0198-001

ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE,	)	
	)	PCB 03-125
Petitioner,	)	PCB 03-133
	)	PCB 03-134
v.	)	PCB 03-135
	)	(consolidated)
COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC.	)	(Pollution Control Facility Siting Appeals)
	)	
Respondents.	)	

NOTICE OF FILING

To: (See attached Service List.)

PLEASE TAKE NOTICE that on this 23rd day of June 2003, the following was filed with the Illinois Pollution Control Board, attached and herewith served upon you:

Brief and Argument of Respondents County of Kankakee and County Board of Kankakee

COUNTY OF KANKAKEE and
COUNTY BOARD OF KANKAKEE

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CERTIFICATE OF SERVICE

I, the undersigned, state that I served a copy of the described document on June 23, 2003, in the above-captioned matter as indicated on attached service list.

Jeanette M. Podlin

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB 03-125 (Third-Party Pollution Control Facility Siting Appeal)
MERLIN KARLOCK, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondent.	)	PCB 03-133 (Third-Party Pollution Control Facility Siting Appeal)
MICHAEL WATSON, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondent.	)	PCB 03-134 (Third-Party Pollution Control Facility Siting Appeal)
KEITH RUNYON, Petitioner, vs. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondent.	)	PCB 03-135 (Third-Party Pollution Control Facility Siting Appeal)

BRIEF AND ARGUMENT OF RESPONDENTS COUNTY OF KANKAKEE AND COUNTY BOARD OF KANKAKEE

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INTRODUCTION

On March 29, 2002 Waste Management of Illinois, Inc. (WMII) filed an application pursuant to 415 ILCS 5/39.2 (2002) to site a landfill in Kankakee County. The application was withdrawn on July 22, 2002 and refiled on August 16, 2002. (C.1244 at 3). The Application primarily consisted of two bound volumes amounting to thousands of pages of material.

A public hearing was held from November 18, 2002 through December 6, 2002, during which hundreds of hours of testimony was taken. Eight objectors appeared at the hearing including the City of Kankakee, Michael Watson, Merlin Karlock, and Keith Runyon, who are the petitioners in the instant action. The Application was approved by on January 31, 2003 as each criterion of section 39.2 was found to be satisfied. C2348-2354. The petitions for review filed by the petitioners were consolidated, and the proceedings under 415 ILCS 5/40.1 ensued.

During these proceedings, the objectors took 16 depositions, primarily of County Board Members and personnel. Collectively the petitioners have argued that the Kankakee County Board (County Board) lacked jurisdiction, that the proceedings were fundamentally unfair and that the County Board decisions as to criteria 1, 2, 3, 5, 6, 7 and 8 were against the manifest weight of the evidence. However, the record of this case clearly establishes that jurisdiction was proper, the proceedings were fundamentally fair, and the decision of the County Board as to the criteria was supported by ample evidence.

ARGUMENT

I. THE COUNTY OF KANKAKEE HAD JURISDICTION TO CONDUCT THE LANDFILL SITING HEARING.

A. Proper notice was provided to landowners pursuant to section 39.2 of the Environmental Protection Act.

As set forth in section 39.2(b) of the Environmental Protection Act (Act), an applicant is required to provide notice by personal service or registered mail to property owners located

within 250 feet of the proposed facility at least 14 days prior to the filing of an application. 415 ILCS 5/39.2(b). The Brief of the City of Kankakee alleges that WMII failed to provide adequate notice to four landowners, Merlin Karlock, Richard Mehrer, and Robert and Brenda Keller. However, the Briefs of Petitioners Watson and Karlock allege improper service only on Robert and Brenda Keller, and in fact, in his own Brief, Karlock, represented by Attorney George Mueller, does not allege that he was improperly served. As explained below, all of the property owners listed above were properly served with notice pursuant to section 39.2(b) of the Act.

The Affidavit and supporting materials provided by WMII set forth that Mr. Karlock received, signed and returned a certified mail receipt on July 27, 2002. *See* Siting Hearing Petitioner's Ex. 7 and 7A. Obviously, such service is proper under section 39.2(b) of the Act because the service was accomplished 20 days before the application was filed and, as clearly set forth in the Illinois Pollution Control Board's (IPCB's) decisions of *Environmentally Concerned Citizens Organization v. Landfill L.L.C.*, PCB 98-98 (May 7, 1998) and *Ash v. Iroquois County Board*, PCB 87-29 (July 16, 1987), certified mail is entirely acceptable under section 39.2(b). Consequently, any allegation that Mr. Karlock did not receive proper notice must fail.

Next, service to Mr. Mehrer was also clearly appropriate. On July 25, 2002, notice was sent to Mr. Mehrer, as the registered owner of the property, through regular and certified mail. *See* Petitioner's Ex. 7 and 7A. The certified mail receipt was signed and returned by someone other than Mr. Mehrer. *See id.* After receiving that returned receipt, WMII could have concluded its attempts at service because a signed return receipt is sufficient even if it is not signed by the property owner. *See County of Kankakee v. City of Kankakee*, PCB 03-31, 03-33, 03-35 (consolidated), slip op. at 16 (Jan. 9, 2003); *DiMaggio v. Solid Waste Agency of Northern Cook County*, PCB 89-138, slip op. at 10 (Jan. 11, 1990); *City of Columbia v. County of St.*

Clair, PCB 85-177, slip op. at 13-14 (April 3, 1986). However, WMII did not end its attempts there. Instead, WMII went an extra step and served Mr. Mehrer by posting notice on his property. *See* Petitioner's Ex. 7A.

The City of Kankakee contends that WMII should have effectuated service on Mr. Mehrer's widow and/or his heirs, but WMII clearly was not required to do so because Mr. Mehrer was the only owner of the property listed in the Kankakee County tax records. *See* 415 ILCS 5/39.2(b) (explaining that notice shall be given to property owners "which appear from the authentic tax records of the County in which such facility is to be located"). Again going above and beyond its duty, WMII did attempt to serve Mr. Mehrer's widow by certified mail on July 26, 2002 and regular mail on July 25, 2002 even though she was not listed on the authentic tax records as an owner of the property. *See* Petitioner's Ex. 7 and 7A. The certified mail receipt was returned unclaimed. *See id.* Because WMII met and exceeded the service requirements of the Act by providing notice to Mr. Mehrer, the only registered owner of the property, such notice was proper and the County Board had jurisdiction.

Finally, the IPCB should find that service was proper on Mr. and Mrs. Keller. As set forth by Mr. Moran and the process server, Ryan Jones, WMII attempted to serve the Kellers notice of the intent to file the Application no fewer than nine times, consisting of five attempts by personal service (including one attempt where an individual on the Keller property refused to provide a name and could not be served), one by certified mailing, two by regular mailings and even posted the notice by firmly taping it to the door commonly used by the Kellers. *See* C1271 at 5-57; Petitioner's Ex. 7B.

Petitioner Watson claims that WMII's service is inadequate because its attempts at service began four days prior to the deadline for notification, but this is merely a misstatement of

the facts because WMII actually began attempting to serve the Kellers through certified and regular mail on July 25, 2002, 22 days before the application was to be filed and 8 days before the deadline for notification. Beginning attempts at service 8 days prior to the notification deadline was clearly adequate. *See City of Columbia v. County of St. Clair,* 85 PCB 177, slip op. at 10 (April 3, 1986) (explaining that an applicant need only initiate service "sufficiently far in advance to reasonably expect receipt of notice 14 days in advance of the filing of an Application"); *Waste Management of Illinois v. Village of Bensenville*, PCB 89-28, slip op. at 4 (Aug. 10, 1989) ("21-day certified mailing certainly constitutes a reasonable expectation").

Petitioners rely on *Ogle County Board v. Pollution Control Board*, 272 Ill.App.3d 184, 649 N.E.2d 545 (2d Dist. 1995) to allege that the service provided to the Kellers was improper. However, as recently asserted by Mr. Karlock's attorney in another proceeding, to the extent that *Ogle* requires a returned receipt to be signed, that decision is no longer controlling. (*See* IPCB Post-Hearing Brief of Mr. George Mueller for Town and Country in *County of Kankakee v. City of Kankakee and Town and Country*, PCB 03-31, 33, 35 (cons.) (Jan. 9, 2003). In *Ogle*, the Court specifically relied on the Supreme Court's decision in *Avdich v. Kleinert*, 69 Ill.2d 1, 370 (1977) in finding that actual timely receipt of pre-filing notice was required. *Ogle*, 272 Ill.App.3d at 195-96, 649 N.E.2d at 554. However, the Supreme Court in *People ex rel. Devine v. $30,700 United States Currency*, 199 Ill.2d 142, 766 N.E.2d 1084 (2002), effectively overruled the holding in *Advich* as it relates to statutes requiring notice by "return receipt." *Devine* dealt with a forfeiture proceeding in which the required notice provision provided: "If the owner's or interest holder's name and current address are known, then [notice or service shall be given] by either personal service or mailing a copy of the notice by certified mail, return receipt requested to that address." 725 ILCS 150/4(a)(1) (2000). The Supreme Court contrasted the

"return receipt requested" requirement in *Devine* with the "returned receipt" requirement at issue in *Advich* and held that certified mail notice is complete when mailed when a statute requires notice by "return receipt." *Devine*, 199 Ill.2d at 151-53, 766 N.E.2d at 1090-91. Because section 39.2(b), like the statute in *Devine*, requires that the notice be sent "return receipt requested," the IPCB should find that notice is complete when mailed.

Even if the Board relies on *Ogle*, that case is clearly distinguishable because in that case the applicant did not mail certified letters until three days prior to the prior to the 14-day deadline (272 Ill.App.3d at 187, 649 N.E.2d at 548), compared to eight days in this case. The IPCB found that fact significant, noting that it would not be reasonable for the applicant to believe that the certified letters would be received and signed within only three days. *Ogle*, 272 Ill.App.3d at 188-89, 649 N.E.2d at 549. Additionally, *Ogle* is distinguishable because the property owners in *Ogle* actually signed the returned receipts after the 14-day deadline (272 Ill.App.3d at 187, 649 N.E.2d at 548), while the Kellers never signed their notice. The Court in *Ogle* specifically refused to speculate as to how it would rule if the notice was not signed at all, stating: "[w]e express no opinion whether a potential recipient who refuses to sign a receipt of notice may be held to be in constructive receipt of the notice for purposes of the statute." 272 Ill.App.3d at 196, 649 N.E.2d at 554.

After the Court's decision in *Ogle*, the IPCB held that "the requirements of section 39.2(b) can be met through constructive notice." *ESG Watts, Inc. v. Sangamon County Board*, PCB 98-2 (June 17, 1999). The Board explained: "If a property owner does not receive the notice on time, he or she nonetheless may be deemed to be in constructive receipt of a notice if the property owner refuses service before the deadline." PCB 98-2, slip op. at 9. The facts of this case indeed establish constructive notice because the Kellers were provided a certified notice

on July 25, 2002, two notices sent via regular mail, one on July 25, 2002 and one on August 1, 2002, five attempts at personal service were made from July 29 to August 1, 2002, including an attempt on July 31, 2002 when a woman on the Kellers' property was present but refused to identify herself, and, finally, a notice was firmly affixed to the Kellers' door on August 1, 2002, 15 days prior to the filing of WMII's application. *See* C1271 at 5-57; Petitioner's Ex. 7B. Therefore, not only was service effective when it was sent by certified mail, at a minimum, all of the attempts at service and the posting and delivery of the notices beginning 22 days prior to the filing of the application provided constructive notice to the Kellers, as the hearing officer found at the local siting hearing. C1271 at 148.

The Petitioners assert that constructive notice on the Kellers could not be had because there was no evidence that the Kellers "refused" service before the deadline. However, the evidence presented at the hearing establishes otherwise. The Kellers never attempted to claim the certified letter that was sent on July 25, 2002, were conveniently not home on five attempts by the process server to serve them, allegedly never saw the notice firmly affixed to their door and never saw the two notices that they received by regular mail. All of these circumstances lead to the inevitable conclusion that the Kellers were in fact recalcitrant, which the hearing officer found. C1271 at 148. The fact that the certified letter sent to the Kellers was "unclaimed" instead of "refused" makes no difference because there is no logical distinction between a property owner that refuses to go to the post office to pick up a registered letter and a property owner who marks "refused" on the certified mail receipt. Consequently, these property owners should be treated the same and both should be subject to constructive notice. Otherwise, the purposes of section 39.2 could be easily frustrated by property owners who simply refuse to act. It is also important to realize that the Kellers were undoubtedly aware that the notice of the new

application would be forthcoming because they had received notice of the original application that was filed in March of 2002 and had to be refiled due to alleged notice defects. If ever a property owner might seek to avoid service, it would be in a situation where a previous application had been thwarted due to alleged notice defects.

Finally, the Petitioners contend that the notice provided to Mr. and Mrs. Keller was inadequate because the notice was sent only to Mr. Keller. This argument too must fail. The Court in *Wabash and Lawrence Counties Taxpayers and Water Drinkers Association v. Pollution Control Board*, 198 Ill.App.3d 388, 390, 555 N.E.2d 1081, 1084 (5th Dist. 1990), held that it was acceptable to provide notice to only one property owner even though there were several owners listed in the authentic tax records, as heirs of a deceased property owner. The court found that notifying only one owner "complied with section 39.2(b) of the Act even though all of the heirs did not receive personal notice." *Wabash*, 198 Ill.App.3d at 390-91, 555 N.E.2d at 1084. Likewise, in this case, the notice provided to Mr. Keller, as a listed owner of property, was sufficient under section 39.2(b). Furthermore, the Petitioners' assertions that Mrs. Keller should have received notice is disingenuous because the evidence presented at the siting hearing establishes that if such service was attempted, Mrs. Keller would never have been aware of it because she does not believe that she or her husband receive any mail in her mailbox at home. C1271 at 85. Because Mrs. Keller was not even aware that she received mail at her home, she clearly would not have been aware of any mail that was addressed to her there. Consequently, the Petitioners' arguments that Mrs. Keller should have received her own notice should fail.

B. The County Of Kankakee Satisfied All Jurisdictional Prerequisites And, Therefore, Had Authority To Conduct A Siting Hearing.

Petitioner City of Kankakee alleges that the Kankakee County Board did not have jurisdiction to hold a siting hearing because: (1) the applicant did not comply with the Kankakee

County Host Agreement, (2) all documents required by section 39.2(c) were not filed by the applicant and (3) neither Kankakee County nor the applicant followed the requirements of the ordinance. All of these arguments must fail because, as explained more fully in sections II.C, II.E. and below, WMII did comply with the Kankakee County Host Agreement, did file all documents required by section 39.2(c) and did follow the requirements of the ordinance. However, even if the Petitioners' assertions were true, these actions or inactions by Kankakee County and/or WMII do not divest the County Board of jurisdiction over the siting hearing.

The only clearly jurisdictional prerequisites that have been established for a landfill siting hearing are those contained in section 39.2(b). *See Tate v. IPCB*, 188 Ill.App.3d 994, 1016, 544 N.E.2d 1176, 1191 (1989). In fact, courts and the IPCB previously rejected arguments similar to those made by the City of Kankakee that other factors may affect a local siting authority's jurisdiction. *See Tate*, 188 Ill.App.3d at 1016, 544 N.E.2d at 1191; *City of Geneva v. Waste Management of Illinois, Inc.*, PCB 94-58 (July 21, 1994).

The Court in *Tate* specifically refused to hold that the requirements of 39.2(c) are jurisdictional in nature. 188 Ill.App. at 1016, 544 N.E.2d at 1191. The Court explained that "[m]erely because subsection (b) has been held to be jurisdictional does not necessarily mean that compliance with subsection (c) also must be had before the County Board has jurisdiction." *Id.* Additionally, the IPCB held that an applicant's failing to follow the requirements of an ordinance does not divest a board of jurisdiction as a siting authority. *City of Geneva v. Waste Management of Illinois, Inc.*, PCB 94-58, slip op. at 8 (July 21, 1994) (explaining that meeting statutory requirements contained in the Act is all that is required to vest a local siting authority with jurisdiction to hear and decide a siting application).

Finally, the Petitioner's assertion that the lack of a valid host agreement divested the County Board of jurisdiction, must fail. First and foremost, as pointed out by Attorney Helsten at the siting hearings, there was a valid host agreement in place because an application was filed by WMII on March 29, 2002, prior to the June 1, 2002 cut-off date in the agreement. C1245 at 13; WMII Application, C1, Tab C of Additional Materials. Nothing in the host agreement provides that it would be null and void if the applicant had to continue or withdraw its initial application and then refiled at a later date. Furthermore, even assuming, *arguendo,* that there was not a host agreement in place, the absence of such an agreement would have no effect on the jurisdiction of the County Board. As explained above, the only jurisdiction requirements are those set forth in section 39.2(b). Because a valid host agreement is not a requirement under section 39.2(b), the Board cannot declare that the County Board did not have jurisdiction based on the absence of such an agreement. *See City of Geneva,* PCB 94-58, slip op. at 8.

Because the only jurisdictional requirements for a landfill siting application are contained in section 39.2(b) and, as explained above, the requirements of section 39.2(b) have been met, the County Board had jurisdiction to conduct the siting hearing at issue.

II. THE LANDFILL SITING HEARINGS CONDUCTED BY THE COUNTY OF KANKAKEE WERE FUNDAMENTALLY FAIR.

Section 40.1 of the Act requires the Board to review the proceedings before the County Board to determine if they were fundamentally fair. 415 ILCS 5/40.1. A non-applicant who participates in a local pollution control siting hearing has no property interest at stake entitling him to the protection afforded by the constitutional guarantees of due process. *Land and Lakes Company v. Pollution Control Board,* 309 Ill.App.3d 41, 743 N.E.2d 188 (3d Dist. 2000) (citing *South Energy Corp. v. Pollution Control Board,* 275 Ill.App.384, 655 N.E.2d 304 (1995)). Instead, under Section 40.1, such a party has only a statutory right to fundamental fairness,

which incorporates "minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence." *Id.* (citing *Daly v. Pollution Control Board*, 264 Ill.App.3d 968, 637 N.E.2d 1153 (1994)).

In this case, every party was provided the opportunity to be heard, cross-examined witnesses and received impartial rulings from the hearing officer. The applicant provided literally thousands of pages of material to support its application and followed all of the notice procedures required. The County held hearings from November 18, 2002 through December 6, 2002, at which time any member of the public was allowed to present comment and those who registered were allowed to completely participate in the hearings, which involved literally hundreds of hours of questioning, leaving no stone unturned as to this Application. In the discovery associated with this IPCB review, the objectors took depositions of nine County Board members, five Kankakee County employees, and two WMII employees, in an attempt to discover fundamental fairness issues.[1]

The Petitioners assert that the hearings are fundamentally unfair under a variety of equally specious claims. The Petitioners, the City of Kankakee, Merlin Karlock and Michael Watson, all claim fundamental unfairness based upon an alleged unavailability of the operating record of WMII, alleged *ex parte* contacts and alleged pre-adjudication of the Application by the County. Karlock and the City of Kankakee additionally assert fundamental unfairness based upon an alleged failure of the applicant to comply with local siting ordinances and on the

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[1] The depositions of all of these individuals were admitted into the record as evidence; however, any questioning regarding the County's Solid Waste Management Plan contained within these depositions was admitted only as an offer of proof as the hearing officer ruled that such discovery and evidence was beyond the purview of a Section 40.1 hearing. IPCB Tr. 5/5/03 at 46-47. The County also objected to any questioning or the admission of any evidence regarding pre-filing contacts or negotiations concerning the Host Agreement, however, the hearing officer denied those objections. IPCB Tr. 5/5/03 at 35-45. The County reiterated its objections in a motion to the hearing officer and stands by those objections and reiterates them here to the IPCB. Those depositions were entered as IPCB Hearing Officer's Exhibits 1-15, 18. IPCB Tr. 5/5/03 at 58-62.

grounds that the Application was not "certified as complete." Petitioner Runyon makes no fundamental fairness arguments.

A. There is no evidence of pre-adjudication of the merits by the County Board.

The decisionmaker in this case was the Kankakee County Board. Depositions were taken of numerous County Board members, none of whom testified that they had prejudged the merits of the Application in any. (*See* deps. of Leo Whitten, Michael Quigley, Elmer Wilson, George Washington, Jr., Douglas Graves, Pamela Lee, Leonard Martin and Karl Kruse). As a matter of fact, none of these witnesses were specifically asked by any of the Petitioners whether they prejudged the Application in any way. *Id.*

Unlike the *Town and Country* case, which was recently heard by the IPCB, in this case there is no evidence that a pre-hearing was held in front of the County Board before the Application was filed. *See County of Kankakee, et al. v. City of Kankakee, Town and Country Utilities, Inc., et al.*, PCB 03-31, 03-33 and 03-35 (January 9, 2003). In *Town and Country*, the City Council hosted a "special presentation" by the applicant, less than one month before the application was filed, at which time the applicant made a presentation through its expert witnesses concerning the consistency of the application with the 39.2 criteria and impugned the credibility of objector's witnesses that might appear at the official hearing. *Id.* There was also evidence that the applicant in *Town & Country* was involved in the City's strip annexation of the area where the proposed landfill would be located and was extensively involved in negotiation of a Host Agreement with the City, and even assisted the City in the creation of its own siting ordinance. *Id.* In *Town & Country*, a procedure was employed by the City which required individuals to register to participate in the hearing at the first night of the hearing; however, numerous members of the public were not allowed into the hearing room that night, thereby

creating the potential that members of the public were barred from participating in the siting hearing at all. *Id.* Indeed, two members of the public testified that they were barred from participating in the hearing when they desired to do so, though one of the members was eventually allowed to participate several days after the commencement of the hearing. *Id.* The IPCB ultimately held that even despite the pre-filing contacts, the pre-hearing of the Application, and the procedural irregularities at the hearing itself, that the proceedings were fundamentally fair. *Id.*

In this case, it is obviously much clearer that the proceedings were fundamentally fair because here there is none of the evidence of pre-adjudication of the merits of the Application and collusion between the Applicant and the siting authority, as existed in *Town & Country.* Rather, in this case, the primary argument of the Petitioners is that the language of the County's Solid Waste Management Plan somehow shows a pre-adjudication of the Section 39.2 landfill siting hearing. In an attempt to support this argument, the Petitioners are forced to rely upon evidence that was only submitted as an offer of proof and was never admitted at the IPCB hearing because the hearing officer appropriately ruled that any evidence concerning passage of the Solid Waste Management Plan is irrelevant and inadmissible pursuant to *Residents Against the Polluted Environment v. Illinois Pollution Control Board,* 293 Ill.App.3d 219, 687 N.E.2d 552 (Ill.App.3d Dist. 1997). IPCB Tr. 5/5/03 at 48. The Court in *Residents* explicitly held:

> We agree that Section 40.1 does not authorize the Board to review the process involved in the County's amendment of its Plan. The Appellants do not cite, nor do we find, any statutory or judicial authority which would allow evidence to be presented concerning the County's amendment of its Plan. Indeed, the express language of the Act indicates that the purpose of the siting process is to determine whether the proposed facility *complies* with the County's Plan. 415 ILCS 5/39.2(a)(8)(West 1994). The Act does not authorize an inquiry into the County's prior *Amendment* of the Plan. Rather, the adoption and amendment of a solid waste management plan is governed by the Local Solid Waste Disposal Act (415 ILCS 10/1, et seq. (West 1994)) and the Solid Waste Planning and Recycling Act

(415 ILCS 15/1, et seq. (West 1994)). Neither of these Acts authorizes the Board in a siting approval appeal to review the procedures used by a county in adopting its Solid Waste Management Plan. *Id.* at 555.

The *Residents* case also noted that the Illinois Supreme Court in *E&E Hauling* held that even if a county previously approved the landfill by ordinance, such did not render the siting proceeding fundamentally unfair and was not indicative of prejudgment of the adjudicated facts. *Id.* (citing *E&E Hauling v. Pollution Control Board*, 107 Ill.2d 33, 43, 481 N.E.2d 664, 668 (1985)). Simply stated, the amendment of the Solid Waste Management Plan is beyond Section 40.1 review of a Section 39.2 hearing and rather the only issue that must be decided is whether or not the application is consistent with the Plan.

Nonetheless, if somehow the IPCB decides that the amendment of the Plan may be considered, in this case there is absolutely no evidence that the amendment of that Plan resulted in bias upon the decisionmakers at the siting hearing. The Plan as amended was never even admitted into evidence at the County Board hearing and was only put into the record at the IPCB hearing as an offer of proof. IPCB Tr. 5/6/03 at 96-98. Therefore, if the petitioners are somehow relying on the language of the Plan as evidence of the pre-adjudication of the merits, their claim fails as that Plan was never admitted into evidence.

Furthermore, the Kankakee County Solid Waste Management Plan at issue in no way provides that an application by WMII would be approved by the County Board at a Section 39.2 hearing. Rather, the Plan as amended only provides that "the only exception to this restriction (on landfilling in the County) is that an expansion of the existing landfill on the real property that is contiguous to the existing landfill would be allowed under this Plan." IPCB Hrg. Watson Ex. 7. There is nothing in this language that indicates an obligation, agreement or even bias toward siting the landfill. Rather, the language makes it clear that landfilling is <u>not</u> favored by Kankakee County except that an expansion of the existing landfill is consistent with the County

Plan because it limits the impacts to the County to the area that is already affected by a landfill while assuring sufficient capacity for the next 20 years.

Petitioner Watson suggests that somehow the Host Agreement, which was negotiated well before the application was ever filed, displays a pre-adjudication of the merits. However, the Petitioner provides no explanation for this conclusion and indeed the document on its face explicitly provides that "nothing in this *Agreement* shall affect or obviate the County's obligation under 415 ILCS 5/39.2 to fairly and objectively review and decide the Siting Application to be filed by Waste Management." Host Agreement p.2 (C1 at Tab C of Additional Information). The Host Agreement further provides that "Waste Management conclusively acknowledges that no representations, promises, or assurance, of any kind or nature, have been made by Kankakee County, its officials, officers, employees or servants, to any of the Waste Management's directors, officers, and employees as to the outcome of any such Siting Application proceedings." C1 at Tab C of Additional Information, p. 2.

It is well established that an adoption of a Host Agreement between an applicant and a decisionmaker is a legislative function, which is not an indication of pre-judgment or bias. *See Residents Against a Polluted Environment v. County of LaSalle and Land Comp.*, PCB 96-243 (Sept. 16, 1996). In the *Residents* case, the IPCB upheld a hearing officer's refusal to allow petitioners to introduce evidence regarding the adoption of a Host Agreement between the applicant and the decisionmaker.[2] *Id.*

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[2] In a pleading filed with the IPCB hearing officer, the County objected to the admission of any evidence concerning the adoption of the Host Agreement; however, said objection was overruled. The County reiterates its objection noting that the only time that evidence of prefiling contacts is discoverable is when there is evidence of specific instances of fundamentally unfair communications occurring before an application is filed. *See Land and Lakes Co. v. Village of Romeoville*, PCB 92-25, Slip Op. at 4 (June 4, 1992); *DiMaggio v. Solid Waste Agency of Northern Cook County*, PCB 89-138, Slip Op. at 7 (Oct. 27, 1989). Furthermore, the Third District established that elected officials are presumed to act objectively and unless there is a showing of bias and specific instances of fundamental unfairness, discovery on such prefiling communications will not be allowed. *Residents,* 687 N.E.2d 556-557.

Watson makes the unsupported conclusion that the City had "actual obligations to approve the application" but fails to identify any evidence to support such a bald-faced and incorrect statement. Apparently, Watson is suggesting that the payment made by WMII to the County at the time of the execution of the Host Agreement obligated the County to accept WMII's siting application. Watson ignores the plain language of the Host Agreement, which explicitly provides that the Agreement in no way affects the County's obligations to conduct an impartial 39.2 hearing. Furthermore, the payment that was made was in consideration of removing a restriction on the existing landfill from accepting out-of-county waste. *See* Host Agreement, p.3 (C1 at Tab C of Additional Information). There is no indication in the Host Agreement that this payment was in any way contingent upon approval of a subsequent application for expansion, nor was the payment to be returned if siting approval was not granted. Therefore, Watson's assertion that there was an obligation on behalf of the County to site the landfill is simply false.

Another argument of the Petitioners of alleged evidence of pre-adjudication of the merits, surrounds the testimony of one Board member, Leonard "Shakey" Martin. According to the City and Mr. Karlock, Mr. Martin allegedly testified that siting approval was a "foregone conclusion." *See* City Br. at 9, Watson Br. at 28. However, a review of Mr. Martin's testimony clearly shows that he never testified that there was any pre-adjudication of the merits of the Application. As a matter of fact, Mr. Martin never even used the words "foregone conclusion" and, rather, that was a statement made by counsel for the City of Kankakee. (Martin, 15). Indeed, the fact that Mr. Martin himself voted against the Application is evidence that there was no pre-adjudication of the merits of the Application.

Mr. Martin did not testify that he ever heard a Board member indicate that he would not give the Application full and impartial consideration. Nowhere within Mr. Martin's testimony is there a description of pre-adjudicatory bias on behalf of a County Board member. None of the County Board members were even asked by any of the Petitioners, whether they pre-adjudicated the merits or believed they were not impartial. There is absolutely no evidence gleaned from any of the depositions that a meeting took place between County Board members wherein the Application was pre-adjudicated or a decision was made before the 39.2 hearing, as occurred in the *Town and Country* case. Regardless, even in *Town and Country*, the proceedings were still found fundamentally fair.

On the contrary, the Board members testified that they did not even discuss the Application amongst themselves until the conclusion of the evidence. (*See* Deps. of Weisman at 12, 25; Washington at 20; Wilson at 9). No decision was made before a vote was taken. (Wilson, 17). After the Application was filed, the County Board members did not communicate with Charles Helsten, Richard Porter or any Hinshaw & Culbertson attorneys who represented County staff at that time. (Dep. of Pam Lee, 62). Additionally, there is no evidence any Board member communicated with the applicant in any way after the Application was filed, and, on the contrary, there is explicit evidence that no such communications took place. (Dep. of Kruse, 33-34; Graves, Pg. 21-22). There is no evidence that the Planning and Zoning Committee or the Planning Commissioner spoke with the Applicant after filing (Graves, 21). There is also no evidence of County staff or its attorneys communicating with the applicant after filing and before decision. (*See* Martin, 39; Graves, 21). Furthermore, there is absolutely no evidence that any member of the County Board even spoke with County staff or Planning Committee members about the Application after it was filed and before decision. (Kruse, 33-34; Graves, 21-22). As a

matter of fact, Mr. Martin also testified that he is not aware of any conversations between the attorneys for the County Board with the attorneys for the County staff after the filing of the Application for the decision. (Martin, 38-39). Finally, the testimony that the City relies upon of Mr. Martin concerning "foregone conclusion" actually was as follows:

"Q. From March of 2002 until August of 2002, only looking at that time period, in those time periods did you share your belief that the site had been pre-selected with other members of the County Board?

(Objection by County attorney) The witness never testified to that.

A. When you say share, what do you mean?

Q. Talk. Communicate in any way.

A. I would say no.

Q. At that point in your mind was that a foregone conclusion?

A. It seemed that way so there was no use talking about it." (Martin, 15)

Therefore, Mr. Martin testified that he actually never had any communication with another Board member wherein that Board member indicated an intention to vote in favor of the Application. On the contrary, Mr. Martin admitted that he never had any actual communication with any Board members about that topic. The record is not clear that Mr. Martin had any opinion at that time that any Board members were biased in favor of the landfill. Furthermore, even if he had that opinion, it is not based on any factual evidence which was admitted in the record at the IPCB hearing and, accordingly, is not a sufficient basis for a finding of pre-adjudication.

An example of the desperation of the Petitioner's arguments is an additional argument made by Defendant Karlock that somehow language used in the invoices of Hinshaw & Culbertson is evidence of pre-adjudication of the merits or bias. Mr. Karlock points out that certain invoices from Hinshaw & Culbertson to the State's attorney of Kankakee County, Ed

Smith, reference "Kankakee County Landfill." These invoices were addressed appropriately to Ed Smith at 450 East Court Street, Kankakee, Illinois, 60901-3992 (which is the State's Attorney's office); however, the invoices also reference Kankakee County Landfill.

The affidavit of Joan Lane, Secretary to Attorney Charles Helsten, explains that when Hinshaw & Culbertson and Mr. Helsten were first hired by Kankakee County State's Attorney, Ms. Lane drafted the file intake sheet and the matter was referred to as "Kankakee County Landfill." However, Ms. Lane testified in her public comment, via affidavit, that at no time has Hinshaw & Culbertson represented the Kankakee County Landfill or its operator, WMII, and rather it has always been retained by either the Kankakee County State's Attorney, Kankakee County, or Kankakee County staff. *See* Public Comment No. 3. Furthermore, Mike VanMill, Kankakee County Planning Director, testified by affidavit that "at no time did the State's Attorney, Kankakee County or Kankakee County staff retain Hinshaw & Culbertson or Mr. Helsten to represent WMII, the operator of the Kankakee County Landfill." *See* Public Comment No. 4, Par. 6. All of Hinshaw & Culbertson's invoices have been paid by the County of Kankakee.

Mr. Karlock asks the IPCB to apply the reasoning of *Concerned Citizens for a Better Environment v. City of Havana,* PCB 94-44 (May 19, 1994) by making a ruling of fundamental unfairness as a result of the mere clerical error referencing "Kankakee County Landfill" on the invoices of Hinshaw & Culbertson. The *Concerned Citizens* case is in no way analogous to the case at bar. *Concerned Citizens* involved alleged bias of the hearing officer, rather than an attorney for County staff. In *Concerned Citizens*, the IPCB held that the same standard for determining bias of a decisionmaker can be applied to a hearing officer. PCB 94-44, slip op. at 8. That standard requires a determination that a disinterested observer might conclude that the

hearing officer had adjudged the facts, as well as the law of the case, in advance of the hearing. *Id.* In this case, there is no allegation that the hearing officer or the decisionmakers were biased by the Hinshaw invoices referring to "Kankakee County Landfill." Rather, at the time of the siting process, Attorney Helsten represented County staff and did not even represent the decisionmaker and was certainly not the hearing officer. C1244-1272, identifying Helsten as the attorney for the County of Kankakee Staff.

Furthermore, in the *Concerned Citizens* case, the hearing officer was actually employed by the applicant, the applicant had the power to terminate her at will, and the applicant paid the hearing officer's invoices directly. In this case, there is no evidence that Attorney Helsten was ever paid by WMII, that WMII in any way hired Mr. Helsten, or that that WMII could ever terminate Mr. Helsten's employment. On the contrary, the County Board members, Mr. Mike VanMill, and Ms. Lane all indicated that the County hired Attorney Helsten, who represented County staff during the siting process.

Finally, in the *Concerned Citizens* case, the applicant exercised editorial control over the documents prepared by the hearing officer. There is absolutely no evidence that any documents prepared by Attorney Helsten were controlled, edited or drafted by WMII. Once again, even if such evidence existed, it would be irrelevant as Mr. Helsten did not have any decision-making authority, was not the hearing officer, did not represent the decisionmaker, and did not even have any communications with the decisionmaker once the Application was filed.

Finally, even if the reference to "Kankakee County Landfill" had not been a mere clerical mistake, it would still be innocuous as it is merely a file identifier and indeed all of the work that Hinshaw & Culbertson has done on behalf of Kankakee County in some way related to the Kankakee County Landfill or the law concerning Solid Waste Management. At no place within

the invoices of Hinshaw & Culbertson is there any indication that WMII was the client of Hinshaw & Culbertson concerning the Kankakee County Landfill or the law concerning solid waste management. Accordingly, the Petitioner's argument that somehow there was collusion between WMII and Kankakee County is an obvious fabrication on the part of the Petitioners, and the claim of pre-adjudication on the merits is unfounded.

B. There Were No *Ex Parte* Communications Between The Decisionmaker And The Applicant.

Pursuant to the aforementioned testimony, there is no evidence in this case of any communications between the Applicant and the County Board after the filing and before decision. As a matter of fact, the Planning Commission, the Planning and Zoning Committee, the staff attorneys and the staff had no communications with the Applicant after filing and before decision, even though they were not decisionmakers. (*See* VanMill, 34, previously cited testimony of County Board members). Nonetheless, the City of Kankakee and Petitioner Watson misconstrue the facts of this case in an attempt to argue that there was some type of improper *ex parte* communication. Specifically, these Petitioners refer to testimony of Leonard Martin at pages 23-24 concerning communications of Charles Helsten with WMII about the special conditions which were imposed by the County Board on January 31, 2003. Mr. Martin was asked whether Mr. Helsten had any contact with WMII regarding those conditions. to which Mr. Martin replied that he believed Mr. Helsten did. (Martin, 23). He was specifically asked "when do you believe he had contact with WMII regarding those conditions" to which he responded "I think shortly after the conditions were set into effect." (Martin, 23)(emphasis added). The record establishes that those conditions were put into effect on January 31, 2003, the date that the County Board approved the Application with conditions. The communications about the

meaning of the conditions, therefore, must have occurred after the decision and were, thus, not improper in any way.

Despite this clear testimony of Mr. Martin, the Petitioners attempt to deceive the IPCB by using testimony of Mr. Martin at a time when he was obviously confused as to the chronology of events. Specifically, he was later asked "before January 31st, - - let's focus on a time before January 31st. Do you know whether Mr. Helsten had contact with Waste Management?" And the answer was "I believe he was." The attorney for the City followed up "you believe he did have?" And the answer was "yes." Mr. Martin however clarified two questions later that that communication happened at a Board meeting and when Mr. Martin was asked if that time period was before January 31, 2003, he testified "I can't be sure of that . . . " (Martin, 24). He was then later asked by the attorney for Mr. Watson about the conversations concerning the conditions and was specifically asked "did those conversations occur before or after the Regional Planning Commission made the recommendation?" to which Mr. Martin responded "after." He was then asked "did those conversations occur before or after the siting application was ruled upon." Mr. Martin was confused as to what Watson's attorney meant by "ruled upon" and Watson's counsel explained that there was a Board meeting on January 31, 2003 when the Application was approved and Mr. Martin explicitly testified "yes it would be after that." (Martin, 38) (emphasis added). Thereafter, Mr. Martin testified on two different occasions that the communications Mr. Helsten had with WMII took place after the conditions were imposed on January 31, 2003. (Martin, 39 and 49). It is clear that after Mr. Martin was given the appropriate reference point, he unequivocally testified that Mr. Helsten's communications concerning the conditions took place after January 31, 2002. Furthermore, the Affidavit of Attorney Helsten definitively establishes no communications took place with the Applicant or its counsel about the conditions

until after the decision was rendered. (Affidavit of Helsten, attached to the County's "Objection to Depositions" filed with the IPCB Hearing Officer on 4/23/03).

The attorneys for the City and Mr. Watson failed to inform the IPCB that Mr. Martin clarified his testimony during the deposition and unequivocally testified that he was unaware of any communications of Helsten with the applicant before the decision was rendered by the County Board. Furthermore, even if such communication had taken place (which it did not) that communication would not have been fundamentally unfair as Mr. Helsten did not represent the decisionmaker at that time and, instead, represented the County staff as is admitted by the City at Pg. 9 of its brief. Furthermore, the transcripts at the hearing established that Mr. Helsten represented County staff and Ms. Elizabeth Harvey represented the County Board which was the decisionmaker. (*See* Lee, 62).

As further evidence of the Petitioner's extreme desperation to find fundamental unfairness in this proceeding and to misconstrue and mischaracterize the record, Petitioner Watson goes on to argue that this testimony of Mr. Martin is of "particularly heightened concern" in light of the statement of Dale Hoekstra that Helsten was "our attorney." (*See* Watson Brief 30-31). At no time did Mr. Hoekstra ever testify that Attorney Charles Helsten was the attorney for WMII. The reference at Page 47 of Mr. Hoekstra's deposition is merely a typographical error made by the court reporter as Mr. Hoekstra was describing the individuals that were involved in the negotiation of the Host Agreement (before the Application was ever filed). Those individuals were "Mr. VanMill, Ms. Lee, Mr. Quigley, Mr. Graves, our attorney, and Mr. Helsten." The court reporter apparently inadvertently put the word "and" before the words "our attorney." Obviously, WMII's attorney (Dennis Wilt) was involved in the drafting of a Host Agreement and Mr. Helsten was the attorney for the County at that time. It is undeniable

that the reference to "our attorney" is a mere typographical error in the deposition transcript as there were no follow-up questions by any parties about a reference by Dale Hoekstra of Mr. Helsten being "our attorney," which would have been a shocking revelation This misrepresentation by Watson is particularly troubling in light of the ample evidence in the depositions and discovery that Mr. Helsten was hired to represent the County of Kankakee and the complete lack of evidence that he had ever represented WMII.

The only other allegation of an improper *ex parte* communication is also contained within Watson's brief about a purported communication between the attorney for the Kankakee County Board (Elizabeth Harvey) and the attorney for WMII (Donald Moran). However, the record contains absolutely no evidence of any such communication ever occurring because the hearing officer sustained the objection to admitting the answers to interrogatories as evidence and only allowed them as an offer of proof. IPCB Tr. 5/5/03 at 141. Furthermore, Ms. Elizabeth Harvey, attorney for the Kankakee County Board submitted an affidavit, which provides that although she did receive a telephone call from Donald Moran after the January 16, 2003 meeting of the Regional Planning Commission (which recommended conditions be imposed) but before the January 31, 2003 meeting of the County Board, the call "consisted only of Mr. Moran's questions regarding procedure." *See* County Ex. 2. Mr. Moran inquired as to whether there would be an opportunity to address either the Regional Planning Commission or the County Board regarding the special conditions, and Ms. Harvey informed him that there would be no such opportunity. *Id.* at Par. 7. "There was no discussion regarding any substantive issue in that January 3, 2003 phone call with Ms. Moran." *Id.* at Par. 6. Once again, this is only a mischaracterization by Watson of the facts of the case which clearly establish that there were no

ex parte communications between the applicant and the decisionmaker or its attorney after the application was filed and before the decision was rendered.

Watson attempts to use certain testimony from Mr. Whitten to bolster its specious claims of *ex parte* contacts by characterizing his testimony to assert that "give and take" occurred between the County and WMII before the County's decision on siting. (Watson Brief, 30). A review of Mr. Whitten's testimony makes it absolutely clear that the "give and take" he was referring to was the negotiation concerning the Host Agreement which took place before the Application was filed as Mr. Whitten references the tipping fee negotiations. (Whitten, 16). Mr. Whitten was specifically asked "did you hear anything about the negotiations that occurred between County and WMII between March 1, 2002 and January 31, 2003" to which he responded "no." (Whitten, 18). On redirect, Mr. Whitten was asked "you don't have any personal knowledge that any Board member ever spoke with WMII after they filed their application and before the decision" to which he responded "I have no proof of that, no." (Whitten, 28). He was then asked "isn't it true that the Board was counseled not to have any such communication" to which he responded "yes." (Whitten, 28).

Therefore, nothing in Whitten's deposition contradicts the testimony of the other Board members that there were no *ex parte* communications with WMII. There simply is no evidence of any improper *ex parte* communications, and the Petitioner's claim of fundamental unfairness should be rejected and the County Board's decision affirmed.

C. The Alleged Unavailability Of Certain Records Prior To The Siting Hearing Did Not Amount To Fundamental Unfairness.

Section 39.2(c) of the Act required that WMII file a copy of its request with the county. The request was required to include: (i) the substance of the applicant's proposal, and (ii) all documents submitted as of that date to the IEPA relating to the proposed facility. 415 ILCS

5/39.2(c). All documents or other material on file with the county board were to be made available for public inspection at the office of the county board and copies provided upon payment of the actual cost of reproduction. *Id.*

Petitioners City of Kankakee, Karlock and Watson allege that the unavailability of the operating record of the applicant prior to the siting hearing rendered the proceedings fundamentally unfair. However, this is clearly not the case. While Petitioners assert that the operating record was not available for public inspection from the County of Kankakee, it was in fact available at the County Clerk's office. C1244 at 43-44. Additionally, the entire application was available at four other locations, including the Kankakee Library, Bourbonnais Library, Hoppel Central Library and Bradley Library. *Id.* In fact, a sign was posted in the County Clerk's office listing the other locations where the application was available. (Dep. of Ester Fox, 28-29). Moreover, even if the entire application was not available prior to the hearings, it was undeniably available beginning on the first day of the siting hearings and, therefore, did not render the proceedings fundamentally unfair.

Petitioner Watson also asserts that the property value protection plan was not available; however, this claim is simply erroneous. The property value protection plan, consisting of Exhibits A-1 and A-2 to the Host Agreement, was a part of the Application filed by WMII with the County Board on August 16, 2002. C1253 at 91-96. In fact, the transmittal letter filed with the application on August 16, 2002 specifically states that the materials filed include Host Agreement Exhibits A, A-1 and A-2, and the record on file with the County Clerk specifically included those documents. C2371; C1253 at 96, C1254 at 5-6. Therefore, anyone who obtained a copy of the application filed on August 16, 2002 would have obtained the property value

guarantee plan. It is obvious that the objections merely failed to acquire the refiled Application. Furthermore, copies of that agreement were passed out at the hearing. (C1245 at 4-6).

Even assuming, *arguendo*, that the operating record was "unavailable" until the siting hearing because a county employee did not specifically direct an objector to the place of its filing, this does not mean that the hearing lacked fundamental fairness. The IPCB has repeatedly held that the unavailability of some documents in a siting application does not render a proceeding fundamentally unfair. *See Village of LaGrange v. McCook Cogeneration Station,* L.L.C., PCB 96-41 (Dec. 1995); *Tate v. Macon County Board*, PCB 88-126, *aff'd Tate v. Illinois Pollution Control Board*, 188 Ill.App.3d 994, 544 N.E.2d 1176; *Town of St. Charles v. Kane County Board and Elgin Sanitary District*, PCB 83-228, 229, 230 (consolidated) (March 21, 1984), *vacated on other grounds, Kane County Defenders v. Illinois Pollution Control Board*, 129 Ill.App.3d 121, 472 N.E.2d 150 (3d Dist. 1984); *Concerned Citizens for a Better Environment v. City of Havana*, PCB 94-44 (May 19, 1994).

The IPCB in *Tate* held that "an abbreviated siting application (one without technical supporting documents) is acceptable where, as here, such materials were available prior to the close of the hearing process." PCB 88-126, slip op. at 4. Additionally, the IPCB in *Village of LaGrange* and *Concerned Citizens for a Better Environment* held that applications that were not complete when filed did not render the siting hearing fundamentally unfair because they were supplemented at the siting hearing. PCB 96-41, slip op. at 9; PCB 94-44, slip op. at 11. Specifically, the Court in *Concerned Citizens* held that "the application need not contain all material necessary for the local governing body to make its decision." PCB 94-44, slip op. at 11. Finally, the Board in *Town of St. Charles* upheld a siting application that was only two pages in length when filed and later supplemented a few days prior to the hearing. PCB 83-228-230

(cons.), slip op. at 3. As set forth above, when an incomplete application is later supplemented at or before a siting hearing, the lack of completeness prior to the hearing does not render the hearing fundamentally unfair.

Additionally, Petitioners' arguments must fail because they have not demonstrated prejudice. It is well settled that the public's inability to inspect documents will not result in fundamentally unfair proceedings unless there has been some prejudice demonstrated as a result of the missing documents. *See Tate*, 188 Ill.App.3d at 1017, 544 N.E.2d at 1191; *see also Sierra Club v. City of Wood River*, PCB 95-174 (1995); *Landfill 33 v. Effingham County Board*, PCB 03-43, 52 (consolidated) (Feb. 20, 2003); *Spill v. City of Madison*, PCB 96-91 (March 21, 1996). In *Tate*, the Court considered whether siting proceedings were fundamentally unfair when the applicant failed to file documents submitted by the applicant to the IEPA. 188 Ill.App.3d at 1016-17, 544 N.E.2d at 1191. In finding that the absence of those documents did not result in a fundamentally unfair hearing, the Court explained that the record demonstrated that "the documents were on file with the IEPA and were public record, and that the Committee held several hearings after the documents became available to petitioners so that petitioners' witnesses certainly had an opportunity to review the documents before testifying." 188 Ill.App.3d at 1017, 544 N.E.2d at 1191. Because the petitioners were unable to show how they were prejudiced by the applicant's failure to file the documents, the Court held that any error that might have occurred would be "harmless at best." *Id.*

Like the documents at issue in *Tate*, the operating record was filed with the IEPA and was a public record. Therefore, anyone interested in reviewing the operating record would have been able to obtain those documents through a source other than the application. Additionally, like the documents in *Tate*, the allegedly unavailable documents in this case were indisputably

available on the first day of the hearing and throughout the three weeks of the hearing, leaving witnesses ample time to review those documents before testifying. Because no one can legitimately assert that they were harmed by the alleged absence of the operating agreement, the petitioners cannot possibly demonstrate that they were prejudiced without these documents, and any unavailability of these documents would be harmless at best.

In their arguments, Petitioners Watson and the City of Kankakee generally allege that the public and participants were prejudiced but fail to explicitly state how this is true. Even assuming, *arguendo,* that the public and participants did not have access to the operating record and property value protection plan prior to the siting hearing at every location, it is uncontested that when the siting hearing began all of the documents were available. Therefore, the public had plenty of time to review those documents and submit comments on those documents if they so desired. In fact, a public comment was provided on November 26, 2002, regarding the property value protection plan. (C1264 at 6-15). That comment was presented by Gregory Deck, an attorney, on behalf of residential property owners, expressing their concerns over the property value protection plan. *Id.* Therefore, it is clear that these individuals were able to obtain a copy of the plan in enough time to thoroughly review it and actively participate in the hearing.

Additionally, Petitioners Karlock and City of Kankakee allege that Mr. Karlock's geologist, Charles Norris was prejudiced by not having parts of the operating record available to him to review. However, Mr. Norris himself admitted that he reviewed the entire operating record several weeks or months before the siting hearing began, having obtained it from an independent source. IPCB Tr. 5/6/03 at 35-36, 38-40. Therefore, any unavailability of the operating agreement could not have caused him any prejudice.

It is clear that the Petitioners have been unable to find anyone who was prejudiced by the alleged unavailability of the operating record because the only witness to testify about that topic at the IPCB hearing was Mr. Norris, who admitted that he was not prejudiced and denied ever being told that anyone else was prejudiced by being allegedly unable to review the operating record prior to the hearing. (IPCB Tr. 5/6/03 at 35). The fact of the matter is that even though several announcements were made at the siting hearing that the entire application, including the operating record, was available for review at the County Clerk's office, only Charles Norris, went to the County Clerk's Office requesting the operating record. (Fox Dep. Ex. 2). Mr. Norris' only purpose in reviewing the record he had already seen, was to verify its completeness for a possible fundamental fairness claim. He did not need to review it to support his opinions. (*See* IPCB Tr. 5/6/03 at 35-36, 39-40). Mr. Norris was clearly not prejudiced by any alleged inability to review that document previously from the County Clerk's office because he had previously reviewed that document. Therefore, the Petitioners have been unable to identify and demonstrate that any individual was prejudiced by the alleged unavailability of the operating record, and they cannot, therefore, establish fundamental unfairness. *See generally County of Kankakee v. City of Kankakee*, PCB 03-31, 03-33, 03-35 (consolidated) (Jan. 9, 2003) (examining whether prejudice was caused to specifically identified individuals).

To the extent that Petitioners claim that parts of the operating record were not able to be reviewed because they were contained in microfiche, this claim must also fail. The Kankakee County Clerk, Jeffrey Clark, and the Kankakee County Chief Deputy Clerk, Ester Fox, testified that there is a microfiche reader in the County Clerk's office. (Clark, 31; Fox, 35). Ms. Fox stated that if anyone requested to use a microfiche reader, one would be made available. (Fox, 37). She also believed that all four of the libraries where the application was available had

microfiche readers available to the public. (Fox, 37). Because there were clearly microfiche readers that could have been used, if requested, no prejudice was caused by parts of the document being available on microfiche only. Again, even assuming, *arguendo,* that microfiche readers were not available, the Petitioners have failed to demonstrate prejudice because the only person to testify regarding the alleged unavailability of a microfiche reader was Mr. Norris, who stated that "the microfiche was not a critical issue because I had previously obtained copies of the operating record and I had the microfiche." (IPCB Tr. 6/6/03 at 34).

Petitioners rely on *American Bottom Conservancy*, PCB 00-200 (Oct. 19, 2000) and *Residents Against a Polluted Environment v. County of LaSalle*, PCB 96-243 (Sept. 19, 1996) to support their allegations that the unavailability of certain documents made the proceedings fundamentally unfair. However, *American Bottom* and *Residents Against a Polluted Environment* are clearly distinguishable from the case at hand. First, in *American Bottom*, none of the application was available for public view until merely two weeks prior to the siting hearing, where, in this case nearly the entire application was available for review for an entire 90 days before fore the hearing. Additionally, unlike the petitioner in *American Bottom*, the Petitioners in this case have not demonstrated that they were prejudiced by the lack of availability. Furthermore, *Residents Against a Polluted Environment* is clearly distinguishable because the unavailable documents in that case were never made available to the public, the opponents or even the board members. As set forth above, all of the allegedly unavailable documents in this case were available to anyone who wished to see them at the siting hearing at the very latest; therefore, there was no prejudice like that found in *Residents Against a Polluted Environment.*

Finally, Petitioner Watson's assertion that there is no evidence that the County Board ever received complete copies of the record is absolutely flawed. Watson relies on the testimony of Mr. Wilson to attempt to establish that the entire record was not available. However, Mr. Wilson was specifically asked if he had access to the entire record, to which he responded "yes." (Wilson, 20). In addition to such testimony, the facts demonstrate that the entire application was available at all times at five different locations. (C1244 at 43-44; C1245, 37-38). Therefore, even if the Board finds that the entire application was not available until the first day of the siting hearing, as asserted by Petitioners, this still gave the County Board members plenty of time to review entire the siting application before making their decisions.

Because it is clear that the vast majority, if not all, of the application was available at all times and no prejudice was caused by any alleged unavailability, the Petitioners' arguments must fail.

D. The Testimony Of Ms. McGarr Did Not Render The Proceedings Fundamentally Unfair.

1. <u>There is no competent evidence that Ms. McGarr committed perjury.</u>

Petitioner Watson contends that the testimony of Ms. Patricia McGarr made the hearing fundamentally unfair. However, the Petitioner's argument must fail because there is no competent evidence in the record to establish perjury on the part of Ms. McGarr. At the IPCB Hearing, the Hearing Officer explicitly excluded the offer of proof presented from Ms. Mary Ann Powers of Daley College because he correctly found that the IPCB does not reweigh the credibility of witnesses. (IPCB Tr. 5/5/03 at 26-30). While Petitioner Watson claims that this is an issue of "fundamental fairness," it is actually an issue of credibility, which the IPCB has no power to determine. *See Worthen v. Village of Roxana*, 253 Ill.App.3d 378, 384, 623 N.E.2d 1058, 1062 (1993) (explaining that the PCB may not reassess the credibility of witnesses);

McLean County Disposal, Inc. v. County of McLean, 207 Ill.App.3d 477, 480, 566 N.E.2d 26, 28 (4th Dist. 1991) (holding that the PCB is not to make new credibility determinations).

It is well-established that it is for the County Board, as the local siting authority, to determine the credibility of witnesses. *See Land and Lakes Co. v. Illinois Pollution Control Board*, 319 Ill.App.3d 41, 53, 743 N.E.2d 188, 197 (3d Dist. 2000) In this case, at the County Board siting hearing there were numerous questions directed at Ms. McGarr about her education as well as a statement by one of the opponents stating that "Richard J. Daley College to my knowledge doesn't have a record of issuing you an Associate's Degree." (C1249 at 36-38). Thereafter, Ms. McGarr stated that she would produce such a degree. *Id.* at 38. However, she never did so. As a result of that interchange and Ms. McGarr's failure to provide a diploma, the County Board was free to conclude that Ms. McGarr was untruthful and it was for them, not this Board, to so determine.

Furthermore, even if this Court were to overrule the Hearing Officer's decision and allow the testimony from Ms. Powers, that testimony does not unequivocally establish that Ms. McGarr testified untruthfully and, therefore, committed perjury. In order to commit perjury, "the witness must know that the statements being made are false." *People v. Moore*, 199 Ill.App.3d 747, 557 N.E.2d 537 (1st Dist. 1990). While Ms. Powers stated that Ms. McGarr did not graduate and did not have enough credits to graduate (IPCB Tr. 5/6/03 at 66-67), the affidavit of Mr. Holm, Ms. Powers' supervisor, states that Ms. McGarr took the required classes to obtain an associate's degree. (See Siting Hearing Petitioner's Ex. 26). If these two school officials cannot decide whether or not Ms. McGarr met the requirements to graduate, it would not be unreasonable for Ms. McGarr to believe that she did. Consequently, the testimony presented to the IPCB does not unequivocally establish perjury, as the Petitioners would have the Board believe.

Finally, even if this Board finds that the testimony of Ms. McGarr regarding her degree was erroneous, this does not require that Ms. McGarr's entire testimony be stricken, as Petitioner Watson suggests. Petitioners disingenuously argue that if Ms. Beaver McGarr does not have an associate's degree, she is not qualified to testify about criterion 3. This is clearly not the case because it was not her associate's degree that made her qualified to testify about criterion 3, rather it was her vast experience, designations and certifications in real estate appraising and consulting that made her qualified to offer opinions on compatibility of the landfill with the surrounding area. (C1249 at 7-9). It is entirely possible that the County Board was indifferent as to whether Ms. McGarr had an associate's degree but still accepted her testimony as a licensed and qualified appraiser. Therefore, even if this Board finds that it is necessary to examine the alleged perjury, there is no basis to exclude all of Ms. McGarr's testimony and no basis to find the proceedings fundamentally unfair.

2. There was no fundamental unfairness because Ms. McGarr was not re-cross-examined.

Petitioner Watson further contends that he was "denied due process" because he was not allowed to re-cross-examine Ms. McGarr because his counsel "prematurely terminated" his questioning of her. (Watson Brief, 26). Not only is this a misstatement of the facts but is a misstatement of the law because due process does not required continued and repeated cross-examination of a witness. While Watson seems to imply that he was required to "prematurely" terminate his cross-examination of Ms. McGarr, that is clearly not the case. After being told by Ms. McGarr that she would present a copy of her diploma, Watson's counsel chose to end that line of inquiry. C1249 at 38. Because Watson did not take full advantage of his cross-examination of Ms. McGarr, he should not be allowed the opportunity to do so on another attempt.

Furthermore, there was no denial of fundamental fairness because of Ms. McGarr's alleged inability to be cross-examined. The Appellate Court has explained that citizens in a local siting hearing are entitled to procedures that comport with due process standards of fundamental fairness but are not entitled to a fair hearing by constitutional guarantees of due process. *See Tate,* 188 Ill.App.3d at 1019, 544 N.E.2d at 1193. One court has explained that standards of fundamental fairness require that "parties before a local governing body in a siting proceeding must be given the opportunity to present evidence and object to evidence presented, but they need not be given the opportunity to cross-examine opposing parties' witnesses." *Southwest Energy Corp. v. Illinois Pollution Control Board*, 275 Ill.App.3d 84, 655 N.E.2d 304 (4th Dist. 1995). Because petitioners did not have an absolute right to cross-examine Ms. Beaver McGarr in the first place, they clearly did not have a right to re-cross-examine her. Even if this court finds that fundamental fairness would require Ms. McGarr to be cross-examined in the first instance (*see Land and Lakes Co. v. Illinois Pollution Control Board,* 319 Ill.App.3d 41, 48, 743 N.E.2d 188, 193), clearly fundamental fairness did not require her to be re-cross-examined when all of the Petitioners clearly had the opportunity to fully examine her the first time on the issue of her education and, in fact, did so.

E. Any Alleged Failure Of The County To Comply With The Local Siting Ordinance Does Not Result In Fundamental Unfairness.

The IPCB will not review the procedures employed in a siting proceeding to determine if they are in compliance with a local siting ordinance, nor will the IPCB compel performance of a local ordinance. *See Residents Against a Polluted Environment*, PCB 96-243, slip op. at 6 (Sept. 19, 1996); *Smith v. City of Champaign*, PCB 92-55, slip op. at 3 (Aug. 13, 1992). However, that is exactly what the Petitioners are asking this Board to do. They are asking this Board to determine that the Board was not in compliance by: (1) failing to properly pay a filing fee, (2)

failing to file certain documents specified in the ordinance, and (3) failing to certify the application. Because the Petitioners are asking the Board to determine compliance with a local ordinance, the Board should refuse to consider the Petitioners' argument. *See Residents*, PCB 96-243, slip op. at 6.

Even if the Board decides that it will review the arguments by the Petitioners, those arguments must be rejected because the Petitioners have failed to show a lack of compliance with the ordinance and/or prejudice as a result of any lack of compliance. Turning to the first issue, that WMII did not pay the required filing fee, this assertion is clearly untrue. It is undisputed that at the time of its August 16, 2002 filing, WMII paid approximately $108,000 of the $250,000 application fee required by the ordinance. (C1245 at 18, 26-27). This is the full amount that WMII was required to pay because WMII had previously paid the entire $250,000 to the County when it filed its previous application with the County in March of 2002. *Id.* Of that $250,000 originally paid, approximately $108,000 had been expended. *Id.* Therefore, WMII was required to pay only an additional $108,000 to replenish its account and fulfill the $250,000 requirement. *Id.* In addition to paying that $108,000, WMII filed a transmittal letter indicating that WMII's previous application was being refiled along with a few other documents listed in the letter that were being filed for the first time. (C1245 at 28-29). That letter specifically requested that the previously paid filing fee be applied to the new application. (C2371). Because WMII clearly paid the fee required to be paid pursuant to the ordinance, there was no violation of the ordinance.

Turning to the next issue, that the applicant failed to file certain documents specifically referenced by the ordinance, particularly those required by sections H(2)(c) and H(2)(d), this argument does not demonstrate fundamental unfairness because the Petitioners have failed to

allege or demonstrate that they were in any way prejudiced by these documents allegedly not being contained in the application. This section provided for the filing of closing plans and procedures related to other facilities owned by the Applicant. (Sections H(2)(c) and H(2)(d) of local siting agreement). It is well settled that when a petitioner alleges that an applicant has failed to follow the requirements of an ordinance, fundamental unfairness cannot be established unless the petitioner can show prejudice. *See Gallatin National Co. v. Fulton County Board*, PCB 91-256, slip op. at 11-12 (June 15, 1992) (explaining that there was no fundamental unfairness where petitioner was not shown to be prejudiced by applicant's failure to follow local siting ordinance). While Mr. Rubak, of WMII, admitted that he did not include "three or four feet of material" that would have been responsive to sections H(2)(c) and H(2)(d), he did provide a summary of that information and stated the he was happy to provide additional information about that subject and did in fact do so in his testimony. (C1261 at 100-106.) There has been no demonstration of prejudice by anyone because of the unavailability of documents that relate to completely different facilities than the one at issue, and which Mr. Rubak labeled "irrelevant to this facility." (C1261 at 100). Furthermore, Petitioners' argument must fail because a local siting authority may waive a portion of its siting ordinance, if it so desires. *See Gallatin National Co. v. Fulton County Board*, PCB 91-256, slip op. at 12 (June 15, 1992) (holding that county could waive the siting application fee).

Finally, with respect to the Petitioners' argument that the application was never certified, this argument also must fail because the record was, in fact, certified when it was previously filed. (C2373). As set forth in the transmittal letter of August 16, 2002, only a few documents were added to the original application and none were deleted. (C2371). Therefore, the application filed on August 16, 2002 must have been complete, and a new certification was not

necessary. Even assuming, *arguendo*, that the new application was not appropriately certified, there is also no showing that the lack of such a certificate in any way prejudiced the public or participants.

The arguments made by the Petitioners are analogous to those made in *Citizens for Controlled Landfills,* PCB 91-89, 90 (cons.) (Sept. 26, 1991) in which a petitioner asserted that the applicant's failure to include in the application certain materials required by the local siting ordinance resulted in fundamental unfairness because it deprived opponents "a fair opportunity to prepare for the public hearing on the application and prevented the possibility for opponents to fully prepare adequate written comment on the application." Slip op. at 3. The Board found the petitioner's arguments to be factually unconvincing and held that the procedures were fundamentally fair because: (1) adequate notice was given, (2) "a wealth of substantive information" was prefiled; (3) three public hearings were held where anyone could cross-examine witnesses, and (4) a 30-day written comment period was established. *Id.* Because the citizens were clearly able to, and did, take advantage of the hearings and comment period, the Court found that it afforded all interested parties due process. *Id.*

In this case, as in *Citizens for Controlled Landfills*, it is clear that all parties were granted due process because they were provided (1) adequate notice, (2) "a wealth of substantive information," including thousands of pages filed by WMII, (3) eleven days of public hearings where anyone could participate, and (4) a 30-day public comment period. While Petitioners point to a few documents that were unavailable to them, the fact of the matter is that the applicant's application was several thousand of pages in length. As such, it is no wonder that a few documents may have inadvertently been left out. However, the absence of those documents

does not create a fundamentally unfair hearing. If it did, it would be hard to imagine any hearing that would be fundamentally fair.

III. THE KANKAKEE COUNTY BOARD'S DECISION IS SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

The County Board's decision, finding that WMII had demonstrated compliance with all applicable criteria of Section 39.2, is supported by the manifest weight of the evidence, and should be affirmed by the IPCB. It is well-settled that, when reviewing the decision of a local decisionmaker on the statutory criteria, the IPCB's review is limited to the inquiry of whether the local decision is supported by the manifest weight of the evidence presented to that local decisionmaker. *McLean County Disposal, Inc. v. County of McLean,* 207 Ill.App.3d 352, 566 N.E.2d 26, 29 (4th Dist. 1991); *E & E Hauling, Inc. v. Pollution Control Board,* 116 Ill.App.3d 586, 451 N.E.2d 555 (2d Dist. 1983), *aff'd in part* 107 Ill.2d 33, 481 N.E.2d 262, 265 (1985). A decision is against the manifest weight of the evidence if the opposite result is clearly evident or indisputable. *Will County Board v. Pollution Control Board,*, 319 Ill.App.3d 545, 747 N.E.2d 5, 6 (3d Dist. 2001). "That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable." *Concerned Adjoining Owners v. Pollution Control Board,* 288 Ill.App.3d 565, 680 N.E.2d 810, 818 (5th Dist. 1997), *citing Turlek v. Pollution Control Board,* 274 Ill.App.3d 244, 653 N.E.2d 1288 (1st Dist. 1995).

Although petitioners pay lip service to the "manifest weight of the evidence" standard of review, they gloss over the meaning and effect of that standard.[3] In most cases, the arguments raised by petitioners as to the statutory criteria are rehashing of the arguments made to the County Board: petitioners are, in essence, asking the IPCB to review the evidence and to

[3] For example, petitioner Watson makes the unsupported claim that an applicant must meet the criteria without the imposition of conditions, in spite of the fact that Watson recognizes that conditions can be imposed on siting approvals. 415 ILCS 5/39.2(e). Watson cites no authority for his claim.

substitute its judgment for the judgment of the County Board. Such substitution is specifically prohibited by the "manifest weight" standard of review.

Where there is conflicting evidence, the IPCB 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,* 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184 (3d Dist. 1990); *Tate v. Pollution Control Board,* 188 Ill.App.3d 994, 544 N.E.2d 1176, 1195 (4th Dist. 1989); *Waste Management of Illinois, Inc. v. Pollution Control Board,* 187 Ill.App.3d 79, 543 N.E.2d 505, 507 (2d Dist. 1989). Merely because the local government might have drawn different inferences and conclusions from testimony is not a basis for the IPCB to reverse the local government's findings. *File v. D & L Landfill, Inc.,* PCB 90-94 (August 30, 1990), *aff'd File v. D & L Landfill, Inc.*, 219 Ill.Aat3d 897, 579 N.E.2d 1228 (5th Dist. 1991). The burden of proof in an appeal to the IPCB is on the petitioners. 415 ILCS 5/40.1(b).

Petitioners repeatedly misstate testimony and evidence, fail to provide citations for their claims, and in some cases cite testimony for the exact opposite proposition of what that testimony actually says. The County Board will point to examples of such misstatement and misleading citations, but discusses the issue here to highlight the fact that petitioners state things, as if they are unquestionably true, when in fact in many cases those statements are unsupported by any evidence in the record. Perhaps petitioners, in their attempt to overturn a well-supported decision by the County Board, hope that "if they say it, it will be true."

A review of the record, applying the manifest weight standard, demonstrates that the County Board's decision on all criteria is supported by the manifest weight of the evidence.

A. The County Board's decision on criterion one (need) is supported by the manifest weight of the evidence.

The first criterion to be considered by the local decisionmaker is whether the proposed expansion is necessary to accommodate the waste needs of the area it is intended to serve. 415 ILCS 5/39.2(a)(i). Petitioner Watson claims that the County Board's decision on criterion one is against the manifest weight of the evidence. However, a review of the record belies Watson's contention.

WMII presented the testimony of Sheryl Smith on the issue of the need for the facility.[4] C1252 at 4-24; C1 at Criterion One tab. Ms. Smith has extensive experience in the field of solid waste planning, and in reviewing service areas and solid waste management plans in connection with landfill siting applications. Ms. Smith reviewed waste generation and recycling rates, waste capture rates, and the available capacity of other solid waste disposal facilities serving the designated service area. Based upon that review, Ms. Smith concluded that there was a capacity shortfall in the proposed service area which ranges from 59 million to 155 million tons. C1252 at 23. The capacity of the proposed expansion is 30 million tons. C1252 at 23. Thus, Ms. Smith opined that the proposed expansion is necessary to accommodate the waste needs of the service area. C1252 at 24.

Watson attacks Ms. Smith's methodology, and asserts that Ms. Smith understated the capacity of the service area, while overstating waste generation rates. However, this argument was presented to the County Board (C1252 at 25-59), which chose to accept Ms. Smith's testimony. The hallmark of a "manifest weight" review is that questions of credibility and the acceptance of testimony are left to the local decisionmaker. *Concerned Adjoining Owners*, 680

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[4] The service area proposed by WMII consists of Kankakee, Cook, DuPage, Kane, Kendall, Grundy, and Will Counties in Illinois, and of the Indiana counties of Jasper, Lake, Newton, and Porter. C1252 at 12.

N.E.2d at 818. The County Board was well within its authority to accept Ms. Smith's extensive study of the service area, and her explanation of her methodology. Addressing several areas of Watson's argument demonstrates that the County Board's decision is supported by the manifest weight of the evidence.

Watson asserts that Ms. Smith underestimated the disposal capacity in the service area by excluding disposal facilities which should have been considered. For example, Watson attacks Ms. Smith's decision not to include the Spoon Ridge Landfill's 39.5 million tons of disposal capacity in her calculations. However, as Ms. Smith testified, she excluded Spoon Ridge because it has been inactive since June 1998, with no certainty if or when the facility will reopen. Additionally, Spoon Ridge's identified service area is waste from outside Illinois, including New York City, and does not include the counties identified as the service area for the proposed expansion. C1252 at 21-22. Likewise, Ms. Smith excluded other disposal facilities because they do not accept waste from the service area, and excluded disposal facilities which lack permits.[5] Ms. Smith testified, however, that even including the projected capacity of recently sited (but unpermitted) facilities, there is still a capacity shortfall in the service area. C1252 at 39-43.

The County Board is free to reject consideration of facilities which are not permitted, and to reject consideration of facilities which do not accept waste from the defined service area. *Tate*, 544 N.E.2d at 1196. There must be some reasonable expectation that the disposal capacity of a particular facility will be actually available to the service area. Indeed, it would be poor planning to rely on disposal capacity which may never be available. Ms. Smith explained her reasoning for including certain facilities and in excluding others, and the County Board is

[5] Watson asserts that the Forest Lawn facility in Michigan was permitted in July 2002, and implies that this landfill should have been considered by Ms. Smith. However, a review of the permitting document submitted by Watson demonstrates that the Forest Lawn permit is a construction permit, not an operating permit. C1875. Thus, there is no certainty, or even necessarily a reasonable expectation, that any disposal capacity at Forest Lawn will be available to the service area.

entitled to accept that explanation. In fact, in both of the two cases which Watson cites for support for his claim that there is no need for this facility, the IPCB and the appellate court upheld the local decisionmaker's decision regarding the consideration of some facilities and not others. *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill.App.3d 1023, 530 N.E.2d 682 (2d Dist. 1988); *Waste Management of Illinois, Inc. v. Pollution Control Board*, 122 Ill.App.3d 639, 461 N.E.2d 542 (3d Dist. 1984).

Finally, there was no testimony presented by any witness that the proposed facility does not satisfy criterion one. Applying the manifest weight of the evidence standard to the evidence presented regarding need, it is clear that the County Board's decision is supported by the manifest weight.

B. The County Board's decision on criterion two (health, safety, and welfare) is supported by the manifest weight of the evidence.

The second criterion to be considered by the local decisionmaker is whether the proposed facility is designed, located, and proposed to be operated so that the public health, safety, and welfare will be protected. 415 ILCS 5/39.2(a)(ii).

Extensive evidence and testimony was presented on the issue of whether the proposed facility meets criterion two. WMII presented four witnesses, and petitioner Karlock presented one witness. Those witnesses testified, and were cross-examined, for hours at the local hearings. *See, e.g.,* C1254 at 56-96; C1255; C1256; C1257; C1258; C1259. WMII and the petitioners submitted exhibits regarding compliance with criterion two, and the issue was the subject of extensive public comment, both oral and written. One of the public comments was submitted by County staff, in conjunction with Patrick Engineering, which was retained to assist the County staff in its review of the application. C1318-C1373. The staff's report and recommendation summarized the evidence, made recommendations, suggested special conditions, and drew

conclusions on whether the application met the statutory criteria. The County Board had exhaustive testimony and evidence upon which to base its decision as to criterion two. The County Board determined that WMII had demonstrated compliance with criterion two: however, the County Board imposed twenty-five conditions on its approval of criterion two. C2349-C2351. Those conditions provide extra measures of insurance for the public health, safety, and welfare.

Despite the extensive evidence presented to the County Board, and despite the "manifest weight" deference given to the County Board's decision, petitioners Watson, Karlock, and the City challenge the County Board's decision on criterion two. The majority of the arguments raised by petitioners are not new: their claims on this criterion are simply a rehashing of the arguments made during the local proceeding.[6] Petitioners raise three categories of claims on criterion two: 1) that the location of the proposed expansion is inappropriate; 2) that there are hydrogeological and geological concerns with the proposed expansion; and 3) that the location of the proposed expansion has been rejected by the IPCB in a prior IPCB decision. Petitioners cannot prevail on any of these claims.

1. The location of the proposed expansion is appropriate, and is supported by the manifest weight of the evidence.

Petitioner Watson attacks testimony given by Mr. Andrew Nickodem on behalf of WMII[7], and alleges that flaws in Mr. Nickodem's testimony demonstrate that WMII failed to adequately investigate the location of the proposed expansion. However, Watson's argument regarding Mr. Nickodem's testimony is filled with misleading citations, and outright

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[6] The County Board notes that the arguments made by Karlock and the City on criterion two are essentially identical, down to the phrasing and order of paragraphs.

[7] Mr. Nickodem, a licensed professional engineer who specializes in the design of landfills, was the lead designer of the proposed expansion, and provided expert testimony regarding design issues on WMII's behalf. C1254 at 56-61.

misrepresentations of Mr. Nickodem's testimony. None of Watson's claims regarding the location of the expansion demonstrate that the County Board's decision is against the manifest weight of the evidence.

One example of Watson's misleading statements regarding Mr. Nickodem's testimony is Watson's statement that Mr. Nickodem "admitted" that he did not consider the location of the facility as a factor of the design. However, the testimony cited by Watson does not support his claim: in fact, the cited testimony contains Mr. Nickodem's statement that he does indeed take the location of the proposed facility into account in creating the design. In response to cross-examination by Watson's attorney, wherein she asks Mr. Nickodem if he had testified that he needs to take the location of the landfill into account in preparing the design, he answered "Yes". C1257 at 11. It is unclear why Watson would mislead the IPCB in this way.

Another example of Watson's misleading citations include Watson's allegation that Mr. Nickodem did not know the location of the nearest municipal water intake when designing the facility. In fact, Mr. Nickodem testified that he took that fact into consideration in designing the facility, but simply did not remember the location during his hearing testimony ("We looked at that information, but I do not recall."). (C1257 at 30.)

Watson also twists Mr. Nickodem's testimony that the geology of the site is not necessary to his opinion that the design meets criterion two. Watson implies that this testimony somehow translates into the failure WMII to appropriately consider the geology of the location. However, when reviewing Mr. Nickodem's cited testimony, he clearly states that the design of the proposed facility, in and of itself, is protective of the public health, safety and welfare, even without the geology of the site as described by WMII. The geology of the site provides an

additional feature of protection, beyond the engineered aspects of Mr. Nickodem's design. C1258 at 61. This is not somehow a failure of the design, but an added benefit.

Watson further misleads the IPCB regarding Mr. Nickodem's testimony regarding a potable well which may be located on the property to the east of the proposed expansion. Watson states that Mr. Nickodem failed to investigate whether there was a well on the eastern property, when in fact Mr. Nickodem testified that he reviewed all available public records regarding wells in the area, and that no well was shown on the eastern property. Although he was aware that there might be "something" on the eastern property, there was no documentation to show that any well there was certified. C1257 at 27-28. Additionally, Watson fails to inform the IPCB that the County Board added a specific condition to its approval on criterion two, which requires WMII to perform a field verification to locate all potable wells within 1,000 feet of the proposed expansion. C2349, Condition 2(c). Thus, to any degree that there might be a lack of information on nearby wells, the County Board has already required, as a condition of siting, that WMII investigate further.

Watson again misquotes Mr. Nickodem's testimony in Watson's arguments regarding plans if levels of landfill gas reach five percent of the lower explosive limit. Watson implies that Mr. Nickodem believed that this only need be addressed if raised by the IEPA. However, Mr. Nickodem's testimony was much more extensive, and included an explanation that such occurrences need to be addressed on a case-by-case basis, because the appropriate steps to be taken depend upon the specific situation. C1257 at 56-60. Likewise, Watson glosses over Mr. Nickodem's testimony regarding a schedule for the installation of gas collection wells. Mr. Nickodem testified that gas systems for individual cells will be installed when the waste

thickness reaches a sufficient height. Installing the wells too early, when the waste is still shallow, decreases the efficiency of the wells. C1257 at 70-72.

In addition to attacking Mr. Nickodem's testimony, Watson makes several other misleading claims relating to the location of the proposed expansion. For example, Watson asserts that state and federal agencies have questioned the suitability of the location for the existing facility. In support of this contention, Watson submitted a 1995 report that stated that the landfilled wastes are a possible source of contamination for migration pathways. However, Watson fails to include the very next sentences of the report:

> [H]owever, according to the IEPA, the landfill is regularly inspected. If leachate or erosion problems occur, landfill operators are responsive with resolving problems and mitigating contaminant migration. Based upon this information, no reconnaissance was conducted and no samples were collected during the...investigation. C1889.

Thus, the report cited by Watson deals only with the existing facility (not the proposed expansion), does not conclude that there is any actual contamination, and in fact concludes that WMII is responsive to all concerns, such that there was no need to investigate further. This clearly does not support Watson's claim that the regulatory agencies have "seriously questioned" the suitability of the location.

Watson further questions the leachate collection system, asserting that IEPA has found that WMII has never been able to maintain leachate at the existing facility at the allowable depth. However, the existence of one 1990 IEPA report, regarding the existing facility (C1876-1877), cannot, in 2002, be translated to any statement that WMII will be unable to maintain leachate in the proposed expansion. Watson then makes statements regarding "confusing and inconsistent" testimony regarding the depth of the leachate at the proposed expansion, but fails to provide cites to any of this allegedly confusing and inconsistent testimony. Finally, on this issue, Watson avers, without any further explanation or support, that the County Board's decision is against the

manifest weight of the evidence, despite the County Board's condition regarding leachate.[8] To the contrary, the County Board's condition adds another layer of protection regarding leachate. Watson's bare assertion, without explanation or support, that issues regarding leachate render the County Board's decision against the manifest weight of the evidence does not make it so.

Next, Watson attacks WMII's proposal that leachate be recirculated in the proposed expansion. However, Watson fails to inform the IPCB that the County Board imposed a condition on siting approval disallowing the recirculation of leachate. C2350, Condition 2(m). The condition prohibits the recirculation of leachate, under any circumstances for a period of at least four years after receipt of an operating permit. After this four year period, leachate may be recirculated only upon the express approval of the County Board. Thus, issues relating to the proposed (but prohibited) recirculation of leachate do not show that the County Board's decision is against the manifest weight of the evidence.

Another misleading argument made by Watson is the claim that there is insufficient information on how WMII will manage excess soil. Watson states that there will be six million cubic yards of excess soil created by construction of the facility, and questions what will be done with the excess soil. Watson fails to note, however, that Mr. Nickodem testified as to uses of the excess soil (liner construction, berm construction, daily and intermediate cover). C1257 at 48. Of course, not all of that excess soil will be created at once: the construction of the landfill is done in stages, so that the "excess" soil is created over a number of years. During that time, much of the soil is used at the facility.

In short, none of the issues raised by Watson demonstrate that the County Board's decision is against the manifest weight of the evidence. In fact, a review of the information cited

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[8] The County Board requires WMII to install an automatic monitoring system to ensure that the leachate level does not exceed one foot of head on the liner. C2351, Condition 2(u).

by Watson actually demonstrates that there is ample evidence in the record to support the County Board's decision on criterion two.

2. The geology and hydrogeology of the site are appropriate, and protect the public health, safety, and welfare.

Next, petitioners Karlock and the City (joined by Watson) attack the evidence presented regarding the geology and hydrogeology of the site. Petitioners raise claims related to the in-situ materials, the proposed inward gradient, the proposed groundwater monitoring program, and the groundwater impact assessment. However, all of these arguments are based upon differing testimony given by WMII's experts and by Karlock's expert. As has been well-established, the credibility of experts is an issue for the local decisionmaker. Thus, simply because the County Board credited the testimony of WMII's experts over Karlock's witness does not mean that the County Board's decision is against the manifest weight of the evidence. *Concerned Adjoining Owners*, 680 N.E.2d at 818.

There is substantial evidence in the record to support the County Board in accepting the testimony of WMII's experts over the testimony of Karlock's witness. Mr. Norris, who testified on behalf of Mr. Karlock, has no actual experience in performing site characterizations or hydrogeologic evaluations of solid waste landfills. He has never designed or operated a landfill, never conducted a site characterization, never performed a hydrogeologic study to evaluate a proposed landfill site, never conducted a groundwater impact assessment for a proposed landfill, and never conducted laboratory or field permeability tests for a proposed landfill. C1267 at 32-33.

In contrast, WMII's experts have substantial experience in their fields, directly relating to the development of landfills. For example, Mr. Nickodem is a licensed professional engineer who has spent the entirety of his career (more than fifteen years) in the field of solid waste

engineering. He has worked on more than 45 landfill projects, including the design of landfills. Mr. Nickodem's design experience includes eight landfills which involved the expansion of an existing facility, as is proposed in this case. C1254 at 56-60. Ms. Joan Underwood, who testified on WMII's behalf regarding the hydrogeological and geological aspects of the proposed facility, is a licensed professional geologist and hydrogeologist, with twenty-four years of experience. Ms. Underwood has worked on a number of landfill siting and groundwater projects, and has extensive experience in performing feasibility studies relating to the siting of landfills. She has designed monitoring systems for landfills, and has taught in the fields of hydrogeology and geology in the University of Wisconsin system. C1262 at 80-86; C264-C271.

It is clear that, comparing the qualifications and experience of the expert witnesses, the County Board had substantial reason to credit the testimony of Mr. Nickodem and Ms. Underwood over the testimony of Mr. Norris. Both Mr. Nickodem and Ms. Underwood have years of practical experience in their fields, relating directly to solid waste landfills. In contrast, Mr. Norris has no such experience. It is up to the County Board, as the siting authority, to determine the credibility of the witnesses, to resolve conflicts in the evidence, and to weigh all of the evidence offered. *Concerned Adjoining Owners*, 680 N.E.2d at 818, *citing FACT*, 555 N.E.2d at 1184. The County Board did so, and accepted the testimony of Mr. Nickodem and Ms. Underwood.

Additionally, the County Board had the report submitted by County staff during the public comment period. C1318-C1373. That report summarized the testimony, and drew conclusions regarding the conflicts in the testimony. Thus, the County Board had evidence from a third party, who represented neither the applicant nor the objectors. The County staff report concluded that WMII's presentation regarding geology and hydrogeology was sufficient to

demonstrate that criterion two was met. C1349. In some limited areas, the County staff recommended conditions to remedy areas with less information than others. The County Board imposed those conditions. Finally, it is important to note that even Mr. Norris, Karlock's expert witness, did not testify that the proposed facility did not meet criterion two. Mr. Norris simply believed that the information was insufficient to make a determination on compliance with criterion two. C1268 at 51-52. Thus, there is no expert testimony in the record stating that the proposed facility does not satisfy criterion two.

3. The IPCB has not rejected the location of the proposed facility.

Finally, Karlock asserts that the location of the proposed facility is "functionally the same" as the location found unsafe by the IPCB in *County of Kankakee v. City of Kankakee*, PCB 03-31 (January 9, 2003). Like the other arguments regarding criterion two, this claim fails.[9] First, the IPCB's reversal of siting in the *City* case was based on fairly narrow grounds. The applicant had performed only a single fifty foot boring in the entire proposed 256 acre waste footprint, yet asserted that the results from that single boring trumped published regional geological information and specific well log data for 89 wells in the vicinity of the proposed facility. The IPCB found that the paucity of the applicant's evidence regarding the geologic and hydrogeologic features could not adequately rebut research which demonstrated that the Silurian dolomite (upon which the proposed landfill would rest) is an aquifer. Under such circumstances, the IPCB determined that the City's approval on criterion two was against the manifest weight of the evidence. The IPCB did not, in any way, indicate that the area in which the WMII facility is

[9] The County Board notes that Karlock's attorney represented Town and Country Utilities, the applicant in *City of Kankakee*, during which he argued that the location was safe and protective of the public health , safety, and welfare. In the instant case, Karlock's attorney argues that the "functionally" same location of the proposed WMII facility is unsafe. This is especially ironic because Mr. Karlock's attorney continues to represent Town and Country in its refilled application, currently pending before the City of Kankakee after the IPCB's reversal of the prior siting. In that refilled application before the City of Kankakee, Karlock's attorney asserts that the location is protective of the health, safety, and welfare. Apparently, whether the location is actually unsafe is a function of which client one is representing on a given day.

proposed is unsafe. Its decision in the *City* case is based upon the applicant's lack of information. *City of Kankakee*, slip op. at 26-28.

Second, there are substantial differences between the proposed design of the WMII landfill (in this case) and the proposed design of the landfill in the *City* case. In this case, there is a natural clay barrier between the bottom of the landfill and the Silurian dolomite. In the *City* case, the landfill was proposed to scoop down into the Silurian dolomite, and thus into the aquifer itself. *City of Kankakee*, slip op. at 13. There is a huge difference between the two designs, and how they potentially impact the aquifer. In the instant case, the chance of an impact into the aquifer is very low, because of the natural clay barrier between the aquifer and the landfill. In the *City* case, there is literally no protective buffer between the landfill and the aquifer: in fact, the landfill sits in the aquifer.

In sum, none of the claims raised by petitioners demonstrate that the County Board's decision on criterion two is against the manifest weight of the evidence. In fully reviewing the evidence and testimony, and in deferring to the County Board for questions of credibility and weight to be given, it is apparent that the County Board's decision on criterion two is indeed supported by the manifest weight of the evidence.

C. The County Board's decision on criterion three (real estate) is supported by the manifest weight of the evidence.

The third criterion to be considered by the local decisionmaker is whether the proposed 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. 415 ILCS 5/39.2(a)(iii).

Petitioners Watson and the City contend that the County Board's decision on this criterion is against the manifest weight of the evidence. First, they assert that the testimony of Ms. Patricia McGarr, WMII's expert on valuation, is "perjured" as a result of uncertainty over

whether she actually received an associate degree more than twenty years ago. The County Board has addressed that issue above, in connection with fundamental fairness, and will not repeat those arguments here. See Section II(D), above. However, once again, it must be noted that determinations as to the credibility of witnesses are left to the County Board. *Concerned Adjoining* Owners, 680 N.E.2d at 818. Ms. McGarr was thoroughly cross-examined on the issue of her degree, and both WMII and the objectors presented additional evidence on the issue in the form of exhibits and public comments. The County Board was aware of the dispute over Ms. McGarr's diploma, and chose to credit her testimony.[10] The objectors' disagreement with this credit does not render the County Board's decision against the manifest weight of the evidence.

Second, Watson and the City attack the testimony given by Ms. McGarr and Mr. Lannert, WMII's expert on compatibility. Initially, the City raises the specious argument that, because Mr. Lannert gave his opinion that the proposed expansion is "compatible" with the character of the surrounding area, rather than stating that the proposed expansion "minimizes" the incompatibility with the surrounding area, his testimony is not relevant to criterion three. The City cites no authority for its apparent claim that a testifying expert must use exactly the same words as used in the statute. Additionally, the substantive effect of a statement that the expansion is "compatible" is the functional equivalent of testimony that the expansion "minimizes" incompatibility. Mr. Lannert clearly testified that the proposed expansion satisfies the compatibility portion of criterion three. The County Board is entitled to accept that testimony. The City's argument should be summarily rejected.

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[10] The City makes the unsupported assertion that, because the County Board made no reference to Ms. McGarr's credibility, the issue of her credibility must never have been considered by the County Board. City Br. at 23. This is absolutely untrue. The issue was discussed during the public sessions of the Regional Planning Commission and the County Board in considering the application. Further, there is no requirement that the County Board make a written finding on the credibility of each witness. It is only logical to assume that, if the local decisionmaker makes a finding consistent with testimony by a given witness, the local decisionmaker accepted that witness' testimony. The City's incorrect and unsupported allegation should be stricken.

Both Watson and the City attack the testimony given by Ms. McGarr relating to her valuation study. According to these petitioners, Ms. McGarr either considered too many transactions (Kane County transactions, transactions that petitioners assert are not properly characterized as farmland, sales prices that petitioner characterize as aberrations[11]), or did not consider enough transactions (petitioners' complaints that Ms. McGarr did not locate residential transactions prior to 1998). However, Ms. McGarr's testimony was straightforward: she located all available transactions within the target and control areas in Kankakee County, and compared all of those transactions. C1249 at 11-18. Ms. McGarr also performed a similar study in Kane County, in order to assess the impact of a larger facility on the real estate values in the area of that facility. C1249 at 19-23; C1 at Criterion 3 tab. Petitioners now complain that Ms. McGarr considered transactions in another county (without realizing, apparently, that those transactions are used for comparative and illustrative purposes), but also complain that Ms. McGarr did not use a sufficient number of transactions. This is a classic "Catch 22" argument, and does not demonstrate that the County Board's decision was against the manifest weight of the evidence. Again, the County Board is entitled to choose to accept the testimony of a witness. *Concerned Adjoining Owners*, 680 N.E.2d at 818.

D. The County Board's decision on criterion five (plan of operations) is supported by the manifest weight of the evidence.

The fifth criterion to be considered by the local decisionmaker is whether the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. 415 ILCS 5/39.2(a)(v).

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[11] While Watson characterizes some transactions as "apparitional", the County Board assumes that Watson intends to characterize those transactions as "aberrations".

Petitioners Watson and the City purport to challenge the County Board's decision on this criterion. However, while Watson states that his arguments concerning operational issues are contained in his arguments on criterion two, the only operational issues he identifies relate to plans in the event that landfill gas reaches five percent of the lower explosive limit (addressed above, regarding criterion two), and to WMII's operational history at the existing facility. Neither of these claims can prevail. The County Board has demonstrated that Watson's summation of the testimony on landfill gas is incomplete (see Section III(B) above). The dispute over how many notices of violation WMII may have received regarding the existing facility does not demonstrate that WMII's plan of operations is insufficient. Watson raises no other issues relating to criterion five.

The City raises only one specific complaint regarding WMII's plan of operations: a claim that there is no monitoring system to protect against radiation hazards. The City fails to recognize that the County Board added a special condition to its approval of criterion five, which requires that WMII install and maintain a radiation detector at the facility. C2352, Condition 5(a). Thus, any concern regarding non-detection of radiation is addressed by Condition 5(a). The City does refer to "other shortcomings" in the WMII plan, but fails to identify those shortcomings.[12] Thus, the City has waived any other claim as to criterion five.

Neither Watson nor the City has identified any issue which demonstrates that the County Board's decision on criterion five is against the manifest weight of the evidence.

[12] The City makes a reference to its arguments on criterion two. However, none of the City's claims on criterion two addressed operational issues. City Br. at 11-20, 24.

E. The County Board's decision on criterion six (traffic patterns) is supported by the manifest weight of the evidence.

The sixth criterion to be considered by the local decisionmaker is whether the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic. 415 ILCS 5/39.2(a)(vi).

Both the City and Watson challenge the County Board's finding on criterion six. Both base their challenges on allegations that Mr. Corcoran of Metro Transportation Group, Inc., WMII's expert on traffic, used insufficient and unrepresentative data as the basis for his traffic study. The City's sole claim is that the amount of data relied on by Mr. Corcoran was insufficient to carry WMII's burden of proof. However, other than simply quoting Mr. Corcoran's testimony regarding the number of days people from Metro were actually on site, the City makes no further argument or identifies any specific flaw in Mr. Corcoran's methodology. In any event, the City fails to demonstrate exactly how Mr. Corcoran's data is insufficient.

Watson makes similar claims about Mr. Corcoran's data. For example, Watson complains that the traffic counts, performed in February, are not "representative" because traffic counts in February would not include farming traffic, or traffic from the nearby fairgrounds, which does not occur in winter. This assertion is just as easily reversed, to say that a traffic count performed in the summer would not be "representative", since farm and fairground traffic do not occur in the winter. Watson also challenges Metro's use of 4,000 tons per day of waste accepted at the site, and asserts that the host community agreement between WMII and the County allows for up to 7,000 tons of waste. Watson fails to note that WMII proposes that the actual amount of waste accepted on a daily basis will be approximately 4,000 tons per day. C1252 at 87-88. There is no evidence in the record that the proposed facility will accept 7,000

tons per day. Thus, if Metro had based its study on 7,000 tons per day, Watson would have most likely challenged that figure!

The County Board carefully considered the application's compliance with criterion six. That careful consideration is evidenced by the County Board's imposition of nine conditions regarding traffic. C2352, Conditions 6(a)-(i). It had the benefit of Mr. Corcoran's report and testimony (including the objectors' cross-examination of Mr. Corcoran), as well as questions and comments from the public and the County staff. There is ample evidence in the record to support the County Board's finding that criterion six is satisfied.

F. The County Board's decision on criterion seven (hazardous waste) is supported by the manifest weight of the evidence.

The seventh criterion to be considered by the local decisionmaker is, if the facility will be treating, storing, or disposing of hazardous wastes, an emergency response plan exists for the facility which includes notification, containment, and evacuation procedures to be used in case of an accidental release. 415 ILCS 5/39.2(a)(vii).

The County Board found that the facility will not be treating, storing, or disposing of hazardous waste, and thus found criterion seven inapplicable. C2353. Watson asserts that, because it was undetermined whether leachate from the existing facility might be classified as hazardous[13], criterion seven is indeed applicable. Watson cites no authority for his interpretation of criterion seven. Watson has misunderstood the meaning of criterion seven. Criterion seven applies only when an applicant proposes to accept hazardous waste for treatment, storage, or disposal. It does not apply when there is a possibility that leachate generated at the facility could become hazardous. If Watson's interpretation were correct, there would be no need for the qualifying statement "if the facility will be treating, storing, or disposing of hazardous waste".

[13] Watson admits that there is no conclusive evidence that the leachate is a hazardous waste. Watson Br. at 47.

The County Board properly interpreted criterion seven to apply only when the applicant proposes to treat, store, or dispose of hazardous waste, and thus properly found that criterion seven is not applicable.

G. The County Board's decision on criterion eight (consistency with the solid waste management plan) is supported by the manifest weight of the evidence.

The eighth criterion to be considered by the local decisionmaker is, if the facility is located in a county with a solid waste management plan, the facility is consistent with that plan. 415 ILCS 5/39.2(a)(viii).

WMII presented the testimony of Ms. Sheryl Smith as to the consistency of the proposed facility with the County's solid waste management plan. Ms. Smith has a great deal of experience in reviewing county solid waste management plans, and has been doing so for more than twenty years. C1253 at 44-46. She discussed the requirements of the County plan, applied those requirements to the details of the proposed expansion, and concluded that the proposed facility is consistent with the solid waste management plan. C1253 at 47-56. Ms. Smith noted that the County's plan identifies landfilling as the preferred disposal option; that the plan identifies the existing landfill as the preferred landfill; that any expanded facility would provide at least twenty years of disposal capacity; that the private sector provide disposal and recycling services for the county; and that the operator of the facility and the County enter into a host agreement. C1253 at 55-56. Ms. Smith was subject to cross-examination regarding her methodology and conclusions. C1253 at 57-123; C1254 at 4-55. Ms. Smith was the only expert witness to testify on criterion eight.

All four petitioners purport to challenge the County Board's decision on this criterion. However, the City's sole claim regarding criterion eight is its reference to its fundamental fairness claim that the application did not comport with the requirements of the local siting

ordinance. City Br. at 5, 7-8, 25. As the County Board demonstrated above (see section II(E)), there is no fundamental unfairness resulting from the alleged failure of the application to address all portions of the local siting ordinance. Further, the City provides no explanation as to how an alleged failure to meet the requirements of the local siting ordinance somehow translates into proof that the County Board's decision on criterion eight was against the manifest weight of the evidence. The City's claim does not demonstrate that the County Board's decision is against the manifest weight of the evidence.

Petitioner Runyon raises four claims as to the consistency of the proposed expansion with the solid waste management plan.[14] However, Runyon applies the wrong standard of review, asserting that the "preponderance of the evidence" demonstrates that the expansion is not consistent with the plan. The proper standard of review of the siting criteria is "manifest weight", not "preponderance of the evidence." Thus, Runyon's arguments must be reviewed on a "manifest weight" basis, and his claims regarding "preponderance of the evidence" should be ignored. Further, the bulk of the information cited by Runyon in support of his claims are cites to statements of attorneys and objectors (including himself), made during opening and closing arguments, and during direct and cross examination. *See, e.g.,* Runyon Br. at 5, 6, 8, 10, 11, 12, 13, 16, 18, 19, 20, 21, 22. However, the statements made by attorneys during opening and closing arguments, and during examination, are not evidence, and cannot be used to prove a particular position. The same limitation is applicable to statements made by non-attorney objectors, such as Mr. Runyon, in the context of opening and closing statements, and examining

[14] Watson and Karlock raise similar claims to those raised by Runyon.

witnesses.[15] The IPCB should not consider any such non-evidentiary statements, cited by Mr. Runyon, as support for his arguments.[16]

Runyon argues that the proposed facility is not consistent with the solid waste management plan, because the plan requires the existence of a valid host-fee agreement between the County and the applicant. While Runyon admits that there is indeed a host fee agreement between the County and the applicant[17], he asserts that the agreement is invalid. That argument is based on the provision of the agreement which states:

> Waste Management shall file a siting application for the Expanded Facility on or before June 1, 2002, unless the County consents in writing to an extension of this period for good cause shown. In the event that Waste Management does not file its siting application for the Expanded Facility on or before June 1, 2002, and absent the County's consent in writing to an extension of the filing deadline for good cause shown, this Agreement shall become null and void.
>
> Host Agreement, Recital C (C1, Additional Information, Tab C).

Runyon asserts that because this siting application was filed on August 16, 2002, the host agreement is of no effect. However, Runyon ignores the plain wording of the agreement. As petitioners admit, WMII initially filed its siting application on March 29, 2002. At the first day of hearing on that application, on July 22, 2002, WMII decided not to go forward, based on issues regarding pre-filing notices. Less than one month later, on August 16, 2002, WMII refiled its application. C1; C2; C2371-C2372. Thus, it is clear that WMII complied with the plain language of the agreement, which requires WMII to file a siting application on or before June 1, 2002. The initial siting application was filed on March 29, 2002. The fact that WMII chose not

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[15] Of course, any public comment or testimony made by Mr. Runyon or any other objector as a witness is appropriately considered as testimony or public comment.

[16] Additionally, Runyon repeatedly cites to specific pages of the solid waste management plan. However, that plan is not in the record, except as an offer of proof at the IPCB hearing, as the hearing officer ruled that new information could not be entered into the record. IPCB Tr. 5/6/03 at 96-98.

[17] The host agreement is contained in WMII's application. (C1, Additional Information, Tab C).

to proceed with that application does not change the fact that a complete and detailed application was filed prior to June 1, 2002. The filing of the March 29, 2002 application met the requirements of the host agreement.

Although the County Board believes that the March 29, 2002 filing met the requirements of the host agreement, such that the host agreement is valid and continues in effect after June 1, 2002, it chose to add a condition clarifying that WMII must follow the host agreement as a condition of siting. Condition 8(a) states:

> The landfill operator must comply with all obligations and responsibilities of the December 21, 2001 Host Agreement between the County and Waste Management of Illinois, Inc.
>
> C2352, Condition 8(a).

Thus, to any extent that there is a question as to the validity of the host agreement, the County Board provided an extra level of assurance that WMII will comply with all obligations of the host agreement.

Runyon next asserts that the property value guarantee program submitted by WMII, which is required by the solid waste management plan, is insufficient. Runyon notes that the plan requires that the required property value guarantee program be prepared by an independent entity satisfactory to the County. Runyon claims that WMII's property value guarantee program (attached to the host agreement, *see* C1, Additional Information, Tab C) was not prepared by an independent entity. However, Runyon does not cite any evidence, beyond the above-mentioned statements by attorneys, that supports his claim that the plan was not independently prepared. Further, the County Board again imposed a condition on siting, which requires that the landfill operator must employ independent appraisers acceptable to the County as part of the property value guarantee program. (C2352, Condition 8(b)). Certainly the County Board has authority, in

interpreting its own plan, to decide that the use of independent appraisers satisfies the requirements of the solid waste management plan.

The other two arguments raised by Runyon relate to provisions in the solid waste management plan which set forth factors to be considered in siting a landfill in Kankakee County. In addition to the regulatory factors which must, under state and federal law, be satisfied to site a landfill, the plan includes environmental, community, economic, and other factors to be considered. Those factors (except for the regulatory factors) are not mandatory, but are suggested considerations. (See Plan at 330-334, IPCB Hrg. Watson Ex. 7.) Two of those discretionary factors are whether the landfill is located above or near a heavily utilized water supply aquifer, and the level of public involvement in the landfill site selection process. Runyon asserts that neither of these factors were satisfied.

Initially, the County Board notes that none of the petitioners has demonstrated that these two factors are mandatory. The clear language of the plan shows that these factors are things to consider, not hard and fast rules. Thus, absolute compliance with these discretionary factors is not required in order for a proposed facility to be consistent with the plan. This is illustrated by the fact that, if the plan absolutely prohibited a landfill above an aquifer, no landfill could be sited in northern Illinois, since the Silurian dolomite aquifer at issue in this case underlies most of northern Illinois. (C1266 at 27). Further, the County Board found that the proposed expansion protects the public health, safety, and welfare. Clearly the consideration of a facility's proximity to an aquifer is most appropriately considered under criterion two, as it was in this case.

As to public involvement in the site selection process, there have been a myriad of opportunities for the public to be involved in the process. First, it must be remembered that the

site itself was selected by WMII, not by the County. Thus, the County had no obligation or ability to create public input opportunities prior to the Section 39.2 siting hearing. However, WMII did keep the public informed of its plans, beginning in March 2000. C1283-C1285. Additionally, contrary to Mr. Runyon's assertion, the Section 39.2 siting hearing does indeed provide an opportunity for public involvement in the broad category of landfill site selection. The Section 39.2 siting process is an integral part of the overall process of "site selection", since a site cannot be said to be finally "selected" (at least by the County) until siting approval is granted.

All of these claims by petitioners were raised at the hearings, yet the County Board determined that the proposed facility is indeed consistent with the County solid waste management plan. Once again, the County Board is entitled to accept the testimony of Ms. Smith, who gave her expert opinion that the facility satisfies criterion eight. C1253 at 55-56. The County Board's decision on criterion eight, interpreting the consistency of the proposed expansion with its own solid waste management plan, is supported by the manifest weight of the evidence.

Finally, petitioner Watson attempts to reserve an argument that amendments to the plan, in 2001 and 2002 are not valid. (Watson Br. at 47-48, footnote 12.) However, there will be no other opportunity for Watson to make that argument, because the parties' briefs are to contain the entirety of their claims. Any attempt by Watson to raise such a claim in the future, either in its "reply" brief, or through some other type of filing, should be stricken. This brief was Watson's opportunity to make his arguments, and he cannot reserve an argument for some later date.

IV. THE IPCB HEARING OFFICER RULINGS CHALLENGED BY WATSON WERE CORRECT, AND THERE IS NO NEED FOR FURTHER PROCEEDINGS

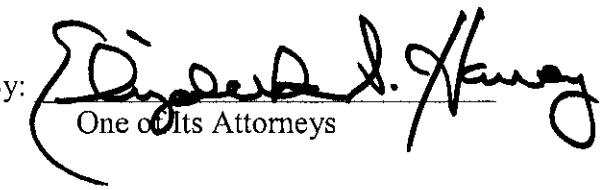
Watson makes the final claim that a number of rulings by the IPCB hearing officer were incorrect, denied him due process, and resulted in prejudice to him. He asks that the proceeding be "remanded" for further discovery proceedings and hearings. This claim must fail. First, a non-applicant is not entitled to full due process guarantees, but has only a right to minimal standards of due process, including the opportunity to be heard, the right to cross-examine witnesses, and impartial rulings on the evidence. *Land and Lakes Company v. Pollution Control Board*, 309 Ill.App.3d 41, 743 N.E.2d 188 (3d Dist. 2000). Watson received all of these protections, including the opportunity to conduct discovery (including depositions), and two days of hearings before the IPCB hearing officer. Second, Watson has failed to specifically identify exactly how the complained-of rulings prejudiced him, and has failed to demonstrate that those rulings were in error. The hearing officer rulings were correct, and should be affirmed and there is no need for additional proceedings.

CONCLUSION

The County Board was vested with jurisdiction of this application for siting approval, and the proceedings it conducted on the application were fundamentally fair. Its decision to grant siting approval, subject to conditions, was based upon a great deal of evidence in the record and upon hundreds of hours of testimony, and is supported by the manifest weight of the evidence. Therefore, the County Board's January 31, 2003 decision granting siting approval should be affirmed by the IPCB.

Respectfully submitted,

COUNTY OF KANKAKEE and
COUNTY BOARD OF KANKAKEE

By: 
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