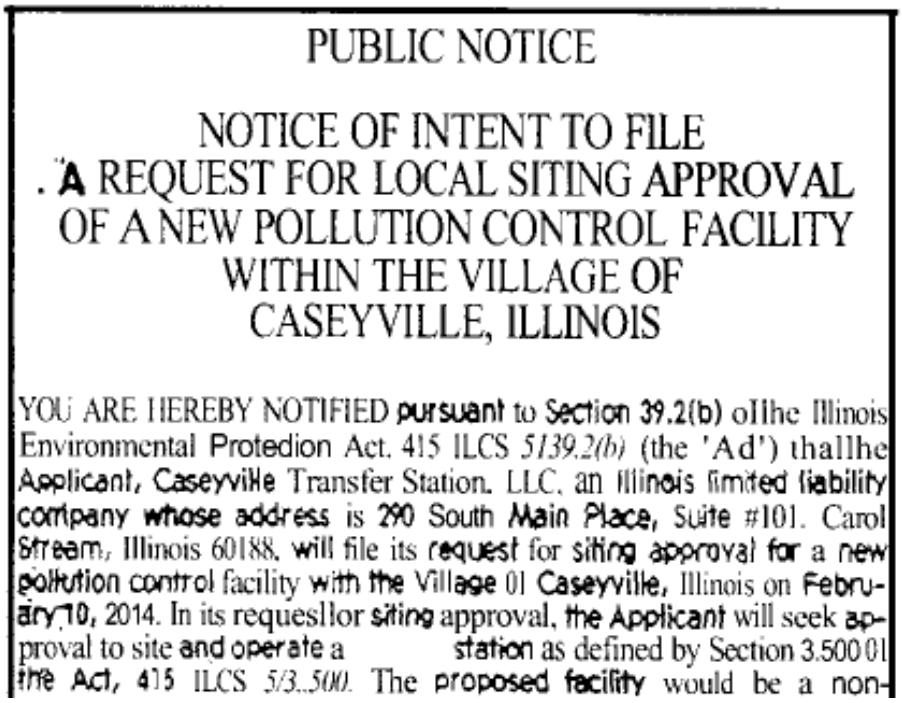
The notice requirements are jurisdictional prerequisites to the municipal government's power to hear a siting proposal. *Concerned Boone Citizens, Inc. v. MI. Investments, Inc*., 144 Ill. App. 3d 334, 494 N.E.2d 180 (D Dist. 1986); *Kane County Defenders, Inc. v. PCB*, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2nd Dist. 1985). In this case, the notice requirement is the jurisdictional prerequisite to the Village Board's power to hear the CTS's siting proposal.

i. There Is No Evidence That The Village of Caseyville Received CTS's Siting Application On The Date Stated In the Pre-Filing Notice

Section 39.2(b) pre-filing notice is required to be published in a newspaper "[n]o later than 14 days before the date on which the county board or governing body of the municipality **receives a request for site approval**. . ." (emphasis added) and the content of the pre-filing notice shall include, among other things, the date when the siting application will be submitted to the municipal decision-maker. The notice requirements of Section 39.2 are to be strictly construed as to timing, and even a one day deviation in the notice requirement renders the local government without jurisdiction. *Browning-Ferris Industries of Illinois, Inc. v. PICK*, 162 Ill. App. 3d 801, 516 N.E.2d 804, 807 (5th Dist. 1987).

CTS's pre-filing notice stated that it would "file its request for siting approval for a new pollution control facility with the Village 01 [sic] Caseyville, Illinois on February 10, 2014." A

true and correct excerpt of this portion of the pre-filing notice publication is copied below, and the entire document is attached to this Brief as **Exhibit A**.[4]



PUBLIC NOTICE

NOTICE OF INTENT TO FILE
A REQUEST FOR LOCAL SITING APPROVAL
OF A NEW POLLUTION CONTROL FACILITY
WITHIN THE VILLAGE OF
CASEYVILLE, ILLINOIS

YOU ARE HEREBY NOTIFIED pursuant to Section 39.2(b) oIlhe Illinois Environmental Protedion Act. 415 ILCS *5139.2(b)* (the 'Ad') thallhe Applicant, Caseyville Transfer Station. LLC. an Illinois limited liability company whose address is 290 South Main Place, Suite #101. Carol Stream, Illinois 60188. will file its request for siting approval for a new pollution control facility with the Village 01 Caseyville, Illinois on February 10, 2014. In its requesllor siting approval, the Applicant will seek approval to site and operate a station as defined by Section 3.500 01 the Act, 415 ILCS *5/3..500.* The proposed facility would be a non-

Thus, for the Village Board to have jurisdiction on the CTS siting application, the Village had to have **received** the siting application on February 10, 2014. However, there is no evidence that the Village received the siting application on that date. The Village Clerk, Robert Watt, is the only person at the Village of Caseyville authorized to receive the siting application. (**Exhibit B**, Tr. R. Watt p. 7). When asked on what date the Village of Caseyville received the siting application, he testified:

[4] A the Pollution Control Board public hearing on October 28, 2014, the parties agreed to supplement the Record on Appeal with a number of documents left out by the Village Board and Village of Caseyville. At the time of this Brief, the Supplement did not have page numbers to reference, thus the actual document is attached.

> Q What's the first date that you received the siting application?
>
> **A I can't -- I can't recall the actual date. I know that the -- I don't think it was the February 10th. That's because we didn't know it was already delivered.**

(**Exhibit B**, Tr. R. Watt, p. 8).

The Village Clerk also could not testify as to a specific date on which the CTS application was filed with or received by the Village of Caseyville:

> Q Okay. So, as you sit here today, as Village Clerk, can you tell me with specificity on what date the siting application for Caseyville Transfer Station, LLC was filed with the Village of Caseyville?
>
> **A I can't say that off, no. Because I don't know when it actually -- when somebody actually took possession of it. I can't say that. I mean, it could have been the day that -- the first day that the application should have been filed, I don't know.**

The Village Clerk, Robert Watt, also testified that in the ordinary course of business, that all documents received by the Village of Caseyville have to come in through the administration section of the Village. (**Exhibit B**, Tr. R. Watt, p. 33). Keri Cary (a Village of Caseyville employee in the administrative office) or Leslie McReynolds (the Deputy Clerk) will receive a document for the Village of Caseyville and stamp it with a received stamp, then leave it for the Village Clerk. (**Exhibit B,** Tr. R. Watt, p. 12-13; **Exhibit C**, Tr. L. McReynolds, pp. 7, 11, 41-

42). "No document should be coming in here without being stamped." (**Exhibit B**, Tr. R. Watt, p. 33, 43).

There is no received stamp from the Village of Caseyville anywhere on the CTS siting application. The Village Clerk also testified that without a date stamp by the Village of Caseyville, there is no way for someone to determine when the CTS siting application was filed by the Village. (**Exhibit B**, Tr. R. Watt, p. 47).

The requirement that the pre-filing notice include date the governing local government is to receive the application and that the governing local government actually receive the siting application on that published date is strict. Even a single day deviation results in jurisdiction not vesting with the local government. In *Concerned Boon Citizens, Inc. v. MI. Ins.,* 144 Ill. App. 3d 334, 339 (Ill. App. Ct. D Dist. 1986), the local siting authority (a county board) received the siting application from the applicant a day early. The appellate court held that because the siting applicant filed its application 13 days after it published notice of its application, its siting application was defective and the county board lacked jurisdiction to act on it. *Id.*

Likewise, in *Kane County Defenders, Inc. v. Pollution Control Bd.,* 139 Ill.App.3d 588, 591, 487 N.E.2d 743 (2nd Dist 1985), the siting applicant filed its site location request with the local government entity on August 11, 1983, but, it was not until August 10, 1983, that it caused a notice to be published in the Daily Courier-News in Elgin. The newspaper notice stated that the site approval request would be submitted to the local government entity "within 14 days," rather than announcing the exact date it would be filed, as is required by the statute. Although the application in the *Kane County Defenders, Inc.* case went through a full public hearing and appeal before the Pollution Control Board, the Illinois Appellate Court did not hesitate to vacate all decisions on the basis that the local government had no jurisdiction due to the applicant's

failure to strictly follow the pre-filing, jurisdictional, notice requirements of Section 39.2(b) and (c).

CTS's pre-filing notice states that the siting application will be filed with the Village of Caseyville on February 10, 2014. While the applicant will state that the application was delivered to the Village of Caseyville on that date, neither the applicant nor the Village of Caseyville have any documentation from the Village of Caseyville evidencing the receipt by the Village of Caseyville on February 10, 2014, of the siting application. Moreover, there is no received stamp by the Village of Caseyville on the siting application and the Village Clerk, the only person with authority to file a siting application, cannot state, specifically, on what date the siting application was received by the Village.

Therefore, the Board should find that jurisdiction did not vest with the Village of Caseyville and vacate the siting approval in this case, as there is no evidence that the Village of Caseyville received CTS's siting application on February 10, 2014, the date stated in CTS's pre-filing notice.

ii. The Pre-Filing Notice Contained An Incorrect And Misleading Description Of The Location Of the Property

In addition to the jurisdictional failure identified in (i), above, CTS's Section 39.2(b) pre-filing notice was also fatally flawed in its wording. The Section 39.2(b) notice is required, among other things, to provide a statement of "the location of the proposed site." CTS's pre-filing notice states that the property is "located as follows:"

> A five (5) acre parcel more or less, situated directly southeast of the intersection of Bunkum Road and the Harding Ditch, in Section 15 of Canteen Township, St. Clair County, Illinois, within the municipal boUndaries [sic] 01 [sic] Caseyville, Illinois, and consisting of portions 01 [sic] of the Parcels identified by the St. Clair County Assessor as PIN Numbers [sic] 02-15-400-028, 02-15-400-029 and 02-15-400-030.

The description "directly southeast of the intersection" in conjunction with three parcel numbers is confusing as it relates to a much larger scope of land than the mere five (5) stated acres. There is also no description of what portion of the Parcels is proposed to be included in the transfer station site nor street address for those Parcels.

Further complicating the description by CTS in its pre-filing notice, is that all of the PINs used by CTS are not identifiable on the St. Clair County Tax Assessor's website. Each of the PINs appears to be missing a "0" in the township portion of the numbering. The correct PINs appear to be 02-15.0-400-028, 02-15.0-400-029, and 02-15.0-400-030. If one types the PINs, as identified by CTS in the pre-filing notice into the St. Clair County Tax Assessor's website or website utilized by that office, no property is identified. Since the owners of the properties and addresses of the properties are not included in the pre-filing notice, one cannot search the Tax Assessor's website by any other option.

Moreover, to make it yet even more confusing, even if one figures out that CTS missed the "0" and types in the correct PINs, the tax record identifies none of these properties as being located on Bunkum Road. The PINs are identified by St. Clair County as having a common address of "Rock Springs Rd., East St. Louis, IL" – not even located within the Village of Caseyville. (F-0057-0059).

Thus, CTS's description of the location of the proposed facility, which under the best-case scenario tells the reader that the proposed site is somewhere southeast of a roadway and a ditch, is incorrect and misleading and insufficient to meet the requirements of Section 39.2 of the Act.

(3) The Siting Public Hearing Was Fundamentally Unfair

A fair hearing before an administrative agency includes "the opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling upon the evidence." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 95, 180 Ill. Dec. 34, 606 N.E.2d 1111 (S. Ct. 1992); see also *Van Harken v. City of Chicago*, 305 Ill. App. 3d 972, 983, 713 N.E.2d 754 (1st Dist 1999) ("the essence of due process is based on the concept of fundamental fairness") and *Peoria Disposal Company v. Illinois Pollution Control Board, et al,* 385 Ill. App. 3d 781; 896 N.E.2d 460 (3rd Dist. 2008)(citing *Abrahamson*). If the procedures used by an administrative agency violate fundamental fairness and a party's due process rights, the appellate court should reverse the agency's decision. *Dimensions Medical Center, Ltd. v. Elmhurst Outpatient Surgery Center, L.L.C.,* 307 Ill. App. 3d 781, 795, 718 N.E.2d 249 (4th Dist 1999).

The Village of Caseyville had no siting ordinance and no rules of hearing were made known to the public prior to the actual hearing. Objections were, in fact raised to the process at the May 29, 2014, as being fundamentally unfair and the opportunity for cross-examination was denied, when the ruling on the objections was that they would be taken with the case. For example, within the first several minutes of unsworn comment by CTS, the following exchange occurred:

MS. POHLENZ: For the record, I need to raise an objection with respect to the applicant presenting unsworn comments. I think it's fundamentally unfair to this proceeding, and I think it's contrary to the intent and the direction under 39.2 of the Illinois Environmental Protection Act.

MR. GILBERT: As the mayor indicated, those objections will be taken with the case so to speak.

MS. POHLENZ: I ask that it be a standing objection to this presentation.

(05/29/14 Tr. p. 7; E-0066).

The same type of exchanged occurred again during the May 29, 2014, public hearing:

MS. POHLENZ: But the point is, it doesn't allow us to make our case fully, doesn't allow us to question the applicant fully. It constrains the process.

MR. GILBERT: So noted.

(05/29/14 Tr. p. 20; E-0079; *see also* 05/29/14 Tr. pp. 24-25; E-0083-84).

And yet again:

MR. MORAN: Mr. Mayor, if I could lodge my objection to this applicant presenting information unsworn in the form of simply a presentation as being really a guess the appropriate rules that govern these proceedings in terms of what type of evidence has to be presented. I understand you're going to allow this to occur, but I need to lodge this objection because this clearly is not a fundamentally fair way to present a case to establish these criteria. Again, my name is

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Donald Moran. I'm here on behalf of the village of Fairmont City.

MAYOR BLACK: Go ahead.

MR. SIEMSEN: Turning to the first criterion

(05/29/14 Tr. 24-25; E-0083-0084).

Due process at this type of public hearing requires that the siting applicant testify under oath and be subject to cross-examination. Even in less involved proceedings, such as administrative hearings on municipal allegations of violations of a building ordinance, the cross-examination has been required. For example, in *Dombrowski v. The City of Chicago, et al.,* 363 Ill. App. 3d 420; 842 N.E.2d 302 (1st Dist. 2005), the City of Chicago presented its evidence of building code violations as the administrative hearing through sworn statements of its inspectors. The only reason that it was found acceptable not to have the inspectors at the hearing to testify was that the City has passed an ordinance that provided for the procedure of the hearing, was publically noticed (through the process of passing an ordinance) and available, and gave the

Administrative Law Judge the right to require the inspectors be available to testify. *Id.* 363 Ill. App. 3d at 427; 842 N.E.2d at 308.

Likewise, the Seventh Circuit has held that, in administrative proceedings "live testimony and cross-examination might be so important as to be required by due process" and that the subpoena mechanism contained in Rule 6.4 provides parties with the opportunity to cross-examine complaining witnesses and therefore functions as a "safety valve for those cases * * * in which fair consideration of the respondent's defense would require, as a constitutional imperative, the recognition of a right of confrontation." *Van Harken v. City of Chicago,* 103 F.3d 1346, 1352 (7th Cir. 1997).

Unlike alleged building code-violation cases, in Section 39.2 siting proceedings it is not merely the property owner at issue that faces a potential impact. Thus, while written reports may be within the discretion of a municipality establishing, by ordinance, the rules of its administrative hearing process for building code tickets, it is not in the discretion of local governments to limit cross-examination for Section 39.2 siting hearings.

Section 39.2 proceedings are, in some ways, analogous to a special use zoning proceeding. For example, the proceedings are both adjudicative in nature and both concern a proposed new use at a property. Both require some form of notice to be given to a specified distance of property owners from the property which is the subject of the proceedings. Both, understandably, have a potential impact much greater than only the property where the proposed use is located.

Unlike zoning, siting is governed by 9 numbered and 1 unnumbered, specific state statutory criteria. The Illinois Supreme Court and courts thereafter have long held that cross-examination is essential to the fundamental fairness of such a zoning hearing. In *People ex rel.*

Klaeren v. Vill. of Lisle, 352 Ill. App. 3d 831, 839-840 (Ill. App. Ct. 2d Dist. 2004), the 2nd District Appellate Court summarized this history in stating:

> The supreme court held that the right of cross-examination accrued in a hearing before a zoning board on a special use permit, just as the court in *E&E Hauling* determined that the right of cross-examination was available in any hearing before a zoning board. *Klaeren* II, 202 Ill. 2d at 185. * * *
>
> As noted above, since at least 1979, the courts in this state have recognized that public hearings before zoning boards include the right to cross-examination. has shown no change in the law, there is no reason not to apply Klaeren II to this case.

There is no reason to differentiate the fundamental fairness of a Section 39.2 proceeding from that of special use zoning and find that cross-examination while a necessary right for one, is not required for the other. Moreover, even the statute, Section 39.2 acknowledges this procedure with its reference to cross-questioning:

> At any time prior to completion by the applicant of the presentation of the applicant's factual evidence and an opportunity for cross-questioning by the county board or governing body of the municipality and any participants . . .
>
> 415 ILCS 5/39.2(e).

In addition to CTS's and the Village Board's denial of the right of cross-examination, and the failure of CTS to present any evidence, there were a multitude of other fairness issues that further impeded the participants' rights. For example, there is no question that the siting application was unavailable to the public for at least the period of time from February 10, 2014 (the date on which the pre-filing notice stated it was to be received by the Village of Caseyville) until it actually was received by the Village Clerk and made available for review (*see*, Roxana's Motion to Dismiss which is incorporated herein, F-0043-0045). In addition, the Deputy Village Clerk failed to respond immediately throughout the siting process to requests for the public

record and, instead, contacted the Village Clerk each time for some parties and not for others, to get permission to disclose the public record. *See*, *American Bottom Conservancy, et al. v. Village of Fairmont City, et al.,* PCB 00-200. Likewise, the siting hearing location was changed at the last minute (literally just prior to the hearing starting) and the room in which it was held failed to fit all participants, interfering with their right to be present and participate in the public hearing. (10/28/14 Tr. p. 76-77, 82-83, 145-146).

Thus, as a result of any one or more of the issues herein discussed the Village Board decision on the CTS siting application should be reversed, as the public hearing and siting process before the Village of Caseyville and Village Board was fundamentally unfair.

WHEREFORE, Participant Roxana Landfill, Inc. respectfully requests this Honorable Board to reverse the decision of the Village Board of the Village of Caseyville approve the Caseyville Transfer Station, L.L.C. Application for Site Location Approval or, in the alternative, vacate the decision for lack of jurisdiction.

Dated: November 7, 2014

Respectfully submitted,

ROXANA LANDFILL, INC.

By: */s/ Jennifer J. Sackett Pohlenz*
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