ILLINOIS POLLUTION CONTROL BOARD
January 23, 1997

SENATOR WILLIAM SHAW, RONNIE LEWIS and JUDITH EVANS,	)	
Petitioners,	)	PCB 97-68
v.	)	(Pollution Control Facility Siting Appeal)
BOARD of TRUSTEES of the VILLAGE of DOLTON, MAYOR DONALD HART and LAND AND LAKES COMPANY,	)	
Respondents.	)	

MR.EVERETT C. MCLEARY APPEARED ON BEHALF OF PETITIONERS[1];

MR. DANIEL L. HOULIHAN APPEARED ON BEHALF OF LAND AND LAKES COMPANY;

MS. ELIZABETH S. HARVEY OF MCKENNA, STORER, ROWE WHITE AND FARRUG APPEARED ON BEHALF OF LAND AND LAKES; AND

MR. DAVID A. DEYOUNG AND MR. STANLEY T. KUSPER OF KUSPER AND RAUCCI APPEARED ON BEHALF OF THE VILLAGE OF DOLTON.

OPINION AND ORDER OF THE BOARD (by J. Yi):

This matter is before the Illinois Pollution Control Board (Board) on an appeal filed pursuant to paragraph (b) of Section 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/40.1(b) (1994)) on October 8, 1996 by Senator William Shaw, Ronnie Lewis, and Judith Evans (petitioners).[2] Petitioners are appealing the September 3, 1996 decision of the Village of Dolton, Illinois (Village) to grant local siting approval to Land and Lakes Company (Land and Lakes) for an expansion of its pollution control facility located in the Village. Petitioners request the Board to reverse the Village's decision on the grounds that the decision of the Village was against the manifest weight of the evidence concerning the challenged criteria of Section 39.2 of the Act. (415 ILCS 5/39.2 (1994).) For the reasons enunciated

[1] Mr. Akim Gursel filed the petition on behalf of the petitioners but did not appear on behalf of the petitioners at hearing due to health reasons. Mr. McLeary filed his appearance at hearing and appeared at hearing on behalf of petitioners.

[2] The petitioners' petition will be referred to as "Pet. at ."

below, the Board finds that the Village's decision was not against the manifest weight of the evidence concerning the challenged criteria and affirms the Village's decision.

PRELIMINARY ISSUE

The first issue the Board will consider concerns Respondent Village of Dolton's motion for reconsideration filed December 26, 1996. Respondent requests that the Board reconsider its November 21, 1996 order which denied respondent's request for reimbursement of the costs to file the record before the Board (*See* Senator William Shaw, Ronnie Lewis, and Judith Evans v. Illinois Environmental Protection Agency, Board of Trustees of the Village of Dolton, Land and Lakes, and Mayor Donald Hart, PCB 97-98 (November 21, 1996). In that order, the Board found that petitioners were a "citizen's group" thereby exempt from paying the costs of preparing and certifying the record of proceedings as required by Section 39.2(n) of the Act.

In its motion to reconsider, respondent argues that the Board erred in finding that petitioners in this matter were a "citizen's group." Respondent argues that in order to qualify as a citizens group, "[t]he definition required the Petitioners to join together during the hearing process and at that point present a unified front." (Mot. to Reconsider at 3.) In support of its argument, respondent cites to Alice Zeman et al. v. Village of Summit and West Suburban Recycling and Energy Center, Inc., PCB 92-174 (December 17, 1992). Respondent contends further that "[s]ince petitioners failed to fulfill the definition at the initial stage, they do not qualify as a citizen's group on appeal." (Mot. to Reconsider at 2.) The Board did not receive any response from petitioners regarding respondent's motion for reconsideration.

In ruling upon a motion for reconsideration the Board is to consider factors including, but not limited to, error in the previous decision and facts in the record which are overlooked. (35 Ill. Adm. Code 101.246(d).) In Citizens Against Regional Landfill v. The County Board of Whiteside County, (March 11, 1993), PCB 93-156, the Board stated that "[t]he intended purpose of a motion for reconsideration is to bring to the court's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of the existing law." (Korogluyan v. Chicago Title & Trust Co., (1st Dist. 1992), 213 Ill. App.3d 622, 572 N.E.2d 1154.)

The Board finds that the arguments presented in respondent's motion for reconsideration do not present the Board with any new evidence, a change in the law, or any other reason to conclude that the Board's decision was in error. Therefore, we deny respondent's motion for reconsideration.

BACKGROUND

Land and Lakes filed its application for local siting approval with the Village on March 11, 1996. (C. at 36).[3] The application sought siting approval, pursuant to Section 39.2 of the Act (415 ILCS 5/39.2), for an expansion of its existing River Bend Prairie facility of

[3] The record for the proceedings below will be referred to as "C. at ."

approximately 68 acres with 13 acres set aside for non-disposal purposes. (C. at Group Exh. III, Vol. I at 3.) River Bend Prairie is located at the southeast corner of 138th Street and Cottage Grove Avenue in Dolton, Illinois, in an area predominately devoted to industrial and waste disposal uses. (C. at Group Exh. III, Vol. I Exh. 3 at 4-8.) Letters from the surrounding landowners in support of the requested expansion were presented at hearing before the Village. (C. at 163-167.) Additionally, several petitions in opposition to the grant of the landfill expansion were filed. (Tr. at 71.)

Land and Lakes proposed a vertical expansion of approximately 60 feet, as measured at the center of the facility, to match the elevation of a closed landfill directly north of River Bend Prairie. Land and Lakes also sought approval of a horizontal expansion onto an area of approximately 12 acres directly east of the existing facility. The expanded facility would total approximately 68 acres, of which approximately 13 acres will be set aside for access roads, sedimentation ponds, landscape berms, and other buffers. (Generally Group Exh. III, vol. I at 2-3.)

The Village held hearings on the application on the evenings of June 24-28, 1996. (Group Exh. I.) The Village appointed Lawrence P. Gulotta as hearing officer to preside at the hearings. (C. at 33-35.) There were more than 65 exhibits presented at hearing, and six expert witnesses testified in support of the application. (Group I, vol. I-IV.) Fifteen citizens gave testimony at the local hearings in opposition of the landfill expansion. (Group Exh. I vol. II-IV, at 270- 483.) During the 30-day comment period following the close of the local hearings, approximately 10 written comments were submitted to the Clerk of the Village. (C. at 174-211.) On September 3, 1996, at a public meeting, the Board of Trustees of the Village found that Land and Lakes met all of the applicable criteria set forth in Section 39.2 of the Act, and granted siting approval for the expansion of River Bend Prairie. (C. at 261-264.) On October 8, 1996, petitioners filed their appeal with the Board.

Pursuant to the filing of the petition and Section 40.1(b) of the Act, the Board is required to hold a public hearing which was held on December 19, 1996.[4] At hearing petitioners did not present any argument. (Tr. at 13.) Petitioners state that they chose not to present argument at the Board's December 19, 1996 hearing. (Pet. Resp. at 1.)[5] Instead, petitioners made an oral motion and filed a written request for "Continuance of Hearing On Petition For Denial of Site Approval" for 30 days. (Pet. Resp. at 1-2.) The hearing officer denied the motion. At the hearing and in their response brief petitioners claim that they were prejudiced by the hearing officer's denial of its motion. (Pet. Resp. at 2.) Respondents presented no evidence at hearing and saved its arguments for its post-hearing brief. (Tr. at 89.)

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[4] On November 21, 1996 the Board found that petitioners had standing to appeal the Village's grant of approval of the siting request. The transcript from the Board's December 19, 1996 hearing will be referred to as "Tr. at ."

[5] Petitioners' response brief that was filed on January 6, 1997 will be referenced to as "Pet. Resp. at ."

At hearing several members of the public provided testimony as well as petitioners, Senator Shaw and Judith Evans. (Tr. 18- 86.) Majority of the testimony provided by the public opposed the siting grant for the expansion of Land and Lakes facility. (Tr. at 18-61, 75, and 76-82.) Senator Shaw testified that several members of the community signed petitions that they were against the landfill expansion and that the Robbins Incinerator facility could have been contacted to dispose the Village's waste. (Tr. at 70-74, 80.) Senator Shaw also stated that the Village had an opportunity not to grant siting but they did not. (Tr. at 76-77.) Judith Evans testified that Land and Lakes did not meet its burden concerning health, safety and welfare and minimization of the effects of property value. (Tr. at 82-83.)

At the close of the hearing, the hearing officer established a briefing schedule. Post-hearing briefs were to be filed simultaneously on January 2, 1997. Response briefs were to be filed simultaneously on January 6, 1997. All public comments were to be filed on January 2, 1997. On January 2, 1997, Land and Lakes filed its post-hearing brief.[6] Petitioners did not file a post-hearing brief on January 2, 1997 but on January 6, 1997, petitioners filed a response brief to Land and Lakes' post-hearing brief. (Generally Tr. at 97-89.) On January 3, 1997, the Board received one public comment after the close of the hearing from Ms. McDuffie. Ms. McDuffie raised concerns that the Village did not have adequate representation during the process because the Village did not know how to address the citizens' opposition to the landfill and the Village failed to address the health, property value, traffic and environmental concerns that were raised in opposition to the expansion.

On January 9, 1997, Land and Lakes filed a motion to file instanter its response brief and its response brief.[7] Land and Lakes in its motion states that it had no opportunity to respond to any claims raised by petitioners in their response brief and petitioners for the first time raise arguments in support of its petition for review. (R.Resp. at 2.) Land and Lakes also states that petitioners did not serve Land and Lakes with its response brief that was filed on January 6, 1997. (R.Resp. at 2.) Land and Lakes argues that it will be prejudiced if the Board denies the motion to file instanter. (R.Resp. at 2.) Land and Lakes motion to file instanter is granted.

ISSUES PRESENTED

The petition requests "a recession of The Dolton Board Approval and a denial of the existing application for both the existing facility and the expansion of River Bend Prairie". (Pet. at 1.) The petition states further that "[o]therwise, The (sic) Dolton Community will suffer significant arbitrary and unreasonable hardship, for several reasons." (Pet. at 1.) The petition lists the following reasons:

First, this facility creates a unnecessary and duplictors (sic) health hazard.

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[6] Land and Lakes' post-hearing brief will be referred to as "R.Brief at ."

[7] Land and Lakes response brief will be referenced to as "R.Resp. at ."

> Second, there are other facilities that can provide for the waste being disposed of at River Bend Prairie, namely the Robbins Resource Recovery Facility, located in Robbins, Illinois.
>
> Third, Land and Lakes request (sic) an expansion of River Bend Prairie yet in reality they are creating surrepticiously (sic) a ne (sic) landfill which is a draconian application of laws.
>
> (Pet. at 1-2.)

The Board will interpret the first reason given by petitioners to be a challenge of Section 39.2(a)(2) of the Act. (415 ILCS 5/39.2(a)(2)(1994).) The second reason clearly challenges Section 39.2(a)(1) of the Act. (415 ILCS 5/39.2(a)(1)(1994).) The third reason appears to be stating that this should be treated as an application for a new facility rather than an expansion of an existing facility.

Petitioners' response brief filed on January 6, 1997 raised several new arguments. The first argument, stated that denial of petitioners' motion for continuance of hearing on petition for denial of site approval was prejudicial error. (Pet. Resp. at 1-2.) The second argument presented in petitioners' response brief stated that the Village's findings were influenced by error of law. (Pet. Resp. at 2-6.) The third new argument raised by petitioners' stated that the Village's findings disregarded the testimony that the citizens were against the approval of the siting request. (Pet. Resp. at 6-7.) Petitioners' fourth and fifth arguments presented in its response brief concerned Section 39.2(a)(1) of the Act, commonly known as the "need criteria", which was challenged in the original petition. (Pet. Resp. at 7-10.) None of the arguments raised by petitioners in either their petition or response brief raise issues of fundamental fairness of the proceeding or challenge the jurisdiction of the Village to hear the application.

NEW ISSUES PRESENTED IN PETITIONERS' RESPONSE BRIEF

The Board will discuss the first issue raised in the response brief concerning the denial of petitioners' motion for continuance of hearing and then address the remaining new issues together.

Petitioners' argument concerning prejudice

At the December 19, 1996 hearing, petitioners made an oral motion and filed a written request for "Continuance of Hearing on Petition For Denial of Site Approval" which was denied by the hearing officer. (Tr. at 6-7.) Petitioners' motion clearly sets forth their argument that petitioners' first attorney of record suffered a massive stroke on or about November 20, 1996 and was still hospitalized in intensive care, which "delineated" petitioners' efforts to secure counsel for the hearing. (Pet. Resp. at 1-2.) Petitioners state that "[d]espite Petitioners' efforts and due to circumstances beyond Petitioners' control, Petitioners' newly retained counsel had not had an opportunity or adequate time to formalize and prepare the

Petitioners case by the date of the hearing." (Pet. Resp. at 2.) Petitioners state that their new attorney obtained the file on December 16, 1996. (Pet. Resp. Attachment at 2.)[8] Petitioners maintain that they properly objected to the denial of the motion for continuance at hearing and stated that denial was prejudicial error in that petitioners were prevented and prejudiced from presenting their case on the merits. (Pet. Resp. at 2.)

Land and Lakes' Response Argument

Land and Lakes argues that petitioners were not prevented from presenting a case on the merits and therefore no prejudice occurred. (R.Resp. at 2.) Land and Lakes states that petitioners are not allowed to present any new evidence regarding any finding of the Village pursuant to Section 40.1 of the Act. (R.Resp. at 2.) Land and Lakes asserts that the hearing officer informed petitioners that since the petition for review raised only "manifest weight" issues, no new evidence was not admissible. (R.Resp. at 2-3, Tr. at 10.) Land and Lakes argues that "[s]ince the petitioners can only present argument regarding the manifest weight of the evidence already in the record, petitioners' arguments can be fully and appropriately presented through written briefs." (R.Resp. at 3.) Furthermore, Land and Lakes asserts that there are no claims that could have only been raised at hearing, or which required witnesses to testify. (R.Resp. at 3.) Land and Lakes concludes by stating that any arguments that could have been raised at hearing could have been raised in written briefs and that petitioners were not prejudiced by the denial of their motion for continuance of the hearing. (R.Resp. at 3.)

Board's Discussion

The Board finds that the hearing officer's denial of petitioners' motion for continuance did not cause prejudice. It is within the hearing officer's discretion to grant or deny petitioners' motion for continuation. Petitioners do not have an absolute right to a continuance. (Sinram v. Nolan, 169 Ill. Dec. 248, 249, 591 N.E.2d 128 (4th Dist. 1993).)

Petitioners claim that the hearing officer's denial of their motion for continuance prejudiced them by preventing them from presenting their case on the merits. Petitioners have not argued how they were prevented from presenting their case, but state that because their new attorney did not obtain the case file until three days prior to hearing from the original attorney they were prejudiced. Since the Board is reviewing the decision of the Village concerning two of the criteria in Section 39.2 of the Act no new evidence relating to those criteria can be presented at hearing before the Board.

Additionally, pursuant to Section 40.1 of the Act the Board has a 120-day statutory decision deadline in this matter which requires it to make a determination in this matter no later than February 5, 1997. Since petitioners requested a 30-day continuance on December 19, 1996 such continuance would have been until January 21, 1997. Pursuant to petitioners request, if the Board decided to hold a special meeting, it would have had only eleven days to hold a hearing, receive a transcript, schedule briefing and review the record in the matter prior

[8] The attached hand written motion will be referred to as "Pet. Resp. Attachment at ."

to making a decision. Such continuance would have prohibited the Board from fully reviewing the record in this matter. Since no new evidence can be presented and all arguments based on the petition could be raised in post-hearing briefs and the Board was confronted with the statutory deadline, we find that the decision of the hearing officer was not an abuse of discretion and we find that the denial did not cause an injustice.

Petitioners' arguments concerning the Village's findings were influenced by error of law and the Village's decision disregarded the testimony that the citizens of Dolton were against approval of siting request.

Petitioners in their response brief argue that the Trustees of the Village were mistaken in their view of the scope of the evidence and the weight to be granted that evidence in reaching their decision. (Pet. Resp. at 2.) Petitioners assert that in addition to the nine statutory criteria that must be met before the local decision maker may grant a request for siting approval, the entire record must be considered, including the testimony and evidence of the local unit of government. (Pet. Resp. at 2-3.) Petitioners argue that the Village only considered the nine criteria and did not consider or properly consider the testimony of the citizens and friends of the Village of Dolton. (Pet. Resp. at 3.)

In support of their contention petitioners cite to several different pieces of evidence. The first cite is the Village's hearing officer's recommendation to grant the application request because all applicable criteria were satisfied. (Pet. Resp. at 3.) Next, petitioners cite to the Village's September 3, 1996 approval of the application. (Pet. Resp. at 4.) Additionally, the petitioners cite to the December 19, 1996 testimony of Village Trustee Burton R. Herzog, who affirmed that it was his testimony that the criteria he used to make his vote on the landfill was the nine criteria set forth in Section 39.2 of the Act. (Pet. Resp. at 4, Tr. at 69.) Finally, petitioners cite to the December 19, 1996, testimony of Village Trustee Donald L. Clayton who testified that the Board of Trustees were informed by their attorney that they had no say so in the matter of granting or denying the application except as to whether the nine criteria of Section 39.2 of the Act were complied with. (Pet. Resp. at 4.)

Petitioners state that the Act does not set forth a mandate that only the nine criteria may be considered and/or that public interests and concerns are not to be considered. (Pet. Resp. at 5.) Petitioners additionally assert that the Act provides for the public hearing and a 30-day comment period following the close of the local hearings to allow for public participation. (Pet. Resp. at 5.) Petitioners argue that "these avenues of public participation were established not merely as perfunctory or meaningless gestures to placate that public into thinking that they have a voice in the process, but rather constitute a mandate that the public participate in the process as well as provide an avenue of notification to elected officials of the position of their constituents on the issues." (Pet. Resp. at 5.) Petitioners conclude by stating that "[i]f the requirement that only the 9 criteria may be considered, then the total discretion regarding the creation or expansion of landfills would be vested in the hands of those in the landfill business." (Pet. Resp. at 5.) Petitioners also state that the "Illinois Appellate Court recently upheld a decision in favor of the City of Chicago against the LALC (Land and Lakes) regarding whether a local unit of government could place a moratorium on landfills within

their jurisdiction." (Pet. Resp. at 5.) Petitioners argue that this demonstrates that "[i]f a local unit of government, based upon public interests, may place a moratorium on landfills within their jurisdiction, then a local unit of government may consider those same public interests issues in determining whether to grant or deny a siting request." (Pet. Resp. at 5-6.)

Petitioners' arguments that the Village's findings disregarded the testimony that the citizens were against approval of the siting request.

Petitioners argue that the citizens of Dolton testified at the Village public hearing, via written comments, and at the Board's hearing; that the citizens of Dolton do not believe that the expansion of the landfill is in the best interests of the people of Dolton and therefore, the citizens of Dolton are not in favor of another landfill site in Dolton, Illinois. (Pet. Resp. at 6.) Petitioners then cite to the testimony of Trustee Herzog from the Board's hearing, who testified that "it would be fair to say that the concern of the will of the people who made presentations at that meeting [the Village Hearing] was that they were **not** in favor of the landfill." (Pet. Resp. at 6-7, Tr. at 65.) Additionally, petitioners cite to Trustee Herzog's response of "no" to whether the other citizens with whom he had spoken about the matter had indicated that they were in favor of the landfill expansion. (Pet. Resp. at 6-7, Tr. at 65.) Petitioners conclude by stating "[t]he will of the people of Dolton was erroneously not taken into consideration in the decision of the Board of Trustee" and "[t]hus, the Board of Trustees' decision must be reversed or remanded for full consideration." (Pet. Resp. at 7.)

Land and Lakes Response Arguments

Land and Lakes asserts that these arguments must be stricken. (R.Resp. at 3.) Land and Lakes states that although these arguments are set forth as two separate arguments, both arguments raise the single issue of the Village's consideration of citizen testimony against the expansion. (R.Resp. at 3.) Land and Lakes states that this issue was not raised in the petition for review and in order to prevent prejudice, a petition for review must allege, at least minimally, all bases for appeal of the local decision. (R.Resp. at 4.) Land and Lakes claims that "[h]ere, three months subsequent to filing their petition for review, petitioners attempt to raise a new claim not set forth in their petition for review, not presented or argued at hearing, and which is submitted for the first time in a response brief." (R.Resp. at 3.) Land and Lakes argues that it has been prejudiced because it has not had an opportunity to rebut or respond to this claim at hearing. (R.Resp. at 3-4.) Land and Lakes further states that the actions of the petitioners negate the purpose of the governing rules of procedure. (R.Resp. at 4.)

Additionally, Land and Lakes argues that these arguments should be stricken because they are not responsive to Land and Lakes post-hearing brief filed on January 2, 1997. (R.Resp. at 4.) Land and Lakes asserts that the "[i]ssues raised for the first time in a responsive brief are waived for the purposes of review, and do not merit consideration on appeal" and cite to Tivoli Enterprises v. Brunswick Bowling & Billiards Corporation, 269 Ill. App.3d 638, 646 N.E.2d 943, 945, 207 Ill. Dec. 109, 111 (2d Dist. 1995); Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc., 252 Ill.App.3d 96, 623 N.E.2d 1036, 1038, 191 Ill.Dec. 446, 448 (2d Dist. 1993. (R.Resp. at 4.)

In its response brief Land and Lakes also sets forth its arguments if the Board allows petitioners to raise their claim that the Village's decision was based on an erroneous view of the law. (R.Resp. at 4.) Land and Lakes states that petitioners' arguments are asserting that in addition to the nine criteria set forth in Section 39.2 of the Act, the Village should have also considered "the will of the people." (R.Resp. at 4.) Land and Lakes states that petitioners "cite no statute or caselaw in support of this claim" and asserts that it is because this argument is contrary to law. (R.Resp. at 4.)

Land and Lakes argues that "Section 39.2 specifically states that the criteria and procedures of that section are the exclusive criteria and procedures for local siting approval (415 ILCS 5/39.2(g).)" (R.Resp. at 5.) Land and Lakes states that the units of local governments are directed to give reasons for their decisions, and that "such reasons to be in conformance with subsection (a) of [Section 39.2]." (R.Resp. at 5.) Land and Lakes states that "[s]ubsection (a) sets forth the nine criteria, and does not include any provision for a denial based upon any factor other than those nine criteria" and argues that unit of government must make its decision based solely on the nine criteria. (R.Resp. at 5.)

Land and Lakes further states that the Village held a lengthy hearing on Land and Lakes' application where testimony from the public was submitted. (R.Resp. at 5.) Land and Lakes asserts that "the purpose of the hearing is to receive evidence and hear testimony on the nine criteria" and that the Village followed all procedures established by Section 39.2 in hearing Land and Lakes' application for siting approval. (R.Resp. at 5.) Land and Lakes states that petitioners have not claimed issues of fundamental fairness. (R.Resp. at 5.)

Land and Lakes states that petitioners' argument is that "since you didn't agree with us, you must not have considered our testimony, or you gave it insufficient weight." (R.Resp. at 6.) Land and Lakes argues that it is inappropriate for the Board to "invade the mind" of decisionmaker in a local siting proceeding. (Smith v. City of Champaign, PCB 92-55, (August 13, 1992), *citing* City of Rockford v. Winnebago County, PCB 87-92, (November 19, 1987), *aff'd* 186 Ill. App.3d 303, 542 N.E.2d 423.). Land and Lakes concludes that "petitioners cannot fashion an argument that because a trustee voted in favor of the proposed expansion, he or she must not have considered testimony against the proposed expansion." (R.Resp. at 6.)

To conclude, Land and Lakes states that criteria set forth in Section 39.2 are the exclusive criteria upon which the Village was to base its decision and contains no provision for a denial of a siting approval request simply because some citizens oppose the proposed expansion. (R.Resp. at 6.) Land and Lakes asserts that as part of the process established by Section 39.2, the Village held extensive local hearings, at which a number of citizens presented comments and asked questions. Land and Lakes further argued that because the Village approved the siting request does not mean that it did not consider the public testimony and comments. (R.Resp. at 6.)

Board Discussion

Petitioners raise these arguments for the first time in their response brief. Response briefs are reserved for response to arguments made in the post-hearing briefs. (See Tivoli Enterprises v. Brunswick Bowling & Billards Corporation, 269 Ill. App.3d 638, 646 N.E.2d 943, 945, 207Ill.Dec. 109, 11 (2d Dist. 1995); and Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc., 252 Ill.App.3d 96, 623 N.E.2d 1036, 1038, 191 Ill.Dec.446, 448 (2d Dist. 1993).) By raising these arguments for the first time in their response brief, petitioners precluded the respondent from presenting evidence to the contrary, such as presenting the testimony of other trustees or the attorney of the Village or other appropriate testimony, which causes prejudice to Land and Lakes. For these reasons the Board strikes these new arguments from the petitioners' response brief. Therefore, the remaining issues before the Board are those raised in petitioners' petition concerning the Village's decision on two of the statutory criteria.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. Only if the local body finds that all criteria are satisfied can siting approval be granted. In this case, the Village found that all of the applicable criteria had been met, and granted siting approval. When reviewing a local decision on the criteria, the Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592, E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.)

Additionally, the Board is authorized to review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, Inc., 451 N.E.2d 555, 562.) In this case, petitioners have not raised challenges to the jurisdiction of the Village to hear the application or that proceeding was fundamentally unfair. The only challenge made by petitioners in their petition concerns the Village's decisions on two of the criteria. Therefore the Board's discussion will focus only on those two criteria.

STANDARD OF REVIEW

Section 39.2 of the Act requires a local government to consider nine criteria when acting upon an application for local siting approval. Only if the local government finds that all applicable criteria have been met by the applicant can the local body grant siting approval. In

this case, the Village found that Land and Lakes had satisfied all of the applicable criteria. (C. at 261-264.)

When reviewing a local decision on the criteria, the Board must determine if the local decision is against the weight of the evidence. (McLean County Disposal Inc, v. County of McLean (4th District. 1991), 207 Ill. App. 3d 352, 566 N.E.2d 26, 29; E & E Hauling Inc, v. Pollution Control Board (2d Dist. 1983), 116 Ill. App.3d 586, 451 N.E.2d 555, *aff'd in part* (1985), 107 Ill.2d 33, 481 N.E.2d 262, 265.) The Board does not reweigh the evidence. 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 Taskforce v. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1195; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505, 507.) Merely because the local government might have drawn different inferences and conclusions from testimony is not a basis for the Board to reverse the local government's findings. (File v. D & L Landfill, Inc, (August 30, 1991), PCB 90-94, *aff'd* File v. D & L Landfill, Inc. (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228.) Section 40.1(b) of the Act provides that the Board's review is to be based exclusively on the record as it existed before the local government. The burden of proof in an appeal to the Board is on the petitioners. (415 ILCS 5/40.1(b).)

The Board may also review the areas of jurisdiction and the fundamental fairness of the procedures used at the local level. However, as noted by the hearing officer at the Board hearing (Tr. at 10), petitioners have not raised any claim of fundamental unfairness. Thus, the only issues before the Board are the challenged criteria that are to be reviewed against the "manifest weight of the evidence."

ISSUES PRESENTED IN PETITIONERS' PETITION

In its response brief Land and Lakes "objects to petitioners' filing of a response brief without filing an opening brief." (R.Resp. at 1-2.) Land and Lakes states that "[t]he hearing officer's briefing schedule clearly contemplated that parties who wished to file written argument would file all opening briefs by 4:30 p.m. on January 2, 1997." (R.Resp. at 1.) Land and Lakes asserts that the briefing schedule allowed time for the parties to review the opening briefs and prepare responses to those opening briefs. (R.Resp. at 1.) Land and Lakes argues that petitioners' non-compliance with the briefing schedule violates the hearing officer's order establishing the briefing schedule, has caused prejudice, and should not be tolerated. Land and Lakes requests the Board to strike the response brief. (R.Resp. at 1-2.)

Additionally, Land and Lakes argues that since petitioners failed to file a post-hearing brief and did not raise any arguments at hearing "petitioners have failed to present any argument whatsoever in support of their petition for review." (R.Resp. at 2.) Citing to Citizens United for a Responsible Environment v. Browning-Ferris Industries of Illinois, PCB 96-238, (September 19, 1996), *citing* Stauton Landfill Inc. v. Illinois Environmental Protection Agency, PCB 91-95 (March 26, 1992), D & B Refuse Service v. Illinois

Environmental Protection Agency, PCB 89-106 (October 24, 1991), and In re Application of Anderson 516 N.E.2d860 (2d Dist. 1987), Land and Lakes argues that petitioners have waived their claims. (R.Resp. at 2.) Furthermore, Land and Lakes asserts that the purpose of a response brief is to respond to arguments presented by Land and Lakes' post-hearing brief and petitioners cannot carry their burden of proof by simply responding to arguments made by Land and Lakes. (R.Resp. at 2.) Land and Lakes argues that "petitioners have not carried their burden of proof, and have waived the claims raised in the petition for review." (R.Resp. at 2.) Land and Lakes requests that the Board "summarily deny the petition for review, and affirm the Village of Dolton's decision." (R.Resp. at 2.)

Board Discussion

The Board finds that since Land and Lakes was allowed to file a response to petitioners' response brief the claimed prejudice has been cured. Therefore the Board will not strike petitioners' response brief in its entirety and allow those arguments that support the claims stated in the petition. As discussed above all new arguments concerning the Village's decision have been stricken. However, the Board does agree with Land and Lakes that those issues raised by a petition but have not been argued by a petitioner are waived.

Petitioners' arguments that the Village's findings are against the manifest weight of the evidence concerning the waste need criteria.

Petitioners argue that the Village's finding was made despite testimony and evidence on the record that the facility will not accommodate the needs of the area to be served. (Pet. Resp. at 7.) Petitioners state that Land and Lakes defined the service area of River Bend Prairie as twenty townships (including Dolton) in Cook, DuPage and Will Counties. (Pet. Resp. at 7.) Petitioners state that "Rolf Campbell and Associates (RCCA), on behalf of LALC, testified that even with the expansion of the facility, there will be significant shortfall in disposal capacity for the service area and that the shortfall in disposal capacity will continue throughout the estimated 20 year life of the proposed expansion." (Pet. Resp. at 7-8, Vol. 2: Tr. at 175-195). Petitioners argue that "[i]f in fact there will be a significant shortfall in disposal capacity at the outset, then the needs of the area of service will not be accommodated." (Pet. Resp. at 8.) Petitioners' assert that as such "the prudent and responsible action would be to assess and explore alternatives that would accommodate the service area rather than approve a plan which at the outset is insufficient." (Pet. Resp. at 8.) Petitioners conclude by stating that "[i]n the absence of consideration of the testimony and evidence presented setting forth the will of the people that the application be denied, virtually the only evidence considered in determining whether to grant LALC's application is what LALC had to say on the matter." (Pet. Resp. at 8.)

Additionally, petitioners state that "[a]lthough the Board of Trustees determined that the site was necessary to accommodate the twenty townships in the area of service, the Village of Dolton does not need an additional or expanded site to accommodate its needs." (Pet. Resp. at 8) Petitioners cite to the Village's public hearings, where citizens testified that the proposed expansion is not necessary to serve the waste disposal needs of the Village. (Pet.

Resp. at 9.) Furthermore, petitioners direct our attention to the needs assessment presented by Senator William Shaw. (Pet. Resp. at 9.) Petitioners state that the need assessment presented in Senator Shaw's submittal concludes that there is no need to expand the River Bend Prairie to accommodate the disposal needs of the Village. (Pet. Resp. at 9.) Petitioners state in their petition that the citizens will suffer arbitrary and unreasonable hardship if Land and Lakes proposal is treated as an expansion rather than a new facility. (Pet. at 1.) In their response brief, petitioners quotes the statement made in the petition and states that the Act provides that a "new pollution control facility" includes "the area of expansion beyond the boundary of a currently permitted pollution control facility." (415 ILCS 5/3.32(b)). (Pet. Resp. at 8.) Petitioners state that if the application is viewed as it should be, as an application for a new twelve acre site, evidence and testimony should be allowed and considered regarding whether the Village of Dolton needs additional sites, and if not, whether the people of Dolton wish to continue servicing 19 other townships across three counties. (Pet. Resp. at 8.)

Land and Lakes Argument

Land and Lakes in its post-hearing brief states that it presented testimony and evidence from Rolf Campbell, president of Rolf C. Campbell & Associates (RCCA), who is an expert in the field of solid waste and land use planning. (R. Brief at 6.) Land and Lakes claims that RCCA analyzed the need for disposal capacity in the service area. (R. Brief at 6.) Land and Lakes maintains that the analysis included detailed consideration of reports on disposal capacity published by the Agency, by the South Suburban Mayors and Managers Association (SSMA), and by the Northern Illinois Planning Commission (NIPC). (R. Brief at 6-7.) Land and Lakes states that RCCA concluded that, even considering the projected disposal capacity of the Robbins, Illinois waste incinerator, and including the additional capacity to be provided by the proposed expansion of River Bend Prairie, there will be a significant shortfall in the disposal capacity deficit, ranging from 1.3 million gate cubic yards (GCY) in 1997 to more than 11.4 million GCY in 2016. (R. Brief at 7.) Land and Lakes further states that the proposed expansion's capacity is less than 10 percent of the service area's total disposal shortfall over the 20 year life of the expansion. (R. Brief at 7.) Based on this evidence Land and Lakes argues that a shortfall will continue throughout the expected 20 year life of the proposed expansions and even should the Robbins, Illinois incinerator become fully operational, there will still be a significant disposal capacity shortfall in the service area. (R. Brief at 7.)

Additionally, Land and Lakes states that the only evidence presented contrary to its conclusions were Senator Shaw's comments filed as part of his written submittal during the post-hearing comment period after the Village's hearing. (R. Brief at 7.) Land and Lakes asserts that the comments contained in Senator Shaw's submittal are not persuasive. (R. Brief at 7.) Land and Lakes states that the comments are flawed because (1) there is no indication of who authored the submittal, nor of the qualifications of the author; and (2) the author did not testify and become subject to cross-examinations, nor did the author cross-examine Mr. Campbell. (R. Brief at 7-8.) Furthermore, Land and Lakes asserts that the comments are laced with inaccuracies. (R. Brief at 8.)

Land and Lakes asserts that the comments concerning available landfill capacity are inaccurate because they included landfills which do not have local siting approval or an Agency permit, which do not accept waste generated outside their geographic area, and which have a defined service area which does not include the River Bend Prairie service area. (R.Brief at 8.) Therefore Land and Lakes argues that the listing of available capacity contained in the submittal is wrong. (R.Brief at 8.) Additionally, the cost calculation in the comments for landfill outside of the service area is incomplete and inaccurate because there is no consideration of tipping fees for transfer stations, of costs of the return trip, of state fees, or costs of transporting the waste from its point of origin to the transfer station. (R.Brief at 8.) Land and Lakes argues that the comments contained in Senator Shaw's submittal grossly underestimates the costs of disposal at other facilities and the discussion regarding waste transportation via rail line is mere speculation, since none of the currently permitted transfer stations in the River Bend Prairie service area have access to rail. (R.Brief at 9.) Furthermore, Land and Lakes states that the need criteria established in Section 39.2 is not defined by existing hauling contracts but by whether there is sufficient capacity for the service area to meet its waste disposal needs, over a long period of time. (R.Brief at 9.) Land and Lakes argues that Senator Shaw's assertions concerning contracts and relationships with haulers is not relevant when determining this criteria. (R.Brief at 9.) Finally, Land and Lakes argues that Senator Shaw's statements that Land and Lakes report on the need criterion is wrong because it ignores established contracts between communities and the Robbins incinerator are incorrect. (R.Brief at 9-10.) Land and Lakes asserts that its report specifically assumed that the Robbins incinerator would be open and providing disposal capacity for approximately 1.2 million gate yards annually. (R.Brief at 10.) Land and Lakes argues that even including the Robbins incinerator disposal capacity there remains a need in the service area. (R.Brief at 7.)

Land and Lakes also presents arguments on the evidence in the record that supports the Village's finding. Land and Lakes asserts that the SSMMA's solid waste management plan also concludes that even with the Robbins incinerator being fully operational, there is still a significant need for additional landfill capacity in south suburban Cook County and that the SSMMA supports the expansion. (R.Brief at 10.) Additionally, Land and Lakes states that Cook County's solid waste management plan also concludes that there is a need for additional landfill capacity even when considering the Robbins incinerator and supports the requested expansion. (R.Brief at 10.)

To conclude, Land and Lakes states in its post-hearing brief that Mr. Campbell's testimony is the only expert testimony presented at hearing and is consistent with both the SSMMA and Cook County solid waste management plans. (R.Brief at 10.) Land and Lakes argues that in contrast to the evidence it presented demonstrating the need, the comments in Senator Shaw's submittals are flawed and thus the Village's decision is not against the manifest weight of the evidence. (R.Brief at 10.)

Land and Lakes in its response brief asserts in response to the first argument raised in petitioners' response brief that since the expanded facility will not be big enough to meet all of the service area's disposal capacity shortfall, it was against the manifest weight of the evidence

for the Village to find that the proposed expansion is necessary to accommodate the waste needs of the service area, and that petitioners' argument is unsupported by any law. (R.Resp. at 7.) Land and Lakes argues that "[t]here is no requirement that a proposed facility satisfy all of the service area's waste needs: only that some disposal capacity is needed." (R.Resp. at 7.) Additionally, Land and Lakes argues that it has demonstrated that the application has met this criterion and that the Village's decision was not against the manifest weight of the evidence. (R.Resp. at 7-8.)

Land and Lakes states in response to petitioners' second argument, that the Village itself does not need an additional or expanded site to accommodate its waste disposal needs, that petitioners misunderstand the statutory criterion regarding need. (R.Resp. at 8.) Land and Lakes states that the need criterion inquiry is whether the proposed facility is necessary for the waste needs of the service area, not whether the facility is necessary for the waste needs of only the individual unit of government in which the facility is to be located. (R.Resp. at 8.) Land and Lakes states that if need is limited to the waste needs of the individual unit of government, each unit in the state would have to have a its own landfill. (R.Resp. at 8.) Land and Lakes argues that "[b]y requiring that a facility be necessary for the area it is intended to serve, the legislature indicated its intent that the need analysis consider areas outside the individual unit of government, if those areas are to be served by the facility." (R.Resp. at 8.) Land and Lakes concludes in its response brief that Land and Lakes presented evidence that the proposed expansion is necessary to accommodate the waste needs of the area it is intended to serve and discredited all contrary evidence. (R.Resp. at 8-9.) Land and Lakes argues that the Village's decision is supported by the manifest weight of the evidence. (R.Resp. at 9.)

Board Discussion

The Board finds that the Village's decision is not against the manifest weight of the evidence. The service area is defined by the applicant whether the proposal is for a new facility or an expansion of a existing facility. (See Metroploitan Waste Systems, Inc. v. Pollution Control Board, 146 Ill.Dec. 822, 201 Ill.App.3d 51, 558 N.E.2d 785, 787 (3rd. Dist. 1990) and Worthen v. Village of Roxana, 191 Ill.Dec. 468, 253 Ill.App.3d 378, 623 N.E.2d 1058, 1062-1063 (5th Dist. 1993).) The issue presented to the Village is whether the proposed expansion is necessary to accommodate the waste needs of the area it is intended to serve. Therefore, petitioners' second argument, the needs of the Village should be considered, is misplaced whether the proposed facility is new or expanded.

The courts have used several different phraseologies but have defined "necessary" in substantially the same way. (See Industrial Fuels and Resource/Illinois Inc. v. Illinois Pollution Control Board, 169 Ill.Dec. 661, 227 Ill.App.3d 533, 592 N.E.2d 148, 156 (1st Dist. 1992).) The term "necessary" means that the facility is reasonably required to meet or accommodate the waste needs of the defined service area taking into consideration the defined service area's disposal capabilities and waste production. There is no requirement that the facility is necessary to meet all the waste disposal needs at any given point in time for the defined service area. Petitioners' argument, that since the evidence demonstrates that the

proposed expansion does not meet all the required disposal needs of the service area the Village's decision is against the manifest weight of the evidence, is contrary to the purpose of the need criteria. The fact that the proposed expansion cannot service all the waste disposal needs of the proposed service area tends to show that the facility is necessary to accommodate the waste needs of the area it is intended to serve. Based on the Board's standard of review and upon review of the record in this matter, the Village's decision is not against the manifest weight of the evidence.

Petitioners' arguments that the Village's findings are against the manifest weight of the evidence concerning the health criteria.

Petitioners raised this issue in their petition but have failed to present any arguments in support of their contention that the Village's decision is against the manifest weight of the evidence.

Land and Lakes Argument

In its post-hearing brief Land and Lakes states that it "presented testimony and evidence from Dr. Neil Williams, president of GeoSyntech Consultants, experts in the field of geotechnical engineering and landfill design and operations." (R.Brief at 11.) Land and Lakes argues that the evidence presented at hearing before the Village demonstrates that the proposed expansion is designed, located, and proposed to be operated so that the public health, safety, and welfare will be protected. (R.Brief at 11.) Additionally, Land and Lakes argues that Senator Shaw's submittal which contained a letter from Alternative Resources, Inc. and a United States Environmental Protection Agency report on landfill gas composition at Fresh Kills Landfill in Staten Island, New York was rebutted by direct testimony and information contained in the application. (R.Brief at 12-14.) Land and Lakes concludes its arguments in its post-hearing brief by stating that it presented a great deal of both written evidence and direct testimony which was not rebutted. Land and Lakes argues that the Village's determination was not against the manifest weight of the evidence. (R.Brief at 14.)

In its response brief Land and Lakes states that petitioners have not made any arguments that the Village's decision was against the manifest weight of the evidence. (R.Resp at 9.) Land and Lakes argues, as it did previously concerning the whole petition, that petitioners have failed to carry their burden of proof, and have waived this claim. (R.Resp at 9.) Land and Lakes requests the Board to affirm the Village's decision. (R.Resp at 9.)

Board Discussion

As discussed previously, issues raised which are not argued will be considered waived. The Board agrees with Land and Lakes that petitioners have waived its argument that the Village's decision on this criteria was against the manifest weight of the evidence and will not discuss this issue further. (See Citizens United for a Responsible Environment v. Browning-Ferris Industries of Illinois, PCB 96-238, (September 19, 1996.) *citing* Stauton Landfill, Inc. v. Illinois Environmental Protection Agency, PCB 91-95 (March 26, 1992), D & B Refuse

Service v. Illinois Environmental Protection Agency, PCB 89-106 (October 24, 1991), and In re Application of Anderson, 516 N.E.2d 860 (2d Dist. 1987).)

CONCLUSION

The Board sits in review of the local unit of government's decision in matters brought pursuant to Section 39.2 of the Act. The Board's role when reviewing the local unit of government's decision on the criteria is not to reweigh the evidence or draw different inferences than the unit of local government but is to review the record as it existed before the local government to determine whether the unit of local government's decision is against the manifest weight of the evidence. Section 40.1 of the Act specifically states that the hearing before the Board shall "be based exclusively on the record before the county board or governing body of the municipality." Thus the Board's role is limited when reviewing the decision of the unit of local government concerning Section 39.2 of the Act. The Board's role is not to provide a forum for petitioners to present evidence for the first time concerning the criteria set forth in Section 39.2 of the Act. It is the role of the local unit of government to hear the evidence and make a decision. As noted by Senator Shaw at the December 19, 1996 hearing the State legislature specifically gave the units of local government the siting authority and this Board cannot reverse a unit's decision unless it is against the manifest weight of the evidence.

In this case petitioners only raised issues concerning the Village's decision on two of the criteria set forth in Section 39.2 of the Act and did not challenge the jurisdiction of the Village to hear the application or contend that the proceeding before the Village was fundamentally unfair. For the reasons stated above the Board finds that the Village's decisions on the challenged criteria are not against the manifest weight of the evidence. Therefore, we affirm the Village's decision to grant approval of Land and Lakes local siting request.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board denies Village of Dolton's motion for reconsideration of the Board's November 21, 1996 order that denied the Village of Dolton's motion to direct petitioners to pay the costs associated with the filing of the record in this matter.

The decision of the Village of Dolton granting local siting approval for the expansion to Land and Lakes Company River Bend Prairie facility is affirmed.

IT IS SO ORDERED.

Board member M. McFawn concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders within 35 days of the date of service of this order. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the _____ day of _____, 1997, by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board