ILLINOIS POLLUTION CONTROL BOARD
March 7, 1996

THOSE OPPOSED TO AREA LANDFILLS (T.O.T.A.L.), a Concerned Citizen's Group,	)	
Petitioner,	)	PCB 96-79 (Third-Party Landfill Siting Review)
v.	)	
CITY OF SALEM,	)	
Respondent.	)	
CONCERNED ADJOINING OWNERS, a Concerned Citizen's Group,	)	
Petitioner,	)	
v.	)	PCB 96-82 (Third-Party Landfill Siting Review) (Consolidated)
CITY OF SALEM,	)	
Respondent.	)	

BILL MILNER, of WHAM & WHAM APPEARED ON BEHALF OF THE PETITIONERS, T.O.T.A.L.;

GEORGE LACKEY, of LACKEY & LACKEY APPEARED ON BEHALF OF THE PETITIONERS, CONCERNED ADJOINING OWNERS;

KEITH KOST, of KOST & KOST APPEARED ON BEHALF OF THE CITY OF SALEM; and

MICHAEL JONES, of BRANSON, JONES & STEDLIN APPEARED ON BEHALF OF THE CITY OF SALEM

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

On October 13, 1995, Those Opposed to Area Landfills (T.O.T.A.L) and on October 16, 1995, the Concerned Adjoining Owners filed petitions for review of the City of Salem's (City) September 11, 1995 decision approving siting for an expansion of the landfill already

owned and operated by the City. On October 19, 1995, the Board consolidated these matters and a hearing was held on December 12, 1995.[1] These petitions were filed pursuant to Section 40.1 of the Environmental Protection Act (Act). (415 ILCS 5/40.1 (1994).) T.O.T.A.L. is seeking review of the City's September 11, 1995 grant of siting approval for the new pollution control facility pursuant to Section 39.2 of the Act. (415 ILCS 5/39.2 (1994).) T.O.T.A.L. requests the Board to reverse the City's decision due to the City's lack of jurisdiction, that the proceeding before the City was fundamentally unfair and that the decision of the City was against the manifest weight of the evidence concerning the challenged criteria of Section 39.2 of the Act. For the reasons enunciated below, the Board finds that the City did have jurisdiction to hear the application, that the proceeding before the City was fundamentally fair and that the decision of the City was not against the manifest weight of the evidence concerning the challenged criteria of Section 39.2 of the Act. The City's decision is accordingly affirmed.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. Only if the local body finds that all criteria are satisfied can siting approval be granted. In this case, the City found that all of the applicable criteria had been met, and granted siting approval. Concerned Adjoining Owners failed to file a clarification as to which criteria it was challenging as required by the Board's December 7, 1995 order and did not file a post-hearing brief. As a result the Board will only review those criteria challenged by T.O.T.A.L.[2] When reviewing a local decision on the criteria, the Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592, E & E

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[1] Although the Concerned Adjoining Owners participated at the hearing, they filed no post-hearing brief. Additionally, their original petition for review of the City's siting approval contained basically the same arguments as T.O.T.A.L. We will only address the Concerned Adjoining Owners by name in referring to arguments which were not raised and argued by T.O.T.A.L. in this opinion and order.

[2] T.O.T.A.L.'s post-hearing brief will be referenced as "Pet. Brief at", T.O.T.A.L.'s reply brief will be referred to as "Reply at ", the City's post-hearing brief will be referenced as "Resp. Brief at ", the record before the City will be referenced as "C. at ", the transcript before the Board will be referenced as "Tr. at .", T.O.T.A.L.'s exhibits will be referenced as "Pet. Exhibit " and the City's exhibits will be referenced as "Resp. Exhibit ".

Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.)

Additionally, the Board is authorized to review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, Inc., 451 N.E.2d 555, 562.) In this case, petitioners have raised challenges to the jurisdiction of the City to hear the application, fundamental fairness of the local proceeding, as well as challenges to the City's decisions on five of the criteria. Since jurisdiction is a threshold issue, we will address that claim first, then proceed to fundamental fairness, and finally the challenged siting criteria of Section 39.2(a).

BACKGROUND

The City is both the owner and operator of a landfill located within the City's boundaries which currently receives only City waste and is known as "The City of Salem Municipal Landfill Number 2." (C. at 1.) On April 16, 1992, the City purchased an option to buy roughly 40 acres of land which is next to the current landfill site but at that time was located outside the City's boundaries. (Pet. Brief at 2-3.)

On August 1, 1994, the City adopted Resolution No. 94-17 which appointed the City Manager, Mr. Kinney or his successor, to be the applicant seeking siting approval before the City if in the future it decided to become a regional pollution control facility. (C. at 1-3.) The City's Resolution No. 94-17 in paragraphs 2, 3 and 4 further stated the following:

> That although the City Manager will be having contact with the City Council on matters from time to time, if the City Manager, as applicant for the City of Salem, files an application for landfill expansion with the City of Salem, at that time and throughout the whole siting/hearing process, pursuant to state statute, the City Manager shall have no contact with the members of the City Council, including the Mayor, of the City of Salem which contact would relate to the application for regional pollution control facility, except contact that takes place pursuant to the public hearing requirements of Senate Bill 172, commonly referred to as Siting. This shall not prevent the City Manager from having contact with the elected officials on his other assigned duties.
>
> That the members of the City Council, including the Mayor, if an application for landfill expansion is filed by the City of Salem by it's (sic) applicant, the City Manager, shall have no contact with the City Manager in regards to the application for a regional pollution control facility except contact that would take place pursuant to the public hearing requirements of Senate Bill 172, commonly referred to as Siting. This shall not prevent the members of the City

> Council, including the Mayor, from having contact with the City Manager on other assigned duties.
>
> The City Council understands that their body is charged both with investigatory and adjudicatory functions. If an application is filed for landfill expansion, the City Council understands that they will be in an adjudicatory role as a decision maker (sic) on said application.

On August 15, 1994, the City acted on the option to purchase the above mentioned property for an estimated cost of $120,000. (Pet. Brief at 3.) The City received the deed to the 40 acres on September 16, 1994, and adopted Ordinance No. 94-25 annexing the property to the City. (Pet. Brief at 4.)

On September 19, 1994 the City adopted Resolution No. 94-20, a resolution providing for rules and regulations for the approval of site location for a new regional pollution control facility in the City of Salem, Marion County, Illinois. (C. at 4-13.) The City Manager originally filed an application on October 13, 1994, but later withdrew that application. The City Manager filed a second application with the City seeking site location approval for a new pollution control facility on March 23, 1995. (C. at 20-636.) The application was seeking siting approval for the expansion of the existing landfill, Landfill No. 2, and for the new landfill, Landfill No. 3, to be located on the newly purchased property. (C. at 26 - 34.) The required hearing pursuant to Section 39.2(d) of the Act was held in this matter on July 8, 14, 15 and 24, 1995 before the City. The City granted approval in Resolution No. 95-14 on September 11, 1995. (C. at 7759-7762.)

ARGUMENTS AND ANALYSIS

Jurisdiction

T.O.T.A.L. argues that the City is not the owner of the property sought to be sited because the City failed to follow the statutory requirements set forth in 65 ILCS 5/11-76.1-1 (Illinois Municipal Code, Purchase or Lease of Real Property or Personal Property, Powers of Corporate Authorities) and 65 ILCS 5/11-76.1-3 (Illinois Municipal Code, Purchase or Lease of Real Property or Personal Property, Ordinance for lease or purchase of property--Publication--Effective Date). (Pet. Brief at 47.) More specifically, T.O.T.A.L. asserts that the City failed to fulfill "the notice requirements of the statute which would have given citizens of Salem the opportunity to put the issue of the purchase of property on the ballot for a binding referendum." (Pet. Brief at 47-48.) T.O.T.A.L. argues that, since the City failed to properly notice the purchase of the property, the annexation of the property was improper causing the proposed expansion in Landfill No. 3 to be outside of the City's boundaries, with the result that the City was divested of its jurisdiction to site the landfill expansion. (Pet. Brief at 47-48.)

In response the City states that T.O.T.A.L. has not presented any evidence that it was unaware of the annexation at the time of the siting hearing; in fact T.O.T.A.L. disclosed that it was aware of the annexation at the first day of the siting hearing given that it filed an objection to the siting hearing arguing that the City did not have jurisdiction. (Resp. Brief at 31, C. at 763.) The City argues that since T.O.T.A.L. was aware of the annexation prior to the siting hearing, it cannot raise the issue for the first time before the Board and such argument must be deemed waived. (Resp. Brief at 31.) Additionally, the City states that "[e]ven if the Pollution Control Board would find that the issue has not been waived, T.O.T.A.L. cannot now contest the jurisdiction of the City of Salem" because there is a one year statute of limitation to contest annexations. (Resp. Brief at 31.) The City asserts that 65 ILCS 5/7-1-46, entitled "Actions Contesting Annexation-Limitation" bars T.O.T.A.L. from challenging the annexation which the City states is more than one year old. (Resp. Brief at 31.) Furthermore, the City directs the Board's attention to a Fourth Circuit Judicial Court, Marion County, action wherein T.O.T.A.L. sued the City alleging the same statutory violation, and which has been dismissed with prejudice. (Resp. Brief at 31-32, Resp. Exhibits 1, 2 and 3.)

Although T.O.T.A.L. had not raised the question of jurisdiction until this matter was before the Board, we have held, as have the courts, that jurisdiction may be challenged at any time. (See C.O.A.L. (Citizens Opposed to Additional Landfills) v. Laidlaw Waste Systems, Inc., and the Perry County Board of Commissioners, (January 21, 1993), PCB 92-131 and Tate v. Illinois Pollution Control Board, (4th Dist. 1989) 136 Ill.Dec 401, 188 Ill.App.3d 994, 544 N.E.2d 1176.) Even though T.O.T.A.L. may raise this issue with the Board, the Board does not have the authority to decide whether the annexation and purchase of the property by the City was conducted according to the applicable statutes in the Illinois Municipal Code, as the Board's authority is limited to those matters arising under the Act. Since the Fourth Circuit Court dismissed the action with prejudice we will proceed with this matter as if the City had jurisdiction to hear the siting application and rule on the remaining issues raised by T.O.T.A.L.

Fundamental Fairness

T.O.T.A.L. makes two arguments concerning the issue of the proceeding being fundamentally unfair. First, T.O.T.A.L. argues that the City was biased towards siting approval causing the proceeding to be fundamentally unfair and second, the hearings were conducted in a manner which caused the proceeding to be fundamentally unfair. Section 40.1 of the Act requires the Board to review the proceedings before the local siting authority to assure fundamental fairness. In E & E Hauling, Inc., the appellate court found that, although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process

must be applied. (E & E Hauling, Inc. 451 N.E.2d 555, 564.) (See also Industrial Fuels and Resource/Illinois Inc. v. Illinois Pollution Control Board, (1st Dist. 1992) 227 Ill.App.3d 533, 592 N.E.2d 148; and Tate, 544 N.E.2d 1176.) Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois Inc. v. Illinois Pollution Control Board, (2d Dist. 1988) 25 Ill.Dec. 524, 530 N.E.2d 682, 693.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, 117 PCB 117.)

1. Alleged Bias, Prejudice, Conflict of Interest.

T.O.T.A.L. asserts that the actions of the City leading to the September 11, 1995 resolution granting siting approval created bias and a conflict of interest whereby the proceeding was fundamentally unfair. (Pet. Brief at 1-5.) T.O.T.A.L. states that the "Illinois Courts have recognized that persons objecting to the granting of a site application can insist that the procedures utilized by the governing body comport with due process standards of fundamental fairness." (Pet. Brief at 6.) T.O.T.A.L. argues that the City was biased "due to the fact the majority of the council had already voted to take whatever action (sic) [was] necessary to develop a regional pollution control facility." (Pet. Brief at 6.) As evidence of this alleged bias, conflict of interest or prejudice, T.O.T.A.L. sets forth the minutes of the August 1, 1994 meeting in which the City adopted Resolution No. 94-17 where the mayor and two other council members made statements in support of the new facility. (Pet. Brief at 7.)

As additional evidence to this alleged bias or prejudice on the part of the City, T.O.T.A.L argues that the City expended approximately $500,000 prior to its decision (Pet. Brief at 9, 5); the City performed work in the expansion area prior to the grant of approval (Pet. Brief at 24); and that each member did not review all submitted information prior to the issuance of the siting decision. (Pet. Brief at 23, 22-24). T.O.T.A.L argues that the City cannot "side step" this bias by arguing that the City Manager, Mr. Kinney, is the applicant, while the City is the governing body hearing the application. (Pet. Brief at 8.) In conclusion, T.O.T.A.L argues that the City should not hear its own application and cites to the appellate court decision in E & E Hauling, Inc., for the proposition that "[f]undamental fairness is not only violated where the adjudicator's pecuniary interest in a case is personal" but also when it is an indirect outgrowth of public official's desire to protect official funds. (Pet. Brief at 8-10.)

In response, the City states that T.O.T.A.L.'s argument has been found to have no merit by the Illinois Supreme Court. Citing to the Supreme Court's decision in E & E Hauling, Inc. the City argues that the City council members are presumed to be unbiased and that the burden is on T.O.T.A.L. to demonstrate that a bias existed. (Resp. Brief at 7.) The City asserts that T.O.T.A.L. has not demonstrated that bias existed. In support, the City

states that T.O.T.A.L. failed to ask any questions as to bias at the hearing before the Board and that the city council members were aware of the dual role as evidenced in their adoption of Resolution 94-17. Furthermore, the City states that City Council Member Black who voted for Resolution No. 94-17, ultimately voted against siting approval and City Council Member Storment who voted against Resolution No. 94-17, voted to grant the siting approval. (Resp. Brief at 7.)

As to the issue of annexation, the City specifically argues that the question of the annexation of property and fundamental fairness has been addressed on several occasions. The City argues that the court in Woodsmoke Resorts, Inc. v. City of Marseilles, (3d Dist. 1988) 174 Ill.App.3d 906, 529 N.E.2d 274, specifically addressed whether an annexation by the City of Marseilles created inherent bias. (Resp. Brief at 7.) The City contends that the Third District, citing to E & E Hauling, Inc., held that there was no inherent bias. (Resp. Brief at 8.) The City also states that the Board has addressed this issue in Fairview Area Citizens Taskforce v. The Village of Fairview and Gallatin National Co., (F.A.C.T.) (June 22, 1989), PCB 89-33, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3d Dist. 1990). (Resp. Brief at 8.) Additionally, the City argues that the City Manager testified at the hearing before the Board, that he could not recall whether the City council members directed him to prepare a petition for annexation, or that it was prepared due to the policy of the City that all property purchased by the City should become part of the corporate limits to the greatest extent possible. (Resp. Brief at 8-9, Tr. at 70, 85.) The City argues that T.O.T.A.L. has not discredited the testimony of the City Manager as to why he filed the petition for annexation. (Resp. Brief at 8-9.)

Finally, the City contends that T.O.T.A.L. has not presented any evidence that the City council members were prejudiced by the expenditures connected to the expansion. (Resp. Brief at 10.) The City states that during the siting process it was also going through the Significant Modification Permit process for part of the landfill which was already sited, and that most of the costs detailed in Petitioner's Exhibit No. 9 are associated with the Significant Modification Permit process and not the siting process. (Resp. Brief at 10-11.) The City maintains that the total costs for the expansion at that point was $203,742.49. (Resp. Brief at 10-11.) Overall, the City concludes that T.O.T.A.L. has not demonstrated that the City council members were biased or prejudiced so as to make the proceeding fundamentally unfair.

In its reply brief T.O.T.A.L. states that E & E Hauling, Inc., Woodsmoke Resorts, and F.A.C.T. are not similar to this case and are not situations where the applicant and the local siting authority are the same governmental entity. (Reply at 1-2.) T.O.T.A.L. argues that in this case the situation is significantly different and that "[n]o hearing could ever be fundamentally fair where the governing body and the applicant are one in the same." (Reply at 3.)

We disagree with T.O.T.A.L.'s argument that the situation in E & E Hauling, Inc. is significantly different than here. In E & E Hauling, Inc. the members of the forest preserve

district of Du Page County (the applicant) were the same members of the county board for Du Page County (the local siting authority). (E & E Hauling, Inc. 481 N.E.2d 664, 665.) The Board finds no evidence to support a finding that the City council members were biased or that they prejudged the siting application so as to make the process fundamentally unfair. Since the development of the siting process pursuant to Section 39.2 of the Act, the courts and this Board have been confronted with the issue of the local decisionmaker allegedly having a disqualifying bias or prejudging the application. One of the leading cases on this issue is the Supreme Court's decision in E & E Hauling, Inc. In that case the Supreme Court dealt with several issues of bias, i.e. the local decision maker also being the applicant, the pecuniary interest of decision maker, and ordinances demonstrating approval of the landfill prior to its siting decision, all of which are relevant in this case.

As in this case, the Supreme Court was confronted in E & E Hauling Inc., with the situation where the applicant and the siting authority were the same and found that "[w]e do not consider that the legislature intended this unremarkable factual situation to make 'fundamental fairness of the procedures' impossible." (E & E Hauling, Inc., 481 N.E.2d 664, 668.) The Court reasoned:

> It does not seem unusual that a landfill would be proposed for location on publicly owned property. The Act was amended to place decisions regarding the sites for landfills with local authorities and to avoid having a regional authority (the Agency) in a position to impose its approval of a landfill site on an objecting local authority.

The Board recently held in City of Geneva v. Waste Management of Illinois, Inc. and County Board, County of Kane, (July 21, 1994), PCB 94-58, where the City of Geneva was challenging the siting approval of the County of Kane, who is the owner and one of the local siting authorities that "..the inclusion of the 'operating contract' condition (between Kane County and Waste Management of Illinois , Inc.) or any requisite 'renegotiation' does not so taint the siting process as to render it fundamentally unfair." (Id. at 15.)

Although T.O.T.A.L. quotes language from the appellate court decision in E & E Hauling, Inc. concerning monetary interest on the part of the local siting authority, we find the Supreme Court's findings controlling on this issue. The Supreme Court stated the following:

> More fundamentally, the board should not be disqualified as a decisionmaker simply because revenues were to be received by the county. County boards and other governmental agencies routinely make decisions that affect their revenues. They are public service bodies that must be deemed to have made decisions for the welfare of their governmental units and their constituents. Their members are subject to public disapproval; elected members can be turned out of office and appointed members replaced. Public officials should be considered to act without bias.

> The village next claims that the hearing was unfair because both the county and the district had earlier approved the landfill by ordinance. The village thus is claiming a type of bias that has been called "prejudgment of adjudicative facts." (See K. Davis, 3 Administrative Law Treatise sec. 19.4 (2d ed.. 1980).) But the ordinances were simply a preliminary to the submission of the question of a permit to the Agency. Subsequently, the Act was amended and the board was charged with the responsibility of deciding whether to approve the landfill's expansion. The board was required to find that the six standards for approval under the amended act were satisfied. It cannot be said that the board prejudged the adjudicative facts, *i.e.*, the six criteria. This conclusion is supported by the line of decisions that there is no inherent bias created when an administrative body is charged with both investigatory and adjudicatory functions. (E & E Hauling, Inc. 481 N.E.2d 664, 667-668.)

The City's actions in this case of purchasing, annexing and adopting certain ordinances concerning these purposes do not create a disqualifying bias. Based on E & E Hauling Inc., a local decision maker can be an applicant and still be presumed to be unbiased. The court in Woodsmoke Resort Inc., utilizing E & E Hauling Inc., where the local siting authority annexed the property and relinquished various other rights, found that there was no inherent bias. (Woodsmoke Resort Inc., 529 N.E.2d 274, 276.) We agree with the judicial decisions on this issue that there is no inherent bias created in these situations.

Additionally, the legislature amended the Act in Section 39.2(d) to include the following language:

> The fact that a member of the county board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue.

During the legislative debate the House Sponsor of House Bill 4040 stated:

> The intention of the Bill, and this was brought up in committee, is to allow county board members and city council members to run for office and indicate their position on either the issue (sic) siting generally or (sic) specific site, and then be able to vote on it. It's kind of a Catch-22 now. You got to have democracy work. At the same time, if you make democracy work, then you're disqualified from voting, or arguably so, under the opinion of at least one local state's attorney. So, that's the intention of the Bill. (House Floor debates May 6, 1992, P.A. 87-1152, effective date January 1, 1993.)

The Board finds nothing in this record that demonstrates bias on the part of the City council members. Pursuant to E & E Hauling, Inc. and successor cases, the City council members are presumed to act in an unbiased manner and none of the actions or circumstances argued by T.O.T.A.L. demonstrate the contrary. To conclude otherwise would prohibit local governments from owning and operating their own landfills which clearly was not the intent of the siting legislation. Furthermore, in light of the above amendment to Section 39.2(d) of the Act the local siting authority members may state an opinion on a siting issue without being precluded from taking part in the local siting decision. In order for the Board to find a bias, there must be some other action that demonstrates a bias or that the City council members prejudged the matter. The record demonstrates that the City council members were aware of their two separate and distinct roles as evidenced in the language of Resolution No. 94-17, and that such distinction was maintained. T.O.T.A.L. has not presented any evidence that any of the City council members were biased or that the matter was prejudged. In fact, the City states that City Council Member Black, who voted for Resolution No. 94-17, voted against siting approval. Also City Council Member Storment, who voted against Resolution No. 94-17, voted to grant the siting approval. For the reasons stated above, we find that there has been no demonstration of bias which would have caused the proceeding to be fundamentally unfair.

2. Alleged fundamental unfairness concerning the hearing before the City.

T.O.T.A.L asserts that the following arguments, set forth below, caused the siting proceeding to be fundamentally unfair:

A. Allegation that the attorney representing the City Manager, as applicant, improperly performed work for the City, as siting authority.

T.O.T.A.L. alleges that the attorney representing the City Manager, Mr. Kost of Kost & Kost, was also representing the City throughout the siting process, causing the process to be fundamentally unfair. (Pet. Brief at 12.) T.O.T.A.L. asserts that a review of the attorney's billings, which were admitted at hearing before the Board as Petitioner's Exhibit #14, demonstrates that the attorney had phone conversations and conferences with City officials. (Pet. Brief at 12.) Additionally, T.O.T.A.L. states that the same attorney "appears to have drafted the Rules and Regulations of the hearing" (Pet. Exhibit 8, C.1488-1497) or, citing to Petitioner's Exhibit #9, (C. 1498-1500), states alternatively that "at a minimum, had much discussion with the City's attorney", "and also appears to have participated in the preparation of the Resolution purporting to separate adjudicatory and applicant functions in the siting process." (Pet. Brief at 12-13.) Furthermore, T.O.T.A.L. states that the City paid for all of Mr. Kost's fees and that his services were on the behalf of the City. (Pet. Brief at 13.)

The City asserts that T.O.T.A.L. has put forth "no evidence whatsoever that any members of the city council or the mayor ever met with anyone associated with Kost & Kost

except in the formal proceedings of the siting application." (Resp. Brief at 12.) As to whether Mr. Kost prepared any resolutions for the City, the City states that the City Manager testified that he presumed that Resolution No. 94-17 was prepared by the City attorney and that Resolution No. 94-20 was prepared by the City attorney. (Resp. Brief at 12, Tr. at 58-61.)

Furthermore the City argues, citing Southwest Energy Corporation v. Illinois Pollution Control Board, (4th Dist. 1995) 275 Ill.App.3d 84, 655 N.E.2d 304, that even assuming the resolutions were prepared by Mr. Kost there was no effect on the fundamental fairness of the proceedings since the adoption of the resolutions occurred prior to T.O.T.A.L.'s entry of its appearance in the proceeding. (Resp. Brief at 12.) Finally, the City contends that Resolution No. 94-17 established a separation between the City and the City Manager and the only evidence before the Board demonstrates this separation was maintained throughout the proceedings. (Resp. Brief at 12-13.) The City, in support of this contention, cites to the City Manager's testimony at the Board's hearing. (Resp. Brief at 13, Tr. at 90-122.)

The Board finds, after careful review of the record, that T.O.T.A.L. has not demonstrated that the attorney representing the applicant had *ex parte* contacts with the City council members in a manner causing the proceeding to be fundamentally unfair. The City Manager testified that once the original application was filed, the separation between the City council members and the City Manager, as applicant, started and was maintained throughout the proceedings. T.O.T.A.L. argues that Petitioner's Exhibit No. 14, the billing statements for Kost & Kost for the period between August 1994 and August 1995, demonstrates that Mr. Kost had *ex parte* contacts causing the proceeding before the City to be fundamentally unfair. We find nothing in the exhibit that demonstrates that Mr. Kost had any contact with the City council members.

Additionally, assuming there were contacts, T.O.T.A.L. has never argued how the alleged contacts has caused the proceeding to be fundamentally unfair. The court in Waste Management, Inc. stated the following:

> A court will not reverse an agency's decision because of *ex parte* contracts with members of that agency absent a showing that prejudice to the complaining party resulted from these contracts.*** Moreover, existence of strong public opposition does not render a hearing fundamentally unfair where, as here, the hearing committee provides a full and complete opportunity for the applicant to offer evidence and supports its application. *** Thus, although personal *ex parte* communications to county board members in their adjudicative role are improper, there must be a showing that the complaining party suffered prejudice from these contacts. (Waste Management Inc., 125 Ill.Dec 524, 539.)

Furthermore, the court in Southwest Energy Corporation found that it was not fundamentally unfair for the applicant and members of a siting authority to attend a luncheon together where the general public was not allowed "as no opponents of the facility had made appearance at

time of luncheon and, thus, it would have been impossible to include opponents in luncheon." (Southwest Energy Corporation 655 N.E.2d 304, 312.) Here, T.O.T.A.L. did not make its appearance until July of 1995 subsequent to the occurrence of the alleged contacts.

For the above stated reasons, we find that the alleged contacts have not been demonstrated by T.O.T.A.L., and we further find that T.O.T.A.L. has not demonstrated how such alleged contacts would have caused the proceeding to be fundamentally unfair.

B. Allegation that the City did not follow its rules regarding the conduct of the hearing.

T.O.T.A.L. states that the City did not allow for cross-examination of all witnesses presented by the applicant, in violation of the City's rules and regulations for the conduct of the hearing as established pursuant to City Resolution No. 94-20. (Pet. Brief at 13.) Citing Daly v. Illinois Pollution Control Board, (1st Dist. 1994) 264 Ill.App.3d 968, 637 N.E.2d 1153, 202 Ill.Dec. 417, T.O.T.A.L. argues that "Illinois Courts have long recognized '...that a fair hearing before an administrative agency must include the opportunity to be heard, right to cross-examine adverse witnesses, and impartial rulings on evidence'." (Pet. Brief at 13.) More specifically, T.O.T.A.L. states that it was not allowed to cross-examine the City's expert, Mr. Rapps, who analyzed the evidence and issued an opinion (which is contained in the record at C. 5970-6160) as to whether the criteria had been met. (Pet. Brief at 14.)

The City asserts that T.O.T.A.L. was allowed to cross-examine every witness tendered at the siting hearing by the City Manager as applicant. (Resp. Brief at 14.) The City argues, as to the specific allegation that T.O.T.A.L. was not allowed to cross-examine the City's engineer, Mr. Rapps, that T.O.T.A.L. had no right to cross-examine Mr. Rapps. (Resp. Brief at 14.) Furthermore, the City asserts that pursuant to F.A.C.T., it had a right to retain its own expert and for that expert to file written comments. (Resp. Brief at 14.) Finally, the City states that Resolution No. 94-17 provided no restrictions on the scope of comments and provide an opportunity to respond to filed public comments which T.O.T.A.L. did not exercise. (Resp. Brief at 15.)

The Board finds, based on the record, the proceeding was not fundamentally unfair as a result of T.O.T.A.L. not being allowed to cross-examine the applicant's witnesses and the City's expert. Although T.O.T.A.L. alleges that it was denied cross-examination on "all witnesses presented by the applicant" it does not present evidence as to which witnesses it was denied a right to cross-examine. After careful review of the transcript from the siting hearing (C. 6198-7758), we find that all witnesses presented by the applicant were tendered for cross-examination.

Additionally, we find that T.O.T.A.L. had no right to cross-examine Mr. Rapps. In this case Mr. Rapps was not a witness for the applicant and did not even testify at the siting hearing. In F.A.C.T., the court upheld the Board's finding that the local siting authority may

retain an expert, that the expert may file a report as a public comment containing information that was not testified to at hearing, if the report is properly submitted as a public comment and petitioners had the opportunity to respond. (F.A.C.T. 555 N.E.2d 1178, 1182.) Mr. Rapps filed his report on the last day in which public comments could be filed and T.O.T.A.L. had seven (7) days to file a response but failed to do so. Accordingly, we find that T.O.T.A.L. has not demonstrated that the above actions created a right to cross-examine Mr. Rapps or that the proceeding was fundamentally unfair.

C. Allegation that the opinions of individuals who did not appear and did not testify were admitted into the evidence with no foundation being established for those opinions and those individuals were not available for cross-examination.

T.O.T.A.L. states "[t]hroughout the proceeding, reports which set forth the opinions of witnesses were admitted into evidence via the Application for Site Location Approval, Addendum No. 1 to Significant Modification Permit and Application for Significant Modification Permit." (Pet. Brief at 15.) T.O.T.A.L. argues that the admission of the above mentioned documents over its objection, due to the lack of foundation and unavailability of the individuals who prepared the documents, causes the proceeding to be fundamentally unfair. (Pet. Brief at 15.)

The City states that T.O.T.A.L. has not presented any "evidence to show how it was prejudiced in any way, shape or form by admission of certain reports in the siting record." (Resp. Brief at 15.) The City argues that "[t]he burden was upon T.O.T.A.L. to bring forth evidence at the Pollution Control Board hearing from witnesses to show that T.O.T.A.L. was prejudiced by the admissions of these reports" and failed to do so. (Resp. Brief at 15-16.)

The Board finds that the admission of certain documents which may have contained opinions without foundation and about which T.O.T.A.L. was unable to cross-examine the authors of those opinions, does not cause the proceeding to be fundamentally unfair. Section 39.2(c) of the Act requires the applicant to file a copy of its request with the local siting authority which includes the applicant's proposal and "all documents, if any, submitted as of that date to the Agency pertaining to the proposed facility." (415 ILCS 5/39.2(c) (1994).) Furthermore, T.O.T.A.L. has not demonstrated how the submission of these documents caused bias or prohibited them from presenting evidence and/or arguments against the information.

Additionally, T.O.T.A.L. states in its post-hearing brief with respect to the Addendum that "[a]ssuming this evidence was properly admitted, each council member and the mayor testified that they did not read all the information in connection with the application, and specifically, petitioner recalls that at the post-hearing [Board's hearing] held on December 12, 1995, that no council member nor the mayor read the addendum." (Pet. Brief at 23.) There is no evidence in the record that shows that the information or the opinions contained in the

documents caused the proceeding to be fundamentally unfair. T.O.T.A.L. itself argues that the information was not even utilized by the City council members in their decision to grant siting approval. For all of the reasons stated above, we find that the submission of the documents did not cause the proceeding to be fundamentally unfair.

D. Allegation that petitioners were not allowed to call the City Manager as a witness although he was present at the hearing.

T.O.T.A.L. states that it attempted to call the City Manager as an adverse witness at the hearing but was denied the ability to do so by the hearing officer pursuant to an objection by the attorney representing the City Manager. (Pet. Brief at 15.) T.O.T.A.L. argues that the hearing officer's ruling was "inappropriate and adversely affected petitioners in their ability to present evidence to the council which would have supported their position that the site application should not be granted." (Pet. Brief at 16.) T.O.T.A.L. asserts that "[f]undamental fairness required that petitioner be allowed to call Mr. Kinney [the City Manager] to testify in the proceeding" especially "where the city has instructed Mr. Kinney to file the application even though he advised the council as its manager that he could not recommend proceeding to develop a regional facility." (Pet. Brief at 16.) As a result of Mr. Kinney's stated position in the minutes of the August 1, 1994 meeting in which the City adopted Resolution No. 94-17, T.O.T.A.L. argues that there is no true separation between the City as judge and the City as applicant and the petitioners should have been allowed to explore this before the City at the hearing. (Pet. Brief at 16.) T.O.T.A.L. further argues that, due to Mr. Kinney's position concerning the expansion, his testimony was extremely relevant in demonstrating the conflict of interest or bias of the City. (Pet. Brief at 17.) Finally, T.O.T.A.L. argues that Mr. Kinney possessed information concerning economics which also was relevant to the "needs" and "public health, safety and welfare" criteria. (Pet. Brief at 18.) For these reasons T.O.T.A.L. alleges that denial of the opportunity to cross-examine Mr. Kinney caused the proceedings to be fundamentally unfair.

The City argues that T.O.T.A.L. has failed to present any evidence of how the proceeding was fundamentally unfair due to its inability to call the City Manager, Mr. Kinney. (Resp. Brief at 15.) Citing Concerned Citizens of Williamson County v. Bill Kibler Development Corporation, (January 19, 1995), PCB 94-262, the City contends that the Board found the proceeding was fundamentally fair even though petitioners were not allowed to call the applicant to testify, and further found that the petitioner had not presented evidence on how it was prejudiced. (Resp. Brief at 15.)

The Board finds that the hearing officer's ruling denying T.O.T.A.L.'s request to call the City Manager as an adverse witness, although he was present at the hearing and a City employee, did not cause the proceeding to fundamentally unfair. In Waste Management Inc., where the hearing officer allowed an objector to testify on an issue and did not allow Waste Management to present evidence in contradiction stated that "Waste Management fails to

articulate how this one error resulted in a prejudicial determination by the County Board" and found the proceeding to be fundamentally fair. (Waste Management Inc. 530 N.E.2d 682, 694.) In this case T.O.T.A.L. was not prejudiced because it had the ability to present their own evidence concerning the position of Mr. Kinney as related to the alleged bias, had the ability to present its own evidence concerning the criteria, and was allowed to cross-examine the witnesses for the applicant on those issues. Additionally, as in Waste Management, Inc., T.O.T.A.L. has failed to show how Mr. Kinney's failure to testify at public hearing on July 8 has prejudiced T.O.T.A.L. such that the proceeding was fundamentally unfair. For the above stated reasons we find that T.O.T.A.L. has failed to demonstrate how the proceeding was fundamentally unfair.

E. Allegation that the petitioner was severely limited on presenting evidence on economics and profitability of the proposed expansion.

T.O.T.A.L. argues that they had a right to "examine" economics with the City Manager within the "needs" and the "public health, safety and welfare" criteria. (Pet. Brief at 18.) T.O.T.A.L. states that it was not allowed to pursue this information at the hearing with the City Manager. (Pet. Brief at 18.) If allowed to explore this area with the City Manager, T.O.T.A.L. states it would have questioned the City Manager about resources to maintain the landfill so the facility could then be analyzed on a profit standpoint. (Pet. Brief at 18.) T.O.T.A.L. argues that "[t]his type of inquiry is necessary where public funds are involved and to guarantee fundamental fairness where the city is both the applicant and judge." Additionally T.O.T.A.L. asserts that the "information was also relevant and necessary to the needs and health, safety and welfare criteria, and Mr. Kinney (City Manager), or council members themselves were the only persons possessed (sic) with such information." (Pet. Brief at 18.)

Furthermore, T.O.T.A.L. states that it was prejudiced by the fact that the City heard information pertaining to the profitability of the expanded landfill on August 15, 1994 immediately prior to its vote to proceed with the expansion. (Pet. Brief at 19.) T.O.T.A.L. maintains that prior to the City's vote to proceed with the landfill expansion, Mr. Herman of STS Consultants (also the witness for the City Manager/applicant) presented evidence on the profitability and the potential need to increase personnel and equipment at the landfill due to the expansion. (Pet. Brief at 19.) T.O.T.A.L. argues that "such contact with applicant's expert was an (sic) improper and denied fundamental fairness." (Pet. Brief at 19.) Citing to Southwest Energy Corporation, T.O.T.A.L. states that this case "indicates the relevancy of this type of testimony." (Pet. Brief at 19-20.) T.O.T.A.L. concludes that it should have been allowed to "present rebuttal evidence via Mr. Kinney who was the only person with such knowledge." (Pet. Brief at 20.)

The City asserts that T.O.T.A.L. has not cited to any law which would allow it to present or examine Mr. Kinney as to this type of evidence and has not demonstrated that it was

biased or prejudiced by not being able to present this evidence. (Resp. Brief at 16.) The City argues, pursuant to Concerned Citizens of Williamson County, that T.O.T.A.L. had a duty to present a witness at the Pollution Control Board hearing to show how it was prejudiced by not being allowed to present the evidence on economics. (Resp. Brief at 16.) Additionally, the City states that T.O.T.A.L. has not presented an "offer of proof" explaining the type of potential questions for Mr. Kinney, the City Manager, and "when given the opportunity to ask those questions at the Pollution Control Board hearing...T.O.T.A.L. was silent." (Resp. Brief at 16.)

Finally the City argues that T.O.T.A.L. has misplaced its reliance upon Southwest Energy Corp. and that F.A.C.T. sets forth the appropriate standard, which according to the City is "...factors could be considered outside of the criteria if the criteria had been satisfied" and the converse is not true. (Resp. Brief at 16.) The City argues that "[i]f the criteria has been complied with, the city council must approve the siting and cannot deny the siting because of matters outside of the criteria." (Resp. Brief at 17.)

The Board finds that the proceedings were not fundamentally unfair due to limitation on presenting evidence on economics and profitability of the proposed expansion and the contact between the applicant's expert and the City prior to the application being filed. Since we previously addressed the issue of whether T.O.T.A.L. should have been allowed to call Mr. Kinney above, we will not do so again. For the reasons stated above we feel that the proceeding was not fundamentally unfair concerning this issue. The contact between the applicant's expert and the City concerning the economics occurred prior to the filing of the application and such expert was available for cross-examination on those issues at the siting hearing. The City council members are presumed to be unbiased and absent a showing of bias the contacts that occurred prior to the filing of the application do not cause the proceeding to be fundamentally unfair. Finally, in F.A.C.T. the court stated the following:

> Therefore, the previously approved annexation agreement and possible economic benefit to Fairview do not render the village board biased. Furthermore, for site-location-suitability approval, the facility must meet the criteria set out in section 39.2(a) of the Environmental Protection Act (Act) (Ill.Rev.Stat.1987, ch 111½, par. 1039.2(a)). However, while these listed criteria must be satisfied, the statute does not state these are the only factors which may be considered. Nor do petitioners cite any cases which bar consideration of economic benefit to the community. Therefore, there is no impropriety by the village board considering the economic benefit, as long as the statutory criteria are also met. (F.A.C.T. 555 N.E.2d 1178, 1182.)

While the Board understands T.O.T.A.L.'s arguments that economics are connected to the ability of the landfill expansion to be operated in a manner to meet the criteria concerning public health, safety and welfare in Section 39.2 (a) of the Act, the exact language of the criterion states "...the facility is so designed, located and proposed to be operated..." and does

not require that the local siting authority determine the solvency of the applicant. (415 ILCS 5/39.2(a) (1994).) The issue of financial assurance of the applicant is addressed at the permitting stage before the Illinois Environmental Protection Agency. Furthermore T.O.T.A.L. could have presented its own witnesses and cross examined the applicant's witnesses on those issues. We find that T.O.T.A.L. was not so limited in presenting evidence concerning economics such that the proceeding was fundamentally unfair.

F. Allegation that petitioner was prejudiced by undisclosed expert.

T.O.T.A.L. alleges that it was denied fundamental fairness when the applicant, the City Manager, called an "undisclosed expert witness" at the hearing before the City to testify on the site compatibility criteria. (Pet. Brief at 20.) The expert witness, Mr. Briggs, was not mentioned in the application and the application contained information supplied by a different expert, Mr. Somer. (Pet. Brief at 20.) T.O.T.A.L. argues that such use of this expert witness created prejudice and surprise and denied the petitioner a fundamentally fair proceeding. (Pet. Brief at 22.) T.O.T.A.L. argues that it was prepared to rebut the evidence of the application which it believed to be insufficient and was not prepared to rebut the evidence presented by the undisclosed expert witness. (Pet. Brief at 22.)

The City states that the adopted Resolution 94-20 which establishes the rules and regulations for the siting hearing did not provide for the disclosure of witnesses. (Resp. Brief at 17.) Furthermore, the City asserts that there is no statutory requirement or case law that requires the disclosure of witnesses, and that T.O.T.A.L. itself was not required to disclose its witnesses. (Resp. Brief at 17.) The City argues that T.O.T.A.L. has not stated how the undisclosed expert witness caused the proceedings to be fundamentally unfair. The City further notes that T.O.T.A.L. chose not to pursue the testimony of Mr. Somer after placing him on subpoena for the hearing before the Board. (Resp. Brief at 17.)

The Board finds that the "undisclosed expert witness" did not create prejudice which caused the proceeding to be fundamentally unfair. T.O.T.A.L. argues that it was surprised by the use of the expert and was prepared to cross-examine the expert named in the application. Hearing was held on the following days; July 8, July 14, July 15 and July 24, a period of roughly two weeks. The applicant called Mr. Briggs, the undisclosed expert, as the first witness on the first day of hearing. There were three additional days of hearing, spread over a two week period, in which T.O.T.A.L. could have presented evidence to rebut his testimony and Mr. Briggs was made available for cross-examination. Furthermore, the rules and regulations adopted by the City did not require disclosure of witnesses, and apparently neither T.O.T.A.L. nor the applicant disclosed their witnesses. T.O.T.A.L. finally argued that the applicant should not be able to provide additional evidence in support of the application at the hearing before the local siting authority. We disagree. The purpose of the hearing is to create a record to form the basis of appeal of the decision of the local siting authority. The applicant must be allowed to put forth testimony in support of the application at the hearing before the

local siting authority. In this case we find that T.O.T.A.L. failed to demonstrate how the calling of Mr. Briggs as a witness caused the proceeding to be fundamentally unfair.

G. Allegation that fundamental fairness was denied when the Addendum No.1 to Significant Modification Permit (Addendum) was introduced into evidence.

T.O.T.A.L. states that it filed a Freedom of Information Act (FOIA) request with the City on May 24, 1995 to which the Addendum would have been responsive. (Pet. Brief at 22.) T.O.T.A.L. asserts that the City's consultant submitted the Addendum to the Agency on May 12, 1995. (Pet. Brief at 22.) T.O.T.A.L. further states, however, that the City responded to the FOIA request by providing the original Significant Modification Permit request. T.O.T.A.L. objected to the applicant's introduction of the Addendum into evidence at hearing. (Pet. Brief at 22.) T.O.T.A.L. argues that the Addendum is quite voluminous and that the "failure to notify petitioner of the addendum in the possession of the city's agent is additional evidence of the lack of fundamental fairness in the siting procedure." (Pet. Brief at 23.) T.O.T.A.L. also argues that the City council members did not review the Addendum which they were required to, which further demonstrates that the process was not fundamentally fair. (Pet. Brief at 21-23.)

The City asserts that a free flow of information between the Illinois Environmental Protection Agency and a permit applicant is common, and that Section 39.2(c)(2) of the Act (415 ILCS 5/39.2(c)(2) (1994)) requires such submission. (Resp. Brief at 18.) The City further states that it was seeking a Significant Modification Permit to bring its existing facility into compliance with the current regulations while the siting process was taking place. (Resp. Brief at 18.) The City argues that T.O.T.A.L. has failed to present any evidence on how the introduction of the Addendum caused the proceeding to be fundamentally unfair. (Resp. Brief at 18.)

The Board finds that T.O.T.A.L. has failed to demonstrate that the introduction of the Addendum caused the proceeding to be fundamentally unfair. In Sierra Club, Madison County Conservation Alliance, and Jim Bensman, v City of Wood River, Wood River Partners, L.L.C, (October 5, 1995), PCB 95-174, in determining whether fundamental fairness was denied concerning the availability of the transcript to the public we stated, citing Citizens Against Regional Landfill v. County Board of Whiteside County and Waste Management of Illinois, Inc. (February 25, 1993), PCB 92-156) (C.A.R.L.), that "[e]ven if this Board was compelled to find that the City erred in limiting public access to the local hearing transcript, we would not be able to find that the error made the City's proceeding fundamentally unfair because we do not believe that petitioners have demonstrated prejudice". (Id. at 7.) In this case T.O.T.A.L. has alleged but has not demonstrated how the introduction of the Addendum caused the proceeding to be fundamentally unfair, especially since the City council members testified that they did not utilize the information for their decision. We find that T.O.T.A.L. has not demonstrated that the submission of the documents caused the proceeding to be fundamentally unfair.

H. Allegation that the Hearing Officer was improperly chosen and paid by the City.

T.O.T.A.L. states that the hearing officer who "made many rulings which have been attacked herein which prejudiced the petitioner" was also "paid by the City of Salem and chosen by the City Council and Mayor of the City of Salem." (Pet. Brief at 24.)

The City argues that T.O.T.A.L. has not presented any evidence of how the City caused the proceedings to be fundamentally unfair as a result of choosing the hearing officer and paying the associated expenses. (Resp. Brief at 18.)

The Board finds that the manner in which the hearing officer was paid and chosen does not make the procedure fundamentally unfair. T.O.T.A.L. did not object to the hearing officer at the proceedings before the City. T.O.T.A.L. does not argue as to how the hiring and the paying of the hearing officer by the City may have caused prejudice or the proceeding to be fundamentally unfair. T.O.T.A.L. merely alleges that it disputed some of the hearing officer's rulings and that the hearing officer was paid by the City. The Board has previously addressed the issue of hearing officer bias in a landfill siting appeal case. In C.A.R.L., the Board held that the same standard of determining bias can be applied to a hearing officer as it applies to the decisionmaker. (139 PCB 535.) Using the standard as enunciated in E & E Hauling Inc., the Board determined that the hearing officer may be disqualified for bias or prejudice if a "disinterested observer might conclude that he had in some measure adjudged the facts as well as the law of the case in advance of hearing". (E & E Hauling, Inc. at 451 N.E.2d 565-566.) The Third District Appellate Court, in its analysis of the issue of hearing officer bias and conflict of interest noted that the hearing officer in the C.A.R.L. case was "ultimately under the control and direction of the State's Attorney who is an elected official responsible to the community and subject to public disapproval." (C.A.R.L., 627 N.E.2d 682, 685.) Moreover, the court also found that, since the hearing officer was not the decisionmaker, the same standard of fundamental fairness does not apply to the hearing officer. Additionally Section 39.2 of the Act requires the local siting authority to conduct a hearing which would include supplying the court reported and hearing officer. Section 39.2(k) of the Act allows for the local siting authority to charge applicants for review under this section a reasonable fee to cover the reasonable and necessary costs incurred by such county or municipality in the siting review process including the hearing officer fee. We find that where the local siting authority is also the applicant the mere fact that the hearing officer was chosen and paid by the local siting authority does not show prejudice on the part of the hearing officer and does not cause the proceeding to be fundamentally unfair. There must be some showing that the hearing officer caused the proceeding to be fundamentally unfair. In this case T.O.T.A.L. has failed to demonstrate how the hearing officer caused the proceeding to be fundamentally unfair. For the reasons stated above we find that the hearing officer being paid for and chosen by the City has not caused the proceeding to be fundamentally unfair.

Statutory Criteria

As stated above, T.O.T.A.L. is challenging the City's decision on five of the statutory criteria set forth in Section 39.2(a) of the Act. The criteria which T.O.T.A.L. is challenging are set forth below along with corresponding arguments and Board discussion in the order as they appear at Section 39.2(a) of the Act.

When reviewing challenges to a unit of local government's determination that the statutory criteria have been satisfied, the Board must apply the "manifest weight of the evidence" standard of review. (Waste Management of Illinois, Inc., 513 N.E.2d 592; See also City of Rockford v. Pollution Control Board (2d Dist. 1987), 125 Ill.App.3d 384 [80 Ill.Dec. 650], 465 N.E.2d 996.) A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. (Harris v.Day, (4th Dist. 1983) 115 Ill.App.3d 762, 451 N.E.2d 262). The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. Merely because we could reach a different conclusion, is not sufficient to warrant reversal. (City of Rockford v. Illinois Pollution Control Board and Frink's Industrial Waste, (2d Dist. 1984) 125 Ill.App.3d 384, 465 N.E.2d 996; Waste Management of Illinois, Inc. v. IPCB, (3d Dist. 1984) 22 Ill.App.3d 639, 461 N.E.2d 542; Steinberg v. Petta, (1st Dist. 1985) 139 Ill.App.3d 503, 487 N.E.2d 1064; Willowbrook Motel v. Pollution Control Board, (1st Dist. 1985) 135 Ill.App.3d 343, 481 N.E.2d 1032.

At the hearing before the City, the opponents made several arguments and questioned several witnesses on the issue of economics associated with the proposed expansion in relation to several of the criteria in Section 39.2 of the Act. Furthermore, T.O.T.A.L. argued that the proceeding was fundamentally unfair because it was limited in presenting evidence as to the economic issues. As noted on pages 16-17, supra, economics as to the profitability of the proposed expansion in relation to the criteria of Section 39.2 of the Act is not properly part of the local siting authority's consideration on the criteria. The Board is not stating that economics cannot be considered, but that any such consideration is in addition to the consideration of the criteria. (See F.A.C.T. 555 N.E.2d 1178, 1182.)

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

T.O.T.A.L. asserts that "[t]he evidence at hearing clearly established that there is no need for the expansion of the Salem landfill so as to accommodate a region encompassing 16 counties or more." (Pet. Brief at 38.) T.O.T.A.L. argues that the evidence (C. 7367 to 7501) presented at the siting hearing through Mr. Thompson's testimony demonstrates that the proposed facility is "not necessary to accommodate the waste needs of the area it is intended to serve." (Pet. Brief at 11.) Additionally T.O.T.A.L. states that Mr. Hermann, expert for the City, "testified that all of the people and governments in Fayette, Clinton, Washington,

Jefferson, Clay County, and even Marion County who could not utilize the Salem landfill, as it is a city-owned landfill, are being serviced with regard to their waste disposal (R. 6526)". (Pet. Brief at 41.) Furthermore, upon review of the record in its entirety, T.O.T.A.L. asserts that the City did not perform market studies, cannot state a customer basis, and proved that the only entity who will be utilizing the expanded landfill would be the City itself. (Pet. Brief at 41-42.) T.O.T.A.L. concludes that the needs of the City can be met by other waste haulers and that the City's finding on this criterion is against the manifest weight of the evidence (Pet. Brief at 42.)

The City asserts that the "[t]estimony introduced by the applicant and the materials included in the application established that the proposed pollution control facility is necessary to serve its proposed service areas." (Resp. Brief at 22.) The City states "[t]here are presently no pollution control facilities operating within the first six-county tier one territory." (Resp. Brief at 23.) The City argues that the testimony of Mr. Thompson, T.O.T.A.L.'s witness, is flawed because he did not take into consideration that facilities were presently going through the re-permitting process, he included counties which were not within the City's proposed service area, and also included the D&L Landfill in Bond County which has not been constructed. Therefore, the City argues that the capacity of the D&L Landfill should not be included in the discussion on need pursuant to Tate. (Resp. Brief at 23.) The City states that T.O.T.A.L. is improperly requesting the Board to re-weigh the evidence. (Resp. Brief at 21.) The City concludes that T.O.T.A.L. is requesting the Board to believe their witnesses instead of the City's. The City argues that it is not for the Board to redetermine which expert is more believable or to decide controverted facts, as it is the City as decisionmaker who assesses the testimony and renders a decision. (Resp. Brief at 21.)

Section 39.2(a)(1) of the Act provides that local siting approval shall only be granted if "the facility is necessary to accommodate the waste needs of the area it is intended to serve". In order to meet this statutory provision, an applicant for siting approval need not show absolute necessity. (Clutts v. Beasley (5th Dist. 1989), 133 Ill.Dec. 633, 541 N.E.2d 844, 846; A.R.F. Landfill v. Pollution Control Board (2d Dist. 1988), 528 N.E.2d 390, 396; Waste Management, Inc., 461 N.E.2d 542, 546.) The Third District has construed "necessary" as connoting a "degree of requirement or essentiality." (Id. at 546.) The Second District has adopted this construction of "necessary," with the additional requirement that the applicant demonstrate both an urgent need for and the reasonable convenience of, the new facility. (Waste Management, Inc., 530 N.E.2d 682, 689; A.R.F. Landfill, 528 N.E.2d 390, 396; Waste Management of Illinois, Inc. v. Pollution Control Board,(2d Dist. 1984), 79 Ill.Dec. 415, 463 N.E.2d 969, 976.) The First District has stated that these differing terms merely evince the use of different phraseology rather than advancing substantively different definitions of need. (Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board, (1st Dist. 1992), 227 Ill.App.3d 533, 592 N.E.2d 148, 156.)

After careful review of the extensive record, we find that it is not clearly evident that the proposed expansions are unnecessary to accommodate the waste needs, as defined by the

courts, such that we may reverse the City's decision. The City council members questioned all witnesses extensively on the arguments and evidence presented by the parties. The Board is not in the position to reweigh all the evidence as it is within the province of the local siting authority to place credibility on the witnesses and to assign the appropriate weight to the evidence. We find that the City council members could reasonably have placed their reliance on the testimony of Mr. Hermann and corresponding evidence of the application in finding that this criterion had been met. Additionally the Board has affirmed in Hediger v. D & L Landfill Inc., (December 20, 1990), PCB 90-163, the local siting decision on this criterion where opponents presented evidence of landfill capacity outside of the proposed service area. For these reasons we find that the City's decision is not against the manifest weight of the evidence.

2. The facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

T.O.T.A.L. states that its expert witness, Mr. Norris, testified that "the background water quality data in combination with the choice of statistic used to characterize that background at the proposed landfill site will make it almost impossible to detect leachates (R. 7215)." (Pet. Brief at 46.) Furthermore, T.O.T.A.L. directs the Board's attention to the fact that Mr. Norris was concerned with background water data because it is utilized to develop a "trigger level" which is to provide "the responsible party with sufficient time to react, remediate and minimize the liability down the road." (Pet. Brief at 47, 46-47.) T.O.T.A.L argues that Mr. Norris believed "that sites No. 2 and No. 3 were not so located as to protect the public health, safety and welfare (R. 7229.)", and that Mr. Norris had concerns that the proposed site was located where the Vandalia Till was present." (Pet. Brief 46-47.)

The City contends that T.O.T.A.L. is arguing that its expert should have been relied upon by the City in its siting decision rather than the applicant's expert. (Resp. Brief at 24.) The City states that T.O.T.A.L.'s expert acknowledged (C. at 7326) that there were no issues of technical concern to him at the siting hearing that had not been presented to the City. (Resp. Brief at 24.) The City argues that "[i]t was not against the manifest weight of the evidence for the council to have believed the applicant's witnesses, rather than Mr. Norris", who is not an engineer and has never designed or constructed a landfill. (Resp. Brief at 24.)

In this matter the applicant has presented evidence on the design and operation of the landfill through the testimony of its experts, Mr. Herman (C. 6867 - 7038) and Mr. Rawlinson (C. at 6650 - 6854), including the evidence contained in the application. In File v. D & L Landfill, Inc., (FILE) (5th Dist. 1991) 162 Ill.Dec. 414, 219 Ill.App3d 897, 579 N.E.2d 1228, 1236, the court stated that the decision as to whether the criterion is met is purely a matter of assessing credibility of expert witnesses. In Clutts v. Beasley, (5th Dist . 1989) 133 Ill.Dec 633, 185 Ill.App3d 543, 541 N.E.2d 844, 846, the court stated that this criterion is not a guarantee against contamination.

Again, it is not within the Board's purview to reweigh all the evidence, rather it is the province of the local siting authority to place credibility on the witnesses and to weigh the evidence. The mere fact that a different conclusion may be drawn from the evidence is not sufficient to warrant reversal. We find that the City Council Members could reasonably have placed their reliance on the testimony of Mr. Hermann and Mr. Rawlinson and the corresponding evidence of the application. For these reasons we find that the City's decision is not against the manifest weight of the evidence.

3. The facility is so located as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property.

T.O.T.A.L. argues that "the manifest weight of the evidence is that the facility will not minimize incompatibility and will have, and already has had, an effect on the value of the surrounding property." (Pet. Brief at 27.) In support of its argument, T.O.T.A.L. puts forth four main assertions: 1) no adequate study was performed by the applicant's experts regarding the impact on the market value of the local property and therefore their opinion on market value should be disregarded; 2) the proposed landfill expansion will and already has caused a substantial impact on the property surrounding the landfill; 3) the proposed landfill is in a wetland area and will have a substantial impact; and 4) that the design of the landfill does not call for adequate screening to minimize the impact of the landfill. Those arguments are set forth in more detail below.

A) There was no adequate study performed regarding the impact of the expansion.

T.O.T.A.L. states that the testimony of applicant's expert, Mr. Briggs, "was not proper according to real-estate appraiser standards and must, therefore, be ignored." (Pet. Brief at 27.) T.O.T.A.L. states that its witness, Mr. Hall, testified that, based upon what he was given and reviewing the basis of the opinions of the persons offered by the applicant, Mr. Briggs and Mr. Somer, he did not have enough information to make any kind of determination with regard to the impact of the landfill on the neighboring homes and the effect on surrounding property. (Pet. Brief at 29.) T.O.T.A.L. states that Mr. Hall testified that for a proper study to be performed that "we would probably be looking at landfills throughout the Midwest and picking any sort of damages that might have occurred and to measure damages, you have to see what a property sold for before the external problem came in and then measure the effect afterwards." (Pet. Brief at 29, C. at 7044.) T.O.T.A.L. argues that Mr. Hall's testimony demonstrates that Mr. Brigg's study is insufficient and that it "could not be accepted by the city council as he did not follow the rules of conduct according to the testimony of Gary Hall." (Pet Brief. at 30-31.) In addition, T.O.T.A.L. puts forth the testimony of Mr. Wright, a licensed appraiser in the State of Illinois, who testified in support of Mr. Hall's testimony as further evidence that the opinion of the applicant's witness, Mr. Briggs, is flawed and should not be utilized by the City. (Pet. Brief at 31-33.)

B) Damage to Property Values

T.O.T.A.L. argues, in support of its contention that the property values have been substantially impacted, that the testimony of Mr. Peterson concerning the planned subdivision which is on "hold" demonstrates that the property value has been impacted. (Pet. Brief at 33-35.)

C) Wetlands Impacted:

T.O.T.A.L. argues that "[d]ue to the presence of wetlands on the proposed landfill expansions No. 2 and No. 3, it is obvious that with no mitigation plans set forth and with no recognition of destruction of wetlands, the expansion cannot be so located to minimize the compatibility with the surrounding property. In support of its argument, T.O.T.A.L. cites to the testimonies of Mrs. Hourigan (C. at 7563 to 7596) and Mr. Boyles (C. at 7597 to 7663). (Pet. Brief at 35-37.) Both witnesses for T.O.T.A.L. testified that the proposed landfill expansions are not located to minimize the effect on the wetlands. (Pet. Brief 35-37.)

D) Lack of Screening

Finally, T.O.T.A.L. argues that "throughout the entire record there is no indication of screening which would adequately minimize the impact on the surrounding property." (Pet. Brief at 37.) T.O.T.A.L. asserts that no study was developed concerning the impact which the 120 to 130 feet high mound would have on the City. (Pet Brief. at 37.) T.O.T.A.L. argues that such evidence is necessary to determine, a) the possible impact on the surrounding area which could include the entire town, b) whether or not the city has taken adequate steps to minimize the effect on the surrounding community, and c) determine the compatibility of said expansion with the property. In considering these assertions T.O.T.A.L. concludes that pursuant to F.A.C.T. the City has not met its burden of proof on this criterion and the finding of the City council members in favor of the applicant is against the manifest weight of the evidence.

The City contends that T.O.T.A.L. is arguing that its experts are the only experts that may give opinions as to whether the proposed expansion is so located as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property. (Resp. Brief at 25.) The City asserts that Mr. Briggs, its expert, personally visited the expansion area of the landfill on two occasions; reviewed the zoning map, aerial photographs describing the surrounding land uses, and the land sales in the area; and took his own photographs before presenting an opinion on the criterion. (Resp. Brief at 25.) The City states that Mr. Briggs made a complete examination concerning the character of the ground surrounding the proposed expansion and described the natural screening that was currently at the site. (Resp. Brief at 26.) Additionally, the City states that evidence submitted with the application depicts the height of the trees, the conifer screening

and the maximum height of the landfill and that "the top of the natural screening presently in place would be less than 13 1/2 feet from the maximum height of the landfill in over 20 years without regard to the trees continuing to grow." (Resp. Brief at 26.) The City asserts that T.O.T.A.L. did not cross-examine Mr. Briggs or request any information concerning the basis of his opinion. (Resp. Brief at 26.)

The City asserts that T.O.T.A.L. presented two local residents as witnesses, Mr. Dunahee and Mr. Wright, neither of whom presented an opinion on the criterion being met or not, but who gave only personal viewpoints concerning the criterion. (Resp. Brief at 25.) Additionally, the City cites to a statement made by Mr. Wright in a letter to T.O.T.A.L.'s attorney, Mr. Milner, which states "I might point out that I very recently completed a residential appraisal of a property very near the present landfill in Salem, and I saw no justification to adjust the value of the subject downward because of the existing landfill". (Resp. Brief at 25.) The City asserts that neither witness for T.O.T.A.L. reviewed the application, knew of the proposed tons per day, knew the traffic patterns, knew of the vertical height of the landfill or any of the proposed screening for the landfill. (Resp. Brief at 25, C. at 7112, 7355-7356.)

The City states that T.O.T.A.L.'s witness Mr. Hall did not render an opinion as to the criterion, was hired after the first day of hearings, and only reviewed the transcript of the testimony of Mr. Briggs prior to testifying on this criterion. (Resp. Brief at 25.) The City also argued that the testimonies from the remaining witnesses Mr. Petersen, Ms. Hourigan and Mr. Boyles are not credible. (Resp. Brief at 26-27.) The City contends that the testimony of Mr. Petersen concerning damaged property value, demonstrates that the subdivision was not planned, and since there were no written offers to purchase property, that his testimony as to damaged property values is speculative in nature. (Resp. Brief at 27, C. at 7587.) The City asserts that Ms. Hourigan's testimony that the proposed landfill is to be located on wetlands was shown to be totally incorrect due to Ms. Hourigan's misunderstanding that all three criteria for a classification of wetlands are needed instead of only two out of the three. (Resp. Brief at 27.) Finally, as to the testimony of Mr. Boyles, the City simply cites to the statements made by Mr. Rapps in his public comments (C. at 6112-6113) that Mr. Boyles' testimony is not credible. (Resp. Brief at 27.)

The City asserts that, of all the testimony and evidence submitted into the record before the City council members on this criterion, the only valid opinions were from Mr. Briggs and Mr. Somer. (Resp. Brief at 27.) The City argues that T.O.T.A.L. is requesting the Board to reweigh the facts, but that "[i]t was up to the city council to decide the conflicting evidence and to give that evidence the weight that it so desired." (Resp. Brief at 27.)

The applicant is required to minimize the incompatibility of the facility on the surrounding area and minimize the effect on property values. This requirement acknowledges that some effect is likely. However, the applicant is not required to choose the best possible location or to guarantee that no fluctuation in property values occurs. (Clutts 541 N.E.2d

844, 846.). Additionally, the court in E & E Hauling, Inc. stated "testimony adequately showed that petitioners had taken and planned to take steps to do what they could to minimize the impact of the fill on the surrounding areas...." (E & E Hauling, Inc. 415 N.E.2d 555, 576.) The local authority is to consider that the applicant design plans take reasonable steps to minimize the impact of the proposed landfill.

The record contains extensive information concerning the compatibility or incompatibility of the site. The parties have presented many facts as to the screening of the proposed expansion, the impact as to property value of the surrounding property, whether the facility is to be located on wetlands which would possibly require mitigation of effects on those wetlands if present and whether the proper studies have been conducted. We find that the City's decision on this criterion is not against the manifest weight of the evidence.

T.O.T.A.L. has presented evidence that demonstrates conflicting opinions of the process by which this criterion is to be demonstrated and whether the City's plan indeed minimizes the incompatibility of the proposed expansion. The City's expert visited the site, reviewed zoning maps and aerial photographs, read the application and gave his opinion as to whether the site is designed so as to minimize its incompatibility. T.O.T.A.L.'s expert did not deliver an opinion as to the criterion itself, but only as to the way the City's expert performed an appraisal of property values. Additionally, T.O.T.A.L. has presented individual citizens who claim that it will effect the property value and that a speculative property sale was not executed due to the planned expansion, but do not state to a certain extent the impact. As to the wetlands issue, both parties presented witnesses that argued whether or not the proposed expansion was in areas where wetlands are located. T.O.T.A.L.'s witnesses argue that a portion of the proposed expansion is in an area where there are wetlands while the City argues the opposite and that T.O.T.A.L.'s witnesses are not credible. The City presented evidence through the testimony of Mr. Briggs and the application as to the planned screening for the proposed expansion and that the impact is minimized by being located near an existing landfill.

Again, the Board cannot reweigh this evidence or the credibility of the witnesses. We are not reviewing this matter to reweigh the evidence to determine if the proposed landfill expansion is to be located on wetlands or to determine whether appraisal of the property was proper, but to determine if the manifest weight of the evidence is against the City's decision. We find that the City's decision is consistent with the manifest weight of the evidence. The record contains sufficient evidence in which the City could reasonable place its reliance concerning the efforts of the applicant to screen the proposed expansions, that the proposed expansions are not located in wetlands, the proposed expansion is near an existing landfill and that the impact to surrounding property has been minimized. For the reason stated above, we find that the City's decision is not against the manifest weight of the evidence.

4. The traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flows.

T.O.T.A.L. contends that the City has failed to establish that the traffic pattern to and from the facility is designed to minimize the impact on existing traffic flows. (Pet. Brief at 45.) T.O.T.A.L states that the traffic entering the landfill must cross railroad tracks that have 15 to 20 train crossings a day. (Pet Brief at 45.) T.O.T.A.L. asserts that no study was done by the City's expert concerning the train crossing and the amount of delay that may be caused which could result in a cross street being blocked. (Pet. Brief at 45-46.) T.O.T.A.L. argues that a traffic impact study was not performed and that the City's decision is against the manifest weight of the evidence. (Pet. Brief at 45-46.)

The City asserts that "[t]he only testimony before the city council on this matter was presented by the applicant." (Resp. Brief at 28.) The City contends that its expert provided evidence at "Tab No. 8 of the Siting Application" about the existing conditions at the site, the amount of landfill traffic, a traffic accident study and his opinion on this criterion. (Resp. Brief at 28.) The City concludes its argument concerning this issue by stating that "[a]s there was no evidence presented by T.O.T.A.L. concerning this criteria, it is hard to understand how T.O.T.A.L. now challenges it before the Pollution Control Board based on the manifest weight of the evidence standard of review." (Resp. Brief at 28.)

Although T.O.T.A.L. has not presented any evidence, it may challenge the City's decision on this criterion, the question before the Board is whether the local siting authority's decision is against the manifest weight of the evidence as presented by the applicant. Opponents to a landfill siting may impeach the evidence presented by the applicant through cross-examination without presenting their own evidence. In this case T.O.T.A.L. is challenging the City's decision based on the responses of the applicant's expert witness on cross-examination. (Resp. Brief at 45-46, C. at 6394-6396.)

In FILE the court stated that this criterion "does not refer to traffic noise or dust, nor does it relate to potential negligence of the truck drivers" and that "[t]he operative word is 'minimize', and it is recognized that it is impossible to eliminate all problems." (FILE 579 N.E.2d 1128, 1236-1237.) The Board can not reweigh the evidence in this matter and there is sufficient evidence in the record for the City to reasonably find that the impact of the proposed expansions is minimized. We find that the City's decision is not against the manifest weight of the evidence.

5. The facility is consistent with the Marion County solid waste management plan.

T.O.T.A.L. maintains that the Marion County (County) solid waste management plan did not include the proposed expansion. (Pet. Brief at 42.) In support of its contention, T.O.T.A.L. presented testimony of Mrs. Sullens (C. at 7503 to 7532), Marion County Board

member, which states that the County was not in favor of a 16 county regional landfill in Salem, Illinois. (Pet. Brief at 43, C. at 7508.) T.O.T.A.L. argues that since the County solid waste management plan does not include the proposed expansion, the City's decision is against the manifest weight of the evidence. (Pet. Brief at 42, 45.)

The City asserts that the "Phase II Solid Waste Plan" adopted by the County considered the expansion of its landfill and is therefore consistent with the solid waste plan. (Resp. Brief at 28-29.) In support of its contention, the City cites to certain excerpts from the solid waste plan submitted into the record before the City (C. 5550-5747). (Resp. Brief at 28.) The City argues that it is clear from the solid waste plan that the application is consistent with the plan and that Ms. Sullens' testimony is not credible. (Resp. Brief at 29.)

Based upon the record, we find that the City was justified in finding that the proposed facility is consistent with the solid waste management plan for the County. The City was presented on the one hand, a solid waste plan that was adopted by the County which contained language in support of the proposed expansion and on the other the testimony of a County Board member who stated that the adoption of the plan containing that language was a mistake. There was no evidence before the City which indicates that the plan did not support the proposed expansion or that the intent of the plan was not to support the proposed expansion. The only evidence that was before the City was presented by one County Board member who testified that she and possibly others would not have adopted such plan if they knew it contained such language.

We find that the City could reasonably have placed reliance on the plain language of the plan in finding that the proposed expansion was consistent with the County's currently adopted solid waste management plan. There were no arguments or evidence presented that the County's plan was not legally adopted or that the plan was not law at the time of the City's decision. The Board cannot reweigh the evidence or place credibility on the witnesses. For the above stated reasons, we find that the City's decision is not against the manifest weight of the evidence.

Conclusion

The City of Salem's decision granting siting approval for the proposed expansion of Salem Municipal Landfill No. 2 and Landfill No. 3 is affirmed in its entirety. We reaffirm that local governments may hold an economic interest to the siting of a landfill and be the siting authority as is the case here. Such action does not infringe upon the siting participants due process rights and thus, does not render a local siting process fundamentally unfair. Having reviewed the record and the arguments concerning the challenged criteria we also find that City of Salem's decision is not against the manifest weight of the evidence. We therefore affirm its decision to grant siting approval.

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

ORDER

The September 11, 1995 decision of the City of Salem granting siting approval for the proposed expansion of the City of Salem's Landfill No. 2 and Landfill No. 3 is hereby affirmed.

IT IS SO ORDERED.

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

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 7th day of March, 1996, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board