BEFORE THE ILINOIS POLLUTION CONTROL BOARD

PROTECT WEST CHICAGO, Petitioner, v. CITY OF WEST CHICAGO, WEST CHICAGO CITY COUNCIL, and LAKESHORE RECYCLING SYSTEMS, LLC, Respondents	)	PCB No: 2023-107 (Pollution Control Facility Siting Appeal)
PEOPLE OPPOSING DUPAGE ENVIRONMENTAL RACISM, Petitioner, v. CITY OF WEST CHICAGO and LAKESHORE RECYCLING SYSTEMS, Respondents.	)	PCB No: 2023-109 (Third-Party Pollution Control Facility Siting Appeal)

NOTICE OF FILING

To: **See Attached Service List**

PLEASE TAKE NOTICE that on December 6, 2023, Protect West Chicago electronically filed with the Illinois Pollution Control Board, 60 E. Van Buren Street, Suite 630, Chicago, IL 60605, an original of the attached: *Response Brief in Support of Its Amended Petition*, copies of which are attached and served upon you.

Dated: December 6, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Ricardo Meza, an attorney, certify that I have served the attached: *Response Brief in Support of Its Amended Petition*, on the below-named parties (Service List) by delivering the document to them via electronic mail on December 6, 2023 and via the PCB's Clerk's Office electronic filing system.

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PROTECT WEST CHICAGO'S RESPONSE BRIEF
IN SUPPORT OF ITS AMENDED PETITION

NOW COMES Petitioner, Protect West Chicago, ("PWC"), by and through its attorneys, Meza Law, and for its *Response Brief in Support of Its Amended Petition*, states as follows:

I. INTRODUCTION

In their opening briefs, neither the City of West Chicago ("West Chicago") nor Lakeshore Recycling Systems, LLC ("LRS") seriously refute PWC's arguments. Rather, West Chicago and LRS simply regurgitate prior arguments that are unsupported by Illinois law.

In any event, PWC respectfully adopts, in its entirety, the arguments PODER advanced in its opening brief and further responds as follows:

II. LAKESHORE RECYCLING SYSTEMS, LLC FAILED IN MULTIPLE RESPECTS TO MEET THE STATUTE'S JURISDICTIONAL NOTICE REQUIREMENTS

Neither West Chicago nor LRS dispute that an application for siting approval must comply with all statutory provisions. The Siting Statute requires applicants to serve written notice of intent (the "Pre-Filing Notice") on all owners of property within 250 feet in each direction of the lot line of the Subject Property (the "Subject Area Radius"), as determined ***by the authentic tax records*** of the county in which the facility is to be located. 415 ILCS §5/39.2(b). (emphasis added). The Siting Statute also provides the proper manner for serving the Pre-Filing Notice. Here, LRS did not provide notice to the owner, nor did it provide notice as required by the Siting Statute.[1]

a. The Pre-Filing Notice Was Not Provided to All Owners of Property

In its opening brief, West Chicago erroneously asserts that LRS's expert "searched the authentic tax records in DuPage County," to determine whom to provide Pre-Filing Notice. West Chicago Br. at 4 ("WC Br. at __"). In fact, LRS's expert never did search the "authentic tax records" and, accordingly, wholly failed in that regard.

Rather than review the required authentic tax records, LRS advances a contorted set of steps that its engineer followed to base his opinion on as to what entities were entitled to notice. *Id.* Specifically, West Chicago attempts to prop-up LRS's engineer by asserting that he:

1) "[L]earned that DuPage County maintains the official tax records database";

2) He then discovered that the database can be "accessed via the DuPage County website" and "the DuPage County Treasurer's Official website";

3) He then found out that the "DuPage County website also links to a GIS database showing all real estate parcels in the County"; and then,

[1]If the Illinois Pollution Control Board concludes that LRS failed to provide proper notice and thus the City of West Chicago did not have jurisdiction to consider LRS's Application, there is no need to consider any of PWC's other arguments.

4) He discovered on "Map page 1-32B-W of the County's Clerk's official tax/plat maps," that "this map affirmatively identifies the owners of two railroad track properties directly east of the subject site." WC Br. at 4.

After taking the above steps, the LRS engineer then cut the inquiry required by the law short, and simply jumped to the conclusion that the entity to provide notice to was Canadian National Railway ("CN"). However, that conclusion was wrong.

First, as noted in PWC's opening brief, there is no indication or reference in any of the "authentic tax records" that CN is the property owner of PIN 01-32-506-001. *See* C006129-C006185. This fact dooms West Chicago and LRS's arguments vis-à-vis service on CN because CN was not the entity listed on the authentic tax records in question. Illinois courts have taken a very strict view on the entities that must be served the Pre-Filing Notice. LRS failed to comply with this requirement and that failure ends the inquiry. *Waste Mgmt. of Illinois, Inc. v. Illinois Pollutions Control Bd.*, 356 Ill. App. 3d 229, 234, 826 N.E.2d 586, 591-92 (3rd Dist. 2005).

Second, LRS's reliance on information included on a "map" is not the proper method to follow in order to determine whom to provide Pre-Filing Notice under the Siting Statute.[2] Furthermore, reliance on a map which states on its face that it was created for "*assessment purposes only*," (emphasis added) is also erroneous.[3] *See* Exhibit 5 at C003399. In short, going through a series of contorted steps, as LRS's engineer did, is not the process required to be

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[2] Both West Chicago and LRS also rely on a photo depicting a building with the emblem of Canadian National Railway to support their argument that Canadian National Railway owns EJ&E. However, and as set forth above, whether CN "owns" EJ&E does not obviate the need for Pre-Fling Notice to have been provided to EJ&E as they are the entity reflected on the authentic tax records as being the property owners.

[3] A visit to the ARCGIS website that LRS's expert relied on is met with the following statement: "Due to update changes in the county tax system ***the ownership and tax information within the Parcel Viewer parcel data may not be current***." (Emphasis added). Further, the website includes a clear disclaimer of warranty that states: "The user expressly acknowledges ***that the Parcel Viewer website, data, and maps may contain nonconformities, defects, or errors***…. The County of DuPage is not inviting reliance on the Parcel Viewer website, data or maps and ***the user should always verify the actual data by contacting the appropriate regulating agency***." (Emphasis added). In other words, these are not "authentic tax records," so please do not rely on them.

followed under the Siting Statute. Rather, the very clear and proper method is to provide Pre-Filing Notice to all owners of property within the Subject Radius Area *as determined by the authentic tax records* - nothing more, nothing less. That was never done here and notice was thus invalid.

Third, even assuming *arguendo* that it was appropriate for LRS's engineer to rely on a map (for assessment purposes only) rather than on authentic tax records, the map indicates that the railroad line ***is associated*** with "EJ&E RR." Here, since this information mirrors the actual authentic tax records, LRS's expert should have provided notice to EJ&E. However, he did not. Courts have recognized that the County Treasurer, the County Clerk and/or the Assessor, are the entities that each have a role in the keeping of the authentic tax records. *Bishop v. Pollution Control Bd.*, 235 Ill. App. 3d 925, 932, 601 N.E.2d 310, 315 (5th Dist. 1992); *Scott v. City of Chicago*, 2015 IL App (1st) 140570, ¶ 6, 29 N.E.3d 592, 594-595. None of these local officials were ever consulted, nor were their actual records reviewed or used by LRS's engineer. C002034-C002035, C002037-C002039 and C002160-C002163. Therefore, West Chicago did not have jurisdiction to even consider LRS's Application.

The engineer having failed in this regard, LRS, West Chicago, and Hearing Officer Price attempt to establish and rely upon an already rejected theory for Pre-Filing Notice by citing a letter submitted by Canadian National, after the evidence had closed, to argue that "actual notice" was achieved. The problem for them is that the case law is very clear that actual notice is insufficient in this regard. *Waste Mgmt. of Illinois, Inc. v. Illinois Pollution Control Bd*., 365 Ill.App.3d 229, 826 N.E.2d 586, 592 (3d Dist. 2005).

Hearing Officer Price attempts to justify LRS is fatal error by stating that the "requirements of formal service is not required as a matter of law where, as here, actual notice has been documented. *See, e.g.,* Waste Management of Illinois, 826 N.E.2d at 591 (difference in delivery method not of "pivotal importance" when delivery method documents that the addressee received

the letter).” However, this quote ignores the real holding of the case, where the court found that actual notice was insufficient. The court in *Waste Management* specifically stated: “Even if we assume that those facts prove actual notice, it could make no difference. Notice would not have been achieved by the statutorily required means and ***proof of actual notice would not overcome that failure of compliance***.” *Id*. at 592. (Emphasis added). In fact, the petitioner in *Waste Management* advanced arguments strikingly similar to those made by West Chicago and specifically argued that either actual notice or constructive notice is sufficient to satisfy the requirement of the statute. *Id*. at 591. *However*, these arguments, made by the petitioner in *Waste Management,* were squarely rejected. *Id*.

Hence, to suggest that *Waste Management* allows actual notice to overrule compliance with the statutory requirements is a gross mischaracterization of the case and plain wrong. In summary, the improper method employed by LRS flies directly in the face of the *Waste Management* decision, as well as Section 2(b) of the Act, which expressly evidences the intent of the legislature to “… establish a unified, state-wide program …” of environmental requirements and protections.

Against that backdrop, the Pre-Filing Notice was clearly deficient and dooms LRS’s application.

b. The Form of Service was Defective.

In any event, even assuming for the purposes of argument that Canadian National Railway was the proper entity to serve, the way LRS provided Pre-Filing Notice was improper. In other words, LRS’s form of service (via overnight express mail) is wholly defective under the Siting Statute.

LRS and West Chicago argue that by using UPS and requiring signature, they provided personal service. However, they cite no caselaw in support of this position because it is an absurdity to claim that using a delivery service on a corporation is the equivalent of personal

service. The law in Illinois is clear on this matter. In Illinois, a private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State; or (2) in any other manner now or hereafter permitted by law. 735 ILCS 5/5-204. Although §2-204 does not indicate a preference of which individual should be served when a corporation is the defendant, service generally should be made upon the registered agent. *Slates v. International House of Pancakes, Inc.*, 90 Ill. App. 3d 716, 729, 46 Ill. Dec. 17, 26, 413 N.E.2d 457, 466 (4th Dist. 1980). The agent served must have actual authority to accept the service. *Dei v. Tumara Food Mart, Inc*., 406 Ill. App. 3d 856, 862, 347 Ill. Dec. 51, 56, 941 N.E.2d 920, 925 (1st Dist. 2010). The court will not create an agent by implication or convenience. *Sarelas v. Fagerburg*, 316 Ill. App. 606, 45 N.E.2d 690 (1st Dist. 1942).

Personal service does not mean leaving it at the hands of anyone in the corporation.[4] This is an undeniable error that LRS committed. UPS did confirm that the letter was delivered to "Helene" and "Tosin." C001024-C001025. However, neither Helene nor Tosin are the registered agent, nor is there any evidence that either of them had the authority capable of accepting service, such as an officer would. If they had such authority or either of them was the registered agent, LRS and West Chicago would say so and the inquiry would end there. Rather than confess error, however, LRS and West Chicago resort to mischaracterizing caselaw.

[4] Moreover, personal service means personal service, not service via an overnight carrier. The Seventh Circuit has held that delivery by Federal Express is not "mail' for the purposes of Federal Rule of Civil Procedure, Rule 4. Fed. R. Civ. P. 4 (c)(2)(C)(ii). *Audio Enterprises, Inc. v. B & W Loudspeakers,* 957 F.2d 406, 409 (7th Cir.1992). In *Audio Enterprises,* the court reasoned that "Rule 4(c)(2)(C)(ii) specifies first class mail, postage prepaid. Federal Express is not first-class mail." *Id.* Similarly, the Fifth Circuit has held that Federal Express is not mail for purposes of Fed. R. App. P. 25(a). *Prince v. Poulos,* 876 F.2d 30, 32 n. 1 (5th Cir.1989). The *Prince* court rejected the appellant's argument that the appellee's brief should have been delivered by Federal Express to satisfy the requirement of Rule 25(a) that the most "expeditious form of delivery by mail" be utilized. The court relied upon the definition of "mail" in Webster's New Collegiate Dictionary (1973), which defines mail as "letters ... conveyed under public authority." *Id.* at 32 n. 1. Because Federal Express delivery service is not public authority, the court reasoned, it is not mail.

In fact, Hearing Officer Price's proposed findings of fact and conclusions of law state: "It is not disputed that the Applicant ***did not serve the Canadian National Railway by personal service nor by registered mail return receipt requested***. Instead, the Applicant caused written notice of the Applicant's request for site approval to be delivered via paid courier to the Canadian National Railway at the corporate offices of the Canadian National Railway in Montreal, Quebec, Canada, and that the Applicant's courier secured the signature of a representative of the Canadian National Railway documenting that delivery." (Emphasis added). Thus, it is undisputed that service was not completed by a method authorized under the statute. Moreover, the City of West Chicago cannot now argue that personal service was completed because the West Chicago City Council adopted Hearing Officer Price's findings that explicitly state personal service was not achieved.

Again, LRS and West Chicago improperly attempt to rely on *Waste Management.* However, all three parties have mischaracterized not only the holding in Waste Management, but the actual quote they cite. For example, on page 6 of its brief, West Chicago cites *Waste Management v. Illinois Pollution Control Board,* 356 Ill. App. 3d 229, 826 N.E.2d 586 (3d Dist. 2005) in a parenthetical to suggest that "difference in delivery method not of 'pivotal importance' when delivery method documents that the addressee received the letter." However, this disingenuous mischaracterization must be rejected because what the *Waste Management* Court actually wrote was that the "*difference between certified mail, return receipt requested and registered mail, return receipt requested* not of 'pivotal importance' when both document that the addressee received the letter." *Id*. 826 N.E.2d at 591. (Emphasis added)(sic). In other words, the Court was therein comparing the difference between "certified" versus "registered" mail return receipt requested (the only two proper methods of service under the siting statute) and not simply

stating that *any* delivery method was proper and clearly never held that actual notice overruled the statutory notice requirement. Thus, West Chicago's sly mischaracterization must be rejected.

LRS's case citation fares no better. In its brief, LRS cites *Bishop* to suggest that the language in the pre-filing statute should be given its ordinary meaning and not expanded to require more than what is written. *Bishop v. Pollution Control Bd.*, 235 Ill. App. 3d 925, 601 N.E.2d 310 (5th Dist. 1992). However, the court in *Bishop* stated this in regard to compliance with using the authentic tax records. This comment was not made in relation to non-compliance with the method of delivery. LRS made a clear and obvious error in service and is now searching without success for ways to justify it in ways not founded in law.

Therefore, for the IPCB to find in favor of LRS, it must overturn *both* the precedent that compliance with statutory requirements is necessary, and the precedent that service upon a corporation must be left with a registered agent or authority capable of accepting service. Accordingly, West Chicago undoubtedly lacked jurisdiction in multiple respects to even consider LRS's Application.

III. LAKESHORE RECYCLING SYSTEMS, LLC'S APPLICATION DOES NOT COMPLY WITH 415 ILCS §5/22.14(A)

The parties do not dispute that an application for siting approval must comply with 415 ILCS §5/22.14(a) which requires a setback of 1,000 feet from property zoned residential (the "Set-Back Provision"). In fact, in its Application, LRS conceded that two residentially zoned properties (ER-1) are located within the Set-Back Provision. C002383; C000317. Despite this fatal concession, both West Chicago and LRS continue to argue that the Set-Back Provision does not apply to LRS's proposed site and advance various specious arguments.

In its opening brief, West Chicago writes that it "stands on the reasoning set forth in Ordinance No. 23-O-00006 and in LRS's post-trial brief," and argues that "the spirit and purpose

of 415 ILCS 5/22.14(a) must prevail over the literal language if necessary to avoid an unjust or absurd result." WC Br. at 7. LRS, on the other hand, asks the IPCB to rely on three matters in support of their position. None of West Chicago or LRS's arguments have merit.

First, LRS asks the IPCB to rely on the *Roxane* decision. This reliance should be rejected because the *Roxane* decision was issued under Rule 23(e)(1) and thus under Supreme Court rules, cannot be cited as binding precedent. However, even if the IPCB were to consider the *Roxane* decision, the facts in *Roxane* are distinguishable from the facts in this case. In *Roxane,* the proposed site location contained "***permanent deed restrictions*** in the parcels purchased by St. Clair County . . . intended to restrict the use of the land to open space ***in perpetuity*** and that the grantee agree that no new structures or improvements shall be erected . . ." (emphasis added). *Roxana Landfill, Inc. v. Illinois Pollution Control Bd.*, 2016 IL App (5th) 150096-U, ¶ 60. Here, there are no deed restrictions on the site location, let alone a permanent, in perpetuity restrictions as there were in *Roxane,* thus *Roxane* is inapplicable.[5]

Second, LRS asks the IPCB to rely on a letter from West Chicago Community Development Director Tom Dabariener in support of its position. This letter carries no weight and should not be relied upon. As noted in PWC's opening brief, Mr. Dabareiner has no authority to determine whether LRS's Application complies with the Set-Back Provision. Thus, it does not matter what a West Chicago official wrote in a letter in support of LRS nor does it matter that the official stated "West Chicago concludes" that Section 22.14 does not apply, because it is the

[5] In any event, unrefuted evidence has been presented that residential development *IS* possible in the location. As noted in PWC's opening brief, its expert Joe Abel, (C003002-C003006) testified unequivocally that: (1) properties are consolidated and re-zoned on a regular basis (C0030007-C003008); (2) numerous rail lines in DuPage County have been vacated during his career and utilized in other ways, including as parts of other developments (C003000-C003002, C003016 and C003030-C003031); and (3) the adjacent vacant property currently being farmed could be legally re-zoned and consolidated with the Railroad Parcels and the adjacent farmland to develop and use in a residential manner. C003009-C003011 and C003018-C003020. LRS on the other hand has declared that residential development is impossible on the basis that such development is unlikely or impractical. However, whether development is likely to happen is not the standard that *Roxane* laid out.

responsibility of the applicant (LRS) to make certain all criteria are met and then ultimately the West Chicago, City Council, the IPCB and the courts. Mr. Dabareiner's opinion is just that, an opinion, it is not a conclusive fact as LRS would suggest.

Third, LRS also asks the IPCB to ignore the Set-Back Provision and specifically argues that "when a proffered reading of a statue leads to absurd results or results that the legislature could not have intended, courts are not bound to that construction, and the reading leading to absurdity should be rejected." LRS Br. at 25. However, in this case, there is nothing absurd about the application of the Set-Back Provision to the facts in this case.

The Siting Statute makes it clear that no facility may be constructed within 1,000 feet of residentially zoned property and everything associated with the Siting Statute (including each of the nine criteria that must be satisfied prior to approving an application for construction of a pollution control facility) provides guidance and reasoning for the Set-Back Provision requirement. The legislature clearly wanted to make certain that any proposed pollution control facility site should and would not to be constructed within 1,000 feet of property zoned residential for, among other reasons,[6] public health and safety reasons.[7]

IV. THE COMBINATION OF EVENTS REVEALS PRE-ADJUDICATION IN FAVOR OF LAKESHORE RECYCLING SYSTEMS, LLC'S APPLICATION AND LACK OF FUNDAMENTAL FAIRNESS IN THE PROCEEDINGS

In its opening brief, West Chicago argues that there was no lack of fundamental fairness in the proceedings before West Chicago's City Council. According to West Chicago, PWC failed "to present any factual evidence of bias or predisposition, and its conspiracy theory is refuted by

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[6] For example, even if located beyond 1,000 feet of property zoned residential, pursuant to Criteria 2 an applicant must nevertheless prove that the facility "is so designed, ***located***, and proposed to be operated that the public health, safety, and welfare will be protected." (emphasis added). In other words, the "location" of a proposed facility, even if proposed beyond Set-Back Provision is nonetheless still critical.

[7] Again, consistent with the overarching intent of the Act being to "… establish a unified state-wide program …" of environmental requirements and protections.

the overwhelming evidence of the City Council's fair and honest deliberations to reach a decision." WC Br. at 7. However, rather than view all of the combined events and facts that occurred before the West Chicago City Council, West Chicago elects to selectively analyze various individual events and facts.

In its opening brief, LRS argues that the hearing officer's decision to deny "questions about environmental justice" was not in error because the environmental justice "concept is not part of the nine siting criteria and is not found anywhere in Section 39.2 of the Act." LRS Br. at 7. Then, peculiarly and in directly contradictory fashion, LRS also writes that: "all the objectives of a good environmental justice policy are inherent in a Section 39.2 siting hearing." LRS Br. at 8. Regardless, as set forth in PWC's opening brief and below, as well as in PODER's brief, the totality of facts and events that occurred before West Chicago's City Council clearly support the conclusion that the siting proceedings did not comport with the standards for an adjudicatory proceeding and were fundamentally unfair.

a. General Fundamental Farness Standards

Regarding issues relating to fundamental fairness, PWC does not quarrel with the general proposition that some *ex parte* contacts are inevitable[8] or that members of a local siting authority are considered to have acted without bias.[9] PWC also does not dispute that even if a member of a local siting authority has taken a public position or expressed strong views on the issue, this does not overcome the presumption. *See Southwest Energy Corp. v. Illinois Pollution Control Bd.*, 275 Ill. App. 3d 84, 91, 655 N.E.2d 304, 309 (1995).

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[8] *See Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill. App.3d 1023 (1988). In this matter, although the underlying record reveals that West Chicago City Council members received communications from constituents opposing a second waste transfer station, PWC has never suggested those communications were improper *ex parte* contacts.

[9] *See EE Hauling, Inc. v. Pollution Control Board*, 107 Ill.2d 33 (1985).

Rather, bias or prejudice may 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." *E & E Hauling, Inc. v. Pollution Control Board,* (1983), 116 Ill. App.3d 586, 598, 71 Ill. Dec. 587, 451 N.E.2d 555, *aff'd* (1985),107 Ill.2d 33, 89 Ill. Dec. 821, 481 N.E.2d 664. Moreover, as the Pollution Control Board has found (and as affirmed by the Appellate Court) a combination of contacts can "led to the conclusion the siting proceedings did not comport with the standards for an adjudicatory proceeding and were fundamentally unfair." *Southwest Energy Corp. v. Illinois Pollution Control Bd.*, 275 Ill. App. 3d 84, 655 N.E.2d 304 (1995). In this matter, the combination of events (and contacts) before West Chicago's City Council proves that there was pre-adjudication in favor of LRS's Application and a lack of fundamental fairness in the proceedings.

b. The Combined Events and Facts Reveal a Lack of Fundamental Fairness

The underlying events, when viewed in combination, together with the IPCB's use of "its experience, technical competence, and specialized knowledge in evaluating evidence"[10] reveal a lack of fundamental fairness.

First, Mayor Pineda's conduct before LRS had even submitted its Siting Application reveals pre-adjudication bias in favor of LRS. On November 14, 2019, Mayor Ruben Pineda demonstrated his bias toward LRS when he sent a text message to a member of the clergy referencing negative "propaganda" relating to LRS's proposed waste transfer station. This message clearly demonstrates the Mayor's opinion in favor of LRS and attempts to quell and quiet any opposition to a second waste transfer station by referring to any opposition as "propaganda." LRS argues that the Mayor's statements do not matter as he ultimately did not vote on the approval

[10] S*ee* 35 Ill. Adm. Code §101.630(c) (Official Notice and Evidence Evaluation).

of the transfer station. However, LRS is well aware that support from the Mayor is important to voting members and had there been a tie the Mayor would have been the individual to cast the deciding vote.

Second, in addition to the text message, the conduct of West Chicago officials to improperly conceal documents and opinions of its own expert (Aptim) during the Pre-Filing Application Review process also clearly reveals pre-adjudication in favor of approving LRS's application. Here, West Chicago officials improperly denied a Freedom of Information Act (FOIA) request for documents and opinions from their expert and *but for* a ruling from a DuPage Circuit Court requiring the production, it would not have been known that their expert (Aptim) had identified multiple deficiencies in LRS's Application. Thus, the decision of West Chicago to conceal information from its own expert revealing that LRS had not complied with the siting criteria reveals pre-adjudication.

Third, the decision of a West Chicago official to draft, edit and submit a letter in support of LRS's Application also reveals a lack of fundamental fairness. LRS was required to meet all siting requirements, not West Chicago. The letter from the West Chicago official written in support of LRS's application is direct evidence of West Chicago's pre-adjudication in favor of LRS and a lack of fundamental fairness. West Chicago officials should not have played a role in helping LRS in attempting to meet its burden.

Fourth, Hearing Officer Derke Price's decision to ignore requests for a Spanish language interpreter, and everything he did to quell PODER also supports a lack of fundamental fairness. The Hearing Officer's decision(s) prevented a large number of West Chicago residents from having any meaningful participation in the "public" hearings. Moreover, although PWC did submit an offer of proof, this evidence was not considered by the Hearing Officer and in turn, West Chicago's City Council members.

Fifth, Hearing Officer Derke Price's failure to render impartial rulings on the evidence, also supports the existence of a lack of fundamental fairness. As noted before, Mr. Price prevented PWC from cross-examining LRS's expert on environmental justice related issues which go directly to criteria set forth at 415 ILCS §5/39.2(a), a fact that even LRS now admits. *See* LRS. Br. at 8. Specifically, Mr. Price prevented PWC from asking questions regarding emissions and environmental justice related issues and this denied PWC (and PODER) from presenting relevant testimony. *See* Exhibit PWC-702 (James Powell Offer of Proof) C004133-C004176. Thus, Mr. Price did not render impartial rulings and did not properly allow testimony related to the public safety, health, and welfare of the Latino community.

Sixth, the decision of West Chicago's City Council to "deliberate" in closed session, coupled with the fact that Special Counsel Dennis Walsh appears to have drafted the final ordinance in advance of the city council's formal deliberations in open session on February 28, reveals pre-adjudication in favor of LRS and a lack of fundamental fairness. In fact, to date, it is unknown what was discussed in closed session because West Chicago has refused to produce the closed session recording.

c. The Pollution Control Board Hearing Testimony Solidifies a Lack of Fundamental Fairness

In addition to all of the above-mentioned facts, the testimony elicited during the September 28, 2023, IPCB public hearing involving West Chicago expert Aptim, as well as the testimony involving the findings contained in Ordinance 23-O-0006 (approving LRS's Application) solidifies the lack of fundamental fairness.

i. The IPCB Hearing Testimony Relating to West Chicago's Expert Aptim

At the IPCB public hearing, Mayor Pineda appeared completely confused about what was occurring vis-à-vis LRS's Application as it related to West Chicago's own expert. For example,

while Mayor Pineda testified that he was unsure whether a member of the City's staff would have had the ability, knowledge or expertise to review LRS's Application to determine if it met the standards of the siting ordinance (Tr. 96:15-24), he also said he was unsure if it was their expert's (Aptim), City Administrator Michael Guttman's, or any City employees' role **to help LRS obtain approval** for their Application. Tr. 103:1-17 (emphasis added).

Mayor Pineda's confusion about the role(s) of its own expert Aptim,[11] supports a lack of fundamental fairness. In fact, Mayor Pineda's confusion in this matter is no different than the confusion of hearing officer Christine Zeman in *Southwest Energy Corp*. In the *Southwest Energy Corp* case, the Fourth District Appellate Court in considering an argument made on behalf of objectors by none other than LRS's current attorney,[12] upheld a lack of fundamental fairness ruling by the Illinois Pollution Control Board, stating that:

> Zeman's testimony reveals she was confused regarding whether Southwest was also her client. Kirby participated in the initial meeting with Zeman and aided in determining whether she was qualified to be the hearing officer. ***Such contact is inherently fundamentally unfair; it is fraught with possibilities for actual prejudice***. It could have given Zeman the impression that Southwest was her client. In addition, the fee agreement, which required Southwest to pay the attorney fees directly to Zeman's firm, inherently biased the siting proceedings. The fee agreement could also have given Zeman the impression that Southwest was her client. Southwest argues the Board should have considered only the written fee agreement and not Zeman's testimony concerning what she thought were the terms of the fee agreement. We disagree. The Board properly considered Zeman's testimony since Zeman would act in conformity with what she considered to be the terms of the fee agreement and not its actual terms. The fee agreement could also have given Southwest some influence over Zeman, even if she had realized Southwest was not her client, because Southwest could have delayed payment or disputed the amount of fees if it was displeased with Zeman. The later contacts between Zeman and Kirby were also fundamentally unfair in light of Zeman's confusion. She would be more deferential to Kirby's suggestions if she considered Southwest to be her client. *Southwest Energy Corp. v. Illinois Pollution Control Bd.,* 275 Ill. App. 3d 84, 96, 655 N.E.2d 304, 312 (1995).(Emphasis added).

[11] Mayor Pineda's confusion regarding Aptim extended to the fact that Aptim believed that properties near the site being zoned residential posed serious risks to LRS's Application. Tr. 118:21-119:2. In fact, Mayor Pineda did not now Aptim had recommended the area (next to the proposed pollution control facility site) be rezoned before an application was modified to be able to meet the 1,000-foot zoning requirement. Tr. 119:3-8.

[12] Mr. George Mueller.

Here, like in *Southwest Energy Corp.,* Mayor Pineda's confusion as to the role(s) and involvement of various entities, including its own expert Aptim[13] is inherently fundamentally unfair and fraught with possibilities for actual prejudice.

ii. The IPCB Hearing Testimony Regarding the Ordinance's Findings

The hearing testimony involving the pre-determined findings contained in Ordinance 23-O-0006, combined with the other facts, also reveal pre-adjudication in favor of LRS. *See* Exhibit PWC-M16. For example, when asked who made the findings contained in Ordinance 23-O-0006, Mayor Pineda responded by stating: "I don't know." In addition, Alderman Lori Chassee testified that the West Chicago City Council made *no decisions* on LRS's Application during the February 27, 2023 closed session (one day before its official deliberations in open session),[14] yet despite this, somehow and miraculously, Ordinance 23-O-0006 was born with multiple "findings" by West Chicago's City Council, citations to cases (which Mayor Pineda could not recall seeing) adoption of the Hearing Officer's Report together with adoption of multiple "special conditions." *See* Exhibit PWC-M16. And, to top it off, Ordinance 23-O-0006 even contained witness credibility determinations. *Id.* To be sure, Ordinance 23-O-0006 was clearly drafted by Special Counsel Dennis Walsh and all findings made in the Ordinance (which were purportedly made by West

[13] Mayor Pineda testified that he was not "aware of the number of issues that Aptim had identified" in LRS's application before it was filed and was not even provided with regular updates on issues Aptim identified (with LRS's Application). Tr. 115:6-17, 18-22.

[14] Alderman Chasse's testified that no decisions were made on February 27, 2023 and in particular that the City Council did not decide whether:

- Lakeshore's application complied with the Pre-Filing Notice;
- Section 5/22.4 of the Environmental Protection Act did or did not bar the proposed facility;
- any of the proceedings complied with the requirements of fundamental fairness;
- the facility met any of the nine criteria under state law were made; or
- whether to adopt the Hearing Officer's findings and recommendations?

See IPCB Hearing Tr. at 210-211.

Chicago City Council) were made by someone and at some time, but clearly not during the City Council's closed session meeting. In other words, the decision was predetermined, plain and simple.

Thus, these facts, combined with all the other events and facts, rendered the entire proceedings before West Chicago fundamentally unfair.

V. THE STATUTORY CRITERIA — LAKESHORE RECYCLING SYSTEMS LLC FAILED TO COMPLY WITH STATUTORY CRITERION 1, 2, 3 AND 8

a. Criterion 1: The facility is necessary to accommodate the waste needs of the area it is intended to serve.

In its opening brief LRS, without citing to *any* supporting law, states that West Chicago's City Council correctly concluded that Criterion 1 was satisfied by first attempting to create a distinction between the application of the criteria between landfills and transfer stations and second by arguing that Criterion 1's "Demonstration of need is, therefore, not an absolute, but a relative requirement." LRS. Br. at 11. LRS then attempts to further support the distinction by making self-serving statements, again without citing to *any* supporting law, by stating:

- "the only need for transfer stations is purely economic and environmental";
- "the real purpose then of transfer stations is to get the garbage to the landfills more efficiently,"; and,
- "the analysis as to whether transfer stations are necessary should be fundamentally different than a landfill necessity analysis and should instead focus on the efficiency related benefits." LRS. Br. at 11-12.

LRS's belief about what should be the necessity analysis and that the analysis should focus on the efficiency related benefits has no bearing on what is required by a party in establishing that criterion 1 has been met.

LRS goes on in its argument by incorrectly citing the legal standard under which need is established under criterion 1 by writing that: "criterion 1 is established when there is evidence that

the facility is r*easonably required* by the waste needs of the service area," and that this "needs analysis has been interpreted by our courts to require a showing that the facility is expedient, or reasonably convenient." LRS Br. at 12. LRS's arguments and standards are incorrect, misplaced, have no basis in law, and should be rejected. The West Chicago City Council's reliance on these faulty arguments in concluding that criterion 1 was met, has resulted in their decision being made against the manifest weight of the evidence and as a result, should be reversed.

Section 39.2(a)(i) requires that the petitioner establish that the site location is necessary for the area to be served. (Ill. Rev. Stat.1985, ch. 111 ½, par. 1039.2(a)(i); *Waste Management of Illinois, Inc. v. Pollution Control Board* (1984), 123 Ill.App.3d 1075, 1083–84, 79 Ill. Dec. 415, 463 N.E.2d 969.) And, although a petitioner need not show absolute necessity, it ***must demonstrate an urgent need*** for the new facility as well as the reasonable convenience of establishing a new or expanding facility. (*Waste Management,* 123 Ill.App.3d at 1084, 79 Ill. Dec. at 422, 463 N.E.2d at 976.) (emphasis added). The petitioner must show that the facility is reasonably required by the waste needs of the area, including consideration of its waste production and disposal capabilities. *Waste Management,* 123 Ill.App.3d at 1084, 79 Ill. Dec. at 422, 463 N.E.2d at 976. *Waste Mgmt. of Illinois, Inc. v. Pollution Control Bd.*, 175 Ill. App. 3d 1023, 1031, 530 N.E.2d 682, 689 (1988). No Illinois case has ever even hinted that this standard only applies to landfills and not transfer stations. LRS is trying to make this argument because it knows it cannot meet the "urgent need" requirement set forth in the statute.

LRS conceded in their opening brief that there is no need for another waste transfer station and in doing so failed to establish that the site location is necessary for the area to be served. LRS stated "looking strictly at capacity, without regard to factors such as pricing and environmental impact and benefits, there is *excess capacity* in the proposed service area. LRS. Br. at 14. (emphasis added). LRS then goes on to mischaracterize the courts findings in *Will County. v. Village of*

Rockdale, to support its argument by stating that the court "held that criterion 1 is not determined exclusively by reference to capacity analysis." LRS Br. at 14. This is incorrect.

In its decision in *Will County. v. Village of Rockdale*, 2018 IL App (3d) 160463, ¶ 58, 121 N.E.3d 468, 484, the *Rockdale* Court found that the respondents had "shown that the proposed facility is necessary to accommodate the waste needs of the service area." 2018 IL App (3d) 160463, ¶ 58, 121 N.E.3d 468, 484. And, in reaching this conclusion, the Court proceeded to identify the facts supporting its finding, including the fact that:

- The evidence indicate[d] that there were three transfer stations in the service area and two were *limited in the amount and type of waste* they received. (emphasis added).
- That the only municipal solid waste transfer station in the service area was "currently accepting more TPD than in its past years, and it was observed that the *station had large amounts of waste on the tipping floor*." (emphasis added).
- That, the same transfer station, "had been *observed cutting off trucks waiting in line*, and consequently, the trucks were not allowed to dump." (emphasis added).
- That there was "a *capacity shortfall of 853 to 2046 TPD in the service* area because the Joliet Transfer Station was currently generating more than double the amount of its average volume and it had been observed to be operating beyond capacity." (emphasis added).
- That the proposed facility would "also provide benefits to the village of Rockdale pursuant to the host agreement, provide benefits to Will County *as more waste will be disposed at Prairie View RDF*, have longer operational hours than the Joliet Transfer Station, and reduce environmental impacts." (emphasis added).

LRS's expert admitted during the Siting Hearing that he had no evidence of anything like the above facts cited in the *Rockdale* opinion. C002042-C002045. Hence, *Rockdale* is complexly inapplicable to this case.

Moreover, only after the Court in *Rockdale* had concluded that a "need" for an additional waste transfer station was warranted, based on the above facts, did the Court in *dicta* refer to capacity by stating "the proposed facility will increase competition to the service area and increase transfer capacity." *Will County. v. Village of Rockdale*, 2018 IL App (3d) 160463, ¶ 58, 121 N.E.3d

468, 484. In other words, the language about the increase in competition or "improving competition" as LRS has stated as a basis in support of the Court's finding is a clear misrepresentation of the Court's decision. In affirming the *Rockdale* Court decision, the Appellate Court found that respondents must show an "urgent need" for the facility and a "reasonable convenience of establishing it." *Id.* The Appellate Court then concluded that respondents demonstrated this in the evidence presented in the record. *Will County. v. Village of Rockdale*, 2018 IL App (3d) 160463, ¶¶ 58-59, 121 N.E.3d 468, 483–84.

LRS has failed to show that there is an urgent need for the transfer station. LRS's Application and the siting hearing testimony clearly establish that there is more than enough waste transfer station capacity to handle the current and future waste needs of the proposed LRS service area. C002041 and C002745-C002746. In fact, testimony revealed that the existing transfer station in the service area (the "Groot Facility") is operating a few blocks away at less than fifty percent (50%) of capacity. C002043. The fact that LRS does not have a waste transfer station within the proposed service area does not mean that there is insufficient competition in the service area and as a result increased transfer capacity is necessary. Criterion 1's analysis hinges on accommodating the waste needs of the area it is intended to serve – not the economic and mark development needs of a specific waste company, in this case, the needs of LRS.

Accordingly, LRS has failed to meet the requirements of criterion 1, as the *Rockdale* case clearly states the standard requires a showing of urgent need. LRS's own expert admitted that they did not have the necessary facts that were present in *Rockdale* to show urgent need. In other words, the only need presented by LRS was its own economic need. The West Chicago City Council incorrectly concluded that Criterion 1 was satisfied and in doing so changed the current Section 39.2 requirements and acted against the manifest weight of the evidence.

b. Remaining Criterion: Criterion 2, 3 and 8 Have Not Been Met.

In their opening briefs, neither West Chicago nor LRS raise any new or different arguments regarding the remaining criterion.

Thus, PWC rests on its opening brief and respectfully asked the Pollution Control Board to find that LRS's Application failed to meet Criterion 2, 3 and 8 of the Siting Statute.

VI. CONCLUSION

PWC respectfully requests the Illinois Pollution Control Board to reverse the decision of West Chicago to approve LRS's Application for development of a second waste transfer station in West Chicago.

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Respectfully Submitted,

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