ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	No. PCB 03-104
	)	
vs.	)	(Pollution Control Facility Siting Application)
	)	
COUNTY BOARD OF KANE COUNTY, ILLINOIS,	)	
	)	
Respondent.	)	

ORIGINAL

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on May 19, 2003, we filed with the Illinois Pollution Control Board, the attached **MOTION FOR LEAVE TO FILE REPLY BRIEF INSTANTER,** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

Donald J. Moran
PEDERSEN & HOUPT
161 North Clark Street, Suite 3100
Chicago, Illinois 60601
(312) 641-6888
Attorney Registration No. 1953923

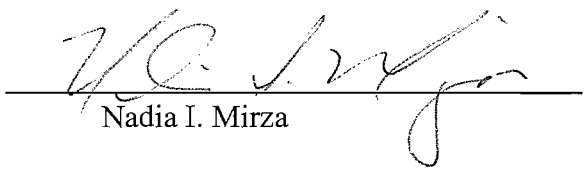
PROOF OF SERVICE

Nadia I. Mirza, a non-attorney, on oath states that she served the foregoing **MOTION FOR LEAVE TO FILE REPLY BRIEF INSTANTER** by facsimile on this 19th day of May, 2003:

Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
Chicago, IL 60601

Jennifer J. Sackett Pohlenz
Querrey & Harrow, Ltd.
175 W. Jackson, Suite 1600
Chicago, IL 60604
Via Facsimile - (312) 540-0578

Mr. Brad Halloran
Assistant Attorney General
Environmental Division
100 West Randolph, 11th Floor
Chicago, Illinois 60601



Nadia I. Mirza

ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	No. PCB 03-104
	)	
vs.	)	(Pollution Control Facility
	)	Siting Application)
COUNTY BOARD OF KANE COUNTY, ILLINOIS,	)	
	)	
	)	
Respondent.	)	

MOTION FOR LEAVE TO FILE REPLY BRIEF *INSTANTER*

Petitioner, WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), by its attorneys Pedersen & Houpt, requests leave to file its Reply Brief in Support of its Petition for Review in the above-captioned matter ("Reply Brief") *instanter*. In support of this Motion, WMII states as follows:

1. WMII's Reply Brief was due to be filed today, May 19, 2003.

2. Due to a word-processing error, WMII was unable to file its Reply Brief by 4:30 p.m. on May 19, 2003.

3. WMII intends to file its Reply Brief first thing in the morning on May 20, 2003, and to serve copies via facsimile to all counsel of record immediately thereafter.

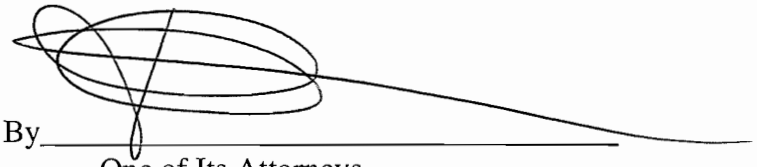
4. Counsel for Kane County has been contacted about the delay and has no objection to WMII filing its Reply Brief on May 20, 2003.

5. The decision deadline is June 19, 2003 and the one-day extension in filing the Reply Brief should not unduly delay these proceedings.

WHEREFORE, WMII requests that it be given leave to file its Reply Brief *Instanter* and for any such further and other relief deemed appropriate.

Respectfully Submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.



By_____
One of Its Attorneys

Donald J. Moran
Lauren Blair
PEDERSEN & HOUPT, P.C.
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Telephone: (312) 641-6888

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ORIGINAL

RECEIVED
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MAY 20 2003
STATE OF ILLINOIS
Pollution Control Board

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	No. PCB 03-104
	)	
vs.	)	(Pollution Control Facility
	)	Siting Application)
COUNTY BOARD OF KANE COUNTY, ILLINOIS,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that at 8:15 a.m. on May 20, 2003, we filed with the Illinois Pollution Control Board, the attached **REPLY BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC. IN SUPPORT OF THE SITING APPEAL TO CONTEST THE KANE COUNTY BOARD SITE LOCATION DENIAL** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

Donald J. Moran
PEDERSEN & HOUPT
161 North Clark Street, Suite 3100
Chicago, Illinois 60601
(312) 641-6888
Attorney Registration No. 1953923

PROOF OF SERVICE

Victoria L. Kennedy, a non-attorney, on oath states that she served the foregoing **REPLY BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC. IN SUPPORT OF THE SITING APPEAL TO CONTEST THE KANE COUNTY BOARD SITE LOCATION DENIAL** by hand delivery to the parties listed below on or before 9:00 a.m. on this 20th day of May, 2003:

Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
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Jennifer J. Sackett Pohlenz
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Assistant Attorney General
Environmental Division
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Victoria L. Kennedy

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	No. PCB 03-104
	)	
	)	(Pollution Control Facility
vs.	)	Siting Appeal)
	)	
COUNTY BOARD OF KANE COUNTY, ILLINOIS,	)	
	)	
Respondent.	)	

REPLY BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC. IN SUPPORT OF THE SITING APPEAL TO CONTEST THE KANE COUNTY BOARD SITE LOCATION DENIAL

PEDERSEN & HOUPT
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
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Petitioner,	)	No. PCB 03-104
	)	
	)	(Pollution Control Facility
vs.	)	Siting Appeal)
	)	
COUNTY BOARD OF KANE COUNTY, ILLINOIS,	)	
	)	
	)	
Respondent.	)	

REPLY BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC. IN SUPPORT OF THE SITING APPEAL TO CONTEST THE KANE COUNTY BOARD SITE LOCATION DENIAL

I. INTRODUCTION

In its Introduction, Respondent County Board of Kane County, Illinois ("County") makes numerous misstatements. Three will be addressed here.

First, the County states that "WMII proposed to locate the transfer station in unincorporated Kane County, on the same site and within the boundaries of the existing Woodland Landfill," and references the Application Criterion 2 report, Figure 2. (County Response Brief, p. 1.) There is no "Figure 2" within the Criterion 2 report. In addition, the Facility will not be located within the boundaries of the existing Woodland Landfill, but will be located on an approximately 9-acre parcel located at the southeast corner of the "permitted Woodland Landfill property." (Application at Criterion 2, p. 2-1, and Figure 2-1.)

Second, the County states that its decision "is comprised of Resolution 02-431, the local hearing officer's findings of fact and law, and a County Board Member, Don Walter's four page written summary." (County Response Brief, p. 2.) In fact, the Walter Memorandum was a six page document. (PCB Hearing, Petitioner's Exhibit No. 1.) Moreover, it was not attached as an exhibit to Resolution 02-431, but merely referred to in that Resolution. (Id.)

Third, the County states that, in addition to criteria 2, 3, 6 and 8, the County Board also found criteria 1 and 5 were not satisfied. (County Response Brief, pp. 2, 47.) Resolution 02-431 adopted the Findings of the Hearing Officer ("Findings"), except to the extent they were inconsistent with the Walter Memorandum. These Findings concluded that the criteria were met subject to conditions. The Walter Memorandum stated that criteria 2, 3, 6 and 8 were not met. Admittedly, the Walter Memorandum is at times opaque and a difficult document to understand. Nonetheless, any fair reading of that document would not disclose any mention of criteria 1 and 5, much less the conclusion that criteria 1 and 5 were not satisfied. If the County's contention that criteria 1 and 5 were found not met had any merit, then it would have been unnecessary to refer to the Walter Memorandum at all, because the Findings of the Hearing Officer alone would have established that all the subject criteria were not satisfied. The County's contention is baseless.

Concerning Respondents' legal arguments, the County further claims that the Walter Memorandum was a summary and opinion about the evidence to which WMII had no right to respond. (County Response Brief, pp. 5, 12-13.) Amicus Curiae Village of South Elgin ("Village") claims that the Walter Memorandum was no different than the report prepared by county staff in Land and Lakes Co. v Illinois Pollution Control Board, 319 Ill. App. 3d 41, 743 N.E.2d 188, 195-96 (3d Dist. 2000). In fact, the Walter Memorandum was an advocacy

document intended to persuade the County Board to deny the Siting Application. Unlike the Olson Report in Land and Lakes Co., the Walter Memorandum contained legal and factual errors on which the County Board's denial was based. Such a result was fundamentally unfair, and explains why the County Board's failure to find that criteria 2, 3, 6 and 8 were met is against the manifest weight of the evidence.

In addition, the County and Village attempt to support the denial of the Woodland Transfer Facility ("Facility") Site Location Application ("Application") request by asserting the lack of strict compliance with certain technical requirements of the Kane County Siting Ordinance ("Ordinance") and the Kane County Solid Waste Management Plan ("the Plan"). (County Response Brief, pp. 16, 27, 36, 44-47; Amicus Brief, pp. 4-8.) Their attempt is unavailing because those requirements, when they are not unreasonable or irrelevant to a proper consideration of the statutory criteria, are both inconsistent with the Act and not probative of whether the criteria were satisfied.

II. ARGUMENT

A. The County Board May Not Deprive WMII of Its Right to Present Its Case By Basing the Siting Decision On The Wrong Legal Standards

The County contends that WMII asserts a right to comment on the fact finder's or decision-maker's decision prior to the decision being finalized. (County Response Brief, p. 6.) This contention assumes that the Walter Memorandum was the County Board decision. In fact, the Walter Memorandum was not a decision, but an argument by an opponent intended to persuade the County Board to reach a decision.

WMII does not claim a right to comment on the County Board's decision before it is finalized. WMII does not claim that it must be given an opportunity to respond to the County

Board's decision before it is voted upon. Rather, WMII asserts that the County Board may not base its decision on a memorandum that misstates the law and facts relating to the statutory criteria. It is fundamentally unfair for the County Board to rely for its decision on incorrect legal standards and inaccurate facts supplied to it by a County Board member opposed to the Application. The resulting decision is a legislative, not an adjudicative, one.

Basing its denial on the wrong legal standard and erroneous facts, the County Board has deprived WMII of a full and fair opportunity to present its case. By accepting and applying the incorrect legal standard for determining whether criteria 2, 3, 6 and 8 were satisfied, the County Board rendered WMII's factual presentation on those criteria irrelevant and immaterial. This nullification of WMII's evidence prevented WMII from making its evidentiary showing that those criteria were met and that the Application should be approved. This preclusion deprived WMII of the opportunity to present its case, and was fundamentally unfair.

Similarly, the reliance on erroneous facts deprives WMII of its right to present its case. It is well established that the decision maker's reliance on inaccurate or erroneous facts is fundamentally unfair. Land and Lakes Co. v. Pollution Control Board, 245 Ill.App.3d 631, 616 N.E.2d 349, 354 (3d Dist. 1993); City of Rockford v. Winnebago County, No. PCB 87-92, slip op. at 9 (November 19, 1987). Where, as here, those erroneous facts are relied upon in denying that the statutory criteria have been met, such reliance is highly prejudicial. Where, as here, an applicant has been afforded no opportunity to respond to or correct those facts, the applicant's right to present its case has been fatally compromised, and the procedure has been rendered fundamentally unfair.

B. WMII Did Not Waive Its Right to Object to the Walter Memorandum

The County contends that because WMII was in attendance at the December 10, 2002 County Board meeting and did not raise an objection to the Walter Memorandum or request an opportunity to respond thereto, WMII waived its right to argue in this appeal that the Walter Memorandum was an adversarial document that rendered the local siting process fundamentally unfair. The County's waiver argument only highlights the fundamental unfairness of introducing the Walter Memorandum, an inaccurate advocacy document, at the County Board public meeting, a non-advocacy proceeding.

Waiver occurs by failing to object to some known bias or impropriety in any of the proceedings prior to or during the local hearings. Miller v. Pollution Control Board, 267 Ill. App. 3d 160, 170, 642 N.E.2d 475, 484 (4th Dist. 1994); A. R. F. Landfill, Inc. v. Pollution Control Board, 174 Ill. App. 3d 82, 88, 528 N.E.2d 390, 394 (2d Dist. 1988). While true that a party's failure to object in a judicial or administrative proceeding generally results in a waiver of the right to raise the issue on appeal, the County's waiver argument ignores the obvious fact that the December 10, 2002 County Board meeting was not a judicial or administrative proceeding.

The County implies that by simply being present at the December 10, 2002 County Board meeting, WMII had the ability to object and adequately respond to all of the factual and legal inaccuracies in the Walter Memorandum. However, county board meetings are not proceedings wherein attendees have the ability to raise objections, present evidence, make arguments and obtain judicial or administrative rulings to which they can take exception in order to preserve those issues for appeal. Rather, a county board meeting is the forum wherein county board members gather to review, discuss and vote on various matters of county board business on the

agenda. While public comment may be taken, attendees certainly have no standing to object to the deliberations of county board members.

Moreover, had WMII been aware of the contents of the Walter Memorandum and attempted to meaningfully challenge it at the County Board meeting, such action might have been construed as an improper *ex parte* contact between the Applicant and the decision-maker. See Land and Lakes Co. v. Randolph County Board of Commissioners, No. PCB 99-69, slip op. at pp. 3-4, 7-8 (September 21, 2000) (local siting proceeding found to be fundamentally unfair where landfill opponents spoke to board members at a county board meeting about their opposition to the landfill.) This is exactly why it was fundamentally unfair to have presented the Walter Memorandum at the County Board meeting, after the public hearing had been concluded and the public comment period had closed, when WMII was effectively powerless to take any meaningful action in response.

Even if WMII had the ability to adequately object and respond to the Walter Memorandum at the County Board meeting, a waiver is only effective if it is a clear and knowing waiver. Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill. App. 3d 541, 545, 555 N.E.2d 1178, 1180-81 (3d Dist. 1990). As stated in Fairview Area Citizens Taskforce, the case cited by the County in support of its waiver argument, a party is only obligated to object "*after knowledge* of the alleged [impropriety]." Id. (emphasis added.) There is absolutely no evidence in the record that WMII knew about the Walter Memorandum or its contents prior to, or at the time of, the County Board's decision denying local siting approval. Indeed, the record contains no indication that the Walter Memorandum was distributed to WMII or any of the persons who attended the County Board meeting.

The statement in the County's Response Brief that "WMII heard County Board Member Walter read substantial portions of his four-page written document" is simply false. (County Response Brief, p. 10.) No transcript of the December 10, 2002 meeting exists. There is nothing in the record indicating exactly what portions, if any, Mr. Walter read aloud from the Walter Memorandum at the County Board meeting, and there is certainly no evidence that WMII "heard" any of it. Given the lack of any citation to the record to support such a proposition, the County apparently felt compelled to make that statement based upon pure conjecture.

The portion of the record (C003126) to which the County cited in its Response Brief purports to be a synopsis of statements made at the meeting by Derke Price and Jim Hanson on behalf of the Village, and by Dale Hoekstra, Director of Operations for WMII. (County Response Brief, pp. 10, 19.) No transcript of the December 10 meeting exists. The following is the synopsis of statements purported to have been made by Mr. Hoekstra:

> Dale Hoekstra, Director of Operations for Waste Management stated that they would operate the Woodland Transfer Station with the same high standards that they have Settlers Hill Landfill and *that they will accept the conditions*. He had two comments, one that extension of hours in emergency situations is approved and that the Board take into consideration similar conditions for any other facility located in Kane County.

(C003126) (emphasis added.) If anything, the logical inference from this synopsis is that WMII was not aware of the Walter Memorandum (which advocated denial of siting approval and rejected approval with conditions) in light of the indication that WMII "will accept the conditions."

Given that the record is devoid of any evidence that WMII received, reviewed or heard any portion of the Walter Memorandum at the meeting, the County cannot, in good faith, allege

that WMII had any knowledge of the Walter Memorandum or its contents. Therefore, without advance knowledge of the Walter Memorandum and its objectionable contents, WMII could not possibly have given a clear, unequivocal and unambiguous waiver of its right to object to that document on appeal.

C. The Walter Memorandum Contains Numerous Misapplications of Law

The County argues that WMII did not adequately or correctly show how the Walter Memorandum misapplied certain legal standards, and therefore, WMII's arguments in this regard should be denied. (County Response Brief, pp. 14-16.)

The County first claims that, in addition to incorrectly articulating the legal standard for criterion 2, WMII also failed to allege how the Walter Memorandum misapplied the legal standard in reaching its conclusion that criterion 2 was not met. (County Response Brief, pp. 14-15.) In its opening Brief, WMII cites Industrial Fuels & Resources v. Pollution Control Board, 227 Ill. App. 3d 533, 592 N.E.2d 148 (1st Dist. 1992), for the principle that criterion 2 requires a demonstration that the design or operation of the proposed facility does not pose an unacceptable risk to the public health and safety. (Petitioner's Brief, p. 8.) It is unclear why the County believes that this is not the holding of Industrial Fuels, given that the First District clearly held that the findings of the Board and the county board that criterion 2 had not been met in that case were against the manifest weight of the evidence because there was nothing in the record to rebut or contradict the applicant's showing that the facility was designed to protect the public health, safety, and welfare. Industrial Fuels, 592 N.E.2d at 157. In addition to stating the correct legal standard, WMII clearly explained that the Walter Memorandum misapplied this legal standard by basing its conclusion that criterion 2 had not been met on WMII's alleged failure to identify certain schools in the area and to consider the end use plan for the Woodland Landfill, *rather*

than evaluating how the design or operation of the Facility would pose an unacceptable risk to public health and safety. (Petitioner's Brief, pp. 8-9.)

With respect to criterion 6, WMII explained in its opening Brief that it was legally erroneous for the Walter Memorandum to conclude that criterion 6 had not been met on the supposed basis that "[a]ll existing routes have been shown to be *inadequate* by expert testimony" when all that is required under the Act is for the applicant to demonstrate that traffic patterns to and from the facility are so designed as to *minimize* the impact on existing traffic flows. (Petitioner's Brief, p. 11; County Response Brief, p. 15.) (emphasis added.) In its Response Brief, the County attempts to argue that there is no basis for WMII's assertion that the County Board considered "adequacy" rather than "minimization." (County Response Brief, p. 15.) In fact, that is precisely what the Walter Memorandum stated, that is, "a(ll existing routes have been shown to be inadequate." It is illogical to conclude, as the County invites, that the Walter Memorandum used "inadequate" to refer to WMII's inability to meet criterion 6, when the plain language of the phrase shows that the word "inadequate" modifies the word "routes."

Finally, with respect to criterion 8, the County does not argue that WMII inadequately or incorrectly explained how the Walter Memorandum misapplied that legal standard. Instead, the County argues that WMII's fundamental fairness argument is really a manifest weight of the evidence argument. However, WMII's fundamental fairness argument stands separate and apart from WMII's manifest weight of the evidence argument, and is simply this: because the Walter Memorandum is an advocacy document submitted to the County Board for the purpose of persuading it to deny local siting approval, and because the Walter Memorandum contains misstatements of facts and law which were relied upon by the County Board in making its decision, the local siting process was tainted and resulted in a legislative decision.

D. The Walter Memorandum Contains Numerous Factual Inaccuracies

The County claims that "WMII wants the IPCB to rely on WMII's paraphrased and out-of-context reiteration of portions of that portion of Resolution 02-431 comprised of County Board Member Dan Walter's four-page document." (County Response Brief, p. 14.) The County further argues that "an 'inaccuracy,' if any, was insignificant (particularly in a record that is almost 5000 pages long); is not of a substantial enough fact to reverse the decision of the Kane County Board on a manifest weight of the evidence argument; and did not interfere with the procedural due process of the hearings and WMII's right to be heard." (County Response Brief, p. 17.) This argument is without merit. The County argues that the quantity of evidence presented in this record somehow justifies the appropriateness of the County Board's decision and overshadows the "insignificant" inaccuracies. However, quantity does not determine relevance or overcome materiality. The inaccuracies in the Walter Memorandum were significant, and provided the basis for the denial of the Application.

Contrary to the County's claim, the erroneous facts are significant because they were the basis for the Walter Memorandum's argument that criteria 2, 3, 6 and 8 were not met. The County's response to the factual inaccuracies in the Walter Memorandum, was not to demonstrate the accuracy of those facts but, rather, to dismiss them summarily as insignificant or not substantial. (County Response Brief, p. 17.)

The County's attempt to explain the inaccurate facts are now discussed in the order in which they appear in the County Response Brief.

1. Criterion 6: Traffic Volumes:

> "Under cross-examination, their traffic expert's testimony confirmed that the traffic volume represented as existing traffic at the time of their application should have been about 160, not the five-year average of 227

> as shown. They presented a *five-year average* traffic volume when the volume of landfill related **truck traffic was significantly decreasing**. Their conclusions, including their assertion that traffic would *decrease*, are flawed. (Pp. 28-29, 9/30/02)" (Walter Memorandum, p. 1.)

This is the very first statement in the Walter Memorandum addressing any criterion. Contrary to the County's contention, it is not paraphrased, nor taken out of context. (Petitioner's Brief, p. 15.) The Walter Memorandum suggested that Mr. Miller relied upon the wrong traffic volume, utilizing an historical number rather than an actual number. Hence, the Walter Memorandum argues that WMII's conclusions regarding criterion 6 "are flawed" and, for this reason, should be rejected. (Walter Memorandum, p. 1.) However, this is an incorrect representation of Mr. Miller's testimony. (Petitioner's Brief, pp.14-15.)

Mr. Miller testified that the number of vehicles at the Facility initially would be less, even at 1,000 tpd, due to the mix of the types of trucks used at the Facility. (9/30/02 Tr. at 34-35.) The County fails to acknowledge all of the actual traffic-count data contained in the Application, supporting the traffic volumes utilized by Mr. Miller to develop his opinion regarding the appropriate traffic volumes. The County claims that Mr. Miller's testimony is flawed and that he is inconsistent. The objection is groundless. Mr. Miller testified that the vehicle count per day increases at the time of the Facility opening due to the addition of transfer trailers. However, he does not state that truck volumes will increase over existing, but that the mix of trucks will be different and still result in a lower volume over existing. (9/30/02 Tr. at 35.)

The Walter Memorandum mischaracterizes Mr. Miller's testimony and, in so doing, stated that WMII's conclusions regarding criterion 6 were flawed and must be rejected. This mischaracterization was one of the bases for the County Board's denial of criterion 6.

2. **Criterion 6 – Traffic Signal Phasing:**

> "The *traffic expert for the applicant* asserted that the use of Rt. 25 to Bartlett Road would not work for multiple reasons. Among these reasons, the intersection would **require a change in the traffic signal phasing** which **IDOT has informed them would not be granted.** (pp. 32-34, 9/30/02)." (Walter Memorandum, p. 2.)

Contrary to the County's claim, this statement is not paraphrased or taken out of context. (Walter Memorandum, p. 2.) The statement is erroneous and misleading because it suggests that a request made to IDOT for a signal change at the Rt. 25/Dunham Road intersection "would not be granted." (Petitioner's Brief, p. 15.) In fact, the record established that Mr. Miller had a conversation with IDOT regarding a traffic signal phase change at the Rt. 25/Dunham Road intersection. IDOT did not reject a request for a signal change. It indicated its knowledge of the intersection and its reluctance to make a change at a time when the Stearns Road realignment was already scheduled for construction. (Petitioner's Brief, pp. 15, 16; 9/30/02 Tr. at 32, 33.)

In addition to its falsity, the Walter Memorandum's statement that a request for a signal change "would not be granted," suggested to the County Board that WMII was unable to demonstrate that criterion 6 could be met. This was an unfair characterization that was considered by the County Board in deciding whether criterion 6 was satisfied.

3. **Criterion 6 – Traffic Signal Warrants:**

> "A traffic signal would ultimately result in *three traffic signals within a half-mile*. Mr. Miller, for the applicant, indicated that warrants "…**would not even be remotely close**" to meeting criteria for a signal. (p. 29-30, 10/01/02) It is entirely **inappropriate** to offer this as a "remedy" to address one of the many deficiencies **based on expert testimony** and our inability to guarantee this condition." (Walter Memorandum, p. 2.)

Contrary to the County's claim, this statement is not paraphrased. It is taken from a paragraph in the Walter Memorandum describing left turns out of the Facility and the addition of a traffic signal at that location. Nothing has been taken out of context. The Walter Memorandum indicates that it "is entirely inappropriate to offer this as a 'remedy' to address one of the many deficiencies...." at the Facility entrance. (Walter Memorandum, p. 2.) The suggestion that WMII offered a traffic signal to remedy a deficiency at the Facility entrance, when there is no warrant for a signal, is a key consideration in the County's consideration of criterion 6 because it implies that WMII acknowledged a deficiency and attempted to correct it with a traffic signal that could not be justified. However, WMII did neither. (10/01/02 Tr. at 29.)

First, there is no evidence presented in the Application that WMII recommended or offered to install a traffic signal at the Facility entrance. (Petitioner's Brief, p. 16; Application at Criterion 6.) To the contrary, *it was Kane County's own expert*, Mr. Brent Coulter, who recommended the addition of a traffic signal at the Facility entrance. (emphasis added) (Petitioner's Brief, pp. 16, 17; 10/03/02 Tr. at 79-81, 89.) Mr. Coulter even admitted that "if the site is approved and volumes are monitored, operating conditions are monitored, signals may not be warranted..." (Petitioner's Brief, pp. 16, 17; 10/03/02 Tr. at 141.)

The County fails to recognize the inherent error in Mr. Walter having ascribed the recommendation of a traffic signal to Mr. Miller and not to its own expert, Mr. Coulter. This error misled the County Board such that it might presume that it was WMII who recommended this "entirely inappropriate" remedy, protecting the testimony of the County's witness, and protecting Mr. Walter's opinion, which clearly disagreed with the County's own expert.

Second, the County misrepresented the proposed condition of the Hearing Officer in its Response Brief, stating "that a traffic signal was included in a proposed condition for the transfer facility and WMII's representative, Dale Hoekstra, agreed to the conditions." (County Response Brief, p. 19.) This statement is *an incomplete recitation* of the Hearing Officer's proposed condition, leaving out a vital term. The Hearing Officer actually recommended "(t)he Applicant shall install or provide the funds to the applicable highway authority to install a traffic signal control at the site driveway and access to Il. Rt. 25, *if warranted or required* by Kane County Division of Transportation or the Illinois Department of Transportation." (emphasis added) (Findings, p. 33.) Further, the County claims that the acceptance of this condition is part of the evidence in this record, but fails to indicate that Mr. Hoekstra agreed to this condition *during a public statement made at the December 10, 2002* County Board meeting. Prior to that statement on December 10, 2002 (the County Board decision date), the only evidence in this record that the County Board and Mr. Walter could have relied upon was the recommendation of a traffic signal by the County's own witness.

4. **Criteria 2 and 8 – Schools:**

> "Criteria 2 required that they *protect the health, safety and welfare of the public*. While agreeing that it would be **important to the "...health and safety and welfare of those students**" to have traffic studies reflecting the routes of these students, their traffic expert admitted **none were considered**. (pp. 41-42, 09/03/02.) *Had they complied* with **Section 28(a)(4) of our Ord. 01-281**, *they would have identified the schools as well as subsurface mining activities to the north already generating large volumes of trucks*." (Walter Memorandum, p. 3.)

Contrary to the County's claims, this is not a paraphrase, but a direct quote from the Walter Memorandum regarding development of two new schools to be located "approximately 1.5 miles north of the site." (Walter Memorandum, p. 3.) In its Response Brief, the County

simply omits all of the testimony presented by Petitioner's regarding the efforts taken by Mr. Miller to obtain bus routing information and his knowledge of the schools. In fact, Mr. Miller and Mr. Lannert considered the two new schools in evaluating the Facility relative to traffic and minimizing incompatibility with the surrounding area. (Petitioner's Brief, pp. 17-19; 9/30/02 Tr. at 41, 42; 10/01/02 Tr. at 85, 86, 122.)

The Walter Memorandum incorrectly asserted that WMII did not consider the public health, safety and welfare of the students at the two new schools. Mr. Miller and Mr. Lannert testified to their knowledge of the schools, the location of the schools, discussion with the school districts, and attempts to obtain bus routing information, and concluded that at a distance of 1½ miles, the Facility did not pose any threat to the public health, safety and welfare of the students. The County Board's consideration of the Walter Memorandum statements regarding school bus routes was a factor in its decision regarding criterion 2.

5. Criteria 2 and 3 – Woodland Landfill End Use Plan:

> "...the **end use plan** submitted with that application [1988 siting application] makes it clear that the intended use for this site is *passive recreation.*"
>
> "**These conditions were not taken into consideration in Criteria 2**, ... or in that portion of **Criterion 3** that deals with incompatibility with the surrounding area. They propose to use the site drive that was to become the access drive to the park for *hundreds* of trucks weighing up to 80,000 pounds each, traveling in and out of the proposed facility 96 hours per week. This will directly conflict with the planned/promised use as a park." (Walter Memorandum, p. 3, 4.)

Contrary to the County's claims, these two statements are not paraphrased and are direct quotes from the Walter Memorandum regarding the proposed end use of the Woodland Landfill. These statements in the Walter Memorandum imply that criterion 2 was not met because the site drive that was to become the access drive to the open space/park on the Woodland Landfill

would be used by "hundreds of trucks weighing up to 80,000 pounds each, traveling in and out of the proposed facility 96 hours per week." (Walter Memorandum, p. 4.) It also argued that this traffic on the access drive justified a rejection of criterion 3, because such traffic "will directly conflict with the planned/promised use as a park." (Walter Memorandum, p. 4.) Thus, the assertion that hundreds of trucks traveling in and out of the facility 96 hours per week was a basis for the County Board's conclusion that criterion 2 and 3 were not met.

The statement that the site drive was to become the access drive to the park for *hundreds* of 80,000-pound trucks traveling in and out of the proposed facility 96 hours per week is untrue. First, a different entry location would be provided to the park. (Petitioner's Brief, pp. 19-21; 9/19/02 Tr. at 146.) Second, a review of Tables 1 and 2 presented in the Metro report discloses the projected traffic volumes entering the Facility each day: 152 roll-off trucks, weighing approximately 39,000 lbs each when fully loaded; 142 packer trucks, weighing approximately 56,000 lbs each when fully loaded; and 108 transfer trailers, weighing approximately 73,280 lbs each when fully loaded and leaving, at current roadway weight restrictions. (Petitioner's Brief, pp. 19-21; Application at Criterion 6, pp. 10-11.) None of the trucks entering or leaving the Facility will weigh 80,000 pounds. Only approximately 108 transfer trailers *will leave the Facility* weighing approximately 73,280 pounds.

Third, trucks will not be traveling in and out of the Facility 96 hours per week. The *hours of waste acceptance* for the Facility are 6:00 a.m. to 6:00 p.m., Monday through Saturday, which is 72 hours per week. (Petitioner's Brief, pp. 19-21; Application at Criterion 6, p. 10.) Mr. Hoekstra testified twice that even though a facility may have specified, permitted hours of waste acceptance, in actuality, the operator may choose to have waste acceptance hours that are

shorter than the permitted waste acceptance hours. (Petitioner's Brief, pp. 19-21; 9/26/02 Tr. at 51; 10/3/02 Tr. at 9, 11.)

The County simply ignored all of the evidence in this record that demonstrates the erroneous nature of Mr. Walter's summarized evidence as stated above. There is no demonstration in the County Response Brief that WMII's witnesses were inconsistent on this issue and that Mr. Walter's "references are accurately reflected in the record." (County Response Brief, p. 21.)

The conclusion in the Walter Memorandum that there was a "conflict between the proposed transfer station and the end use for Woodland Landfill" is baseless. The County ignores all of the evidence in this record which establishes the contrary. The Woodland Landfill property is approximately 213 acres in size. The Facility will be located on a 9-acre parcel, south of the Woodland Landfill, and will take up approximately 4.2 percent of the Woodland Landfill property. (Petitioner's Brief, pp. 19-21; Application at Criterion 2, p. 2-1; Petitioner's Exhibit No. 11.) The Hearing Officer noted in his Findings that "The area on which the transfer station is to be erected is not part of the Woodland Landfill as permitted by the Illinois Environmental Protection Agency." (Petitioner's Brief, pp. 19-21; Findings, p. 9.)

The Facility will utilize only 4.2 percent of the Woodland Landfill property. It has been concluded by Mr. Lannert to be compatible with the surrounding area. (Petitioner's Brief, pp. 19-21; 9/17/02 Tr. at 56.) A separate entrance will be provided to the park, and the end use plan will be developed as indicated in the 1988 Siting Approval. The Walter Memorandum ignored all of this evidence in its conclusion that the Facility "will directly conflict with the planned/promised use as a park." (Walter Memorandum, p. 4.)

The County Board's consideration of this erroneous conclusion was highly prejudicial because it provided a seemingly compelling basis to deny that criteria 2 and 3 were met. However, as demonstrated by the evidence, the Facility would in no way conflict with the proposed end use for the Woodland Landfill.

E. The Walter Memorandum Improperly Considered Information Outside the Record

In addition to erroneous facts, the Walter Memorandum presented evidence dehors the record. These extra-record matters are described below.

1. Criterion 6 - Inbound Collector Trucks:

> **"South Elgin, Wayne and St. Charles will quickly become accustomed to *no more garbage* trucks."** "Inbound collector trucks will prevent reduction of the traffic burden, which was to occur with the closure." **(Walter Memorandum, p. 1.)**

There is no evidence to support the claim that these municipalities will become "accustomed to no more garbage trucks." (Walter Memorandum, p. 1.) The comments filed by the municipalities do not even suggest, much less establish, that they look forward to no more garbage trucks. Indeed, even if the Facility is never built, garbage trucks will remain a part of the traffic volume in these communities so long as waste is generated. (Petitioner's Brief, p. 21.)

2. Criterion 6 - Over-Burdened Bridges:

> "24 of 29 townships are entirely or partially west of the river, **requiring hundreds of truck per day to cross our already over-burdened bridges**. This site fails to reasonably minimize impact on existing traffic as required in **Criteria 6**." (Walter Memorandum, p. 3.)

The County claims that "it is reasonable and logical to conclude that additional trucks will be coming into the site from the proposed service area, including those portions of the service area west of the Fox River." (County Response Brief, p. 24.) While additional trucks

will be going into the site, it does not support the contention that the Facility will require "hundreds of truck (sic) per day to cross our already over-burdened bridges." (Walter Memorandum, p. 3.) There was no evidence provided that demonstrated that the existing bridges that cross the river are "over-burdened."

Contrary to the County's argument, "maps and diagrams" which show the location of the Fox River relative to the Facility do not constitute evidence supporting these statements. No such evidence exists. Further, during the November 19, 2002 County Board meeting, the Hearing Officer directed the County Board that during its deliberations, it could not consider "wear and tear on roads" or "whether the roads are falling apart," but had to make its decisions based on "existing traffic flows." (November 19, 2002 Tr. at 17.) Mr. Walter ignored the direction of the Hearing Officer and chose to include this information from outside the record in his Memorandum, which the County Board adopted as its opinion in rendering its decision. (County Response Brief, p. 22.)

By ignoring the Hearing Officer's direction, and presenting these statements which were not contained in this record, the Walter Memorandum provided allegations of fact both significant and relevant to criterion 6. The County Board adopted the Walter Memorandum in concluding that criterion 6 was not met.

3. **Criterion 6 - Rail Lines:**

> "The applicant admitted that they **gave no consideration to the use of a rail line** located near the property that could have eliminated the need for hundreds of transfer trailer trips each day." (Walter Memorandum, p. 3.)

In this statement, the Walter Memorandum asserts that a rail line was a practicably available alternative that could have eliminated hundreds of transfer trailer trips daily. The

assertion is both unsupported and false. Mr. Miller and Mr. Hoekstra testified that they were not aware of the proposed use of a rail line to handle garbage at the Facility. (9/26/02 Tr. at 62; 9/30/02 Tr. at 42.) No evidence was presented as to whether the rail line was suitable for the use of waste transfer, or if it was even available for use by WMII to transfer waste. There was no evidence adduced to establish that the use of a rail line was a potential or possible alternative for the Facility. Mr. Walter created his own evidence claiming that "the use of a rail line located near the property that could have eliminated the need for hundreds of transfer trailer trips each day." (Walter Memorandum, p. 3.) The County Board's consideration of this extra-record evidence relating to criterion 6 was fundamentally unfair.

4. Criteria 2 and 3 - Comprehensive Plan of South Elgin:

> "The Comprehensive Plan of South Elgin relied upon **promises made** by Waste Management and **conditions imposed by this Board** in 1988. This Plan was ignored as it applies to **Criteria 2 and Criteria 3**." (Walter Memorandum, p. 3.)

The statement that the Comprehensive Plan of South Elgin was ignored is incorrect. Mr. Lannert specifically testified that he considered the Comprehensive Plan in his analysis. (9/17/02 Tr. at 59, 87-102; Application at Criterion 3, Lannert Report, p. 12.)

The County attempts to justify the inaccuracy by arguing credibility. The County alleges that "to what extent Mr. Lannert considered the South Elgin comprehensive plan is a matter of credibility." (County Response Brief, p. 25.) However, Mr. Lannert's credibility was neither challenged nor impeached. He testified that the Facility is compatible with the character of the surrounding area because of the existing industrial and business uses adjacent to the site, either zoned industrial or B-3, that the agricultural and open space uses are predominant in the study area, and that screenings and buffers will enhance compatibility. (Petitioner's Brief, p. 29;

9/17/02 Tr. at 56, 57.) More specifically, he testified that the Facility is surrounded by existing industrial uses, including a concrete pipe plant to the south, the closed Tri-County Landfill, the closed Elgin Landfill, the railroad tracks embankment, and an asphalt paving and contractor's yard. (Petitioner's Brief, p. 29; 9/17/02 Tr. at 59, 73, 101, 102.) He stated that the 9-acre parcel for the Facility is "very appropriate in the context of this portion of this land" and that it is "a very similar, if not upgradeable use in this location." (9/17/02 Tr. at 102.)

Mr. Lannert's testimony and report demonstrate that he evaluated the Kane County 20/20 Plan and the South Elgin Comprehensive Plan. (Petitioner's Brief, p. 30; 9/17/02 Tr. at 59; Application at Criterion 3, Lannert Report, p. 12.) The Facility is consistent with those plans and the open space designations for the Woodland Landfill area, because of the mixture of uses in the surrounding area, including "industrial uses, the concrete pipe plant to the south, those uses on the corner, have been there historically…for a long time. And I think that the open space uses with the Prairie Path and with the reclaimed end use of the landfill…is the reason that it is compatible." (Petitioner's Brief, p. 30; 9/17/02 Tr. at 59.)

Contrary to the County's claim, Mr. Lannert did not testify that "a leaking Superfund site is a compatible use with open space/recreational use, because it is 'open space.'" (County Response Brief, p. 25.) He testified that the adjacent Superfund site, (former Tri-County Landfill) is "open space." That is all the question posed of him required. (09/17/02 Tr. at 137, 138.) In no way does the evidence suggest that Mr. Lannert's study was "surficial and did not take into account actual or planned uses, only 'spaces.'" (County Response Brief, p. 25.) The evidence demonstrates the opposite.

The assertion that the Comprehensive Plan was ignored as it applies to criteria 2 and 3 is a statement that WMII ignored the "promises made…and conditions imposed by this Board in

1988." (Walter Memorandum, p. 3.) The argument is that since WMII ignored its alleged promises and the conditions of Kane County's 1988 siting approval for the Woodland Landfill, WMII did not satisfy criteria 2 and 3. The argument, however, is improper because whether the alleged promises were breached or the conditions violated were not issues that could appropriately be considered here. (9/24/02 Tr. at 6; 11/19/02 Tr. at 14.)

The County argued that the Hearing Officer held that evidence concerning the 1988 siting approval for the Woodland Landfill was admissible in this siting proceeding. (County Response Brief, pp. 25, 26.) In fact, the Hearing Officer precluded any such evidence with the exception of evidence relating to the land and land use (including the Woodland Landfill) around the Facility. (9/19/02 Tr. at 15; 9/24/02 Tr. at 6; 11/19/02 Tr. at 14.) Specifically, the Hearing Officer instructed the County Board:

> "One of the things that was talked about during these hearings at some length was the location of this facility and whether or not this particular facility somehow is not in compliance with a letter that was written in 1988 and a County resolution with respect to what would happen to the Woodland Landfill when it closed.
>
> I'm going to tell you that that issue is not an issue that I believe is to be decided by you. There is already a court case that has been filed with respect to that.
>
> I do believe you can consider in connection with this its location in the vicinity of the landfill, but whether or not that resolution was violated is not a consideration for this body." (November 19, 2002 Tr. at 14.)

The very content and assertions of the Walter Memorandum disregarded this instruction of the Hearing Officer by including reference to the 1988 siting conditions for Woodland Landfill and the South Elgin Comprehensive Plan. The County Board rendered its decision on criteria 2 and 3, based on information *specifically instructed by the Hearing Officer not to be considered.* (County Response Brief, p. 22.) The County Board's consideration of this untrue,

irrelevant and extra-record evidence in denying criteria 2 and 3 was improper and fundamentally unfair.

5. Criteria 2 and 3 - Request for Relief:

> "*We are being asked to relieve Waste Management of the obligations already agreed to and imposed upon them by this Board.*" (Walter Memorandum, p. 4.)

At no time during these proceedings did WMII ever request to be relieved of any obligation imposed upon them by the County Board. Not only is this statement entirely unsupported and false, it is inflammatory and highly prejudicial. It suggests that WMII is attempting to avoid or skirt legal obligations imposed upon it. It implies that criteria 2 and 3 cannot be satisfied unless the County Board relieves WMII of these alleged legal obligations. These statements provided an unfounded and highly improper basis on which the County Board decided to deny criteria 2 and 3.

F. WMII Complied with Section 39.2(c)

The Village contends that WMII did not comply with Section 39.2(c) of the Act by failing to submit (i) the December 1993 Significant Modification Permit Application prepared for the Woodland Landfill ("Sig. Mod. Permit Application"); and (ii) Illinois Environmental Protection Agency ("Agency") documents demonstrating Woodland Landfill's compliance with the standards for Surface Water Drainage with its Application. Those documents were filed with the Agency in connection with the Woodland Landfill, not the proposed Woodland Transfer Facility. The plain language of Section 39.2(c) requires local siting applications to include: "(i) the substance of the applicant's proposal and (ii) all documents, if any, submitted as of that date to the Agency *pertaining to the proposed facility*, except as to trade secrets as determined under

Section 7.1 of this Act." 415 ILCS 5/39.2(c) (Emphasis added.) Because the Sig. Mod. Permit Application and the documents demonstrating Woodland Landfill's compliance with the standards for Surface Water Drainage relate to the Woodland Landfill, and therefore, do not pertain to the proposed Woodland Transfer Facility, WMII was not required under Section 39.2(c) of the Act to include them with its Application.

Even if WMII were required to include those documents with its Application, Section 39.2(c) of the Act is a procedural, not a jurisdictional, requirement of the Act. Tate v. Pollution Control Board, 188 Ill. App. 3d 994, 1016-17, 544 N.E.2d 1176, 1191 (4th Dist. 1989). Furthermore, compliance with Section 39.2(c) of the Act is not one of the criteria enumerated in Section 39.2(a) of the Act that must be met in order to obtain local siting approval. As such, failure to include documents previously submitted to the Agency pertaining to the proposed facility does not divest the local governing body of its jurisdiction to consider an application, nor does it force the conclusion, as suggested by the Village, that the Applicant "could not possibly have satisfied the statutory criteria." (Amicus Brief, p. 4.)

The Village's claim that WMII's failure to comply with Section 39.2(c) prejudiced the public and the County by preventing any analysis of the effects of the Facility on the landfill's hydrology, its stormwater management system, or any of the other safety issues of the landfill is completely lacking in merit. In Tate, certain Agency documents were not attached to the application; however, they were known to the petitioners in the early stages of the proceedings, were on file with the Agency and were public record. Id., at 1017, 544 N.E.2d at 1191. The court found that, because the public had an opportunity to review the documents in advance of the local hearing, the petitioners could not demonstrate any prejudice as a result of the applicant's non-compliance with Section 39.2(c) of the Act. Id. Therefore, the court held that "any error

which may have occurred [as a result of the applicant's failure to file the Agency documents with the application] is harmless at best." Id.

In this case, the Sig. Mod Permit Application and the other documents were plainly referenced in WMII's application, in accordance with Section 11-102(d) of the Ordinance[1], and, as the Village concedes in its *Amicus Curiae* Brief, they were "obviously" on file with the Agency and available for public access. (Amicus Brief, pp. 2-3.) Therefore, the Village's argument that the public and the County were deprived of the opportunity to evaluate that information against the statutory criteria is disingenuous, and should be rejected as meritless.

G. The County Board's Failure to Find That Criteria 2, 3, 6 and 8 Were Met is Against the Manifest Weight of the Evidence

The County alleges that WMII has misstated the findings of the Hearing Officer. (County Response Brief, p. 29.) This is false. The conclusion of the Hearing Officer was that each criterion was met subject to his proposed conditions (Findings, pp. 13-35), which was consistent with his instructions. He stated that the County Board could "approve it (the Application) as filed, you can deny it, or you can approve it with the conditions that you set out." (November 19, 2002 Tr. at 7.) At the December 10, 2002 County Board meeting, Mr. Dale Hoekstra gave public comment that WMII would accept the conditions imposed by the County Board. (C003126.)

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[1] Section 11-102(d) of the Ordinance provides:

> (d) Content Of Petitions: *The determination of the quality and quantity of information to be included in a petition is, ultimately, the applicant's to make*, as it is the applicant's burden to demonstrate that the siting criteria set forth in section 39.2 of the act are met. However, for purposes of this article, a petition shall contain, at a minimum, the following documents and information and, to the extent such documents and information are based on, in whole or in part, other information or data, *citations to the primary source shall be provided, so to reasonably enable a member of the public to locate such information.* (Emphasis added.)

1. The County Board's Failure to Find That Criterion 2 Was Met Is Against The Manifest Weight of The Evidence

The County seeks to support its failure to find that criterion 2 was satisfied by referring to testimony provided by Mr. Gary Deigan concerning his review of the Facility. (County Response Brief, pp. 31-35.) However, this testimony did not establish that the design of the Facility was flawed from a public safety standpoint, that its location presented any threat to the public health or safety, or that its proposed operation posed any unacceptable risk to the public health, safety and welfare. Industrial Fuels, 592 N.E.2d at 157. Instead, the testimony merely offered the observations and concerns of an environmental consultant who lacked experience in the design and operation of waste transfer stations.[2]

Mr. Deigan's concerns were speculative and failed to demonstrate how a particular design or operating feature increased a risk of harm to the public. For example, he noted that no insulation for noise attenuation was proposed, but did not evaluate whether off-site noise impact would even occur. (9/24/02 Tr. at 77-79; 9/26/02 Tr. at 18.) He observed that the air ventilation and carbon monoxide (CO) monitoring systems were presented in the conceptual stage of design, and then surmised that the system installed would "short-circuit." (9/26/02 Tr. at 24-25; 10/10/02 Tr. at 50-55.) He complained about WMII's failure to accommodate natural illumination in its lighting plan, speculating that drivers will experience difficulty in backing their trucks into the Facility with the change from natural to artificial light. (9/24/02 Tr. at 82-84.) His speculation is baseless as the lighting plan was designed by an electrical engineer. (9/24/02 Tr. at 83-84.) Finally, he raised concerns about WMII's housekeeping practices on the

[2] Mr. Deigan was not a licensed professional engineer, and stated that he did not oppose the Application. (10/10/02 Tr. at 5, 8-10.) The Hearing Officer made no mention of Mr. Deigan's testimony or report in his Findings.

basis of his "windshield" survey of two of WMII's facilities that are fundamentally different in size and scope than the proposed transfer station. (10/10/02 Tr. at 27-41.)

For all of his observations and concerns, Mr. Deigan acknowledged that there is no specific set of government regulations that apply to waste transfer stations. (10/10/02 Tr. at 24-26.) Thus, his concerns were conjectural and he was unable to establish that the design, location or operation of the Facility ignored or violated any governmental regulations. Industrial Fuels, 592 N.E.2d at 157.

The County also claims that WMII's alleged failure to comply with other legal requirements is sufficient reason to deny criterion 2. Specifically, the County asserts that WMII was not compliant with the Kane County Stormwater Ordinance or with the wetland provisions of the Kane County Solid Waste Management Ordinance. (County Response Brief, p. 32.) The assertion is specious. The undisputed evidence was that WMII complied with the Kane County Stormwater Ordinance. (9/24/02 Tr. at 104-106.) In addition, there are no wetlands on the Facility. (Application at Criterion 2, p. 2-2.) WMII must comply with any local ordinances that apply to the construction of the Facility. It will do so. (9/19/02 Tr. at 135; 9/24/02 Tr. at 62; 9/26/02 Tr. at 14.) However, compliance with such ordinances is necessary at the time any permits or approvals are required. Demonstration of compliance is not necessary at the siting stage. Hence, such compliance is not properly made a condition of siting approval.

There were no opinions presented that the design, location or proposed operation of the Facility did not protect the public health, safety and welfare. The County claims that there is evidence in this record to supports its conclusion, but that evidence is irrelevant, speculative or not probative.

There is no evidence indicating that the design, location or proposed operation of the Facility were flawed from a public health standpoint, presented any unacceptable risk to public safety, or ignored or violated any applicable governmental regulation. Hence, the failure to find criterion 2 met is against the manifest weight of the evidence. Industrial Fuels, 592 N.E.2d at 157.

2. The County Board's Failure to Find That Criterion 3 Was Met Is Against The Manifest Weight of The Evidence

The County argues that its failure to find that criterion 3 was met was justified by the fact that WMII proposed no berms on the west and north sides of the Facility. (County Response Brief, pp. 36-37.) The argument is groundless.

Criterion 3 requires WMII to do what is reasonably feasible to minimize incompatibility. File v. D&L Landfill, 219 Ill. App. 3d 897, 579 N.E. 2d 1228 (5th Dist. 1991). It does not require that WMII take all actions necessary to guarantee that no impact or incompatibility occurs. See Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E. 2d 844, 846 (5th Dist. 1989). Indeed, where as here, the undisputed evidence is that the Facility is compatible with the surrounding area, there is no need to propose measures to minimize incompatibility. Tate v Pollution Control Board, 188 Ill.App.3d 994, 544 N.E.2d 1176, 1197 (4th Dist. 1989).

Mr. Lannert stated that notwithstanding the Facility's compatibility with the character of the surrounding area, WMII proposed berms and screening along the east and south sides of the Facility. (9/17/02 Tr. at 55-57.) He explained why berms and screening were not proposed on the west and north sides of the Facility. (9/17/02 Tr. at 99-101.) No one contradicted or refuted this testimony.

In an attempt to argue that there is no evidence to support Petitioner's claim of compatibility, the County attempts in a footnote to discredit the testimony of Mr. Lannert. (County Response Brief, p. 22.) The County contends that despite the fact that Mr. Lannert was the only witness to testify on Criterion 3, the County Board could weigh his testimony in their decision and find him not credible based on one statement, taken out of context, that Mr. Lannert testified that "he believes a leaking Superfund space is a compatible use with open/recreational space." (County Response Brief, p. 22.)

This is wrong. The accurate exchange is as follows:

Q: The only other question that I have is, you had stated earlier that you categorized the Tri-County facility as open space; is that correct?
A: That's correct.
Q: So in your expert opinion, you categorize a leaking superfund landfill as open space; is that your opinion?
A: Yes
MR. MORAN: Objection.
BY THE WITNESS:
A: It is open.
HEARING OFFICER KINNALLY: I want to hear the answer. It's open space?
THE WITNESS: It is open space.

(09/17/02 Tr. at 137-138.)

Nowhere did Mr. Lannert testify that "he believes a leaking Superfund space is a compatible use with open/recreational space." He simply states that it is "open space." Further, a review of Lannert Exhibit 1, Zoning /Adjacent Land Use, shows the adjacent Tri-County Landfill as an open space. (Application at Criterion 3, Lannert Report, Exhibit 1.) There is no other way to answer this question - the Tri-County Landfill is open space. To discredit Mr. Lannert's testimony and suggest his lack of credibility by stating the truth is baseless.

The undisputed evidence established that WMII will do what is reasonably feasible to minimize any impact, and the County Board's rejection of criterion 3 is against the manifest weight of the evidence.

3. The County Board's Failure to Find That Criterion 6 Was Met Is Against The Manifest Weight of The Evidence

The County Board found that Criterion 6 was not met on the grounds that "all existing routes have been shown to be inadequate by expert testimony." (Walter Memorandum, p.2.) As previously discussed, this is a legally insufficient basis on which to deny Criterion 6. (See supra, pp.8-9.) In addition, the statement is against the manifest weight of the evidence.

Mr. Miller and Mr. Coulter were the only expert witnesses to testify regarding Criterion 6. It is true that they did not agree that the South Route preferred by Mr. Miller was the appropriate route to satisfy Criterion 6. However, it is equally true that their testimony did not conclude that all existing routes were inadequate.

Mr. Miller agreed with Mr. Coulter that the North Route was suitable. (10/01/02 Tr. at 101, 104, 118.) While Mr. Miller preferred the South Route because it presented the least impact on existing traffic flows, he at no point testified that the North Route did not minimize impact on existing traffic or that the North Route failed to satisfy Criterion 6.

The experts did not disagree that the North Route was a suitable route. Accordingly, all routes were not shown to be inadequate, and the County's finding on Criterion 6 is against the manifest weight of the evidence.

4. The County Board's Failure to Find That Criterion 8 Was Met Is Against The Manifest Weight of The Evidence

Contrary to the County's claim, WMII does not seek to establish a rule that limits the consistency of the Solid Waste Management Plan to challenge the County's authority with respect to the Plan. (County Response Brief, p. 44.)

Consistency with the County Solid Waste Management Plan is shown by demonstrating general agreement or harmony with the purposes and principles of the Plan. Strict compliance with each provision of the Plan is not necessary. City of Geneva v. Waste Management of Illinois, Inc., No. PCB 94-58, slip op. at 22 (P.C.B. July 21, 1994).

Ms. Sheryl Smith testified that the Facility was consistent with the Plan. These was no testimony or evidence that rebutted Ms. Smith. The fact that information about traffic characteristics for future growth and accident histories at key intersections was not provided does not make the Facility inconsistent with the purposes and principles of the Plan. This conclusion is especially true where, as here, the information requested is itself inconsistent with or irrelevant to the statutory criteria.

5. Strict Compliance with the Kane County Siting Ordinance Is Not Required to Satisfy the Statutory Criteria

The County and the Village incorrectly state that WMII is challenging the Ordinance. (County Response Brief, pp. 45-46.) WMII is simply asserting that strict compliance with every provision of the Ordinance is not required in order to demonstrate compliance with the statutory criteria. Strict compliance with the Ordinance is the improper standard that the Walter Memorandum persuaded the County Board to apply.

The Walter Memorandum stated that the Application was defective because WMII failed to meet two requirements in the Ordinance. (Walter Memorandum, p. 4.) However, compliance

with the Ordinance is not required to meet the criteria, particularly where, as here, the relevant provisions of the Ordinance are inconsistent with the Act. See Waste Management of Illinois v. Illinois Pollution Control Board, 175 Ill. App. 3d 1023, 1035-36, 530 N.E.2d 682, 693 (2d Dist. 1988) (even though local authorities may develop their own siting procedures, those procedures must be consistent with the Act and supplement, rather than supplant, the Act's requirements); Residents Against A Polluted Environment v. County of LaSalle, No. PCB 96-243, slip op. at p. 18 (September 19, 1996) (local ordinance provision that certain documents filed with the county board could be kept confidential was inconsistent with the requirement in Section 39.2(c) of the Act that such documents be made available to the public); Daly v. Village of Robbins, Nos. PCB 93-52, 93-54 (cons.), slip op. at p. 6 (July 1, 1993) (compliance with the local siting ordinance may not be enforced by the PCB, and is an issue of fundamental fairness.)

As for the Village's argument that the public was prejudiced by WMII's failure to make the submissions required in the Ordinance, that argument was raised by the petitioners and rejected in Citizens For Controlled Landfills v. Laidlaw Waste Systems, Inc., No. PCB 91-89 and 91-90 (September 26, 1991). In Laidlaw Waste Systems, Inc., the applicant did not meet all of the requirements of the local ordinance governing applications. Id., slip op. at 4. The petitioners argued that the absence of the required information prejudiced the county board, the public and the opponents of the application, in that they were deprived of a fair opportunity to prepare for the public hearing on the application, prepare adequate written comment on the application, and to address all of the issues in general. Id., slip op. at p. 7. The Board disagreed and held that it was sufficient that the applicant had complied with all the requirements under the Act. Id.

Therefore, the governing case law make clear that an applicant is not required to strictly comply with local ordinance requirements in order to obtain local siting approval. Such a mandate would run counter to the Act in cases, like the instant one, where certain local requirements are unreasonable or inconsistent with the criteria set forth in Section 39.2(a) of the Act.

Here, the County and the Village argue that denial was proper because WMII did not strictly comply with three requirements of Section 11-102(d) of the Ordinance, namely: (i) Subsection 28(a)(4), which requested a study and a submission of information from WMII on all property within a 5-mile radius of the proposed site; (ii) Subsection 31(d), which requested a proposal from WMII of the traffic routes or plan for vehicles entering and exiting the proposed facility from the point where the vehicles enter and exit the county to the point where the vehicles exit the proposed facility; and (iii) Subsection 34, which requested WMII to demonstrate that its application is consistent with the Plan, particularly in this case with the Plan's request that WMII develop traffic characteristics of future growth. (County Response Brief, pp. 16, 26-27, 36, 44-47; Amicus Brief, pp. 4-8.) However, WMII was not required to comply with those Subsections because the information and documentation requested therein are either directly inconsistent with the statutory criteria or so unreasonable or irrelevant to the criteria that the requests are inherently inconsistent with the Act.

First, the requirement in Subsection 28(a)(4) that WMII conduct a study on all property within a 5-mile radius of the proposed site is clearly inconsistent with criterion 3 of Section 39.2(a) of the Act, which contains no such requirement and simply requires a demonstration that "the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property." See 415 ILCS

5/39.2(a)(iii). (emphasis added.) "Surrounding" does not include an area miles distant from the Facility. A local requirement that applicants survey all property within a 5-mile radius is not only unreasonable, but also unnecessary to make a determination as to whether an applicant has satisfied criterion 3.

Similarly, the requirements in Subsection 31(d) that WMII describe the traffic routes or plan for vehicles entering and exiting Kane County, and identify all roadways within the County used by vehicles to access the site, are unreasonable and unrelated to any of the criteria. (Findings, p. 24.)

Finally, the requirement in Subsection 34 that consistency with the Plan requires that WMII develop traffic characteristics of future growth is directly inconsistent with criterion 6. The plain language of criterion 6 states that the Act is concerned only with existing, not future, traffic flows. Moreover, criterion 8 simply allows counties to take their solid waste management plans into account when considering siting applications, and while a local siting approval must be consistent with the plan, the Act does not state that approval is contingent on the applicant satisfying all of the plan's provisions. Again, a determination by the County Board that criterion 8 was not met on the basis that WMII did not satisfy Subsection 34 was unreasonable and inconsistent with the Act.

The County Board's reliance on the failure of strict compliance with the Ordinance to reject criteria 3, 6 and 8 is legally improper and fundamentally unfair. Together with its adoption of the incorrect legal standards, erroneous facts and extra-record evidence contained in the Walter Memorandum, the County Board's reliance on the lack of compliance with the Ordinance rendered its siting resolution a legislative decision, not an adjudicative one.

CONCLUSION

For all reasons set forth above and in its opening memorandum, WMII respectfully requests that the Kane County decision denying site location approval for the Woodland Transfer Facility be reversed.

Respectfully submitted,

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