

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

FOX MORaine, LLC)	
)	
Petitioner,)	
)	
v.)	PCB 07- 146
)	
UNITED CITY OF YORKVILLE,)	
CITY COUNCIL)	
)	
Respondent.)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on this 26th day of September, 2008, George Mueller, one of the attorneys for Petitioner, Fox Moraine, LLC, filed via electronic filing of the attached **Second Amended Petition For Review** with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

FOX MORaine, LLC

By: /s/ George Mueller
One of its Attorneys

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Fox Moraine, LLC v. United City of Yorkville
PCB No. 07-146
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CERTIFICATE OF SERVICE

I, Sharon Twardowski, a non-attorney, certify that I served a copy of the foregoing **Notice of Filing** and **Second Amended Petition For Review** to the Hearing Officer and all Counsel of Record listed on the attached Service list, by sending it via Electronic Mail on September 26, 2008, before 5:00 p.m.

/s/ Sharon Twardowski

- [x] Under penalties as provides by law pursuant to ILL. REV. STAT. CHAP. 110-SEC 1-109, I certify that the statements set forth Herein are true and correct

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORaine, LLC)	
)	
Petitioner,)	
)	
)	PCB 07-146
)	(Pollution Control Facility Siting Appeal)
UNITED CITY OF YORKVILLE,)	
CITY COUNCIL)	
)	
Respondent.)	

SECOND AMENDED PETITION FOR REVIEW

NOW COMES Fox Moraine, LLC ("Petitioner") by its attorneys, Charles F. Helsten and George Mueller, pursuant to §40.1(a) of the Environmental Protection Act ("the Act") (415 ILCS 5/40.1(a)) and petitions for review of the decision of the United City of Yorkville City Council on May 24, 2007, in which it denied the Application of Fox Moraine, LLC for Site Location Approval of a new pollution control facility, namely a municipal solid waste landfill located in Yorkville, Illinois. In support of its Petition, Fox Moraine, LLC states and alleges as follows:

1. That on December 1, 2006, Petitioner filed an Application with the United City of Yorkville for site location approval pursuant to §39.2 of the Act of a new pollution control facility, namely a solid waste landfill located in Yorkville, Illinois (the "Application").

2. That a public hearing was held on the Application commencing on March 7, 2007, during which Petitioner proved that the Application satisfied all nine statutory siting criteria.

3. That on May 24, 2007, the United City of Yorkville City Council held a special meeting to consider the Application, and the City Council at that time passed a

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resolution to deny the Application with conditions. A copy of said resolution #2007-36 is attached hereto as required by 35 IAC 107.208(a).

4. The Hearing on the Petition for Site Location approval was not conducted in accordance with the requirements of §39.2 of the Act and the action of the Yorkville City Council was not taken in accordance with the requirements of §39.2 of the Act.

5. The proceedings of the Yorkville City Council, including the public hearing, post-hearing procedures and the decision making process, as well as the action of the Yorkville City Council taken on May 24, 2007, were not fundamentally fair for the following reasons:

A. The Yorkville City Council failed to comply with its local pollution control facility siting ordinance and said non-compliance rendered the proceedings fundamentally fair.

B. The Hearing procedures employed by the Yorkville City Council were not fundamentally fair.

C. The post-hearing proceedings employed by the Yorkville City Council were not fundamentally fair.

D. The decision making procedures employed by the Yorkville City Council were not fundamentally fair.

E. Multiple members of the Yorkville City Council were biased against Fox Moraine, LLC and prejudged the Application.

F. Multiple members of the Yorkville City council had disqualifying conflicts of interest.

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G. The action of the Yorkville City Council was not based upon the evidence.

H. The action of the Yorkville City Council was based on matters outside the record, including ex parte contacts by siting opponents and so called "independent research" by several council members

I. The Yorkville City Council disregarded the recommendation for approval of the Hearing Officer and its own technical staff and adopted findings which were in direct conflict with the findings of its technical and professional staff.

J. Objectors to the Application including, but not limited to, participants Kendall County and Friends of Greater Yorkville engaged in prejudicial ex parte contacts with the members of the Yorkville City Council.

K. The Yorkville City Council applied a fundamentally unfair and incorrect burden of proof

L. The Mayor of Yorkville, although not voting on the Application, campaigned for office on the basis of opposing the Application and spear headed a movement to defeat the Application. Her opposition to the Application was for political gain and not related to the evidence.

M. The decision of the City Council was based upon promises made and political considerations related to the municipal election, which took place while the public hearings on the Application were in progress.

N. The public hearing on the Application, the hearing procedures and the decision making process were otherwise fundamentally unfair.

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6. The finding of the Yorkville City Council that Fox Moraine, LLC had not proven siting criteria i, ii, iii, v, vi, viii and ix was against the manifest weight of the evidence as to each criterion. Additionally, the purported finding by the Yorkville City Council that numerous conditions should be imposed if siting is achieved by reversal or remand from the IPCB was not supported by the evidence, and is contrary to law.

7. The Yorkville City Council made findings which are inconsistent with denial of the application.

8. 415 ILCS 5/39.2 (e) requires in pertinent part that “decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this section.” (emphasis added)

9. On May 24, 2007, the Yorkville City Council purportedly passed a Resolution which stated in pertinent part that its action was based upon “the reasons stated at the Special Meetings of the Yorkville City Council held on May 23 and May 24, 2007.”

10. The resolution submitted to Fox Moraine and purporting to be the resolution adopted on May 24, 2007, is not the resolution presented at the May 24, 2007 meeting. Instead, it is a document drafted by counsel for the City in the days after the May 24, 2007, meeting and filled in after the fact as if adopted on May 24, 2007. The resolution further does not represent what was voted on at the May 24, 2007, meeting, in that the attorney for the City unilaterally chose after the fact what portions of what the City Council voted on to include or omit from this “final resolution.” In fact, the City Council on May 24, 2007 by oral amendment of the motion to adopt a resolution

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purporting to be a denial with conditions delegated to their attorney the power and discretion to decide which conditions to include or omit. Accordingly, the City Council did not make a final decision as required. Instead their attorney made the final decision.

11. The form of the resolution actually presented to and voted on by the City Council was not included in the record filed with the Board in this case.

12. Attached to the final after the fact Resolution was a transcript of the proceedings of May 23 and May 24, 2007. Those proceedings are in the nature of public deliberations where individual council members expressed opinions about the evidence. These opinions varied from council member to council member. No single opinion or group of opinions was ever adopted as a Finding of the Council, and in fact no vote was ever taken to adopt any particular opinion. Accordingly, there are no "reasons", within the meaning of that term as used in 415 ILCS 5/39.2(e) which were ever adopted. Additionally, the reference in the city resolution to "reasons" is entirely illusory.

13. The aforesaid resolution also states affirmatively that the City Council reviewed a report from counsel for the city staff and the hearing officer's report and recommendations when the record affirmatively demonstrates that these documents were not reviewed by a number of city council members.

14. The Resolution submitted as the alleged decision of the City Council does not reflect the actual intent of council members and is not their decision.

WHEREFORE, Fox Moraine, LLC prays that the action of the Yorkville City Council denying Fox Moraine, LLC's Application for Site Location Approval be reversed or, alternatively, that he same be remanded with instructions to correct fundamental

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fairness errors including, but not limited to, removal of those Yorkville City Council members who had conflicts of interest, were biased or otherwise prejudged the Application from further consideration of the matter.

Respectfully submitted,

FOX MORaine, LLC

BY: /s/George Mueller
GEORGE MUELLER
One of Its attorneys

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RESOLUTION NO. 2007-36

**DENIAL OF SITING APPLICATION FROM
FOX MORAINE, LLC FOR A PROPOSED LANDFILL
IN THE UNITED CITY OF YORKVILLE**

WHEREAS, Fox Moraine, LLC (the "Applicant"), pursuant to the Illinois Environmental Protection Act (415 ILCS 5/39.2 *et seq.*) (the "Act") and the United City of Yorkville Pollution Control Facility Siting Ordinance (City Code Title 8, Chapter 14) (the "Ordinance") filed an application on December 1, 2006 for siting approval for a proposed landfill (the "Application") in the United City of Yorkville to be named the Fox Moraine Landfill (the "Landfill"); and

WHEREAS, pursuant to the Ordinance, Mr. Larry M. Clark was appointed as Hearing Officer; and

WHEREAS, in compliance with the Act and the Ordinance, public hearings were held regarding the Application beginning on March 7, 2007 and continuing from time to time until April 20, 2007 for a total of 23 days of public hearing, comment, and argument; and

WHEREAS, the City Council has reviewed the Application; and

WHEREAS, the City Council has received into evidence and reviewed numerous exhibits, Power Point presentations, and other relevant documents; and

WHEREAS, the City Council has received and reviewed public comments from numerous residents, non-residents, entities and political subdivisions both supporting and opposing the Application; and

WHEREAS, the City Council has received and reviewed a report from counsel for the city staff regarding the Application; and

WHEREAS, the City Council has received and reviewed the hearing officer's report and recommendations regarding the Application; and

WHEREAS, under Section 39.2 of the Act, the City Council may grant siting approval to the Applicant only if the proposed Landfill meets all of the statutory criteria set forth in Section 39.2 of the Act; and

WHEREAS, after consideration of the public record in this matter, including but not limited to the hearing testimony, oral comment, evidence, and written comment timely submitted, and the criteria set forth in Section 39.2 of the Act and in the Ordinance, the City Council has found and determined that the criteria set forth in Section 39.2 of the Act have not been satisfied by the Applicant.

NOW, THEREFORE, BE IT RESOLVED by the United City of Yorkville that:

1. The Application of Fox Moraine, LLC for siting approval for a landfill in the United City of Yorkville is hereby denied; and
2. The United City of Yorkville finds, for the reasons set out in the record of these proceedings, including but not limited to the reasons stated at the Special Meetings of the Yorkville City Council held on May 23 and May 24, 2007, that the following criteria, as set forth in Section 39.2 of the Act, were not met (i), (ii), (iii), (v), (vi), (viii) and (ix) (previous operating experience and past record of the Applicant, Fox Moraine, LLC and its proposed operator, Fox Valley Landfill Services, LLC; this is also commonly referred to as the "Tenth Criterion."); and
3. The certified transcription of the deliberations and decision on the Application conducted by the City Council of the United City of Yorkville at its Special Meetings held on May 23 and May 24, 2007, at which this Resolution was approved, be attached hereto as Exhibit "A" and repeated and incorporated herein as part of the written decision of the United City of Yorkville on the Application; and
4. Should this decision of the City Council be reversed and remanded with instructions to approve the Application, the Host City Agreement dated September 26, 2006 between Fox Moraine LLC and the United City of Yorkville shall become a condition and shall become a contract binding upon both the City and Fox Moraine LLC., and such approval shall be also conditioned upon the following being satisfied:
 - (A) the conditions set forth in the memorandum of Derke Price/Staff to the Mayor and City Council, dated May 18, 2007, attached hereto and incorporated herein as Exhibit "B", which conditions are numbered 1.1 and 1.2; 2.1 through 2.39; 3.1 through 3.9; and 6.1 through 6.4;
 - (B) the conditions set forth in the Findings and Recommendations of Hearing Officer, Larry M. Clark, attached hereto and incorporated herein as Exhibit "C", which are conditions are directed to Criterion (vi), and which are numbered 1. and 2., found at page 10 of the Findings and Recommendations;
 - (C) Construction of the Landfill may not commence until the Prairie Parkway has been fully constructed from I-88 on the north to I-80 on the south and is fully operational and open to traffic, provided however that, as constructed, the Prairie Parkway contains an interchange at the intersection of Illinois Route 71 and the Prairie Parkway;
 - (D) Hours of Landfill operation shall be limited to: (i) from 6:00 a.m. to 4:30 p.m. Monday through Friday; and (ii) from 6:00 a.m. to 12:00 p.m. (noon) on Saturday;
 - (E) No truck traveling to or from the Landfill may pass through downtown Yorkville;
 - (F) No truck traveling to or from the Landfill may pass through downtown Plainfield;

(G) Neither Hollenback Creek nor any tributary of Hollenback Creek shall be rerouted or rechannelized;

(H) The Applicant shall test all private water wells within a 10-mile radius of the Landfill on a quarterly basis (every three months) and promptly provide the results to the well owner and user, if different from the well owner;

(I) As part of its post-closure plan, the Applicant shall establish an escrow account sufficient to pay for the costs to landscape and maintain the Landfill for a 25-year period;

(J) The Applicant shall provide an irrigation plan for the Landfill;

(K) The Landfill shall accept no more than 4,000 tons of waste per operating day (this is not an average, but shall be a daily maximum);

(L) The liner system shall be designed to include a geosynthetic clay liner sandwiched between two 60-mil geomembranes for the entire Landfill;

(M) The entire Landfill liners shall be tested to detect factory defects and any damage caused during installation;

(N) All storage tanks, containing leachate or any other substance, shall be aboveground tanks;

(O) All aboveground storage tanks shall meet AWWD-100 or API-650 standards;

(P) All run-off from the wheel wash basin and stormwater falling in the paved area shall be monitored on a daily basis;

(Q) The Landfill shall be restricted to a peak height of 50 feet above the surrounding natural grade;

(R) The Applicant and Landfill operator shall provide all information regarding their respective operating experience and record of actual or alleged violations as required by the Ordinance; and

(S) All Landfill groundwater monitoring wells shall be installed and operational prior to waste placement in any Landfill cell.

BE IT FURTHER RESOLVED that the City Administrator be directed to transmit certified copies of this Resolution and attached Exhibits "A", "B" and "C" to Fox Moraine, LLC, 6110 State Route 71, Oswego, IL 60543, and to the parties on the attached Service List.

Passed by the City Council of the United City of Yorkville, Kendall County, Illinois, the 24th Day of May, A.D. 2007.

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Joseph Besco	<u>No</u>	Joseph Plocher	<u>Yes</u>
Gary Golinski	<u>Yes</u>	Rose Spears	<u>Yes</u>
Jason Leslie	<u>Yes</u>	Robyn Sutcliff	<u>Yes</u>
Marty Munns	<u>Yes</u>	Wally Werderich	<u>Yes</u>

Signed by me as Mayor of the United City of Yorkville, Kendall County, Illinois, this
24th Day of MAY, A.D. 2007.

Valerie Burd
MAYOR

ATTEST: Lisa Pickering
DEPUTY CITY CLERK