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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner	)	
	)	No. PCB 2014-099
v.	)	
	)	(Pollution Control Facility Siting Appeal)
VILLAGE OF ROUND LAKE PARK,	)	
ROUND LAKE PARK VILLAGE BOARD	)	
and GROOT INDUSTRIES, INC.,	)	
	)	
Respondents	)	

PETITIONER'S REPLY POST-HEARING BRIEF

Now comes Petitioner, Timber Creek Homes, Inc. ("TCH"), by its attorneys, Jeep & Blazer, LLC, and hereby submits its Reply Post-Hearing Brief, in reply to the post-hearing briefs filed by Groot Industries, Inc. ("Groot"), the Village of Round Lake Park ("VRLP") and the Round Lake Park Village Board (the "Village Board")[1], in connection with THC's appeal of the Village Board's December 12, 2013 approval of the Site Location Application (the "Siting Application") for the siting of Groot's Lake Transfer Station (the "Transfer Station").

I. RESPONDENTS AVOID OR MISSTATE THE CLEAR EVIDENCE OF PREDETERMINATION BY MEMBERS OF THE VOTING BLOC

Respondents expend a great deal of effort in an attempt to avoid an assessment of TCH's fundamental fairness claims. This effort takes two forms – the assertion that TCH waived its fundamental fairness claim because it allegedly failed to raise that claim during the siting hearing, and misstatement of the burden of proof applicable to fundamental fairness claims.

A. TCH Properly Raised The Issue Of Fundamental Fairness During The Siting Hearing

As noted in TCH's opening Brief, VRLP's counsel, Glenn Sechen ("Sechen"), disclosed during the siting hearing that VRLP had already determined that it was "prudent" to site a

[1] VRLP and the Village Board filed a joint post-hearing Brief, and will sometimes collectively be referred to herein as the "Village Respondents".

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transfer station, and was proceeding jointly with Groot for approval of that transfer station. (C03214, C03219-03220) Sechen further acknowledged that VRLP and Groot had found it necessary to site a transfer station for their own business reasons. (C03220) At that point, counsel for the Solid Waste Agency of Lake County ("SWALCO"), another participant in the siting hearing, objected because he "didn't know that the Village was an applicant in this case", and noted that Sechen's comments led to the conclusion that the "Village and Groot" had jointly determined that the Transfer Station was "necessary". (C03220-03221)[2]

Groot asserts that, "TCH has not introduced any facts into the record that show that it made any specific claim regarding its allegations of fundamental fairness in the original siting proceeding in a timely or operative fashion, nor did it actually do so." (Groot Brief at 5) This is untrue. Counsel for TCH raised the issue of fundamental fairness, including bias, pre-judgment, and VRLP's previously undisclosed status as a co-applicant, at the time Sechen revealed VRLP's status. TCH's counsel specifically confirmed that the issue was being raised so that it would <u>not</u> be waived:

> THE HEARING OFFICER: *** Mr. Blazer, you said you had a statement? I'm not sure what that may be, but I guess we'll let you start.
>
> MR. BLAZER: I'm saying this at this point, Mr. Hearing Officer, only because I believe we're required to do so, or I will waive this for appeal. Based on Mr. Sechen's performance today, it is apparent to us that this application -- or I should say not Mr. Sechen, by the attorney for the Village of Round Lake Park, it is apparent to us that there has been a predetermining of this application, the rules of fundamental fairness have been violated. And I want to state that for the record.

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[2] The Village Respondents claim that the assertion of VRLP's status as Groot's co-applicant "was invented by TCH's attorney". (Village Respondents Brief at 18) The hearing record in fact confirms that SWALCO's counsel raised the point, as the natural conclusion resulting from Sechen's unguarded disclosure. Nor could Sechen have been acting alone, independent of VRLP's interests and directives. Rule 1.2 of the Illinois Rules of Professional Conduct provides that, "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." Sechen could not have been acting independent of the wishes and direction of his client, VRLP.

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(C03234) Counsel for Groot and the Village Respondents argued against TCH's fundamental fairness assertions. (C03235-03236) The Hearing Officer, Phillip Luetkehans ("Luetkehans") then acknowledged that he had no authority to address the issue:

> THE HEARING OFFICER: Anybody else wish to weigh in on this?
> Mr. Blazer, I will have to say that Mr. -- or excuse me Mr. Clark, Mr. Blazer has implied that you agree with him. I haven't heard you agree with him on the record, so I will let Mr. Blazer say his reply, and we'll go from there.
> MR. [CLARK]: I'll stand on my prior comments.[3]
> THE HEARING OFFICER: Okay. I think there was a motion in there somewhere.
> MR. BLAZER: There actually was not.
> THE HEARING OFFICER: You made the statement --
> MR. BLAZER: I don't think you'd be authorized to grant any such motion anyway.
> THE HEARING OFFICER: I don't think I would.[4]

(C03236-03237)

Notably, Groot admits that TCH's counsel did in fact raise the fundamental fairness issue in response to Sechen's conduct. (Groot Brief at 7) Groot then tries to sidestep this acknowledgement of the fallacy of its assertions by claiming that TCH's assertions were "brief and generalized". Groot does not explain how much more "lengthy and specific" it believes the preservation of the fundamental fairness claims needed to be. Instead, Groot cites to *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill.App.3d 586 (2nd Dist. 1983), affirmed 107 Ill.2d 33 (1985) for the proposition that, "The comments made need to have been specific to Petitioner's actual allegations regarding fundamental fairness". (Groot Brief at 7) Groot's reliance on *E & E Hauling* is misplaced.

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[3] As noted above, Mr. Clark, SWALCO's counsel, had first raised the issue of VRLP's status as Groot's co-applicant in reaction to Sechen's comments.

[4] VRLP's Pollution Control Facilities Siting Ordinance (the "Siting Ordinance") (C02458-02470) does not provide any means for either presenting a motion based on fundamental fairness, or for the disqualification of any member of the Village Board. Nor does the law require that a "motion" be made (even if such a motion could have been made) in order to preserve the issue of fundamental fairness for appeal. Rather, the cases confirm that the party claiming a fundamental fairness violation must have "raised" or "asserted" the issue during the siting proceeding. *E & E Hauling, Inc. v. Pollution Control Board*, 107 Ill.2d 33, 38 (1985) *Peoria Disposal Co. v. Illinois Pollution Control Board*, 385 Ill.App.3d 781, 798 (3rd Dist.), appeal denied 231 Ill.2d 654 (2008)

Groot fails to mention certain salient points in *E & E Hauling* that render its "specificity" argument wholly inapposite. The party raising the fundamental fairness claim in *E & E Hauling* was the Village of Hanover Park. The court noted, however, that the Village had not raised the fundamental fairness claim in the siting proceeding at issue. Rather, the issue had been the subject of "brief comment" from two citizens. 116 Ill.App.3d at 592 In affirming, the Supreme Court likewise noted that, "The village did not raise the issue of bias at the board hearing. One citizen simply commented that the district would gain financially from the approval." 107 Ill.2d at 38

Despite the fact that the actual complaining party had not raised the fundamental fairness issue, the *E & E Hauling* court nevertheless held that:

> While we agree that these comments are insufficient to raise the issues of conflicting duties and bias and prejudice raised before the PCB, we are impelled, owing to the seriousness of the Village's charges, to consider the merits of the issue. The waiver rule is not inflexible and may encompass challenges to the composition of administrative bodies made for the first time on administrative review wherein injustice might otherwise result.

116 Ill.App.3d at 592-593

The evidence here completely controverts Groot's assertions. TCH, the complaining party, raised the fundamental fairness issue immediately after it was disclosed by Sechen's unguarded revelations. Moreover, Groot fails to mention that the "specific comments" it claims to be absent from the record were also a substantial subject of TCH's post-hearing proposed Findings and Conclusions. TCH specifically asserted detailed claims of bias, pre-judgment, and VRLP's status as a co-applicant. These claims were in turn based on Sechen's statements noted above, on statements in the local solid waste plan that VRLP had adopted, the bias and misrepresentations in the testimony of VRLP's retained witness, Dale Kleszysnki

("Kleszynski"), and on other hearing conduct by Sechen – all of which reflected VRLP's clear pre-disposition in Groot's favor and against Transfer Station opponents. (C04190-04194)[5]

In a final effort, Groot argues that TCH did not raise Luetkehans' "alleged usurpation of the Village Board's role, nor did it mention the alleged predetermination based on approvals related to other facilities or the transfer station host agreement" during the siting hearing. (Groot Brief at 8) This argument ignores several points.

Luetkehans' usurpation of the Village Board's obligation to determine the credibility of the witnesses, and the Village Board's concomitant failure to make that determination, did not occur until the siting hearing was closed and the Village Board had concluded its deliberations. Groot does not explain when or how TCH could have raised the issue under those circumstances.[6]

The purported "claim" based on approvals of other facilities is not itself a claim. It is, rather, further evidence of Respondents' collusion and the Voting Bloc's predetermination. The evidence regarding the intertwining of all approvals and facilities, and Respondents' comments in the context of those approvals, did not come to light until discovery was taken in this proceeding. Similarly, the reference to the "transfer station host agreement" does not reflect a separate claim. Again, evidence regarding discussions involving the host agreement supports the claim of predetermination.

B. Respondents Misstate The Burden Applicable To A Fundamental Fairness Claim

Groot claims that fundamental fairness claims are subject to a "clear and convincing evidence" standard. (Groot Brief at 3, 5) Groot cites to *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶¶8, 59 (2nd Dist. 2011), appeal denied __Ill.2d__, 968

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[5] Luetkehans thereafter discussed TCH's fundamental fairness assertions in his proposed findings and conclusions. (C04355.037-038) Although Luetkehans rejected the fundamental fairness assertions, he of course did not have the benefit of the substantial additional evidence that was generated during discovery in this proceeding.

[6] Groot acknowledges the *E&E Hauling* court's recognition that a claim could not be "waived" if it could not have been raised until the review proceeding. (Groot Brief at 7, n. 1)

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N.E.2d 81 (Table) (2012) as authority for the purported "clear and convincing" standard. (Groot Brief at 3, 8-9) Yet neither that case, nor any other, establishes such a standard.

The Village Respondents separately claim that the "clearly erroneous" standard applies. (Village Respondents Brief at 24) That likewise is incorrect. The "clearly erroneous" standard applies to appellate review of an IPCB decision regarding a fundamental fairness claim, not to the IPCB's determination of whether a fundamental fairness violation in fact occurred. *Peoria Disposal Co. v. Illinois Pollution Control Bd*., 385 Ill.App.3d 781, 797 (3rd Dist. 2008), appeal denied 231 Ill.2d 654 (2009); *Stop the Mega-Dump v. County Bd. of De Kalb County*, 2012 IL App (2d) 110579, ¶25 (2nd Dist. 2012)

Rather, "The established standard is for the PCB to review the local siting authority's decision on the statutory criteria to determine if that decision is against the manifest weight of the evidence." *Peoria Disposal,* 385 Ill.App.3d at 800 Specifically regarding fundamental fairness claims:

> The members of a local siting authority are presumed to have made their decision in a fair and objective manner. [Citations] That presumption is not overcome merely because a member of the authority has previously taken a public position or expressed strong views on a related issue. [Citations] Rather, to show bias or prejudice in a siting proceeding, **the complainant must show that a disinterested observer might conclude that the local siting authority, or its members, had prejudged the facts or law of the case**. [Emphasis added]

Id. at 798-799 "[A]n objector accusing the siting authority of prejudgment must identify specific evidence showing that members of the siting authority were actually biased." *Stop the Mega-Dump*, 2012 IL App (2d) 110579, ¶56 It is with this standard in mind, not some higher one created out of whole cloth, that the evidence must be assessed.[7]

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[7] Respondents also try to use the non-existent "high evidentiary standard" to create an argument based on the fact that TCH's corporate president did not have personal knowledge of the facts supporting TCH's fundamental fairness claims. (Groot Brief at 12-13; Village Respondents Brief at 4) Respondents never explain how that absence of personal knowledge, particularly by someone who was not deposed as a corporate representative, detracts from the volume of evidence confirming Respondents' collusion and the Voting Bloc's predetermination.

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C. When Considered In The Context Of The Applicable Evidentiary Standard, The Evidence Confirms Bias And Predetermination By Members Of The Voting Bloc

As noted in TCH's initial Post-Hearing Brief, a voting bloc (the "Voting Bloc") consisting of Linda Lucassen ("Lucassen"), Jean McCue ("McCue"), Donna Wagner ("Wagner") and Robert Cerretti ("Cerretti") approved the Siting Application. Respondents point to testimony from McCue, Lucassen, and Wagner that their decision was not pre-determined, but was instead based on the evidence. (Groot Brief at 11; Village Respondents Brief at 1-2) Citing to *Stop the Mega-Dump*, Respondents then argue that the evidence of predetermination in this record is "more than negated" by that testimony. (Groot Brief at 4; Village Respondents Brief at 24, 27)

One assertion exemplifies the fallacy of Respondents' reliance on the Voting Bloc members' self-serving assertions that they did not predetermine their votes. Groot asserts that, "Ms. Lucassen's testimony that she 'had no idea [she] would be called to vote' further shows that neither she nor any other Village Board member had predetermined how they would vote on the siting application." (Groot Brief at 12, n. 3) Yet Lucassen's conduct during the vote on the Transfer Station, and VRLP's subsequent effort to cover up that conduct, demonstrates exactly the opposite conclusion.

During the Village Board's deliberations on December 10, 2013, Kenyon made a motion, approved unanimously, to vote in favor of siting criteria 4, 5, 8 and 9 because all the Village Board members agreed that Groot had met its burden regarding those criteria. (TCH Exhibit 11, C04521; TCH Exhibit 12, C03890-03891; TCH Exhibit 73, Lucassen Tr. 46) In her deposition, Lucassen claimed that she did not vote on Kenyon's motion because that vote was unanimous. (TCH Exhibit 73, Lucassen Tr. 46) Lucassen confirmed that, as the Mayor, she could only vote

in the event of a tie. (TCH Exhibit 73, Lucassen Tr. 41, 46)[8] That was why, according to Lucassen, she voted in favor the VRLP resolution approving the Siting Application – because there was a 3 to 3 to on the Village Board regarding the overall approval. (TCH Exhibit 73, Lucassen Tr. 44-45)

Lucassen's story about her lack of a vote on Kenyon's motion disintegrated when she was impeached with the transcript of the December 10 meeting. That transcript confirms that, contrary to the prohibition in the Illinois Municipal Code, 65 ILCS 5/3.1-40-30, and her clear knowledge of the prohibition against a mayoral vote, Lucassen was so anxious to support Groot that she did in fact vote in favor of the unanimous motion. (C03891) Lucassen then compounded her fabrication. Upon being confronted with the transcript, Lucassen contradicted her prior admission that she could only vote in the event of a tie, and claimed that she had "the option to vote". But the Municipal Code does not allow for any such "optional" vote. Lucassen then changed her story yet again, and claimed that she did not "recall" why she voted in favor of the subject motion. (TCH Exhibit 73, Lucassen Tr. 48-49) VRLP thereafter itself compounded Lucassen's misconduct by generating a set of meeting minutes that falsely reflected that Lucassen did not vote. (TCH Exhibit 11, C04521)

Beyond this, Respondents' reliance on *Stop the Mega-Dump*, given the dramatic factual differences between that case and this one, is misplaced. The *Stop the Mega-Dump* court first noted that the county board members "repeatedly stated on the record that their decision was not based on prefiling contacts but only on the evidence". 2012 IL App (2d) 110579, ¶59 Contrary to the facts in the present case, however, the court noted that, "The PCB found 'no credible evidence' that the members who voted for siting approval prejudged the application or were

[8] Groot admits that a mayor may only vote in the event of a tie, but claims that this limitation is based on an unidentified "ordinance". (Groot Brief at 12, n. 3) The limitation on mayoral voting is in fact a matter of State law, pursuant to the Illinois Municipal Code. See 65 ILCS 5/3.1-40-30

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biased in Waste Management's favor." *Id.* The evidence of predetermination in that case was, in fact, tenuous at best. The petitioner had sought to connect what it claimed to be the county's need for funds for a jail expansion with an otherwise unstated desire to approve the subject landfill expansion. The court rejected this argument, and found that the petitioner had misrepresented the county board's actions. The evidence in fact confirmed that there were a number of alternate sources of funds for the jail expansion, and there was no connection with the proposed landfill expansion. *Id.* at ¶61

This case presents a starkly different scenario. This discussion must begin with the testimony of Candace Kenyon ("Kenyon"), the senior trustee on the Village Board. Not surprisingly, Respondents expend significant effort to either explain, diminish or contradict Kenyon's testimony regarding the Voting Bloc's predisposition in general, and specifically that of McCue. Respondents also question the veracity of the statements attributed to Kenyon in TCH's initial Post-Hearing Brief. (Groot Brief at 10-11; Village Respondents Brief at 2-3) So there is no doubt, the following are the statements attributed to Kenyon and the direct testimony from her deposition substantiating those statements:

1. The Voting Bloc's vote did not come as a surprise to Kenyon (TCH Exhibit 73, Kenyon Dep. Tr. 6-7)

   Q. All right. Did it come to a surprise to you that those four people voted in favor of the transfer station?
   A. No.

2. Kenyon identified McCue as a Village Board member with a preconception regarding approval of the Transfer Station. McCue "worked very hard" to bring the Transfer Station to VRLP in order to provide much-needed revenue. (TCH Exhibit 73, Kenyon Tr. 8-9, 10-11)

   BY MR. BLAZER:

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Q. Sure. All right. Did you -- before the deliberations on December 10 of last year, did you expect that those four people, Lucassen, Wagner, Cerretti, and McCue would vote in favor of the transfer station?
A. Expected would not be the word that I would bring to mind.
Q. All right. What word would you use?
A. Anything can happen in a board meeting. I never expect an outcome. I don't know what word you would use, but I always go in with -- to a meeting with the expectation that I could possibly bring someone to my train of thought.
Q. Okay.
A. So anything could happen. Anyone could change their preconceived notion of what they are going to vote. During a deliberation they can possibly change their mind. It wouldn't have been the first time.
Q. All right. And going into the December 10 deliberation meeting, did you have a sense that one or more of those four people had a preconceived notion about how they were going to vote on the transfer station?

***
A. Yes.
BY MR. BLAZER:
Q. And what was the basis of that?
A. That's usually how the vote goes with our administration.

***
Q. Well, but specifically with respect to the transfer station, what was it that led you to believe that one or more of those four people had a preconception about how they were going to vote about the transfer station?

***
A. I know that at least one person in particular worked very hard to bring something liquid to the village.
BY MR. BLAZER:
Q. What do you mean by liquid?
A. For lack of the word that I'm looking for --
Q. Source of revenue?
A. Yes. Thank you.
Q. All right. Which person was that?
A. Jean McCue.
Q. And could you explain what you mean by her working very hard to bring a source of revenue to the village?
A. She was -- she had perseverance with any endeavor that she did undertake, and I believe that she thought it was the best thing for the village because we did need -- do need more revenue for the village. So this was the only opportunity that I see, and with the economy, there just wasn't anything else coming into the village. We even tried an assisted living facility, but they actually went somewhere else. So there was nothing forthcoming, nothing else forthcoming.

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3. Kenyon had no reason to believe that McCue would not vote in favor of the Transfer Station. (TCH Exhibit 73, Kenyon Tr. 12-14)

> Q. When did it first become clear to you that Jean McCue was going to vote in favor of the transfer station?
>
> ***
> BY MR. BLAZER:
> Q. Do you understand my question, ma'am?
> A. Yes.
> Q. Okay. Do you need it read back, or can you answer?
> A. I had an answer. Just one second.
> Q. Okay.
> A. I had no reason to believe that she would not vote yes.
> Q. And when did you come to that conclusion first, if you can remember? We'll be going through some documents in a little bit. But right now I'm just trying to check what your memory might be.
> A. For the transfer station itself, I do not recall.
> Q. All right. But at some point it became clear to you that Jean McCue was going to vote in favor of that transfer station; correct?
>
> ***
> BY MR. BLAZER:
> Q. Go ahead.
> A. I had no reason to believe she wasn't going to vote in favor of it. It didn't suddenly become clear to me. It was just -- it was what it was.

What was the basis for Kenyon's recognition that McCue's predetermination "was what it was"? What Groot disingenuously describes as "some mention of the transfer station" in Village Board meeting minutes (Groot Brief at 9), and what the Village Respondents claim to be "the mere existence of pre-filing contacts". (Village Respondents Brief at 6) The unrebutted evidence confirms that McCue decided to approve the Transfer Station long before the Siting Application was filed.

As discussed in TCH's initial Post-Hearing Brief, the Village Board met on December 13, 2011. In connection with negotiations regarding the host agreement for Groot's Construction and Demolition Debris Recycling Facility (the "C&D Facility"), McCue stated that:

> Mayor [McCue] asked board if they wanted to take a tough ground and try and get more money and **take a chance on them not having a transfer station** and not having a scale for the police department, or do we want to **take something which is better than nothing and have them in the town and deal with the next step.** Company is hoping to complete this agreement within the next month or two. [Emphasis added]

(TCH Exhibit 17, C04383)

Respondents clearly recognize the impact on their case of McCue's admission, 18 months before the Siting Application was filed, that she did not want to "take a chance on them not having a transfer station". During McCue's deposition, the Village Board's counsel claimed that these meeting minutes were "not relevant", and directed McCue not to answer any questions regarding that subject. (TCH Exhibit 73, McCue Tr. 62) This is despite the fact that the Village Board had already admitted that these minutes, together with a number of others, are "Minutes of all Relevant Open Meetings of the Village Board of the Village of Round Lake Park". (C00vii)

That disingenuous effort continues in Respondents' post-hearing briefs. Respondents take two approaches in their effort to diminish the impact of these admissions. First, they assert that evidence of pre-filing contacts is irrelevant to a determination of predisposition. (Groot Brief at 10; Village Respondents Brief at 4, 10) This is a grossly incorrect statement of the law. It is well settled that pre-filing contacts may be probative of prejudgment of adjudicative facts, which is an element to be considered in assessing a fundamental fairness allegation. *American Bottom Conservancy (ABC) v. Village of Fairmont City*, 2000 WL 1600471, PCB 00-200, Slip Op. Cite at 6 (Oct. 19, 2000) "While prefiling contacts are not *ex parte* communications, they might support a claim of fundamental unfairness if they are evidence of prejudgment." *Stop the Mega Dump, supra,* 2012 IL App (2d) 110579, ¶56

Groot cites to "*Sandberg v. City of Kankakee*, PCB No. 04-33, 2004 WL 604915, at 13-14 (Mar. 18, 2004)" for the proposition that pre-filing contacts are "irrelevant". (Groot Brief at

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10) Nowhere in *Sandberg* did this Board state what Groot now claims. On the contrary, this Board confirmed that, "[C]ollusion between the applicant and the actual decisionmaker resulting in the prejudgment of adjudicative facts is fundamentally unfair." 2004 WL 604915, Slip Op. Cite at 14[9]

Respondents further claim that McCue's admission was made in the context of host agreement negotiations. Groot points out that there is nothing wrong with "negotiation of a host agreement prior to a siting decision". (Groot Brief at 13-14) The Village Respondents similarly argue that McCue's statements reflect "negotiation strategy" regarding the Transfer Station host agreement and are irrelevant. (Village Respondents Brief at 6, 9)

Contrary to these assertions, McCue's statement was made in the context of a discussion about the host agreement for Groot's C&D Facility, <u>not</u> the host agreement for the Transfer Station. McCue confirmed that the approval of the two facilities was intertwined, and that VRLP was approving the C&D Facility as a precursor to the Transfer Station.[10] It was in this context that McCue warned the Village Board to not "take a chance" on "not having a transfer station", and to approve the C&D Facility host agreement so they could move on to the "next step".[11]

The Village Respondents next claim that McCue's admissions regarding "not having the transfer station" refer to the C&D Facility, and not the Transfer Station. No evidence is cited to support this assertion, and the evidence is in fact to the contrary. From their earliest contacts with each other, and continuing throughout their relations, Respondents consistently distinguished between the C&D <u>recycling facility</u>, and the municipal solid waste <u>transfer station</u>. (TCH Exhibit

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[9] Groot also reverts to the legally baseless assertion, addressed above, that the admission "does not meet Petitioner's burden to show predetermination by clear and convincing evidence". (Groot Brief at 13)

[10] The Village Respondents correctly point out that "a local siting authority's mere approval of zoning requests is not evidence of predisposition, nor does it disqualify that local siting authority from considering an application for local siting approval". (Village Respondents Brief at 7) McCue's direct linkage of the C&D Facility to the approval of the Transfer Station reflects far more than any such benign "mere approval".

[11] Respondents subsequently entered into the host agreement for the C&D Facility in April 2012. (TCH Exhibit 73, Kenyon Tr. 55)

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2, C02083, 02086, 02087; TCH Exhibit 73, Kenyon Tr. 55-56) Despite Respondents' unsubstantiated protestations to the contrary, there is no doubt that the "transfer station" that McCue did not want to risk losing, 18 months before the Siting Application was filed, is the Transfer Station that was approved in December 2013.

Open discussion of the host agreement for the Transfer Station did occur, but not until October 2012. On October 9, 2012 McCue "reported" to the Village Board regarding the host agreement being negotiated between VRLP and Groot regarding the Transfer Station:

> After meeting with Groot's attorney, they stated that in order to get things done in a timely fashion and **make this a reality by next operating season,** they did to get approval of the host agreement.
>
> ***
> Board discussed what had been explained so far and **they don't want to push too far and end up losing everything**. Polled board and consensus was that Attorney's proposal was fair. Would like to have agreement ready for approval at the October 16th board meeting. [Emphasis added]

(TCH Exhibit 15, C04389; TCH Exhibit 73, Kenyon Tr. 61) The Village Board approved the host agreement (TCH Exhibit 14) the following week, on October 16, 2012. (TCH Exhibit 73, Kenyon Tr. 62; TCH Exhibit 13) This followed a reiteration of the concern about "losing everything":

> Rather than take a chance on losing this Agreement altogether, the Mayor and Trustees did not want Attorney Karlovics to pursue further negotiations to attempt to obtain a higher cap and that it would be acceptable.

(TCH Exhibit 13, C04394-04395) [12]

[12] In a last-ditch effort to salvage McCue's credibility, the Village Respondents attempt to explain away her extensive discussions with Groot's consultant regarding her desire to provide the public with information to clear up the "terrible misunderstanding" (McCue's words) regarding the Transfer Station. (TCH Exhibit 18, C04405-04406; TCH Exhibit 31; TCH Exhibit 73, McCue Tr. 92) The Village Respondents claim that this was at the behest of the mayors from other villages. (Village Respondents Brief at 17) This assertion ignores McCue's admission that this was her effort to try and have someone explain what a transfer station was to VRLP residents. (TCH Exhibit 73, McCue Tr. 92-93)

The "reality" that Groot expected, well before the Siting Application was filed, in fact occurred on December 12, 2013, when the Voting Bloc formalized its predetermined approval of the Transfer Station. The Village Respondents try to relegate this acknowledgment by Groot's attorney of the impending Transfer Station approval to the status of, "Statements regarding economic benefit to the community [that] do not indicate prejudgment or predisposition." (Village Respondents Brief at 15) That assertion consciously misses the point. The statement by Groot's attorney did not relate to "economic benefit". Rather, it reflected the clear recognition that the parties needed to get host agreement negotiations out of the way so the Transfer Station could become "a reality by next operating season".

That "reality" first became evident with Groot's purchase of the Transfer Station property in April 2010, following VRLP's zoning approval of Groot's Truck Terminal. As discussed in TCH's initial Post-Hearing Brief, Lee Brandsma ("Brandsma"), Groot's principal, admitted that Groot began focusing specifically on the Transfer Station effort once it acquired the Truck Terminal property in November 2009 and received the zoning approval from the Village Board for that facility. (TCH Exhibit 73, Brandsma Tr. 11-12, 19) The acquisition of the Truck Terminal property had been conditioned on Groot obtaining necessary zoning approval. But once VRLP provided that approval, and the road to Transfer Station approval was clear, Groot spent $2,750,000 for the <u>unconditional</u> purchase of the properties that would house the C&D Facility and the Transfer Station. This was over 2 years before Groot filed its Siting Application. (TCH Exhibit 73, Brandsma Tr. 55-56, 57-59)

The Village Respondents try to assail these admissions in two ways. First, they claim that, "Brandsma, in his deposition, said that his initial search for a truck maintenance facility had nothing to do with him finding a site for a Transfer Station". The Village Respondents cite to page 11 of Brandsma's deposition transcript in purported support of this assertion. (Village

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Respondents Brief at 13-14) Brandsma did not say what the Village Respondents claim – at page 11 or elsewhere.[13] This is in fact what Brandsma said about Groot's intertwined plans:

> Q. Can you recall what steps either you personally or Groot took initially with respect to looking for a transfer station location in Lake County in 2008?
> A. Any time you look at a transfer station location in the State of Illinois, there are certain criteria that must be met, which is why I bring in the engineers and I say find me some pieces of property that are A, for sale, and B, meet the criteria, and then we will talk about it. So it's just real basic stuff.
> Q. So if I understand your testimony, at the time that you were -- and correct me if I'm wrong. It sounds like there was a joint effort going on here. You were looking for bigger office and maintenance space and a transfer station at the same time; is that correct?
> A. That's what we do.

(TCH Exhibit 73, Brandsma Tr. 9-10)

The Village Respondents then challenge the fact that Groot's purchase of the Transfer Station property was unconditional. According to them, there is no evidence "that the real estate contract for one property was subject to a condition, and the other was not". (Village Respondents Brief at 11) The Village Respondents further assert that TCH's Post-Hearing Brief "provides no specific designation that provides any Brandsma testimony that the Truck Terminal purchase was conditioned on obtaining zoning approvals, and the contract for the transfer station was unconditional". (Village Respondents Brief at 10)

Contrary to the Village Respondents' assertions, Brandsma admitted that:

> Q. When did it happen that you first started focusing on a site in Round Lake Park for a transfer station?
> A. Once we made the effort to purchase the property, get involved with everything that had to be done, which I believe you were involved with to get that approved.
> Q. What you're talking about now is the office and truck maintenance facility?
> A. The office and truck maintenance.

[13] Brandsma's testimony at page 11 of his deposition related to the property for the Truck Terminal, not the Transfer Station.

> Q. The Stock Lumber property –
> A. The Stock Lumber property, all the variances, the hearings that all went on and the agreement that was reached. Then we looked around and said we were looking for other facilities within Lake County in order to be competitive with Waste Management and Veolia, who were the two large dogs in the fight there, and there was two pieces of property adjacent to our property that came for sale, and through quite a long process we purchased those pieces of property and moved forward with our plan to have a larger facility, multiple facilities in one location.
>
> ***
> Q. Do you recall that your purchase contract with Stock Lumber was conditioned on getting certain approvals from the Village of Round Lake Park?
>
> ***
> A. I don't recall, but it certainly makes sense to me.

(TCH Exhibit 73, Brandsma Tr. 11-12, 56) As for the fact that the purchase contract for the Transfer Station property was unconditional, the Village Respondents need look no further than Groot's Post-Hearing Brief, which acknowledges that, "Groot purchased the transfer station property without conditions". (Groot Brief at 9)[14]

Groot refers to its unconditional purchase of the Transfer Station property as "good business judgment". (Groot Brief at 10) That is certainly understandable since Groot knew that its siting approval was guaranteed. McCue's efforts in that regard went into full swing shortly before Groot purchased the Transfer Station property.

At a Village Board meeting on October 13, 2009, McCue submitted a "report" regarding a SWALCO meeting that she had attended. (TCH Exhibit 28; TCH Exhibit 73, McCue Tr. 49-50) McCue told the Village Board that:

> One issue is **the landfills are filled to capacity** and recycling should be increased. Mayor McCue offered the suggestion to SWALCO that they

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[14] The Village Respondents speculate that a "plausible explanation" for Groot's action is that the Truck Terminal property required zoning approval, and the Transfer Station property did not. (Village Respondents Brief at 11) This of course ignores the fact that the Transfer Station property did require siting approval.

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> should be training the businesses and not charging them so much for the recycling. Groot is looking into Transfer stations. [Emphasis added]

(TCH Exhibit 28; TCH Exhibit 73, McCue Tr. 49) The statement regarding landfill capacity was a blatant misrepresentation. McCue claimed that she was "repeating what she had heard" at the SWALCO meeting. (TCH Exhibit 73, McCue Tr. 49-50) Yet neither SWALCO, nor even Groot, ever claimed that the two Lake County landfills "are filled to capacity". Indeed, as discussed in TCH"s opening Brief, and as will be discussed in more detail below, landfill capacity in Lake County exists until 2027. Indeed, further undermining McCue's misrepresentation regarding what she "heard" at the SWALCO meeting, SWALCO's attorney pointed out during the siting hearing that one of the Lake County landfills, Countryside, has even more remaining capacity than Groot's witness claimed. (C3654-3656; C01873-01878)

McCue followed her misrepresentation regarding landfill capacity with confirmation of her suggestion to SWALCO that, "SWALCO and Groot work together" (TCH Exhibit 28) – doubtless in the same way she and Groot were "working together". But McCue was not done. She also "reported" that, "SWALCO is looking into transfer stations **as opposed to landfills**. [Emphasis added]" (*Id.*) This was yet another misrepresentation of SWALCO's position. The SWMP in fact confirms Lake County's intent "to continue to manage as much Lake County waste requiring disposal as feasible within the borders of Lake County because this is the most responsible and sustainable approach to waste management." (C01921) The SWMP even acknowledges the possibility of expansions of two in-county landfills. (C01929; C3607-3608)

McCue's efforts led directly to Sechen's unguarded disclosure during the siting hearing of "the Village of Round Lake Park and its hauler finding it necessary, if they do, to site a transfer station for whatever business reasons they may have". (C03220) The predetermination of "need", the subject of Criterion 1 of §39.2 of the Act, is the type of "adjudicative fact" that

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runs afoul of the prohibition against predetermination. See *Stop the Mega-Dump, supra*, 2012 IL App (2d) 110579, ¶62 (2nd Dist. 2012)

Respondents' efforts to dispose of the evidence regarding their cooperative conduct in the drafting of VRLP's local solid waste plan (the "Local Plan") and Siting Ordinance are equally unavailing. In its opening Post-Hearing Brief, TCH pointed out that both documents are evidence of the uniquely close relationship between Respondents. Groot's consultant helped draft the Local Plan – the first VRLP had ever adopted. Groot's counsel provided substantial input into the "very important" Siting Ordinance – something no other applicant for an approval from VRLP had ever been allowed to do.

Respondents never directly address this evidence of Respondents' unique relationship, resorting instead to commentary regarding the propriety of solid waste plans and siting ordinances. (Groot Brief at 14-15; Village Respondents Brief at 16-17) The Village Respondents do try to "explain" VRLP's adoption of the Local Plan, but do so by proposing the unsubstantiated speculation that "it is clear that the purpose of the local plan was based on a dispute between SWALCO and Lake County, and VRLP over the host fees that would be provided in a Host Agreement." (Village Respondents Brief at 16)

Finally, the unrebutted evidence also confirms that Sechen understood his mission on behalf of VRLP – to support Groot and undermine any opposition so that the Siting Application would be approved – and that he conveyed that mission to Kleszynski. It is in this area that Respondents' failed efforts to explain away the substantial evidence of predetermination reach new depths.

Respondents first discuss TCH Exhibit 33. As set forth in TCH's opening Brief, TCH Exhibit 33 is an email from Sechen to Kleszynski that identified hearing participants opposing the Siting Application as being "on the other side of our case". This is further confirmation of

VRLP's status as an undisclosed co-applicant with Groot. Hearing Officer Halloran, without explanation, nevertheless sustained VRLP's objection and did not allow Exhibit 33 into evidence. It was therefore accepted as an offer of proof. (June 2, 2014 Hearing Tr. 85)[15]

Despite the fact that Exhibit 33 was disallowed, Sechen called Kleszynski to testify about it. The following discussion ensued at the hearing:

> MR. SECHEN: Yes. As attorney for the Village of Round Lake Park, we would like to call Mr. Dale Kleszynski, but before doing that let's clarify a couple of things for the record. I plan on using what has been marked previously as TCH Hearing Exhibit's 33 and 58. Thirty-three I believe you did not admit, but rather had an offer of proof on and Mr. Dale Kleszynski's testimony regarding that exhibit would be offered as a rebuttal offer of proof. I have copies here if you like.
> HEARING OFFICER HALLORAN: Let me see if I can find it.
> MR. BLAZER: Thirty-three and what is the other one?
> MR. SECHEN: Fifty-eight.
> HEARING OFFICER HALLORAN: What do you want me to do with them?
> MR. [SECHEN]: I'm going to question him with respect to those two exhibits, but what he says about 33 you've denied admission so –
> HEARING OFFICER HALLORAN: Offer of proof.
> MR. SECHEN: Right. Counter offer of proof from your standpoint.
> HEARING OFFICER HALLORAN: All right. Mr. Blazer, any comment?
> MR. BLAZER: Testimony regarding an exhibit that hasn't been admitted?
> MR. SECHEN: It's a counter offer of proof.
> MR. BLAZER: I don't know how we get there.
> HEARING OFFICER HALLORAN: Yeah, I don't either. This is kind of a newbie for me.
> MR. SECHEN: If Mr. Blazer's offer of proof is accepted in terms -- and it turns into an actual exhibit, I can offer it into evidence, then we'll seek the admission of Mr. Kleszynski's testimony regarding that very exhibit and if it is not, we won't.
> HEARING OFFICER HALLORAN: The Board is going to have a field day with this one.

(June 2, 2014 Hearing Tr. 152-154)

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[15] Groot claims that Hearing Officer Halloran's reasons for excluding Exhibit 33 were "thoroughly detailed in prior rulings". (Groot Brief at 15, n. 5) A "thorough" review of the record of this case, and of the hearing transcript, reveals no such "reasons".

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Sechen then asked his questions, and counsel for TCH pointed out that, by calling a witness and asking questions about the disallowed exhibit, VRLP waived any objection to that exhibit:

> MR. BLAZER: For the record, Mr. Halloran, to muddy the waters even further my view of this is as I'm sure you know routinely when an exhibit is rejected, no further testimony is taken on it other than an offer of proof with respect to the offering of that exhibit. In our view, our position is that Mr. Sechen by having questioned Mr. Kleszynski about this exhibit has opened the door and has waived any objection to this exhibit. That will be our position in this case.
> HEARING OFFICER HALLORAN: Mr. Sechen, anything?
> MR. SECHEN: I have nothing further than what we've already said.

(June 2, 2014 Hearing Tr. 174-175)

VRLP tries to avoid Sechen's waiver of any objection to Exhibit 33 by asserting that his questions "were a formal counter or rebuttal offer of proof". (Village Respondents Brief at 22-23) The Village Respondents cite no authority to support such a "counter offer of proof". Instead, substituting unsupported speculation for authority and reasoning, the Village Respondents offer a disjointed and confusing "explanation" for Sechen's admission in TCH Exhibit 33 that VRLP was adverse to Groot's opponents:

> If there are four (4) appraisers in the siting case and Kleszynski's opinions is in accord with Groot's appraiser, the Tressler Firm will have the right to cross examine Kleszynski. Accordingly, the Tressler firm is in fact on the other side at least one side of the case, at least on the appraisal issues.

(Village Respondents Brief at 23)

The Village Respondents attempt to address one other TCH exhibit. TCH pointed out in its opening Brief that Kleszynski's report and testimony further confirmed VRLP's complicity with Groot. Kleszynski had been retained at Sechen's request, based on Sechen's statement that Kleszynski "is really good and he knows how to testify". (TCH Exhibit 4, C04446; TCH Exhibit 58)

The Village Respondents claim that, "TCH Exhibit 58 was NOT admitted into evidence at the PCB hearing, but was accepted as an offer of proof. TCH Exhibit 58 is a January 13, 2013 email from Sechen to RLP Village Board Attorney Peter Karlovics ("Karlovics") stating that Sechen, 'found the guy I was looking for…. Dale (Kleszynski) is really good and he knows how to testify' is evidence.' " (Village Respondents Brief at 23) Contrary to this misrepresentation, Hearing Officer Halloran did admit TCH Exhibit 58:

> MR. BLAZER: All right. Fifty-eight relates to the retention of Dale Kleszynski. It is dated January 18, 2013.
> MR. PORTER: Same objection. This is an e-mail between Mr. Karlovics and Mr. Sechen regarding the retention of an appraiser named Dale Kleszynski who was a subsequent witness at the underlying hearing. It is, again, absolutely irrelevant to the question of fundamental fairness and bias of the decisionmaker.
> MR. BLAZER: Other than what Dale Kleszynski testified to in the hearing, which we won't get into today potentially, this relates to the issue of when Dale Kleszynski was actually retained.
> HEARING OFFICER HALLORAN: I'm going to admit it over objection.

(June 2, 2014 Hearing Tr. 112-113)[16]

Respondents next turn their attention to Sechen's cohort, Kleszynski. TCH pointed out in its opening Brief that Kleszynski confirmed what "side" VRLP was on, and his directive to ensure that the hearing record supported a pre-determined approval, via his support of the Siting Application and opposition to Groot's opponents. Although he tried to avoid the admission, Kleszynski had to confirm that his actions were undertaken at the express direction of his client, VRLP. (C3742.070-3742.074)

Groot first asserts that, even if Kleszynski was biased, neither he nor Sechen were decision-makers, and their bias is therefore irrelevant. (Groot Brief at 18) This argument misses

[16] Respondents' deceptive conduct, focusing on their misrepresentations regarding the nature and extent of documents, is also addressed in TCH's pending Motion for Sanctions.

the point. The relevant fact is not that Sechen and Kleszynski were biased – it is that they were pursuing a course of action in lockstep support of Groot at VRLP's direction.

The Village Respondents separately try to defend Kleszynski's conduct. They claim that he did not violate the ethics rules applicable to his profession. (Village Respondents Brief at 20-21) That argument ignores Kleszynski's own admissions. Kleszynski admitted that it was a violation of the Uniform Standards of Professional Appraisal Practice ("USPAP") for him to either advocate the cause or interest of any party or issue, or accept an assignment that includes the reporting of predetermined opinions and conclusions. (C 3742.064-3742.065) Nevertheless, as noted above, Kleszynski ultimately admitted that he did what he did because his client, through Sechen, told him to.

There is one final point to be made on this aspect of Respondents' defense. Consistent with Respondents' collusion, and in furtherance of Sechen and Kleszynski's mission on behalf of VRLP to support Groot, the evidence reflects that Kleszynski was provided with an advance copy of the Siting Application, before it was filed and publicly available. TCH Exhibit 75 is an invoice for Kleszynski's services that he issued to VRLP. (June 2, 2014 Hearing Tr. 177-178) VRLP paid the invoice. (June 2, 2014 Hearing Tr. 178) The invoice reflects that Kleszynski spent 9 hours from June 15 to 17, 2013, several days before the Siting Application was filed and made public, reviewing that application. That fact led to Hearing Officer Halloran's admission of TCH Exhibit 75 into evidence. (June 2, 2014 Hearing Tr. 179)

Kleszynski, at Sechen's prodding, thereafter tried to claim that the entries in his invoice were a "mistake", and that he did not receive the Siting Application until June 24. (June 2, 2014 Hearing Tr. 180) Undermining that "explanation", however, Kleszynski then admitted that he never submitted a replacement invoice correcting the "mistake", and that this was the invoice he

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submitted and was paid for. (June 2, 2014 Hearing Tr. 181) In a final concession, Kleszynski admitted that:

> Q. And did you submit anything -- any e-mail, any message, any anything to the Village of Round Lake Park or anyone representing the Village of Round Lake Park saying "Wait. Stop. Don't pay this one. There's a mistake. I'm going to issue you a new one"?
> A. I did not make any such submission, e-mail or phone call.

(June 2, 2014 Hearing Tr. 181)

All of the foregoing facts reflect far more than "mere expressions of public sentiment" that have been found insufficient to support a claim of predetermination. See *Peoria Disposal, supra,* 385 Ill.App.3d at 798 Nor do they reflect the type of indirect, revenue-related considerations that were rejected in *Stop the Mega Dump, supra*. 2012 IL App (2d) 110579, ¶¶61-62 Rather, the evidence reflects pre-application confirmation, particularly by McCue, that nothing would stop the Transfer Station from being approved – and Groot's recognition of that fact – followed by the actions of VRLP's agents in pursuit of that result.

Notably, in the context of these facts, Groot admits that:

> The facts of *E&E Hauling* that were sufficient to show a violation of fundamental fairness were egregious: the county board siting authority was comprised of the same individuals who made up the forest preserve district that was in fact a co-applicant for siting approval. *Id*. The county board had also previously passed an ordinance approving the facility at issue on largely the same grounds as the Section 39.2 criteria, effectively deciding the merits of the siting application prior to the hearing. *Id*. at 590-91

(Groot Brief at 4) Those egregious facts led to the *E&E Hauling* court's resounding rebuke of the type of conduct present in this case:

> Before hearing the application, the Board plainly had more than a mere predisposition in favor of landfill development generally. It had officially and explicitly endorsed the proposed expansion, largely on grounds, such as necessity and environmental and geological safety, that it would later have to consider in passing on the application. The Board's prejudgment, though inadvertent in the sense that Board members had not yet become

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> charged with the duty of adjudication when the Board passed its resolution, was straightforward and substantial. Moreover, it created an appearance of unfairness which could only have been strengthened by Board members' role as commissioners of the co-applicant District. It is elementary that administrative procedures should provide both fairness and the appearance of fairness. *Amos Treat & Co. v. S.E.C.*, 113 U.S.App.D.C. 100, 107, 306 F.2d 260, 267 (D.C.Cir.1962).

116 Ill.App.3d at 599

Respondents nevertheless repeatedly point out that three Village Board members (not members of the Voting Bloc) voted against the Siting Application, even though those members had previously voted in favor of prior actions on Groot's behalf. (See, *e.g.*, Village Respondents Brief at 15) The *E&E Hauling* court rejected that contention as well:

> We find that the actions of the County Board adequately demonstrate a disqualifying bias and prejudgment of the merits of the application. It is not fatal to this conclusion that several Board members eventually voted against the application. The Board's unequivocal public pronouncements in favor of the proposed expansion amounted to a sufficient prejudgment of the merits of the case to warrant the finding of disqualifying bias.

Id.

Kenyon confirmed that the Voting Bloc voted in unison. It is nevertheless important to recognize the impact on their decision even if only McCue's vote is disallowed. As noted previously, the Mayor is only allowed to vote in the event of a tie. If McCue's vote is disallowed, as it must be, there would no longer be a tie, and Lucassen's vote would be void. This results in a 3-2 vote against the Transfer Station.

D. Respondents Have Failed To Diminish The Impact of Luetkehans' Usurpation Of The Village Board's Obligation To Determine The Credibility Of The Witnesses

Groot admits, as it must, that "it is the siting authority's province 'to determine the credibility of witnesses'". (Groot Brief at 1) Luetkehans' nevertheless himself made that determination. (C04355.036- C04355.038, C04355.044, C04355.050-C04355.052, C04355.055, C04355.058-C04355.060, C04355.069-C04355.070) Respondents first try to avoid that fact by

claiming that Luetkehans' determinations were just "recommended findings". (Groot Brief at 19) Luetkehans' Findings and Recommendations do not support that attempted recasting of his statements: "Because there was often testimony which conflicted, the Hearing Officer has been required to make credibility **determinations** about various witnesses. Accordingly and as noted herein, some witnesses' testimony have been afforded more weight than others based upon their relative credibility and experience. [Emphasis added]" (C04355.036)[17]

Respondents then argue that the Village Board was authorized to adopt proposed findings, and did so in this case. (Groot Brief at 19; Village Respondents Brief at 28) That is true as far as it goes. Again, however, there was nothing "proposed" about Luetkehans' determinations. Those determinations in turn exceeded the authority granted to Luetkehans by VRLP's Siting Ordinance to make proposed findings, not final determinations (TCH Exhibit 8, C02458-02470) – a point Respondents completely fail to address.

The Village Respondents finally claim that, contrary to the transcript of their deliberations, the Village Board "debated the credibility of witness during its deliberations". (Village Respondents Brief at 28-29) Contrary to this representation, the transcript reflects only one instance where a Voting Bloc member, Wagner, was directly asked if she was making a credibility determination, and she demurred. (C03977)

II. RESPONDENTS FAIL TO OVERCOME THE CLEAR WEIGHT OF EVIDENCE OVERCOMING THE VILLAGE BOARD'S FINDINGS REGARDING SITING CRITERIA 1, 2, 3, 6 AND 8

Groot asserts that, "Petitioner has also misrepresented the testimony of Groot's experts on numerous occasions. Rather than detaining the PCB by correcting each of Petitioner's misrepresentations regarding the evidence, this Brief instead shows that the Village Board's decision

[17] Groot then contradicts itself and admits that Luetkehans' Findings "clearly do make credibility determinations". (Groot Brief at 19) The Village Respondents likewise admit that Luetkehans made determinations of credibility, not recommendations. (Village Respondents Brief at 28)

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was supported by substantial evidence and is therefore not against the manifest weight of the evidence." (Groot Brief at 20) In it is feigned desire to not "detain" this Board, Groot does not identify a single "misrepresentation".

A. Criterion 1 – Respondents Base Their Arguments On The Incorrect Evidentiary Standard And On A Non-Existent 20-Year Requirement Of Disposal Capacity

In its opening Brief, TCH pointed out that the modern authorities confirm that "need" for purposes of Criterion 1 requires a showing of present urgency. *Fox Moraine, supra*, 2011 IL App (2d) 100017, ¶¶109, 110 (2nd Dist. 2011), appeal denied __Ill.2d__, 968 N.E.2d 81 (2012) Even Groot's Criterion 1 witness, Christine Seibert ("Seibert"), admitted that this is the applicable standard. (C3613-3614, 3615; C00037; C01349) Yet Respondents' first line of defense of the Voting Bloc's decision on Criterion 1 is the assertion of the outmoded concept of "expedience", or "reasonable convenience". (Groot Brief at 20-21; Village Respondents Brief at 31-32) Indeed, Respondents do not even mention the requirement of present urgency in their briefs.

TCH next pointed out that, in order to circumvent the substantial remaining disposal capacity in Lake County, through 2027, Seibert sought to connect need for purposes of Criterion 1 with a recommendation in the 2004 version of the Lake County SWMP to maintain 20 years of available disposal capacity. (C3525) This was the ultimate basis for Seibert's opinion on need. (C3548, 3580, 3757-3758)

Yet TCH also pointed out that Seibert's notion of a 20-year capacity "requirement" was based on a false premise. The prior requirement in the former version of the SWMP was deleted in the version currently in effect, and no longer exists. (C01916, C01921, C01884) [18]

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[18] TCH noted in its opening Brief that Luetkehans' Recommendation acknowledged that this was in fact the basis for Groot's assertion of need, but confirmed that the most recent SWMP no longer includes a 20-year planning requirement. (C04355.040) Nevertheless, in an inexplicable, and unexplained, about face, Luetkehans then accepted Groot's assertions regarding "the needed twenty (20) years capacity…." and "the twenty (20) year disposal capacity needs." (C04355.041, 042) At least one of the Voting Bloc members, Wagner, likewise used the fallacious 20-year "requirement" as a basis for her vote on Criterion 1. (C03909)

How do Respondents' deal with this complete rejection of the fundamental basis for Seibert's need opinion, and the Voting Bloc's decision on Criterion 1? By ignoring it. Respondents instead continue to rely on the non-existent "requirement" of "twenty (20) years of guaranteed disposal capacity". (Groot Brief at 22, 23; Village Respondents Brief at 33, 34, 35) Indeed, the Village Respondents even try, with no support, to convert the abandoned concept into an unidentified "statutory" requirement. (Village Respondents Brief at 34)

Respondents next try to substantiate need by asserting that the SWMP cited a "need to develop new transfer stations". (Groot Brief at 22; Village Respondents Brief at 34) Respondents fail to mention that they tried the same approach during the siting hearing. SWALCO's counsel objected to Groot's effort to commingle the concept of need in Criterion 1 with the "needs" of the Lake County SWMP for purposes of Criterion 8. (C03190) Luetkehans agreed, and noted that the Lake County SWMP indicates that transfer stations are consistent with SWMP, <u>but that is not relevant to need</u>. (C03191-03192)

Despite the fact that Seibert's opinion effectively ignored remaining disposal capacity as the basis for her opinion, Respondents next assert as an "undisputed" fact Seibert's claim of remaining disposal capacity at the two Lake County landfills. This includes her assertion that the Countryside Landfill will have less than five (5) years capacity remaining when the Transfer Station begins operating in 2015. (Groot Brief at 22-23; Village Respondents Brief at 34) Seibert was wrong about the remaining capacity at the Countryside Landfill. As noted previously, counsel for SWALCO pointed out that Seibert understated the remaining capacity at Countryside Landfill by at least two to three years. The capacity certifications for the Countryside Landfill dated as of January 1, 2013 confirm that it had ten years of capacity. (C3654-3656; C01873-01878) TCH's Criterion 1 witness,

John Thorsen ("Thorsen"), likewise confirmed that the Countryside Landfill has 10 years of capacity remaining. (C03193-03184)[19]

Finally, as they did during the siting hearing, Respondents shift their argument to one of "timing". Respondents appear to be critical of Thorsen's agreement with Seibert that there is remaining disposal capacity in Lake County until 2027. (Groot Brief at 23-24; Village Respondents Brief at 35) That is certainly true, and is the fundamental reason why Groot did not prove a present need, urgent or otherwise, for the Transfer Station (and the reason why Seibert had to concoct a "need" based on a non-existent 20-year capacity "requirement").

Respondents nevertheless argue that, in terms of "timing", a transfer station is needed now because transfer stations take seven years to develop. (Groot Brief at 23, 24; Village Respondents Brief at 34, 36)[20] This assertion ignores the fact, confirmed in TCH's opening Brief, that development of a transfer station takes roughly two to three years. (C3620, C02488) As noted above, Groot purchased the Transfer Station property on April 29, 2010. Shaw, Groot's consultant, thereafter spent less than a year on the planning and design of the Transfer Station. (C00690-00693, 00056-00086, 00189, 00192, 00667, 00686, 00902-00908, 00927-00929, 00948, 00951, 00957, 00959, 00967, 00969, 00971, 00974-00975, 00977-00978, 00983, 00988-00989, 00994-00996, 01002-01003, 01010-01011, C01123-01124, C01131, 01134, C01158, C01212, 01214-01215, 01217) As with so many other inconvenient facts, Respondents completely ignore this unrebutted evidence – there is no mention of it in either brief.

Nevertheless continuing their focus on "timing", and their effort to undermine Thorsen's unrebutted opinions, Respondents assert that he did not know when a transfer station siting application

[19] Respondents also completely fail to mention the substantial amount of disposal capacity added by the recent expansion of the Zion Landfill – evidence that was generated by Groot's own consultant, Shaw. (C02105-0212)

[20] This was also a basis for the Voting Bloc's decision. (C04355.044; C03895, 03897, 03910, 03911-03912)

should be filed. (Groot Brief at 24; Village Respondents Brief at 36) This assertion ignores Thorsen's repeated confirmation that, assuming no new landfill capacity becomes available before 2027, there will be no need for a transfer station until 2025. (C03180-03181, 03196, 03200-03201, 03205-03206, 03216, 03222)

B. Criterion 2 – Respondents Continue To Ignore Unrebutted Evidence

Respondents correctly point out that TCH's challenge to the Voting Bloc's vote on Criterion 2 is based on two primary points – Devin Moose's ("Moose") lack of credibility and Groot's failure to provide for adequate odor controls. In typical fashion, however, Respondents then continue to ignore the unrebutted evidence regarding those issues.

TCH pointed out two principal areas of Moose's misrepresentations – that the Transfer Station's plan of operations calls for all waste to be transported to the Winnebago Landfill, and that the Transfer Station will accept food waste. Respondents ignore both points. Instead, Groot falls back on the argument that "the Village Board has already assessed his credibility". (Groot Brief at 25) That point was addressed above – the Village Board made no such assessment.

The Village Respondents take a different approach, and argue, remarkably, that, "Manifest weight, however, does not concern credibility issues." (Village Respondents Brief at 37) This is yet another gross misstatement of the law. The credibility of the expert witnesses is a significant factor in assessing compliance with Criterion 2. See *Fox Moraine, supra*, 2011 IL App (2d) 100017, ¶102, citing *File v. D & L Landfill, Inc*., 219 Ill.App.3d 897, 907 (1991)

Respondents then turn their attention to the issue of odors from the Transfer Station, and the testimony of TCH's expert, Charles McGinley ("McGinley"). In essence, Respondents claim that McGinley's testimony was "speculative" and he "was actually not recommending any specific equipment, such as air scrubbers or bio-filters in the exhaust system". (Groot Brief at 28; Village

Respondents Brief at 37) Again, however, Respondents deal with inconvenient facts by simply ignoring them.

TCH's opening Brief points out that McGinley relied on the detailed recommendations in USEPA's *Waste Transfer Stations: A Manual for Decision Making*, published in 2002 (the "USEPA Manual"), which was attached to his report. (C01424-01488) Moose confirmed, on behalf of Groot, that the vast majority of USEPA's recommendations will not be implemented at the Transfer Station. (C02860-02862) Respondents do not even mention the requirements of USEPA Manual, or of Moose's confirmation that they will not be followed to control odors from the Transfer Station.

C. Criterion 3 – Respondents Fail To Overcome The Impact Of Lannert's Mischaracterization Of The Surrounding Area

Groot makes passing mention of the fact that TCH focuses on Christopher Lannert's ("Lannert") assessment of the character of the surrounding area. (Groot Brief at 30) Apart from that, there is no mention in either brief of the fact that Lannert's "characterization" was based on legally improper speculation. (C03006-03007) This was the fundamental underpinning for Lannert's opinion, and its speculative basis renders that opinion completely unreliable.

The Village Respondents take a different approach, and appear to try to defend Lannert's mischaracterization by themselves speculating that:

> TCH Homes trailer park is used for residential purposes but it is zoned industrial. While outside of Mr. Lannert's testimony, one could even argue that TCH Homes will one day become an industrial use simply through market forces. The Village Board may have already seen market forces result in similar changes in land use, though likely on a much smaller scale.

(Village Respondents Brief at 40, n. 3) This statement is not merely unsupported speculation, it is flatly wrong. Luetkehans noted that:

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> Regarding the character of the surrounding area, Mr. MaRous confirmed that the Timber Creek community is well established in the area. It is a well-developed residential community with approximately 240 residential units and over 700 residents. Timber Creek has been in existence for over 40 years. It is attractive, has mature landscaping and it is well maintained. (TR 10/0l/l3A at 24-27). In contrast, Mr. MaRous described a transfer station as a "very heavy industrial use". (TR I0/01/l3A at 27). Mr. MaRous further explained that in his opinion a garbage transfer station is a heavy industrial use because of its characteristics - it generates heavy truck traffic, with vehicles weighing over 40,000 pounds, with doors open potentially 20 hours per day. (TR 10/0l/13A at 81). It is not common for heavy industrial uses to be co-located with residential uses. Instead, heavy industrial uses are generally concentrated with other heavy industrial uses. (TR I0/01 /13A at 27-28). Mr. MaRous explained that a light industrial use generally includes office, light distribution, warehouse and light assembly. Heavy industrial uses, like a waste transfer station, are much more intensive uses, such as heavy manufacturing, cranes, forges, etc. (TR 10/0 II I 3A at 79).

(C04355.058-059)

Respondents' defense of their real estate witness, Peter Poletti ("Poletti"), follows a similar course. Groot acknowledges that, "Lannert's testimony was echoed and agreed to by Mr. Poletti". (Groot Brief at 31) But none of the Respondents address the fact that Poletti's echoing and agreement included Lannert's mischaracterization of the surrounding area. (C03068, 03073)

D. Criterion 6 – Respondents Do Not To Address Their Traffic Expert's Artificial Limitation Of The Scope Of His Traffic Analysis

Respondents assert that the "primary criticism" of TCH's traffic expert, Brent Coulter ("Coulter"), is the absence of evidence regarding "all of the arterial routes that might be used by transfer trailers traveling to their ultimate destinations". (Groot Brief at 35; Village Respondents Brief at 45-46) Groot then artificially dismisses this claimed criticism by pointing out that the law does not require an assessment of all potential impacts to remote arterial roads. (Groot Brief at 36)

This argument is the proverbial red herring. Contrary to Groot's representation, Coulter's principal concern was Groot's failure to assess the impact of Transfer Station traffic at any point

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beyond one nearby intersection – Route 120 and Cedar Lake Road. (03116.021-022, 035, 055; C00210; C01352, 01358, 01360, C03116.070-072)

Coulter concluded that the complete absence of any information beyond the immediate vicinity of the proposed Transfer Station, where so much of the heavy truck traffic would go, and how the impact from that traffic had been considered and minimized, did not meet either sound traffic engineering principles or the requirements of Criterion 6. (C03282-03283, 03285-03286, 03295-03296, 03309, 03329; C01498)

All of the Respondents suggest that the proper scope of a Criterion 6 assessment is limited to "nearby intersections and roadway traffic" – "the roadway system in the immediate area of the facility". (Groot Brief at 36; Village Respondents Brief at 45, 46) This is not an accurate statement of the law.

In the first instance, unlike the situation here, the *Fox Moraine* court recognized that Groot's traffic expert, Michael Werthmann, who also testified in that case, had in fact identified multiple routes that would be used to access the proposed landfill. 2011 IL App (2d) 100017, ¶113 Further, Werthmann acknowledged in this case that the intersection at Cedar Lake Road and Route 120 is a short distance from the proposed Transfer Station. (C03116.111) This is in stark contrast to the area under review in *Fox Moraine*, in Plainfield, which was 15 miles from the landfill at issue in that case. 2011 IL App (2d) 100017, ¶116

Coulter also testified in *Fox Moraine.* The *Fox Moraine* court's review of his testimony, and that of another traffic engineer, focused on their criticism of the applicant's failure to demonstrate elimination of all traffic impacts in the subject area, rather than minimization of those impacts. *Id.* at ¶116 Rejecting that concept the court noted that, "The Act does not require elimination of all traffic problems…." *Id.,* citing *Tate v. Pollution Control Board*, 188 Ill.App.3d 994, 1024 (4th Dist. 1989)

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This limitation on the scope of the Criterion 6 issue in *Fox Moraine* had also been discussed, and confirmed, by the applicant in the case before this Board:

> Fox Moraine agreed that Mr. Coulter and Mr. Corcoran may be experts, but argued that they misunderstood the criterion and testified on location of the facilities and the impact on the Village of Plainfield. Fox Moraine asserts that the criterion contemplates that there will be traffic impacts, and the applicant must demonstrate that those impacts are minimized.

Fox Moraine, LLC v. United City of Yorkville, PCB 07-146, 2009 WL 6506730, Slip Op. Cite at 75 (IPCB October 1, 2009)

Following the above statement, the *Fox Moraine* court then stated that:

> [N]or is the applicant required to provide evidence of exact routes, types of traffic, noise, dust, or projections of volume and hours of traffic, because the Act does not require a traffic plan **but rather a showing that the traffic patterns to and from the facility are designed to minimize impact on existing traffic flows** (*Tate*, 188 Ill.App.3d at 1024, 136 Ill.Dec. 401, 544 N.E.2d 1176). See also *McHenry County Landfill, Inc. v. Environmental Protection Agency*, 154 Ill.App.3d 89, 102, 106 Ill.Dec. 665, 506 N.E.2d 372 (1987) (traffic criterion was not established where the landfill's entrance design did not have a deceleration lane for trucks to make right turns into facility, where road's speed limit of 55 miles per hour was considered hazardous). Here, the entrance was designed to have right and left turn lanes for trucks to use and would also allow trucks to enter the facility at off-hours so that trucks could come after rush-hour times. Fox Moraine did not have to establish that every arterial road would not be affected, just that it designed the entrance to and from the facility to minimize the impact on the roadways. **Downtown Plainfield is quite a distance from the planned landfill site (approximately 15 miles), and since Fox Moraine was not even required to submit planned traffic routes, we question the Board's analysis that Fox Moraine failed to demonstrate that the traffic patterns to and from the facility were designed to minimize the impact on the traffic flow around it**. [Emphasis added]

Id. at ¶116

Most notably, not even Werthmann limited his analysis in this case to the "immediate vicinity" – he merely artificially, and without explanation, stopped where a significant portion of the collection trucks, and all of the transfer trailers, would go to and come from. No case has

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ever provided an applicant with such unilateral control over the scope of its minimization obligation under Criterion 6.

The case law in fact demonstrates that the Criterion 6 analysis is fact specific, and is not subject to a blanket limitation regarding its geographic scope. It is important in this regard to recognize that the sole traffic issue in *McHenry County Landfill,* the "entrance design" case cited by the *Fox Moraine* court, was in fact limited to the entrance design. No other issues at any other roads to and from the facility were raised or addressed. 154 Ill.App.3d at 101-102 No case has ever held that Criterion 6 requires the abandonment of the recognized methodology for conducting a traffic analysis that Werthmann admitted applies to this process.

For example, in *Tate, supra,* also cited by the *Fox Moraine* court, the court noted that, "The IPCB found ample evidence that traffic patterns are designed to minimize impact on traffic flow, citing evidence of **truck routes, road condition, and usage**, location of the access gate and the MCL plan to extend the on-site exit roadway to minimize road mud. [Emphasis added]" 188 Ill.App.3d at 1024

In another example, the court in *Fairview Area Citizens Taskforce v. Illinois Pollution Control Board*, 198 Ill.App.3d 541, 554 (3rd Dist.), appeal denied 133 Ill.2d 554 (1990), abrogated on other grounds by *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill.2d 103 (2007), likewise addressed the scope of the review before it beyond merely the entrance gate of the proposed facility:

> As Gallatin points out, the question is not whether there will be no adverse impact, but whether the impact on traffic flow has been minimized. Should a new access road be built? **Should landfill traffic be routed to Routes 9 or 116? Should traffic signals or signs be installed at any intersections where they are not presently located?** Petitioners presented no evidence to indicate that the proposed traffic patterns did not already minimize the impact on the existing traffic flow. No State, county, township, or village official concerned with roadways or traffic testified

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> that the traffic patterns in Gallatin's proposal did not minimize the impact on existing traffic flows. [Emphasis added]

The scope of the traffic evidence was also reviewed by the Second District (well before *Fox Moraine*) in *A.R.F. Landfill, Inc. v. Pollution Control Board*, 174 Ill.App.3d 82, 93-94 (2nd Dist.), appeal denied 123 Ill.2d 555 (1988) In affirming the denial of a siting application, the Second District noted that:

> According to Box, the increased volume of trucks entering and leaving the facility would create additional traffic problems in the roads surrounding the landfill. Additionally, he testified that one of the access roads (Harris Road) is currently too narrow to safely accommodate two garbage trucks passing each other from opposite directions, and that in his opinion the proposed expansion would have an **adverse effect on traffic conditions in the area**. Moreover, he opined that the proposed traffic patterns for the landfill facility would not minimize the impact on existing traffic flows. [Emphasis added]

This Board has likewise confirmed that the site access is merely one of the many issues addressed in the context of Criterion 6, including the routes leading to and from the proposed facility. See, *e.g.*, *Waste Management of Illinois, Inc. v. County Board of Kane County,* PCB 03-104, 2003 WL 21512770, Slip Op. Cite at 11-12 (IPCB June 19, 2003) (Transfer station proceeding, in which Coulter testified for Kane County. IPCB affirmed denial of siting because the applicant failed to provide traffic volume information on a critical intersection, and the record either lacked information on traffic patterns or showed the traffic patterns were not designed to minimize impacts on current traffic flows.); *Industrial Fuels & Resources/Illinois, Inc. v. City Council of the City of Harvey*, PCB 90–53, 1990 WL 171483, Slip Op. Cite at 15-18 (IPCB September 27, 1990) (Routing to and from the proposed facility reviewed)

The requirement of minimization of impacts, and not their elimination, is certainly a requirement of Criterion 6. But beyond that concept that is clearly supported by the language of the statute, the case law demonstrates that the issue of the minimization of impacts to or from the

facility is considered on a case by case basis, depending on those factors which Werthmann himself admitted are critical to a Criterion 6 analysis. It is a well-settled principle of statutory construction that the best indication of legislative intent is the language of the statute, which must be given its plain and ordinary meaning. *Metropolitan Life Insurance Co. v. Hamer,* 2013 IL 114234, ¶18 (2013) The statute at issue here explicitly requires an analysis of the traffic patterns to or from the facility, and not merely those into and out of the facility. Respondents' effort to artificially limit the scope of the evidentiary burden under Criterion 6 is not supported by either the clear language of the statute or by the case law construing the statute's requirements.

E. Criterion 8 – The Transfer Station's Plan Of Operations Is Inconsistent With The SWMP

Groot argues that the section of the SWMP cited by TCH "applies to landfills, not transfer stations". (Groot Brief at 37) That argument misses the point. The section of the SWMP at issue applies to landfills "deemed to be serving Lake County". (C01929) It is now uncontroverted that the Transfer Station's plan of operations calls for all of the waste from the Transfer Station to be transported to the Winnebago Landfill. It is also uncontroverted that the Winnebago Landfill does not comply with the requirements imposed by the SWMP. (C03122-03125) The Transfer Station is not therefore consistent with the SWMP.

The Village Respondents clearly understand the point, since they continue the effort to evade and misrepresent the certainty that all waste will go to the Winnebago Landfill:

> TCH claims that the Winnebago Landfill, **one of the landfills likely to receive waste** from the Lake Transfer Station, does not have a host agreement with Lake County, which in turn would require that the Winnebago County landfill pay Lake County a host fee and guarantee Lake County capacity in order to be consistent with the Lake County Solid Waste Management Plan. (C03123 – C03125) [Emphasis added]

(Village Respondents Brief at 47)

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The Village Respondents then appear to suggest that the requirements in the SWMP may be illegal or unenforceable:

> It is not uncommon for some counties to utilize compliance with their solid waste management plans to force waste companies to enter into host agreements requiring the payment of host fees. Those proposing the development of pollution control facilities in Illinois have been unwilling to litigate to an significant degree the legitimacy of plans requiring the negotiation of host agreements requiring the payment of money in the form of host fees. However, the facility in question is one that is located in another county. It may well have a host agreement and it may well pay host fees to Winnebago County, apparently not to Lake County.

(Village Respondents Brief at 47-48) Apart from the fact that there is no basis in the record for this speculation, the Village Respondents do not explain what this has to do with Groot's failure to comply with the requirement of the SWMP.

Instead, the Village Respondents assert that a solid was plan need not be followed to the letter in order for a facility to be consistent, so long as the facility "is not inapposite" of the plan. (Village Respondents Brief at 48) The Village respondents cite to *City of Geneva v. Waste Management of Illinois, Inc.*, 1994 WL 394691, PCB No. 94-58, Slip Op. Cite at 16 (IPCB July 21, 1994) and *CURE v. Browning Ferris Industries of Illinois*, 1996 WL 577357, PCB No. 96-238, Slip Op. Cite at 6 (IPCB September 19, 1996) in support of this argument.

The Village Respondents correctly state the law in general. The provision at issue here, however, is not the type of technical timing provision at issue in either *City of Geneva* or *CURE*. It is, rather, a direct and clear limitation on the circumstances under which a landfill can serve Lake County. Absent compliance with that limitation, the Transfer Station is not consistent with the SWMP.

VII. CONCLUSION

Based on all of the foregoing, and the arguments in TCH's opening Brief, the combination of the Voting Bloc's predetermination and its failure to make a credibility

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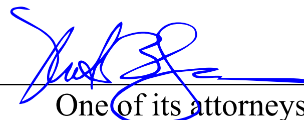
determination, coupled with the dramatic shortcomings in Groot's evidence with respect to Criteria 1, 2, 3, 6 and 8, mandate reversal of the Voting Bloc's decision.

Timber Creek Homes, Inc.

By: 
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of PETITIONER'S REPLY POST-HEARING BRIEF to be served on the following, via electronic mail transmission, on this 10th day of July, 2014:

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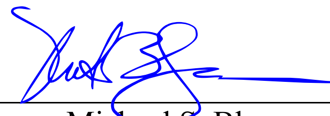

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