ILLINOIS POLLUTION CONTROL BOARD
March 18, 2004

BYRON SANDBERG, Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 04-33 (Third-Party Pollution Control Facility Siting Appeal)
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 04-34 (Third-Party Pollution Control Facility Siting Appeal)
COUNTY OF KANKAKEE, ILLINOIS, and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, Petitioners, v. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 04-35 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

ORDER OF THE BOARD (by N.J. Melas):

Respondents, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. (Town & Coutry), filed an application for siting approval of a regional landfill facility on March 7, 2003. The City of Kankakee, Illinois City Council (City) approved the application on August 18, 2003, despite objections from Mr. Byron Sandberg, the County of Kankakee, Illinois (County), and Waste Management of Illinois, Inc. (Waste Management).

Mr. Sandberg, the County, and Waste Management appeal on the grounds that the City lacked jurisdiction to hear the landfill siting application, the City's landfill siting procedures were fundamentally unfair, and the City's findings were against the manifest weight of the evidence with regard to siting criteria (ii) and (viii) of Section 39.2(a) of the Environmental Protection Act (Act). 415 ILCS 5/39.2(a) (2002). As discussed below, the Board finds that the City had jurisdiction and that the proceedings were fundamentally fair. The Board affirms the City's decision to grant siting approval for Town & Country's proposed landfill.

Below, the Board addresses two preliminary procedural matters, provides the facts and procedural history, applicable statutory language, and a discussion of the legal issues and the parties' arguments. Lastly, the Board will address each of Mr. Sandberg's arguments in turn.

PRELIMINARY MATTERS

Outstanding are two motions that the Board will resolve before proceeding with the parties' substantive arguments.

First, the City filed a motion to waive the necessity of filing 1,700 pounds of rock core samples with the Board on October 23, 2004. Prior to any Board ruling on the motion, but after the Board found that Waste Management was to pay costs of delivery of the record, the City delivered the rock core samples on January 30, 2004. After a thorough review of the record, the Board finds a description of the rock core samples in Section 2.2-32 of the 2003 application. The application describes that the 27 samples were obtained by using either a 5-foot-long or 10-foot-long core barrel. Town & Country provides the rock type, recovery, and rock quality designation in Appendix G.3 of the 2003 application.

The Board finds the record adequately describes the composition of the rock core samples. In the interest of administrative economy, to avoid burdening the Board or court system with costs for storing and transporting the 1,700 pounds of rock samples, the Board grants the City's motion to waive filing the samples. Within 45 days, the City, or in the alternative Town & Country, must remove the rocks from the Board offices.

Second, on January 9, 2004, Town & Country filed a motion to file a brief in excess of 50 pages. Board Hearing Officer Brad Halloran granted the County's motion to exceed the post-hearing brief page limit and accepted the County's 109-page brief on January 8, 2004. Here, the Board grants Town & Country's motion and accepts the 99-page post-hearing brief.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

In this section, the Board briefly recites the facts. Facts pertinent to each argument will be provided below.

Town & Country's application for siting approval proposed a new municipal solid waste landfill of approximately 400 acres with a waste disposal footprint of 236 acres and an estimated service life of 30 years. Town & Country previously filed an application with the City for siting approval of a landfill development on the same real estate on March 10, 2002. On August 19, 2002, the City approved the first application. On appeal by the County, Waste Management, and Byron Sandberg, the Board reversed the City's siting approval on January 9, 2003, holding that the City's decision on siting criterion (ii) of Section 39.2(a) of the Act was against the manifest weight of the evidence. *See* PCB 03-31, 03-33, 03-35 (Jan 9, 2003), appeal pending *sub nom*, Town & Country Utilities, Inc. *et al*. v. Illinois Pollution Control Board, *et al*. no. 3-03-0025 (3rd Dist. filed Jan. 10, 2003) (Town & Country I).

Town & Country's application filed on March 7, 2003 (2003 application), consisted of its previous application filed on March 10, 2002 (2002 application), three new volumes, and supplemental drawings, core samples, core sample observation logs, and modeling data. C1860.

The City held public hearings on the 2003 application that began on June 24, 2003, and ended June 28, 2003. C1861. The hearing officer was Mr. Robert Boyd. C1861. The City received public comments through July 29, 2003. C1862. The City received three public comments: (1) a letter opposing the application by Mr. Ron Thompsen, Otto Township Supervisor; (2) an affidavit by Mr. Karl Kruse, Chairman of the Kankakee County Board, opining that the application is inconsistent with the County's Solid Waste Management Plan and that the Plan only allows for expansion of the existing facility owned by Waste Management; and (3) a letter to Mr. Larry O'Conner and Mr. Mark Benoit of the citizens' group C.R.I.M.E. from Mr. H. Allen Wehrmann, P.E. of the Illinois State Water Survey addressing several geological questions.

At the local siting hearings, Town & Country called seven witnesses who testified regarding different aspects of the application, including Mr. Michael Donahue (City Tr. at 87-97), Mr. Peter Poletti (City Tr. at 98-108), Mr. Michael Werthmann (City Tr. at 108-120), Mr. Phillip Kowalski (City Tr. at 122-158), Mr. Daniel Drommerhausen (City Tr. at 160-564), Mr. Devin Moose (City Tr. at 564-824) and Mr. David Daniel (City Tr. at 824-906). The County called Mr. Jeffery Schuh. City Tr. at 1249-1411. Waste Management called Mr. Stuart Cravens (City Tr. at 1029-1223), a geologist.

Mr. Ronald Yarbrough, a geologist for the City, also submitted a report on July 28, 2003. The City Clerk's office received the report on July 31, 2003, after the close of public comment. Pet. Exh. 24.

Mr. Michael Donahue testified that he is a planning and zoning consultant retained by Town & Country to do a land use compatibility analysis. City Tr. at 88-89. The same analysis is included in both the 2002 and 2003 applications. City Tr. at 90. Mr. Donahue's analysis finds

that the proposed facility is compatible with the surrounding area. *See* Section 3.2 of the 2002 App. at 10305.

Mr. Michael Werthman testified that he is a traffic and transportation engineer and performed studies for Town & Country regarding the potential impact of the proposed facility on traffic patterns. The same studies were included in both the 2002 and 2003 applications. City Tr. at 110. For the 2003 application, Mr. Werthman updated his studies but found that nothing had changed his original conclusions. *Id*. at 111.

Next, Mr. Phillip Kowalski, a solid waste planner with Emcom/OWT, formerly Envirogen, testified about the needs assessment he performed for Town & Country regarding the proposed facility. City Tr. at 123. The service area for the study he performed in 2002 consisted of 12 counties, including Kankakee County. *Id*. at 124; 2002 App. Section 1-1, at 10034. He performed a new study for the 2003 application that consists of eight counties. 2003 App. Section 1-1. Mr. Kowalski testified that this represents a forty percent reduction in the service area size, which corresponds to a total waste reduction of approximately four or five %. City Tr. at 128.

Mr. Devin Moose testified he is a civil engineer and the director of the St. Charles office for Envirogen, part of a 20,000 person consulting firm. City Tr. at 565. Mr. Moose stated he was the project manager for Town & Country's 2003 application, selecting all of the team members that worked on the project, and compiling and checking the work for the application. He is the engineer that signed the application.[1] Mr. Moose stated that Town & Country's 2002 and 2003 applications are same in the following respects: the location of the facility in Otto Township within the municipal boundaries of the City of Kankakee and legal description of the real estate; the size of the facility, approximately 400 acres; the capacity, 50.9 million cubic air space yards; the waste footprint, slightly more than 236 acres; the daily tonnage of waste to be received; the storm water management plan; the closure and post-closure care plan; the inward hydraulic gradient design; the leachate collection system; the landfill gas management and monitoring system; and the final contours and cover.

Mr. Byron Sandberg read a public comment into the record at the City hearing objecting to the location of Town & Country's proposed facility and the supporting studies. City Tr. at 1230.

Mr. Richard Simms, Superintendent of the Kankakee Municipal Utility, testified that the City Council asked him to act as an advisor for the purposes of receiving and reviewing the information presented regarding the siting application at the City hearings. City Tr. at 1432.

On August 18, 2003, the City adopted findings of fact and conclusions of law that were signed by the City Mayor, Donald E. Green. The City's findings stated that siting criteria (vii) and (ix) were not applicable, and that Town & Country's application satisfied the remaining seven siting criteria of Section 39.2(a) of the Act. On the same day, the City approved Town & Country's application, with conditions, by a vote of 12 to 1 with one person abstaining. C1890.

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[1] See preliminary pages of Town & Country's 2003 application for landfill siting.

On September 18, 2003, Mr. Sandberg filed a petition pursuant to Section 40.1(b) of the Act requesting the Board to review the City's August 18, 2003 decision approving Town & Country's application to site a pollution control facility. On September 22, 2003, Waste Management and the County filed separate petitions with the Board also seeking review of the City's decision.

The Board accepted the petitions for hearing and consolidated the petitions in an October 2, 2003 order. County of Kankakee, *et al*. v. City of Kankakee, *et al.*, PCB 04-33, 34, and 35 (consolidated) (Oct. 2, 2003). On October 23, 2003, the City submitted the record of its proceedings. Board Hearing Officer Brad Halloran conducted a public hearing on December 2, 2003, at City Hall in the City of Kankakee, Kankakee County.[2]

At hearing, the parties agreed to incorporate the entire record of PCB 03-31, 03-33, 03-35 into this record.[3]

Mr. Sandberg submitted a post-hearing brief on December 22, 2003.[4] The County and Waste Management submitted post-hearing briefs on December 24, 2003.[5] The City responded on January 9, 2004,[6] and the County and Waste Management replied on January 20, 2004.[7]

STATUTORY BACKGROUND

Section 39.2(b) requires that:

> No later than fourteen days prior to request for location approval, the Applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the Applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear on the authentic tax records of the County in which such facility is to be located; provided, that the number of all

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[2] The City's record will be cited as "C____." The Board's hearing will be cited as "Board Tr. at __." Exhibits admitted at the Board's hearing will be referenced as "Pet. Exh. __," or "Hrg. Officer Exh. __."

[3] The record in PCB 03-31, 33, 35 will be cited as "R. at ___."

[4] Mr. Sandberg's post-hearing brief will be cited as "Sandberg Br. at __."

[5] The County's post-hearing brief will be cited as "County Br. at __." Waste Management's post-hearing brief will be cited as "WMII Br. at __."

[6] The City's response brief will be cited as "City Resp at __."

[7] The County's reply brief will be cited as "County Reply at __." Waste Management's reply brief will be cited as "WMII Reply at__."

> feet occupied by all public roads, streets, alleys, and other public ways shall be excluded in computing the 250 feet requirement; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys, and public ways. 415 ILCS 5/39.2(b) (2002).

No later than 120 days after receiving an application for landfill siting, the governing body of the municipality must hold at least one public hearing. 415 ILCS 5/39.2(d) (2002). The procedures followed in the hearing must be fundamentally fair. 415 ILCS 5/40.1(b) (2002).

Before the City could approve siting for a landfill within its boundaries,the Act required Town & Country to submit sufficient details describing the proposed facility to demonstrate compliance with nine criteria of Section 39.2(a). 415 ILCS 5/39.2(a) (2002). The petitioners contend that the City's conclusion that Town & Country satisfied criteria (ii) and (viii) was against the manifest weight of the evidence. Criteria (ii) and (viii) require:

> ii. the facility is so designed, located and proposed to be operated that the public health, safety, and welfare will be protected;
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> * * *
>
> viii. If the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan. 415 ILCS 5/39.2(a)(ii), (viii) (2002).

Section 40.1(b) of the Act provides:

> If the . . . governing body of the municipality . . . grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the . . . governing body of the municipality may, within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the approval of . . . the governing body of the municipality. 415 ILCS 5/40.1(b) (2002).

The Act also requires that Board hearings on landfill siting decisions are to be based "exclusively on the record before the county board or governing body of the municipality." 415 ILCS 5/40.1(b) (2002).

CITY JURISDICTION

The petitioners argue that the City did not have jurisdiction to hear Town & Country's landfill siting application for three reasons: (1) Town & Country failed to properly serve Section 39.2(b) notices; (2) the 2003 application was substantially the same as the 2002 application; and (3) Town & Country failed to submit a complete siting application. For the reasons discussed below, the Board finds that the City had jurisdiction to hear Town & Country's 2003 application.

Service of Notice

Siting applicants must strictly follow the notice requirements of Section 39.2 to vest the City with the jurisdiction to hear a landfill siting proposal. *See* Kane County Defenders, Inc. v. PCB, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746 (2d Dist. 1985). The County contends that the City lacked jurisdiction because Town & Country failed to properly serve notice to certain landowners of its intent to file an application to site a new pollution control facility. Specifically, the County argues that Town & Country failed to properly serve all the individuals listed as owners of the Bradshaw Farm. The Board previously addressed this issue in Town & Country I. The Board again finds that Town & Country met the service requirements under Section 39.2(b) of the Act.

Section 39.2 of the Act requires the applicant to serve the owners of all property within 250 feet in each direction of the lot line of the proposed landfill. 415 ILCS 5/39.2(b) (2002). Owners are defined as "such persons or entities which appear from the authentic tax records of the County." 415 ILCS 5/39.2(b) (2002).

Facts

Town & Country sent two notices to the owners of Parcel No. 13-16-23-400-001, 22802 Prophet Road, Rock Falls (the Bradshaw Farm). Pet. Br. at 10. Town & Country sent one notice certified mail addressed only to Ms. Skates and the other notice addressed to all of the names of the other owners in care of Ms. Skates. Pet. Br. at 14. Both notices were mailed to Ms. Skates' address, 203 South Locust Street, Onarga. Pet. Br. at 10. Town & Country did not send any notice to the five siblings at 22802 Prophet Road, Rock Falls. PCB Tr. 12/2/03 at 55-56.

Denise Fogle, Gary Bradshaw, Ted Bradshaw, Jay Bradshaw, and James Bradshaw submitted affidavits stating they are owners of Parcel No. 13-16-23-400-001, known as the Bradshaw Farm. All five affiants also state they did not authorize Judith Skates to accept service on their behalf and that at no time before July 31, 2003 did they know that the landfill siting hearings had taken place. *See* PCB Tr., at H.O. Exh. 2, 4, 5, 6, and 7. The affiants did not state that they reside at the Bradshaw Farm and the affidavit did not include their current addresses.

At the Board hearing, Ms. Sheila Donahoe, the Chief County Assessment Officer, testified regarding the County's tax records. The parties agree, and Ms. Donahoe testified at hearing, that there are three authentic tax records concerning the Bradshaw Farm. Board Tr. at 73, 78, 86. The first is a property index card maintained by the Chief County Assessment Officer showing the Rock Falls address as the address of the six property owners. The second is a change of name and address card for Judith Skates. The third is the real estate tax bill addressed and sent to Judith Skates at her Onarga, Illinois address.

Mr. Tom Volini, of Town & Country, testified that before he sent out the notices regarding the 2003 application, he verified the names of the property owners of the Bradshaw Farm and their addresses by reviewing records in the county assessor's, clerk's and treasurer's offices. Pet. Exh. 23 at 55. Three employees of the Assessor's Office told him, and the county

treasurer and county clerk confirmed, that the real estate tax bill for the Bradshaw Farm showing Judith Skates as the sole recipient was the most current record available. Pet. Exh. 23 at 67-68.

The County's Arguments

The County contends that because not all of the owners of the Bradshaw Farm were served notice, the City did not have jurisdiction to hear Town & Country's landfill proposal. The County argues that Board precedent provides that if the authentic tax records indicate there is more than one property owner, each owner must be served. Pet. Br. at 13. According to the County, Town & Country only served one owner because it failed to send separate notice to each landowner of the Skates parcel. Pet. Br. at 14. The County distinguishes these facts from those in Town & Country I where the Board found that service of notice upon only Judith Skates was proper. Pet. Br. at 15.

Town & Country's Arguments

Town & Country contends the present facts are distinguishable from City of Kankakee v. County of Kankakee and Waste Management of Illinois, Inc., PCB 03-125, 133, 134 (Aug. 7, 2003), because the tax records for the Bradshaw Farm designate Judith Skates as the only person to receive the real estate tax bills. T&C Br.at 16.

Town & Country argues that the name and address change request evidences an intent by Judith Skates to change the address and mailing information for all of the owners of the Bradshaw Farm. T&C Br. at 10. Town & Country states that in the first proceeding a private process server attempted personal service on the listed owners of the Bradshaw Farm. An individual at the Bradshaw Farm identified herself as Judith Skates' daughter and stated that none of the listed owners lived at the Rock Falls address. T&C Br. at 11.

Town & Country also contends that in the first proceeding, the Board found that service was proper where Town & Country sent notice only to Judith Skates at her Onarga address. Here, Town & Country argues it actually exceeded statutory requirements by sending notice to all six owners of the Bradshaw Farm. Town & Country states that the Illinois Appellate Court has held it is sufficient to serve only one of several heirs where the tax records list the name and address of that heir to receive the tax statement on behalf of all the heirs. T&C Br. at 13; citing Wabash & Lawrence Counties Tax Payers and Water Drinkers' Assoc. v. PCB, 198 Ill. App. 3d 388, 390, 555 N.E.2d 1081, 1084 (5th Dist. 1990).

The County's Response

In response, the County contends that the Board should not rely on Town & Country I in support of Town & Country's contention that service was proper. County Resp. at 6. The County asserts that unlike in Town & Country I, here the evidence shows that no conflict existed in the County tax records.

The County argues that the change of address card attached to the County tax records changed only Ms. Skates' address, not the addresses of the other property owners. The County

further notes that Town & Country is wrong in asserting that it only needed to serve Judith Skates. The County states that Section 39.2(b) clearly states that applicants must serve all owners identified from the authentic County tax records.

Finally, the County asserts that City of Kankakee requires that separate notices be provided to each landowner. County Resp. at 9; citing City of Kankakee, PCB 03-125, 133, 134, slip op. at 16-17. The County contends that one notice to multiple owners does not ensure that all owners actually receive notice. County Resp. at 10. For these reasons, the County contends the City lacked jurisdiction to consider Town & Country's 2003 application.

Board Analysis

The Board finds, as it did in Town & Country I, that the Treasurer's office maintains authentic tax records. Additionally, the property owners entitled to notice are those who "appear from the authentic tax records of the County in which such facility is to be located." 415 ILCS 5/39.2(b) (2002). The statute does not mandate where the applicant must serve the owners, but only how the property owners must be identified and served. The parties agree that the County tax bill is an authentic tax record. The County tax bill identifies Judith Skates, Gary L. Bradshaw, James R. Bradshaw, Jay D. Bradshaw, Ted A. Bradshaw, and Denise Fogle as co-owners of the Bradshaw Farm.

The parties also agree that the authentic tax records indicated that Judith Skates received real estate tax bills and other legal notices regarding the property. Town & Country sent notice to Judith Skates at her home address in Onarga. Town & Country also sent notice to the other five siblings, in care of Ms. Skates, to the Onarga address. Both mailings were certified and timely.

The Board has held that under Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)), an applicant can effect service by mailing notice to property owners via certified mail return receipt and the service is proper upon mailing. City of Kankakee, PCB 03-125, slip op. at 16. In City of Kankakee, the Board also held that the wife of a property owner was not properly served because she never received a notice via certified mail. *Id*. at 5. In that case, however, it was clear that the wife was listed as a property owner, but was not identified on the notice and was not served by certified mail. *Id*. The Board finds this set of facts is distinguishable from those in City of Kankakee because all listed owners of the Bradshaw Farm were sent notices via certified mail.

In Town & Country I, the Board held that service to only Judith Skates was consistent with the records at the treasurer's office, and therefore, Town & Country satisfied the service requirements under Section 39.2 of the Act. Town & Country contends the record showed that the records of the tax assessor's office and those of the treasurer's office conflicted. The records at the assessor's office indicated that there were six owners of record at the Bradshaw Farm. The Treasurer's office listed Judith Skates as the owner of record at the Bradshaw Farm. In finding that both offices maintain authentic tax records for the county, the Board noted "'as long as notice is in compliance with the statute and places those potentially interested persons on inquiry, it is sufficient to confer jurisdiction on the county board.'" Town & Country I, at 41; *citing* Bishop v. PCB, 235 Ill. App. 3d 925, 933, 601 N.E.2d 310, 315 (5th Dist. 1992).

Here, the tax records listed Judith Skates as the recipient of the tax statement on behalf of her other five siblings. Town & Country also sent notice by certified mail to all six listed owners of the Bradshaw Farm at the address where the tax bill is to be sent. The Board finds that Town & Country could reasonably expect that such service would appraise all owners of the Bradshaw Farm of the opportunity to participate in the City siting proceeding. Accordingly, the Board finds that Town & Country served all owners of the Bradshaw Farm as required by Section 39.2 of the Act and that the City had jurisdiction to hear Town & Country's application.

Substantially the Same Request

The County contends the City did not have jurisdiction to hear Town & Country's application because the 2003 application was substantially similar to the 2002 application. As discussed below, the Board finds the City's conclusion that the 2003 application was not substantially the same as the 2002 application was not against the manifest weight of the evidence. Section 39.2(m) of the Act provides:

> An Applicant may not file a request for local siting approval which is substantially the same as a request which was disapproved pursuant to a finding against the Applicant under any criteria (i) through (ix) of subsection (a) of this Section within the preceding two years. 415 ILCS 5/39.2(m) (2002).

Facts

Town & Country's 2003 application consists of its 2002 application (R. at 10001 through 50345) plus three additional volumes of amendments to the 2002 application.

At the local siting hearings, Waste Management filed a motion to dismiss Town & Country's application as substantially similar to its previous application that the City approved. The hearing officer denied the motion and the City approved the hearing officer's denial. C1863. The City emphasized that the local siting authority did not disapprove the application, rather the City's approval was reversed by the Board. *Id.*

The City found that Town & Country's 2003 application was substantially different for three reasons: (1) the service area is substantially smaller in the current application as compared to the previous application; (2) the current application contains additional hydrogeological information; and (3) the current application contains alternate designs including a geo-composite liner, a double 60 mil. liner of the sumps and the v-notches (leachate collection pipe), the updated flood plain map, new studies regarding endangered species, biology, fish and mussels and mammalogy, an archaeological investigation, groundwater impact modeling using a two-dimensional model and additional ground water monitoring data. C1863.

The County's Arguments

The County claims the two-year prohibition against refiling a substantially similar application begins to run from the date that the prior application is disapproved by the local

governing body or the Board. County Br. at 2; citing Laidlaw Waste Systems v. PCB, 230 Ill.App.3d 132, 136, 595 N.E.2d 600, 602-603 (5th Dist. 1992); Turlek v. Village of Summit, PCB 94-19, 21, 22, slip op. at 6 (May 5, 1994).

The County next argues that Town & Country's 2003 application is substantially the same as its 2002 application. County Br. at 4. The County contends that the location of the landfill, the legal description and size of the property, the proposed operation with receipt of 3500 tons of waste per day, and all of the reports supporting criteria iii, iv, vi, vii, and ix, were exactly the same. *Id*. The County contends the difference in service area between the 2002 and 2003 applications is not a significant change in the 2002 application. County Br. at 5.

The County cites to Worthen as an example of where the Board has upheld a local siting authority's finding that an application was not substantially the same as a previously filed application. Worthen v. Village of Roxana, PCB 90-137 (Sept. 9, 1993). The County argues that in Worthen, the differences between the two applications were significant: (1) the size of the expansion was 159 acres versus 94 acres; (2) the liner was a 10 foot clay versus composite liner; (3) the facility was proposed to be a horizontal and vertical expansion rather than just a horizontal expansion; and (4) the design incorporated new aspects such as groundwater drainage systems, a gas flaring system, a monitoring plan, and a recycling composting facility. The County contends that in contrast to Worthen, the differences between the 2002 and 2003 applications are minor, not substantive or material. County Br. at 8.

Town & Country's Arguments

First Town & Country argues that the application is not prohibited under 39.2(m) of the Act because the first application Town & Country filed with the City was not actually disapproved. T&C Br. at 19. Town & Country argues that the word "disapproved" in Section 39.2(m) of the Act actually means the prohibition applies to local disapproval, not reversal by the Board. *Id*. at 20. For support, Town & Country points to dicta in Turlek v. PCB, 274 Ill. App. 3d 244, 653 N.E.2d 1288 (1st Dist. 1995), where the Court noted that the first application "was approved, not disapproved, by Summit. The prohibition upon which petitioners rely relates to subsequent applications following a disapproved application." *Id*. at 248.

Second Town & Country argues that the pending application is not substantially the same as the previous application. Town & Country refers the City's findings regarding the differences between the two siting applications. Specifically, Town & Country notes that Applicant's Exhibit 16 illustrates the differences between the two applications regarding hydrogeologic data. C419. Town & Country contends that engineering changes include the addition of double 60 milliliter liners in all sumps and v-notches (Tr. at 816) and dry hydrants added at the storm detention basins (Tr. at 818). The current application also contains four versions of the groundwater model, including two-dimensional models both with and without the geosynthetic clay liner (GCL), compared to the previous application, which contained one one-dimensional model. T&C Br. at 22-23. Town & Country notes that it revised the section regarding consistency with the Kankakee County Solid Waste Management Plan, reflecting a recent amendment to the plan, effective February 11, 2003. T&C Br. at 23.

Specifically with regard to criterion (ii), Town & Country states that it has made significant changes to the application in response to the Board's previous concerns. For example, Town & Country states the second application presents the results of 21 soil borings that penetrate ten feet or more into the bedrock, compared to one soil boring in the previous application. In order to determine whether the bedrock at the site functions as an aquitard or aquifer, Town & Country contends the second application increased the original ten field permeability tests conducted in the bedrock to a total of 78 such tests. Ten of the tests were conducted in competent (unweathered) bedrock whereas the original application contained none. T&C Br. at 24.

The City's Arguments

The City adopted and incorporated by reference, Town & Country's reply brief, in response to the County's arguments regarding jurisdiction. City Br. at 3.

The County's Response

In response, the County states it is clear that Section 39.2(m) precludes the filing of a subsequent application if any body or court disapproves the application based on failure to satisfy the 39.2(a) criteria. County Resp. at 3. The County continues that nothing in Section 39.2(m) requires that the local siting authority must disapprove the application.

The County also responds that the testimony of both Mr. Moose and Mr. Daniel supports the County's argument that Town & Country's 2003 application is substantially the same as its 2002 application. County Resp. at 5. For these reasons, the County argues that the City lacked jurisdiction to consider Town & Country's 2003 application.

Waste Management's Reply

Waste Management argues that Town & Country has failed to demonstrate that the 2003 application is not substantially the same as the 2002 application. First, Waste Management argues that contrary to Town & Country's contentions, Section 39.2(m) of the Act applies to preclude the filing of a subsequent application where the local siting authority's grant of approval is reversed on appeal. WMII Reply at 9.

Second, Waste Management disagrees with Town & Country's argument that the 2003 application is not substantially the same as the 2002 application just because it contains supplemental information. WMII Reply at 11. Waste Management argues that the Board must make a determination by reviewing the two applications on terms of statutory criteria, and assessing whether there are sufficiently significant differences between them. *Id*.; citing Laidlaw Waste Systems, 595 N.E.2d at 604.

First, Waste Management contends the reduction in the proposed service area is slight, translating to a 4% reduction in the overall amount of waste generated. WMII Reply at 12; citing City Tr. Vol. 1-B at 48. Second, Waste Management asserts there is no meaningful difference between the huydrogeologic information contained in the two applications. Next, Waste

Management maintains that the newly proposed optional GCL composite does not amount to a significant change. Waste Management notes that the GCL composite is simply an alternative that Town & Country recommends against and does not believe is necessary or appropriate for the proposed landfill. WMII Reply at 13; citing City Tr. Vol. 3A at 38-42.

Finally, Waste Management asserts that the revised report that Town & Country submitted in response to a recent amendment to the County Plan is substantially the same as the report contained in the 2002 application, and the conclusion on criterion (viii) is the same. WMII Reply at 13. Waste Management states that the information concerning criteria (iii), (iv), (vi), (vii), and (ix) are the same in both applications. For these reasons, Waste Management argues the two applications are substantially the same and Section 39.2(m) of the Act precluded the City's ability to review the 2003 application. WMII Reply at 14.

Board Analysis

The Board finds that Section 39.2(m) does not apply to the City's review of the 2003 application. Section 39.2 of the Act is entitled "Local Siting Review," indicating that the provisions of 39.2 govern the local siting authority's review of a siting application. Moreover, Section 39.2(m) uses the word "disapproval" and it is the local siting authority's role to "approve or disapprove the request for local siting approval." The Board's authority is limited to reviewing a local siting authority's decision, but not actually approving or disapproving the siting application.

The Board further finds that the appellate aourt in Turlek distinguishes a local siting authority's decision to disapprove a siting application from a local siting authority's decision to approve an application, which the Board then reverses. *See* Turlek, 274 Ill. App. 3d at 248. Therefore, the Board affirms the hearing officer's denial of Waste Management's motion to dismiss pursuant to Section 39.2(m) of the Act. Because the Section 39.2(m) prohibition does not apply, the Board need not address the parties' arguments regarding whether the 2003 application is substantially the same as the 2002 application.

The Applicant Failed to Submit a Complete Application

The County's Arguments

The third jurisdictional issue that the County raises is whether Town & Country submitted a complete application. County Br. at 23. The County contends that the application was incomplete because it did not contain the sensitivity analyses Town & Country relied upon in concluding that the proposal was protective of the public health, welfare, and environment. County Br. at 23. In particular, the County states the application lacks the sensitivity analyses regarding the hydraulic conductivity of the dolomite beneath the landfill. County Br. at 23. The County further argues that Town & Country did not perform sensitivity analyses for porosity, gradient dispersion coefficient and leachate strength. *Id*. at 24. According to the County, the sensitivity analyses were necessary in order to assess the accuracy of assumptions that Town &

Country made in calculating hydraulic conductivity and the high variability that the conductivity results showed. *Id*. at 23-24.

Town & Country's Arguments

Town & Country argues that the 2003 application was complete for jurisdictional purposes. T&C Br. at 17. Town & Country notes that it did include multiple sensitivity analyses in the application. Town & Country contends that a total of four iterations of the groundwater model evaluate the sensitivity of two variables: aquifer thickness and liner material. T&C Br. at 18. The iterations are found at Appendix P.2, Appendix P.5, and Appendix P.6 of the 2003 siting application, and Appendix P.2 of the 2002 application. T&C Br. at 18. Town & Country contends that even without sensitivity analyses, the application would be complete for jurisdictional purposes because the Act does not specify what must be filed regarding groundwater modeling. T&C Br. at 17.

The County's Response

In response, the County reiterates that Town & Country's own witness, Mr. Drommerhausen, admitted that he did not include his sensitivity analyses in the application. County Resp. at 10; *citing* City Tr. Vol. 5-A, 77. The County claims that as a result, Town & Country's application did not contain the substance of the applicant's proposal as required by Section 39.2(c) of the Act (415 ILCS 5/39.2(c) (2002)), and the City lacked jurisdiction to hear it.

Board Analysis

The Board finds that the Town & Country's application is complete for jurisdictional purposes. The 2003 application contains sensitivity analyses of certain parameters, though not those specified by the County, including analyses for porosity, gradient, dispersion coefficient, and leachate strength.

The Board finds, as Town & Country noted, that the application contains four iterations of the groundwater model. Appendix P.2 of both applications is a baseline model run of the groundwater impact evaluation. Appendix P.5 of the 2003 application shows the effect of increasing the uppermost competent dolomite aquifer thickness from 10 feet to 50 feet. Appendix P.6 of the 2003 application demonstrates the effect of adding a geo-composite liner on the baseline model. Four iterations of the baseline groundwater model may be fewer than the typical number of iterations used in evaluating groundwater contaminant transport, but they are sensitivity analyses. The Board finds that the City could have reasonably believed that the analyses Town & Country provided were sufficient to show the proposal would protect human health and the environment.

FUNDAMENTAL FAIRNESS

The courts have held that the public hearing before the local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App. 3d 631, 616

N.E.2d 349, 356 (1993). The manner in which the hearing is held, any opportunity to be heard, whether *ex parte* contacts existed, prejudgment of adjudicative facts, and the introduction of evidence are important, not rigid, elements in assessing fundamental fairness. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000); citing Hediger v. D & L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990). The Board must consider the fundamental fairness of the procedures used by the City in reaching a decision. 415 ILCS 5/40.1(a) (2002).

The County asserts that the City's procedures and conduct were fundamentally unfair for the following reasons: (1) the City Council pre-judged the merits of the application; (2) improper *ex parte* communications; (3) the hearing officer's findings of fact and conclusions of law misled the City Council and violated the City's own siting ordinance; and (4) several additional factors rendered the City's proceedings fundamentally unfair. As discussed below, the Board finds that evidence in the record shows that the City's siting proceedings regarding the 2003 application were not fundamentally unfair.

Pre-Adjudication of the Merits of the Application

The County's Arguments. The County cites several incidents surrounding Town & Country's 2002 application that it claims amount to pre-adjudication of the merits of the 2003 application. The County contends that the City's finding that Town & Country's 2002 application met criterion (ii) was in itself a pre-adjudication of the merits. County Br. at 83. The County also maintains that the City and Town & Country conspired to annex a certain strip of land that effectively established the City as the siting authority. The County claims that the city negotiated a lucrative host agreement and that Town & Country drafted the City's siting ordinance. County Br. at 108. Finally, the County asserts the City allowed Town & Country to address the City Council before the 2002 application was filed without proper Section 39.2(b) notices. *Id*. The record establishes that all of these allegations occurred before Town & Country filed the 2002 application on March 13, 2002. There is no authority for applying ex parte restrictions to contacts concerning pollution control facility siting that occurred prior to the filing of an application for siting approval. Residents Against A Polluted Environment v. County of LaSalle, 97-139, slip op. at 7 (June 19, 1997). Thus, the Board will not address these arguments.

The County also argues that the City Council's authorization of two civil actions against the County demonstrate that the City pre-judged the merits of the 2003 application. County Br. at 86-89. The City filed an action against the County to enjoin the illegal expenditure of its solid waste funds on November 26, 2002. County Br. at 86; City Resp. at 4. On June 11, 2003, the City filed a second action against the County seeking a declaration that the County's solid waste plan is an illegal and unconstitutional infringement on the City's home rule powers. County Br. at 87; City Resp. at 4.

Town & Country's Arguments. Town & Country contends that the first civil action was filed because of the City's concern about the way the County was spending money that would otherwise benefit residents of the City. The second action, Town & Country contends, concerns nothing more than the jurisdiction and authority of two competing political subdivisions. T&C Br. at 46.

Board Analysis. Public officials should be considered to act without bias. E&E Hauling, Inc. v. PCB, 107 Ill. 2d 33, 42, 481 N.E.2d 664, 668 (1985). There is no inherent bias created when an administrative body is charged with both investigatory and adjudicatory functions. *Id*. However, collusion between the applicant and the actual decisionmaker resulting in the prejudgment of adjudicative facts is fundamentally unfair. *See* Land and Lakes v. PCB, *et al.*, 319 Ill. App. 3d 41, 51, 743 N.E.2d 188, 196 (3rd Dist. 2000). Where a municipal government "operates in an adjudicatory capacity, bias or prejudice may only be shown if a disinterested observer might conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." Concerned Adjoining Owners, *et al*. v. PCB, 288 Ill. App. 3d 565, 573, 680 N.E.2d 810, 816 (5th Dist. 1997).

In E & E Hauling, the Illinois Supreme Court concluded that, even where the decisionmakers had approved the landfill application by ordinance, the approval did not amount to prejudgment of adjudicative facts. E & E Hauling, 107 Ill. 2d at 43, 481 N.E.2d at 668. Likewise, in Waste Management of Illinois, the court held that the fact that a public official has taken a position or expressed strong views on an issue does not overcome the presumption that the official will fairly and objectively decide the controversies before them. Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1040, 530 N.E.2d 682 (1988). Under the rationale of these cases, the Board finds a disinterested observer would not conclude the City prejudged the adjudicative facts of the 2003 application by authorizing the two civil actions as the County argues. The Board finds the County's allegations do not overcome the presumption that the City acted on the merits of the application without prejudging the law or facts.

***Ex Parte* Communications**

The County contends that *ex parte* communications surrounding Town & Country's 2003 application render the City's siting proceedings fundamentally unfair. The County asserts that if *ex parte* communications occurred, then the issue becomes whether those communications irreparably tainted the decisionmaking process, thereby making the siting authority's decision unfair, either to an innocent party or to the public interest. County Br. at 90; citing Gallatin v. Fulton County Board, PCB 91-256, slip op. at 8-9 (June 15, 1992).

The County contends that in order to determine whether *ex parte* communications irrevocably taint the decision making process, the Board must consider the following: (1) the gravity of the communications; (2) whether the contacts may have influenced the ultimate decision; (3) whether the party making the improper contacts benefited from the ultimate decision, and (4) whether the content of the communications were unknown to opposing parties allowing them no opportunity to respond. County Br. at 91, citing E&E Hauling, 451 N.E.2d 603. For the reasons set forth below, the Board finds the improper *ex parte* communications that the County alleges do not render the City's proceedings fundamentally unfair.

Between the Applicant and the City. The County alleges *ex parte* communications between Mr. Volini, of Town & Country, and the City on matters relating to the siting application and proceedings, making the proceedings fundamentally unfair. The County asserts that Mr. Volini met with the City at a session closed to the public to discuss appealing Town &

Country's 2002 application to the Board. The County asserts the City did not provide minutes of the meeting, claiming attorney client privilege attached because both the City Council and City Attorney, Mr. Bohlen, were present. The County further asserts that Mr. Volini had conversations with the City concerning filing the 2003 application and that he communicated with the City about hiring a geological consultant to review the 2003 application. County Resp. at 30, 36.

Mr. Volini testified that he attended an executive session City Council meeting on February 3, 2003 to discuss the appeal of Town & Country I. Pet. Exh. 23 at 13. Mr. Volini stated he indicated to the mayor and Mr. Bohlen that Town & Country intended to file another application in mid-February 2003. *Id*. at 14. Mr. Volini also stated he spoke with Mr. Bohlen before March 7, 2003 regarding hiring a geological consultant. *Id*. at 16.

The Board finds that the above-described contacts between the applicant and the City do not render the City proceedings fundamentally unfair. Contacts between the applicant and the siting authority prior to the filing of a siting application do not constitute impermissible *ex parte* communications. Residents Against A Polluted Environment, 97-139, slip op. at 17. It follows to reason that contacts between the applicant and sitng authority before the application is filed are irrelevant to the question of whether the siting proceedings themselves were conducted in a fundamentally unfair manner. Moreover, the Appellate Court has held that pre-filing closed door meetings between the applicant and the siting authority were not fundamentally unfair. Town & Country I, slip op. at 47-48; citing Southwest Energy v. PCB, 275 Ill.App.3d 84, 97, 655 N.E.2d 304, 312 (4th Dist. 1995).

Between the City Attorney and the Hearing Officer. The County argues that the City attorney, Chris Bohlen, had improper *ex parte* communications with the hearing officer. County Br. at 90, 93. The County argues it is undeniable that *ex parte* communications occurred between Mr. Bohlen and the hearing officer because Mr. Bohlen appeared at siting hearings on behalf of the City, opposed motions to disqualify and motions to quash the proceedings, questioned witnesses, and filed two civil actions that attempted to bar the County from enforcing its Solid Waste Management Plan. County Br. at 94.

The County further alleges there were direct substantive communications between Mr. Bohlen and Mr. Boyd because Mr. Bohlen assisted Mr. Boyd in drafting the proposed findings of fact and conclusions of law. County Br. at 95. The County alleges it is obvious Mr. Bohlen drafted the findings because at the August 18, 2003 City Council meeting where the City adopted Mr. Boyd's findings of fact and conclusions of law and voted to approve siting, Mr. Bohlen stated "we also make reference to the fact we believe . . . ." *See* C1921. The County maintains Mr. Bohlen's use of "we" proves he helped draft the hearing officer's findings. County Br. at 95.

"In the context of a siting proceeding, then, an *ex parte* contact is a contact between the siting authority and a party with an interest in the proceeding without notice to the other parties to the proceeding." Citizens Opposed to Additional Landfills v. G.E.R.E., PCB 97-29 (Dec. 5, 1996). The Board will not reverse the local siting authority's decision because of improper *ex parte* contacts with members of the local siting authority absent a showing that the complaining

party suffered prejudice from these contacts. Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 555 N.E.2d 1178, 144 Ill.Dec. 659 (3rd Dist. 1990); E & E Hauling, Inc. v. PCB, 116 Ill.App.3d 586, 607, 451 N.E.2d 555 (1983), *aff'd* 107 Ill.2d 33, 481 N.E.2d 664 (1989).

The Board does not find that the contacts prejudiced the objectors. First, the alleged *ex parte* communications, which the County argues occurred at hearing and by filing civil actions, did not taint the proceedings because opposing parties knew about these actions and had the opportunity to respond.

Regarding the alleged *ex parte* contacts surrounding the hearing officer's findings of fact, the Board notes that the hearing officer is not the decisionmaker. The hearing officer's job is to preside over the siting hearing, and make findings of fact and conclusions of law. C1840.

The Board finds that the County has not alleged *ex parte* communications involving any member of the City Council. Further, the County has not shown that it suffered prejudice from the contacts between Mr. Bohlen and Mr. Boyd. Accordingly, the Board finds that the County has not alleged any improper *ex parte* contacts that rendered the City's proceedings fundamentally unfair.

The Hearing Officer's Proposed Findings of Fact

Facts

Mr. Bohlen testified that Nancy Smithberg, an administrative assistant of the City, sent Mr. Boyd a number of documents, including transcripts and a copy of the 2002 findings of fact on August 4, 2003. Pet. Exh. 14 at 19, Att. 6. Mr. Bohlen stated that Mr. Boyd contacted him requesting an electronic version of the 2002 findings. Pet. Exh. 14 at 19. Mr. Bohlen sent him the City's findings of fact and conclusions of law regarding Town & Country's 2002 application, which Mr. Bohlen drafted. Pet. Exh. 15 at 19-22, 25-26, 29. Mr. Boyd stated he made two to three pages of changes and sent them back to the City. *Id*. at 19-20. Mr. Bohlen stated the only changes that he made to Mr. Boyd's draft was the addition of references to the Yarbrough conditions and a statement that the County Plan was an improper infringement on the City's home rule authority. Pet. Exh. 14 at 20, 22.

During the August 18, 2003 City Council meeting, the City Council asked Mr. Bohlen several times to make additions, correct errors, or amend parts of the hearing officer's proposed findings of fact and conclusions of law. *See eg*., C1914, C1915, and C1922.

Mr. Bohlen testified that the changes he made to the proposed findings of fact and conclusions of law subsequent to August 18, 2003 did not change the substance of the document that the City Council approved. Pet. Exh. 14 at 50. Further, Mr. Bohlen stated that the final version signed by the Mayor was sent to all City Council members. *Id*. at 51.

The Parties' Arguments

The County contends the hearing officer's findings of fact presented to the City Council were flawed for several reasons. First, the County asserts the hearing officer's proposed findings were never put into the public record. County Br. at 98. The County contends that the City voted to adopt the hearing officer's proposed findings. The County asserts that subsequently, Mr. Bohlen and Mr. Schaffer, the City of Kankakee Planner substantively changed the proposed findings, and the Mayor signed the new document that appears in the public record. *See* C1860. The County therefore contends that the record contains a version of the hearing officer's findings of fact, signed by the mayor of Kankakee, which was never voted on by the City Council. County Br. at 103.

The County contends the later version of the hearing officer's findings prejudice the County and violate Section 39.2 of the Act. The County contends the later version did not make any specific finding whether criteria 3 through 9 were met, the later version is not a decision of the governing body, and the version that the City Council voted on is not included in the record. County Br. at 106.

Second, the County asserts the hearing officer misled the City Council and parties into believing that the hearing officer's report was his own independent work product. County Br. at 97. The County contends that in reality the hearing officer only drafted two or three pages of the thirty-page document himself and Mr. Bohlen drafted the remainder. County Resp. at 31. The County further contends that the changes Mr. Bohlen made were substantive because they indicated that the City counsel made specific findings under the Section 39.2 criteria where the original document made no specific findings. County Resp. at 35.

Third, the County asserts that the hearing officer drafted his proposed findings of fact without having seen the Yarbrough report or the public comments included in the record. The County contends it was fundamentally unfair for the City Council to rely on and adopt the hearing officer's findings based on an incomplete record. County Br. at 99, 100. Additionally, the County argues that because the hearing officer's findings of fact were based on the Yarbrough report, filed after the close of public comment period, the City Council's decision was fundamentally unfair. County Br. at 102.

Town & Country contends that the County's arguments are without merit because none of the individuals that the County contends prejudged the merits of the application or had improper communications were decisionmakers. T&C Br. at 28. Town & Country contends that the hearing officer reviewed and approved any changes that the City attorney made. T&C Br. at 19; Pet. Exh. 15 at 20. Furthermore, Town & Country states that Mr. Bohlen sent his final version to the City Council members and no member objected. T&C Br. at 38.

The City asserts that Mr. Bohlen testified he drafted a section of the proposed findings relating to a grouting condition, recommended by Dr. Yarbrough, but not included in the original application. City Br. at 21; Pet. Exh. 14 at 21. The City notes Mr. Bohlen testified that he may have also drafted a section concerning the County's alleged "illegal" activities, but has no recollection of having done so. City Br. at 6.

The Board finds that the hearing officer's proposed findings of fact and conclusions of law do not render the City proceedings fundamentally unfair. The Board has held that the role of the hearing officer and his potential predisposition are not relevant to the issue of fundamental fairness of the proceeding because he does not have a vote on whether to grant the site application. *See* Citizen's Against Regional Landfill v. PCB, 255 Ill. App. 3d 903, 907-908, 627 N.E.2d 682, 685 (3rd Dist. 1994); Fairview, 555 N.E.2d 1178. Elected officials are presumed to act objectively. *Id.*, 555 N.E.2d at 1182. At the same time, a local siting authority is not held to the same standard of impartiality as a judge. Southwest Energy Corp., 275 Ill. App. 3d 84, 655 N.E.2d 304.

That the Mayor signed the findings of fact amended by the City Council rather than the hearing officer's proposed findings of fact does not render the City's proceedings fundamentally unfair. Mr. Bohlen and Mr. Schaffer amended the hearing officer's findings of fact at the request of the City Council, demonstrating that the City Council was not misled as to who made the changes. The amendments to the hearing officer's proposed findings of fact also reflect the City Council's vote on each of the siting criteria made at the August 18, 2003 City Council meeting. Further, the local siting ordinance does not require that the hearing officer's findings be made part of the record. However, the local siting ordinance does require that the City's decision and reasons for the decision be in writing and available for inspection at the City Clerk's office. C1848.

In Land and Lakes, the appellate court held that as long as the siting authority is aware of the possibility of bias, it is not improper for the authority to adopt findings and recommendations of someone predisposed towards the siting application. Land and Lakes, 743 N.E.2d at 195. The City Council was aware of Mr. Bohlen's position regarding Town & Country's application because he was the hearing officer in the 2002 City hearings and drafted findings of fact and conclusions of law recommending that the City grant siting approval.

Here, not only is a consultant report or staff recommendation not binding on the decisionmaker, but nothing in the record indicates that the City failed to exercise its own judgment when it adopted the hearing officer report. The Board finds that because the City Council knew who authored the hearing officer's findings of fact and conclusions of law and the authors' potential predispositions, it was not improper for the City to adopt the hearing officer's findings and recommendations.

The City's Proceedings

Next, the County contends that several other factors contributed to making the City proceedings fundamentally unfair.

Improper Representation. First, the County contends that Mr. Bohlen acted improperly by representing the City Council, the City Staff, and advocating in favor of the application throughout the siting process. County Br. at 90. The County maintains it is fundamentally unfair for the siting authority's attorney to advocate a position in favor of an application at the same time he is representing the decisionmaker. County Br. at 92; citing Sierra Club *et al*. v. Will County Board, PCB 99-136, 99-139 (Aug. 5, 1999).

The Board does not find that Sierra Club supports the contention that it is fundamentally unfair for the siting authority's attorney to advocate a position in favor of an application at the same time he is representing the decisionmaker. "There is no inherent bias created when an administrative body is charged with both investigatory and adjudicatory functions." Citizens Against a Regional Landfill v. PCB, 627 N.E.2d at 685. The Board has held that the procedures before the local siting authority were fundamentally fair where the attorney representing the decisionmaker has had different roles. For example, in Citizens Against a Regional Landfill, the Board found no conflict of interest where an assistant State's Attorney who negotiated a landfill contract on behalf of the siting authority also acted as hearing officer in the local siting hearings. Citizen's Against a Regional Landfill, 627 N.E.2d at 686. The Board also has found no conflict of interest where a group of county board members made recommendations on which the full board acted. Town of Ottowa v. PCB, 129 Ill. App. 3d 121, 472 N.E.2d 150 (1984). Accordingly, the Board finds no impropriety as a result of Mr. Bohlen representing both the City Staff and the City Council, having no decision-making role, during the local siting hearings.

The Yarbrough Report. Dr. Ronald Yarbrough stated that he is a geologist and was hired by the City to review Town & Country's 2003 application. Pet. Exh. 16 at 9. Dr. Yarbrough stated Mr. Volini called him on February 3, 2003 asking if he would review information on a landfill for the City. *Id*. Dr. Yarbrough continued that on February 11, 2003, Mr. Bohlen contacted him for his curriculum vitae. *Id*.

The County argues that Mr. Yarbrough's report, submitted after the close of the public comment period, rendered the City proceedings fundamentally unfair because the County did not have the opportunity to cross-examine. County Resp. at 32. The County asserts that the Yarbrough Report contained new evidence that specifically influenced the City's approval and caused the City Council to add a grouting requirement to Town & Country's siting application. *Id*. For these reasons, the County argues that Dr. Yarbrough's report made the City's proceedings fundamentally unfair.

Town & Country contends that Dr. Yarbrough is not a decisionmaker. T&C Br. at 28. Town & Country further argues that a party will not be allowed to cross-examine a person who merely submits a public comment. T&C Br. at 43; citing Southwest Energy, 655 N.E.2d 304. Town & Country maintains that the Yarbrough Report is not expert testimony, but rather a technical review of the application along with recommendations regarding siting approval and suggested conditions. T&C Br. at 43. Town & Country contends that the Board has held that a consultant report filed after the close of public comment recommending siting and 52 special conditions did not prejudice the other parties. *Id*.; citing Sierra Club, PCB 99-136. Town & Country notes that like the Yarbrough Report, the report at issue in Sierra Club was co-authored by a technical consultant, Environmental Solutions. T&C Br. at 43; citing Sierra Club, slip op. at 9, 10.

In response, the City argues that Dr. Yarbrough billed the City for his consulting, not Mr. Volini. City Resp. at 5. Further, the City notes that Mr. Volini contacting Dr. Yarbrough occurred before Town & Country filed the 2003 application, and such pre-filing contacts are not prohibited under Section 39.2. City Resp. at 7.

The Board finds that the Yarbrough report did not prejudice the County. Neither Section 39.2 of the Act, nor the County ordinance, create a right to respond to a public comment or expert report. Sierra Club, PCB 99-136, 139 slip op. at 9. Further, the Board has held a local siting authority's procedures fundamentally fair where a consultants' report consisting of a review of the siting application and comment on the technical data was included in the public record, but not the individual reports of the individual experts. Material Recovery Corp. v. Village of the Lake in the Hills, PCB 93-11 (July 1, 1993). In Material Recovery, the consultants hired by the siting authority filed a report three weeks after the close of the public hearings. *Id*. The Board found that the compilation of individual reports did not provide wrong information to the decisionmakers, that the objector had an opportunity to respond to the compiled report, and that the absence of the individual reports did not render the proceedings fundamentally unfair.

Here, Dr. Yarbrough was a consultant hired by the City to review Town & Country's application. The Yarbrough report was submitted the day after the public comment period closed. The Board finds the County was not prejudiced because: (1) it had no right to respond to the consultant's report; and (2) unlike in Material Recovery, Dr. Yarbrough's report was made part of the City's record (*see* C1593). Accordingly, the Board finds the Yarbrough report did not render the City proceedings fundamentally unfair.

County's Public Comment Filed as Late. The County argues that the proceedings were fundamentally unfair because the City Clerk erroneously certified the County's additional public comment as late. County Br. at 103. The County argues that as a result, the City Council may have given the public comments less weight based on the City attorney's assertion that the comment was not timely filed.

The County contends it suffered prejudice from the City Clerk's mistake of registering the County's public comment as late. The Board finds that the County's public comment was included in the record along with an affidavit by the City Clerk stating the public comment was timely filed. Accordingly, the Board finds that the City Clerk's mistake does not render the City's proceedings fundamentally unfair.

Violation of the City's Local Siting Ordinance. Finally, the County argues that the City violated its own siting ordinance. The siting ordinance provides:

> The Hearing Officer shall at the Hearing Officer's discretion and to the extend reasonably praticable, permit the City, the Applicant, and any party to file proposed findings of fact and conclusions of law. The Hearing Officer shall draft his or her own proposed findings of fact and conclusions of law and submit them, and copies of such other proposed findings of fats and proposed findings of facts and conclusions of law as may have been filed, to the City Council. Ordinance No.2003-11, Sec. 6, par. L; C1847; County Br. Exh. A.

The City's siting ordinance also provides that the City Council may select a hearing officer by majority vote and that the hearing office will serve at the pleasure of the City Council. C1841.

The County asserts the City's siting ordinance requires the hearing officer to draft his own findings. Here, the County argues Mr. Bohlen's assistance in drafting the findings in violation of the City's siting ordinance rendered the proceedings fundamentally unfair. County Resp. at 33.

Town & Country asserts it is well-established that the Board cannot compel enforcement of a local ordinance and that failure to comply with local ordinances does not necessarily render a proceeding fundamentally unfair. T&C Br. at 35; citing Sierra Club, PCB 99-136. Town & Country asserts that regardless, Mr. Boyd did not violate the City's siting ordinance. Town & Country maintains that the ordinance does not prohibit the hearing officer from receiving assistance. T&C Br. at 35.

Town & Country contends that the County's fundamental fairness arguments are merely evidence of bias or prejudgment and that the Board has rejected such arguments. According to Town & Country, the County misapplies American Bottom, PCB 00-200.

The County responds that the Board can consider the violation of a local ordinance if the violation contributes to fundamental fairness. County Resp. at 34; citing Citizens for Controlled Landfills v. Laidlaw Waste Systems, Inc., PCB 91-89, 90 (Sept. 26, 1991).

Board Analysis. The County raises a fundamental fairness issue, but the Board is not persuaded by the County's argument. The Board can review siting proceedings for compliance with a local ordinance where a petitioner contends that failure to comply with the ordinance rendered the proceedings fundamentally unfair. Residents Against a Polluted Environment v. County of LaSalle, PCB 96-243 (Sept. 19, 1996); citing Smith v. City of Champaign, PCB 92-55 (Aug. 13, 1992). Here, the County raises an issue of fundamental fairness. However, the Board finds that the local ordinance does not prohibit the hearing officer from receiving input when drafting the proposed findings. The Board finds that the record shows that Mr. Boyd drafted the proposed findings of fact himself, after which Mr. Bohlen made minor changes. However, the Board does not find that Mr. Bohlen's changes violated the local siting ordinance or rendered the City's proceedings fundamentally unfair.

In summary, the siting approval objectors had the opportunity to be heard, cross-examine adverse witnesses, and submit comments during the statutory period. None of the alleged activities frustrated the public hearing process by limiting public participation on any of the issues. For the foregoing reasons, the Board concludes that the City's local siting proceedings were fundamentally fair.

SECTION 39.2 CRITERIA

Standard of Review

A party seeking siting approval for a pollution control facility must submit sufficient details of the proposed facility to meet each of nine statutory criteria. 415 ICS 5/39.2(a) (2002). Here, the objectors contend that Town & Country failed to submit sufficient details to meet

criteria (ii) and (viii). The County argues that the City's decision was against the manifest weight of the evidence with respect to those criteria.

The Board will not disturb the City's decision to approve Town & Country's application unless the decision is against the manifest weight of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain, or indisputable. *Id*. Although the County suggests that the Board should apply a *de novo* standard to its review of criterion (viii) (County Br. at 48), the Board maintains that the manifest weight of the evidence standard applies to each and every criterion on review. *See* Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 680 N.E.2d 810, 818, 223 Ill. Dec. 860 (5th Dist. 1997); citing Tate v. PCB, 188 Ill. App. 3d 994, 1022, 136 Ill. Dec. 401, 544 N.E.2d 1176 (1989).

Criterion (ii)

Next the objectors challenge the City's finding that the proposed facility is designed so as to protect public health, safety, and welfare. The County contends that Town & Country's proposed facility is not protective of public health, safety, and welfare for six reasons: (1) Town & Country mischaracterized the Silurian Dolomite bedrock below the proposed landfill; (2) the application fails to consider the impacts of vertical flow; (3) the application lacks sensitivity analyses; (4) Town & Country failed to establish inward flow; (5) the proposed groundwater monitoring system is fundamentally deficient; and (6) siting a landfill in a bedrock aquifer is not protective of public health, safety and welfare. As discussed below, the Board finds the City's decision regarding criterion (ii) was not against the manifest weight of the evidence.

Hearing Testimony

Mr. Drommerhausen testified at the City hearings that he is a geologist for Envirogen. City Tr. at 161. Mr. Drommerhausen stated he was the senior hydrogeologist in charge of preparing the groundwater impact assessment for Town & Country's proposed facility. *Id*. at 162-63. Regarding site specific hydrogeology, Mr. Drommerhausen testified that the uppermost aquifer consists of the weathered and competent Silurian dolomite and Pennsylvanian Age shale outliers. City Tr. at 205.

Mr. Drommerhausen testified that when analyzing conductivity or permeability data, he uses a geometric mean to compute an average. City Tr. at 215. Mr. Drommerhausen states the Illinois Environmental Protection Agency (Agency) accepts this practice, and he does it at every site he has worked on and in all groundwater impact assessments he has ever done. *Id*. Mr. Drommerhausen stated that he characterized the entire dolomite as an aquifer in order to be conservative and directly address the Board's concerns in Town & Country I. *Id*. at 232. Further, he testified that the groundwater impact evaluation done for the site utilized a two-dimensional model to address the vertical migration concerns raised by the Board. *Id*. at 256-57. Mr. Drommerhausen testified he thought the 2002 application contained enough geological information, but not enough to obtain an Agency permit. *Id*. at 247

Professor David Daniel, a professor of civil engineering at the University of Illinois and consultant to Envirogen, testified at the City hearings on behalf of Town & Country. City Tr. at 824. Professor Daniel testified that having reviewed Town & Country's 2002 and 2003 applications, his own experience, and documents relevant to the project, he believes that the number of borings and amount of testing is reasonable. *Id*. at 834. Professor Daniel stated that in his opinion the dolomite at the site is an aquifer, but one that yields water very slowly in places. However, Professor Daniel opines that what is important is the hydraulic conductivity of the medium. *Id*. at 839. Professor Daniel's opinion was that with an inward gradient design, the proposed site is suitable for landfill development. *Id*. at 842.

Professor Daniel maintained that the discussions regarding hydraulic conductivity are irrelevant to the safety of the landfill because it is the gradient's inward driving flow that will defeat outward diffusion. City Tr. at 856-57. Professor Daniel continued that it is the direction of the flow that is important in order to assess safety at the proposed site. *Id*. at 858.

Mr. Stuart Cravens, a certified groundwater professional, testified on behalf of Waste Management. Mr. Cravens stated that his company, Kelron Environmental, does hydrogeologic investigations, soil and groundwater investigations for industries and municipalities. City Tr. at 1029. Mr. Cravens explained that he performed an independent study to characterize the hydrogeology adjacent to Town & Country's proposed facility. *Id*. at 1034. Mr. Cravens stated he used four locations and installed six wells; four deep wells into the dolomite and two shallow wells. *Id*.

From his studies, Mr. Cravens concluded that the Silurian dolomite in the area of the proposed facility is fractured below the weathered zone. Mr. Cravens also concluded that there is a hydraulic connection between the weathered and unweathered zones. City Tr. at 1074. As a result, Mr. Cravens states his data plus the data included in the 2003 application does not support Town & Country's characterization that the weathered zone is nine feet thick across. *Id*. at 1075. In Mr. Craven's opinion, the proposed site is hydrogeologically unsuitable. Cit Tr. at 1099.

Mr. Jeffery Shuh testified that he is a civil engineer and senior vice president of Patrick Engineering. City Tr. at 1250. Mr. Shuh testified he was retained by the County to review Town & Country's 2003 application and render an opinion on whether the proposed application is protective of health, safety, and welfare. *Id*. at 1253. Mr. Shuh stated that the test results in the application show that the bedrock permeabilities are highly variable while Town & Country used one number. *Id*. at 1259. Mr. Shuh also opined that the application mischaracterized the background water quality data for the unweathered bedrock. He stated that he does not believe the test results were flawed, but the way the test results were used.

At the City hearings, Mr. Moose testified that the application recognizes that the Silurian dolomite is an aquifer, that it is below the proposed site, and that it is fractured. City Tr. at 587. Mr. Moose stated he did not have a lot of on-site specific data to make that determination last year, but that he has that data this year. Mr. Moose described a new two-dimensional model he used to model groundwater this year that he believes is more conservative than the one-dimensional model used last year. *Id*. The application includes both models. City Tr. at 640. Regarding the groundwater monitoring network, Mr. Moose stated he located it in the uppermost

portion of the bedrock aquifer because he believes that is the first place that will detect contamination. At the City hearings, Mr. Moose showed slides of the inward gradient and explained that it is a fundamental principle of physics that water will flow from high head to low head. City Tr. at 593.

Mr. Moose stated that the 2003 application proposes a liner system three feet thick on the bottom and 12 feet thick on the sides; six times the federal requirements on the sides and thirty percent thicker on the bottom. On top of the liner, Mr. Moose testified that the application includes a 60-mil high-density polyethylene liner on the areas that will be most exposed to the leachate. Mr. Moose explained that this material is used to line hazardous waste facilities. City Tr. at 594.

Mr. Moose stated that he included an option in the application for a second liner, but after performing a groundwater model on the double liner system, concluded that two liners would provide no measurable benefit. City Tr. at 597.

Bedrock Below the Proposed Landfill

The County's Arguments. The County contends that Town & Country mischaracterized the Silurian Dolomite below the proposed site by classifying the upper nine feet as highly permeable, or "weathered," and the dolomite below nine feet as competent bedrock, or an aquitard. County Br. at 32. The County argues that the manifest weight of the evidence supports that the competent bedrock is actually an aquifer. *Id*. The County maintains that Town & Country relies on the mischaracterization in proposing an additional barrier for the landfill. *Id*. at 32-33. As a result, the County argues that Town & Country proposes to construct the landfill on and within an aquifer, which is not protective of public health, safety, and welfare. *Id*. at 33.

The County claims that Town & Country underestimated the hydraulic conductivity of the bedrock. County Br. at 33. The County also states that Town & Country misrepresented its data and conclusions from tests by assigning the results to the wrong bedrock zones. County Br. at 34. The County argues that overwhelming evidences establishes that the area beneath the proposed landfill is a significant fractured bedrock aquifer. For example, the boreholes had zones with hydraulic conductivity values indicative of a productive fractured bedrock aquifer. County Br. at 35. Further, the County cites to scientific studies and published research confirming that the dolomite in the area of the proposed landfill is regionally significant fractured bedrock aquifer. *Id*. Finally, the County notes that more that half of the 300 wells within two miles of the site are drawing water from the lower zone of the Silurian dolomite, indicating the zone is in fact an aquifer producing significant amounts of water. *Id*.

Town & Country's Arguments. In response, Town & Country asserts that it did not mischaracterize the bedrock. Town & Country maintains that the bedrock can be both an aquifer and an aquitard depending on how it performs. Regardless, Town & Country contends that some of the issues the County raises regarding characterization of the bedrock are irrelevant because the landfill is designed as an inward gradient landfill. In addition, Town & Country contends

that it took a conservative approach and used conservative values in forming conclusions about the bedrock.

Town & Country notes there is no disagreement between the parties' experts that the permeability of the dolomite decreases with depth. T&C Br. at 58. Town & Country states that Professor Daniel stated that the data generated by Mr. Cravens, on behalf of Waste Management, is consistent with the data in the application. *Id*. at 59.

Town & Country claims that its consultant, Mr. Drommerhausen, conservatively characterized the entire dolomite as an aquifer. *Id*. Town & Country notes that Mr. Drommerhausen's modeling of the upper aquifer as ten feet of the bedrock as an aquifer is conservative. Town & Country claims the sensitivity analysis run with a 50-foot aquifer thickness confirms this fact. *Id*.

Regarding the hydraulic conductivity of the bedrock, Town & Country asserts that using the geometric mean rather than the highest permeability value in the groundwater assessment should not be a problem because the predicted contaminant concentrations at the compliance point in the baseline model are 10,000 times lower than the maximum allowable concentrations. *Id*. at 60. Town & Country also conveys that the County's concerns about permeability in the bedrock are of little interest because the landfill is designed with an inward gradient. *Id*. at 60-61.

Because of the inward gradient design, Town & Country also argues that Mr. Drommerhausen's estimation of the permeability of competent bedrock is conservative. Town & Country, argues that bedrock permeabilities only serve to increase the driving force of groundwater into the landfill because of the inward gradient design. *Id*. at 61.

Finally, Town & Country contends that there exists no test to measure secondary porosity to account for fractured flow, so the County's arguments regarding this matter are without merit.

The County's Response. The County responds that Mr. Drommerhausen confused the vertical permeability with the permeability along bedding planes. The County maintains that the application contains no data regarding the permeability through fractures, which the Board noted was a significant concern in Town & Country I. County Resp. at 17. The County asserts that Mr. Drommerhausen also mischaracterized the downward gradient at the site and that Town & Country failed to establish that its groundwater monitoring system is adequate.

Failure to Consider the Impact of Vertical Flow

The County's Arguments. The County argues that Town & Country misrepresented the flow dynamics in the bedrock. The County argues that a vertical flow of contaminants at the site will occur through fractures in bedrock and because of the downward gradient present at the site. The County maintains that Town & Country has not considered these characteristics.

The County further contends that Mr. Drommerhausen's testimony regarding vertical fracture flow conflicts with the angle bore hole conductivity results, which indicate higher

vertical flow permeability. The County also argues that because of Town & Country's failure to account for secondary porosity, the groundwater evaluation did not consider contaminant flow through cavities and fracture. County Br. at 38. These failures, the County contends, show Town & Country has not met its burden of proving that the proposed facility is designed and located to protect the public health, safety, and welfare.

Town & Country's Arguments. Town & Country admits that all of its experts noted that there is a very slight downward vertical gradient in the dolomite. Further, Town & Country contends that constructing the landfill with an inward gradient design reverses the downward gradient. T&C Br. at 64-65.

Town & Country addresses the County's arguments regarding hydraulic conductivity by stating that the County's expert ignored data from 8 out of 10 tests in making his conclusions, and secondary porosity by reiterating that there is no test methodology to measure the secondary porosity of the geologic material. T&C Br. at 62.

Lack of Sensitivity Analyses

The County's Arguments. The County argues above that the City lacked jurisdiction because the absence of sensitivity analyses made Town & Country's application incomplete. Here, the County argues that the absence of sensitivity analyses makes the City's decision regarding criterion (ii) against the manifest weight of the evidence. The County contends that changing one parameter one time is not considered sensitivity analysis, and is not adequate to conclude that the landfill will not impact groundwater quality. The County argues that Town & Country should have provided adequate sensitivity analyses for parameters such as porosity and hydraulic conductivity. County Br. at 12-13.

Town & Country's Arguments. In response, Town & Country maintains that the application contains four iterations of the groundwater impact assessment. Further, Town & Country notes that Mr. Drommerhausen performed a sensitivity analysis at hearing to demonstrate that a change in permeability of bedrock would not change the model result. T&C Br. at 69. Town & Country continues that Dr. Daniel's flow calculation shows there is an adequate margin of safety even if he increased the permeability an order of magnitude and thickness of the aquifer to 30 feet. T&C Br. at 65 and 69.

The County's Response. In response, the County contends that Town & Country's sensitivity analyses are grossly inadequate. The County maintains that analyses for changes in porosity, changes in permeability, and changes in gradient are necessary to demonstrate that the landfill design is protective of groundwater quality. County Resp. at 19.

Failure to Establish Inward Flow

The County's Arguments. The County contends Town & Country has failed to establish that an inward flow and inward gradient will exist and be maintained at the facility. County Br. at 44; County Reply at 13. The County claims that Town & Country based its conclusions on analyses that were flawed because they used the worst-case scenario for

hydraulic conductivity and highest inward gradient. The County notes that relying on these analyses is also problematic because they were prepared for sizing the leachate collection system for all sources of water, and not for the assessment of actual seepage from the bedrock into the landfill. County Br. at 44-45.

Town & Country's Application. Although Town & Country did not specifically respond to the County's arguments on this topic, the application shows the design as an inward gradient landfill where the base grade of the landfill liner system is set below the hydraulic head of the groundwater in the shallow water bearing zones and the underlying aquifer. T&C App. II at 2.3-5. At the City hearings, Mr. Moose explained how the inward gradient is created in the landfill. R. at 591-593. Mr. Moose also noted that an inward gradient would be maintained so long as the elevation of the leachate in the landfill is less than the groundwater elevation. R. at 592; C361-354.

Furthermore, Dr. Daniel testified before the City there was no question in his mind that an inward gradient would be established given the difference between the piezometric levels inside and outside the landfill, even if the aquifer thickness were increased to 30 feet. R. at 1547-1550.

The County's Response. The County responds that Town & Country has not adequately established that the landfill will have and maintain an inward flow and inward gradient design because Town & Country's witnesses used miscalculations and mischaracterizations to support their conclusions. County Resp. at 13. The County criticizes Dr. Daniels' calculations performed at hearing because he used an incorrect inflow rate and the wrong permeabilities. County Resp. at 15. Finally, the County argues that Dr. Daniel's calculations actually show that the landfill will withdraw water from the aquifer faster than it can be replenished, which will ultimately create an outward gradient.

The County also contends that Dr. Daniel confused the inward gradient in the compacted backfill with the gradient in the aquifer, and was wrong in stating that because of the inward gradient at the site, a higher permeability aquifer would actually increase the velocity of the groundwater inward to overcome diffusion. County Resp. at 16. The County contends that inward gradient does not translate to inward flow, and that the velocity of water into the landfill depends on the hydraulic conductivity of the complete liner system, the inward gradient and the effective porosity of the liner system. *Id*.

Groundwater Monitoring Network

The County claims Town & Country's groundwater monitoring system is flawed for two reasons: (1) Town & Country proposed to monitor only the weathered dolomite, and not the competent bedrock under the landfill; and (2) Dr. Daniel's contaminant flow calculation is unreliable because the County maintains that a downward gradient exists, which will allow contaminants to move vertically through competent bedrock before reaching the perimeter of the site where they can be detected in the monitoring wells. County Br. at 43.

Town & Country maintains the system monitors groundwater along the shortest and most direct pathway, which is the upper permeable portion of the bedrock. Town & Country asserts that the only downward flow after construction of the landfill will be through diffusion, and diffusive flow velocity would be about the same in all directions. Therefore, groundwater should be monitored at locations where contamination will be detected first. T&C Br. at 67.

In response, the County maintains that Town & Country has clearly not adequately characterized the hydrogeology at the site. The County states Town & Country failed to examine how changes in permeability would impact the groundwater model. County Reply at 11. The County contends that permeability varies greatly at the site and the application contains a groundwater model run for one permeability with no variations. The County further maintains that the application does not contain adequate sensitivity analyses for important parameters. *Id*. The County highlights the importance of evaluating the sensitivity of the model to porosity at the site because porosity can vary for dolomite. Because the actual value is unknown, the County argues, Town & Country's failure to address the impacts of porosity makes the groundwater impact model unreliable. *Id*. at 13.

Board Analysis Regarding Criterion (ii).

Since there is evidence in support of the City's decision on all of the issues the objectors raise under criterion (ii) and because it is not the Board's function to reweigh evidence or reassess credibility, the Board finds the City's decision was not against the manifest weight of the evidence. The Board discusses each of the issues raised under criterion (ii) below.

A review of the record shows that the application and related expert testimony contained sufficient hydrogeologic information in support of the City's finding that Town & Country's characterization of the Silurian dolomite was proper.

In Town and Country I, the applicant characterized the entire bedrock as an aquitard and did not evaluate the impact of the landfill on the bedrock aquifer. The Board did not find that siiting a landfill on or in an aquifer is inherently unsafe. Rather the Board found that by assuming that the Silurian dolomite was an aquitard in the groundwater impact evaluation when the evidence in the record showed that the underlying geologic formation was an aquifer, Town & Country did not present sufficient information to show that the proposed landfill could be located in an aquifer and still protect the public health, safety and welfare.

Here, Town & Country modeled the upper 10 feet of the dolomite as an aquifer to assess the landfill's impact on groundwater. The modeling results contained in Town & Country's application show that the predicted concentrations of contaminants at the compliance point are significantly lower than the maximum allowable concentrations.

The record contains design information and expert testimony in support of the City's decision regarding groundwater impact. The application provides that when constructed, the proposed landfill will reverse the downward gradient causing water to flow into the landfill. Town & Country could have included vertical flow in its modeling to show that even in the unlikely event of downward flow, the proposed landfill would not significantly impact the

underlying groundwater. However, the absence of such additional modeling is not dispositive of the City's conclusion regarding groundwater impact.

Without reweighing the evidence, it appears that the City had sufficient information and expert testimony in the record to make its decision concerning the adequacy of the groundwater modeling. The application includes sensitivity analyses for aquifer thickness and the alternate liner design. Also, the results of additional analyses done by changing bedrock permeability were discussed at hearing before the City. T&C II, Tr. Vol. 5-A at 57-54.

Town & Country could have evaluated additional parameters that affect the groundwater contaminant transport such as hydraulic conductivity, porosity, hydraulic gradient, and contaminant concentrations, and run multiple iterations of those parameters over a specified range. As an aside, the Board's landfill regulations provide "A sensitivity analysis shall be conducted to measure the model's response to changes in the values assigned to major parameters, specified error tolerances, and numerically assigned space and time discretizations." *See* 35 Ill. Adm. Code 811.310. While Town & Country does not have to comply with these regulations when filing an application with the local siting authority, they do provide an example of standard requirements for an acceptable groundwater impact assessment.

The Board finds that Town & Country's inward gradient analyses were not flawed and that the record supports the City's conclusions that the landfill is designed with an inward gradient resulting in an inward flow. Town & Country performed the analyses the County claims are flawed for the purpose of designing the leachate system, not to demonstrate inward flow. Further, Town & Country's experts testified that the landfill is designed with an inward gradient and that the design affords a significant factor of safety to account for uncertainties associated with hydrogeological parameters such as hydraulic conductivity, aquifer thickness, and hydraulic gradient. Therefore, the record contains narrative description, conceptual design drawings, and expert testimony concerning the inward gradient design.

The Board finds there is adequate support in the record for the City's decision regarding Town & Country's groundwater monitoring system. Specifically, Town & Country's proposal shows that the inward gradient design will reverse the down gradient, and that the monitoring network is designed to detect any contamination along the shortest and direct groundwater flow pathway.

Town & Country could have provided additional monitoring of the lower competent bedrock, given the variability in the flow characteristics of Silurian dolomite. However, the lack of such monitoring wells does not make the City's conclusion against the manifest weight of the evidence.

Criterion (viii)

Criterion (viii) of Section 39.2 of the Act provides: "if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan." 415 ILCS 5/39.2(a)(viii) (2002). As

discussed below, the Board finds the City's conclusion that Town & Country's application satisfied criterion (viii) is not against the manifest weight of the evidence.

Hearing Testimony

At the local siting hearings, Town & Country moved the hearing officer to declare the County's solid waste management plan unconstitutional. The hearing officer denied the motion. The City affirmed, but found that the February 11, 2003 amendment limiting the City's authority to site a pollution control facility constituted an improper infringement on the City's Home Rule authority. C1863. The February 11, 2003 amendment provides:

> It is the intent of Kankakee County that no landfills or landfill operations be sited, located, developed, or operated within Kankakee County other than the existing landfill located southeast of the intersection of U.S. Route 45/52 and 6000 South Road in Otto Township, Kankakee County, Illinois, The only exception to this restriction on landfilling 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. The expansion or development of a landfill on the real property contiguous to the existing landfill would limit the impacts of land filling activity in the County. Accordingly, the development of any other landfills in the County on land that is not contiguous to the existing landfill is inconsistent with this County's Solid Waste Management Plan. A noncontiguous landfill is inconsistent with this Plan, regardless of whether it is or to be, situated upon, unincorporated County land, incorporated municipal land, village land, township land, or any other land within the County borders that is not contiguous and adjacent to the existing landfill. C472.

The City found that the County does not have a valid solid waste plan and, alternatively, that even assuming a valid plan, Town & Country's proposal is contiguous to the existing landfill. C1885. The City found that the proposed site is contiguous to an existing landfill in that it is in close proximity, or within two miles, of the operating and existing Waste Management landfill. C1887. At hearing, the City conceded in the findings that the City and the hearing officer were without authority to find the amended County Plan unconstitutional. C1888.

At the City hearings, Mr. Joseph Poletti testified that Town & Country retained him to assess the potential impact of the proposed facility on surrounding property values. City Tr. at 100. The 2003 application contains the same study included in the 2002 application. Mr. Poletti continued to research property values after the 2002 application, but concluded there was nothing that would change his original report. *Id.*

The County's Arguments

The County asks the Board to reverse the City's conclusion regarding criterion (viii) for the following reasons: (1) the City erroneously concluded that the County's solid waste management plan (SWMP) was invalid; (2) the City's conclusion that the SWMP was consistent

with the proposed facility was against the manifest weight of the evidence . The County contends that Town & Country's application is not consistent with the County Plan because the proposed site is not contiguous to the existing Waste Management facility, Town & Country did not show that an independent entity prepared a property value protection program or that the County approved one, and Town & Country did not show that an environmental damage fund or insurance or a domestic water well protection program were submitted to the County for approval.

Validity of the SWMP. Allegations concerning the adoption of the County's SWMP are not proper for the Board's consideration in a Section 40.1 pollution control facility siting appeal. Siting hearings are not intended to include inquire into prior legislative enactments. Residents Against a Polluted Environment, PCB 96-243, slip op. at 15, 20. The Board finds the local hearing officer correctly refused to consider the validity of the SWMP, stating that the City lacked jurisdiction to make such a determination. Here, the Board will not consider whether the City erroneously concluded the County's SWMP was invalid. Section 39.2(a)(viii) assumes that the county solid waste management plan is consistent with the SWPRA or the Disposal Act. Town & Country I, PCB 03-31, 33, 35, slip op. at 29. Only when the plan is consistent with the SWPRA or the Disposal Act will the Board assess whether the application is consistent with the plan. *Id*.

Town & Country contends that the County Plan amendments made October 9, 2001, March 12, 2002, and February 11, 2003 are improper because they were not reviewed and approved for consistency by the Illinois Environmental Protection Agency (Agency) as required by the SWMP. *See* 415 ILCS 15/4(b) (2002). The County asserts that it submitted all of the amendments to the Agency for review, but that the Disposal Act does not require Agency approval before implementation of the Plan. County Resp. at 24. The Board finds evidence in the record that the County submitted each of the amendments to the Agency (C1761, C1762), and that the Disposal Act does not require Agency approval before implementation of the County Plan.

After considering the County Plan together with both the SWMP and the Disposal Act, the Board finds no disagreement. Therefore, below the Board discusses the parties' arguments under criterion (vii), and finds the 2003 application is consistent with the County Plan.

Consistency with the County Plan. The County contends that the City's alternative argument, that the application is consistent with the County Plan, is also against the manifest weight of the evidence. The County maintains that the County Plan unambiguously states that no new landfills are to be sited in Kankakee County, other than the expansion of the existing Waste Management facility.

The County states that in Town & Country I, the Board found the first two paragraphs of Chapter Five, Section VI of the County Plan ambiguous. The County contends that the February 11, 2003 amendment was passed to replace the first two paragraphs of Chapter Five, Section VI of the County Plan and clarify any ambiguity regarding the County's intention to limit the landfilling in the County to the existing landfill, or expansion of that landfill.

The City found that no expansion of any existing landfill had been approved, Town & Country's proposed application is contiguous to the existing landfill, and the application will meet the City's disposal solid waste disposal needs for a guaranteed thirty years. C1886. The County asserts that the City's conclusion that the proposed site is contiguous to an existing landfill is against the manifest weight of the evidence.

Mr. Moose stated at the local hearing that the word "contiguous" is ambiguous because there are two possible meanings: "touching; in contact," or "in close proximity without touching." City Tr. Vol. 3-C, 25 (reading from Webster's Dictionary). Michael Donahue, Town & Country's planning expert, testified that in the context of zoning and planning, a recognized definition of "contiguous" is "adjacency." City Tr. at 96. Mr. Donahue also testified that "the proposed facility and the existing facility are in very close proximity to one another, which I understand to be one of the definitions of the word contiguous." *Id*.

The County asserts, however, that the County Plan only allows an expansion that is both contiguous and adjacent to the existing landfill in Kankakee County. Further, the County contends the Plan clearly identifies the existing landfill as the Waste Management facility located at the intersection of Route 45/52 and 6000 South Road, Otto Township. County Br. at 57; County Reply at 22.

The Board finds that the record contains evidence in support of the City's finding that the proposed application is contiguous to the existing Waste Management facility. The February 11, 2003 County Plan amendment states "the development of any other landfills in the County on land that is not contiguous to the existing landfill is inconsistent with this County's Solid Waste Management Plan." The Board finds that under the possible definition presented by Mr. Moose at the City hearings, a landfill development within two miles could be "in close proximity without touching" the Waste Management facility. The February 11, 2003 amendment does not require any expansion or development of a landfill to touch or border the real property of the existing landfill. Therefore, the Board finds the City's conclusion that Town & Country's proposal is contiguous to the existing landfill is not against the manifest weight of the evidence.

The County next contends that Town & Country failed to provide a Property Value Guarantee Program "prepared by an independent entity satisfactory to the County", any environmental damage fund or insurance, or domestic water well protection program for the County's approval as required by the County Plan. County Br. at 61, 62; *See* C161-162. The County asserts that it never approved an independent entity to develop such a program for Town & Country. County Br. at 61. Similarly, the County argues that Town & Country has not submitted a performance bond or policy of onsite/offsite environmental impairment insurance to the County for review. For these reasons, the County argues that the City's decision regarding criterion (viii) is against the manifest weight of the evidence.

The City's findings state that Town & Country provided for a Property Value Protection Plan, has made offers to surrounding property owners in compliance with the requirements of the plan, and agreed to post a liability insurance policy in the fact of $5,000,000. C1887. The City also asserts that the County Plan does not require approval of the Property Value Protection Plan before siting is approved.

Town & Country did provide a Property Value Guarantee Program in Section 3 of Town & Country's application. R. at 10388. Town & Country also agreed to purchase and maintain a liability insurance policy of $5,000,000 per occurrence and a combined limit of $10,000,000. R. at 20122, 20129. Town & Country also included land option agreements in the application. R. at 20238-64. Town & Country's 2003 application did not amend any of these sections in the 2003 application. Further, the Board found this Property Value Guarantee Program met the requirements of the County Plan in Town & Country I. The Board also finds Town & Country's well protection plan, at Section 2.8-25 of the 2003 application, in accordance with the County Plan. The Board finds that the City's conclusion that Town & Country's application is consistent with the County Plan, thus satisfying the requirements of criterion (viii), was not against the manifest weight of the evidence.

MR. SANDBERG'S ARGUMENTS

Finally, the Board addresses Mr. Sandberg's arguments. Mr. Sandberg argues in his post-hearing brief that the City's proceedings were fundamentally unfair and that the City's conclusions that the 2003 application satisfied criteria (ii) and (iv) were against the manifest weight of the evidence. For the following reasons, the Board is not persuaded by Mr. Sandberg's arguments.

Mr. Sandberg argues that the City's hearings were fundamentally unfair, yet does not cite examples of how the proceedings were conducted in an unfair manner, or detail *ex parte* contacts, bias, or problems with the introduction of evidence. Sandberg Br. at 10. Mr. Sandberg maintains that the City hearings were fundamentally unfair because the City conducted siting hearings knowing that Town & Country "faked evidence" and did not have a DNR permit to construct in the proposed location. *Id*. The Board finds that Mr. Sandberg does not prevail on his challenge to the fundamental fairness of the City's proceedings.

Mr. Sandberg also argues that the City Council's decision was against the manifest weight of the evidence regarding criterion (ii) because the "hydrological well tests were faked in six tests," citing only the testimony of the other parties' experts in support of his arguments. Sandberg Br. at 5. As discussed above, the Board finds evidence in the record that supports the City's findings on criterion (ii). Accordingly, the Board finds the City's decision that the proposed facility is designed to protect public health, safety, and welfare was not against the manifest weight of the evidence.

Regarding criterion (iv), Mr. Sandberg argues that the proposed landfill is to be located within the boundaries of the 100-year floodplain. Sandberg Br. at 7. Section 39.2(a)(iv) provides that the applicant must establish that "the facility is located outside the boundary of the 100-year flood plan." 415 ILCS 39.2(a)(iv) (2002). However, Mr. Sandberg refers to testimony and documents not contained in the City's record regarding the 2003 application in support of his argument. Sandberg Br. at 7-8. For example, Ms. O'Conner, Mr. Milk, and Mr. Mosier provided testimony in the City hearings regarding Town & Country's 2002 application. Mr. Sandberg also discusses a letter dated June 18, 2002 from the Illinois Department of Natural Resources (DNR) to Mr. Volini indicating that Town & Country would require a permit from the DNR prior to construction of the proposed facility.

The Board may not consider evidence not before the City at the time it approved Town & Country's 2003 application for siting. *See* 415 ILCS 5/40.1(a) (2002). On the merits of the flood plain issue, the Board notes that Mr. Moose testified that based upon the most recent Federal Emergency Management Agency (FEMA) maps, the entire proposed site lies outside the 100-year flood plain. Public comment received discusses flooding that occurred around the proposed site most severely in 1957. However, the FEMA maps reflect drainage improvements made since that time. C1878. Accordingly, the Board finds that the City's conclusion that the proposed facility lies outside of the 100-year flood plain is not against the manifest weight of the evidence.

In conclusion, the Board is not persuaded by Mr. Sandberg's arguments. As discussed above, the Board does not find that the City's proceedings were fundamentally unfair or that the City's conclusions regarding criteria (ii) and (iv) were against the manifest weight of the evidence.

CONCLUSION

After a careful review of the record, the Board concludes that the City had jurisdiction to hear Town & Country's application, the City's siting procedures were not fundamentally unfair, and the City's siting approval of Town & Country's 2003 siting application was not against the manifest weight of the evidence with regard to criteria (ii), (iv) or (viii) of Section 39.2(a) of the Act.

This opinion and order constitutes the Board's findings of fact and conclusions of law.

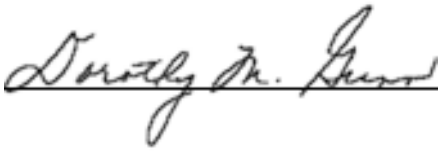
ORDER

The decision of the City of Kankakee approving Town & Country's 2003 application to site a new pollution control facility is affirmed for the reasons expressed in the Board's opinion.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 18, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board