BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

COUNTY OF KANKAKEE and EDWARD D. SMITH, STATE'S ATTORNEY OF KANKAKEE COUNTY, **Petitioners,** **vs.** **THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES,INC. and KANKAKEE REGIONAL LANDFILL, L.L.C.** **Respondents.**	**No. PCB 03-31** **(Third-Party Pollution Control Facility Appeal)**
BYRON SANDBERG, **Petitioner,** **vs.** **THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C.,** **Respondents.**	**No. PCB 03-33** **(Third-Party Pollution Control Facility Appeal)**
WASTE MANAGEMENT OF ILLINOIS, INC. **Petitioner,** **vs.** **THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C.,** **Respondents.**	**No. PCB 03-35** **(Third-Party Pollution Control Facility Siting Appeal)** **(Consolidated)**

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TO: See Attached Service List

PLEASE TAKE NOTICE that on December 4, 2002 there has caused to be filed with Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, an original and 9 copies of the following document, a copy of which is attached hereto:

Reply Brief of Town & Country Utilities, Inc.

George Mueller
GEORGE MUELLER, Attorney at Law

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I, Pat vonPerbandt, a non-attorney, on oath state that I served a copy of the above listed document by sending the same to each of the parties listed on the attached Service List via United Parcel Service from Ottawa, Illinois, on December 4, 2002.

Pat vonPebandt

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The undersigned, pursuant tot he provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on December 4, 2002, a copy of the foregoing Reply Brief Of Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. was served upon:

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TOWN & COUNTRY UTILITIES, INC.
AND
KANKAKEE REGIONAL LANDFILL, L.L.C.

I. INTRODUCTION

Because the parties filed simultaneous briefs, many of the arguments in the Petitioners' Briefs have already been addressed, and for some of those arguments, no additional comment is necessary. However, to the extent that Petitioners' Briefs make unanticipated arguments, cite new authority or make factual or legal statements which are simply wrong, further comment is necessary, and this Reply Brief will be limited to those situations. This notwithstanding, almost everything in Petitioners' Briefs has already been discussed to some extent in Town & Country's Brief in chief, so that at a minimum, repetition of the basic facts is unnecessary at this time.

II. PROPER SERVICE WAS MADE ON THE OWNERS OF PARCEL 13-16-23-400-001

Neither of Petitioners' Briefs addresses the fact that the authentic tax records of Kankakee County had two conflicting listings of the owners of this parcel (known also as the Skates/Bradshaw Parcel). In fact, the testimony of Patricia vonPerbandt regarding her research at the County Assessor's and Treasurer's Offices as well as Town & Country Exhibits 1, 2 and 3 admitted at the Board fundamental fairness hearing, make it clear that the more current and up-to- date record is the one listing Judith Skates at the Onarga, Illinois address as the owner. Judith Skates was served in a timely fashion.

Instead, Kankakee County argues that the Board should reconsider its Hearing Officer's decision to allow testimony by Town & Country regarding jurisdiction. This is somewhat curious in light of the fact that the Board's Order in this case on October 3, 2002 specifically

held that, "The record before the City will be the exclusive basis for all hearings except when considering issues of fundamental fairness or jurisdiction" (PCB Order 10/3/02, Page 3, emphasis added). The County apparently does understand that jurisdictional defects cannot be waived and may be raised at any time, because it cites Ogle County Board On Behalf of the County of Ogle v. Pollution Control Board, 272 Ill.App.3d 184, 649 N.E.2d 545 (2nd Dist. 1995). In that case, extensive evidence was received at the PCB hearing from both sides on jurisdiction. The County argues, however, that the receipt of evidence on jurisdiction at a PCB hearing should only be allowed if initiated by a party claiming lack of jurisdiction. This would seem to create a situation where the party needing to establish jurisdiction can be blind-sided at any time by another party claiming lack of jurisdiction after the evidentiary portion of a hearing has been concluded, precisely what happened to Town & Country when the County first alleged lack of jurisdiction in its Proposed Findings of Fact to the City Council.

To the extent that Kankakee County argues that evidence of jurisdiction should be restricted to what was presented at the initial local siting hearing, Town & Country would point out once again that Paragraph 6 of Tom Volini's Affidavit submitted as Applicant's Exhibit #2 at the local siting hearing states, "On February 18, 2002 I caused a Notice Of Request For Location Approval For Pollution Control Facility attached as Exhibit A (the Notice) to be mailed, by registered mail, return receipt requested, to all of the owners identified above." This includes all of the owners listed in Rock Falls, Illinois, on the outdated property index card for the Skates/Bradshaw parcel. The same statement was subsequently made by Mr. Volini in sworn testimony subject to cross-examination at the Board Hearing.

Patricia vonPerbandt's testimony at the Board Hearing is factually misstated at pages 37 and 38 of Kankakee County's Brief where the County states, "Five of the owners as identified by

the tax records were never sent notice as there is no return receipt for the Prophet Road property contained in the Applicant's Exhibit #7. This fact was even confirmed by a witness called by the Applicant, Patricia vonPerbandt, who testified that receipts indicated to who notices were sent..." This is misleading since the Affidavit of Service and the testimony of Ms. vonPerbandt indicate that notices were sent to all owners as confirmed in the following exchange between the County Attorney and Ms. vonPerbandt:

> Q. (By Mr. Porter) Now you did not send out any notices that aren't reflected by those receipts; is that correct?
>
> A. (By Ms. vonPerbandt) I sent out notices that were reflected on the list that was given to me.
>
> Q. (By Mr. Porter) And for each of those notices, we have a receipt... strike that. For every notice you sent out, there is a receipt attached; is that right?
>
> A.(By Ms. vonPerbandt) I'm not sure if there is a receipt for every notice. I'm not sure. If it matches my list, then there is. (Bd. Tr 11-6 296,297)

The list referred to by the witness is, of course, the complete list of all the parcels set forth in the original affidavit of service.

In its argument the County also conveniently forgets the fact that Tom Volini's testimony at the Board Hearing explained the apparent discrepancy between Paragraphs 6 and 7 in his Affidavit Of Service, namely that the non-acceptors of the registered mail on this parcel were not identified since service on Skates was correctly deemed to be acceptance by the correct owner.

The County's reference on Page 5 of its Brief to Ms. vonPerbandt's obvious "biases" is unwarranted and not supported by anything in the record.

III. COUNTY'S ARGUMENT THAT TIMELY SERVICE WAS NOT HAD UPON THE ILLINOIS CENTRAL RAILROAD COMPANY IS BROUGHT IN BAD FAITH

The County originally brought this argument in its proposed Findings Of Fact to the Kankakee City Council. In response, the City Council made a special Finding Of Fact that the Railroad was timely served on February 20, 2002 (C3289). In fact, registered mail sent to the railroad's agent was not promptly claimed, but the authentic address for the Railroad's parcels as shown is in Tom Volini's Affidavit Of Service is actually 17641 Ashland Avenue, Homewood, Illinois, and service at this address was timely received (Applicant's Exhibit #2). These facts are simply ignored in the County's Brief.

IV. THE ARGUMENT THAT RETURN RECEIPTS WERE SIGNED BY INDIVIDUALS OTHER THAN THE OWNERS OF THE PROPERTY IS NOT BROUGHT IN GOOD FAITH.

Experienced counsel for the County knows that the law is well settled on this issue. To the extent that the County now attempts to argue that Sam DiMaggio v. Solid Waste Agency Of Northern Cook County, PCB 89-138 (January 11, 1990) was wrongly decided, is it also arguing that City of Columbia, et al. v. County of St. Clair and Browning Ferris Industries of Illinois, Inc, PCB 85-223, 85-177, 85-220 Consolidated (April 3, 1986) was wrongly decided?

V. THE ACTIONS OF THE CITY CLERK DID NOT PREVENT ANYONE FROM FULLY PARTICIPATING

The County argues that Darrell Bruck "was turned away by the City Clerk's Office which was operating under the understanding that all participants had to register at least five days before the hearing..." (County Brief, Page 41). It's not at all clear from a careful review of the record that Mr. Bruck was, or is, a "victimized citizen." The County's argument is based upon Bruck's public comment on June 27th that he was aware of conflicting registration requirements, after which he called the City Clerk's Office and was told that it was too late. (TR 1549). In his public comment, Mr. Bruck admitted that he later learned that the Hearing Officer had changed the sign-up rules of the City's Amended Siting Ordinance to the more lenient requirements in the Applicant's published legal notice, but at the time the Hearing Officer announced it, he was out in the hall and had not heard. (TR. 1550).

At the Board Hearing, Bruck did not testify that he was turned away by the Clerk. He did indicate that even though he had determined before the hearings to participate that he never signed up, or attempted to after the hearings had begun (Bd.TR 11-4 100). Even though Bruck got to the hearings five to ten minutes late (the hearing was scheduled to start at 8:00 P.M.) on the first night when the room had, according to the County's Brief, already been full for more than an hour, he admitted that he did get into the hearing room by about 10:00 p.m. He attended thereafter, and despite this, he never registered as an Objector, nor did he ever talk to anyone about registering as an Objector. (Bd. TR.11-4 110, 113). Mr. Bruck also never read the transcript of the first night's hearings even though he knew the same was available to him. (Bd. TR. 11-4 114).

The County, and to some extent Mr. Bruck, would have you believe that circumstances conspired to disenfranchise Mr. Bruck from participating. It is curious that he never asked to participate after he started attending the hearings even though the Hearing Officer actually approached Mrs. O'Dell on the third night because word of her discussing the possibility of participating during a recess had gotten back to him. (Bd. TR. 11-6 83, 84). The County's Brief erroneously describes this situation where Mrs. O'Dell's participation was, in fact, solicited by the Hearing Officer. Instead the County would have the Board believe that, "It was not until the third or fourth day of the hearing until Mrs. O'Dell was successful in convincing Hearing Officer Bohlen that she should have been recognized as a participant." (County Brief, Page 12). In any case, Mr. Bruck's public comment of June 27th also indicated that he was the President of OUTRAGE, an organization described by another OUTRAGE Officer, Keith Runyon, as a "citizen's governmental accountability group." (Bd. TR. 11-4 177, TR 1549). Mr. Runyon also arrived late, but since he had registered, he was admitted to the hearing room upon announcing his identity to a police officer. (Bd. TR. 11-4 179, 181). Similarly, Richard Murray, another OUTRAGE affiliate, had registered as an Objector and, in fact, cross-examined every witness during the hearings. (Bd. TR. 11-6 115).

In light of the foregoing, it is difficult to imagine how Mr. Bruck, President of a governmental accountability citizens' group, failed to get himself included as a participant when a fellow OUTRAGE Officer and another OUTRAGE affiliate were two of the most active participants during the hearing. One cannot help but wonder whether Mr. Bruck intentionally exploited the conflict between the City's five day registration requirement and the Pre-Hearing Notice so as to create an appealable issue. Certainly Mr. Bruck was present in the hearing room at the start of the third night (June 19th) when the Hearing Officer received and read into the

record a Motion by his cohorts, Mr's Runyon and Murray, on that very subject and on the further subject of the fact that people out in the hall on the first night didn't all hear the Hearing Officer's decision to extend registration to the first night. (TR. 354-356). Appended to the Motion from Runyon and Murray as evidence of the confusion regarding registration requirements was a copy of Mrs. O'Dell's letter expressing the desire "to speak." Mr. Bruck, however, continued to say nothing to anyone in the hearing about wanting to participate even though it was later on the same evening that the Hearing Officer sought out Mrs. O'Dell to solicit clarification about her participation. At the start of the proceedings on the following evening (June 20th) the Hearing Officer publically announced that he had added Mrs. O'Dell to the roster of registered Objectors and still Mr. Bruck said nothing. (TR. 502). Given Mr. Bruck's organizational affiliations and his numerous opportunities to get himself listed as an Objector, no one can seriously argue that he was prevented from participating simply due to a phone call to the City Clerk's Office.

The County also alleges that other members of the public that attempted to register during the week of June 12th to June 17th were turned away by the Clerk's Office. However, there are no other individuals who came forward to testify that they attempted to register during this five day period. The County's Brief also alleges that the Clerk knew that registration could occur until the time of the hearing when the record does not support this. (County Brief, Page 41). The County's continuous references to "armed guards" don't make sense and are clearly intended to be prejudicial in light of the fact that no one testified at the Board Hearing that the police did anything but their jobs, or acted unprofessionally in maintaining the Council Chambers at its legal maximum capacity.

The County's Brief again erroneously alleges that Mrs. O'Dell could not get in the hearing room the first night, and that Mr. Power ignored her request to ask questions the first night. (County Brief, Page 43). First of all, Mrs. O'Dell admitted asking a representative at the Clerk's Office what she was "supposed to do to be able to talk " (Bd. TR. 11-6 33). It is difficult to argue that the Clerk gave misinformation in response to such a vague and misleading request. Mrs. O'Dell was an Objector sufficiently motivated and organized to arrange for videotaping on the first night, and ultimately she may have excluded herself from the hearing room after two or three trips in and out without difficulty (Bd. TR. 11-6 79). Mrs. O'Dell also admitted under cross-examination that she did not ask Assistant City Attorney Patrick Power to participate on the first night. (Bd. TR. 11-6 81). One has to wonder why, if Mrs. O'Dell was excluded from the hearing room the first night, she was in fact able to have conversations with the Assistant City Attorney in the hearing room. Perhaps she re-entered the hearing room during breaks when she was not busy circulating her Petition in opposition to the landfill. Mrs. O'Dell's testimony should further be taken in the context of her apparent association with the OUTRAGE members, Keith Runyon and Richard Murray, as her original letter to the Clerk was an exhibit appended to their Motion To Quash on June 19th.

As already pointed out regarding her alleged need to convince the Hearing Officer of her right to participate, the County has taken unjustified license with the facts related to Mrs. O'Dell. The County states that she asked both the City Clerk and Mr. Bohlen before the hearing about possibly inadequate room size, (County Brief, Page 12), but there is nothing whatsoever in the record to support this untrue statement. The County's Brief also states that no one in the hallway on the first night heard any of the City's announcements regarding right to participate. (County

Brief, Page 13). However, the first time Mrs. O'Dell was asked about this at the Board Hearing, the exchange went as follows:

> Q. Part of that time, do you remember anybody coming down from the podium and conveying information to the folks that assembled outside telling them what was going on, what the rules were, whether they could sign up and so forth?
>
> A. (Mrs. O'Dell) At two different points, I heard someone in the hall give that information. (Bd. TR 11-6 52).

Only after a lengthy series of subsequent leading questions did Mrs. O'Dell "rehabilitate" her testimony by remembering that she didn't hear what was said. In contrast, the testimony of Pat Power, Assistant City Attorney, is consistent with Mrs. O'Dell's first recollection on this point.

VI. FAILURE TO ADMIT ALL MEMBERS OF THE PUBLIC TO THE HEARING ROOM ON THE FIRST NIGHT WAS NOT FUNDAMENTALLY UNFAIR IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES

Neither Town & Country nor the City has ever disputed that the scheduled hearing room was inadequate in size to seat everyone who wanted to attend on the first night of the hearings. The County Brief alleges that "the PCB has previously ruled that a lack of adequate seating can lead to a finding of fundamental unfairness in the public hearing" and cites in support of that proposition Daly v. Village of Robbins, PCB 93-52, PCB 93-54 (July 1, 1993) (County Brief, Page 43). In fact, Daly does not support that proposition. The County then argues that in City Of Columbia v. County Of St. Clair, PCB 85-177 (April 3, 1986), the Board considered the lack of seating a "dampening prejudicial effect on the hearing attendees." (County Brief, Page 43). In fact, that is a misstatement of the holding in City of Columbia where the Board found that the County in that case did not act unreasonably in commencing a hearing with an overflow crowd.

In addition to the hearing room being too small, however, the Board also found that the hearing lasted only one night, concluding between 2:00 a.m. and 2:30 a.m., and that during said hearing there were restrictions on cross-examination and public comment time. The Board found that it was the combination of these factors which had a "dampening prejudicial effect on the hearing attendees."

The distinction between the instant case and City Of Columbia is that by only starting the hearing with an overflow crowd, the City Council here was able to cure the error in subsequent nights. Only the testimony of one witness was missed, that testimony was made available to everyone two days later, and that witness's testimony was essentially duplicated by another witness (Devin Moose). Moreover, in deciding who to let in and who to leave out, the City Council made a good faith attempt to admit all attendees who had made known their desire to be participants prior to the first night. The hearings in this case continued over eleven days and nights mostly because of lengthy cross-examination by all who cared to do so.

The County of Kankakee argues that the factual scenario in the instant case is even worse than in City Of Columbia, because the City knew that their hearing room would not be large enough to accommodate all of the attendees. This assertion is not supported by the record. Hearing Officer, Christopher Bohlen, testified that he did not recall being confronted at his office by CRIME Spokesperson, Doris O'Connor, about whether he had a back-up plan for a hearing area (Bd. TR 11-4 320). Bohlen testified that there were 105 spectator chairs in addition to room for all registered participants, and that he knew of no other alternative facility with air-conditioning. He also testified that at the Town & Country Annexation Hearings which had been just as controversial, there had still been room for everyone and therefore he didn't expect that the City Council Chambers would not be large enough. (Bd. TR. 11-4 320-322).

Frankly, both Waste Management and the County have over dramatized what occurred on the first night of the hearing. Aside from the fact that the most vocal complainers about lack of public participation were the officers and spokes-people of the well organized and effectively represented citizens' groups joined by the four Attorney's for Kankakee County sitting in the front of the hearing room, the City did what it could under the circumstances to assure full participation. The assertion in the Waste Management Brief that the City never notified the crowd outside the room of its rights is rebutted by the fact that written rules of conduct were handed out on the first night both inside and outside the Council Chambers. (TR 361). Town & Country does not take issue with the fact that between 50 and 125 people didn't get into the room, but does take issue with Waste Management's representation that this group included "many of whom had pre-registered." (Waste Management Brief, Page 18). The only even arguably pre-registered person who didn't get in on night one was Mrs. O'Dell whose testimonial inconsistencies and biases have already been extensively discussed. It is also of note that this appeal is not brought by any citizen or citizens' group which claims that their rights were violated, but by the County and its landfill operator who are publicly committed to stopping the City from siting a landfill at all costs.

The Board has previously found that chaotic hearing conditions including threats to members of the public did not have a sufficiently chilling effect to render proceedings fundamentally unfair. Daly v. Village of Robbins, PCB 93-52, PCB 93-54 (July 1, 1993), Affirmed 264 Ill.App.3d 968, 637 N.E.2d 1153 (1st Dist. 1994). The County's Brief cavalierly speaks about members of the public being "banished to the hallway" citing Mrs. Elliott as an example. (County Brief, page 13), when in fact her testimony at the Board Hearing indicates

that she may have left the room on her own, certainly out of frustration but not necessarily out of compulsion. (Bd. TR. 11-4 61).

Town & Country regrets that members of the public were frustrated, hot, and unhappy, but urges the Board to remember that this is not the same as members of the public being denied their fundamental right to participate. One also has to wonder what more members of the public could have done to make the best out of a bad situation and to insure their personal participatory rights. In weighing the reasonableness of the City's reaction to the June 17th overcrowding, the Board is asked to compare the City's options versus the public's options, and to do so keeping in mind the recent pronouncement of the Third District Appellate Court that "a non-applicant who participates in a local pollution control facility siting hearing has no property interest at stake enabling him to the protection afforded by the constitutional guarantee of due process," Land & Lakes Company v. Illinois Pollution Control Board, 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000). At the Board Fundamental Fairness Hearing, the City's Hearing Officer, Christopher Bohlen, was grilled at length by the County's Attorneys about how he responded to the overcrowding on June 17th and also what he did to insure the right of people to participate. A review of that portion of the transcript probably says more than any argument about the reasonableness of the City's reaction in light of the totality of the circumstances:

> Q. Isn't it true that you made an announcement from the bench that people could sign-in throughout the night to appear?
>
> A. Yes.
>
> Q. And isn't it true that that announcement could not be heard from the hallway?
>
> A. That announcement was repeated by Mr. Power in the hallway.

Q. How do you know that that announcement was repeated by Mr. Power in the hallway?

A. I asked him to go out to make that announcement. I was also informed by the police officers that that announcement was made by Mr. Power so that's how I believed it was made.

Q. When did you ask Mr. Power to go make that announcement?

A. It was pretty early on because I note in the – I believe there's an indication in the transcript that I said to sign-up with Mr. Power or that somebody indicated that that's what they were told is to sign-up with Mr. Power.

Q. Was your direction to Mr. Power made before or after my motions to quash?

A. I believe it was before because I believe Officer Kato was asked to read off the names of those persons who had already signed up out in the hallway and I believe it was at that same time that I asked Mr. Power to go out and check in the hallway because I didn't want to rely on just the police officer reading the names.

Q. You do not know whether the people in the hallway heard Mr. Power make such announcement, do you?

A. I don't know whether they did or didn't.

Q. You do not know how many people had simply turned around and left after being denied access by the police before Mr. Power ever made it out to the hallway assuming that he actually did?

A. Nobody ever indicated to me that they did that.

Q. You don't know if that occurred, is that correct?

A. I don't one way or the other except nobody ever said to me that they did that.

Q. So you don't know whether or not your announcement was ever made to all of the people in the hallway that they could sign-in and participate, correct?

A. I know it was made to everybody in the hallway because Mr. Power indicated later that it was and the police officer also verified that it was, so I know that it was made to everybody in the hallway.

Q. Do you have an explanation to the people that say they never heard such announcement?

A. No.

Q. The request you made of Mr. Power as not on the record, correct?

A. That's correct.

Q. You don't know exactly what was said to each person in the hallway regarding whether or not they could come in and register to participate, is that right?

A. No. But I do know that people came and requested to participate after we started the proceedings.

Q. We know that Mr. Runyon did, is that correct?

A. Mr. Runyon actually requested – had indicated he wanted to be an objector prior to the proceeding.

Q. Who exactly came in after the proceedings started and requested to be an objector?

A. It's my recollection that Elizabeth Fleming-Weber was originally not going to be an objector and then came in in the midst of the proceedings that night and indicated that she was. Her name got added to the list, I do recall, because there was a question as to whether she was or was not. She did come in and indicate – I do know that she was late in arriving and she did come in in the midst of the proceedings and indicate that she wanted to be a participant. I know also that Ms. O'Dell and brought to me by Doris O'Connor and indicated, and that happened on the Wednesday of the proceeding, indicating that Ms. O'Dell wanted then to participate and she commenced her participation on Thursday.

Q. Do you know whether Ms. O'Dell had actually previously indicated a desire to participate that fell on deaf ears?

A. I know that she had sent me a letter saying she wanted to speak at the proceedings. Those who indicated to me that they wanted to speak at the proceedings were listed as those who were going to make public statements and based upon that, there were a number of people that had sent me letters saying they wanted to speak and because the rules Differentiated between those that wanted to speak and those who wanted to present evidence and cross-examine witnesses. I took her and understood her to be a request to speak at the public comment session on the Thursday of the second week.

Q. What rules are you referring to that drew some type of distinction between those who wanted to speak and those who wanted to participate?

A. The rules of the siting – the rules and procedures of the siting – part of the siting ordinance.

Q. That was the rule that wasn't followed, is that correct?

A. No. All of those rules were followed. There was an allowance made in the one instance. All of the rules and procedures, to my knowledge, were followed. There was an allowance made that we would not bar those who wanted to participate by cross-examining and presenting evidence even though they hadn't signed up by the – on the fifth day prior to the hearing, but, to my knowledge, those rules were followed.

Q. So there were a variety of people that had filled out a document with the city clerk's office five days before the hearing but because the document said they wanted to speak rather than participate their names were never called out as being participants, is that correct?

A. Correct. There were a number who said they wanted to participate who then changed their minds and said they really only wanted to speak.

Q. Are the names of the individuals that actually filled out a document with the city clerk five days ahead of time contained at pages 2223 through 2234 of the record?

A. Yes. And I believe each of those people did, in fact, speak at the public comment session on that Thursday evening.

Q. So if I'm understanding correctly, unless someone used the magic word participate in that document they filed five days ahead of time they weren't considered to be an objector, a supporter, or a participant, is that correct?

A. I don't consider – I guess I'm a little hesitant – the magic word comment is offensive to me. I don't consider it a magic word. I think you're in a legal process and a legal proceeding and those rules were followed and if you indicated you wanted to be an objector, present evidence or cross-examine, we certainly allowed anybody to do that that indicated that was their desire. If you said you wanted to speak, we put you in the public comment session and everybody who wanted to speak did, in fact, speak and none of those people, except for Pat O'Dell, ever indicated and almost all of them – we heard Mr. Thompsen here today, almost all of them who indicated they wanted to speak, not one of them other than Pat O'Dell, ever indicated they changed their mind and most of them were present during many days of the hearing.

Q. While Mr. Power was apparently making some announcement in the hallway, the proceedings were continuing in council chambers, is that correct?

A. I think if you look in the transcript there's a point where I ask Officer Kato to read the names and I think it was at that point that I also asked Pat Power to go out in the hallway.

Q. Okay. And the proceedings were continuing while these names were being read in the hallway and Mr. Power was allegedly making an announcement, is that right?

A. No, that's not right. We stopped until that portion – until they read the names and Mr. Power returned. (Bd. TR. 11-4 326-334).

The County, in its Brief, argues lastly that "it is particularly egregious in this case because the people that were banished to the hallway appear to be almost entirely composed of people that would be neighbors to the proposed facility ... the citizens that are actually impacted most were the very individuals that the City would not allow enter the hearing room on June 17, 2002." (County Brief, Page 44, 45). The above statement is so devoid of support in the record that it draws the last measure of credibility from the County's position in this appeal.

Coincidentally or otherwise, the County's two principal fairness witnesses, Pat O'Dell and Darrell Bruck along with their cohort, Keith Runyon, are all from Bourbonnais which is Northwest of the City of Kankakee whereas the proposed site is on the Southeast edge of the City. (Bd. TR. 11-4 98,176 11-6 28). As already mentioned, none of these "most impacted" citizens or citizens' groups appealed the City Councils' unanimous decision other than Mr. Sandberg who was a full participant during the siting hearing and is really only interested in the hydro-geologic characterization. Perhaps the actual "most impacted" participants are Kankakee Count and Waste Management..

VII. GOING BEYOND THE ENDING SCHEDULED TIME ONCE IN ELEVEN DAYS DOES NOT RENDER THE PROCEEDINGS FUNDAMENTALLY UNFAIR

The County cites no law for its argument, but nonetheless states that failure to end at 10:00 p.m. on the first night of the hearings is fundamentally unfair. No matter when hearings are held, someone will be inconvenienced. Evening hearings, which are often more accessible to the working public than daytime hearings, are always at risk of running late, and late nights sometimes go with the territory. In the instant case, that happened once in eleven days when the first night's hearing went until 12:30 a.m. A transcript of the first night's hearing was made available to all to review, and no harm was done. It should be noted from a review of the record that the bulk of the time spent on the first night was in cross-examination by multiple Objectors.

VIII. THE CITY'S FAILURE TO FOLLOW ITS OWN SITING ORDINANCE NOT TRANSMITTING COPIES OF THE SITING APPLICATION TO THE COUNTY DID NOT RENDER THE PROCEEDINGS FUNDAMENTALLY UNFAIR AND WAS HARMLESS ERROR

Waste Management Of Illinois v. Pollution Control Board, 175 Ill.App.3d 1023, 530 N.E.2d 682 (2nd Dist. 1988), long ago established the principle that a county or city may establish its own siting procedures to supplement those contained in Section 39.2 of the Act so long as those procedures are not inconsistent with fundamental fairness. This does not mean that the county or city must follow those procedures, or that failure to follow them is necessarily unfair. Once again the County in its Brief makes a legal citation where the case cited really has nothing to do with the principle enunciated. In this case the County states, "In Waste Management, the IPCB found that failure to provide access to the application was a fatal flaw from a statutory perspective and constituted fundamental unfairness. Waste Management,. 530 N.E.2d at 693." (County Brief, Page 48). In fact, in Waste Management, the Pollution Control Board affirmed the County Board's finding that the Applicant had failed to establish need for a new regional pollution control facility. The case has nothing to do with public access to the siting application and actually, the Appellate Court which affirmed the Pollution Control Board found that it was harmless error for the hearing officer to violate the express language of the local siting ordinance by allowing a witness to introduce exhibits in violation of the "ten-day rule." (530 N.E.2d at 694). In affirming, the Appellate Court relied on Waste Management's failure to articulate how it was prejudiced, meaning how the outcome was altered by the hearing officer's error.

The other cases that are cited by the County on this issue also do not support the proposition for which they are cited, but they at least deal with the general subject matter. Both Residents Against A Polluted Environment v. County of LaSalle, PCB 96-243 and American

Bottom Conservancy v. Fairmount, PCB 00-200 deal with denying the public access to the application. In ABC, that denial was cured, but only two weeks prior to the start of the siting hearing, and the Board found that by that time the right of an objector to adequately prepare had been prejudiced. The unfairness in ABC was compounded by the fact that the Village had attempted to charge an Objector a higher price for a copy of the application than it had charged someone else.

In the instant case, the City is not accused of denying anyone access to the Application. If the City had no local siting ordinance whatsoever, there would be no complaint because the County was not denied access to the Application and because the County was treated the same as everyone else requesting a copy. The record of the siting hearings, itself, does not reveal any lack of preparation by the County, nor does the County even argue in its Brief that it was prejudiced as a matter of fact, instead relying on American Bottom Conservancy for support of the proposition that it was prejudiced as a matter of law. In addition to the fact that in the instant case the County requested and received the Application almost two months before the hearing whereas in ABC the Objector got it two weeks before the hearing, what most importantly distinguishes the cases is that the County, here, could have gotten the Application or viewed it whenever it chose to do so..

IX. PRE-FILING CONTACTS BETWEEN TOWN & COUNTRY AND THE CITY WERE NOT IMPROPER

Petitioners arguments fall into two categories, the pre-filing contacts between the Applicant and the City before the February 19th City Council Meeting and the Applicant's presentation to the City Council on February 19, 2002. The first category of pre-filing contacts, which consists of contacts during the annexation process, negotiation of a Host Agreement, and

the City Attorney receiving input on Solid Waste Management Plans and a Local Siting Hearing Ordinance from the Applicant as well as others, are routine and occur in virtually every case. The County's argument that these are prejudicial is not made in good faith because it flies in the face of well established law. In addition to E & E Hauling v. Pollution Control Board, 115 Ill.App.3d 898, 451 N.E.2d 555 (2nd Dist. 1983), Fairview Area Citizens Task Force v. Pollution Control Board, 198 Ill.App.3d. 541, 555 N.E.2d 1178 (3rd Dist. 1990), and Southwest Energy Corp. v. Illinois Pollution Control Board, 275 Ill.App.3d 64, 655 N.E.2d 504 (4th Dist. 1995), which all grant approval to the various and customary pre-filing contacts between the parties, Town & Country would also cite to Concerned Adjoining Landowners v. Pollution Control Board, 288 Ill.App.3d 565, 680 N.E.2d 810 (June, 1997). In Concerned Adjoining Landowners, not only did the city annex a piece of land for the sole purpose of exercising siting jurisdiction, but the city actually bought the land which it annexed. Repeating and restating its arguments three or four times as occurs in the County's Brief doesn't change the fact that what they are missing is any evidence of collusion, dishonest dealings or actual bias.

Regarding the Mayor's advocating for the project, Section 39.2 was specifically amended to allow decision-makers to express opinions on a proposed application without becoming disqualified. It should also be noted that the Mayor was not one of the decision-makers, and that he never advocated that the City Council Members should do anything but their duty under the statute.

Petitioners next cite to an allegedly improper and prejudicial visit to other landfill facilities hosted by Town & Country six months prior to the filing of the Application. The County acknowledges in its Brief that all of the cases it cites deal with the decision-makers being taken to another facility while an application is pending. The County, however, argues that what

is critical is that no opponents were invited on this bus trip. That fact is simply not established. The County relies on the testimony of Christopher Bohlen, the Hearing Officer, whose testimony is properly read as Mr. Bohlen not knowing who was invited because he didn't concern himself with the matter (Bd TR 11-6 322). It is simply not fair for the County to equate this bus trip, about which little is known, to a facility which was never mentioned during the siting hearings with the extensive post-filing out-of-state trip in Concerned Citizens v. City of Havana, PCB 94-44 (May 19, 1994), where the facility visited by the city council members represented the model in the evidence at the siting hearing.

The County refers to a pre-filing letter from Town & Country's Attorney to the City Attorney as the "smoking gun" proving bias. (County Brief, Page 51). This seems both disingenuous and overly dramatic, because the pre-filing technical contacts between non-decision makers in this instance seems to be considerably more benign than the pre-filing substantive review successfully pioneered by the County's attorneys when they represented Will County, which activity was approved by the Court in Land & Lakes Company v. Illinois Pollution Control Board, 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000). Moreover, with regard to the instant letter, Christopher Bohlen testified that he received it by fax the day before the Application was filed, and that there were no follow-up discussions on any of the subject matter of the letter after filing of the Application. (Bd. TR. 11-4 243, 247). Bohlen also testified that he secured sample draft ordinances from a number of sources including the Applicant. (Bd. TR. 11-4 303). This is hardly the same as the situation in City of Havana, cited by the County on this issue, where the siting applicant was a party to the fee agreement with the hearing officer, and the hearing officer sent a draft version of an ordinance to the applicant for his review.

The County also, in its shotgun approach to the arguments, cites the March 12, 2002 letter

from Town & Country's Attorney to the City Attorney as an impermissible post-filing ex parte contact. The basis is that although the letter was also sent by fax, it may not have been received by regular mail until the day of the filing or the day after. Regardless, Christopher Bohlen testified he recalled receiving the fax before the filing and he never followed-up on it in any event. If Town & Country's Attorney and the City Attorney had been doing more talking about the siting ordinance after the Siting Application was filed, Town & Country might have been made aware of the April Amendment to that Siting Hearing Ordinance which changed the registration requirements, and the parties could have avoided all of the unpleasantness arising out of the disparity between the Applicant's Pre-Hearing Notice and the City's Siting Hearing Ordinance.

X. TOWN & COUNTRY'S PRESENTATION AT THE FEBRUARY 19, 2002 CITY COUNCIL MEETING WAS NOT IMPROPER OR PREJUDICIAL

Rather than reiterate the obvious argument that once again both Waste Management and especially the County take isolated statements from Town & Country's presentation at the February 19th City Council Meeting out of context, it is sufficient to point out that the minutes of that meeting are attached in their entirety to the County's Brief, and the Board can review them in their entirety to determine the complete context. However, a few blatantly false statements in Petitioners' Briefs need to be corrected. References on Page 6 of Waste Management's Brief that the public was not given notice or permitted to attend and the further reference to this City Council Meeting as a "closed door meeting" are simply not supported by the record. Mayor Green testified that industry presentations to the City Council were regular occurrences, and that Town & Country was, in fact, on the meeting agenda of a regularly scheduled, public City

Council Meeting. (Bd. TR. 11-6 176, 177, 182, 184). This was a public City Council Meeting and, in fact, the minutes of the Meeting reflect that the Mayor opened the Meeting after Town & Country's presentation to questions from both the Planning Commission and the press, and at least one reporter asked Tom Volini a question. (C3156, 3158). Exaggerating the facts doesn't change them.

It is the position of Town & Country that this Board's previous Order in Residents Against A Polluted Environment v. Landcomp Corporation and County of LaSalle, PCB 96-243 (July 18, 1996) closed the door on consideration of pre-filing contacts absent some preliminary showing of collusion or illegal activity. In response, the County cites Land & Lakes Company v. PCB 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000). At best, Land & Lakes supports the proposition that pre-filing contacts may be scrutinized to determine if there is pre-filing collusion between the applicant and the decision-maker. However, the Appellants in Land & Lakes, in apparent acknowledgment of the bright line test regarding pre-filing contacts announced in Residents Against A Polluted Environment did not argue that the process complained of represented ex parte contacts or pre-judgment of adjudicative facts. (743 N.E.2d at 194). In Land & Lakes, the County's technical experts conducted a pre-filing review of a draft siting application whereby suggestions for revision were made to the applicant, some of which suggestions were incorporated in the final application. The Appellants argued that this gave the applicant an unfair advantage at the siting hearing and virtually rendered the siting hearing meaningless. The proof they cited was that the report prepared by the County's technical expert was ultimately adopted almost verbatim by the County. Here, unlike in Land & Lakes, the Applicant's pre-filing presentation was out in the open rather than behind closed doors, and the Applicant received no input or feedback from the decision-maker or the decision-maker's representatives. Here, Town

& Country's statements to the City Council on February 19th are really in the nature of "we think we have a good proposal, and we hope you will agree after you hear the evidence at the statutory siting hearing." This is considerably more benign than a detailed pre-filing review between the parties' technical representatives which actually results in a revised application which addresses some or all of the concerns that the decision-maker's technical representatives may have expressed.

Waste Management's Brief acknowledges that there is a presumption that a decision-maker is unbiased, but argues that this presumption can be overcome upon a showing that members of the local authority prejudged the adjudicative facts. However, this presumption is overcome with facts, not with inferences. Christopher Bohlen testified at the Board Hearing that the City Aldermen knew exactly what was going on at the February 19th meeting and that he understood the Applicant as simply attempting to let the Council know what it intended to prove at subsequent hearings. (Bd. TR. 11-4 291, 296). The record does not reveal otherwise, and accordingly this Board's holding should be governed by the holding in Land & Lakes, which, although cited by the County, actually supports Town & Country:

> "Nothing in the record indicates that the county board failed to exercise its own judgment when it adopted the Olson Report. In the absence of any pre-filing collusion between the applicant and the actual decision-maker, i.e. the county board, the pre-filing contact between WM and Waste Services could not have deprived LALC or any other siting approval opponent of fundamental fairness." (743 N.E.2d at 194).

XI. THE CITY'S REQUIREMENT OF FOIA REQUESTS TO SECURE COPIES OF PUBLIC DOCUMENTS WAS NOT FUNDAMENTALLY UNFAIR

As argued in more detail in Town & Country's Brief in Chief, the City Clerk's practice of requiring a FOIA Request consisting of a simple form to be completed to secure copies of public records long predated the filing of the Application and was applied uniformly to everyone, including Town & Country.

XII. THE HEARING OFFICER WAS NOT BIASED

The County argues that the Hearing Officer was biased due to his extensive pre-hearing contacts with the Applicant in the context of his participation as City Attorney in the annexation proceedings and negotiations for a Host Agreement. Again, the County can only be bringing this argument in bad faith because the well established law is that such contacts are not even relevant on the issue of bias.

The County does not point to any conduct of the Hearing Officer evidencing his bias, nor does the County suggest that the Hearing Officer treated any participant unfairly at the hearing. A review of the entire hearing transcript, in fact, confirms the even-handedness with which Mr. Bohlen approached his responsibility as Hearing Officer. The County finally argues that a disinterested observer might conclude that the Hearing Officer was biased because he ruled against the County on its Motions to Quash. That same observer might also conclude that the County's Motions were not well taken. Ironically, Mr. Bohlen testified at the Board Hearing that he was personally opposed to the proposal. (Bd.TR 11-6 355).

XIII. THE CROSS-EXAMINATION FORMAT WAS NOT UNFAIR

Waste Management alleges that the round table cross-examination format whereby all cross-examination of the Applicant's witnesses was deferred until they had all completed their direct testimony was fundamentally unfair. Waste Management does not allege prejudice or harm as a result of this format. The Hearing Officer explained his reasons for using this format, those essentially being that questions, particularly from lay-people, would be more efficiently directed to the person most qualified to answer. (Bd. TR 11-4 251, 252). It is well established and has been consistently held that the right to cross-examination is not unlimited, and that the right may be modified without violating fundamental fairness. "Parties before a local governing body in a siting proceeding must be given the opportunity to present evidence and object to evidence presented, but they need not be given the opportunity to cross-examine opposing parties' witnesses." Southwest Energy Corp. 275 Ill.App.3d at 92-93, 655 N.E.2d 304 (4th Dist. 1995).

XIV. THE CITY COUNCIL'S FINDING THAT THE PROPOSED FACILITY IS SO LOCATED, DESIGNED, AND PROPOSED TO BE OPERATED THAT THE PUBLIC HEALTH, SAFETY, AND WELFARE WILL BE PROTECTED IS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

The one thing revealed in the Briefs of the parties is that there is ample evidence in the record for all of the parties to cite in support of their respective positions. It is not necessary here to argue that one side's evidence is more persuasive than the other since the very existence of ample evidence on both sides of the issues means, as a matter of law, that the City Council's determination cannot be against the manifest weight of the evidence. It doesn't matter whether the Board would choose on balance to believe the testimony of Devin Moose over that of Stuart Cravens. 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. Harris v. Day, 115 Ill.App.3d 762, 451 N.E.2d 262 (4th Dist. 1983). Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. Fairview Area Citizens Task Force v. Pollution Control Board, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3rd Dist. 1990).

Interestingly, the only dispute between the parties on this Criterion is on the characterization of the Dolomite Bedrock. All parties agree that there is an aquifer at the top of the Bedrock, and the real difference between them is in their assessment of the thickness of that aquifer. This hydro-geologic debate may be of academic interest, but it is of no practical value in assessing whether or not the Applicant has established this Criterion. The reason is that Town & Country's witnesses admitted throughout the siting hearing that they were proposing to build a facility with unique and enhanced engineering in direct proximity to the Uppermost Aquifer.

What the Petitioners are really arguing is that constructing a regional pollution control facility in direct proximity to an aquifer underlying most of Northern Illinois is inherently a bad thing to do. There is, however, no authority to support this argument, and the argument is, in fact, contrary to technical requirements of the Illinois Environmental Protection Agency. Devin Moose explained many times during his cross-examination that location and design are inter-twined, and what the Petitioners have ignored is that the proposed facility is specifically designed so as to be compatible with, and take advantage of, the natural hydro-geologic conditions. Both the inward hydraulic gradient and the additional engineering (12 foot recompacted sidewalls and recompacted structural fill at the base) make the presence of a thick layer of glacial tills between the facility and the Uppermost Aquifer unnecessary.

The City Council not only heard this testimony, but review of their special conditions

indicates that they understood the issues. The City Council, in fact, had nineteen special conditions related to its finding that Criterion ii had been proven. These include, among others, the condition that "adequate measures shall be taken to insure the protection of any and all aquifers from any contamination as required by the IEPA through its permitting process. Upon determination of the necessary measures, said measures shall also be approved by the City of Kankakee." (C3273).

XV. THE PROPOSAL IS CONSISTENT WITH ALL RATIONAL REQUIREMENTS OF THE COUNTY SOLID WASTE MANAGEMENT PLAN

Little more needs to be said on this subject in a Reply Brief. The Board can read the Plan and its Amendments and evaluate their applicability to the instant proposal. However, contrary to the assertion on Page 14 of Waste Management's Brief, the Applicant did prove that its proposal provides twenty years of disposal capacity for the County. (TR 64).

The Applicant has a Host Agreement with the host community. There is no Host Agreement with the County. The Applicant has a Property Value Protection Program. It was not approved by the County. The Applicant has an Environmental Contingency/Damage Fund/Guarantee in excess of the minimums imposed by the County, but it was not approved by the County. Therefore, the proposal complies with all the technical and rational requirements of the County Solid Waste Management Plan except the County's requirement to get its permission. That permission has been, and will continue to be, withheld.

The County Brief distills its argument to a succinct essence when it states, "The City Council decision should simply be reversed, and the application denied with prejudice as the County is the primary planning body for waste management, and the application is not and cannot

be consistent with Criterion viii." (County Brief, Page 65). The County, therefore, admits that it thinks it has the power to unilaterally and without justification prevent the City from ever exercising its planning and siting jurisdiction. The patent illegality on multiple levels of such a position has been discussed fully in Town & Country's Brief in Chief.

In a similar vein, Waste Management has argued that, "If the intent of the Plan does not allow or provide for the proposed facility, consistency cannot be established," (Waste Management Brief, Page 23), and cited for that proposition, Waste Hauling, Inc. v. Macon County Board, PCB 91-223 (May 7, 1992). Like many of the cases cited by Kankakee County, this case also does not support the proposition for which it is cited. The Board in Waste Hauling found that the County's decision of inconsistency with its Solid Waste Management Plan was not against the manifest weight of the evidence, and in doing so the Board gave substantial deference to the decision-maker's reading and interpretation of the language in the Plan.

Kankakee County lastly argues that the testimony of Dr. Shoenberger, because it was based on erroneous legal assumptions and because much of it was stricken, is not even reviewable and should be disregarded. (County Brief, Page 67). This raises an interesting point since if this Board finds, as Town & Country would hope, that the Application need not be consistent with a County Solid Waste Management Plan which illegally and unconstitutionally attempts to restrict and usurp the siting jurisdiction of the City, the testimony of Dr. Shoenberger does, indeed, become irrelevant. Since he was the only witness who testified on June 17th, (even opening statements by the parties were deferred until the next day), the exclusion of some people from the hearings on June 17th because of space limitations now truly becomes harmless error.

XVI. CONCLUSION

The Petitioners here have apparently taken their guidance from a misreading of the Board's decision in the American Bottoms Conservancy case, a reading that has them believing that the cumulative affect of a number of small errors, none of which is individually significant enough to alter the outcome, can lead to a finding that the proceedings were, in their totality, fundamentally unfair. Waste Management Of Illinois was coincidentally the unfortunate losing party in the ABC case. In an effort to turn some molehills into a mountain, the County has raised every conceivable argument. This list includes some that are contrary to well established law such as non-owners signing for registered mail, some that blatantly ignore the facts in the record such as failure to timely serve the Railroad, and some that are just silly such as the argument that the statutory Section 39.2 hearing actually commenced on February 19th rather than June 17th. This type of shotgun approach, where merit of the argument is never a consideration, offends both the truth and the law, and the Board is asked to be mindful of this as it evaluates whether any of the County's other arguments have real merit. The truth is that the totality of the record tells the story far better than the one-sided, out-of-context witness summaries appended to the County's Brief. The pre-filing contacts between the parties were routine, uneventful and of a sort that has been approved since E&E Hauling was originally decided by our Supreme Court. The only thing unusual about the February 19, 2002 presentation by Town & Country to the City Council was that it was transcribed in its entirety, and it happened out in the open where everyone could see and hear. It certainly had less substantive affect and was less subversive to a fair hearing process than the practice of "pre-filing application review" pioneered by an attorney in this case when he had a similar role in Will County and Waste Management was the Applicant. (A fact proudly noted in the County's Brief at page 30).

Not everything went perfectly immediately before and on the first day of the eleven days and nights of public hearings but the Hearing Officer acted decisively to cure the errors, and no one was prejudiced other than those who arguably wanted to be for purposes of appeal. The two thousand plus page transcript of the siting hearing reveals that everyone who wanted to participate did so exhaustively with the result that the proposal was thoroughly tested and probed. The hearings themselves were contentious, but conducted by the Hearing Officer in an even-handed manner. The result was that both the strengths and weaknesses of the Application were completely revealed to the City Council. The Findings of the City Council, as well as the conditions imposed, indicate that the City Council considered all the evidence on both sides. The City Council carried out its responsibility in considering and weighing all of the evidence. The only thing lacking from this record is any evidence that any City Council Member had any actual bias or prejudgment.

The decision of the City Council should be affirmed.

Respectfully Submitted,
Town & Country Utilities, Inc. and
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